

1979

State of Utah v. Larry Vale Potter : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	
-v-)	No. 16355
)	
LARRY VALE POTTER,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

Appeal from the Judgment Rendered in the
Seventh Judicial District Court,
Carbon County, State of Utah,
Honorable Boyd Bunnell, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : No. 16355
LARRY VALE POTTER, :
Defendant-Appellant. :

BRIEF OF APPELLANT

NATURE OF THE CASE

Appellant was charged with three criminal counts (all statutory references are to the Utah Code Annotated (1953), as amended):

1. Aggravated robbery in violation of § 76-6-302 (1)(a);
2. Failure to stop at the command of a police officer, in violation of § 41-6-169.10; and
3. Aggravated assault, in violation of § 76-5-103.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury which found appellant guilty as to counts one and two. Appellant was acquitted of

the third count.

Appellant was sentenced to an indeterminate term in the Utah State Prison of from five years to life, and fined \$2,000. The prison sentence was suspended, as was \$1,500 of the fine. Appellant was placed on probation for a period of five years.

Appellant's probation was subsequently revoked, and he was committed to the Utah State Prison to serve his original sentence.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his convictions for aggravated robbery and failure to stop at command of a police officer, and a reversal of the judgment revoking his probation and committing him to the Utah State Prison.

STATEMENT OF FACTS

At approximately 1:30 a.m. on the morning of February 22, 1978, Mr. and Mrs. Von Wayne Johnston were awakened by a knocking on the door of their home. Mr. Johnston went to the door, and observed appellant standing, armed with a revolver. Mr. Johnston asked appellant what he wanted. Appellant stated that he wanted to come in. He then entered the home. Mr. Johnston again asked appellant what he wanted. Appellant replied that he wanted a roll of toilet paper and some matches. Mr. and Mrs. Johnston immediately procured toilet paper and matches and placed them in appellant's hat.

Appellant then said to Mrs. Johnston, "Ma'am, it's best that you go to the right. Me and your husband can handle this now --." (Tr. 18.)

Appellant and Mr. Johnston then stepped outside. Appellant fumbled with his hat and the toilet paper. He seemed nervous. He thanked Mr. Johnston, and shook his hand. Appellant then got in his car and drove off rather hurriedly. Mr. Johnston went back inside. Mrs. Johnston called the Highway Patrol.

Officers intercepted appellant's auto soon thereafter. After a high-speed chase in which appellant apparently discharged his revolver, and in which appellant tried to run the pursuing officers off the road, he was finally subdued.

Mr. and Mrs. Johnston testified that during the incident in their home, appellant was always polite, although he spoke with authority, and that he never threatened them or raised his weapon. Mr. and Mrs. Johnston agreed that appellant seemed in a daze, and that his eyes were without expression, staring blankly, starry-eyed. Mr. Johnston testified that appellant appeared to be very incoherent, without his senses, and "not in the same world as us" (Tr. 9). Mr. Johnston firmly felt that appellant was "on dope" and without his faculties (Tr. 12, 16).

All of the arresting officers agreed that appellant had none of the earmarks of a typical drunken driver, i.e.,

his speech was not slurred, he had no trouble walking, and while he was driving in an extremely reckless manner, he appeared to have complete control of his vehicle. They testified that appellant never pointed his revolver at any of them during his arrest.

Officer Larry Prince testified that while he could not detect whether appellant had been drinking, appellant was acting "abnormally," was "incoherent," without his senses, and "not in the same world as us" (Tr. 38, 39).

At approximately 3:00 a.m. appellant underwent a blood alcohol test, which was introduced as evidence. It showed the concentration of ethyl alcohol in his blood to be .24%, approximately 1-1/2 hours after the incident began. This is three times the statutory presumption of intoxication.

Appellant testified that he had no memory of the incident, that he recalled having about five drinks of whiskey, and that his next memory was wakening in a jail cell. The evidence showed that in addition to the whiskey, appellant had consumed quantities of beer, tequila, Colbenemid, and Benemid. The evidence also showed that appellant had suffered a head injury in 1974 which left a "cortical scar," with resultant abnormal electroencephalogram, and that appellant had been under medication for gout since the age of 25, taking two tablets of Benemid or Colbenemid every day, including the day of the incident.

After his conviction (from which this appeal was perfected), appellant was placed on probation. Among the terms and conditions of the probation set out in the judgment of the trial court dated February 21, 1979, were the following:

3. That the said defendant remain in present treatment with Dr. Lincoln Clark and enter alcohol therapy as designated by the Adult Probation and Parole Department.
4. That the said defendant submit to a breathalyzer test at the discretion of the Adult Probation and Parole Department within reasonable circumstances and hours.
5. That the said defendant totally abstain from the use of alcoholic beverages

The events whereby appellant allegedly violated the conditions of his probation occurred very early on the morning of April 27, 1979. Officer Lawrence Penrod answered a call and met Ms. Lucille Begay, who was at that time standing in the driveway at the home of one Mr. Trokvine. Ms. Begay related that she had been "assaulted" by appellant, and that she wanted to get her clothes from the residence that appellant shared with Mr. Randy Diamanti.

Officer Penrod proceeded with Ms. Begay to appellant's residence. Two other peace officers were summoned, as

was Agent Nat Roth and Mr. Evan Reid. When Mr. Reid arrived on the scene, the entire party entered the residence, with the consent of Ms. Begay.

Mr. Reid and the officers proceeded to appellant's bedroom door. Mr. Reid tested the knob, finding that it was locked. He then knocked on the door, awakening appellant. Appellant came to the door where an extremely brief scuffle ensued between appellant and Mr. Reid. Appellant retreated into his bedroom.

Mr. Reid asked appellant if he would submit to a breathalyzer test. Appellant, after asking if Mr. Reid had a search warrant, stated that he had to get up early to go to work, and was therefore returning to bed. (These events apparently occurred at approximately 1:00 a.m., the exact time being unknown. See Tr. 9.)

Appellant subsequently opened his bedroom door, brought one drawer from a dresser, and deposited it on the floor of the living room area, stating that it contained Ms. Begay's clothing. The clothing was gathered, and the entire party then left the residence.

The trial court found that Ms. Begay had a sufficient "proprietary interest" in appellant's residence to consent to the entrance by Mr. Reid, Agent Roth, and the officers. The court further found that appellant had violated his probation, and revoked the same. Again, appellant appealed.

ARGUMENT

POINT I

THE JURY'S VERDICT OF GUILTY OF AGGRAVATED ROBBERY IS NOT SUPPORTED BY THE EVIDENCE.

The definition of the offense of aggravated robbery is to be found in the Utah Criminal Code. (All statutory citations are Utah Code Annotated (1953) unless otherwise indicated.) Section 76-6-301 states:

Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear. (Emphasis added.)

Section 76-6-302 states:

A person commits aggravated robbery if in the course of committing robbery, he: (a) uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or (b) causes serious bodily injury upon another. (Emphasis added.)

Therefore, the statutory offense of aggravated robbery may be described as having four elements:

1. There must be an intentional and unjustifiable taking of personal property.

2. The property must be taken from the person of another, or from his immediate presence.
3. Force or fear must be used to obtain the property. The taking must be against the will of the rightful possessor.
4. A gun, knife, facsimile thereof, or a deadly weapon must be used to provide the force or fear; or serious bodily injury must have resulted to another.

Appellant concedes that the evidence was sufficient to support a conviction as to elements 2-4 above. Appellant is admittedly guilty of having committed acts that are of a seriously antisocial nature.

The evidence did not, however, prove beyond a reasonable doubt the first element above described, an intentional taking of property.

In order to determine what conduct constitutes "an intentional taking," we must look first to the statutes. The definition of "intentional" is found in Section 76-2-103(1):

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result. (Emphasis added.)

As discussed below, the evidence at trial showed rather clearly that when appellant committed the acts in question, he was incapable of forming

. . . a conscious objective or desire to engage in the conduct or cause the result.
(§ 76-2-103)(1), emphasis added.)

