

1978

## State of Utah v. Chris Dean Bender : Brief of Respondent

Utah Supreme Court

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Christine Fitzgerald; Attorney for Appellant Robert B. Hansen; Attorney for Plaintiff-Respondents

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

CHRIS DEAN BENDER,

Defendant-Appellant.

-----  
BRIEF OF RESPONSE  
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APPEAL FROM THE JUDGMENT OF THE  
JUDICIAL DISTRICT COURT OF THE  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE JUDGE

CHRISTINE FITZGERALD

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- : -----  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.  
15413

CHRIS DEAN BENDER, :

Defendant-Appellant. :

----- : -----  
BRIEF OF RESPONDENT  
-----

STATEMENT OF THE NATURE OF THE CASE

This is a criminal proceeding in which the appellant, Chris Dean Bender, was charged with the crime of theft in the third degree in violation of Utah Code Ann. § 76-6-403 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury on March 3, 1977, before the Honorable James S. Sawaya, and found guilty of theft in the third degree. Appellant was sentenced to an indeterminate term as provided by law and placed on probation. As terms of that probation, the appellant is required to reside at the Community Correction Center (Halfway House) until released by that facility.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the conviction and judgment rendered below.

## STATEMENT OF THE FACTS

Francis Hayes, an employee of Chalk Garden, a woman's clothing store located in Salt Lake City, testified that on December 21, 1976, she had just arrived at work when she first noticed the appellant in one of the Chalk Garden's dressing rooms (T.3). At that time, Ms. Hayes saw the appellant ". . . kind of bent over, . . . putting something in a big paper bag." (T.5). The article being put into the bag was identified as being a leather coat belonging to the Chalk Garden (T.24-25). The sack into which the coat was put by the appellant was not one of the vanity used by the Chalk Garden, but was one used by ZCMI Department Stores (T.21).

After contacting John Bernard, owner and manager of the Chalk Garden, concerning what she had seen the appellant do, Ms. Hayes returned to the dressing room in which the appellant had concealed the leather coat in the ZCMI bag, and found a hanger (T.7). The hanger was wooden, and was of the type used by the Chalk Garden for the more expensive merchandise (T.7). Ms. Hayes testified that the employees usually tried to keep all hangers cleared out of

the dressing rooms so as to know exactly which articles go in the dressing rooms and which came back out (T.7).

Further testimony by Ms. Hayes revealed that the appellant, upon leaving the dressing room and with the coat in the ZCMI sack, stopped and looked at some pants on a rack, as he was approaching the front of the store (T.7,14).

John Bernard, upon being contacted by Ms. Hayes, followed the appellant from the dressing room, past the check out area (cash register), to the front of the store. He saw the appellant stop at the cash register area, engage in a brief conversation with someone (T.20), then proceed towards the front door (T.20). It was at this point that Mr. Bernard stopped the appellant, asking him if he (appellant) would show what was contained in the sack (T.20). Bernard then took the sack and looked into it, seeing the coat which belonged to Chalk Garden (T.21). The appellant told Mr. Bernard that he had purchased the coat at ZCMI (T.21). He repeated this statement several times (T.22), but later changed his story, saying that he wanted or intended to purchase the garment (coat) from Chalk Garden (T.23).

On cross-examination, Mr. Bernard testified that he did not stop appellant immediately after he came out of the dressing room, because he wanted to give appellant

a chance to pay for the merchandise at the cash register counter (T.38-39). The same reason was given for not stopping or approaching the appellant at the cash register counter (T.39). Bernard also testified that after the appellant passed the check out counter, appellant was in the process of walking directly out of the store, and did not stop to browse or look at any of the merchandise located in the front of the store near the entrance-exit (T.48).

The appellant took the stand in his own behalf, and testified that he had been resting on a bench in the Chalk Garden when he noticed a woman leave the ZCMI bag in the dressing room (T.53-54). His testimony was that he went over to the dressing room, closed the sack, picked it up, and proceeded to the counter (T.55). He related that he told a sales lady at the checkout counter that he thought a woman had left the bag with the coat in it (T.55). No response came from the sales lady, according to appellant (T.55). It was at this time, testified Bender, that Mr. Bernard came up to him and grabbed the bag (T.55).

