

2001

The State of Utah v. David Tyrone Smith : Petition for Rehearing

Utah Supreme Court

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BRIEF

**UTAH
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IN THE SUPREME COURT OF THE STATE OF UTAH

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.S9 THE STATE OF UTAH,

DOCKET NO. 19283
Plaintiff/Respondent

:

:

-v-

:

DAVID TYRONE SMITH,

:

Case No. 19283

Defendant/Appellant.

:

Category No. 2

PETITION FOR REHEARING

Petition for reconsideration of a decision by the Utah Supreme Court filed September 16, 1986, in an appeal from conviction and judgment imposed for Burglary, a Third Degree Felony, and Theft, a Third Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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FILED

OCT 21 1986

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent :
-v- :
DAVID TYRONE SMITH, : Case No. 19283
Defendant/Appellant. : Category No. 2

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent :
-v- :
DAVID TYRONE SMITH, : Case No. 19283
Defendant/Appellant :

PETITION FOR REHEARING

STATEMENT OF THE CASE

This is a petition for rehearing of an opinion filed by the Utah Supreme Court on September 16, 1986. (A copy of that opinion, State v. Smith, 42 Utah Adv. Rep. 14, is contained in Addendum A.) Originally this case was an appeal from a conviction and judgment imposed for Burglary, a Third Degree Felony, and Theft, a Third Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding.

STATEMENT OF FACTS

The facts are set forth in the Brief of Appellant at 2 and in State v. Smith, 42 Utah Adv. Rep. at 15.

INTRODUCTION

In Brown v. Pickard, denying reh'g, 11 P. 512 (Utah 1886), the Utah Supreme Court stated the standard for the granting of a petition for rehearing: "To justify a rehearing, a strong case must

be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions," In Cummings v. Nielson, 129 P.619 at 624 (Utah 1913), the Court declared:

To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

The argument section of this brief will establish that, applying these standards, the Appellant's petition for rehearing is properly before the Court and should be granted.

ARGUMENT

POINT I.

THE COURT ERRED IN ITS CONCLUSIONS CONCERNING THE DISPUTED JURY INSTRUCTION IN THIS CASE AND THE RESULT OF THIS CASE DIRECTLY CONTRADICTS THIS COURT'S HOLDING IN STATE V. PACHECO

In his opening brief, Mr. Smith challenged the trial court's giving of instruction No. 20 (R.111). Over Smith's objection, the trial judge instructed the jury:

Utah Law provides that:

"Possession of property recently stolen when no satisfactory explanation of such possession is

made, shall be prima facie evidence that the person in possession stole the property."

Thus, if you find from the evidence and beyond a reasonable doubt, that the defendant was in possession of stolen property, that such possession of stolen property, that such possession was not too remote in point of time from the theft, and the defendant made no satisfactory explanation of such possession, then you may infer from those facts that the defendant committed the theft.

You may use the same inference, if you find it justified by the evidence, to connect the possessor of recently stolen property with the offense of burglary.

The first full paragraph of the instruction contains the language of Utah Code Ann. §76-6-402(1) (1953, as amended), while the remainder of the instruction explains the statutory language.

A. INSTRUCTION NUMBER 20 WAS AN UNCONSTITUTIONAL MANDATORY REBUTTABLE PRESUMPTION.

In upholding Instruction No. 20, this Court held that, when read "in light of its immediate context and the context of the instructions as a whole," the jury in the case could not "have reasonably applied the instructions in an unconstitutional manner." State v. Smith, 42 Utah Adv. Rep. 14 at 16. The Court concluded that the instruction created only a permissible inference and was therefore allowable. In reaching this conclusion, the Court stated:

Lest there be a misunderstanding of our ruling in this case, we emphatically declare that we do not retreat from [State v. Chambers]. The trial court should not have used the statutory language in the instruction for the reasons stated in Chambers. We hold only that the instruction cannot be deemed reversible error in this case in light of the clear explanatory instructions . . .

Smith at 16. In fact, the conclusion reached in this case stands in direct contradiction to the conclusion of State v. Chambers, 709

P.2d 321 (Utah 1985) and subsequent cases.

In Chambers, this Court unequivocally stated:

We therefore conclude that a jury instruction using the language of U.C.A., 1953, §76-6-402(1) is unconstitutional because it directly relates to the issue of guilt and relieves the State of its burden of proof. . . . Thus, the statutory language should not be used in any form in instructing juries in criminal cases,

Id. at 327 (emphasis added). Despite this clear prohibition on the use of the statutory language, in this case the Court upholds an instruction which used exactly the prohibited language.

The basis for the prohibition on the use of the statutory language in Chambers was that the Court found that the language formed a mandatory rebuttable presumption. The Court noted that the United States Supreme Court found the use of such presumptions unconstitutional in Francis v. Franklin, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). The Chambers Court stated that instructions containing mandatory rebuttable presumptions were unconstitutional because such instructions relieved the State of its burden of proof and shifted that burden to the defendant. 709 P.2d at 325, 326. Despite the use of the same statutory language as in Chambers, which presumably created the same burden-shifting as in Chambers, the Court in this case concluded that Instruction No. 20 created only a "permissive inference."

The Court reached this conclusion because of the language of the remainder of Instruction No. 20 and the language of Instruction No. 23 which stated:

The mere fact that a person was in conscious possession of recently stolen property is not sufficient to justify a conviction of theft. There must be proof of other circumstances tending of themselves to establish guilt. However, such proof need not be established by

additional evidence or witnesses if you find that the possession occurred under circumstances which warrants a finding of guilty. In this connection you may consider the defendant's conduct, any false or contradictory statements, and any other statements the defendant may have made with reference to the property. If the defendant gives a false account of how he acquired possession of stolen property this is a circumstance that may tend to show guilt.

In the absence of evidence as to why the defendant was in possession of recently stolen property, you may infer that the defendant stole the property.

(R.114). The Court reasoned that if both of the instructions were considered together, the jury could not have applied the instructions in an unconstitutional manner. 42 Utah Adv. Rep. at 16. This reasoning is also contradicted by Chambers in which this Court declared:

Further, although there was another instruction given, instruction No. 25, which restated the presumption in permissive form, the additional instruction failed to cure the defect. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."

