

1998

# State of Utah v. Donald Arthur Harley : Brief of Appellant

Utah Court of Appeals

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981003-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff and Appellee,	)	
	)	Appellate Case No. 981003-CA
v.	)	Trial Court Case No. 971800204 FS
	)	
DONALD ARTHUR HARLEY,	)	Priority No. 2
	)	
Defendant and Appellant.	)	

BRIEF OF THE APPELLANT

Appeal from the Judgment and Order of Commitment  
 Eighth District Court  
 Uintah County, State of Utah  
 Honorable A. Lynn Payne, Judge

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BRIEF OF THE APPELLANT

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Appeal from the Judgment and Order of Commitment  
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STATEMENT OF JURISDICTION

Donald Arthur Harley, Defendant and Appellant, through counsel, appeals his jury convictions for two counts of aggravated kidnaping, a first degree felony, in violation of Utah Code Ann. §76-5-302 (1996), and aggravated burglary, a first

degree felony, in violation of Utah Code Ann. §76-6-203 (1989). The supreme court poured over this appeal to the court of appeals, which has jurisdiction to hear it pursuant to Utah Code Ann. §§78-2-2(3)(i) and 78-2a-3(2)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW,  
WITH STANDARDS OF REVIEW

Issue 1

Did the trial court err when it denied Harley's motion to dismiss the one count of aggravated burglary at preliminary hearing, on grounds that Harley never entered the Jenkins' house and the State conceded the point? Standard of review: A trial court's conclusions of law in criminal cases are reviewed for correctness. *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993).

Issue 2

Did the trial court err when it convicted Harley of one count of aggravated burglary, despite the fact that Harley never entered the Jenkins' house and the State conceded the point? Standard of review: A trial court's conclusions of law in criminal cases are reviewed for correctness. *State v. Thurman, supra*.

### Issue 3

Was there prosecutorial misconduct when the prosecutor, in opening statement, argued to the jury that aggravated burglary does not require the actor to enter or remain unlawfully in a dwelling? Standard of review: Prosecutorial misconduct occurs when the actions or remarks of the prosecutor call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, under the circumstances of the particular case, the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result. *State v. Wright*, 893 P.2d 1113, 1118 (Utah App. 1995).

### Issue 4

Did plain error occur when the trial court, over Harley's objection, allowed the prosecutor, in opening statement, to argue to the jury that aggravated burglary does not require the actor to enter or remain unlawfully in a dwelling? Standard of review: Plain error occurs when there is an error, it should have been obvious to the trial court, and it is harmful to the defendant. *State v. Dunn*, 850 P.2d 1201, 1208

(Utah 1993).

#### Issue 5

Did the trial court err in issuing jury instruction 24, stating that an attempt to unlawfully enter a building or any portion thereof is an element of the offense of aggravated burglary? Standard of review: Even without a formal objection on the record, appellate courts will review instructions for error in order to avoid manifest injustice. Utah R. Crim. P. 19(c). The standard of review utilized is plain error. *State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989).

#### Issue 6

Did the trial court err when it convicted Harley of two counts of aggravated kidnaping, by barring defense counsel as matter of law from arguing, in closing argument, that time and distance were important jury considerations in the determination of whether there had been a seizing, confining, detaining or transportation within the meaning of the aggravated kidnaping statute? Standard of review: A trial court's interpretations of law in criminal cases are reviewed for correctness. *Thurman, supra*.

### Issue 7

Did the trial court err in issuing jury instruction 18, over Harley's objection, informing the jury that neither time nor distance are elements of aggravated kidnaping and that to prove the offense the State does not need to show that the victim was seized, confined or detained for any particular amount of time or transported for any particular distance? Standard of review: The standard of review for jury instructions to which counsel has objected is correctness. *State v. Bryant*, 348 Utah Adv. Rep. 42, 44 (CA, 8-13-98), \_\_\_ P.2d \_\_\_ (Utah App. 1998).

### DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Ann. §76-5-302. **Aggravated kidnaping.**

Utah Code Ann. §76-6-203. **Aggravated burglary.**

These statutes are set forth verbatim in the addendum.

### STATEMENT OF THE CASE

#### A. Nature of the Case

The State charged Harley with five counts: (I) aggravated kidnaping of Ted

Jenkins, a first degree of felony, in violation of Utah Code Ann. §76-5-302 (1996); (II) aggravated kidnaping of Darrell Jenkins, a first degree felony, in violation of Utah Code Ann. §76-5-302 (1996); (III) aggravated burglary, a first degree felony, in violation of Utah Code Ann. §76-6-203 (1989); (IV) possession of a dangerous weapon, a third degree felony, in violation of Utah Code Ann. §76-10-503 (1994); and (V) evidence tampering, a second degree felony, in violation of Utah Code Ann. §76-8-510 (1973).

#### B. Course of Proceedings

Preliminary hearing was held on June 20, 1997. Harley, at that time, moved the court to dismiss count three, aggravated burglary, specifically on grounds that he did not enter the Jenkins' home and the State conceded the point. *See* Prelim. Tr. 81 f., 92. In support Harley cited *State v. Brooks*, 908 P.2d 856 (Utah 1995), containing dicta by then Chief Justice Zimmerman, at 862, that "Aggravated burglary always requires proof that the defendant entered or remained unlawfully in a building." The trial court denied Harley's motion. It subsequently bound him over on all charges.

