

1978

State of Utah v. Kenneth J. Gandee : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Ronald W. Perkins; Attorney for Appellant

Recommended Citation

Brief of Respondent, *Utah v. Gandee*, No. 15635 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/1072

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

KENNETH J. GANDEE,

Defendant-Appellant.

BRIEF OF

APPEAL FROM THE JUDICIAL DISTRICT COURT OF
COUNTY, STATE OF UTAH
F. WAHLQUIST

RONALD W. PERKINS

Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401

Attorney for Appellant

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I: THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY WITH RESPECT TO THE PROVISIONS OF UTAH CODE ANN. § 76-10-505, CARRYING A LOADED FIREARM IN VEHICLE OR ON STREET-----	6
A: UTAH CODE ANN. § 76-10-505 IS NOT A LESSER INCLUDED OFFENSE OF UTAH CODE ANN. § 76-5-504-----	7
B: APPELLANT IS PRECLUDED ON APPEAL FROM ASSERTING AS ERROR THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY REGARDING THE OFFENSE OF CARRYING A LOADED FIREARM IN A VEHICLE OR ON A STREET, UTAH CODE ANN. § 76-10-505-----	13
POINT II: THE EVIDENCE PRESENTED IN THE LOWER COURT WAS SUFFICIENT FOR THE JURY TO FIND APPELLANT GUILTY BEYOND A REASONABLE DOUBT-----	19
CONCLUSION-----	25

CASES CITED

Commonwealth v. Harris, 344 S.W.2d 820 (Ky. 1961)---	12
Crawford v. State, 552 P.2d 1378 (Nev. 1976)-----	20
McCall v. Kendrick, 2 Utah 2d 364, 274 P.2d 962 (1954)-----	18
People v. Bynum, 94 Cal.Rptr. 241, 483 P.2d 1193 (1971)-----	20
People v. Halley, 131 Ill.App.2d 1070, 268 N.E.2d 499 (1971)-----	11
People v. Law, 39 A.D.2d 904, 334 N.Y.S.2d 398 (1972)-----	11

TABLE OF CONTENTS (Continued)

	Page
People v. Zaring, 547 P.2d 232 (Colo. 1976)-----	20
Reed v. State, 199 So.2d 803 (Miss. 1967)-----	11
State v. Brennan, 13 Utah 2d 195, 371 P.2d 27 (1962)-----	8
State v. Chapple, 567 P.2d 20 (Idaho. 1977)-----	20
State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936)-----	17
State v. Dorsey, 491 S.W.2d 301 (Mo. 1973)-----	11
State v. Green, 111 Ariz. 444, 532 P.2d 506 (1975)-----	20
State v. Hall, 20 Mo.App. 397 (1886)-----	10
State v. Hart, 66 Idaho 217, 157 P.2d 72 (1945)---	10
State v. Johnson, 220 Kan. 720, 556 P.2d 168 (1976)-----	20
State v. Kazda, 545 P.2d 190 (Utah 1976)-----	17
State v. Kitchen, 564 P.2d 760 (Utah 1977)-----	17,18
State v. Logan, 563 P.2d 811 (Utah 1977)-----	17
State v. Nielsen, 544 P.2d 489 (Utah 1975), cert. denied 425 U.S. 906-----	11
State v. Quail, 5 Boyce 310, 92 A. 859 (Del. 1914)-----	11
State v. Schoenfeld, 545 P.2d 193 (Utah 1976)-----	22
State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970)-----	20,24
State v. Valdez, 19 Utah 2d 426, 432 P.2d 53 (1967)-----	15
State v. Villiard, 27 Utah 2d 204, 494 P.2d 285 (1972)-----	18
State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934)-----	7
Williams v. Commonwealth, 304 Ky. 761, 202 S.W.2d 408 (1947)-----	10

STATUTES CITED

Utah Code Ann. § 76-10-501 (1973), as amended----	10
Utah Code Ann. § 76-10-503 (1973), as amended----	11
Utah Code Ann. § 76-10-504 (1973), as amended----	1-15,25
Utah Code Ann. § 76-10-505 (1973), as amended----	5-15,19,2
Utah Code Ann. § 77-33-6 (1953)-----	7
Utah Rev. St. § 105-34-6 (1933)-----	7
Utah Rules of Civil Procedure, Rule 51-----	13-15,18

IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
KENNETH J. GANDEE, : 15635
Defendant-Appellant. :

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

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crime of carrying a concealed weapon, a third degree felony, in violation of Utah Code Ann. § 76-10-504 (1973), as amended, in that said defendant did unlawfully carry a weapon, to-wit: a .22 caliber pistol concealed upon his person.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury in the Second Judicial District Court, in and for Weber County, State of Utah, the Honorable John F. Wahlquist, presiding. Appellant was found guilty on June 9, 1976, of the offense charged.

