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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 15687
PAUL DAVID VAN DYKE,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DEAN E. CONDER, JUDGE, PRESIDING

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FILED

NOV 8 1978

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE------------------	1
DISPOSITION IN THE LOWER COURT-----------------------	1
RELIEF SOUGHT ON APPEAL------------------------------	1
STATEMENT OF FACTS-----------------------------------	2
ARGUMENT	
POINT I: THE SEARCH WARRANT ISSUED BY JUDGE STEWART WAS CONSTITUTIONALLY AND STATUTORILY VALID------	3
POINT II: THE COURT DID NOT COMMIT ERROR IN ADMITTING TESTIMONY ABOUT APPELLANT----------------------	9
CONCLUSION---	14

CASES CITED

Allen v. Holbrook, 103 Utah 319, 135 P.2d 242 (1943)------------------------------------	4
Coury v. United States, 246 F.2d 1354 (6th Cir. 1970)------------------------------------	8
Shadwick v. City of Tampa, 92 S.Ct. 2119, 407 U.S. 345 (1972)------------------------------	8
Shelmidine v. Jones, 550 P.2d 207 (Utah 1976)--------	5,6
State v. Case, 547 P.2d 221 (Utah 1976)--------------	13
State v. Goodliffe, Utah (No. 15363, decided May 1, 1978)------------------------------------	12
State v. Hartman, 101 Utah 298, 119 P.2d 112 (1941)--	12,13
State v. Schieving, 535 P.2d 1233 (Utah 1975)--------	10
State v. St. Clair, 3 Utah 2d 30, 282 P.2d 323 (1955)------------------------------------	13
State v. Treadway,28 Utah 2d 160, 499 P.2d 846 (1972)------------------------------------	7

STATUTES CITED

Utah Code Ann. § 76-6-302 (1953), as amended---------	1
Utah Code Ann. § 77-10-5(1953), as amended-----------	4
Utah Code Ann. § 77-12-1 (1953), as amended----------	4
Utah Code Ann. § 77-54-1 (1953), as amended----------	4
Utah Code Ann. § 77-54-3 (1953), as amended----------	8

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TABLE OF CONTENTS
(Continued)

PAGE

STATUTES CITED

Utah Code Ann. § 78-5-4 (1953), as amended---------- 5
R.S.U. 105-10-5 (1933)---------------------------------- 4
R.S.U. 105-54-1 (1933)---------------------------------- 4

OTHER AUTHORITIES CITED

Rule 55, Utah Rules of Evidence--------------------- 10,14
Rule 63(10), Utah Rules of Evidence----------------- 11,14

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,	:	
-vs-	:	Case No. 15687
PAUL DAVID VAN DYKE, Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crime of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury, the Honorable Dean E. Conder, presiding. The jury returned a verdict of guilty and the court sentenced appellant to a term of five years to life to run consecutively with appellant's prior sentences.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment below.

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STATEMENT OF FACTS

On October 8, 1977, at approximately 11:20 p.m., the Villa Theatre, located at 3092 Highland Drive, Salt Lake County, was robbed by appellant, Kirt Moyes and Randy Reid (Tr.78-81).

Appellant and Moyes entered the theatre armed with .45 caliber pistols which were subsequently seized at appellant's residence the same night (Tr.36,78,83,184-186). They ordered an employee to put the theatre's cash receipts in a laundry bag (Tr.37-39). The laundry bag, the small bags from the theatre which contained the cash and coins, and a note written by the employee, were recovered that night from Moyes' room (Tr.182-184,40-44). The appellant and Moyes left the theatre and jumped into Randy Reid's red 1977 Cutlass automobile. Patrons of a lounge just north of the theatre observed a man wearing a ski mask enter a late model red car. The patrons noted the license number of the car as RJD_58. A Salt Lake City police officer observed a red Cutlass, license number RJD458 enter the garage of appellant's residence approximately 30 minutes later (Tr.154). Reid drove to another car where the money (in the laundry bag), weapons and clothing were transferred from Reid's car to the other (Tr.81-83,88). Both cars returned to appellant's residence (all the participants

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lived at the residence in Bountiful, although appellant paid the rent (Tr.111)), and arrived within minutes of each other (Tr.84). The weapons and money were transferred from the car to the house and the money was counted (Tr.88).