On cross-examination, it was brought out that the appellant did not attempt to alert the lady he supposed saw leave the dressing room to the fact that she had forgotten her bag with the coat inside (T.59). It was also pointed out that once the appellant took possession of the bag, he



was in no hurry to either notify the lady that she had left her bag (assuming arguendo that there was in fact such a woman), or to proceed to the checkout counter for purposes of notifying a sales lady of the situation (T.59-60).

Having been apprehended by John Bernard, appellant was subsequently turned over to security police in Trolley Square. They in turn delivered him to Officer Sheya of the Salt Lake City Police Department (T.28-29).

#### ARGUMENT

#### POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S PROFFERED JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED THEFT.

Subsequent to reading of the Instrurctions to the jury by the court and closing arguments by the respective attorneys, appellant took exception to the court's denial of his request to have an attempted theft instruction given (T.66,67). (It should be noted that both counsel, upon suggestion by the court, stipulated that exceptions to the court's instructions be taken after the jury had retired to deliberate [T.66].)

The appellant's requested instruction read as follows:

"In the event that you have a reasonable doubt as to Mr. Bender's guilt as to the crime of theft, you may then consider whether or not Mr. Bender is guilty of attempted theft. Before you would be warranted in convicting Mr. Bender of attempted theft, the State must prove each and every one of the following essential elements of that crime:

1. That on or about December 21, 1976, the said CHRIS DEAN BENDER did attempt to obtain or exercise unauthorized control over the property of the Chalk Garden.

2. That he attempted to obtain the property with the purpose to deprive the said Chalk Garden of said property.

3. That said property had a value in excess of \$250.00 but less than than \$1,000.00 lawful money of the United States.

4. That such acts occurred in Salt Lake County, State of Utah.

Mr. Bender's plea of not guilty thereby casts upon the State the burden of proving beyond a reasonable doubt each and all of the foregoing essential elements. Thus, before you can convict Mr. Bender of the crime of attempted theft, you must find from the evidence, beyond a reasonable doubt, each and every one of the foregoing elements. If you find that the evidence has failed to prove any one or more of these essential elements to your satisfaction beyond a reasonable doubt, then it is your duty to acquit Mr. Bender." (R.30).

Appellant contends that it was prejudicial error for the court to omit instructing the jury on the lesser included offense of attempted theft. A review of existing statutory and case law leads to the conclusion that the lower court's ruling refusing the lesser included instruction was proper.

Utah Code Ann. § 77-33-6 (1953), as amended, which appellant cites as imposing on the court an obligation to give an instruction on the lesser included offense, reads:

"The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense."

As the appellant correctly states in his brief, the Utah Supreme Court has recently interpreted, in State v. Pierre, Supreme Court No. 13903, November 25, 1977, the above section to be subject to the modification of Utah Code Ann. § 76-1-402(4) (1953), as amended, which states:

"The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the excluded offense."

Utah Code Ann. § 77-33-6 (1953), as amended, read in conjunction with Utah Code Ann. § 76-1-402(4) (1953), as amended, as required by State v. Pierre, supra, clearly does not impose any obligation on the court to give a lesser included instruction on an attempt.

A review of Utah case law, even before the enactment of Utah Code Ann. § 76-1-402(4) (1953), as amended,

and the recent decision in Pierre, discloses that the law of the giving of lesser included offense and attempt instructions has not really changed, and the enactment of Utah Code Ann. § 76-1-402(4) (1953), as amended, really codified the existing case law at the time of its enactment.

As early as 1889, this Court in People v. Robinson, 6 Utah 101, 21 Pac. 403 (1889), held that it is not always necessary that the court instruct the jury as to all lesser offenses, even though they may be embraced within the charge set forth in the indictment, and of which the defendant might be convicted.

