

1979

State of Utah v. Robert Dennis Eagle : Brief of Appellant

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 J. Yengich; G. Fred Metos; Attorneys for Appellant;

Robert Hansen; Attorney for Respondent;

Recommended Citation

Brief of Appellant, *State v. Eagle*, No. 16189 (Utah Supreme Court, 1979).

https://digitalcommons.law.byu.edu/uofu_sc2/1523

This Brief of Appellant 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,

-v-

ROBERT DENNIS EAGLE,

Defendant-Appellant.

Case No. 28

BRIEF OF APPELLANT

Appeal from the judgment and conviction rendered by
Third Judicial District Court, in and for Salt Lake County,
of Utah, the Honorable Bryant H. Croft, Judge, presiding.

RONALD J. YENGICH
O'CONNELL & YENGICH
44 Exchange Place
Salt Lake City, Utah 84111

G. FRED METOS (Of Counsel)
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111

Attorneys for Appellant

ROBERT HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

FILED

AUG 10 1979

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
ROBERT DENNIS EAGLE,	:	Case No. 16189
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from the judgment and conviction rendered by the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge, presiding.

RONALD J. YENGICH
O'CONNELL & YENGICH
44 Exchange Place
Salt Lake City, Utah 84111

G. FRED METOS (Of Counsel)
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111

Attorneys for Appellant

ROBERT HANSEN
Attorney General
106 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

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 THE FACTS.	2
ARGUMENT	
POINT I: THE DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO HAVE THE JURY INSTRUCTED ON HIS THEORY OF THE CASE AND FAILURE TO DO SO INSTRUCT IS REVERSIBLE ERROR.	6
POINT II: THE COURT'S INSTRUCTION NUMBER 10 ALLOWING THE JURY TO INFER THE INTENT TO COMMIT A THEFT UNCONSTITUTIONALLY ALLOWED THE JURY TO INFER THE CRUCIAL ELEMENT OF INTENT.	13
POINT III: THE TRIAL COURT'S FAILURE TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON REASONABLE ALTERNATIVE HYPOTHESIS WAS REVERSIBLE ERROR	14
POINT IV: IN CLOSING ARGUMENT THE PROSECUTOR ENGAGED IN MISCONDUCT BY COMMENTING ON THE APPELLANT FAILING TO TESTIFY AND THIS MISCONDUCT RESULTED IN PREJUDICE TO THE APPELLANT.	18
POINT V: THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSE OF THEFT.	25
POINT VI: THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE CUMULATIVE ERROR COMMITTED BY THE TRIAL COURT	27
CONCLUSION.	28

CASES CITED

<u>Triffin v. California</u> , 380 U.S. 609 (1965).	20, 23
---	--------

TABLE OF CONTENTS (Continued)

	Page
<u>Myers v. State</u> , 573 S.W.2d 19 (Tex., 1978)	22
<u>People v. Falgares</u> , 28 Ill.App.3d 72, 328 N.E. 2d 210 (1975)	25,26
<u>Rachel v. Bordenkirdier</u> , 590 F.2d 200 (6th Cir., 1978)	23
<u>Sandstrom v. Montana</u> , ____ U. S. ____, 25 Cr.L. 3147 (6-18-79)	13,14
<u>State v. Bender</u> , Utah, 581 P.2d 1019, 1021 (1978).	15
<u>State v. Boone</u> , Utah, 581 P.2d 571 (1978).	21,22
<u>State v. Crawford</u> , 59 Utah 39, 201 P.2d 1030 (1921).	15
<u>State v. Eaton</u> , Utah, 569 P.2d 1114 (1977)	21,24
<u>State v. Fort</u> , Utah, 572 P.2d 1387 (1977).	15
<u>State v. Garcia</u> , 11 Utah 2d 67, 335 P.2d 57 (1960)	15
<u>State v. Johnson</u> , 112 Utah 130, 185 P.2d 738 (1937).	9
<u>State v. Kazda</u> , Utah, 540 P.2d 949 (1975).	21
<u>State v. Mitcheson</u> , Utah, 560 P.2d 1120 (1977)	11,17
<u>State v. Pappas</u> , Utah, 588 P.2d 175 (1978)	12
<u>State v. Smith</u> , Utah, 571 P.2d 578 (1977).	11
<u>State v. St. Clair</u> , 3 Utah 2d 230, 282 P.2d 323 (1955)	27
<u>State v. Stenbeck</u> , 78 Utah 350, 2 P.2d 1050 (1931)	9
<u>State v. Wilson</u> , Utah, 565 P.2d 66 (1977).	25

STATE STATUTES CITED

Utah Code Ann. §76-2-3 (1973).	12
Utah Code Ann. §76-2-307 (1953 as amended)	6,8,13
Utah Code Ann. §76-4-101(1) (1953 as amended)	25