709 P.2d at 326 (emphasis added, citation omitted). In State v. Tarafa, 720 P.2d 1368 (Utah 1986), one jury instruction created a mandatory presumption which another instruction restated in permissive form. This Court stated:

As in State v. Chambers where the challenged instruction was restated in permissive form, the additional instruction fails to cure the defect. . . . [A]ny reasonable juror could have been left in a quandary as to whether to follow the so-called explanatory instruction or the immediately preceding one it contradicted.

720 P.2d at 1371-1372 (footnotes omitted).

In this case, as in Chambers and Tarafa, the jury was presented with contradictory, confusing instructions. Yet, it is

unclear from the Chambers and Tarafa cases why subsequent

instructions which transform the statutory mandatory rebuttable presumption into a permissive inference result in affirmance here but reversal in Chambers and Tarafa.

Another factor is present in this case which also contributed to the reversal in Tarafa. Here, as in Tarafa, the prosecutor emphasized the mandatory nature of the presumption. In closing argument, the prosecutor stated:

Now the question then becomes one of whether we have a burglary. You have been instructed by the Judge if a burglary occurs and someone is found with the property in his possession, he may within a short period of time, it is called not too remote a time period from the time of the burglary until the time of possession, that you can infer that he committed the burglary. And taking it one step further that you can also infer that he committed the theft. This being the time period that the law provides that if you are going to have stolen property in your possession, and it is going to be right close to the time it was stolen, we can assume that you stole it. Unless you have a satisfactory explanation.

(R.419-420). In Tarafa the Court concluded that the prosecutor's statements in closing argument concerning the mandatory nature of the presumption could have easily contributed to the jury's confusion about the instructions. 720 P.2d at 1371, n.16. The same confusion must have been present in this case because the prosecutor emphasized not the permissive character of the instructions but rather their mandatory nature (if you have stolen property, "we can assume you stole it." [R.420]). In this respect, this case is indistinguishable from Tarafa.

In summary, Instruction No. 20 given to the jury in this case contains the language of U.C.A. §76-6-402(1) which this Court in Chambers stated "should not be used in any form in instructing

juries." Id. at 327. Further, the opinion in this case fails to explain why subsequent instructions which restate the mandatory presumption in permissible form rescue the challenged jury instruction here while in Chambers and Tarafa "the additional instructions fail to cure the defect [of the challenged instruction]" 709 P.2d at 326 and 720 P.2d at 1371. Finally, the prosecutor's emphasis of the mandatory nature of the presumption must have confused the jury here as it did in Tarafa. Because of these factors, the result in this case cannot be reconciled with the results of Chambers and Tarafa and rehearing should be granted.

B. THE RESULT IN THIS CASE IS IN
DIRECT OPPOSITION TO STATE
V. PACHECO, WHICH CONTAINED
A VIRTUALLY IDENTICAL INSTRUCTION.

Appellant Smith further asserts that a rehearing should be granted in his case because the Court's opinion here is directly contrary to the opinion in State v. Pacheco, 712 P.2d 192 (Utah 1985), reh'g den'd 712 P.2d 192.

The opinion in Pacheco was filed the same day as State v. Chambers and involved an instruction quite similar to that given in Chambers. In Pacheco the statutory presumption found in U.C.A. §76-6-402(1) was given in a jury instruction relating to a defendant charged with burglary. 712 P.2d at 194. This Court reversed the conviction in Pacheco because of the verbatim recitation of the statutory presumption in the instruction. The Pacheco Court relied on the reasoning of State v. Chambers and the cases cited therein in reaching its decision.

In Pacheco, Instruction No. 15 read:¹

The law of the State of Utah provides as follows:

"Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."

Thus, if you find from the evidence and beyond a reasonable doubt, (I) that the defendant was in possession of property, (II) that the property was stolen in a burglary, (III) that such possession was not too remote in point of time from the burglary, and (IV) that the defendant had made no satisfactory explanation of such possession, then you may find from those facts that the defendant committed the burglary in which such property was stolen and stole the property.

(source: State's Petition for Rehearing in State v. Pacheco at 4)(Addendum B) (emphasis added). In this case Instruction No. 20 stated:

Utah Law provides that:

"Possession of property recently stolen when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."

Thus, if you find from the evidence and beyond a reasonable doubt, that the defendant was in possession of stolen property, that such possession was not too remote in point of time from the theft, and the defendant made no satisfactory explanation of such possession, then you may infer from those facts that the defendant committed the theft.

¹ Instruction No. 15, given in toto here, was never reproduced in its entirety in the opinion in State v. Pacheco.

You may use the same inference, if you find it justified by the evidence, to connect the possessor of recently stolen property with the offense of burglary.

(R.111) (emphasis added). Even a cursory comparison reveals that the two instructions are nearly identical. Both instructions give a verbatim recitation §76-6-402(1). Both instructions then give explanations of the statutory language. Both instructions' explanations require the jury to find, beyond a reasonable doubt, that the defendant was in possession of recently stolen without giving a satisfactory explanation. If the jury finds these predicate facts, then both instructions state that the jury "may" find from those facts that the defendant committed the crime in question.

Instruction No. 15 in Pacheco restated the language of the statute in permissive form as did Instruction No. 20 in this case. Yet the Pacheco instruction was found unconstitutional while the instruction in this case was upheld. The results of the two cases are clearly not rationally compatible.

The opinion in this case notes that another instruction, number 23, also emphasizes the permissive character of the inference of guilt created by Instruction No. 20. Smith at 16,n.1. Since no other instructions are mentioned in the Pacheco opinion, one may argue that this distinguishes the two cases. However, in its Petition for Rehearing in Pacheco, the State urged this Court to consider at least four other instructions given in that case as

ameliorating the defect in the challenged instruction. (Addendum B at 7-9). By denying that Petition for Rehearing, the Court rejected the very argument which is now used to rationalize the decision in this case.