Ultimately a two-day jury trial was held on September 22 and 23, 1998. At trial the State conceded, in opening statement, that neither Harley nor Gooch entered the Jenkins' home. *See* Tr. 168, ll. 21-24: "[I]n this case, we are not going to argue that the burglary occurred because they entered the house. There will be no evidence that they entered the house."

#### C. Disposition at Trial Court

The jury found Harley guilty on all five counts. The trial court subsequently sentenced him to the Utah State Prison as follows: Count (I), aggravated kidnaping of Ted Jenkins, five years to life, with a minimum mandatory sentence of fifteen years; Count (II), aggravated kidnaping of Darrell Jenkins, five years to life, with a minimum mandatory sentence of fifteen years; Count (III), aggravated burglary, five years to life; Count (IV), possession of a dangerous weapon, zero to five years; and Count (V), tampering with evidence, one to fifteen years. Counts (I), (II), (IV) and (V) were to be concurrent with each other but consecutive to Count (III). In addition, Harley was ordered to serve one additional year, consecutive to all other charges, as the jury found that he used a dangerous weapon in furtherance of a

felony.

(Note: This appeal only seeks review of Harley's three first degree felony convictions.)

### RELEVANT FACTS

In reviewing a jury verdict, the court views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict. Harley recites the facts of this case accordingly. *State v. Scales*, 946 P.2d 377, 379 (Utah App. 1997).

Ted and Betty Jenkins are a retired married couple living in Vernal, Utah. Tr. 184. On May 21, 1997, at home, the Jenkins' babysat their granddaughter. Tr. 185. About 9:30 p.m. their son, Darrell Jenkins, picked up the child. *Id.* Darrell and she went to their own home which is next door, 100-150 feet away. Tr. 183. Ted and Betty Jenkins then prepared to go to bed. Tr. 186.

A little later, Donald Arthur Harley and Harry Gooch drove into the Jenkins' driveway and got out of their van. Unknown to Harley and Gooch, Ted Jenkins had heard the vehicle and suspiciously went out the back door and around the side by a

back gate to investigate. Tr. 189. Harley went to the front door and knocked. Tr. 319. However, when Betty opened the door, Harley already had left and gone to the side of the house to make contact with Jenkins. *Id.* Gooch joined them. Tr. 191. At that point Harley and Gooch tried to grab Jenkins, the latter yelled for help, and Harley announced, "This is a robbery" and demanded entry into the house. Tr. 192-93. During the scuffle Jenkins was knocked to the ground and sustained a cut to his head. *Id.* Hearing his father's scream, Darrell Jenkins immediately ran over from his house. Tr. 214. He saw Gooch holding a pistol. *Id.* He subsequently saw Harley holding it, when Harley and Gooch marched them to the back door of the house. Tr. 216. The back door was locked. Tr. 215. Betty Jenkins had observed what had happened, locked the door and phoned 911 for help. Tr. 320-21. Realizing that their plan had gone awry, Harley and Gooch turned away and fled. Tr. 217. They jumped in their van and headed north out of town. *Id.* Darrell Jenkins ran to his vehicle in his drive way, caught up with and followed Harley and Gooch, and during this time used a cell phone to speak with the 911 operator and give police directions. Tr. 218. Police intercepted and arrested Harley and Gooch.

Tr. 241. While in pursuit, police observed a pistol thrown from the van. Tr. 243. It was recovered and placed into evidence. Tr. 245.

### SUMMARY OF THE ARGUMENT

Harley has been wrongly convicted of aggravated burglary. Aggravated burglary always requires proof that the actor entered or remained unlawfully in a dwelling. Harley never entered the Jenkins' house; the State conceded that point at both preliminary hearing and trial. Therefore Harley could not have committed aggravated burglary. Utah case law supports the view that a necessary element of aggravated burglary is entering or remaining. Fundamental principles of statutory construction support the view. Prosecutorial misconduct occurred when the prosecutor, in opening statement, informed the jury that aggravated burglary does not require entering. Plain error occurred then as well. Jury instruction 24, defining aggravated burglary as attempting to enter a building, was issued in error.

Harley also has been wrongly convicted of aggravated kidnaping. His detention of Ted Jenkins and Darrell Jenkins was slight, inconsequential and merely incidental to another crime. Detention was inherent in the other crime. Detention

had no significance independent of the other crime in that it made the other crime substantially easier to commit or substantially less likely to be detected. Jury instruction 18, stating that time and distance need not be considered in determining whether kidnaping occurred, was issued in error. It also was error that defense counsel, in final argument, was precluded from arguing that time and distance were important jury considerations in the determination of whether an aggravated kidnaping had occurred within the meaning of the law. Harley, in the facts of this case, did not commit aggravated kidnaping of either Ted Jenkins or Darrell Jenkins.

### ARGUMENT

- I. DICTA IN *BROOKS* CORRECTLY STATES THE LAW; AGGRAVATED BURGLARY ALWAYS REQUIRES PROOF THAT THE DEFENDANT ENTERED OR REMAINED UNLAWFULLY; UTAH CASE LAW SUPPORTS THIS VIEW; FUNDAMENTAL PRINCIPLES OF STATUTORY INTERPRETATION SUPPORT IT; PROSECUTORIAL MISCONDUCT OCCURRED DURING OPENING STATEMENT; PLAIN ERROR OCCURRED THEN; JURY INSTRUCTION 24 WAS ISSUED IN ERROR.