On December 23, 1977, the Honorable Judge John F. Wahlquist sentenced appellant to serve a term in the Utah State Prison, not to exceed five years, granting appellant credit for the ninety days he had already served.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the lower court.

STATEMENT OF FACTS

On June 9, 1976, appellant Kenneth J. Gandee was found guilty of carrying a concealed weapon under the provisions of Utah Code Ann. § 76-10-504 (1973), as amended.

The State's primary witness was Officer Corey Bott of the South Ogden Police Department. Officer Bott testified that on the evening of September 29, 1975, he was dispatched to a residence located at 5415 South 800 East in South Ogden at approximately 8:30 p.m. to investigate a minor family disturbance (Tr.20-22). As Officer Bott turned the corner of 500 South [sic] he heard what he believed to be four gunshots in rapid succession (Tr.22). The officer parked behind a large Chevrolet camper pickup truck (Tr.22), and called the dispatcher for backup assistance (Tr.23). Officer Bott then observed a man, identified as appellant Kenneth Gandee, walking quickly down the driveway of the house (Tr.23). Appellant was wearing his shirt untucked

and the officer did not see a gun in his hand at that time (Tr.23,24,38). When appellant came around the front of the truck and proceeded to get in, the officer did not observe a gun in his hands (Tr.52,53,62). Officer Bott then took his red hand spotlight, turned it on and shined it directly into the rearview mirror of the truck (Tr.23). Appellant looked into his side rearview mirror at the officer (Tr.23), and then started the truck and moved away from the curb (Tr.25), with Officer Bott in pursuit (Tr.25). Officer Bott turned on his overhead red and blue lights (Tr.25), siren (Tr.25), and P.A. system and ordered appellant to pull over to the right-hand side of the road (Tr.26). Appellant did not respond (Tr.26). Officer Bott then drove in front of the truck and pulled sideways into the street, thereby blocking it (Tr.27). The officer then got out of his car, drew his weapon and ordered appellant from his vehicle (Tr.27), to which appellant responded, "shoot away, pig." (Tr.28). Officer Bott then holstered his weapon, walked around the left side of the truck and back up the driver's side of the vehicle to appellant's window (Tr.28). Officer Bott asked appellant where the gun was (Tr.28). In response, appellant lifted his shirt, whereupon Officer Bott could see the

handle of the butt of the gun (Tr.30). Appellant asked, "Is this what you want, pig?" (Tr.30). Appellant had his finger on the trigger of the gun (Tr.30). In response, Officer Bott drew his weapon and pointed it at appellant's head (Tr.31). A struggle ensued and appellant released the gun (Tr.31).

The gun was a .22 caliber pistol which held nine shells (Tr.32). Officer Bott testified that the gun was loaded (Tr.32); six shells in the cylinder had been fired, but the gun contained three live rounds (Tr.32-33). A box of .22 caliber shells was found sitting on the front seat of the truck (Tr.22).

Officer Bott testified that although he could not say for certain that the gun was concealed on appellant's person because he could not see the barrel inside appellant's pants (Tr.49), he believed the gun to have been concealed because appellant had to lift his shirt to get the gun and that was when the weapon became visible (Tr.49).

Appellant testified that when Officer Bott came up to the window of the vehicle, the gun was on the seat beside him (Tr.70), and he simply handed the gun to Officer Bott (Tr.71). Appellant also testified that the gun was unloaded (Tr.58-59,66,75-76,88,92,96).

Janene Gandee, appellant's ex-wife, testified that when appellant left her residence, she saw him carrying the gun in his hand (Tr.108). She also testified that she talked to Officer Bott approximately 45 minutes after the shots were fired. She testified that Officer Bott had told her that he was almost physically sick because he had almost shot appellant and the gun had not been loaded (Tr.106).

This testimony was disputed by Officer Bott (Tr.116).