One final, practical factor must be considered with respect to Pacheco. Since the Instruction No. 20 given in this case and Instruction No. 15 in Pacheco are virtually identical, practitioners and trial courts are left in a quandary by the two opinions. The Pacheco instruction was declared unconstitutional while the nearly-identical instruction in this case was upheld. Practitioners and trial courts will be hard-pressed to discern which instructions are allowable and which are defective. Indeed, the Court seems to be drawing lines so fine that they are impossible to perceive.

In summary, Instruction No. 20 which was upheld in this case is virtually identical to Instruction No. 15 which was struck down in Pacheco. The argument that was used to uphold this instruction (that other instructions tended to cure any defect) was rejected by this Court in Pacheco. No rational explanation can be advanced to allow both opinions to co-exist. The decision in this case is clearly contradictory to Pacheco and should be reconsidered.

POINT II. INSTRUCTIONS 20 AND 23 COMBINED TO FORCE THE DEFENDANT TO TESTIFY IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS.

In his opening brief, Appellant Smith argued that the statutory presumption as manifested in the jury instructions forced him to testify in violation of his Fifth Amendment rights. The

opinion in this case relies on several cases to defeat this argument. However, careful examination of the primary cases cited by the Court shows that they are distinguishable from the present case.

Instruction No. 20, supra at 3, clearly stated that the defendant himself was required to give a satisfactory explanation of his possession of recently stolen property. Instruction No. 23 (Addendum C) continued to keep the focus on the defendant by allowing the jury to reach the statutory presumption by simply disbelieving the defendant's explanation or finding it contradictory.

The opinion in this case relies on Barnes v. United States, 412 U.S. 837 (1973) to defeat Mr. Smith's claim. However, in Barnes the instruction given to the jury did not require an explanation directly from the defendant. In Barnes, the defendant's possession of recently stolen property could simply be explained by "facts and circumstances in [the] case which are in some way consistent with the defendant's innocence." 512 U.S. at 840, n.3. No direct testimony from the defendant was required.

State v. Chambers, supra, also cited by the Court in this case, presented a similar question. However, as in Barnes, the Chambers Court stated: "Nothing in the instruction required testimony by defendants, because an explanation of possession could have been made by the testimony of other witnesses or by other evidence." 709 P.2d at 325.

The distinction between Barnes and Chambers and this case is subtle but important. As noted above, neither the Barnes nor the

Chambers instructions required the defendant to testify. In those cases a "reasonable explanation" of possession of recently stolen property could emanate from any source, including the State's witnesses. However, Instruction No. 20 in this case specifically required that the defendant himself provide the explanation of possession. According to the instruction, if the defendant did not testify, the jury was virtually bound to enter a verdict of guilt. Such a result clearly violates the protections secured by the Fifth Amendment. Because the cases cited by the Court in support of its opinion are distinguishable and because of the uniqueness of the instruction in this case, which could be satisfied only by the defendant's testimony, a rehearing should be granted.

CONCLUSION

Because the opinion in this case misapplied State v. Chambers and State v. Tarafa and erroneously applied Barnes v. United States and because the opinion in this case is in direct conflict with State v. Pacheco, the Appellant, David Tyrone Smith, respectfully petitions this court to reconsider its decision and reverse his conviction and remand the case for a new trial or dismissal of the charges.

Respectfully submitted this 20th day of October, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Petitioner

I hereby certify that I delivered four copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 20th day of October, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Petitioner

CERTIFICATION

I, CURTIS C. NESSET, do hereby certify the following:

- (1) I am the attorney for appellant/petitioner in this case and;
- (2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this 20th day of October, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Appellant/Petitioner

ADDENDUM A

Cite as
42 Utah Adv. Rep. 14

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

The STATE of Utah,
Plaintiff and Respondent,

v.

David Tyrone SMITH,
Defendant and Appellant.

No. 19283
FILED: September 16, 1986

THIRD DISTRICT
Hon. Homer F. Wilkinson

ATTORNEYS:

David L. Wilkinson; J. Stephen Mikita,
Thomas D. Vuyk for Plaintiff and
Respondent.

Connie L. Mower for Defendant and
Appellant.

STEWART, Justice:

The appellant, David Tyrone Smith, was convicted by a jury of burglary and theft, both third degree felonies. On appeal he argues: (1) U.C.A., 1953, §76-6-402 establishes an unconstitutional presumption that one in possession of recently stolen property is guilty of having stolen it and that that presumption is not constitutionally sufficient by itself to support a guilty verdict; (2) his wife should not have been permitted to testify against him over his objection; (3) he was forced to testify to rebut the presumption contained in §76-6-402 in violation of his

Fifth Amendment right not to testify; and (4) other prejudicial evidence was admitted against him. We affirm.

Smith was charged with burglary and the theft of a saxophone worth \$850 which belonged to LaRae Francis, who stored it in an apartment house in a locked basement storage unit assigned to her sister, Annette Nielsen. Sometime between December 24, 1982, when Nielsen last visited the storage unit, and December 27, 1982, the day the saxophone was pawned, someone broke into the unit and stole the saxophone. Smith lived nearby. His wife Tonia was staying with a friend in the same apartment complex occupied by Nielsen, where Smith visited her several times.

At trial, Jennifer Kearns, a supervisor at St. Mark's, where Smith lived, testified that she saw the defendant at St. Mark's with the saxophone. He told her that the saxophone was his and that he had used it at a performance the previous weekend. She testified that Smith made no attempt to hide the instrument or to be evasive about it during the conversation. Kearns could not precisely date the conversation. However, Smith admitted the conversation and testified that it occurred on the morning of December 27, 1982. Another supervisor, Tom Webb, testified that sometime, probably shortly after Christmas, he noticed a saxophone in a case in the St. Mark's main office with a piece of paper attached somewhere near the top bearing Smith's full name. The supervisor identified the saxophone by a round white seal on the case which he remembered seeing when the saxophone was in the office. He also was unable to pinpoint the date any more exactly.