### A. The Aggravated Burglary Statute

Harley's first assignment of error is that he was bound over and subsequently convicted of aggravated burglary despite the fact that he did not enter a dwelling and the State conceded the point. He argues that because he did not enter or remain, that is, because he did not engage in burglary, Utah Code Ann. §76-6-202(1), he did not engage in aggravated burglary. This argument finds support in then Chief Justice Zimmerman's dicta in *Brooks*: "Aggravated burglary always requires proof that the defendant entered or remained in a building..." *Brooks, supra*, at 862.

The State, at preliminary hearing and trial, pointed to the language in the aggravated burglary statute, Utah Code Ann. §76-6-203: "(1) A person is guilty of aggravated burglary if in *attempting*, committing, or fleeing from a burglary the actor or another participant in the crime: (a) causes bodily injury to any person who is not a participant in the crime; (b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; ..." (emphasis added). It argued that Harley's *attempt* to enter the Jenkins' house,

coupled with the injury to Ted Jenkins and use of a pistol, constituted aggravated burglary within the meaning of the statute.

Harley believes that the State reads the statute too expansively and for that reason incorrectly. Chief Justice Zimmerman, in *Brooks*, was fully aware of the phrase “attempting” in the definition of aggravated burglary. He included it in his quotation of the statute. *Id.* He nonetheless persisted in stating that, for aggravated burglary to occur, the actor must enter or remain unlawfully in a building.

The dicta in *Brooks*, while dicta, is a correct statement of the law. The court of appeals has interpreted the aggravated burglary statute in a consistent manner. *See State v. Peterson*, 881 P.2d 965 (Utah App. 1994). In *Peterson*, defendant was convicted of aggravated burglary. At issue was the trial court’s refusal to give requested jury instructions for lesser included offenses including attempted aggravated burglary. The court of appeals upheld the trial court, on grounds that another participant in the crime had entered the victim’s dwelling. The court pointed out, in a footnote, that “If entry occurred, the attempt offenses would logically be excluded.” At 968, n. 3. This implies, at the very least, that if the other

participant in the crime did not enter or remain unlawfully the jury should have received defendant's requested instruction for attempted aggravated burglary. The court of appeals clearly is saying that "attempting ... a burglary," as that phrase is used in the aggravated burglary statute, is not identical to attempted aggravated burglary when the actor does not enter or remain.

Two more recent discussions of aggravated burglary demonstrate that entry or remaining is a necessary element of the crime. In *State v. Betha*, 341 Utah Adv. Rep. 8 (CA, 4-23-98), \_\_\_ P.2d \_\_\_ (Utah App. 1998), the court upheld defendant's conviction of aggravated burglary. The elements of aggravated burglary presented at trial were reviewed. They were "that defendant (1) *entered and remained unlawfully* in [the victim's] apartment; (2) with intent to commit a felony or an assault; and (3) while committing the burglary ... both caused bodily injury ... and used and threatened to use a gun..." (emphasis added). At 13. In *State v. Rudolph*, 349 Utah Adv. Rep. 11 (SC, 7-31-98), \_\_\_ P.2d \_\_\_ (Utah 1998), the court upheld defendant's conviction of aggravated burglary, in part on grounds that while defendant did not have intent to commit an assault upon entry he did form the

necessary intent *while remaining unlawfully*.

Consistent with these cases, Harley believes that the unambiguous meaning of the aggravated burglary statute, specifically the phrase “attempting ... a burglary,” is that the actor must make an attempt of some kind after he already has entered a building or dwelling. Numerous scenarios suggest themselves. For example, an actor possessing a dangerous weapon could attempt to remain inside a home after permission to be there has been revoked. The actor is attempting a burglary. However, an actual aggravated burglary is involved because the actor possesses a dangerous weapon. The court of appeals should continue to interpret the aggravated burglary statute in this manner, that is, in conformity with its plain meaning. “A fundamental principle of statutory construction is that unambiguous language in the statute itself may not be interpreted so as to contradict its plain meaning.”

*Epperson v. Utah State Retirement Board*, 949 P.2d 779, 782 (Utah App. 1997) (quoting *Johnson v. Utah State Retirement Bd.*, 770 P.2d 93, 95 (Utah 1988)).

The aggravated burglary statute, in its present form, does not expressly extinguish the crime of attempt, Utah Code Ann. §76-4-101. Therefore attempt, as

an offense, and aggravated burglary, as an offense, stand as separate and equal parts in the criminal code. To read the aggravated burglary statute, as the State urges, in effect would eliminate attempted aggravated burglary as a crime. This itself violates other fundamental principles of statutory construction. Separate parts of an act should not be construed in isolation from the rest. The meaning of any part of an act should harmonize with the purpose of the whole act. *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984). The legislature clearly intends attempted aggravated burglary to remain a separate offense, not subsumed under aggravated burglary. Attempted aggravated burglary, as distinct from aggravated burglary, can take many forms. One example is that an actor did not enter or remain unlawfully in a building or dwelling, but in attempting to do so, he possessed or used a dangerous weapon or caused a victim bodily injury.