TABLE OF CONTENTS (Continued)

	Page
Utah Code Ann. §76-6-401 (1953 as amended)	10
Utah Code Ann. §76-6-401(3) (1953 as amended)	10
Utah Code Ann. §76-6-404 (1953 as amended)	1,3,25

CONSTITUTIONS CITED

United States Constitution, Fifth Amendment.	20,21
United States Constitution, Fourteenth Amendment	14
Utah State Constitution, Article I, Section 7.	14
Utah State Constitution, Article I, Section 12	21

OTHER AUTHORITIES CITED

A.L.I. Model Penal Code, §206(6) (P.O.D. 1962)	8
Barney, <u>Utah Criminal Code Commentary</u> (1973) at 158)	8
Dix and Sharlot, <u>Criminal Law</u> (1973) at 737.	8
LaFave and Scott, <u>Criminal Law</u> (1972) §75 at 519-20.	8

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
ROBERT DENNIS EAGLE,	:	Case No. 16189
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for the offense of Theft, a Class A Misdemeanor, in violation of Utah Code Ann. §76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant, ROBERT DENNIS EAGLE, was charged by Information with the offense of Theft, a Class A Misdemeanor in violation of Utah Code Ann. §76-6-404 (1953 as amended). On the 12nd day of August, 1978, the appellant was convicted by a jury of the offense as charged in the Information. On the 22nd day of November, 1978, the appellant was sentenced to incarceration for six months.

RELIEF SOUGHT ON APPEAL

The appellant, ROBERT DENNIS EAGLE, seeks reversal of the judgment of guilt entered against him and a new trial in the above entitled matter.

STATEMENT OF THE FACTS

Two witnesses were called at the trial, both were employees of Z.C.M.I. Corporation, a retail store in Salt Lake County. Clarence Duwayne Price, a security operative at Z.C.M.I. was called to the stand and testified that on the 25th day of May, 1978, at approximately 6:00 p.m., he saw the appellant and one Myles in the Z.C.M.I. store located on Main Street and South Temple. The witness' attention was directed to the two individuals as they proceeded to an area in the men's suit department. The witness testified that he noticed the two men and recalled the time as being approximately 6:00 p.m. because that was closing time in the store. Mr. Price indicated that he followed the individuals through several store departments and noticed them by the men's suit department (Tr. 11). The witness further testified that he saw the appellant take a gray pin-striped suit off the clothing rack. He then lost sight of the appellant (Tr. 12). He next saw the appellant in a kneeling position on the floor of the store, putting a suit into an overcoat (Tr. 11). The appellant then stood up and handed the coat to Myles, who put it over his left

shoulder, walked along an area in Z.C.M.I. where they passed a number of cash registers, through a short passageway into the sporting goods department, where they proceeded by another cash register. They then went on to the main aisle between the sporting goods department, headed west into the book department and then proceeded generally in the direction of the north exit door (Tr. 13, 14). As the witness followed the appellant and Myles, he saw them go around the sporting goods counter and then lost sight of them. As he continued to follow them, he noticed two men's suits lying on the floor of the store (Tr. 17). As Myles and the appellant approached him, the witness testified that he showed them his Z.C.M.I. identification and told them that they were under arrest (Tr. 18). The appellant then told Price that they had done nothing wrong and they were leaving the store without any merchandise. At that point, the appellant and Myles attempted to push past the witness, who grabbed the appellant in a bear hug (Tr. 18). Then the appellant told Myles to run. Myles followed the appellant's advice, but was subsequently stopped by two other Z.C.M.I. clerks outside of the store and voluntarily returned with them (Tr. 18). Mr. Price further testified that the appellant did not have the suits with him when he was stopped and arrested and further testified that although Z.C.M.I., pursuant to its policy, prefers the customer to purchase items at the check-out counter in the department where the items are found, it is the store policy or procedure to pay for items at any other

register in the store (Tr. 22).

The prosecution also called Mr. Van Thomas Whitesides, who testified, based upon business records, to the value of the men's suits found on the floor of the sporting goods department. The testimony of Mr. Whitesides was uncontradicted and certain exhibits which were entered into evidence without objection by the appellant (Tr. 30,31). The defense rested without appellant producing any evidence or taking the stand in his own defense (Tr. 32).

Appellant moved to dismiss the Information at the end of all evidence, arguing that at best the State had shown an attempt to commit a theft, which would have reduced the offense to a Class B Misdemeanor. The motion to dismiss was denied (Tr. 33-40). Counsel also requested a directed verdict pursuant to instructions submitted to the Court, which was also denied (Tr. 45). Appellant's Proposed Instruction No. 11 stated:

You are instructed to find the defendant, ROBERT DENNIS EAGLE, not guilty of the offense of Theft as charged in the Information. (R. 42)

A number of proposed instructions were offered by the defense, which were refused by the Court. Proper exception was taken to the failure to give the proposed instructions and also to certain instructions submitted to the jury by the Court. Appellant excepted to the Court Instruction No. 10, which stated, in part

A person's state of mind is not always susceptible of proof by direct and positive evidence and, if not, may ordinarily be inferred from acts.