Appellant's residence was under surveillance when the participants returned from the theatre. Police, approximately five hours later, pursuant to a search warrant issued by Justice of the Peace John A. Stewart, searched the residence and recovered the weapons mentioned earlier, cash, a laundry bag, and money bags from the Villa Theatre (Tr.4,181-186,192,201).

During trial appellant moved to suppress evidence seized pursuant to the search warrant on the grounds, inter alia, that Judge Stewart was not a law-trained judge (Tr.7). That motion was denied (Tr.32). Appellant also moved for a mistrial because the testimony of two witnesses allegedly prejudiced him (Tr.69-73,172,187-191). The court struck the answer of one witness and cautioned the jury concerning the testimony (Tr.172). The motions for mistrial were denied (Tr.73,191).

ARGUMENT

POINT I

THE SEARCH WARRANT ISSUED BY JUDGE STEWART WAS CONSTITUTIONALLY AND STATUTORILY VALID.

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Appellant argues that the search warrant in this case was invalid because it was issued by a Justice of the Peace who is not a lawyer. This argument has no support in statute, case law or the Constitution.

Utah Code Ann. § 77-54-1 (1953), as amended, defines "search warrant:"

> "A search warrant is an order in writing, in the name of the State, signed by a magistrate and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate." (Emphasis added.)

Utah Code Ann. § 77-10-5 (1953), as amended, identifies which persons are magistrates:

> "The following persons are magistrates:
> (1) Justices of the Supreme Court.
> (2) Judges of the district courts.
> (3) Judges of the city courts.
> (4) Justices of the peace." (Emphasis added.)

Allen v. Holbrook, 103 Utah 319, 135 P.2d 242 (1943), construed the precursors of Sections 77-54-1 and 77-10-5, Section 105-54-1, R.S.U. 1933 and 105-10-5, R.S.U. 19[illegible] and held that, "A justice of the peace has power to issue search warrants."

Despite the holding of Allen v. Holbrook, supra, appellant contends that by analogy Utah Code Ann. § 78-5-4 (1953), as amended, requires that only law-trained judges issue search warrants. This analogy is flawed and unpersuasive.

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Section 78-5-4 deals specifically and narrowly with the right to be tried by a law-trained judge whenever a jail sentence may be imposed. By statute, the legislature determined that certain changes in the jurisdiction and power of justices of the peace was warranted. Legislation is the proper way to change the jurisdiction and power of a magistrate. If a change such as appellant proposes has merit it should be considered and enacted by the law-making body of government. The same argument applies to appellant's reference to Utah Code Ann. § 77-12-1 (1953), as amended, which discusses issuance of arrest warrants.

Appellant cites Shelmidine v. Jones, 550 P.2d 207 (Utah 1976), to show that justices of the peace should handle minor cases. Shelmidine is instructive on other points as well and has direct application to the present case.

In Shelmidine, three petitioner's attacked by extraordinary writ the right of a non-lawyer justice of the peace to proceed with their cases because there were potential jail sentences. A district judge issued the writ and the defendant justice of the peace appealed. This Court found the writ was improperly issued and subject to recall. The Court noted, however, that since filing of the writ a statute had passed requiring law-trained judges

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to hear cases involving jail sentences and remanded the cases for trial consistent with the new statute.

Justice Crockett writing for the Court observed:

> "Also, it should be borne in mind that there is a definite distinction between a change in interpretation or application of a statute, which sometimes quite justifiably occurs, and attempting by judicial fiat to affect a substantial change in law as clearly expressed in a statute or the constitution. When such a substantial change is necessary or desirable, <u>our constitution has set up procedures for the change by the legislature</u>, or of the constitution, by the amendment process." (Emphasis added.) 550 P.2d at 210.