Belinda Williams, a friend of both Smith and his wife, Tonia, testified that on December 27 Tonia called her and asked her to pawn something for her. She said Tonia told her that she needed money. When Williams picked Tonia up a few minutes later, Tonia directed her to go to Smith's place to pick up something that he was going to let her pawn. Williams did not know what was to be pawned until Tonia went into St. Mark's and returned with the saxophone. At first, Tonia indicated that she wanted Williams to pawn a ring. After they arrived at the pawn shop, Williams presented her identification, but the negotiations took place between Tonia and the pawnbroker.

Tonia was allowed to testify, over Smith's objection based on the spousal evidentiary privilege, that he told her he had a saxophone and asked her if she could persuade Belinda to pawn it. She also testified that he told her she could pick the saxophone up at St. Mark's and that he needed money. Tonia further testified that at first she just wanted to pawn her ring but that when she could not

get enough money for it, she pawned the saxophone instead.

Smith's version of the facts was substantially different than Tonia's. He admitted he had had possession of the saxophone, but testified that Tonia had given it to him on December 26, 1982, and had asked him to hold it for her until the next day. This evidence contradicted his testimony that he told Kearns, the St. Mark's supervisor, that he either had, or was supposed to have, played the saxophone at a performance in Ogden the previous weekend.

The trial judge instructed the jury, over Smith's objection, as follows (the first paragraph being the language of §76-6-402(1)):

Utah Law provides that:

"Possession of property recently stolen when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."

Thus, if you find from the evidence and beyond a reasonable doubt, that the defendant was in possession of stolen property, that such possession was not too remote in point of time from the theft, and the defendant made no satisfactory explanation of such possession, then you may infer from those facts that the defendant committed the theft.

You may use the same inference, if you find it justified by the evidence, to connect the possessor of recently stolen property with the offense of burglary.

I.

On appeal, Smith argues that §76-6-402(1) is unconstitutional because it imposes a statutory presumption of guilt that is not rational and therefore is a violation of due process under *Tot v. United States*, 319 U.S. 463 (1943), and *Leary v. United States*, 395 U.S. 6 (1969). He claims that his convictions were based solely on the statutory presumption and that they therefore must be reversed.

The defendant is in error. At the outset, we note that the statute, properly construed, does not establish an evidentiary presumption, let alone a presumption of guilt. *State v. Chambers*, 709 P.2d 321, 326-27 (Utah 1985). In *Chambers*, we held that a jury instruction using the language of §76-6-402(1) is unconstitutional because it "relieves the State of its burden of proof." *Chambers*, 709 P.2d at 327. See also *State v. Pacheco*, 712 P.2d 192 (Utah 1985). An instruction that simply incorporates the statutory language is unconstitutional when the statutory term "

For cumulative UTAH CODE ANNOTATIONS, see the second section of this issue.

prima facie" is defined as a presumption, as was the case in *Chambers*. Nevertheless, it is elementary that we read the language of an instruction in light of its immediate context and the context of the instructions as a whole. In the same instruction that incorporated the statutory language of §76-6-402(1), the trial court carefully stated that the statutory language meant only that if the jury found certain facts that "you may infer from those facts that the defendant committed the theft." (Emphasis added.) The court also instructed the jury that it could infer a burglary "if you find it justified by the evidence." Thus, the court explained that the statutory language incorporated in the instruction allowed only an inference of guilt, and then only if justified by the facts. Indeed, the court made the same point even more extensively in a later instruction.¹

We do not believe that the jury, in the face of these instructions, could have reasonably applied the instructions in an unconstitutional manner.

Furthermore, the trial court explained to the jury that possession alone of a stolen object is not sufficient to support a conviction, a rule that has been reiterated in numerous opinions. In *State v. Heath*, 27 Utah 2d 13, 15, 492 P.2d 978, 979 (1972), the Court stated:

The mere possession of stolen property unexplained by the person in charge thereof is not in and of itself sufficient to justify a conviction of larceny of the property. It is, however, a circumstance to be considered in connection with the other evidence in the case in the determination of the guilt or innocence of the possessor. Such possession is a circumstance tending in some degree to show guilt, although it is not sufficient, standing alone and unsupported by other evidence to warrant a conviction. In addition to the proof of the larceny and of the possession by the defendant, there must be proof of corroborating circumstances tending of themselves to show guilt. Such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of the defendant which tend to show his guilt.

See also *State v. Clayton*, 658 P.2d 621, 623 (Utah 1983); *State v. Thomas*, 121 Utah 639, 641, 244 P.2d 653, 654 (1952); *State v. Kinsley*, 77 Utah 348, 352, 295 P. 247, 249 (1931). See also *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982).

Defendant's reliance on *Tot v. United States*, and *Leary v. United States* is misapp-

lied. As indicated, the instructions did not permit the defendant to be convicted solely on the basis that he was in possession of stolen goods. There was, in fact, other evidence that Smith stole the saxophone that a St. Mark's supervisor saw him with, and that another St. Mark's supervisor saw the saxophone with a piece of paper bearing Smith's name attached to it. Smith admitted having the saxophone in his possession immediately prior to the time it was pawned. His explanation for his possession of the saxophone, that his wife asked him to hold it for her overnight, was inconsistent with her testimony and with his own admission on the stand that he had told the St. Mark's supervisor that he had, or was to have, played the saxophone at a "gig" in Ogden the previous weekend.² Belinda Williams testified that Tonia told her Smith had something that he was going to let Tonia pawn and that the object picked up by Williams and Tonia from St. Mark's was a saxophone. In addition, Tonia testified that Smith told her that he had a saxophone, needed money, and wanted her to ask her friend Belinda to pawn it. There was sufficient corroborating evidence to support the necessary inference of guilt given the instructions and the evidence.

Lest there be a misunderstanding of our ruling in this case, we emphatically declare that we do not retreat from *Chambers*. The trial court should not have used the statutory language in the instruction for the reasons stated in *Chambers*. We hold only that the instruction cannot be deemed reversible error in this case in light of the clear explanatory instructions that all that the jury could make of the term "prima facie" was a permissible inference.

II.