In 1923, the foundation for the present state of law of lesser included instructions was laid in State v. Angle, et al., 61 Utah 432, 215 Pac. 531, 532 (1923). There the defendant was convicted of grand larceny. On appeal, he argued that the trial court erred in refusing to grant a jury instruction on petit larceny. In affirming the lower court's decision, the Utah Supreme Court said:

" . . . It is argued that because larceny is divided into two degrees, grand larceny, a felony, and petit larceny, a misdemeanor, the court in its charge should have covered the offenses included in the information.

It is a well-settled rule that instructions as to lower grades of the offense charged should be given when warranted by the evidence.

It is equally well settled that in a criminal prosecution error cannot be predicated on the omission of the trial court to instruct as to lesser grades of the offense charged where there is no evidence to reduce the offense to a lesser grade." 215 Pac. at 5321, 532. (Emphasis added.)

This principle of law set forth in Angle was reaffirmed later in State v. Ferguson, 74 Utah 263, 279 Pac. 55, 56 (1929), and State v. Dodge, 19 Utah 2d 44, 425 P.2d 781, 782 (1967).

In State v. Mitchell, 3 Utah 2d 70, 278 P.2d 618, 621 (1955), the Supreme Court of Utah, in affirming a conviction of second degree murder, again cited State v. Angle, supra, and declared:

" . . . Nor is it always the duty of the court to instruct on the lesser offenses,--for example, where either a conviction or outright acquittal of a particular offense is mandatory, leaving no room to hold an accused for any other offense. Nor must the court always instruct as to lesser offenses whether requested so to do or not. . . ."

Turning to more modern day decisions, it is evident that this Honorable Court has not seen fit to alter the principle of law set forth in Angle.

In State v. Ash, 23 Utah 2d 14, 456 P.2d 154 (1969), the defendant was convicted of grand larceny of an automobile. The evidence disclosed that he had left the motel where he was lodging, driving another person's car. He was subsequently

chased down by a deputy sheriff. In the car defendant was driving was found shaving equipment, underwear, a gun and some gun shells. On appeal, the defendant alleged error in that the trial court failed to instruct as to the lesser offense of driving a vehicle without the owner's consent and with intent to temporarily deprive the owner of possession. The Utah Supreme Court rejected this contention by appellant:

" . . . the defendant could not have been prejudiced by a failure to have the jury consider whether his intent was to deprive the owner of the use of his car temporarily because the court clearly told the jury to find the defendant not guilty if they failed to find beyond a reasonable doubt that he intended to deprive the owner permanently of the use of the car." 456 P.2d at 155.

Subsequent to State v. Ash, supra, this Court held in State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890, 891 (1971):

" . . . when parties so request, they are entitled to instructions on their theory of the case, including the submission of lesser included offenses. However, this is true only where there is some reasonable basis in the evidence to justify the giving of such instructions. . . ." (Emphasis added.)

Later in 1971, in State v. Harris, 26 Utah 2d 365, 489 P.2d 1008 (1971), a robbery-rape-kidnapping case, it was

held that where, under any reasonable view of evidence, the defendant was either guilty of the greater offense or not guilty, instructions as to lesser included offenses would have only confused issues, and thus it was not reversible error for the court to refuse to instruct on lesser included offenses. Speaking at 489 P.2d 1001, the Court said, quoting from State v. Gillian, 23 Utah 2d 372, 463 P.2d 811, 814 (1970):

"'. . . where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offenses.'"

In the concluding paragraph in Harris, the Court said:

"In the instant case, under any reasonable view of the evidence, the defendant must be found either guilty of the greater offense or not guilty. Under such circumstances, instructions as to lesser offenses would only confuse." 489 P.2d at 1011.

It can thus be said in summary of the heretofore cited cases that, even without considering Utah Code Ann. § 76-1-402(4) (1953), as amended, State v. Pierre, supra, and State v. Dougherty, 550 P.2d 175 (Utah 1976) (to be discussed hereinafter), all of which lend credence to the above cases, the law in Utah has tended toward exclusion of lesser included offense instruction if the following

situations exist: (1) there is no reasonable basis for the instructions, i.e., there is no reasonable basis on which to reduce the greater offense (State v. Harris, supra; State v. McCarthy, supra; State v. Angle, supra; State v. Gilliam, supra); (2) the evidence warrants either a guilty or not guilty verdict on the greater offense (State v. Mitchell, supra; State v. Harris, supra); (3) the giving of lesser included instructions would tend to confuse the jury (State v. Harris, supra).