The Court also stated:

> "For the reasons stated herein we are unable to agree with the ruling of the district judge that the portion of our own constitution which vested the challenged power in justices of the peace, is itself unconstitutional." 550 P.2d at 211.

Following the language of <u>Shelmidine</u>, respondent asserts that the issuance of search warrants by non-lawyer justices of the peace is not unconstitutional. The issuance in this case was valid and consistent with statute and authoritative case law.

Appellant points to the nighttime search provision of the warrant in this case to support his contention that

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only a law-trained judge should issue search warrants.

Appellant correctly states the law in Utah concerning nighttime searches and State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972), correctly construes the statute. However, appellant's statement that, "The affidavit in the instant case did not so indicate [positiveness] . . . ." (Appellant's brief, p. 6), is inaccurate. The trial cour found the warrant and supporting affidavit to be sufficiently positive to justify denying appellant's motion to quash the warrant (Tr.32). There is no testimony rebutting the positive nature of the affidavit. The transcript reveals that appellant's trial counsel characterized the affidavit as insufficiently positive and the state characterized it as sufficiently positive. The trial court was in the best position to determine the validity of the warrant and its decision should not be reversed absent a showing of abuse of discretion. Appellant does not claim nor show any abuse of discretion by the trial court.

Appellant posits a general contention which seems to be that only law-trained judges can adequately understand and determine complex issues of law and therefore are the only ones who should be permitted to issue search warrants. This contention ignores the role which magistrates play in issuing search warrants.

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Shadwick v. City of Tampa, 92 S.Ct. 2119, 407 U.S. 345 (1972), establishes two tests which magistrates issuing warrants must meet. They must be (1) neutral and detached and (2) capable of determining whether probable cause exists. 92 S.Ct. at 2123.

Coury v. United States, 246 F.2d 1354 (6th Cir. 1970), stated concerning search warrants and those who issue them:

> "[O]nly a probability of criminal conduct need be shown; the rules for determining probable cause are less rigorous than the rules of evidence; the commissioner [United States Commissioner] should be guided by common sense, and 'great deference' should be given to the commissioner's determination of probable cause." 426 F.2d at 1356. (Emphasis added.)

The requirements of a warrant in Utah are found in Utah Code Ann. § 77-54-3 (1953), as amended. This section repeats the probable cause and particularity standards found in the United States Constitution.

The justice of the peace in this case satisfies the tests of Shadwick and Coury. The fact that Judge Stewart is not a lawyer does not make him incapable of determining probable cause. Non-lawyer juries are constantly asked to decide complex and subtle issues under a standard of proof much more rigorous than probable cause.

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Police can make searches and arrests without warrants under certain circumstances. Police decisions of this kind often involve complex factual and legal issues and must be made immediately and under conditions of stress. No constitutional or statutory provision requires that police be law-trained.

Statutes, case law and common sense indicate that the magistrate in this case had jurisdiction to issue a search warrant. The warrant was valid and legally executed. Appellant's contention to the contrary is without merit and does not justify reversal in this case.

POINT II

THE COURT DID NOT COMMIT ERROR IN ADMITTING TESTIMONY ABOUT APPELLANT.

Appellant refers to two witnesses whose testimony constituted prejudicial error. Respondent maintains that neither witnesses' testimony was error and even if error, such testimony was harmless error not justifying reversal.

The testimony of the first witness is found in appellant's brief at pp. 7-8. This testimony was admissible under at least two theories.

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Under Rule 55, Utah Rules of Evidence, evidence that a person committed a crime on a specified occasion is admissible to prove absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity. The testimony in this case established motive for the crime in question and was relevant to the issues of intent, preparation and knowledge. See also State v. Schieving, 535 P.2d 1233 (Utah 1975).

Moreover, the general nature of testimony, "they had been hitting a few rinky-dink places" is not evidence of a crime committed on a specified occasion and therefore is not within the proscription of Rule 55.

Appellant's counsel also elicited similar testimony from the witness on cross-examination. Mr. Reid in response to counsel's question stated, "I said hitting a bigger place possibly like the Villa." Counsel then said, "Oh. Well, what did you think hitting a bigger place . . . meant." (Tr.116).

