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IN THE SUPREME COURT OF THE STATE OF UTAH

860068

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 860068
KIP ROLAND PARKIN,	:	Argument Priority Classification No. 2
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT

DEFENDANT-RESPONDENT SUBMITS HIS BRIEF ON APPEAL FROM THE JUDGMENT IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN BURNS PRESIDING

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Attorneys for Respondent

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issue is presented upon appeal:

1. When all elements of the crimes of theft were either admitted or stipulated to by the appellant, except the element of "intent" to commit the crime, and the jury found the appellant not guilty of theft, may the appellant be convicted of "attempted theft" which requires the same "intent" as does the crime of "theft?"

STATEMENT OF THE CASE

Appellant, KIP ROLAND PARKIN, was charged by amended information with six counts of theft, each a 3rd degree felony under sections 76-6-404 and 76-6-412 of Utah Code Annotated 1913, as amended. (R 22-23) Appellant pled not guilty and a jury trial was held December 11th and 12th, 1985, in the Court of J. Harlan Burns, Fifth Judicial District in and for the County of Washington. The jury found appellant not guilty of theft, but guilty of attempted theft on each count.(R 111-116)

On December 23, 1985, appellant filed a Motion for Judgment Notwithstanding the Verdict.(R 121)

That motion was denied by the Honorable J. Harlan Burns on January 13, 1986 and appellant was sentenced on that same date. Appellant was sentenced to 360 days in the Washington County Jail, which was stayed and he was placed upon probation on condition he serve 90 days in the county jail, make restitution in the amount of $1,208.76, the value of the cattle allegedly stolen, and other conditions.

Thereafter, appellant, on January 14, 1986, filed his Application for Certificate of Probable Cause which was denied by the Honorable J. Harlan Burns on January 28, 1986.(R 140)

In lieu of filing an Application for a Certificate of Probable Cause with this Court, appellant filed his Notice of Appeal on January 30, 1986.(R-146)

STATEMENT OF FACTS

Appellant, KIP ROLAND PARKIN, was living in Nephi, Utah, during the month of February 1985 (TR P 149, LL 16-22) when he made a trip to St. George, Utah on February 26, 1985 to work on a short term job for his employer, Jim Jones, a brick mason. (TR P 150, LL 4-11)

Upon arriving, in the afternoon, in St. George, appellant chanced to meet one K.C. COOMBS (TR P 152, LL 21-25; P 153, LL 1) an acquaintance since grade school from Nephi. (TR P 151, LL 18-22)

Coombs invited appellant to stay at his apartment while in St. George. (TR P 153, LL 6-10)

Appellant checked in with his employer and arranged to start work the next morning. (TR P 153, LL 23-25; P 154, LL 1-8)

After returning to Coombs' apartment and cleaning up, Coombs invited appellant to ride out to Washington fields to show him where he had, according to Coombs, recently participated in motocross motorcycle races, (TR P 154, LL 16-25; P 154, LL 1) which they did, riding around in the area for some time.

On the next day, after appellant had completed work for the day, Coombs asked him if he could borrow appellant's pick-up truck. (TR P 158, LL 8-13)

Appellant first declined to let Coombs use the truck because it belonged to appellant's grandfather, but later felt guilty because Coombs had let him stay at his apartment, so offered to assist Coombs himself with the truck. (TR P 158, LL 22-25; P 159, LL 1-4)

Coombs told appellant he had promised a friend to take some cattle from St. George to Cedar City to a cattle auction. (TR P 159, LL 5-11)

Coombs had prearranged for cattle racks for the pick-up from another friend (TR P 160, LL 8-14) and they then went to the Washington Fields area where Coombs had taken appelant the day before showing him where the motorcycle races had been held. They drove to a corral where they loaded six head of cattle into the truck and drove them to the auction yard in Cedar City after stopping in Washington, Utah, at a 7-Eleven convenience store, to get gasoline. (TR P 161, LL 21-25; P 162, LL 1-23)

The cattle were unloaded at the auction yard in Cedar City late that night. The next day, appellant returned to the auction yard with Coombs in Coombs' car because his job in St.