Smith also claims that §76-6-402(1) forces a defendant to take the stand in violation of his Fifth Amendment right not to take the stand to testify. The United States Supreme Court and other state courts have held that the privilege is not violated by such a statute. *E.g.*, *Barnes v. United States*, 412 U.S. 837, 846-47 (1973); *State v. DiRienzo*, 53 N.J. 360, 251 A.2d 99, 110 (1969); *State v. Chambers*, 709 P.2d 321, 325 (Utah 1985). See also Annot., 88 A.L.R.3d 1178 (1972); 1 *Wharton's Criminal Evidence*, §139, at 235 (1972). Smith's decision to testify to rebut the prosecution's case did not violate his Fifth Amendment right. "Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime, increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination." *Barnes v.*

United States, 412 U.S. at 847.

III.

Smith also argues that his wife's testimony was erroneously admitted because he had a right to prevent her from testifying pursuant to U.C.A., 1953, §78-24-8, which provides:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply ... where it is otherwise specifically provided by law.³

In 1971, this Court promulgated Rules of Evidence pursuant to §78-2-4, which grants this Court power to promulgate rules of procedure and evidence and which nullifies laws in conflict with such rules.⁴ Rule 23(2) of those rules states:

An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife

This rule provides a more limited privilege than that set forth in §78-24-8. Pursuant to §78-2-4, Rule 23(2) nullified §78-24-8 insofar as it was inconsistent with Rule 23(2). See especially Rule 28(2)(e) quoted below. *State v. Benson*, 712 P.2d 256, 258 (Utah 1985); *State v. Bundy*, 684 P.2d 58, 61 (Utah 1984). Smith therefore had no right under §78-24-8 to bar his wife from testifying, but did have the right under §78-24-8 and Rule 23(2) to bar her from testifying about any confidential communications between them.

Very little of Smith's wife's testimony concerned confidential communications with Smith. For example, her testimony that she obtained the saxophone from St. Mark's, where Smith lived, that she gave him money after pawning the instrument, and that she and Belinda in fact pawned it was not barred by the privilege. Her testimony as to any conversations between her and the defendant was to the effect that he told her he needed money and that he had a saxophone he wanted her to pawn.

The trial judge ruled that the privilege was

unavailable pursuant to Rule 28(2)(e), which states that neither spouse may claim the privilege

if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.

The evidence discussed above, aside from the confidential communications, was sufficient in this case to justify a finding that the communications between Smith and his wife were made during the planning or commission of a crime. Therefore, even the more limited spousal evidentiary privilege was not available to Smith to bar his wife's testimony.

IV.

Smith's other claims are also without merit. He claims that testimony that he lived in a half-way house informed the jury of the fact that he had been convicted of a prior felony. Smith recognizes that under Rule 55 "such evidence is admissible to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity"; however, he claims that no special relevance was demonstrated in this case. In addition, he claims that under Rule 45 the evidence should have been excluded because its prejudice outweighed its probative value.

Contrary to Smith's claim, the trial court only permitted parties and witnesses to refer to his residence as "St. Mark's." Except for Smith's own testimony, no other evidence indicated that St. Mark's was a half-way house. It was not until Smith took the stand that the jury heard that he had previously been convicted of a felony and that his residence was a half-way house. Even then, the judge gave an appropriate cautionary instruction to the jury that the evidence could only be considered in assessing Smith's credibility. Clearly the trial judge dealt with the problem in a proper manner, and the claim of error has no substance.

Affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

1. The Court also instructed:

The mere fact that a person was in conscious possession of recently

stolen property is not sufficient to justify a conviction of theft. There must be proof of other circumstances tending of themselves to establish guilt. However, such proof need not be established by additional evidence or witnesses if you find that the possession occurred under circumstances which warrants [sic] a finding of guilty. In this connection you may consider the defendant's conduct, any false or contradictory statements, and any other statements the defendant may have made with reference to the property. If the defendant gives a false account of how he acquired possession of stolen property this is a circumstance that may tend to show guilt.

In the absence of evidence as to why the defendant was in possession of recently stolen property, you may infer that the defendant stole the property.

2. This inconsistency is one of the sort of corroborating circumstances which warrant application of the statutory inference. *State v. Heath*, 27 Utah 2d at 15, 492 P.2d at 979.

3. Smith does not claim a violation of the marital privilege set forth in Utah Constitution Article 1, §12 and §77-1-6(2)(b), which state: "A wife shall not be compelled to testify against her husband nor a husband against his wife."

4. The Rules of Evidence adopted in 1971 were superseded by new rules of evidence which became effective September 1, 1983. However, the old rules were still in effect at the time of Smith's trial, and will therefore be applied in this case.

ADDENDUM B

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Petitioner, :
-v- : Case No. 20047
ROBERT PAUL PACHECO, :
Defendant-Respondent. :

PETITION FOR REHEARING

PETITION FOR REHEARING IN AN APPEAL FROM
CONVICTION OF BURGLARY, IN VIOLATION OF UTAH
CODE ANN. § 76-6-202 (1978), IN THE THIRD
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE ERNEST
F. BALDWIN, JUDGE, PRESIDING.

DAVID L. WILKINSON
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Petitioner, :
-v- : Case No. 20047
ROBERT PAUL PACHECO, :
Defendant-Respondent. :

STATEMENT OF ISSUES PRESENTED IN PETITION FOR REHEARING

The following issues are presented in this petition for rehearing:

1. Did the Court misapply the holding of Francis v. Franklin, ___ U.S. ___, 105 S. Ct. 1965 (1985), as analyzed and applied in State v. Chambers, Utah, ___ P.2d ___, Nos. 19151 and 19152 (filed October 21, 1985), to the jury instruction concerning possession of recently stolen property that was given in the instant case?

2. Did the Court incorrectly hold that admission of defendant's post-arrest explanation of his possession of a recently stolen ring (i.e., "it may have been there from a previous burglary") was prejudicial error because that evidence was only relevant to show defendant's propensity to commit a crime?

STATEMENT OF THE CASE

Defendant, Robert Paul Pacheco, was charged with burglary of a dwelling, a second degree felony, under UTAH CODE ANN. § 76-6-202 (1978). A jury found him guilty as charged. The court sentenced defendant to the Utah State Prison for a term of

one to fifteen years and fined him \$5,000.