Appellant further excepted the Court's failure to give an instruction on what is commonly referred to as reasonable alternative hypothesis (Tr. 44, Appellant's Proposed Instruction No. 6):

To warrant you in convicting the defendant of the crime charged in the Information, or of any crime included therein, the evidence must, to your minds, exclude every reasonable hypothesis other than that of 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 reasonable ground other than the guilt of the defendant, then you must find him not guilty. (R. 37)

The prosecution, through the Deputy County Attorney, also excepted to the Court's failure to give that particular instruction as requested (Tr. 45-47).

The appellant excepted to the Court's failure to give proposed Instruction No. 7, concerning the requirement of joint operation of act and intent (Tr. 44):

You are instructed that in every crime or public offense there must be a union or joint operation of the act and intent. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused.

All presumptions of law, independent of evidence, are in favor of innocence, and a man is innocent until he is proved guilty beyond a reasonable doubt. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal. (R. 38)

The defense also propounded an instruction as its theory of the law on the affirmative defense of withdrawal of criminal activity,

pursuant to Utah Code Ann. §76-2-307 (1953 as amended). The Court failed to give said instruction and the appellant took proper exception thereto (Tr. at 46) (R. 46).

During closing arguments, counsel for the State made reference to the fact that the appellant did not take the stand or adduce evidence. Counsel for the appellant made proper objection to that comment and such objection was overruled by the Court at one point and then upon further objection, the Court sustained any further comment by the Deputy County Attorney. On the basis of these remarks, appellant moved for a mistrial, and after the verdict, also moved for a new trial, and both of these motions were denied (R. 68, 189-192).

ARGUMENT

POINT I

THE DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO HAVE THE JURY INSTRUCTED ON HIS THEORY OF THE CASE AND FAILURE TO SO INSTRUCT IS REVERSIBLE ERROR.

The indisputable facts in the instant case indicate a withdrawal of criminal activity on the part of the appellant and Miles. Assuming arguendo that at the time appellant was secreting the suit within the overcoat that there was an intent to commit a theft, the actual asportation or removal of the suit had not as yet been consummated. The evidence at trial showed that the appellant and Miles had a right to the suit and the suit was

opportunity to pay for the goods, and as they approached Mr. Price, the security operative, that they were not in possession of the men's suits as those suits had been left near the sporting goods department of the store. Taking the State's evidence at its best the only inference that can be drawn is that the men changed their minds and withdrew voluntarily from the criminal activity. Counsel for appellant requested the following instruction as Appellant's Proposed Supplemental Instruction No. 3:

You are instructed that it is an affirmative defense to a prosecution in which an actor's criminal responsibility arises from his own conduct or from being a party to an offense that prior to the commission of the offense the actor voluntarily terminated his effort to promote or facilitate its commission and either:

- 1) Gave timely warning to the proper law enforcement authorities or the intended victim, or
- 2) Wholly deprives his prior efforts of effectiveness in the commission.

If you find from the evidence that the defendant, ROBERT D. EAGLE, wholly deprived his prior efforts in the commission of the offense of theft of any effectiveness, then you must find him not guilty of that charge. (R. 46)

The requested instruction was denied and proper exception was taken thereat. (Tr. 45).

This instruction is an almost verbatim statement of Utah

Code Ann. §76-2-307 (1953 as amended).¹ This statute is found in our criminal code within the part on defenses to criminal responsibility. At the time of the enactment of the new code, this defense was new to Utah's statutory scheme.² However, the "renunciation" defense has long been established as valid at common law. LaFave and Scott, Criminal Law (1972) §75 at 519-20. A.L.I. Model Penal Code, §206(6) (P.O.D. 1962). Dix and Sharlot, Criminal Law (1973) at 737. The legislative purpose of this defense is to follow the primary objective of the criminal law, which is to prevent crime. It is desirable to provide an inducement to those who have set a chain of criminal events into action to allow them to take steps to stop the criminal activity and ultimately prevent the consummation of the criminal offense.

It is beyond argument that some evidence was introduced to establish that the appellant and Myles (1) voluntarily terminated

1. The statute provides in its entirety:

76-2-307. Voluntary termination of efforts prior to offense.--It is an affirmative defense to a prosecution in which an actor's criminal responsibility arises from his own conduct or from being a party to an offense under section 76-2-201 [76-2-212] that prior to the commission of the offense, the actor voluntarily terminated his effort to promote or facilitate its commission and either

- (1) gave timely warning to the proper law enforcement authorities or the intended victim, or
- (2) wholly abandoned all prior efforts of effectiveness in the commission.