After the defense and the state rested, proceedings were held in chambers to discuss the jury instructions (Tr. 120-127). It was the opinion of the trial judge that Utah Code Ann. § 76-10-505 (1973), as amended, carrying loaded firearm in vehicle or on street, was not a lesser included offense of Utah Code Ann. § 76-10-504 (1973), as amended, carrying concealed dangerous weapon (Tr.120). Counsel for appellant requested that an instruction on the ground of Section 76-10-505 be given (Tr.121). However, after the trial judge noted that in his opinion appellant could be found guilty under both Section 76-10-504 and Section 76-10-505 (Tr.121), counsel for appellant stated that he would not submit his client to a double offense

(Tr.121). After several changes were made to the jury instructions, counsel for appellant stated, "No further exceptions" (Tr.127). Moreover, when the court inquired of counsel whether there were further exceptions after the jury had retired to deliberate, counsel for appellant replied that there were none (Tr.128).

On the afternoon of June 9, 1976, the jury found appellant guilty of carrying a concealed weapon under the provisions of Utah Code Ann. § 76-10-504 (1973), as amended.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY WITH RESPECT TO THE PROVISIONS OF UTAH CODE ANN. § 76-10-505, CARRYING A LOADED FIREARM IN VEHICLE OR ON STREET.

Appellant submits that the trial court erred in refusing to instruct the jury regarding the carrying of a loaded firearm in a vehicle or on a street, an offense which appellant contends is a lesser included offense of carrying a concealed weapon. Contrary to the position of appellant, the trial court did not err in failing to instruct the jury with respect to the provisions of Utah Code Ann. § 76-10-505 (1973), as amended. Rather, the position of the trial court was correct both as a matter of law and under the facts of

the instant case. Utah Code Ann. § 76-10-505 (1973), as amended), is not a lesser included offense of Utah Code Ann. § 76-10-504 (1973), as amended. Moreover, the failure of appellant to except to the jury instructions, as well as the failure to submit a written request for instructions to the trial court, preclude appellant, in the instant case, from asserting error on appeal.

A. UTAH CODE ANN. § 76-10-505 IS NOT A LESSER INCLUDED OFFENSE OF UTAH CODE ANN. § 76-10-504.

Utah Code Ann. § 77-33-6 (1953), provides:

"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."

The major deficiency in appellant's position is the failure to address the threshold question: Is Section 76-10-505 a necessarily included offense of Section 76-10-504? If the answer is in the negative, appellant's first claim of error is without merit.

In State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934), this Court, in construing Rev. St. 1933, Section 105-34-6, the predecessor statute of Section 77-33-6, stated:

"The statute allows conviction for any lesser offense necessarily included in the offense charged in

the indictment or information, but does not allow conviction of any lesser offense stated in the indictment unless it is necessarily included in the greater offense. The lesser offense must be a necessary element of the greater offense and must of necessity be embraced within the legal definition of the greater offense and be a part thereof." (Emphasis by Court.) 33 P.2d at 645.

In State v. Brennan, 13 Utah 2d 195, 371 P.2d 27 (1962), the Utah Supreme Court addressed the question of whether the offense of driving a motor vehicle under the influence of liquor is included in the greater offense of driving while intoxicated and injuring another in a reckless or negligent manner. In holding that the former was a lesser included offense of the latter, the Court stated:

"The rule as to when one offense is included in another is that the greater offense includes a lesser one when establishment of the greater would necessarily include proof of all the elements necessary to prove the lesser. Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense." (Emphasis added.) 371 P.2d at 29.

Scrutiny of Sections 76-10-504¹ and 76-10-505² leads to the conclusion that the latter is not a necessarily included offense of the former for the reason that Section 76-10-505 contains elements which must be proven that are not necessary for a conviction under Section 76-10-504.

In the first instance, the provisions of Section 76-10-505 may only be violated if an individual carried a loaded firearm in three proscribed areas: in a vehicle, on a public street in an incorporated city, or in a prohibited area of an unincorporated territory within this State. In contrast, the provisions of Section 76-10-504 are not circumscribed by location; that is, the substantive offense may occur anywhere--in public or private buildings, on public lands which are not prohibited areas or on streets or roads not dedicated to public use. The act which Section 76-10-504 prohibits is the act of concealment--not the possession of a loaded firearm in certain proscribed areas. Thus, one may be found to have

1 "Carrying concealed dangerous weapon.--Any person, except those persons described in section 76-10-503, carrying a concealed weapon as defined in this part is guilty of a class B misdemeanor, and if the dangerous weapon is a firearm, or sawed-off shotgun he shall be guilty of a felony of the third degree."