Perhaps one of the most recent enlightening cases on the subject of lesser included instructions is State v. Dougherty, supra. There, the defendant was convicted of the crime of unlawful distribution for value of a controlled substance. He appealed, alleging that the trial court erred in refusing to give an instruction on the lesser included offense of possession of a controlled substance. In affirming the conviction, this Honorable Court held that where defense testimony could prove only complete innocence, the defendant was not entitled to an instruction on the lesser included offense.

Testimony in Dougherty revealed that an undercover agent, Woolsey, had negotiated with a Ms. Keller over the



telephone regarding the purchase of some marijuana. That night, Woolsey went to Ms. Keller's apartment, paid \$90 to her and received the marijuana. They both left the apartment together, and subsequently encountered the defendant in front of Ms. Keller's apartment. Prior to this encounter, Woolsey had returned the marijuana to Ms. Keller. Upon seeing the defendant, Ms. Keller gave the money and marijuana to the defendant, who in turn gave the bag to Woolsey. No negotiations were made with the defendant regarding the purchase. Ms. Keller's testimony denied most of the testimony of Woolsey.

In referring to Utah Code Ann. § 77-33-6 (1953), as amended, the Court said at 550 P.2d 176:

"This statute, we have said, requires instructions on lesser included offenses, when the evidence and circumstances justify. When an appellant makes an issue of a refusal to instruct on included offenses, we will survey the evidence, and the inferences which admit of rational deduction, to determine if there exists reasonable basis upon which a conviction of the lesser offense could rest. No such basis exists here."

In referring to the contradictory testimony of Woolsey and Ms. Keller, the Court further said at 550 P.2d 177:

"The defense testimony could only prove complete innocence. Appellant's reason for his exception to the court's

refusal to give the instruction is the jury by selectively evaluating the facts as is their province, could well have determined the defendant was in possession of the marijuana in question at a time sufficient to render him guilty of possession only. Such a theory is not available to him where the record shows he could only be found guilty or not guilty of the crime charged."

In its opinion, the Court very clearly enunciated the three situations in which the problem of lesser included offenses are frequently encountered:

" . . . First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.

Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict, or where the elements of the offense differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.

Third, is an intermediate situation. One where the elements of the greater offense include all the

elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser offense. In such a situation instructions on the lesser included offense may be given because all elements of the lesser offense have been proved. However, such an instruction may properly be refused if the prosecution has met its burden of proof of the greater offense, and there is no evidence tending to reduce the greater offense." 550 P.2d at 176, 177. (Emphasis added.)

Subsequent to Dougherty, the Utah Supreme Court in State v. Bell, 563 P.2d 186 (Utah 1977), affirmed the principles set forth in Dougherty, declaring the state of the law as it presently exists:

". . .The trial court should give the instructions for lesser included offenses whenever, by any reasonable view of the evidence, the defendant would be guilty of the lesser included offense. The instructions for included offenses may be properly refused if the prosecution has met its burden of proof on the greater offense and there is no evidence tending to reduce the greater offense." 563 P.2d at 188.

The Court added a very significant comment at 563 P.2d 188:

"Whenever this court believes beyond a reasonable doubt that the error in not giving the instruction would not have affected the verdict the case should not be reversed. . ."

The question to be decided by this Court is whether or not, according to §76-1-402(4), Utah Code Ann. (1953) (as amended), there was a rational basis for a verdict acquitting the defendant of the offense of theft and convicting him of attempted theft.

In order to arrive at such a decision, Utah Code Ann. §76-6-404 (1953) (as amended), the section under which appellant was convicted (in conjunction with Utah Code Ann. §76-6-403 (1953) (as amended)), must be analyzed in light of the evidence addressed at the trial.