2. Barnes, Criminal Law, Supplement, 1973, at 118.

their activity to promote the commission of the theft of the suits by leaving them on the owner's premises and (2) wholly deprived their prior efforts at theft of any effectiveness by dispossessing themselves of any dominion or control over the suits. This was established in the testimony of Mr. Price both in his description of the appellant's and Myles' acts and his testimony about the statement made by the appellant when he said that they were leaving the store without any merchandise (Tr. 18).

It has long been the law in the State of Utah, that an accused in a criminal action has a right to submit to the jury his theory of the case, and that such theory when properly requested should be given to the jury in the form of written instructions. State v. Stenbeck, 78 Utah 350, 2 P.2d 1050 (1931). In State v. Johnson, 112 Utah 130, 185 P.2d 738 (1937), this Court stated the applicable standard in determining when such an instruction must be given:

It is admitted that the defendant is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify giving such an instruction. (185 P.2d 238, 743-44).

There was substantial evidence to support the theory of defense of withdrawal or renunciation of the theft of the men's suits. In order to commit the offense of theft an accused must:

- a. Obtain or exercise unauthorized control over the property of another.

(b) With the purpose to deprive him of that property.³

The Utah Criminal Code defines the word "obtain" as bringing about a transfer of possession.⁴ The Code defines "purpose to deprive" as "having the conscious object to withhold property permanently or for so extended a period such that a substantial portion of its economic value or the use or benefit thereof would be lost, or to restore the property only upon payment of a reward or other compensation".⁵

The evidence at trial is clear in the respect that if appellant and Myles ever obtained or exercised unauthorized control over the property, then their actions failed to imply the presence of the requisite purpose to permanently deprive the owner of the property, because they left the property in the store. There was no economic diminution in value, nor was this a case where the property was obtained and hidden on the premises to be located and actual possession asserted at a later date without the owner's knowledge. The evidence showed the actual withdrawal from any

3. Utah Code Ann. §10-6-404 (1953 as amended). See the trial court's Instruction No. 2, R. 50, Plaintiff's Proposed Instruction No. 1, R. 25, and Appellant's Requested Instruction No. 1, R. 11.

4. Utah Code Ann. §10-6-111 (1953 as amended).

5. Utah Code Ann. §10-6-111 (1953 as amended). See Appellant's Requested Instruction No. 2, R. 11, Plaintiff's Proposed Instruction No. 2, R. 26, and the trial court's Instruction No. 2, R. 11.

criminal plan or scheme when the property was left on the premises. Hence, the defense instruction was properly requested and it was error to fail to submit that defense to the jury.

The instant case is distinguishable from the recent decision of this Court in State v. Smith, Utah, 571 P.2d 578 (1977), wherein the same issue was raised. In State v. Smith, supra, unlike the instant case, there was an actual conversion of real property by the defendant and a transfer of title from the victim to the defendant then to a third person and then the realty was encumbered by a mortgage in the name of the third person. In short, the theft in that case was actually consummated by the transfer of the property to the third person and furthermore, the realty diminished in value substantially by the mortgage. In the instant case no such transfer or diminution occurred. The merchandise was left in the store at a point where cash registers were still available for payment to be made.

In determining whether a failure to give a requested instruction is prejudicial the question is "if the requested instruction had been given and the jury had so considered the evidence, there is a reasonable likelihood that it may have had some effect on the verdict rendered". State v. Mitcheson, Utah, 560 P.2d 111 (1977). Two very important facts in this case were that at the time the appellant was accosted by the security operative he had merchandise on his person and that the merchandise which the appellant was suspected of taking was found in the store. With-

out the instruction on the defense of voluntary termination these facts become insignificant. So it is reasonably likely that had the instruction been given such facts would have weighed heavily in the jury's deliberations and a verdict of not guilty may have been returned.

The Court's failure to give the requested instruction was prejudicial because it also prevented the appellant from presenting his defense. In State v. Pappas, Utah, 588 P.2d 175 (1978) this Court ruled that there was prejudicial error with respect to the failure to instruct on the defense of entrapment:

... when there is any evidence which could reasonably be regarded as indicating entrapment, the question whether it is sufficient to raise a reasonable doubt that the defendant would have committed the crime, except for the inducement by the police officer is for the jury to determine
588 P.2d 175, 176-177. [Emphasis Supplied]

When there is any evidence of a defense the prejudice arising from the failure to instruct the jury on the defense of voluntary termination may not be treated any different from the failure to allow a defendant to raise the defense of entrapment. Both are regarded as affirmative defenses, and both are found under Part 3 of Chapter 2 of Title 76 of the Utah Code. With respect to refusing to allow a defendant to raise a defense the two must be regarded in the same manner.