Section 76-2-103 is not the only statute dealing with the so-called "mens rea" that is generally associated with criminal liability.

Section 76-2-305 provides:

(1) In any prosecution for an offense, it shall be a defense that the defendant, at the time of the proscribed conduct, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(2) As used in this section, the terms "mental disease" or "defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

This author's research reveals only one case where this court has dealt with this statute, State v. Dominguez, 564 P.2d 768 (Utah 1977). There a conviction for aggravated assault was affirmed. The court held that the trial court's

instructions on the defense of insanity were not prejudicial to the defendant, even though they were not based on § 76-2-305,

. . . because the District Court gave as a part of its instruction that insanity can exist when the defendant is 'irresponsible or partly responsible.'
(564 P.2d at 770, emphasis added by the court.)

The court reasoned that therefore the defendant was not denied the arguably more liberal defense that is provided by § 76-2-305, which

. . . only requires defendant to lack substantial capacity to appreciate the wrongfulness of his conduct . . .
(564 P.2d at 770, emphasis supplied by the court.)

As is discussed below, the evidence in the case at bar clearly met the standard enunciated in Dominguez, supra, to entitle appellant to an acquittal.

One other statute bears heavily on the question of an "intentional taking." Section 76-2-306 provides:

Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense, and the actor is unaware of the risk

because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense. (Emphasis added.)

In State v. Dewey, 41 Utah 538, 127 P. 275 (1912), a similar statute was discussed, § 4070, Comp. Laws 1907, which provided:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.
(127 P. at 278.)

As is more thoroughly discussed in Point II of this brief, this court reversed a first degree murder conviction because of erroneous instructions based on this statute. As to the state of the law regarding the defense of voluntary intoxication, the court noted:

Independently of a statute, it is the general rule that, while voluntary intoxication does not excuse crime, and is usually not a defense thereto, yet such condition of the accused at the

time of the commission of the offense may be considered in determining the purpose, motive, or intent where these elements become a material question of inquiry. And where one is charged with the commission of first degree murder, involving a specific intent to commit the crime of homicide, the accused may show, in order to reduce the degree of the offense, that he was in such a state of voluntary intoxication at the time of the commission of the crime as to be mentally incapable of forming the necessary intent, or of entertaining or forming a design to take life, and as bearing on the existence or nonexistence of malice, and to explain and determine the accused's conduct with reference to the design, purpose, motive, and intent with which the act was committed. Extended notes to cases in 13 L.R.A. (N.S.) 1024, and 36 L.R.A. 470; 12 Cyc. 172, 21 Cyc. 674, and cases there cited. This, in effect, is what the statute declares.
(127 P. at 278-279.)

In State v. Stenback, 78 Utah 350, 2 P.2d 1050, 79 A.L.R. 878 (1931), a first degree murder conviction was reversed. The court found, among other things, that the instructions given on intoxication were insufficient. The court quoted with approval from 16 Corpus Juris:

The rule that drunkenness is no defense does not apply to the full extent where a specific intent or motive is an essential element of the offense charged.

If at the time of the commission of such an offense the accused was by intoxication so entirely deprived of his reason that he did not have the mental capacity to entertain the necessary specific intent which is required to constitute the crime, he must necessarily be acquitted; and in like manner the fact of defendant's drunkenness should be considered in determining the degree of the crime. This is so, not because drunkenness excuses crime but because if the mental status required by law to constitute crime be one of specific intent or of deliberation and premeditation, and drunkenness excludes the existence of such mental state, then the particular crime charged has not in fact been committed.
(2 P.2d 1053-1054, emphasis added.)

As discussed below, the evidence in the case at bar clearly showed that in fact appellant did not entertain the "intent" necessary to constitute the crime of aggravated robbery.

While the question of what conduct constitutes the offense of aggravated robbery as defined by § 76-6-302 is of course governed by statute, it is still possible to gain an insight as to what constitutes an "intentional taking" by looking to the case law, much of which predates the statute in question.

In People v. Hughes, 11 Utah 100, 39 P. 492 (1895),

a conviction for robbery was reversed, as the trial court's instructions, based on the robbery statute, were incorrect. The instructions neglected to cover the animus furandi, or specific intent to steal, which is an element of robbery. Our court quoted with approval an Iowa case, State v. Hollyway, 41 Iowa 200 (1878):

In robbery, as in larceny, it is essential that the taking of the goods be animus furandi. Unless the taking be with felonious intent, it is not robbery.
(39 P. at 494.)

This rule is not only humane, but a contrary one would be opposed to all the principles which underlie human conduct as respects the bearing of individuals towards each other, and also as regards their position towards the state.
(39 P. at 493-4.)

Accord: State v. Kazda, 15 Utah 2d 313, 392 P.2d 486 (1964).

An interesting case, closely on point, is State v. Brown, 36 Utah 46, 102 P. 641, 24 L.R.A. (N.S.) 545 (1909). There, defendant had been convicted of forgery and uttering a forged instrument. Defendant did not deny the "acts" in question, but asserted a defense based solely on insanity, i.e., mental defect. The prosecution's case was based solely on proof of the acts in question,

. . . without in any way attempting

to rebut or explain the evidence
of insanity submitted on behalf
of the defendant.
(102 P. at 642.)

The evidence of insanity (or lack of capacity) was substantial (although there was also substantial evidence that, at least at times, defendant acted rationally). Among the evidence going to insanity was the amateurishness of the forgery (cf. taking toilet paper and matches); the fact that some of defendant's ancestors were insane; the fact that defendant had long been responsibly employed; that defendant felt the Japanese were the strongest race on earth, and that this was due to their diet, which consisted largely of rice; that defendant was obsessed with money and getting rich; that defendant lied about making large amounts of money; that when defendant's mother died, defendant was unconcerned, and had stated that he had hypnotized her and cured her; that defendant did not take his prosecution seriously; that he neglected his lodge duties; and that he did not feel that he had done anything wrong.

Defendant had called 14 witnesses, all of whom agreed that at the time of his act, defendant was mentally unbalanced, did not know the nature and quality of his act, and did not know or realize that his act was wrong.

The jury was properly instructed, but nevertheless returned a verdict of guilty.

Our Supreme Court reversed, holding that the guilty verdict was not supported by the evidence, that the jury is not at liberty to disregard affirmative evidence, and that a jury verdict cannot be based on a mere presumption of sanity where defendant presents evidence of lack of capacity. The court noted:

But if we assume that defendant intended to forge the checks, which he no doubt did, this is not alone sufficient to make an insane person guilty of a crime.

The true test is whether the defendant, at the time of the commission of the offense, had the mental capacity to know that in doing the act he was doing wrong.
(102 P. at 645.)

The court held that the presumption of sanity had been entirely overcome, and the guilty verdict ignored or disregarded the evidence, since the prosecution offered no evidence of defendant's sanity. After defendant overcomes the presumption of his sanity with evidence, the prosecution must then prove sanity beyond a reasonable doubt.

The court noted:

. . . whenever intent is an essential ingredient of the crime charged, this intent, to constitute the act a crime, must be shown

An insane person cannot be legally

guilty of a criminal intent.
(102 P. at 645.)

Since all of the evidence on insanity was in defendant's favor, the court concluded that defendant had established his defense as a "matter of law," and concluded:

To convict a sane man who is innocent is depolorable, but to sentence a man to the penitentiary for a crime that he did not have the mental capacity to commit would be intolerable.
(102 P. at 646.)

In State v. Hartley, 16 Utah 2d 123, 396 P.2d 749 (1964), a conviction of second degree burglary was affirmed, but the court noted that voluntary intoxication can negate the specific intent to commit larceny, which is an essential element to second degree burglary (as well as robbery and aggeavated robbery). The issue, once raised, is for the jury.