Harley consequently urges the court of appeals to hold that aggravated burglary requires that the actor enter or remain unlawfully in a building or dwelling. Such a holding is dictated by Chief Justice Zimmerman's correct statement of the law in *Brooks*, analysis of the elements of aggravated burglary in other case law in

this jurisdiction, and fundamental principles of statutory interpretation including plain meaning and harmonization of statutes.

### B. Prosecutorial Misconduct

Harley next assigns as error the prosecutor's interpretation of the aggravated burglary statute as not requiring entry or remaining, during opening statement. The following exchange took place at the beginning of trial:

[Ms. Stringham]: ...[T]his defendant is charged with aggravated burglary. An aggravated burglary occurs when there is bodily injury caused or uses or threatens the use of a dangerous weapon. When that occurs it becomes aggravated burglary. And, in that particular case, you don't have to enter a house to commit a burglary. Statute says attempting.

[Mr. Baden]: ...I would object. I believe that Miss Stringham is improperly-- is arguing the law during her opening statement. And if the court wishes to overrule me, I just ask that the court note my exception for the record.

[Ms. Stringham]: And I am done, your Honor.

[The Court]: You may continue. I'll overrule that. A very brief statement as

to the law is, I think, appropriate in this situation. I don't think she's gone beyond where she should go.

[Ms. Stringham]: Thank you, Judge. So, in this case, we are not going to argue that the burglary occurred because they entered the house. There will be no evidence that they entered the house. I just want to remind you to remember--and, again, you will get the jury instructions--an aggravated burglary can occur because there was bodily injury. If you find there was bodily injury or a dangerous weapon, simply attempting to commit a burglary is sufficient. Tr. 168, l. 4 to 169, l.3.

Assuming, for the sake of argument, that the prosecutor misstated the law-- that in her words aggravated burglary does not require entry or remaining unlawfully--prosecutorial misconduct occurred. Harley acknowledges the recognized two-part test for such misconduct: “the actions or remarks of [the prosecutor] call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable

result.”” *State v. Wright*, 893 P.2d 1113, 1118 (Utah App. 1995) (quoting *State v. Peters*, 796 P.2d 708, 712 (Utah App. 1990)). Here, the prosecutor misstated the law, thereby calling to the jury’s attention a matter it was not justified in considering in determining its verdict. Had the jury been informed properly, it would not have convicted Harley of aggravated burglary since he did not enter or remain unlawfully in the Jenkins’ home.

### C. Plain Error

In the alternative, plain error occurred. The three-part test for plain error, *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993), is satisfied readily. An error occurred, specifically the prosecutor’s misstatement of law during opening statement. The error should have been obvious to the trial court. It was put on notice, at preliminary hearing, that the aggravated burglary statute requires entry or remaining. The error was harmful. Harley was convicted of an offense that he in fact did not commit.

### D. Jury Instruction 24

Harley next assigns as error jury instruction 24. That instruction stated, in

part, “[P]roof of the commission of the crime of Aggravated Burglary as charged in the Information requires proof beyond a reasonable doubt of each of the following:

1. Donald Arthur Harley; ... 4. Did himself, or as a party, attempt to unlawfully enter a building or any portion thereof; ....” Harley, as a matter of record, did not object to the instruction given objections already raised at preliminary hearing and earlier at trial. Failure to object is not fatal, however, as appellate courts review jury instructions for error in order to avoid manifest injustice. Utah R. Crim. P. 19(c). The standard of review utilized is plain error. *State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989). Plain error already has been discussed, *supra*. Here, in brief, an error occurred, namely that instruction 24 did not correctly define the offense of aggravated burglary. The error should have been obvious because of repeated discussions involving counsel and the court about the proper definition of aggravated burglary. The error harmed Harley because he was convicted of an offense without any proof whatsoever about a key element, entering or remaining unlawfully in the Jenkins’ home.

II. JURY INSTRUCTION 18 WAS ISSUED IN ERROR; THE TRIAL COURT ERRONEOUSLY FOLLOWED *PERRY*; THE JURY SHOULD HAVE BEEN ALLOWED TO CONSIDER TIME AND DISTANCE AS FACTORS IN DETERMINING WHETHER AGGRAVATED KIDNAPING OCCURRED; *FINLAYSON*, ADOPTING THE *BUGGS* TEST, IS NOW CONTROLLING; HARLEY, IN THE FACTS OF THIS CASE, DID NOT COMMIT AGGRAVATED KIDNAPING.

A. Jury Instruction 18

Harley next assigns as error jury instruction 18. Counsel and the court met in chambers the morning of the second day of trial, prior to the resumption of testimony, to discuss jury instructions. The meeting was unrecorded. Tr. 351. Counsel and the court also met in chambers during the mid-day recess, to discuss instructions. That meeting was recorded. Tr. 344 f. On both occasions, objection was made to State's proposed instruction 18. The following colloquy occurred between defense counsel and the court:

[Mr. Baden]: Your Honor, for purposes of making a record, I would like to read the proposed jury instruction. It states, "With respect to the charge of

Aggravated Kidnaping, if the State has proven beyond a reasonable doubt that the Defendant seized, confined, detained, or transported a person as alleged, the State has proven that element of the offense. *Neither time nor distance or (sic) elements of the offense of Aggravated Kidnaping. The law does not require the State to prove a victim was seized, confined, detained for any particular amount of time or transported for any particular distance...*” (emphasis added).