In the case at hand the appellant abandoned the suit inside of the store which is his personal and voluntary efforts of

effectiveness in the commission of the offense of theft. The case must be remanded to the District Court for a new trial in which the appellant will be allowed to raise the defense of voluntary termination pursuant to Utah Code Ann. §76-2-307 (1953 as amended).

POINT II

THE COURT'S INSTRUCTION NUMBER 10 ALLOWING THE JURY TO INFER THE INTENT TO COMMIT A THEFT UNCONSTITUTIONALLY ALLOWED THE JURY TO INFER THE CRUCIAL ELEMENT OF INTENT.

Over proper exception by counsel for appellant, the Court offered the following statement to the jury as part of Instruction No. 10 (Tr. 43-44) (R. 57):

... A person's state of mind is not always susceptible of proof by direct and positive evidence, and, if not, may ordinarily be inferred from acts, conduct, statements or circumstances.

The issue at trial was the intent of appellant and the above instruction allowed the jury to infer this crucial element of the offense in effect diminishing the burden on the State to prove each and every element beyond a reasonable doubt.

This type of instruction has recently been held to be a denial of due process of law under the Fourteenth Amendment to the United States Constitution. In Sandstrom v. Montana, _____ U.S. ___, 13 Cr. Cl. 11-7 (6-13-79), the United States Supreme Court held that instructions such as the one submitted by the trial court

in the instant case relieve the State of its constitutional burden to prove each element of the offense beyond a reasonable doubt by permitting an unwarranted inference of a crucial element of the offense, the mens rea or intent.

In the case before the Court since the entire issue centered around the intent of the appellant, the inference allowed the jurors in Instruction No. 10 "conflict[ed] with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime" . . . Sandstrom v. Montana, supra, 25 Cr.L. at 3163.

Under circumstances of the instant case the Court's Instruction No. 10 denied appellant due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of the State of Utah.

POINT III

THE TRIAL COURT'S FAILURE TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON REASONABLE ALTERNATIVE HYPOTHESIS WAS REVERSIBLE ERROR.

The appellant excepted to the trial court's failure to give proposed Instruction No. 10 on reasonable alternative hypothesis. This instruction stated:

To warrant you in convicting the defendant of the crime charged in the information, or if any crime included therein, the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant, that is to say, if after a full and fair consid-

eration and comparison of all the testimony in the case you can reasonably explain the facts in evidence on any reasonable ground other than the guilt of the defendant, then you must find him not guilty. (R. 162)

The instruction as stated was a proper statement of the law as defined in the seminal case of State v. Crawford, 59 Utah 39, 201 P.2d 1030 (1921).

Numerous cases have discussed the failure of the trial court to give this instruction, and the rule seems clearly stated that:

It has long been the law in this jurisdiction that the giving of such an instruction [reasonable alternative hypothesis] is neither appropriate nor required unless proof of a material issue is based solely upon circumstantial evidence. State v. Bender, Utah, 581 P.2d 1019, 1021 (1978) citing to State v. Fort, Utah, 572 P.2d 1387 (1977) and State v. Garcia, 11 Utah 2d 67, 335 P.2d 57 (1960). (Emphasis Supplied)

In the instant case the material issue of intent to permanently deprive Z.C.M.I. of the property was clearly based solely on circumstantial evidence. There was no direct evidence of this element of the crime of theft. Moreover, the property having been abandoned, the elements of obtaining or exercising unauthorized control were totally circumstantial since the appellant never left the store with the suits and indicated his lack of intent or possession verbally when confronted by the security operative. (R. 136)

Counsel for the State of Utah conceded the circumstantial nature of his case and the need to give this instruction. The following discussion between Mr. Housley, Deputy Salt Lake County

Attorney, Mr. Yengich, defense counsel and the Court reflects this acquiescence:

MR. HOUSLEY: Your Honor, I am in agreement with defense counsel. He is entitled to an Instruction concerning reasonable alternative hypothesis and I didn't request it. If he requests it, he is entitled to it.

THE COURT: I was just going to make a comment in the record for that. You both have indicated that. The Supreme Court has ruled in more than one case that that instruction is proper only where the evidence is all circumstantial. Where we have evidence here that is direct and positive, eye-witness testimony of two guys taking a suit, wrapping it in an overcoat, throwing it over their shoulder, starting to walk out the store, that is not circumstantial evidence. I don't think under the facts and circumstances of this case the reasonable hypothesis instruction is proper, in any sense of the word, under the Supreme Court decision.