In State v. Green, 78 Utah 580, 6 P.2d 177 (1931), 86 Utah 192, 40 P.2d 961 (1935), the conviction of first degree murder resulting from defendant's first trial was reversed on several grounds. The evidence showed that defendant and his wife had been fighting, that defendant purchased a knife, pistol, and ammunition, and that defendant had shot and killed his wife, her mother, and the mother's husband. The court held, inter alia, that the presumption of sanity obtains until either defendant or the prosecution produces

"some evidence" of insanity. When evidence of insanity is introduced, the presumption "disappears" and the jury must determine the issue of sanity solely on the evidence, without regard to the presumption. It is for the trial judge, not the jury, to determine if the evidence raises the issue of sanity (i.e., it is a question of law), but only "some evidence" is required before the issue must be sent to the jury. If there exists a reasonable doubt as to defendant's sanity, he is entitled to an acquittal, but insanity excuses only where it renders defendant "irresponsible" or partly so.

In State v. Dewey, 41 Utah 538, 127 P. 275 (1912), supra, defendant was both intoxicated and jealous, as to his wife's affections. The wife determined to leave him. She took a hotel room. Defendant went to the room, in an intoxicated state, with a pistol. It was apparently his intention to kill his wife and himself. He was quite loud. He threatened both his wife and another hotel guest and threatened to kill "any cops" who entered the room. The police were summoned. Three officers arrived at the room, and as they entered, one asked a question to the effect of, "What is the trouble?" Defendant, who had concealed his pistol behind his leg, replied to the effect that there was "no trouble," and immediately drew the pistol and shot the lead officer in the chest. He died shortly thereafter.

The evidence at trial indicated that defendant had

suffered from delerium tremens some six months earlier. Both expert and lay witnesses' testimony as to defendant's alcoholic insanity was conflicting.

As is discussed more completely in Point II of this brief, this court held that the evidence was sufficient to support the jury's verdict of guilty of murder in the first degree, but nevertheless reversed the conviction because the trial court refused to give defendant's requested instructions.

The court, in Dewey, noted that Comp. Laws 1907 § 4856 placed the burden of production of evidence of justification or excuse on defendant,

. . . but he is not required to
establish the justification or
excuse by a preponderance of the
evidence to avail himself of that
defense.
(127 P. at 280.)

Defendant has only to create a reasonable doubt. The prosecution must still prove all the elements in issue, including mental capacity, beyond a reasonable doubt. (Accord: State v. Vacos, 40 Utah 169, 120 P. 497 (1911).)

With this outline of the law before us, let us now look to the evidence that was produced at the trial of the instant case.

The State's first witness was Mr. Von W. Johnston. In addition to those facts previously recited, he testified

in cross-examination that appellant's eyes looked "unusual" (Tr. 8), that he had a "blank stare" (Tr. 8), that he appeared "abnormal" (Tr. 9), and "incoherent," "in one sense of the word" (Tr. 9). Mr. Johnston testified that it was his impression that appellant "did not have his senses," and that he "was not even in the same world as us" (Tr. 9). He felt that appellant was in a "very emotional and mental state" (Tr. 9). Appellant never pointed his revolver at Mr. Johnston (Tr. 10), and seemed very polite, and thanked Mr. Johnston for the toilet paper and matches (Tr. 5, 10), and shook his hand before leaving (Tr. 5). Mr. Johnston testified that appellant seemed "uncoordinated" as he left (Tr. 10), and that he didn't keep Mrs. Johnston constantly in his sight, as an "ordinary robber" would be expected to do (Tr. 11).

On redirect examination, Mr. Johnston was asked by the prosecuting attorney:

Q: You said he [appellant] was very abnormal in one sense of the word. What was that sense of the word?

A: Well, he looked to me as if he had been on dope. This is the first thing that come into my mind, that the man was on dope, and he hasn't got his faculties in his mind, and that he might be an irrational person that could do anything, you know . . .
(Tr. 12.)

After a short recross-examination, the prosecuting attorney questioned Mr. Johnston as to appellant's "physical ability to handle himself, his ability to stand and to walk and to talk, to ask questions[.]" (Tr. 15). The prosecutor asked:

Q: Well, looking back--going on what you observed about the defendant today and at the preliminary hearing, and thinking back to February 22nd--we've gone over this before but I think we need to verify this--his ability to walk, his ability to stand or move around, some of the things that you've observed--is there any difference [between appellant's appearance at trial and on the morning of the incident]?

A: Yes. I've observed that the night that he come to my house--I don't think that he was drunk in that manner, but I do think--I still think that he acted like a person that was on dope. Because he just had a blank stare, which he doesn't have today. And I haven't heard him talk today so I don't know his normal voice. In fact, I never heard the man talk except that night (Tr. 15,16).

The State's next witness was Hazel Lorraine Johnston, Mr. Jonston's wife. On direct examination she stated that

"[Appellant] seemed to be in a daze, sort of starry-eyed. His eyes didn't have any expression in them" (Tr. 19). She further testified on cross-examination that appellant's tone of voice on the night in question was "commanding," like "a sergeant or somebody giving orders, or someone in the army[.]" (Tr. 25).

On redirect examination the prosecuting attorney asked:

Q: Relating to the defendant, in your observation of his senses in his ability to perform, would you tell the Court what you--or the jury what you observed? Did he have his senses in your opinion?

A: Well, I don't think it was so much the way he acted that we thought, you know, there was something--it was what he asked for--to come into someone's home and ask for toilet paper and matches. That's just got to be something wrong. That was more the reason why I thought there had to be something wrong (Tr. 26).

To quickly summarize the evidence to this point, both of the victims of the crime testified that "something was wrong" with appellant's mental state. He seemed to be "on dope" (Tr. 12). They reached this conclusion because of what appellant asked for (Tr. 26), because of his unusual blank

stares, and his incoherent, drugged appearance (see Tr. 8,9, 10,12,15,16,19,22,26,27,28,29).

The next witness in the case was Officer Larry Prince of the East Carbon City Police Department (Tr. 29). He testified that he had been involved in the high-speed chase of appellant. During the chase, the officer's vehicle "reached speeds of over a hundred--probably close to 110 [miles per hour]" (Tr. 30).

The officer testified that appellant almost caused a head-on collision with another police car (Tr. 32); that he tried to disable yet another police car by slamming on his brakes to cause a rear-end collision and by ramming the same car's right front (fender) in a swerving maneuver (Tr. 33).

Finally, appellant stopped his vehicle about a mile short of a roadblock which had been set up (Tr. 34). Officer Prince testified that after appellant had stopped his vehicle,

Officer Penrod exited his car, using his door as cover. I positioned my car to the left rear of Officer Penrod's car. I exited my car using my door as cover. We ordered the subject out of the car, which he did. And he was standing there with the--a weapon in his hand, waving it with the barrel down. And Officer Penrod told him several times to put it down. And at one time he said: 'Put the gun down and don't do anything stupid.' And finally he did put the gun down. Officer Penrod and Sheriff Passic came up

and subdued the subject. And I came up and I grabbed the weapon at that time. (Tr. 34.)

On cross-examination the officer testified that appellant had not pointed his gun at him (the officer) while appellant had been standing in the road (Tr. 36). Further, the officer testified that he agreed with Mr. Johnston's testimony that appellant was, at the time of the incident, "very abnormal," that appellant's eyes were "very unusual," and that appellant "had a blank stare," and that appellant was in a "very emotional and . . . mental state that night," that he was "incoherent," that "he didn't even have his senses," and that it "didn't even seem that [appellant] was in the same world as us." (See Tr. 37, 38.)

The officer also testified that while he could not detect the smell of alcohol on appellant, he had reason to believe that appellant was under the influence of alcohol, "to the point that [appellant] had to submit to a blood test[.]" The officer stated that the blood test showed appellant's blood concentration of alcohol to be .24%, three times the statutory presumption for driving under the influence (Tr. 41, 42).