George was completed, and Coombs wanted company on the ride to Cedar City. (TR P 164, LL 13-25; P 165, LL 1-6)

After the cattle were sold at the auction, and the check given to Coombs, appellant noticed the check was made out to "Coombs," and he became concerned. After Coombs took the check to the bank and cashed it, appellant became more than concerned, he became suspicious. (TR P 167, LL 9-24)

Shortly thereafter, on the way home from Cedar City, appellant confronted Coombs three seperate times about the check and was finally told by Coombs, only on the third time, that the cattle had actually been stolen. (TR P 167, LL 22-25; P 168, LL 1-17)

Coombs, before telling appellant that the cattle were stolen had given appellant $120.00 for gas and for the use of his truck and an additional ten dollars which he owed appellant. (TR P 168, LL 22-25; P 169, LL 1-16)

The check given to Coombs at the auction yard was for $1,462.45. (Record exhibit list)

Appellant denied that he had been told by Coombs prior to that time, or that he knew, that the cattle were in fact being stolen rather than transported for a friend of Coombs, as he insisted Coombs had told him. (TR P 160, LL 1-3; P 175, LL 21-25; P 176, LL 1-7; P 186, LL 20-24; P 187, LL 5-12)

Coombs, himself, was subsequently arrested for, and pled guilty to, not only stealing the six head of cattle on February 27, 1985, the incident involving appellant, but for a second incident in January 1985 for a third incident in March

1985, and for a fourth incident in Iron County, the latter three incidents all unrelated to appellant, (TR P 97, LL 13-25; P 98 LL 1-13) totalling 16 counts. (TR P 98, LL 14-25)

Coombs, as an incident to a plea bargain, agreed to plead to only 4 counts of theft and to testify against appellant, in exchange for which, the remaining 12 counts were dismissed. (TR P 99, LL 7-25; P 100, LL 1-25; P 101, LL 1-5) He had not been sentenced at the time of the trial of appellant.

In contradiction to the testimony of appellant, Coombs also testified during the trial, that he either had told appellant, or that he thought appellant knew, that the cattle were being stolen when they were being loaded into the pickup truck and taken to the auction yard. (TR P 77, LL 9-14 et al)

SUMMARY OF ARGUMENTS

Appellant either by stipulation or by admission during his testimony acknowledged or admitted all of the elements of the crime of theft of the cattle except the element of intent to steal or to unlawfully deprive the owner of the property.

The jury found appellant not guilty of theft. Since it found him not guilty, in the face of the aforementioned stipulations and admissions, the jury could only have so found for the reason that it did not believe he possessed the requisit knowledge or intent to commit a theft, the only element to which he did not admit or stipulate.

Since the offense of attempted theft, pursuant to §76-4-101 of the Utah Code requires that the appellant must have acted ". . .with the kind of culpability otherwise required for

the commission of the offense . . ." itself, and the jury verdict of not guilty of the offense of "theft" could only reflect a determination by the jury that appellant had not had that requisit intent, appellant could not be guilty of attempted theft either.

ARGUMENT

The simple issue before the Court is whether the appellant having admitted all elements of the crime of theft except intent and having been found not guilty of theft, which by process of elimination could only be because the jury found he did not have the intent to commit the crime, could he nevertheless be found guilty, by the jury, of attempted theft, which requires the same intent as is required for theft?

I. JURY'S FAILURE TO CONVICT APPELLANT OF THEFT CONSTITUTES AN ACQUITAL OF THAT OFFENSE.

The Court instructed the jury that the elements of the crime of theft are as follows:

1. That the offense, if any, occurred at and within Washington County, State of Utah.
2. That the offense, if any, occurred on or about the 26th day of February, 1985, although the exact date is immaterial.
3. That at said time and place the defendant, Kip Roland Parkin, knowingly and intentionally obtained and exercised unauthorized control over the property of another, to-wit: one heifer calf belonging to LeMoyne Esplin. (Each of the other 5 counts listed a seperate animal)
4. That the said defendant, Kip Roland Parkin, had the purpose and intent to permanently deprive the owner of such property.(R 85, 87, 89, 91, 93 & 95)

Appellant, during his testimony, admitted, or stipulated to, all the Elements of #1 and #2 in their entirety. He also admitted all portions of Element #3 except that ". . . he

knowingly and intentionally obtained and exercised unauthorized control . . ." over the property of another.

Appellant also denied the allegations that he had the purpose and intent to permanently deprive the owner of the property, because he thought he was assisting one K.C. Coombs transport the cows with the owner's knowledge and consent.

Appellant admitted that the cows were picked up in Washington County, transported to Cedar City for sale at the auction yard, were sold and the money for the cows paid to K.C. Coombs by the auction yard.

If appellant knew he, or Coombs, did not have the permission and consent of the owner to do those acts, he would be guilty of theft, nothing less!