2 "Carrying loaded firearm in vehicle or on street.--Every person who carries a loaded firearm in a vehicle or on any public street in an incorporated city or in a prohibited area of an unincorporated territory within this state is guilty of a class B misdemeanor."

violated Section 76-10-504 for carrying a concealed and loaded firearm in a public building and not be in violation of Section 76-10-505. Section 76-10-505 contains the element of location not found under Section 76-10-504, and this is not a necessarily included offense of the crime of carrying a concealed dangerous weapon.

Moreover, the term "dangerous weapon" as used in Section 76-10-504 is much broader than the term "loaded firearm." Section 76-10-501(1) defines the term "dangerous weapon" as:

". . . any item that in the manner of its use or intended use is capable of causing death or serious bodily injury. In construing whether an item, object, or thing not commonly known as a dangerous weapon is a dangerous weapon, the character of the wound produced, if any; and the manner in which the instrument, object or thing was used shall be determinative."

State statutes prohibiting the carrying or possession of "dangerous" or "deadly weapons" have been held to apply to the carrying of brass knuckles, State v. Hall, 20 Mo.App. 397 (1886), blackjacks and billyclubs, State v. Hart, 66 Idaho 217, 157 P.2d 72 (1945), and a razor. Williams v. Commonwealth, 304 Ky. 761, 202 S.W.2d 408 (1947). Thus, because one could be convicted of carrying a dangerous concealed weapon without that weapon being a loaded firearm, Section 76-10-505 is not a necessary offense of Section 76-10-504.

In addition, Section 76-10-505 requires that the firearm be loaded to constitute the substantive offense. Section 76-10-504, however, requires no such element. Section 76-10-504 states only that "if the dangerous weapon is a firearm, or sawed-off shotgun he shall be guilty of a felony of the third degree."

In State v. Nielsen, 544 P.2d 489 (Utah 1975), cert. denied 425 U.S. 906, this Court held that the use of the term "gun" as opposed to "dangerous weapon" in a jury instruction in a trial for violation of Utah Code Ann. § 76-10-503 (1973), as amended, (possession of a dangerous weapon), was not prejudicial error, whether the gun was loaded or unloaded. This Court noted, "We believe the statute's purpose was to deter those convicted of violent crimes from thereafter having guns, loaded or unloaded." 544 P.2d at 491.

Indeed, it is the position of the majority of jurisdictions that have addressed the issue that a firearm is a "dangerous weapon" whether loaded or not. See State v. Quail, 5 Boyce 310, 92 A. 859 (Del. 1914); Reed v. State, 199 So.2d 803 (Miss. 1967); People v. Halley, 131 Ill.App.2d 1070, 268 N.E.2d 499 (1971); People v. Law, 39 A.D.2d 904, 334 N.Y.S.2d 398 (1972); State v. Dorsey, 491 S.W.2d 301 (Mo. 1973).

The Supreme Court of Kentucky in Commonwealth v. Harris, 344 S.W.2d 820 (Ky. 1961), in construing the Kentucky concealed weapons statute, stated:

"As we view it, one purpose of KRS 435.230 is to deter people from carrying concealed upon or about their persons firearms that are mechanically capable of producing death upon being fired . . . We think it in keeping with the purpose of the statute to hold that a gun mechanically capable of being fired is a deadly weapon within the meaning of KRS 435.230, though it be embodied and though there be no ammunition upon the carrier's person or so near to him as to make it readily available." 344 S.W.2d at 821.

The purpose of Section 76-10-504 is to maintain peace and public safety. The Utah Legislature determined that the purpose could best be effectuated by the broad language of the statute--it did not require that a firearm be loaded to constitute a dangerous weapon; rather, the Legislature provided that ". . . if the dangerous weapon is a firearm, or sawed-off shotgun," the violator would be guilty of a felony of the third degree, indicating a legislative determination that a firearm or sawed-off shotgun is per se a dangerous weapon.