Finally, Officer Prince was asked, and replied to, the following:

Q: All of these that you agreed

to: Eyes unusual, blank stare, very abnormal, incoherent, not even have his senses, not in the same world as us, emotional and in a mental state--and you don't say that he's any of them now, do you, as you sit and look at him?

A: No, sir. (Tr. 43.)

Officer Larry Penrod and Norman Vuksinick also testified for the State. Their testimony was corroborative of that of Officer Prince.

At this point, it should be noted that the State's case raised sufficient evidence to defeat any presumption of appellant's sanity, and therefore placed the burden on the State to prove beyond a reasonable doubt not only that appellant had the requisite "intentional" state of mind, but also that he had the requisite "capacity" to commit a crime. (State v. Brown, supra; State v. Green, supra; State v. Dewey, supra; State v. Vacos, supra; §§ 76-6-301, 76-6-302, 76-2-103, 76-2-305, 76-2-306.)

The State failed to sustain this burden. It presented absolutely no evidence to the effect that appellant had the requisite capacity or intent. Therefore, on this basis alone, appellant's conviction must be reversed.

The case for the defense produced still more evidence showing that appellant lacked the requisite intent and

capacity.

Appellant called two witnesses (Mr. Marvin Dalton and Mr. Gary Grako) who testified as to his general reputation in the community as a nonviolent person (see Tr. 62-65).

Appellant testified in his own behalf. He stated that he did not remember the events of the night in question (Tr. 67). He also testified that he received a head injury in 1974, which left a scar on the left rear area of his head (Tr. 68, note that this is an external scar, not the "cortical scar" which was revealed by the electroencephalogram, and which is discussed further below). He further testified that he had been taking medication (Colbenemid and Benemid) daily for gout, for about five years (Tr. 75).

As to the day of the events in question, appellant testified that the last thing he remembered was being at the Eagle's Lodge at about 9:30 or 10:00 p.m. (Tr. 69,70,79). He recalled having roughly five drinks, blended whiskey mixed with water (Tr. 70). The next thing he remembered was waking in a jail cell (Tr. 71). Appellant could not recall any of the acts, as to the alleged robbery, or as to the high-speed chase with the police (Tr. 71,77).

He stated that he had never had a prior "problem" from taking his medication and drinking at the same time (Tr. 78), although he had in fact taken the drugs and drank simultaneously before (Tr. 79).

On redirect examination, appellant stated that he had never behaved before in the manner which he acted on the night in question (Tr. 81), even though he had been intoxicated before.

Appellant's next witness was Dr. Lincoln Clark, a physician and psychiatrist. Dr. Clark is a graduate of the Harvard Medical School (Tr. 83). He was a resident at the Massachusetts Medical Hospital in Boston for three years in internal medicine (Tr. 83). He then spent three years as a resident at the Massachusetts General Hospital in psychiatry (Tr. 83). He then studied neurology in Great Britain's Hospital Training Center while attending the University of London (Tr. 83). He then returned to Boston where he did research as a junior medical faculty member (Tr. 83). After serving two years as a military psychiatrist in Germany, he came to Utah, where he became a full-time member of the faculty of the College of Medicine at the University of Utah (Tr. 83,84). He is presently teaching at the College of Medicine, where he is a full professor of psychology and pharmacology (Tr. 84). His field of interest is the area of drug effects and human behavior (Tr. 84). He is also currently a consultant to the State of Wyoming as a forensic psychiatrist, and to the Utah State Training School of American Fork (Tr. 84). At this latter institution alone Dr. Clark takes care of some 900 psychiatric and behavior problems, and some 900 brain damage

rehabilitated individuals (Tr. 84). At the College of Medicine he teaches, among other things, the block of classes that deals with drug abuse and alcoholism in the pharmacology courses. This block is taught in all medical schools (Tr. 85). Finally, based on his professional integrity, Dr. Clark testified as a witness without compensation from appellant or appellant's counsel (Tr. 108,109).

Dr. Clark testified that it was his opinion that during the incident in question appellant

. . . was in a period of severe impairment of his usual mental faculties; and that there is a disorganized, chaotic quality to his behavior, if not a bizarre quality[,] evidenced throughout this whole story. And on [my] basic experience it is the description of a behavior of an individual who has impairment because of brain disfunction (sic) from some cause.

Now, in analyzing this case the biggest question is what was the nature of this cause, what made this episode of intoxication different from previous ones? Because the subject is not unused to the effects of alcohol. He knows generally what to expect from it. But this episode had a quality and led to behaviors that are totally out of character with this individual.

Now, given a situation like this, one would try to obtain what information one can in terms of what was different. Some of the

possibilities are that the amount of alcohol, assuming alcohol is a critical factor-- that his exposure was very much more massive or heavy than the experiences before. Now, the subject does not recall his drinking as being excessive-- more excessive than usual. He can recall drinking comparable amounts without this happening. The other possibility is he could have used a beverage that he was not familiar with or not as used to, or there was more toxic in this substance (sic).

For example, in this instance the subject told me that he recalls drinking tequila, which is not an ordinary beverage with him. And he would recall in Vietnam he would become severely intoxicated on tequila. Tequila is a beverage which has its more than its usual share of intoxicating substances other than alcohol. (sic)

And the other possibility is that someone added some other drug (Tr. 88,89, emphasis added.)

Dr. Clark testified specifically about the drug Benemid, and the special significance of the fact that appellant has taken the drug daily for over five years.

Benemid is a substance that is used for the treatment of gout. It exercises its action by blocking the kidneys, blocks the transport of acids and other compounds. In other words, if there was toxic materials entering his

nervous system, the significance of the Benemid would be its affect of the ability of his body to dispose of it.

Now, finally, the key point, I think here, is that this man had a head injury to the left side of his head in 1974. Because of the similarity of the bizarre quality of his behavior in this occasion, I was concerned that it might represent the occurrence of a form of epilepsy that can be adduced by alcohol and by alcohol withdrawal. And that is the reason for sending him for an electroencephalogram. The findings of that electroencephalogram were surprising and I think extremely relevant to this case. (Tr. 90, 91, emphasis added.)

A graph recording of the electroencephalogram was then introduced into evidence. Dr. Clark then proceeded to show the jury the "spikes" which represented electrical brain activity from appellant's temporal lobe (Tr. 91,92). Dr. Clark continued:

The significance of that is that the temporal lobe is the part of your brain that is involved in integrating the complex behaviors. It is also a critical factor in remembering what happens. And this is a man now in a normal state, not under the influence of drugs, who has a spike discharge, a temporal lobe focus that is firing at regular intervals. The presumption is that he has a cortical scar secondary to the brain injury in 1974.

Now, the condition of alcohol withdrawal, because alcohol is a repressive with blood activity, when it is being excreted, there is a release; and as you know, people withdrawing from alcohol can have seizures. Now, the location of this--he would not necessarily have a generalized convulsion, but have psychomotive seizures, that is associated with disorganized behavior often in a dream-like state in which the individual can act in a bizarre fashion but fragments of his normal behavior would be present such as walking and so forth. So in brief, my assumption is that this man has indeed a temporal lobe focus that he was not aware of that is probably related to the injury in '74. It's very common that this not show itself for some years after injury; because the scar forms gradually and usually several years will elapse before this becomes significant. And it may never, indeed, become frontally significant, had he not been exposed to the lasting effects of alcohol intoxication and whatever else may have been involved in that episode.
(Tr. 92,93, emphasis added.)

Dr. Clark and appellant's counsel then went through the following colloquy:

Q Now, do you have an opinion, Doctor, as to whether or not it would be consistent with his going through the acts that have been testified to by the officers and the Johnstons, and still because of the effects that you've

described to the jury--that the defendant would not in fact remember doing them?

A He would not remember, no.

Q And would there at least be a reasonable doubt that under the circumstances he could not form a specific intent to perform these crimes of robbery and aggravated robbery?

A Yes. I think there would be a reasonable doubt.

Q And would it be reasonable that he would not have a conscious objective or desire to engage in that particular conduct or any particular conduct or cause any particular result?