Nevertheless, in spite of conflicting evidence (i.e. the testimony of himself and the testimony of K.C. Coombs) the jury found him, the appellant, not guilty of theft (see verdict [R 111-116]).

The jury could only reach that verdict by a finding that he had not had the requisite intent.

In Green v. United States, 355 US 184, 2 L ed 2d 199, 78 S.Ct. 221, 61 ALR 2d 1119, the United States Supreme Court considered a case in which the defendant, Green had been charged with arson and murder. The Trial Court had given instructions on both first degree and second degree murder. The jury found Green guilty of arson and 2nd degree murder. On remand, at the end of a second trial, the jury this time found Green guilty of first degree murder.

The Court, however, held that the failure to convict the defendant Green of first degree murder, while convicting him of second degree murder, in the first trial constituted an acquital of the first degree murder charge and he could not be retried on the first degree murder charge because of double jeopardy.

Appellant submits likewise, that in this case, the failure of the jury to find him guilty of theft constitutes an acquital of that charge, eventhough it purported to find him guilty of attempted theft, a lesser included offense, with which he had not been originally charged.

An acquital of the charge of theft, could only occur because the jury failed to find the element of intent on the part of appellant.

II. AN ATTEMPTED THEFT REQUIRES THE ACTOR HAVE THE SAME INTENT REQUIRED AS FOR THE CRIME OF THEFT

Section 76-4-101 of the Utah Code provides as follows:

> (1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.
> (2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.
> (3) No defense to the offense of attempt shall arise:
> (a) Because the offense attempted was actually committed; or
> (b) Due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be. (Emphasis added)

In other words, in order to commit the crime of attempted theft, the appellant must have been acting with the

same intent that would have been required to commit the crime of theft.

Obviously, the intent of the legislature is to punish one for attempting to commit a crime even if, because of the intervention of some outside force or the actor's ineptitude, he is unsuccessful in completing the crime. It was clearly not the intent of the legislature to excise intent as an element of the lesser included crime of attempted theft.

In this case, the act or acts necessary to commit a theft were consummated, so that only the intent of the appellant was left to the jury to determine.

Respondent may argue that subsection (3)(a) of §76-4-101 provides that: ". . . (3) no defense to the offense of attempt shall arise: (1) Because the offense was actually committed. . ." and therefore appellant could be guilty of an attempt even though not guilty of the crime itself.

That rationale fails to take into consideration, however, the definition of the word offense as used in §76-4-101.

"Offense" clearly requires a finding that intent to commit the offense was present. Subsection (2) of 76-4-101 the attempt statute provides very specifically:

> "For purposes of this part, conduct does not constitute a substantial step unless it is <u>strongly</u> corroborative of the actor's <u>intent to commit the offense</u>. (Emphasis added)

Therefore, if there was no intent, there could be no crime of attempt, even if all other acts were, in fact, accomplished.

The jury found there was no such intent!

III. ACQUITTAL OF APPELLANT OF THE CRIME OF THEFT MAKES IT IMPOSSIBLE TO CONVICT HIM OF ATTEMPTED THEFT WHERE THE ONLY ISSUE FOR THE JURY TO DECIDE WAS "INTENT."

Many cases throughout the land hold that there cannot be a conviction for an attempt unless there is intent to commit the crime and an ineffective act done toward its commission. See for example: People v. Buffrom, 256 P2d 317 page 321, People v. Werner, 105 P2d 927 page 931; People v. Lyles, 319 P2d 745 page 747; State v. Crowel, 414 P2d 50 page 53; State v. Beremon, 276 P2d 364 page 365; Ervin v. State, 351 P2d 401 page 405, Place v. State, 300 P2d 666; Vandiver v. State, 261 P2d 617.

It may be argued that the adoption of §76-4-101 (3)(a) by the legislature rejected the widespread rule that there can be no conviction of an attempt if the act was in fact consumated, but even if it does, it does not abolish the requirement that there must be an intent to commit the offense in order to convict the appellant of an attempt to commit the offense.

Lewis v. People, 235 P.2d 348, a Colorado case, deals with an almost identical principal. In that case, the charges submitted to the jury were that the defendant took indecent liberties (three counts) with a child under the age of 14 years and that he attempted to take indecent liberties with a child under the age of 14 years. The jury found the defendant not guilty of the three counts of taking indecent liberties with the child, but did find him guilty of attempting to take indecent liberties with the child.