Utah Code Ann. §76-6-404 (1953) (as amended) reads:

"A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof."

The evidence in the case at bar indicates that the appellant was in control and possession of property belonging to the Chalk Garden (T.24,25); that he did not have permission or authorization from the Chalk Garden to be in possession of the property in question (T.29); the value of the property in question was over \$250.00 but less than \$1,000.00 (T.26); and that the obtaining or exercising of control over the property belonging to the Chalk Garden was for the purpose of permanently depriving them (Chalk Garden) thereof (this intent can be deducted by the jury from several of the actions of the defendant, to-wit: stuffing the coat in the shopping bag different from ones used by the Chalk Garden (T.5); changing "stories" concerning the explanation of why appellant was in possession of the coat (T.22,23); taking the coat past the check-out counter without attempting to pay for it and being apprehended shortly before reaching the exit (T.19-20)). Appellant admits in his brief all of the factual items above except for the testimony regarding the statements allegedly made to Mr. Bernard, owner of the Chalk Garden, regarding the explanation as to why appellant had a coat belonging to Chalk Garden concealed in a ZCMI bag. Thus, the only item in dispute is the element concerning the intent to permanently deprive the Chalk Garden of possession of the item in question.

The issue of intent being the only one in contention, it can be seen from appellant's own testimony that he presented an "all or nothing" issue to the jury on the issue of intent. He alleges that he saw a lady leave the sack with the coat in it in a Chalk Garden dressing room (T.54). He subsequently took possession of the sack and attempted to depart from Chalk Garden, allegedly in an effort to run down the woman who had left the sack (T.63). If this was in fact the case and the jury was inclined to so believe this version of the story, then no conviction could stand either for the greater offense of theft or for the lesser offense of attempted theft, since there would be no criminal intent, which of course must be present for a conviction in either case. On the other hand, if the jury believed, as they apparently did, the evidence presented by the prosecution, the requisite intent to permanently deprive can be found and the conviction for the greater offense of theft would stand. Therefore, since there is no factual dispute as to whether or not the appellant had possession of the coat in question, without proper authentication, and since no dispute exists as to the value thereof of the coat, the only issue to be decided was the one of intent. Due to appellant's own testimony and version of the sequence of events, the jury is placed in a position of either deciding that there was an intent to permanently deprive, or there

an honest effort to return a sack with a coat in it that belonged to another lady, in which case there could be no criminal intent. It should be noted that the same reasoning applies to the issue of authorization. If the jury believed that the coat was indeed left by a woman in the dressing room and that the appellant was indeed performing his role of the "Good Samaritan" by seeking to return it, no unauthorized control could be present, thus another essential element of the crime of theft and attempted theft (attempted unauthorized control) would be lacking.

As heretofor reasoned, the jury was placed in a position of either convicting the appellant of theft or acquitting him. The evidence presented no other choice. As such, the case falls directly under the guidelines of State v. Dougherty, where the Court declared, "The defense testimony could only prove complete innocence." There, as here, the appellant tried to proceed on a lesser included offense theory, but this was rejected by the Court:

" . . . Such a theory is not available to him where the record shows he could only be found guilty or not guilty of the crime charged." 550 P.2d at 177.

It can be said, therefore, that under Utah Code Ann. § 76-1-402(4) (1953) (as amended), the trial court in the case at bar was not obliged to instruct as to an included offense,

because even though the jury may have chosen to believe the appellant, thereby acquitting him, no evidentiary basis existed upon which a conviction of an attempted theft could stand. Since Utah Code Ann. § 76-1-402(4) is stated in the conjunctive, both statutory requisites must be present before the trial would be required to instruct on the included offense of attempt.

Finally, these comments should be made in reference to appellant's allegations. First, the allegation in his brief that he never left the Chalk Garden, therefore no asportation causing the case at bar to fall within the purview of the first situation discussed by the Court in Dougherty, is totally without merit. The necessary asportation was fulfilled when appellant concealed the coat in the ZCMI bag and began walking towards the exit. As will be discussed in Point III in this brief, the asportation question presented in State v. Doherty, 29 Utah 2d 320, 509 P.2d 351 (1973), is very similar in fact to the case at bar, and was sufficient in law to fulfill the requirements of being one of the necessary elements of larceny. As will be later discussed, this Court has held on more than one occasion that the removal of an object from the place where the property is found is sufficient asportation to support a larceny charge. State v. Richards, 3 Utah 2d 284 P.2d 691 (1955); State v. Doherty, supra.