With respect to Ron's [Mr. Yengich's] comment about state of mind, I think that were the statute itself expressly sets for the state of mind required as one of the essential elements of the crime, that we define that as one of the elements and state what the law is with respect to that state of mind, and that is all we need do in preparing these instructions. [The Court's and defense counsel's discussion on a different instruction omitted] . . .

MR. YENGICH: . . . And finally, Mr. Housley was speaking on the reasonable alternative hypothesis. I would ask if you have anything else to say on that fact?

MR. HOUSLEY: I do. I don't say what I said, Your Honor, to--

THE COURT: If you want to say something else in the record, go ahead.

MR. HOUSLEY: I don't say it to be critical of the Court's instruction. I think personally it is advantageous to me if it is not given. How-

ever, I feel it is necessary for me to advise the Court, if I think the Court is permitting error to enter the record, and it seems to me in this case it is because of the fact that we have to rely on circumstantial evidence to show the state of their minds, and in view of that, that being a necessary element, as I read the same cases as your Honor referred to, that requires a reasonable alternative hypothesis instruction to cover their state of mind or the possible other alternative with their state of mind.

THE COURT: It is where the evidence of the crime is all circumstantial, as I understand that case, that instruction is proper and at no other time. Let me say this, fellows. I do the best I can in framing my instructions as I think they ought to be. You fellows don't need to apologize to me for taking exceptions to the instructions I give. That is the purpose of our meeting, and you are welcome to state any exceptions you want. If there is merit to it, I will correct my instructions. But if I don't agree with your exceptions, you are welcome to take them and I just simply have to take my chances with the court on high. That is the way I see it.
(Tr. 45-47)

The County Attorney's candid admission that the giving of the instruction is appropriate and the failure to do so is telling, making the error with respect to the failure to give this instruction obvious. Prejudice arises "if the requested instruction had been given had so considered the evidence, there is a reasonable likelihood that it may have had some effect on the verdict rendered". State v. Mitcheson, supra. Here the appellant had abandoned the property in the store, and the only evidence to prove the requisite intent was the act of placing the suit under the overcoat. From this abandonment it may have been inferred that the appellant had

not formed the requisite intent. That being an alternative hypothesis to be inferred from the two separate acts the jury may have returned a different verdict—one of not guilty, or attempted theft.

On this basis, the judgment rendered in the District Court must be reversed and the case remanded for a new trial.

POINT IV

IN CLOSING ARGUMENT THE PROSECUTOR ENGAGED IN MIS-CONDUCT BY COMMENTING ON THE APPELLANT'S FAILING TO TESTIFY AND THIS MISCONDUCT RESULTED IN PREJUDICE TO THE APPELLANT.

In the course of the rebuttal portion of the prosecutor's argument to the jury, the prosecutor made the following remarks:

[BY MR. HOUSLEY] . . . The third thing counsel stated was that the defendant did not take the stand. He then stated--

MR. YENGICH: I am going to object to any reference for the defendant not taking the stand. Instruction No. 6 states it is his right. It is improper for counsel to comment upon it.

MR. HOUSLEY: Your Honor, I request any argument-made to the Court be out of the hearing of the jury.

THE COURT: No, I don't know how far you are going to go. I suggest to you that you limit your comments. He has dealt at some length about that and I will let you respond in some way. You know what the limitations are and don't go beyond that.

MR. YENGICH: I will take exception to his statement at all about it.

THE COURT: Okay.

MR. HOUSLEY: Defense counsel said that it was his decision not to have the defendant take the

stand because he could add nothing to what had already been presented. He could have added that he--the reason why he did not go to the first cash register over in that department.

MR. YENGICH: I will object, your Honor. It is improper argument on what could have been added. I commented solely on the Court's Instruction No. 6 and not what could have been said by the defendant.

THE COURT: Let's not go into that, Mr. Housley.

MR. YENGICH: I have a motion on that basis, if the Court will allow me to reserve it.

THE COURT: Go ahead.

MR. HOUSLEY: He could have--

THE COURT: Don't go into what he could have done.

MR. HOUSLEY: All right. The evidence in this case shows uncontroverted by any other evidence that--

MR. YENGICH: Same objection. Defendant did not put on evidence.

THE COURT: Well, objection to that last comment is overruled. Go ahead, Mr. Housley.

Defense counsel's motion for a mistrial was subsequently denied. The argument of defense counsel that the prosecutor claimed he was responding to was:

... Now, the issue. I want to caution you about a few things before we get to what facts I think comport with that view of the law and that view of the evidence. The issue isn't this young man did not take the stand and testify. The Court has instructed you in this Instruction No. 6 about that. I cautioned you at the outset, as I told you. I caution you at this time, as I told you at the outset, that is my decision as his attorney.

I determined that on the basis of the evidence that was adduced, there was no need for Mr. Eagle to testify and I was happy with the evidence for your ultimate resolution as to whether or not this is an attempted theft, a theft or no theft at all. I suggest to you Mr. Eagle could have added nothing to that. . . .