Your Honor, I know that the proposed instruction is based on ... *State v. Perry* [899 P.2d 1232 (Utah App. 1995)]. I wonder, though, to what extent the holding in *Perry* should apply to this case....

...[W]hat’s very troubling to me about the proposed instruction ... is that the instruction here would seem to eliminate the jury in considering time and distance as facts among the totality of facts in this case to help them reach a determination whether there is a seizing, or ... an attempted seizing.

If the jury in this case is going to try to distinguish between a seizing and an attempted seizing, it seems to me all the facts have to come into play, have to be considered by the jury. Certainly, one of those facts is the time that, well, in this

case, that somebody was scuffling with the victim. Also, I think what's a very important fact in this case is the distance between the back gate and the back door which the victim testified was only 15 to 18 feet and, therefore, would apply [sic] only a very small time period. These time periods are certainly much less than the four minutes that the victim in *Perry* case was restrained in the car at knife point.

...[T]he proposed instruction that the court wishes to give seems to me to, arguably, go beyond the holding in *Perry*. And what's very troubling again, is that it seems to deny the jury to look at the totality of facts, including time and distance, in making a determination on the very important issue in this case of whether there has been a seizing or attempting seizing.

...[The Court]: I am going to give the instruction that has been prepared, and do that because I think it's in conformance with the *Perry* case. I believe that you can talk about anything up to the point of seizure. You can argue seizure or confinement, but you can't argue that it needs to be for a particular period of time or that it didn't occur because it was of short duration.

...[Mr. Baden]: Your Honor, may I ask, am I precluded, in closing argument,

as I would like to do, to argue time and talk again about literally the seconds that went by in this incident?

[The Court]: You can talk about--you cannot argue that it didn't occur because it wasn't a long enough distance, or that it wasn't enough time. ... Well, before the seizure you can argue anything. And the jury should be given to understand that all they want--I want them to understand once they have been contained or restrained, or whatever it is, or transported, once they find any of those things have occurred, they don't have to say he was transported 50 or 100 feet or a mile. Doesn't make any difference. If they are transported, the first step meets the statute. If they are detained, the first moment meets the statute. It's not--don't have to prove anything more. That's what I thought I told you. Tr. 349, l. 1 to 354, l.5.

Harley believes that instruction 18, given over his objection, was error. "The standard of review for jury instructions to which counsel has objected is correctness." *State v. Bryant*, 349 Utah Adv. Rep. 42, 44 (CA, 8-13-98), \_\_\_ P.2d \_\_\_ (Utah App. 1998) (citation omitted). "[C]orrectness means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's

determination of law.” *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

*Perry* is significant because--on the surface at least--it appeared to deviate from *State v. Couch*, 635 P.2d 89 (Utah 1981) and eliminate temporal considerations in the offense of aggravated kidnaping. Defendant in *Couch* had been charged with both kidnaping and sexual assault. In response, he argued that to be convicted of kidnaping there needed to be proof the detention was longer than the minimum inherent in the commission of the sexual assault. Otherwise, the State could transform virtually every sexual assault into a kidnaping, a more serious offense with a heavier sentence. The court in *Couch* agreed. However, in *Perry*, an aggravated kidnaping case, the court observed that the aggravated kidnaping statute was devoid of a temporal element, as opposed to the kidnaping statute, which, in Utah Code Ann. §76-5-301(1)(a), makes reference to detaining or restraining another “for any substantial period.” The court stated, “Nowhere does this statute require the victim be detained or restrained for *any* period of time before the crime of aggravated kidnaping occurs. ...It is the element of restraint with the intent to inflict injury or terrorize, not the length of restraint, which constitutes an aggravated

kidnaping under Utah law” (emphasis in original). At 1242. *Perry*, seemingly, stands for the proposition that time and distance are not factors in aggravated kidnaping.

If so such a view is harsh and illogical. With defendant in *Couch Harley* argues that a seizing or detaining is inherent in numerous crimes. Any robbery, necessarily, involves a detaining. So too do sexual offenses. Without consideration of the totality of the facts, including time and distance, all of those offenses suddenly mutate and become aggravated kidnapings. Those accused face the possibility of greater penalties than they would normally. For example robbery, a second degree felony, punishable by 1-15 years imprisonment, is treated as aggravated kidnaping, a first degree felony with a minimum mandatory sentence of six years, up to life. Attempted aggravated robbery, also a second degree felony, is treated as aggravated kidnaping with the same result.

#### B. *Finlayson*, and Time and Distance

Perhaps for these very reasons the court of appeals wisely has tempered *Perry*. See *State v. Finlayson*, 956 P.2d 283 (Utah App. 1998). Defendant in

*Finlayson* was convicted of aggravated kidnaping, forcible sodomy and rape. The court reversed the aggravated kidnaping conviction, holding that the detention involved was not sufficiently independent of the sodomy and rape. At 289-90. In determining the nature of the detention the court appeared to adopt, for the first time in Utah, the three-part test found in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720, 731 (Kan. 1976). To find that a detention or movement of a victim is significantly independent of another crime, to justify a separate conviction for kidnaping, the detention or movement “(a) Must not be slight, inconsequential and merely incidental to the other crime; (b) Must not be of the kind inherent in the nature of the other crime; and (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.” At 289 (quoting *Buggs*).