Second, appellant's allegation that his case falls within the third situation referred to by the Court in Dougherty is without merit. Under such a situation, proffered lesser instructions may properly be refused by the court if the prosecution has met its burden of proof on the greater offense. Without being repetitious, the evidence heretofore cited and presented to the jury was more than enough to enable the prosecution to fulfill its burden.

Third, and perhaps most important of all, appellant's proffered instruction on attempted theft was not warranted by the evidence, and thus could not as a matter of law be given. Appellant's instruction alleges that he did "attempt to obtain or exercise unauthorized control over the property" and "attempted to obtain the property with the purpose to deprive. . . of said property." The instruction as proposed by appellant is worded in a fashion which would lead one to believe that the appellant did take steps leading towards the goal of exercising control over the said property, but was stopped short of accomplishing such a goal. Since the facts, as admitted by appellant himself, establish that he did in fact have control over the property in question, and since appellant, by his own testimony, claims that this control was authorized (implied authorization since he alleges he was attempting to return something to the rightful owner), then his proffered instruction

is self-contradictory, and as a matter of law incapable of being given. It is questionable also, whether or not such an instruction as proposed by appellant would meet other qualifications set forth in the attempt statute, Utah Code Ann. §76-4-101, (1953) (as amended).

For the reasons heretofore cited, it is the conclusion of respondent that the trial court did not err in refusing to instruct on attempted theft.

#### POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON REASONABLE ALTERNATIVE HYPOTHESIS.

At the trial, appellant submitted a jury instruction on reasonable alternative hypothesis, which reads as follows:

"To warrant you in convicting the defendant of the crime charged in the complaint, the evidence must, to your minds, exclude every reasonable hypothesis other than the guilt of the defendant; that is to say, if after a full and fair consideration and comparison of all the testimony in the case you can reasonably explain the facts in evidence on any other reasonable ground other than the guilt of Mr. Bender, then you must acquit him." (R.31)

The court refused to give the instruction, and rightly so.

The law in Utah as to the giving of a jury instruction on reasonable alternative hypothesis was stated in State v. Fort, Supreme Court No. 15197, Dec. 22, 1977, and in State v. Garcia, 11 Utah 2d 67, 355 P.2d 57, 59, 60 (1960):

" . . . where the only proof of material fact or one which is a necessary element of defendant's guilt consists of circumstantial evidence, such circumstances must reasonably preclude every reasonable hypothesis of defendant's innocence. . .

. . . this rule is applicable only where the proof of a material issue is based solely on circumstantial evidence. . ."  
(Emphasis added.)

The principle was cited and reaffirmed in State v. Schad, 24 Utah 2d 255, 470 P.2d 246, 247 (1970); State v. Romero, 554 P.2d 216 (Utah 1976); and State v. Dumas, 554 P.2d 1313 (Utah 1976). In Romero, the Court reaffirmed that even if only a portion of the evidence is circumstantial, a reasonable hypothesis instruction is not required:

"When the only proof of presumed facts consists of circumstantial evidence, the circumstances must reasonably preclude every reasonable hypothesis of defendant's innocence, but this is not controlling when only part of the evidence is circumstantial. . ." 554 P.2d at 219. (Emphasis added,)

In Schad, supra, the Court, in referring to the rule of law concerning reasonable hypothesis instructions where the conviction is to be based upon circumstantial evidence, declared that such a proposition did not and does not apply to each circumstance separately:

" . . . where a conviction is based on circumstantial evidence, the evidence should be looked upon with caution, and. . . it must exclude every reasonable hypothesis except the guilt of defendant. . .