Although counsel for the appellant did comment on the fact that the appellant had not taken the stand, he did so within the bounds of the law. He merely mentioned that the appellant had not taken the witness stand, that the Court had instructed them on the inference to be drawn and that it was counsel's decision to allow the evidence to stand. The prosecutor's comments however, were clearly comments intended to cause the jury to draw adverse conclusions as to why the appellant did not testify. It was an unfavorable comment on the appellant's exercise of his Fifth Amendment privilege against self-incrimination.

In Griffin v. California, 380 U.S. 609 (1965), the Supreme Court held that it is a violation of a defendant's Fifth Amendment privilege against self-incrimination to allow a prosecutor to comment on an accused's failure to testify. The reasons that the Court gave for this holding were that such a comment, if allowed by the courts, becomes the equivalent of an offer of evidence; it is also a remnant of the inquisitorial system of justice where an accused was forced to testify or face a penalty of contempt. Finally, the Court reasoned that in allowing such a comment the Court would be penalizing a defendant in a criminal case for ex-

exercising his Fifth Amendment privilege.

In State v. Eaton, Utah, 569 P.2d 1114 (1977), this Court found that a prosecutor's comments that the defense had not presented any evidence was a violation of both the Fifth Amendment to the United States Constitution and Article I, Section 12 of the Constitution of the State of Utah. With respect to a prosecutor's closing argument, the Court commented:

We approve and reaffirm that duty and privilege of analyzing the whole evidence as a general proposition. However, there is a point beyond which it must not go in regard to the defendant's constitutional right just referred to; and this includes that it should not be impaired or destroyed by making comments on the failure of the defendant to take the witness stand. 569 P.2d at 1116

The Court went on to distinguish the case of State v. Kazda, Utah, 540 P.2d 949 (1975). In State v. Kazda, supra, the Court found that the prosecutor has a prerogative and a duty to argue all aspects of the case so long as there is no direct reference to the failure to testify. The Court then recognized that:

Upon a fair analysis of the prosecutor's remarks here, the conclusion cannot be escaped that it was but a thinly disguised attempt to do indirectly what the prosecutor knew could not properly be done directly; that is, to comment on the fact that the defendant had chosen not to take the witness stand, and to persuade the jury to draw inferences as to his guilt because of his exercise of that constitutional privilege. [footnote omitted] 569 P.2d at 1116.

In State v. Boone, Utah, 531 P.2d 571 (1978), this Court dealt with a situation where the defense attorney explained that

he did not have his defendant testify because the prosecutor was a skilled cross-examiner. On rebuttal the prosecutor emphasized this statement in noting that the defendant had not testified. This Court found that "the prosecutor was simply emphasizing one of the reasons suggested by defense counsel as to why the defendant did not take the stand". 581 P.2d 571, 574. The situation in the case at bar is substantially different than the situation in State v. Boone, supra. Here defense counsel drew the jury's attention to the instruction on the failure of the appellant to testify, then stated that there was no need for the appellant to testify in light of the state of the evidence (T. 8-9). In response, the prosecutor argued that the appellant could have given reasons why the appellant did not initially stop at a cash register and that the prosecution evidence was uncontroverted (T. 19-20). Obviously, describing the evidence that may be introduced should the appellant testify goes much further than a prosecutor commenting on his own ability to cross-examine a witness.

In other jurisdictions when a prosecutor has even alluded to the possible content of a defendant's testimony when that defendant has failed to testify, the courts have reversed convictions. In Myers v. State, 573 S.W.2d 19 (Tex. 1978), the prosecutor argued that there was no explanation given of why the defendant had 26 1/2 pounds of marijuana in his truck. The Court noted that only the defendant could have offered such an explanation and the prosecution argument was an allusion on the failure to testify. The Court was

on to state, "Thus if the remark complained of called attention to the absence of evidence that only the testimony from the appellant could supply, the conviction must be reversed". 573 S.W.2d 19, 21. Likewise in Rachel v. Bordenkirdier, 590 F.2d 200 (6th Cir., 1978), the defendant had been convicted of manslaughter in a state prosecution. At trial, the prosecutor argued that there were no facts in evidence about how the victim had been beaten or when he was abducted because of all of the men who knew, some would not tell and the other was dead. On habeas corpus the Court of Appeals reversed citing Griffin v. California, supra, because such remarks constituted a comment on the defendant's failure to testify. Consequently, the prosecutor's comments about the possible nature of the appellant's testimony in the case at bar constitute a comment on the failure of the appellant to testify.