STATEMENT OF FACTS

The State agrees with the fact statement set forth in the Court's opinion in State v. Pacheco, Utah, ___ P.2d ___, No. 20047, slip op. at 1-2 (filed October 21, 1985) (a copy of the full opinion is contained in Appendix A), except for that portion relating to the content of the jury instruction concerning possession of recently stolen property that was given at trial. Id. at 2-3.

SUMMARY OF ARGUMENTS

By failing to consider the entire jury instruction regarding unsatisfactorily explained possession of recently stolen property, as well as other jury instruction given, the Court misapplied Francis v. Franklin in holding that the possession instruction was unconstitutional.

In holding that admission of evidence of defendant's post-arrest statement explaining his possession of a stolen ring was prejudicial error, the Court failed to recognize the relevancy of this evidence to the jury's determination of the guilt question and misapplied the relevant rule of evidence.

INTRODUCTION

In Brown v. Pickard, denying reh'g, 4 Utah 292, 11 P. 512 (1886), this Court set forth the standard for determining whether a petition for rehearing should be granted:

To justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing.

4 Utah at 294, 11 P. at 512 (citation omitted). In Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913), the Court stated:

To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

42 Utah at 172-73, 129 P. at 624. The argument portion of this brief will demonstrate that, based on these standards, the State's petition for rehearing is properly before the Court and should be granted.

ARGUMENT

POINT I

THE COURT MISAPPLIED THE HOLDING OF FRANCIS V. FRANKLIN, AS ANALYZED AND APPLIED IN STATE V. CHAMBERS, IN DECIDING THAT THE JURY INSTRUCTION CONCERNING POSSESSION OF RECENTLY STOLEN PROPERTY, GIVEN IN THE INSTANT CASE, WAS UNCONSTITUTIONAL.

In State v. Pacheco, Utah, ___ P.2d ___, No. 20047 (filed October 21, 1985) (see Appendix A), this Court held that, based upon its analysis and application of Francis v. Franklin, ___ U.S. ___, 105 S. Ct. 1965 (1985), in a companion case, State v. Chambers, Utah, ___ P.2d ___, Nos. 19151 and 19152 (filed

October 21, 1985), an instruction concerning possession of recently stolen property was unconstitutional. Basic to the Court's decision was its observation that the instruction given was nothing more than a verbatim recitation of UTAH CODE ANN. § 76-6-402(1) (1978),¹ something it found to be unconstitutional under Franklin in Chambers, slip op. at 6-7. However, the Court, for some unexplained reason, failed to consider the instruction in its entirety. Instruction No. 15 in whole read:

The law of the state of Utah provides as follows:

"Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."

Thus, if you find from the evidence and beyond a reasonable doubt, (I) that the defendant was in possession of property, (II) that the property was stolen in a burglary, (III) that such possession was not too remote in point of time from the burglary, and (IV) that the defendant had made no satisfactory explanation of such possession, then you may find from those facts that the defendant committed the burglary in which such property was stolen and stole the property.

(R. 129). In deciding whether that instruction is unconstitutional under Franklin, the Court must necessarily consider both paragraphs of the instruction, as well as other instructions given to the jury.

¹ Section 76-6-402(1) provides:

Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

The general question presented in Pacheco is the same as that presented in Chambers and Franklin: Did the jury instruction "have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." Franklin, 105 S. Ct. at 1970 (citations omitted). As stated in Franklin:

The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Id., at 514, 99 S.Ct., at 2454. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see id., at 520-524, 99 S.Ct., at 2457-2459, or merely a permissive inference, see Ulster County Court v. Allen, 442 U.S. 140, 157-163, 99 S.Ct. 2213, 2224-2227, 60 L.Ed.2d 777 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

. . .

A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Such inferences do not necessarily implicate the concerns of Sandstrom. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. Ulster County Court, supra, 442 U.S., at 157-163, 99 S.Ct., at 2224-2227.

Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the

State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. Cupp v. Naughton, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This analysis "requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. Sandstrom, supra, 442 U.S., at 514, 99 S.Ct., at 2545,.

105 S.Ct. at 1971-72 (emphasis added). When this analysis is applied in assessing the validity of Instruction No. 15, it becomes clear that a reasonable juror could only have understood that instruction to contain a valid permissive inference. First, although the first paragraph of the instruction, if considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on the elements of burglary, when considered in the context of the instruction as a whole, a reasonable juror could not have considered that paragraph to have created an unconstitutional presumption. The second paragraph, which clearly is stated in the form of a permissive inference, serves to explain the statement of law in the first paragraph. The words "shall be deemed prima facie evidence" are not readily understandable to the average juror, and, in fact, probably are not particularly well understood by many lawyers, as is evidenced by the confusion this Court has experienced with the phrase. See Chambers, slip op. at 7-9. Therefore, a reasonable juror surely would have read

the second paragraph which, significantly, begins with the word "thus," as explaining the statement of law in the first paragraph. No reasonable juror could have read Instruction No. 15 as requiring a finding that defendant was guilty of burglary once he found beyond a reasonable doubt the enumerated predicate facts. Given the wording of the instruction and viewing it as a whole, a reasonable juror would have understood that he may, not must, find defendant guilty of burglary once satisfied that the predicate facts had been proved beyond a reasonable doubt.² This conclusion is further supported by examining other instructions that were given to the jury. Instruction No. 3 read:

You are instructed that to the Information the defendant has entered a plea of not guilty. The plea of not guilty denies each and all of the essential allegations of the charge contained in the Information and casts upon the State the burden of proving each and all of the essential allegations thereof to your satisfaction and beyond a reasonable doubt.