Thus, Section 76-10-505 is not a lesser included offense of Section 76-10-504 insofar as it requires that the substantive offense can only occur in specific proscribed locations. The term "dangerous weapon" encompasses a wide

spectrum of instrumentalities capable of inflicting serious bodily injury or death not proscribed by Section 76-10-505, and Section 76-10-505 requires the element of a loaded firearm, an unnecessary element under the concealment statute, Section 76-10-504. Therefore, the trial court did not err when it did not instruct the jury concerning the offense of carrying a loaded firearm in a vehicle or on a street.

B. APPELLANT IS PRECLUDED ON APPEAL FROM ASSERTING AS ERROR THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY REGARDING THE OFFENSE OF CARRYING A LOADED FIREARM IN A VEHICLE OR ON A STREET, UTAH CODE ANN. § 76-10-505.

Rule 51 of the Utah Rules of Civil Procedure provides that if one of the parties to an action wishes the trial court to instruct the jury on a particular matter, such party should file a written request with the court. Moreover, Rule 51 provides that if objections are to be made to the jury instructions, such objections are to be made either before the instructions are given to the jury or after the instructions are given to the jury but before the jury retires to deliberate. The Rule specifically

provides that "No party may assign as error the giving or failure to give an instruction unless he objects thereto," although the Rule further states that this requirement may be waived by the appellate court if the interests of justice so require.³

Appellant failed to make his request for an instruction regarding the provisions of Utah Code Ann. § 76-10-505 (1953), as amended, in writing as is required

3 Rule 51, Instructions to Jury; Objections:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions; unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court in its discretion and in the interests of justice, may review the giving or failure to give an instruction. Opportunity shall be given to make objections and they shall be made, out of the hearing of the jury. . . ."

by Rule 51. Moreover, counsel for appellant apparently waived his oral request for such an instruction when he stated that he did not wish to subject his client to the possibility of conviction for a "double offense" (Tr.121). Even if Section 76-10-505 were a necessarily included offense of Section 76-10-504, which the State submits it is not, appellant's failure to submit in writing the instructions he wished to be given and his failure to clearly indicate, orally at the least, his continued desire to have such an instruction given, precludes his asserting the failure of the trial court to so instruct as error. In State v. Valdez, 19 Utah 2d 426, 432 P.2d 53 (1967), the defendant therein appealed his conviction of assault with a deadly weapon on the ground that the trial court erred in failing to instruct the jury on the lesser and included offense of simple assault. This Court, in upholding the defendant's conviction, stated:

"As a general rule the trial court should submit to the jury included offenses where the evidence would justify such a verdict. But like all general rules, there are exceptions and it may depend on the circumstances. In this case there was no request, either written or oral, for an instruction on the lesser offense of assault. We say

this advisedly after having examined the statements of counsel which defendant now argues should be deemed sufficient to constitute a request. If the defendant had desired that procedure, it was his duty to submit a proper request in writing, or at least to clearly indicate to the court orally that such was his desire." (Emphasis added.) 432 P.2d at 54.

Additionally, appellant did not take exception during the trial to the failure of the court to instruct the jury regarding Section 76-10-505, and thus should be precluded from asserting the failure of the court to so instruct as error on appeal. In State v. Kazda, 545 P.2d 196 (Utah 1976), a defendant convicted of the theft of copper wire claimed error on the ground that the trial court failed to instruct the jury that an honest mistake of fact constituted a defense to the charge of theft. This Court, while agreeing that an honest mistake of fact was indeed a defense to a charge of theft, held that the failure of the defendant to submit a written request for such an instruction or to take oral exception to the instructions given precluded the defendant from asserting as error the failure of the trial court to so instruct the jury. In so holding, the Court noted:

"There is an important purpose to be served by the rule requiring that objections be made to the instructions. It gives an opportunity for the court to correct, or to fill in any inadequacy in the

instructions, so that the jury may consider the case on a proper basis. In order to accomplish that purpose, the rule should be adhered to. Accordingly, the standard rule is that when a party fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, he is thereafter precluded from contending error." 545 P.2d at 193.