The harm that results from a comment on a defendant's refusal to take the stand is a denial of his Fifth Amendment privilege against self-incrimination. Griffin v. California, supra. Even though the Court may instruct the jury to disregard the comment, it still has been presented to the jury and the juror's attention has been directed to it. Psychologically, it would be nearly impossible for a juror to disregard such a remark. Consequently, it could be cured neither by a retraction nor by an instruction. An error is subject to review by this Court even if there was no objection registered at trial.

The test to determine if a statement in a closing argument

is harmless or prejudicial was given in State v. Eaton, supra, where the Court stated:

Consistent with the nature of criminal proceedings and the protections accorded those accused of crime under our law, including the presumption of innocence and the burden of the state to prove the defendant's guilt beyond a reasonable doubt, we believe that, on appeal, when there is a reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the defendant. This is especially true where the error involved is one which transgresses against the exercise of a constitutional right. Consequently, the rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantial adverse effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not be regarded as harmless; and conversely, if the error is such that it is clear beyond a reasonable doubt that it was harmless in that the result would have been the same, then the error should not be deemed prejudicial and warrant granting a new trial.
[footnotes omitted] 569 P.2d at 1116 (1977)

Since the appellant was the only person who could have explained why he did not stop at the first available checkstand the prosecutor's argument clearly implied that there was no reasonable explanation of such conduct. It is reasonably likely that had such an argument not been made, then the jury may have reached a different result, relying on the fact that the merchandise had not been removed from the store itself. On this basis, the judgment must be reversed and the case remanded to the Third Judicial District Court for a new trial.

POINT V

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSE OF THEFT.

The evidence produced at trial was totally insufficient to sustain a conviction for the offense of theft pursuant to Utah Code Ann. §76-6-404 (1953 as amended). That statute requires the State to establish beyond a reasonable doubt that the appellant obtained or exercised unauthorized control over the property of another with the purpose to deprive him thereof. At best the State established the offense of attempted theft. Utah Code Ann. §76-4-101(1) defines attempt:

For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

When the sufficiency of the evidence for a conviction is challenged on appeal this Court has stated "it must appear that upon so viewing the evidence reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime" State v. Wilson, Utah, 565 P.2d 66 (1977). In the instant case when viewing the evidence most favorably to the State, no reasonable person could disagree that there is a reasonable doubt that the appellant committed anything more than attempted theft.

In the case of People v. Falgares, 28 Ill.App.3d 72, 328

N.E.2d 210 (1975), the defendant was charged and convicted of attempted theft and challenged the sufficiency of the evidence on appeal. The facts were very similar to those in the case at bar. In that case the defendant had placed a shirt and a package of underwear in a paper bag. He walked past a cash register and into another department of the store. He was stopped by a store detective with the merchandise in his possession and arrested. The Appellate Court found that the evidence was sufficient to establish conduct constituting a substantial step towards the commission of the theft. The Court stated:

The substantial step was taken when the defendant placed the merchandise in his bag, and passed a checkout counter into another department. Although these acts required to complete the substantive offense of theft, they constitute more than mere preparation and reach for enough toward the accomplishment of the desired result. 328 N.E.2d 210,211.

In the instant case the facts are even weaker than in People v. Falgares, surpa. Here the appellant was seen putting a suit under his overcoat, walking past one checkout counter into an area still within the store where other checkout counters were still available to pay for the merchandise. Then when the appellant was accosted by the security officer he no longer had the merchandise in his possession, but had abandoned it in the store. Because the appellant was still in the store his possession of the merchandise was not unauthorized by any stretch of the imagination. Taking the State's evidence at its best and placing

of the suit under the coat would evidence the necessary intent or purpose to deprive and walking past the first checkout counter could conceivably constitute a substantial step towards the commission of the offense of theft. However, because the appellant was still in the store and it was customary to pay for merchandise from one department at the checkout counter in another part of the store, no reasonable person could differ in finding that no unauthorized control had been exercised over the merchandise.

POINT VI

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DENIED
BY THE CUMULATIVE ERROR COMMITTED BY THE TRIAL
COURT.

Each of the errors in the preceeding points constitutes prejudicial error that would require a reversal of the judgment of the court below. But these errors must also be considered to have had a cumulative effect on the outcome of the trial. Even if the individual errors are not prejudicial in and of themselves this Court should determine that appellant's case was irreparably prejudicial by the cumulative effect of the numerous errors at trial and hence reverse and remand the case for a new trial. State v. St. Clair, 3 Utah 2d, 230, 282 P.2d 323 (1955).

CONCLUSION

Appellant respectfully submits that the individual and cumulative errors as stated herein, require reversal of the verdict of the jury and the judgment entered thereon, and the appellant should be granted a new trial in the Third Judicial District Court.

DATED this ____ day of August, 1979.

Respectfully submitted,

RONALD J. YENGICH
Attorney for Appellant
G. FRED METOS (Of Counsel)