(R. 118). Instruction No. 12 read in pertinent part:

All presumptions of law, independent of evidence, are in favor of innocence, and a

² That the instruction's first paragraph is a verbatim recitation of UTAH CODE ANN. § 76-6-402(1) (1978) does not automatically render the instruction unconstitutional. And, the use of the term "prima facie" does not in itself require a finding that there is Franklin/Sandstrom error. See Chambers, slip op. at 7-8 (noting cases where this Court held that although the use of the term prima facie in an instruction was improper, it was not prejudicial in light of other instructions given to the jury). Instruction No. 15 does nothing more than instruct the jury on a "traditional common-law inference deeply rooted in our law." Barnes v. United States, 412 U.S. 837, 843 (1973). See also State v. Sessions, 583 P.2d 44, 45-6 (Utah 1978); State v. Kirkham, 20 Utah 2d 44, 432 P.2d 638 (1967) (cases implicitly recognizing the validity of this common-law inference in the context of approving its use in burglary cases).

defendant is presumed 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. 126). Instruction No. 16 read:

Before you can convict the defendant of the crime of Burglary of a Dwelling as charged in the Information on file in this case you must believe from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 3rd day of June, 1983, at 443 East Vine Street, Murray, Utah the defendant, Robert Paul Pacheco, entered or remained in the dwelling of Masaji and Tsuruko Imai; and

2. That said defendant did so unlawfully; and

3. That said defendant did so with the intent to commit a theft.

If you are not convinced that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to find the defendant not guilty. If, on the other hand, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt then you must find the defendant guilty of Burglary as charged by the Information on file in this case.

(R. 130). And, perhaps of most significance, was Instruction No. 18, which stated:

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

(R. 132) (emphasis added).

Second, Instruction No. 15 contains an acceptable permissive inference given that "the suggested conclusion is. . . one that reason and common sense justify in light of the proven facts before the jury." Franklin, 105 S.Ct. at 191. The Supreme Court made this clear in Barnes v. United States, 412 U.S. 837 (1973), which held that an instruction on the common-law inference of guilty knowledge from the unexplained possession of recently stolen property satisfied the requirements of due process. Id. at 841-46. See also State v. Sessions; State v. Kirkham (supra, at fn. 2).

Significantly, the Pacheco instructions do not have the problems identified by the Court in the instructions it found to be unconstitutional in Chambers. There, the verbatim recitation of § 76-6-402(1) appeared alone, without the explanatory paragraph included in Pacheco Instruction No. 15. Chambers, slip op. at 4. Furthermore, in Chambers a separate instruction defined the term prima facie in such a way that it "could well have indicated to a juror that the defendants were required to disprove guilt"--a defect that could not be cured by another instruction that restated the presumption in permissive form. Id. at 6-7.

In sum, Instruction No. 15 survives the Franklin/Sandstrom analysis. In applying Franklin, as analyzed and applied in Chambers, to the instant case, the Court failed to

take into account the significant differences in the instructions at issue in Chambers and the instruction addressed here.

Consequently, the Court arrived at a conclusion that appears to be contrary to the law expressed in Franklin and Chambers.

POINT II

THE COURT INCORRECTLY HELD THAT THE ADMISSION OF TESTIMONY CONCERNING DEFENDANT'S POST-ARREST EXPLANATION FOR HIS POSSESSION OF THE STOLEN RING WAS PREJUDICIAL ERROR.

Pacheco held that the trial court committed prejudicial error in allowing "Detective Anderson to testify during the State's case in chief that defendant had stated in response to a question regarding the origin of the ring, '[I]t may have been there from a previous burglary.'" Slip op. at 3. In arriving at this conclusion, the Court reasoned that, because the inference set out in § 76-6-402(1) is addressed only to the trial court for determining whether the State has established a prima facie case, the post-arrest statement of defendant, who did not take the stand at trial to offer an explanation for possession of the ring, should not have been presented to the jury. Even without that evidence "the trial judge would have been justified in assuming that a prima facie case of burglary had been made out against defendant." Pacheco, slip op. 4. Therefore, in the Court's view, because the evidence of defendant's statement, which included an admission of a prior crime, was "in no way . . . relevant to prove a specific element of the crime of burglary" and went only to show defendant's propensity to commit crime, its admission was prejudicial error. Ibid. This ruling fails to recognize the relevancy of the challenged evidence to prove

defendant's guilt and reflects a critical misapplication of the rules of evidence.

First, the trial court's determination of whether a prima facie case has been established under § 76-6-402(1) and the jury's determination of the guilt question are two entirely different functions. Although the Court correctly concluded that defendant's statement, in light of his failure to offer any explanation of his possession of the ring at trial, was not necessary for satisfaction of the prima facie evidence standard applied by the trial court, it incorrectly concluded that the evidence was not at all relevant to the issue of guilt presented to the jury. The Court's application of Chambers in this regard strongly suggests that jury consideration of unexplained or unsatisfactorily explained possession of recently stolen property, and the inference of guilt that may be drawn from that circumstance, is improper. Such a conclusion is contrary to established law. See Barnes v. United States, 412 U.S. 837 (1973).³ A jury may lawfully and reasonably draw an inference of guilt from possession of recently stolen property when no satisfactory explanation of that possession is given. "Possession of recently stolen property is nothing more than a circumstantial bit of evidence in a case of burglary" State v. Kirkham, 20 Utah 2d at 44, 432 P.2d at 638. See also

³ The error in this conclusion is fully discussed in the State's petition for rehearing in State v. Chambers. The State's argument there is incorporated by reference here (see Appendix B).

State v. Sessions, 583 P.2d at 45-6.⁴

Second, the Court appears to have misapplied Utah R. Evid. 404(b) (Supp. 1985)⁵ in holding that defendant's statement was inadmissible because it was not relevant to prove a specific element of burglary and was relevant only to show defendant's propensity to commit a crime. See Pacheco, slip op. at 4. Rule 404(b) provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Like former Utah R. Evid. 55 (1977), Rule 404(b) is inclusionary: "evidence of other crimes or civil wrongs that is competent and relevant to prove some material fact, other than to show merely the general disposition of the defendant, is admissible." State v. Tanner, 675 P.2d 539, 546 (Utah 1983) (emphasis in original). See also United States v. Bradshaw, 690 F.2d 704, 708 (9th Cir. 1982), cert. denied, 463 U.S. 1210 (1983).