The use of the comparative "bigger" suggests other smaller robberies. Yet this testimony was given during cross-examination and repeated by appellant's counsel.

Any possible error, therefore, was compounded and reiterated by appellant. Appellant should not be

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allowed to claim error where he contributes to it.

The testimony would also be admissible as a declaration against interest under Rule 63(10) of the Utah Rules of Evidence. Under that rule, statements by a declarant who is unavailable as a witness are admissible if they subject him to criminal liability under circumstances which indicate the statements were true. Appellant's statements to Mr. Reid are of this nature and were therefore properly admitted.

The testimony of the second witness, appellant's girlfriend, Maria Newman, is found at Tr. 161-179.

A reading of the complete testimony shows that the witness made several statements about the appellant referring, on the night of the robbery, to "going to work." (Tr.168,171,177). The State's question at issue here and the witness' answer could be viewed as explaining what appellant meant and the witness understood by "going to work." It could also be viewed as an attempt to establish how appellant paid cash for groceries.

Respondent submits that such testimony was admissible. The trial court, however, viewed it differently and immediately struck the answer and instructed the jury to disregard it (Tr.172). This action by the court cured any possible error or prejudice which may have occurred.

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Appellant cites State v. Goodliffe, Utah (No. 15363, decided May 1, 1978) to support his claim that Maria Newman's testimony was prejudicial. Goodliffe is not like this case and inapplicable.

In Goodliffe, a forcible sexual abuse case, the trial court permitted testimony of three prior similar bad acts committed by the appellant as rebuttal on the issue of appellant's truthfulness and veracity. This Court noted that while the testimony was admitted on the issue of truthfulness and veracity, "the clear implication of the testimony was that it was an attempt to demonstrate defendant's propensity to commit sexual crimes of the nature he is presently charged with."

Following this observation the Court made the statement quoted in appellant's brief.

Appellant cites three cases for the proposition that a mistrial will be granted when the prosecution intentionally elicits inadmissible testimony. The cases are distinguishable and provide no authority for appellant's position.

In State v. Hartman, 101 Utah 298, 119 P.2d 112 (1941), a witness mentioned another arrest of the defendant. The trial court struck the answer and admonished the jury to disregard it. This Court found no error but did suggest in dicta that the trial court might have declared a mistrial

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if it were shown that the testimony was an attempt to introduce a prejudicial reference to another crime. Such is not the case here. The dicta of Hartman is not authority and the conduct of the prosecution has not and was not shown or alleged to be an intentional effort to introduce prejudicial references to other crimes. In fact, the challenged testimony of Mr. Reid is similar to the unresponsive answer of the witness in Hartman.

State v. St. Clair, 3 Utah 2d 30, 282 P.2d 323 (1955), was a death penalty case. This Court found that the cumulative effect of several errors at trial required reversal. This Court noted, in dicta, that, deliberate introduction of hearsay statements, by the state, which implied that the defendant threatened the victim on several occasions interfered with a fair trial. This Court further observed, however, that the manner of eliciting the objectionable testimony was not controlling. 282 P.2d at 330.

In State v. Case, 547 P.2d 221 (Utah 1976), this Court in commenting on references to the defendant's former incarceration at the Utah State Prison stated, "It does not appear that the prosecution sought to elicit the information," and found the denial of a motion for mistrial to be proper.

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The State in this case did not deliberately or intentionally elicit inadmissible testimony. The trial court struck one answer and instructed the jury to disregard it. The other testimony was admissible under Rules 55 and 63(10) of the Utah Rules of Evidence. No error occurred because of the testimony and no prejudice resulted.

CONCLUSION

The search warrant issued in this case was valid and evidence seized pursuant to the warrant was properly admitted.

Testimony concerning other bad acts committed by appellant was either admissible or properly excluded by the trial court with appropriate admonition to the jury. No prejudice resulted from such testimony and appellant's conviction should be affirmed.

Respectfully submitted,

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