Harley approves the apparent adoption of the *Buggs* test and believes that had instruction 18 not been given and defense counsel been allowed to argue the totality of facts at trial, including time and distance, the test in effect would have been applied to his case and the result would have been different. While defense counsel

was not allowed to proceed as he wished in closing argument, certain facts were adduced at trial. Ted Jenkins testified that the scuffle that took place between him and Harley and Gooch lasted a “very short time” and could have been only seconds long. Tr. 200, ll. 10-13. He also testified that the distance between the back gate, near where the scuffle occurred, and the back door of the house, which was locked, was fifteen to eighteen feet. Tr. 204, ll. 1-6. Darrell Jenkins testified that after hearing his father scream he ran over from his house in seconds. Tr. 225, l. 18 to 226, l. 11. Betty Jenkins testified, variously, that thirty to sixty seconds went by as she heard her son’s running, went outside and peaked around the corner of the house, then went back into the house and phoned 911. Tr. 328, l. 25 to 330, l. 7. Laconna Davis, the 911 operator, testified that she received Betty Jenkins’ call at 10:18:28 p.m. and Darrell Jenkins’ call, when he was in pursuit of Harley and Gooch, at 10:19:42 p.m., some seventy-four seconds later. Tr. 263, ll. 2-3 and 266, l. 25 to 267, l. 4.

These facts, taken together, clearly demonstrate that Harley’s detention of Ted Jenkins and Darrell Jenkins was slight, inconsequential and merely incidental to

another crime, arguably either attempted robbery or attempted burglary. The detention, here, was inherent in the other crime. The detention did not make the other crime substantially easier to commit or substantially less likely to be detected.

The Kansas Supreme Court in *Buggs* gives several illustrations of when detention does or does not amount to kidnaping. Harley believes that one illustration is particularly instructive: “The forced direction of a store clerk to cross the store to open a cash register is not a kidnaping; locking him in a cooler to facilitate escape is.” Quoted in *Finlayson, id.* He argues that moving Ted Jenkins and Darrell Jenkins from the back gate to the back door of the house is analogous to moving a store clerk from a spot in the store to the cash register. Such movement may be part of another crime. It does not constitute kidnaping.

In sum, instruction 18 misstated the law. Time and distance, technically, are not elements in the offense of aggravated kidnaping. However, they are not irrelevant in determining whether a seizing, confining, detaining or transporting has occurred that is significantly independent of another crime to justify a separate conviction for kidnaping. Harley had the right to argue the totality of facts in his

case, including time and distance, and attempt to convince the jury that he should not be found guilty of two counts of aggravated kidnaping. Instruction 18, in addition to misstating law, barred him from doing so. Defense counsel, in closing argument, was precluded from arguing facts and suggesting to the jury that the detention of Ted Jenkins and Darrell Jenkins did not rise to the level of aggravated kidnaping within the meaning of the law. Had counsel been able to do so, there is a strong possibility, at the very least, that the outcome of Harley's trial would have been more favorable.

### CONCLUSION

The court should reverse Harley's convictions for two counts of aggravated kidnaping and one count of aggravated burglary, all first degree felonies, and remand for a new trial on those charges.

DATED this 11 day of September, 1998.



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WESLEY M. BADEN  
Attorney for Defendant and Appellant

CERTIFICATE OF DELIVERY

On this 11 day of September, 1998 I caused to be delivered two copies of

the Brief of Appellant to:

Criminal Appeals Division  
Attorney General's Office  
160 East 300 South, Sixth Floor  
P. O. Box 140854-0854  
Salt Lake City, Utah 84114-0854

*W. Baden*

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## ADDENDUM

**Attachment A**

**Aggravated Burglary and Aggravated Kidnaping Statutes**

COLLATERAL REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d Burglary § 10.  
**C.J.S.** — 12A C.J.S. Burglary § 5.  
**A.L.R.** — Breaking and entering of inner door of building as burglary, 43 A.L.R.3d 1147. Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin-operated machine, 45 A.L.R.3d 1286.  
 Maintainability of burglary charge, where entry into building is made with consent, 58 A.L.R.4th 335.

**76-6-203. Aggravated burglary.**

- (1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:
  - (a) causes bodily injury to any person who is not a participant in the crime;
  - (b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or
  - (c) possesses or attempts to use any explosive or dangerous weapon.
- (2) Aggravated burglary is a first degree felony.
- (3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

**History:** C. 1953, 76-6-203, enacted by L. 1973, ch. 196, § 76-6-203; 1988, ch. 174, § 1; 1989, ch. 170, § 6.

NOTES TO DECISIONS

ANALYSIS

**Bodily injury.**  
**Evidence.**  
 —Sufficient.  
**Intent.**  
**Judgment.**  
 —Effect of error.  
**Lesser included offense.**  
**Liability of all participants.**  
**Sentencing.**  
 —Consideration of uncharged allegations.  
**Weapon.**  
 —Possession.  
 Cited.