The Court further took cognizance of its ruling in State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936), wherein it had stated that "when palpable error is made to appear on the face of the record and to the manifest injustice of the accused, the court has the power to notice such error and to correct the same, though no formal exception was taken to the ruling." 60 P.2d at 958. The Cobo Court, however, had limited its extraordinary review power to capital cases, "and in cases of grave and serious charged offenses and convictions of long terms of imprisonment involving the life and liberty of the citizen. . . ." Id. at 958. Thus, this Court in Kazda, supra, stated that "the exception is applied only rarely where there appears to be a substantial likelihood that injustice has resulted," 545 P.2d at 193. Therefore, the general rule is that ordinarily the failure to make a timely objection prohibits a defendant from raising the issue on appeal. State v. Logan, 563 P.2d 811 (Utah 1977); State v. Kitchen,

564 P.2d 760 (Utah 1977); State v. Villiard, 27 Utah 2d 204, 494 P.2d 285 (1972).

As noted above, Rule 51 provides that this Court may, in its discretion, and if the interests of justice so require, review asserted errors in the giving of jury instructions, although a proper request was not made for an instruction and no exception was taken during the trial to the alleged deficiency in the instructions. This provision has, however, been narrowly construed. The Court has held in civil cases that the burden of showing special circumstances which could warrant a departure from the rule precluding consideration of alleged errors concerning instructions, in the absence of objection thereto, rests on the party seeking to vary it. McCall v. Kendrick, 2 Utah 2d 364, 274 P.2d 962 (1954):

"Normally, the rules themselves must govern procedure and are to be followed unless some persuasive reason to the contrary invokes the discretion of the Court to extricate a person from a situation where some gross injustice or inequity would otherwise result. The burden of showing special circumstances which would warrant a departure from the rule rests upon the party seeking to vary it." 274 P.2d at 963.

While McCall is a civil case, its analysis of the application of Rule 51 can properly be considered in a criminal appeal. Appellant has pointed to no special

circumstances in his case which would warrant this Court's departure from Rule 51, and indeed the record in this case is void of any such "special circumstances."

Appellant's failure to make his request for an instruction concerning Section 76-10-505 in writing, his apparent waiver of his oral request for such an instruction, appellant's failure to take exception to the trial court's failure to so instruct, and his failure to point to "special circumstances" which would warrant a departure from the requirements of Rule 51, preclude appellant from asserting error on appeal.

POINT II

THE EVIDENCE PRESENTED IN THE LOWER COURT WAS SUFFICIENT FOR THE JURY TO FIND APPELLANT GUILTY BEYOND A REASONABLE DOUBT.

Appellant contends that the evidence presented by the State in the lower court was insufficient for a finding of guilt by the jury (Brief of Appellant, pp.9-12). Appellant grounds this contention on the fact that the State's primary witness, Officer Bott, stated on cross-examination that at the time he stopped appellant's pickup truck, proceeded to the window of the truck, and looked inside, he could not

"honestly" say that the gun had been concealed (Tr.50). Thus, reasons appellant, the State failed to prove every element of the offense alleged to have been committed beyond a reasonable doubt and the evidence did not support the jury's determination of guilt.

Appellant's argument is without merit for several reasons. In the first instance, appellant has unreasonably circumscribed the period of time during which the jury could have found that the act of concealment occurred. The jury was charged in Instruction No. 6 that, "It will make no difference whether the hiding occurred while leaving a dwelling, entering a truck or during an arrest sequence. . . (R.18).

The State concedes that the case against appellant is based upon circumstantial evidence. It is well established however, that a criminal conviction may be sustained on circumstantial evidence alone. State v. Green, 111 Ariz. 444, 532 P.2d 506 (1975); People v. Bynum, 94 Cal.Rptr. 241, 483 P.2d 1193 (1971); People v. Zaring, 547 P.2d 232 (Colo. 1976); State v. Chapple, 567 P.2d 20 (Idaho 1977); State v. Johnson, 220 Kan. 720, 556 P.2d 168 (1976); Crawford v. State, 552 P.2d 1378 (Nev. 1976).

In State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970), the defendant was convicted of second degree murder and appealed his conviction on the ground, inter alia, of

insufficiency of the evidence. In affirming the defendant's conviction, this Court enunciated the standard for reviewing the sufficiency of evidence when the conviction is based on circumstantial evidence:

" . . . [W]e survey the evidence and any reasonable inferences that fairly may be drawn therefrom in the light favorable to the jury's verdict . . . [W]here 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 the defendant. This is entirely logical, because if the jury believes that there is a reasonable hypothesis in the evidence consistent with the defendant's innocence, there would naturally be a reasonable doubt as to his guilt. 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; and if therefrom they are convinced beyond a reasonable doubt of the defendant's guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis. Unless upon our own 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, we should not overturn the verdict." (Emphasis added.)
470 P.2d at 247.