The Court, on page 350, asked the question:

> ...where a verdict of not guilty is returned in connection with each count of the information

> which charges the commission of the completed offense will a verdict of guilty, returned by the jury upon a count charging an attempt to take immodest, improper, immoral and indecent liberties, be upheld? (Emphasis in original)

The answer was in the negative. On page 351, the Court stated:

> ...The evidence offered in support of the information, if believed, could only lead to the conclusion in the mind of a reasonable person that the indecent, immodest, or immoral liberty had been completely consummated. By the verdict of not guilty upon the first, second and third counts of the information the jury rejected the testimony offered by the people as being insufficient to establish the guilt off the defendant upon the only counts of the information which the evidence tended to prove.
>
> It follows, therefore, that the judgment of the trial court should be, and hereby is, reversed, and the cause remanded with directions to discharge the defendant.

In the instant case, the jury, faced with admissions and stipulations of all of the elements of the offense except the element of intent or knowledge required by the statute to complete the offense, found the appellant not guilty of the crime of theft. To follow the logic and rationale of Lewis, then, the judgment of guilty of attempted theft should be reversed.

In State v. O'Neil, 167 P.2d 471, the same concept is illustrated in another way. In that case, the defendant was charged with two counts. One count was an assault count and the second was a first-degree burglary count. Under the law of Washington where the case was decided, one of the elements of first-degree burglary is that there be an assault. Without the assault element, the offense is only second-degree burglary.

The jury found the Defendant not guilty of assault, but

guilty of attempted first-degree burglary a lesser included offense of the first-degree burglary count.

The court held that since the jury found the defendant not guilty of assault, and since assault was an essential element of the first-degree burglary charge, there was insufficient evidence to support a finding of guilty of attempted first-degree burglary.

The court stated on page 474:

> The appellant's assertion is irrefutable that the verdict on the second count finding him guilty of an assault is inconsistent with the verdict returned on the first count which found him guilty of burglary in the second degree for the reason that section 460 of the Penal Code specifically classifies burglary accompanied by an assault on any person as burglary of the first degree.
>
> * * *
>
> Having found that the defendant was guilty of burglary of the second-degree, the necessary inference is that the jury must have assumed he made no assault. This verdict, in effect, constituted an acquittal of the first degree of burglary and the charge of an assault included therein. This determination that there was no actual assault is in irreconcilable conflict with the verdict on the second count of the effect that he was guilty of an assault, for both counts of the information were based on the same transaction which occurred at the same time and place. Since both counts are based on the same transaction and the finding of the jury on the first count refutes the possibility of the commission of the offense by means of an assault, the verdict on the second count is void and should be set aside. (Emphasis added)

Appellant here submits that precisely the same principal and the same logic must apply. By its verdict of not guilty of theft, under the fact situation that exists in this case, the jury could only have concluded that the appellant did

not have the requisite intent or knowledge to commit a theft and since that same intent or knowledge is necessary for a conviction of attempted theft, as well as for theft itself, there is not sufficient evidence to support the conviction of attempted theft.

In *Booth v. State, 398 P.2d 863, an Oklahoma case, in* dealing with a situation involving attempting to receive money by false pretenses, the court noted:

> An accused cannot be convicted of an attempt to commit a crime unless he could have been convicted of the crime itself if his attempt had been successful. Where the act, if accomplished, would not constitute the crime intended, there is no indictable attempt.

In this case, even though the act was completed, the act must be coupled with intent, as required by Section 76-4-101, and there could be no such crime because the jury had already determined that appellant did not have the requisite intent or knowledge to commit the offense, hence the rationale of the Oklahoma Court in Booth, supra, is applicable.

CONCLUSION

The appellant, KIP ROLAND PARKIN, respectfully submits that because of his acquittal by the jury of the crime of theft, there is insufficient evidence upon which to sustain the verdict of guilty of attempted theft and the verdict of guilty of attempted theft should be reversed and judgment of acquittal entered.

Dated this 7th day of April, 1986.

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MAILING CERTIFICATE

I do hereby certify that I mailed four (4) true and correct copies of the above and foregoing BRIEF OF DEFENDANT-RESPONDENT to the following attorneys for appellant: Mr. O. Brenton Rowe, Washington County Attorneys Office at 220 North 200 East, St. George, UT 84770; Mr. David L. Wilkinson Attorney General and Mr. David B. Thompson, Assitant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 on this 11th day of April, 1985.

Attorney