A Yes.

Q And was in your opinion the information that you have heard in court and what information the defendant gave you about his past history, et cetera, in arriving at the opinion--do you have an opinion as to whether or not you believe the witness was telling you the truth--or the defendant was telling you the truth when he gave you his background information?

A Yes. (Tr. 93.)

. . . .

Q Would it be consistent with your opinion that he could be taking medicine on

previous occasions, a large amount of alcohol at the same time on previous occasions, and still not go into one of these --

A Oh, yes.

Q What do you call them -- like a seizure from amnesia?

A Associated disorganized behavior.

Q And if he ordinarily drank Canadian Club or blended bourbon, but on this occasion he had that plus tequila, could they be reasonably one of the causes that would --

A Yes. It could be the total quantity involved as well as the possibility of additional substances of beverages of a toxic effect, yes.

Q And do you have an opinion as to whether or not the defendant is in any way feigning his responsibility by saying: "I don't remember anything from 9:00 or 9:30 on until the next morning?"

A Yes. I do have an opinion.

Q And what is that opinion?

A I believe he is telling the truth.

Q And you believe that under the circumstances he could not form the specific intent necessary for the conviction of the crime?

A That's correct. (Tr. 94, 95.)

On cross-examination, Dr. Clark maintained, as to appellant's testimony, that he remembered nothing of the incident,

I think the description of what occurred is . . . characteristic of a person who has had an organic brain syndrome, associated with epilepsy, of organic diffusion[,] to have this type of global memory loss. It's quite characteristic. (Tr. 97, emphasis added.)

On further cross-examination, Dr. Clark explained in more detail the nature of the epileptic seizure that appellant was subject to on the night in question.

[Epileptics] can become very disorganized on temporal lobe seizures. That's the expression, is chaotic [sic]. It's not a convulsion--is probably what you're thinking about [sic]. But there's any variance of epilepsy. And where some lesion is located, produces a certain type of abnormal behavior [sic]. It is evident in disruption of the normal ability to carry out organized behavior. But there may be fragments of automatic old behavior patterns, walking, driving a car, on making old familiar responses. But the important thing is the chaining together of these into organized, sensible patterns, which can be disruptive. (Tr. 101, emphasis added.)

On redirect examination, Dr. Clark was asked:

Q What is your opinion relative to the order: "Give me your toilet paper and matches?"

A I don't know. Except -- and I can only speculate -- this man spent three years in combat in Vietnam. He was a sergeant and a squad leader. One of the components of C-Rations that's given -- there's a kind of dessert and a can of fruit and cigarettes, matches, and toilet paper -- given in addition to their regular can of beans or whatever. And matches and toilet paper are very important, as is pointed out in Vietnam. You can't go to the local IGA to get your toilet paper. So it's perfectly possible, and it happens in temporal lobe seizures, that he had digressed to a dream-like state and was reacting, as he once did, as [if] he was in a totally different situation. So I think the main association I could draw from him and from this episode, was he was in Vietnam and then to the contents of the C-Ration, this little packet of toilet paper and matches. And he wanted toilet paper and matches. This is the only hypothesis I could develop about why this strange thinking would come into his mind. But it is known that under the influence of alcohol, and during the periods of

abnormal discharge of the temporal lobe, there can be old memories evoked. People will react in terms of these old memories. They'll go back to these other places in their memories. This happens when people are recovering from anesthesia. They'll feel they're back in some location and old memories will come back to them. So I think this man was functioning at a disorganized, primitive level.

Q Would that be consistent with reasonableness, when the Johnstons testified as if he was in full command, giving directions to Mrs. Johnston to go to the right and things such as that?

A Well, again, I think this man has been in a position of command, that giving orders would be habitual as an army sergeant. Also organizing other fragments of his character, with his habitual politeness, which came out -- about his presence in this otherwise chaotic picture. He was acting in this bizarre way and then at the same time politeness. This is a chaotic mixture of old behaviors and character traits, politeness, and having been an army sergeant, mixed in with this strange mixture of activities.

Q And would that also be your opinion relative to the fact that he appeared to the officers to be driving all right, walking all right,

even though his blood alcohol proved to be as great as it was?

A Yes. I think that this man's blood alcohol is in a level that is high, but in an individual who drinks regularly, he could have enough tolerance not to show the motor impairment, the slurred speech, the incoordination. That's why I think particularly there was an additional element going on, and I think that additional element is reflected in this tracing. (Indicating [the spikes on the electroencephalogram].) And it is quite consistent with the behavior given.

Under the statutes and case law cited above, it is clear that the jury's guilty verdict of the count of aggravated robbery is not supported by the evidence.

It is of some significance that the jury acquitted appellant of the count charging aggravated assault against Officer Norman Vuksinick. It is uncontradicted that appellant committed the acts therein charged. That is, he used his vehicle in a manner calculated to wreck the officer's car, while the officer was still in it. Such an act is certainly "such means or force likely to produce death or serious bodily injury[,]" as defined by § 76-5-103(b) Utah Code Annotated (1953).

In State v. Howell, 545 P.2d 1326 (Utah 1976), this court held that under this section of the aggravated robbery statute, only a general intent, or awareness of what is done, is sufficient to satisfy the mental element of the offense. It would seem that the jury's verdict, in acquitting appellant of aggravated assault, represents a finding that appellant in fact lacked the requisite mental capacity.

Nevertheless, the jury found that appellant had the mental capacity to act "intentionally" as to the alleged aggravated robbery. As was discussed above, the aggravated robbery statute, § 76-6-302 Utah Code Annotated (1953), requires a specific larcenous intent. (Also see State v. Howell, supra, as to the "specific intent" requirement where the statute requires an "intentional" act.)

For the jury to find appellant innocent of an offense that requires only a general intent, while convicting him of an offense that requires a specific intent, is clearly inconsistent. It serves to illustrate that the jury's verdict of guilty of aggravated robbery is in conflict with the evidence.

From the evidence of the State's case, the issue of appellant's capacity was raised, and the presumption of capacity was defeated. Indeed, it is arguable that the State's case itself raised a reasonable doubt whether appellant entertained an "intentional" state of mind.

The evidence produced for the defense, especially

the testimony of Dr. Clark, was conclusive that appellant lacked an "intentional" state of mind. It was also conclusive that appellant suffered from a "mental disease or defect" that resulted in his lacking "substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." He was clearly entitled to an acquittal under the defense provided by § 76-2-305.

Even if it is assumed that appellant's mental condition was one of "voluntary intoxication," the evidence still clearly shows a lack of the "intentional" mental element required. Therefore, under § 76-2-306, appellant would be similarly entitled to an acquittal.

Unquestionably, the evidence raised at least a reasonable doubt as to whether appellant had the required culpable mental element. It is of great significance that the prosecution in no way even attempted to prove, by its own evidence, that appellant had the "intentional" state of mind. The State's case was based on proof of the acts, and that alone is not sufficient.

The case of State v. Brown, 36 Utah 46, 102 P. 641, 24 L.R.A. (N.S.) 545 (1909), supra, seems controlling here.

Appellant presented substantial, indeed conclusive, evidence of lack of capacity, which the prosecution in no way rebutted. The prosecution did not even attempt to rebut it.

While the jury is indeed the trier of fact, it may

not disregard affirmative evidence. Nor may a jury base a guilty verdict on a mere presumption of sanity where there is affirmative evidence that the defendant lacked mental capacity. Therefore, appellant's conviction for aggravated robbery must be reversed.

POINT II

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY.

Appellant's proposed Instruction Number 3 stated:

Voluntary intoxication is an absolute defense to a crime charged where such intoxication negates the existence of the mental state required as an element of said crime.

Therefore, should you find that the defendant was intoxicated at the time the alleged acts occurred, as a result of the consumption of alcohol or drugs or both, you must determine whether his intoxication was of a degree which would negate the existence of the mental state required as an element of the offenses charged against the defendant.