Thus, in reviewing the instant case the Court should survey evidence and the reasonable inferences that may fairly be drawn therefrom in a light favorable to the jury's verdict

and only if there is no reasonable basis for the jury's conclusion that the evidence excluded every other reasonably hypothesis except appellant's guilt may the conviction of appellant be reversed and the case remanded. Moreover, it is the prerogative of the jury to judge the weight of the evidence and the credibilty of the witnesses. The jury was not obligated to accept as true defendant's own version of the evidence or his self-exculpating statements as to his intentions and conduct. Rather, the jury is entitled to use their own judgment as to what evidence they will believe and draw any reasonable inferences therefrom. State v. Schoenfeld, 545 P.2d 193, 195 (Utah 1976).

Viewing the evidence presented in a light favorable to the jury's verdict, Officer Bott's testimony that when he saw appellant walking quickly down the driveway of the residence at 5415 South 800 East in South Ogden and observed no gun in appellant's hand (Tr.23,24,38), and further that when appellant got in his truck there was no gun in his hands (Tr.52,53,62), when viewed in conjunction with appellant's admission that he fired the gun at the residence (Tr.75), it was entirely logical and reasonable for the jury to infer that when appellant got in his truck, the gun was concealed somewhere on his

person. Indeed, if Officer Bott's testimony was believed by the jury, this was the only logical conclusion that the jury could reach. In accordance with the court's instructions, the jury could have found that the act of concealment occurred at the time appellant walked to and entered his truck.

Furthermore, the jury could reasonably infer that when Officer Bott asked appellant where the gun was and he did not see the gun in the truck until appellant lifted his shirt, whereupon the officer could see the butt of the gun (Tr.28,30), that the gun had been concealed under appellant's shirt. As Officer Bott stated, "It was concealed at the time or why would he had lifted his shirt to take it out, and that is when the weapon became visible" (Tr.49). Although counsel for appellant hypothesized that the appellant could have lifted his shirt up to get it out of the way in order to lift something out of the seat (Tr.49), such a hypothesis was clearly not supported by the evidence in view of the fact that appellant testified that he believed that his shirt had been tucked in (Tr.91), that he never lifted his shirt (Tr.91), and that the gun had not been jammed down in the seat but was sitting at

his side on the seat of the truck (Tr.91). The jury was presented with a clear choice of either believing Officer Bott of believing appellant. If the jury chose to believe Officer Bott, which they obviously did, the only reasonable inference they could draw was that the gun had been concealed under appellant's shirt. Thus, the fact that Officer Bott could not unequivocally state that the gun had been concealed under appellant's shirt or in his belt, because he could not see the barrel inside his pants (Tr.48), does not require the reversal of appellant's conviction for the reason that if Officer Bott's testimony of what he did see was believed, the only reasonable inference that could be drawn therefrom was that appellant had the gun concealed under either his shirt, his belt, or both.

It cannot be contended, and indeed appellant has not, that upon reviewing the evidence and the reasonable inferences drawn therefrom, that there was no reasonable basis therein for the jury to conclude that appellant was guilty beyond a reasonable doubt of the offense charged. Such being the case, this Court should not overturn the verdict. State v. Schad, 24 Utah 2d 255, 470 P.2d 246, 247 (1970). The submitted evidence was substantial enough to allow the jury to evaluate it, determine the credibility of the witnesses, and fairly

conclude that the defendant was guilty beyond a reasonable doubt.

CONCLUSION

The arguments raised by appellant in seeking to have his conviction for the offense of carrying a concealed dangerous weapon, Utah Code Ann. § 76-10-504 (1973), as amended, are without merit.

Utah Code Ann. § 76-10-505 (1953), as amended, is not, contrary to appellant's assertion, a lesser included offense of Utah Code Ann. § 76-10-504 (1973), as amended, and therefore the trial court did not err in failing to give an instruction concerning Section 76-10-505. Moreover, appellant's failure to request such an instruction in writing, his apparent waiver of his oral request that the instruction be given, and his failure to except to the instructions given by the trial court preclude his raising the issue in this appeal. Also, the evidence presented in the lower court was sufficient for the jury to find appellant guilty beyond a reasonable doubt. Based upon the foregoing points and authorities, appellant's conviction was proper and should be affirmed.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General