Nevertheless, that proposition does not apply to each circumstance separately, but is a matter within the prerogative of the jury to determine from all of the facts and circumstances shown; . . ." 470 P.2d at 247.

This Court in Schad also stated the rule by which it is bound when receiving such a case as the one presently before it:

" . . . Unless upon our review of the evidence, and the reasonable inferences fairly to be deduced therefrom, it appears that there is no reasonable basis therein for such a conclusion. . . (referring to the fact that the evidence must exclude every reasonable hypothesis except guilt of defendant) . . . we should not overturn the verdict." 470 P.2d at 247.

Applying the law cited heretofore to the facts of the case at hand, it can be seen that appellant's request for a reasonable hypothesis instruction was properly denied. First, there was no circumstantial evidence. All of the testimony the prosecution's case was based totally on the eyewitness accounts of Ms. Hayes and Mr. Bernard. Second, the case boiled down simply to a question of whether or not the jury believed the prosecution's version or the appellant's. As such, it is the exclusive prerogative of the jury to decide which version or portion thereof, to believe. State v. Wilson, 565 P.2d 485 (Utah 1977); State v. Mills, 530 P.2d 1272 (Utah 1975).

In State v. Hopkins, 11 Utah 2d 363, 359 P.2d 485

(1961), a similar situation to the one presented before this Court existed in that the defendant's version was totally different from that of the prosecution's, especially as to the issue of intent. There, the Court refused to give a reasonable hypothesis instruction, saying that the jury must decide which version of the evidence to believe:

"The difficulty with defendant's position is that the rule he relies on is not applicable where, as here, there is dispute in the evidence and one version thereof does not support his thesis. He errs in assuming that the jury was obliged to believe his story as to what happened. . ." 359 P.2d at 487.

Appellant, in the case at bar, alleges that the State presented no evidence which overtly reflected on his intent, and as such, the evidence is subject to alternative conclusion, one resulting in a finding of innocence and the other in guilt. As the Court said in Hopkins, supra, at 359 P.2d 487:

"It is to be remembered that intent, being a state of mind, is rarely susceptible of direct proof. But it can be inferred from conduct and attendant circumstances in the light of human behavior and experience. . ."

In the present case, testimony was given by Mr. Bernard, owner of the store, that the appellant, when apprehended with the Chalk Garden coat concealed in the ZCMI bag, said that he (appellant) had purchased the coat at ZCMI (T.21). Bernard said that appellant shortly after that changed his story, saying

that he intended to purchase the garment from Chalk Garden (T.23). The appellant denied ever making such statements (T.64). It was the jury's function to decide which witness to believe. Certainly the above statements, along with the fact that Ms. Hayes testified to seeing the appellant stuff the coat into a ZCMI bag in the dressing room (T.5), give the jury more than sufficient room with which to find an intent to permanently deprive.

Coupled with the heretofore cited testimony is the testimony that the appellant did not attempt to pay for the coat at the cash register, nor did he have any explanation, much less a reasonable one, to the questions propounded to him as to why he did not immediately attempt to notify the supplier lady, who left her bag, that she had in fact done so. Appellant did not seem to be in a hurry to chase down the forgetful woman even after he had apprehended the bag with the coat in it.

The jury thus had testimony from two eyewitnesses from which it could easily find evidence of felonious intent. It could also have rejected such testimony and accepted that presented by the appellant. Apparently, the choice was made to believe the testimony of the State's witnesses, finding therefore that the appellant's actions were done with felonious intent. As such, the jury was merely exercising its function in such a case where felonious intent was an issue. State v.

Richards, supra, at 284 P.2d 692; State v. Peterson, 110 Utah 413, 174 P.2d 843, 845 (1946).

Due to the fact that the evidence presented was not totally circumstantial, either collectively or on any single issue, and because two different versions of the evidence were presented to jury, neither version being based on circumstantial evidence, the Court was therefore not required to instruct the jury on reasonable alternative hypothesis.

### POINT III

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION OF THEFT.