In this case, the defendant has been charged with three offenses and all three offenses require that the defendant have acted intentionally or willfully. Such a mental state is defined at law as being where it is one's conscious objective or desire to engage in a particular conduct or cause a particular result. Should you find that the defendant was,

as a result of his intoxication, unable to form the necessary intent to engage in unlawful conduct or cause unlawful results, you must find him not guilty.

The trial court felt that it had given the instruction in substance in its Instruction Number 8, which stated:

Our law provides that 'no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.' This means that such a condition, if shown by the evidence to have existed in the defendant at the time when allegedly he committed the crime charged, is not of itself a defense. It may throw light on the occurrence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct.

However, when the existence of any particular motive, purpose or intent is a necessary element to constitute a particular kind or degree of crime the jury, in determining whether or not such motive, purpose or intent existed in the mind of the accused, must take into consideration the evidence offered to prove that the accused was intoxicated at the time when the crime allegedly was committed.

This fact requires an inquiry into the state of mind under which the

defendant committed the act charged, if he did commit it. In pursuing that inquiry, it is proper to consider whether he was intoxicated at the time of the alleged offense. The weight to be given the evidence on that question and the significance to attach to it, in relation to all the other evidence, are exclusively within your province.

The Court's instruction erroneously construes the voluntary intoxication statute, § 76-2-306 Utah Code Annotated (1953). It should be noted that the statute is found in Part 3 of Chapter 2 of the Criminal Code. The title of Chapter 2 is "PRINCIPLES OF CRIMINAL RESPONSIBILITY," and the title of Part 3 is "Defenses to Criminal Responsibility."

The statute states:

76-2-306. Voluntary intoxication.— Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense. (Emphasis added.)

Clearly, when the offense charged requires an "intentional" mental state, and intoxication negates the existence of such a state, then such intoxication is, of itself,

an absolute defense. See State v. Stenback, 78 Utah 350, 2 P.2d 1050, 79 A.L.R. 878 (1931), cited supra in Point I. This court therein stated that when one is so intoxicated that he does not entertain the requisite mental capacity for the offense charged, "he must necessarily be acquitted." (2 P.2d at 1054, emphasis added.)

The trial court's instruction specifically states that such intoxication is not a defense. It quotes, and is obviously based upon, an old statute dealing with voluntary intoxication (Section 7910, Penal Code, Comp. Laws Utah 1917). It charged the jury that appellant's intoxication "may throw light on the occurrence and aid you in determining what took place;" but that appellant cannot "use his own vice as a shelter against the normal, legal consequences of his conduct."

The instruction misstates the law, and misled the jury, to the prejudice of appellant's case. It merely states that intoxication is to be taken "into consideration" on whether or not a "motive, purpose or intent existed in the mind of the accused." It does not define "intent," nor did it refer to the definition of "intentional" to be found elsewhere in the court's instructions. It did not refer, even obliquely, to the fact that if appellant's intoxication was such that it negated an "intentional" state of mind, he must be acquitted.

The given instruction further invited the jury to speculate on the issue, by stating the significance to be

given the evidence in this regard was "exclusively within [the jury's] province."

Appellant's proposed Instruction Number 3 was therefore not given in substance by the trial court. Appellant's proposed instruction was based on the current Utah statutory provisions dealing with subject. It correctly states that voluntary intoxication may be an absolute defense, and it gave clear, concrete guidance as to how the question of intoxication relates to the issue of an "intentional" state of mind. The instruction should have been given. Since it was not, the jury may well have improperly applied an erroneous construction of the law to the facts, resulting in appellant's conviction for a crime that he did not have the capacity to commit.

Appellant offered three other instructions on the issue of the mental elements to offenses charged. Appellant's proposed Instruction Number 4 stated:

When a person commits an act without being conscious thereof, he does not thereby commit a crime even though such an act would constitute a crime if committed by a person when conscious. The state of unconsciousness to which I refer in this instruction is a condition experienced by a person normally sane, wherein there is no functioning of the conscious mind, and the person's acts are controlled by the subconscious mind. An example of the type of unconsciousness to which this instruction refers is where a person

performs acts while under involuntary intoxication produced by alcohol or drugs.

Involuntary intoxication is intoxication forced upon a person or intoxication incurred from one's not knowing of the nature of the substance ingested or knowing of its effect when combined with another substance.

Should you find that defendant was under involuntary intoxication to the extent that there was no functioning of the conscious mind at the time of the alleged criminal acts, you must find the defendant not guilty.

Proposed Instruction Number 6 stated:

For every crime with which the defendant is charged in this case, there must not only be unlawful acts, but also there must be unlawful intents, and the acts and intents must happen at the very same instance.

If you should find beyond a reasonable doubt that the alleged unlawful acts occurred, you still may not find the defendant guilty of any offenses charged until and unless you are convinced beyond a reasonable doubt the alleged unlawful intents also occurred, and at the very same instance with the alleged unlawful acts.

In determining the existence of the alleged unlawful intents, you may consider the combination of the effects of alcohol, drugs, and mental disorders on the defendant's mind at the time of the

alleged unlawful acts.

For example, even if you should find there initially was voluntary intoxication on the part of the defendant, if you have reasonable doubt that the effects of alcohol, drugs, mental disorders or any combination thereof caused the absence of the necessary unlawful intents, as elsewhere in these instructions were specifically discussed, then you must find the defendant not guilty.

Proposed Instruction Number 7 stated:

The theory of the defense in this case is that although the defendant did in fact perform the unlawful acts complained of, he did not possess the necessary unlawful intents for his conscious objectives or desires to engage in the particular conduct or cause the particular results.

In support of this theory, the defendant contends a combination of the influence of alcohol, drugs and mental disorders prevented the existence of the necessary unlawful intents or even memories of those acts.

The defendant has no burden of proof whatsoever and surely does not have to convince you beyond a reasonable doubt as to the absence of such unlawful intents.

On the contrary, the State has the burden of proof to convince you beyond a reasonable doubt as to the presence of such unlawful intents.

Therefore, if you have a reasonable

doubt as to the presence or absence of the necessary unlawful intents at the very same instance as the necessary unlawful acts, it is your duty to find the defendant not guilty.

The trial court declined to give these instructions, or any part of them. Rather, the court gave two instructions on the issue of the requisite mental state. The court's Instruction Number 6 stated:

No person is guilty of an offense unless his conduct is prohibited by law and he acts intentionally or knowingly with respect to each element of the offense as defined for you by these instructions. It does not require a specific intent to violate the law but merely an intent to engage in the acts or conduct that constitute the elements of the offense.

Therefore, if you find that the mental condition of the defendant at the times of the alleged offenses was such that he did not have the intent as that term has been defined for you in these instructions to perform the acts or conduct required for the commission of the offense charged, or if you entertain a reasonable doubt thereof, then you should find the defendant not guilty of the crimes charged.

Instruction Number 7 stated:

You are instructed that under the

Utah law a person engages in conduct intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscience objective or desire to engage in the conduct or cause the result.

The given instructions are somewhat inconsistent and misleading. Number 6 stated that "a specific intent to violate the law" is not required, and of course this is true. But the instruction then states that a mere "intent to engage in the acts or conduct" is sufficient for a conviction. This is not the case for an offense that requires an "intentional" state of mind, and obviously this part of Instruction Number 6 conflicts with Instruction Number 7.

In State v. Green, 78 Utah 580, 6 P.2d 177 (1931), 86 Utah 192, 40 P.2d 961 (1935), the court, quoting from Jensen v. Utah Ry. Co., 72 Utah 360, 270 P. 349 (1927), stated:

. . . that the giving of inconsistent instructions is error and sufficient ground for a reversal of the judgment, because, after verdict, it cannot be told which instruction was followed by the jury, or what influence the erroneous instruction had on their deliberations. . . . (6 P.2d at 183-4.)