⁴ Under this analysis, presentation by the State of evidence of a defendant's pretrial explanation for possession of recently stolen property is not restricted to those cases where the defendant takes the stand and offers a contrary explanation. A defendant's unsatisfactory explanation is most appropriately presented as circumstantial evidence in the State's case-in-chief. See Barnes, 412 U.S. at 839 Sessions, 583 P.2d at 44 (defendants' explanatory statements admitted in government's case-in-chief).

⁵ The current rules of evidence were in effect at the time of defendant's trial.

The State offered defendant's statement only as circumstantial evidence of his guilt of burglary (i.e., as evidence of a lack of legal justification for possession of the ring and an inability to explain satisfactorily that possession), see Sessions, 583 P.2d at 45-6 (approving of an inference of guilt from these circumstances in burglary cases); it was not offered to show defendant's propensity to commit a crime (R. 407-11; Appendix C). Defendant voluntarily gave his explanation about a prior burglary to the police officer after being arrested and after receiving a Miranda warning (R. 40-8; Appendix C).

As an initial matter, the evidence of other misconduct contained in defendant's voluntary statement should not be viewed as "extrinsic" evidence for purposes of Rule 404(b). Because the evidence of the prior burglary was inextricably intertwined with the evidence used to prove the crime charged, it was admissible. United States v. McCrary, 699 F.2d 1308, 1311 (11th Cir. 1983) (in prosecution for aiding and abetting introduction of drugs in federal prison, evidence of other acts of dealing in drugs in prison held "inextricably intertwined" with evidence used to prove crime charged). See generally 2 J. Weinstein & M. Berger, Weinstein's Evidence § 404[10] at 77-9 (1985). Cf. United States v. Blanton, 730 F.2d 1425, 1432 (11th Cir. 1984) (evidence of other wrongdoing at time of arrest of defendant not inadmissible under Rule 404(b) because that evidence was "part of the res gestae of the offense"). Evidence of defendant's explanation was critical to the State's case; and, inclusion of defendant's reference to a prior burglary was essential to the jury's

understanding of the explanation and its assessment of whether the explanation was satisfactory.

Even if Rule 404(b) is applicable, the trial court properly admitted defendant's statement. Essentially, a two-step test must be met for admission under that rule: (1) "the evidence of an extrinsic offense must be relevant to an issue other than the defendant's bad character," and (2) "its probative value must not be substantially outweighed by undue prejudice to the defendant." United States v. Punch, 722 F.2d 146, 153 (5th Cir. 1983) (citation omitted). Defendant's statement obviously was relevant to show that he had no legal justification for possession of the ring and could not give a satisfactory explanation for his possession of it. Moreover, the statement was relevant to identity and intent. In short, the evidence assisted the jury in understanding the circumstances, and its probative value was not outweighed by the possible prejudice to defendant. See Punch, 722 F.2d at 153.

In conclusion, the following comment by Professor Ronald Boyce on this part of the Pacheco opinion is particularly instructive:

[T]he Court's ruling on the admissibility of defendant's admission is wrong in this writer's opinion. The Court confuses the value of the evidence as to the State's burden to make out a prima facie case with the State's burden to prove guilt to the satisfaction of the jury beyond a reasonable doubt. The question is whether the defendant's admission has any relevance to prove his guilt, as distinct from merely showing bad character. The admission could be interpreted by the jury as showing defendant had no legal justification for possession of the ring and could not make a

reasonable explanation as to why the ring was in defendant's possession. This evidence, although unnecessary to the determination of a prima facie case by the trial judge, is relevant to the jury's consideration of guilt. Further, the Court is wrong in saying before the evidence is admissible it must "prove a specific element of the crime." The evidence to be admissible under Rule 55, U.R.E., 1971, or Rule 404(b), U.R.E., 1983, need only have been relevant to any issue in the case other than bad character. If the evidence was more prejudicial than relevant, it should have been excluded under Rule 45, U.R.E., 1971, or Rule 403, U.R.E., 1983. By tying the admissibility of the admission to the issue of "prima facie" case for the trial judge, the Supreme Court has created an erroneous, restrictive, and misconceived standard of admissibility that will come back to haunt it. Any knowledgeable defense counsel will use this case to argue that evidence of other misconduct, unnecessary to establishing the prosecution's prima facie case, is inadmissible. This is not the proper legal standard for admissibility of such evidence.

Intermountain Commercial Record, Nov. 1, 1985, at 24, col. 1.

CONCLUSION

Based upon the foregoing discussion, it appears that the Court in State v. Pacheco, misapprehended significant case law in concluding that the jury instruction regarding unsatisfactorily explained possession of recently stolen property was unconstitutional. Also, the Court applied a wrong principle of law in holding that the trial court committed prejudicial error when it admitted evidence of defendant's post-arrest statement explaining his possession of a stolen ring. Therefore, the State's petition for rehearing should be granted and the instant case should be restored to the calendar for reargument or resubmission. See Utah R. App. P. 35(c) (1985). Alternatively,

the Court should modify its opinion to reflect a proper application of Franklin v. Francis and Utah R. Evid. 404(b).

The State certifies that this petition is presented in good faith and not for purposes of delay.

RESPECTFULLY submitted this 6th day of November, 1985.

DAVID L. WILKINSON
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Petition for Rehearing were mailed to Sumner J. Hatch, Attorney for Defendant, 72 East 400 South, Suite 330, Salt Lake City, Utah 84111, this 6th day of November, 1985.

David B. Thompson

ADDENDUM C

INSTRUCTION NO. 23

The mere fact that a person was in conscious possession of recently stolen property is not sufficient to justify a conviction of theft. There must be proof of other circumstances tending of themselves to establish guilt. However, such proof need not be established by additional evidence or witnesses if you find that the possession occurred under circumstances which warrants a finding of guilty. In this connection you may consider the defendant's conduct, any false or contradictory statements, and any other statements the defendant may have made with reference to the property. If the defendant gives a false account of how he acquired possession of stolen property this is a circumstance that may tend to show guilt.

In the absence of evidence as to why the defendant was in possession of recently stolen property, you may infer that the defendant stole the property.