**Bodily injury.**  
 Defendant caused "bodily injury" under this section when he struck victim in the mouth with a closed fist, knocking him off balance and drawing blood. *State v. Boone*, 820 P.2d 930 (Utah Ct. App. 1991).

**Evidence.**  
 —Sufficient.  
 Evidence was sufficient to prove the criminal intent required for aggravated burglary. *State v. Feathersen*, 781 P.2d 424 (1989).

**Intent.**  
 See notes under this catchline at § 76-6-202.

Judgment.

—Effect of error.  
 Although the trial court's oral judgment of "aggravated burglary, a third degree felony" was in error as not conforming to the charge, the jury verdict, or the statute, because defendant's conviction was properly corrected in the subsequent written judgment there was no basis to amend the written judgment to conform to the oral judgment. *Parry v. State*, 837 P.2d 998 (Utah Ct. App. 1992).

**Lesser included offense.**  
 Aggravated assault constituted a lesser and included offense of aggravated burglary, where the jury was instructed that to find defendant guilty of aggravated burglary it must find that he used or threatened the immediate use of a dangerous or deadly weapon against a person and the jury was not required to find any additional elements to convict defendant of aggravated assault once it had found him guilty of aggravated burglary. *State v. Bradley*, 752 P.2d 874 (Utah 1988).

**Liability of all participants.**  
 A defendant was properly charged with aggravated burglary based on the fact that another participant in the crime was knowingly in possession of a dangerous weapon. *State v. Seel*, 827 P.2d 954 (Utah Ct. App.), cert. denied,

836 P.2d 15

**Sentencing**

—Consideration  
 Trial court information during coroner had not been Sweat, 722

**Weapon.**  
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**76-6-20**

- (1) An felony or
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**History** 1973, ch. 1

Cited in 136 (Utah,

A.L.R. - motor vehi

**76-6-20**

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**History** 1973, ch.

**76-5-301.1. Child kidnaping.**

(1) A person commits child kidnaping when the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 with intent to keep or conceal the child from its parent, guardian, or other person having lawful custody or control of the child.

(2) A seizure, confinement, detention, or transportation is deemed to be against the will of the victim if the victim is younger than 14 years of age at the time of the offense, and the seizure, confinement, detention, or transportation, is without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis.

(3) Violation of Section 76-5-303 is not a violation of this section.

(4) Child kidnaping is a felony of the first degree punishable by a term which is a minimum mandatory term of imprisonment of 5, 10, or 15 years, and which may be for life.

**History:** C. 1953, 76-5-301.1, enacted by L. 1983, ch. 88, § 14; 1984, ch. 18, § 6.

## NOTES TO DECISIONS

## ANALYSIS

Constitutionality.

Evidence.

—Admissible.

Cited.

**Constitutionality.**

Subsection (4) is not unconstitutional: (1) it is not cruel and unusual punishment on the theory that the sentences are disproportionate to the crime of kidnaping, (2) it does not infringe on inherent judicial power and authority, (3) it does not invade the province of the Board of Pardons, and (4) the sentencing scheme is not unconstitutionally vague. *State v. Shickles*, 760 P.2d 291 (Utah 1988).

## Evidence.

**—Admissible.**

Evidence of defendant's sexual assaults on the victim were properly admitted at his trial for child kidnaping, because the evidence was directly probative of the proposition that defendant took the victim out of the state with the requisite intent and without a good faith belief that he had implied permission from the child's parents. *State v. Shickles*, 760 P.2d 291 (Utah 1988).

**Cited** in *State v. Bishop*, 717 P.2d 261 (Utah 1986).

## COLLATERAL REFERENCES

**A.L.R.** — Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

**76-5-302. Aggravated kidnaping.**

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) to hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(3) Aggravated kidnaping is a felony of the first degree punishable by a term which is a minimum mandatory term of imprisonment of 5, 10, or 15 years and which may be for life.

**History:** C. 1953, 76-5-302, enacted by L. 1973, ch. 196, § 76-5-302; 1974, ch. 32, § 12; 1983, ch. 88, § 15.

## NOTES TO DECISIONS

## ANALYSIS

**Lesser included offenses.**

**Sentence.**

—Constitutionality.

—Upheld.

Cited.

**Lesser included offenses.**

Defendant charged with aggravated kidnaping was entitled to a jury instruction on assault as a lesser included offense since there was sufficient overlap in elements of two offenses and if jury had accepted defendant's version of evidence, however unlikely that might have been, it could have voted to acquit him of aggravated kidnaping and to convict him of assault. *State v. Brown*, 694 P.2d 587 (Utah 1984).

## Sentence.

—Constitutionality.

The aggravated kidnaping minimum mandatory sentencing provision is constitutional. *State v. Russell*, 791 P.2d 188 (Utah 1990).

—Upheld.

Concurrent 15-year minimum mandatory sentences for aggravated kidnaping and aggravated sexual assault found not cruel and unusual punishment. See *State v. Russell*, 791 P.2d 188 (Utah 1990).

Cited in *State v. DePlonty*, 749 P.2d 621 (Utah 1987); *State v. Babbell*, 770 P.2d 987 (Utah 1989); *State v. Archuleta*, 850 P.2d 1232 (Utah 1993).