While appellant concedes that Instruction Number 7 correctly gives the statutory definition of "intentional," it was nevertheless insufficient to cure the error in Instruction

Number 6. Further, while it correctly states the abstract definition, it gave the jury no guidance in applying that definition to the facts of the case.

In State v. Dewey, 41 Utah 538, 127 P. 275 (1912), cited supra in Point I, this court reversed a conviction of first degree murder. The court found that the evidence supported the jury's verdict, and that the instructions given were correct abstract statements of the law. Nevertheless, the court reversed, holding such instructions were insufficient when the defendant had requested instructions relating the specific facts of the case to the law. The court noted that the given instruction in question was well stated in the abstract,

But the duty of the court is not always discharged by merely giving the jury an abstract and lexical definition of a thing, as was done here. Litigants are entitled to have the court declare the law applicable to the particular facts of the case; to charge concretely, not abstractly. A charge which applies the law to the facts of the case, and states to the jury the crucial question or questions involved, which they, upon the evidence, must answer, is much more helpful to them, and conduces far more to a just administration of the law, than mere abstract propositions of law, dissertations on sound theories, or lexical definitions of things, concerning the application of which the jury are left in doubt or allowed to make

as they might think proper. . . .
The general and abstract charge as
here given applies as well to dif-
ferent facts of a hundred or more
cases as to the one in hand. We
think the defendant was entitled
to a charge substantially as re-
quested, and that it was not given.
(127 P. at 277.)

In Jensen v. Utah Ry. Co., 72 Utah 366, 270 P. 349
(1927), then Justice Straup observed:

As a general rule a trial court
should not leave the jury to apply
mere general principles of law to
a case, as here was done by the
defendant's requests. The court
should give the jury what the law
is as applied to the facts either
stated or assumed, and if so found
by the jury. The rule is well
settled that instructing a jury as
a mere abstract or general state-
ment as to the law should be avoided,
and that all instructions should be
applicable to evidence on either
one or the other of the respective
theories of the parties. Instruc-
tions which are not so applicable,
though abstractly they may be cor-
rect, are not helpful to the jury,
are apt to be misleading and to be
improperly applied. That a proposi-
tion may be correct in a sense, and
yet be inapplicable to the evidence
or to the issue, is readily per-
ceived. (270 P. at 357.)

Appellant's proposed instructions 4, 6, and 7 cor-
rectly stated the law, and specifically applied it to the facts
of the case. Not giving them was prejudicial to appellant, and

advantageous to the prosecution. The jury was left to mis-apply the law according to their whims and emotions, and what they thought was proper. Such instructions are not conducive "to a just administration of the law," and indeed have resulted in a miscarriage of justice in the case at bar. The erroneous instructions therefore require that appellant's conviction be reversed.

POINT III

THE JURY'S VERDICT OF GUILTY OF FAILURE
TO STOP VEHICLE AT COMMAND OF POLICE
OFFICER IS NOT SUPPORTED BY THE EVIDENCE.

The statute under which appellant was charged states:

41-6-169.10. Failure to stop
vehicle at command of police
officer—Penalties.—Stopping
vehicle at command of police
officer.—Any driver who, having
received a visual or audible
signal from a police officer to
bring his vehicle to a stop,
operates his vehicle in willful
or wanton disregard of such
signal so as to interfere with
or endanger the operation of the
police vehicle, or any other
vehicle or person, or who in-
creases his speed and attempts
to flee or elude the police shall
upon conviction
(U.C.A. 1953, emphasis added.)

Since the definition of "willful" is precisely the same as the definition of "intentional" (see 76-2-103(1), U.C.A. (1953) and Point I of this brief), it necessarily follows that

appellant could not be convicted of this offense, since he lacked the requisite mental element prescribed by the legislature.

Further, while the term "wanton" is not defined in the Utah Criminal Code, Black's Law Dictionary (Revised Fourth Edition) notes that the state of mind connoted by "wantonness" requires a "[c]onscious doing of some act . . ." (p. 1753-4).

Appellant concedes that, in some cases, "wanton" may be defined as " . . . characterized by extreme recklessness, . . ." (Black's Law Dictionary, supra, p. 1753), but in this case such a definition should not be applied. It is difficult to see how one could "recklessly" fail to stop upon a clear command of a police officer. The failure to stop, in order to be an offense, must be a conscious, intentional failure.

Where the person who fails to so stop lacks the capacity to form a conscious, intentional state of mind, then his act is not an offense under the statute.

POINT IV

THE REVOCATION OF APPELLANT'S PROBATION OFFENDS THE FOURTH AND FOURTEENTH AMEND- MENTS TO THE CONSTITUTION.

Appellant's probation was revoked on the grounds that he "refused to take a breathalyzer test, and was involved in violent behavior." (Judgment Roll and Index, p. 93; Hearing Transcript - 64.)

The original judgment, after appellant's jury trial, placed him on probation subject to certain terms and conditions, among them the following:

4. That the said defendant submit to a breathalyzer test at the discretion of the Adult Probation and Parole Department within reasonable circumstances and laws; . . . (Judgment Roll and Index, p. 85.)

Appellant executed an agreement on February 20, 1979, which states, in pertinent part, that he agreed

6. To violate no penal law of any local, state, or federal government and to be of good behavior.

. . .

12. To abide by the following special conditions, . . . (4) voluntarily submit to a breathalyzer exam upon request of AP&P agent . . . (Judgment Roll and Index, p. 87.)

Unquestionably, appellant, as a probationer, did not enjoy the same expectation of privacy as would a normal citizen. Nevertheless, the Fourth Amendment's proscriptions against unreasonable searches still have application to the case of a probationer (or parolee), and a probationer has standing to raise Fourth Amendment rights (United States ex rel. Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975); State v.

Allison, 173 N.W.2d 533 (Iowa 1970) cert. denied, 398 U.S. 938 (1971); Latta v. Fitzhanis, 521 F.2d 246 (9th Cir.) cert. denied 423 U.S. 897 (1975); United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir. 1975); State v. Schlosser, 202 N.W.2d 136 (N.D. 1972)).

The terms of a probation agreement must meet the Fourth Amendment's standards of reasonableness (United States v. Consuelo-Gonzales, supra).

It is generally recognized that a probation officer may search a probationer's home on less than probable cause. Generally, it is sufficient that the probation officer have a good-faith reasonable belief to suspect that probationer has violated the terms of his probation. However, the Fourth Amendment forbids searches conducted by a probation officer that are arbitrary and abusive. Among the searches that are arbitrary and abusive are those conducted at unreasonable hours (United States ex rel. Randazzo v. Follete, 282 F. Supp. 10 (S.D.N.Y. 1968); People v. Hernandez, 229 C.A.2d 143, 40 Cal. Rptr. 100 (1964) cert. denied 381 U.S. 953 (1965)).

The trial court recognized the fact that appellant could only be asked to submit to a breathalyzer test at a reasonable time (see Hr. Tr. 20).

Apparently, the trial court based its finding that it was reasonable to request appellant to submit to a breathalyzer test on the facts that

the probation officer had a report that [appellant] had been violent, and secondly that he had been drinking, that on his approaching him [i.e. knocking on appellant's bedroom door at 1:00 a.m.] at first he got no response and then the response he got was in the nature of violence, in that he opened the door and suddenly grabbed [the probation officer] and ripped his shirt.
[Hr. Tr. 65.]

The "report" that appellant had been violent and had been drinking emanated solely from Ms. Begay. According to Officer Larry Penrod, Ms. Begay stated that she "lived with her boyfriend," appellant, that he had "grabbed her hair," "beat her," "threw her outside," and "threatened her with a gun or something." (Hr. Tr. 29.)

Ms. Begay was not present at the revocation hearing. On the night in question, she had been drinking, and, in the opinion of probation officer Evan Reid, she "could have been" intoxicated (Hr. Tr. 23).