Appellant alleges that the evidence was insufficient to sustain a conviction. The standard for determining sufficiency was enumerated in State v. Romero, supra, at 554 P.2d 219:

"This court has set the standard for determining sufficiency of evidence to require that it be so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime. Unless there is a clear showing of lack of evidence, the jury verdict will be upheld."

The Court had earlier in its Romero opinion declared that its function was not to judge the weight of the evidence or credibility of the witnesses:

"This court has long upheld the standard that on an appeal from conviction the court cannot weigh the

evidence nor say what guarantee is necessary to establish a fact beyond a reasonable doubt so long as the evidence given is substantial. Further, this court has maintained that its function is not to determine guilt or innocence, the weight to give conflicting evidence, the credibility of witnesses, or the weight to be given defendant's testimony." 554 P.2d at 218

In reviewing this case, this Court must survey and review the evidence in the light most favorable to the jury verdict, State v. Helm, 563 P.2d 794, 796 (Utah 1977); State v. Sinclair, 15 Utah 2d 162, 389 P.2d 465 (1964), and disregard any errors which do not substantially prejudice the rights of the appellant, State v. Sinclair, *supra*; Utah Code Ann. § 77-42-1 (1953) (as amended). Under Utah Code Ann. § 77-42-1, a presumption exists to the effect that any error found is presumed not to have resulted in prejudice.

Perhaps one of the most accurate and concise statements as to the function of an appellate court in reviewing jury verdict is to be found in State v. McCarthy, *supra*, 48 P.2d at 892. There, the Court quoted from Jacob v. City of York, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed 1166 (1942), where Justice Murphy said:

"...The right of jury trial... is... a right so fundamental and sacred to the citizens... [that it] should be jealously guarded by the courts.' Nevertheless, once this right has been honored and its purpose accomplished, the resulting verdict and judgment should be



accorded such dignity and respect as to give it some solidarity. This requires that it not be upset unless there is error of sufficient substance that it may have had some material effect upon the proceeding so that there is a reasonable likelihood that an injustice resulted."

In review of the evidence, there is no question as to the fact that the evidence presented was sufficient to meet the requirements of Utah Code Ann. § 76-6-404 (1953) (as amended).

First, appellant himself admits that he had possession of the coat belonging to the Chalk Garden (T.54). Second, the testimony presented by the owner of the Chalk Garden established that the appellant did not have permission to be in possession of the coat (T.29). Third, the value and ownership of the property was established by the owner, John Bernard (ownership, T.24,25; value, T.26). Fourth, the intent to permanently deprive the Chalk Garden of the ownership or control of the coat was established by the actions and statements of the appellant (see Point II for specific discussion). Lastly, the asportation necessary was fulfilled when the appellant concealed (as much as possible) the coat in the bag and proceeded towards the exit, after having stopped momentarily at the check stand to speak to someone.

The facts in the case at bar are very similar to those in State v. Doherty, supra, where the court held that

there was a sufficient showing of asportation when the defendant took a gun out of his pocket and dropped it on a counter, even though the gun was not carried past the check stand or from the premises. The gun had previously been removed from a gun case in the store, but there was no evidence that the defendant had himself removed the gun from the case. The Court in Doherty reaffirmed the holding in State v. Richards, supra, that the removal of an object from the place where it is found is sufficient to constitute asportation.

In the present case, the appellant was seen putting the coat into the ZCMI bag; was seen carrying it towards the exit, without having paid for it. Certainly this evidence even stronger claims of asportation than even in Doherty.

The present case does not lack any evidence on which to convict the appellant of theft. The elements of the crime were given to the jury (R.24). It was the responsibility of the jury to determine whether the elements of the crime were proven beyond a reasonable doubt, State v. Coffey, 564 P.2d (Utah 1977). Apparently the jury found the State's evidence convincing beyond a reasonable doubt. The appellant had a full and fair trial. The proceedings are presumed to be valid,

State v. Valdez, 19 Utah 2d 426, 432 P.2d 53, 55 (1967), and are in fact so found to be based upon the evidence and law applicable thereto.

CONCLUSION

For the reasons heretofore cited, the conviction should be affirmed by this Honorable Court.

Respectfully submitted,

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