## COLLATERAL REFERENCES

**C.J.S.** — 51 C.J.S. Kidnapping § 1.

**A.L.R.** — What is "harm" within provisions

of statutes increasing penalty for kidnaping where victim suffers harm, 11 A.L.R.3d 1053.

**76-5-303. Custodial interference.**

(1) A person, whether a parent or other, is guilty of custodial interference if, without good cause, the actor takes, entices, conceals, or detains a child under the age of 16 from its parent, guardian, or other lawful custodian:

(a) knowing the actor has no legal right to do so; and

(b) with intent to hold the child for a period substantially longer than the visitation or custody period previously awarded by a court of competent jurisdiction.

(2) A person having actual judicial authority over a person visits or detains the person or custody right.

(3) Custody removed and third degree.

**History:** C. 1973, ch. 196, 1984, ch. 18, §

**Custody.**  
Detaining child  
Violation of cu

**Custody.**

While it may apply to the primary custody to apply to custody. *State App. 1988*.

**Detaining child.**  
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**Am. Jur. 2**  
Kidnaping §  
C.J.S. —

**76-5-304**

(1) A person  
unlawfully  
(2) Unl

**History:**  
1973, ch. 1

**Attachment B**

**State's Concession, at Preliminary Hearing,  
that Harley Did Not Enter the Jenkins' House**

1 that night after listening to counsel, Judge. I'll respond to  
2 counsel's more technical arguments regarding Mr. Gooch. I  
3 believe the testimony was that he was the passenger in the  
4 vehicle. The gun was thrown out the passenger side. We have  
5 charged him as being a party to having possession of a  
6 firearm. I think there is sufficient evidence to get us past  
7 the preliminary hearing on that one.

8 THE COURT: I don't think you can charge him with  
9 being a party to that offense.

10 MS. STRINGHAM: I wondered about that. But we  
11 still have the evidence that he was in the passenger side.  
12 The gun went out the window, I would like to remind the Court,  
13 probably don't have to with the Pledger cases and the  
14 inferences that should be made in favor of the State. As far  
15 as the conviction goes, it shows that he was convicted for  
16 five years to the Texas Department of Corrections. Anything  
17 over one year is usually considered felony punishment in this  
18 state and other states.

19 I have not read the case cited by Mr. Baden. Just  
20 -- and I would like that opportunity to do that if the Court's  
21 inclined to agree with his reasoning. Your Honor, looking at  
22 the plain meaning of the statute, the plain meaning of  
23 aggravated burglary, plain language is a person is guilty of  
24 aggravated burglary if in attempting, committing or fleeing  
25 from a burglary, the actor or another participant causes

1   bodily injury to any person or uses or threatens the immediate  
2   use of a dangerous weapon. The aggravated burglary statute, I  
3   would submit, the legislature intentionally broadened it  
4   because when a dangerous weapon is used it's a much more  
5   serious situation. They have broadened that to include  
6   attempt, committing, or fleeing from a burglary. So in this  
7   case, there was no entry into the house, but there certainly  
8   was an attempt. We have the testimony that at least one of  
9   these defendants, probably both of these defendants repeatedly  
10   said, Get in the house. Let's get in the house. The Jenkins  
11   were held at gun-point for 13 to 15 minutes, forced to walk to  
12   the back of the house. The gun was held on them. It fits the  
13   statutory definition of attempting to commit a burglary. We  
14   also have Mr. Harley's interview where he said that they were  
15   going to get 1- to \$3 million that was hidden somewhere. We  
16   have the fact that these two defendants arrived at the scene  
17   with all of the material necessary to subdue people. They had  
18   the gun, they had the duct tape.

19           They had two -- Mr. Harley had two pair of  
20   handcuffs on his person. We have rope. We have a flashlight.  
21   We have everything that you would normally think of as being  
22   used to subdue people and keep them under their control. It  
23   doesn't matter whether or not Mr. Jenkins, the Jenkinses or  
24   whether or not these defendants thought they were committing a  
25   robbery. That doesn't matter. The Court has to look at the

1 fact that it shouldn't matter at all, legal elements of each  
2 crime. And I would submit that this crime definitely fits the  
3 aggravated burglary and the aggravated kidnapping. This was  
4 much more than just an interaction, Judge, when people are  
5 held at gun-point. When Mr. Jenkins is smashed in the head  
6 with something, his arms twisted back, believed they were  
7 trying to get both arms behind him, forced at gun-point to go  
8 to the back door, I believe we have more than met our burden  
9 for purposes of preliminary hearing.

10 THE COURT: Thank you.

11 MS. BARTON-COOMBS: Your Honor, may I say two  
12 things?

13 THE COURT: Yes.

14 MS. BARTON-COOMBS: First of all, Your Honor, it  
15 appears to me from the paper that Mrs. Stringham submitted on  
16 Mr. Gooch that the original charge of possession of heroin was  
17 dismissed, and that was the charge that had the five year  
18 sentence. That the marijuana charge that he was convicted of  
19 appears to have a two year sentence.

20 Second of all, there has been no testimony that the  
21 items, that the coat that the items were found in upon arrest  
22 were worn by Mr. Harley at the scene, that the items  
23 Mr. Jenkins was discussing were recovered from the coat  
24 Mr. Harley was wearing 40 miles up the canyon, Your Honor. So  
25 there is no evidence that any of the items, the handcuffs,