Appellant testified that Ms. Begay had spent only the previous night at his residence, and that she had slept on the couch in the living room (Hr. Tr. 54,55). After he had retired for the night, he was awakened by Ms. Begay, who was hitting him, while yelling and screaming (Hr. Tr. 56). Appellant further stated:

And I jumped out of bed. And the door was partly opened and I took and pushed her out there on the living room couch. I told her to 'sleep in your bed and tomorrow morning you can take you [sic] stuff out of here, because I'm not going to put up with something like that.' And I went back to my bedroom. But before I could close the door, she hit it full force and knocked the door into my head. And I still -- I was kind of sleepy. That made me a little bit out of hand with myself and so I grabbed her by the arm and escorted her between the partition between the dining room and living room and on into the kitchen. She might have tripped there in the kitchen. But I opened the door and deposited her out there on the porch and stated to her: 'Get sober before you come back in.'

. . .

I closed the kitchen door and walked back into the house into my bedroom. I closed my door and locked it, because I didn't want her barging in and hitting me anymore.
(Hr. Tr. 57.)

The testimony of appellant on this matter is entirely uncontradicted. It was also uncontradicted that when the probation officer [Mr. Reid] requested appellant to submit to a breathalyzer test, he had absolutely no information or knowledge of his own perception that appellant had consumed any alcoholic beverage (Hr. Tr. 21).

Under these facts, it is difficult to see how it is

reasonable to request appellant to submit to a breathalyzer test. The hour was approximately 1:00 a.m. Appellant had to be at work early in the morning. (The trial court conceded "At least it's true, [the appellant has] a good work record." (Hr. Tr. 67).) The probation officer had absolutely no personal knowledge that appellant had been drinking. While beer cans were seen in the living room area, where Ms. Begay had been staying, none were seen in appellant's room. Further, Ms. Begay was apparently intoxicated, and appellant's roommate, Mr. Diamanti, was in such a "deep sleep" (i.e. passed out) that he could not be awakened by the probation officer's shaking him (Hr. Tr. 21). It is at once apparent that the empty beer cans seen were, in all probability, consumed solely by Mr. Diamanti and Ms. Begay.

As to the "violence" when appellant ripped the probation officer's shirt, this confrontation was "extremely short," in the probation officer's own words (Hr. Tr. 8). It must be remembered that it was roughly 1:00 a.m., and that appellant had already been rudely awakened, and indeed technically battered, that night. To say that this incident violated the term of the probation agreement requiring appellant "[t]o violate no penal law . . . and to be of good behavior" (Judgment Roll and Index, p. 87) would be absurdly over-technical. Nor can it be said that such conduct, of itself, would give rise to a reasonable belief that appellant had been

drinking.

Nor can the presence of beer cans in the living room be a basis for a reasonable belief that appellant had been drinking them. As discussed above, there are more obvious inferences as to who was drinking the beer.

Moreover, all of the "evidence" of appellant's alleged probation violation was the result of an illegal entry and search, and therefore could not serve as a basis to revoke appellant's parole.

It is uncontradicted that no search warrant was involved, nor was the entry and search made incident to an arrest. The trial court apparently validated the entry and search on the ground of consent by a third person, Ms. Begay (see Hr. Tr. 11). The court stated:

Well, of course, it's the opinion of the Court that Ms. Begay would have some proprietary interest in that residence. There's enough of a showing she lived there. She made that representation to the officers. She was the one that opened the door. Her clothes were in the defendant's room, obviously, which he admits he threw out to her; and that she was living there. So it's the Court's opinion she would have a proprietary interest there. Whether she's paying the rent or so on, of course, it is immaterial to the Court. So therefore the motion, of course, to dismiss is denied. (Hr. Tr. 62.)

Appellant contends that in this respect the trial court erred. There was virtually no showing that Ms. Begay lived in appellant's home.

As to representations made to the officers, Probation Officer Evan Reid and the prosecuting attorney engaged in the following colloquy:

Q How did you get entrance into the home?

A Ms. Lucille Begay stated she had lived there, that Mr. Potter had asked her to reside with him. And she opened the door and let us into the residence. (Hr. Tr. 5.)

Nowhere is there an affirmative statement that Ms. Begay was presently living in appellant's home. The phrase "had lived there" connotes a condition in the past, which had since terminated. The phrase, "Mr. Potter had asked her to reside with him" obviously does not mean that in fact she was presently "living" in his home.

It is impossible to see how Ms. Begay's act of opening the door can be construed as showing "a sufficient proprietary interest" to consent to a search.

Nor is the fact that appellant allowed Ms. Begay to keep her clothes in his dresser persuasive of the fact that she was living in the home. It is not unusual for a guest to

put his or her clothes in an appropriate closet or dresser for even a one-night stay in a hotel.

Indeed, the fact that all of Ms. Begay's clothing was to be found in only one drawer is extremely corroborative of the fact that she was merely a guest in the home for one or two nights.

There is the further fact that appellant had locked his door to keep Ms. Begay out. It seems unlikely that one who is living in a home, and allegedly sleeping with one of its occupants, would be locked out of the bedroom.

Finally, there is the fact that Ms. Begay could not even be located anywhere in the area for the hearing. This is highly inconsistent with her "living" in appellant's home.

In United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), the United States Supreme Court stated:

. . . the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.
(415 U.S. at 170, emphasis added.)

As to what constitutes "common authority, the Court noted:

Common authority is, of course,

not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. (415 U.S. at 71, n. 7, emphasis added.)

In United States v. Heisman, 503 F.2d 1284 (8th Cir. 1974) it was held that a co-tenant who had a legal right to enter a portion of premises used by a defendant, but not a factual "possessor right," could not consent to a search there. In United States v. Harris, 534 F.2d 95 (7th Cir. 1976) it was held that an occasional visitor could not validly consent to a search.

Under the logic of the foregoing, it is clear that the facts of the case at bar simply fail to disclose a sufficient "common authority" over appellant's home to enable Ms. Begay to consent to a search thereof.

The facts of the instant case disclose an additional element usually not present in "consent to search" cases.

Here the consent was given out of a deliberate, hostile motive to appellant. While this author could find no case which specifically based a holding on this point, the case of United States ex rel. Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970) contained the following interesting dicta:

The right of one party to consent to a search which affects the interest of another derives from the consenting party's equal right of possession or control of the same premises or property as the other. Such cases fall into three classes. In one class a party having a joint right of control consents to a search directed only at himself and not at the other, but it discloses evidence harmful to the other. A second class consists of those cases in which one having a joint right of control consents to a search which he knows is directed at the other although he does so in the independent exercise of his right of joint control. The justification of the search in both these classes of cases results from the impossibility of severing the joint right of control and the undesirability of permitting the exercise of the right of one to be limited by the right of the other.

A new and intruding element which has not been isolated heretofore may be said to distinguish a third class of cases. This element is the consenting party's agreement to the search out of motives of hostility to the other, made with the intent to harm him by an antagonistic consent. Where it is possible to identify this element

a serious question would arise whether the right to consent is not spent when it reaches this point of deliberate antagonistic intrusion on the rights of the other who has an equal right to possession or control. This would be especially true where a wife intentionally acts against her husband's interest, since she would not be acting in harmony with the marital relationship from which her joint right of ownership or control is derived, but in antagonism to it. (431 F.2d at 842-43.)

Of course, here we are dealing with the alleged consent of one who is only an occasional visitor. Her intentional hostile act toward appellant is obviously antagonistic to any kind of relationship by which she might arguably be said to have a right of "common authority," so that on this additional ground, her consent should be deemed invalid.

In any case where there is a search without a warrant, the government bears the burden of showing that the search was reasonable under the Fourth Amendment (United States v. Canada, 527 F.2d 1374 (9th Cir. 1975); United States v. Heisman, 503 F.2d 1284 (8th Cir. 1974); United States ex rel. Cabey v. Mazurkiewicz, 431 F.2d 839 (3rd Cir. 1970)). Here, the state has failed to do so.

Therefore under the total facts of this case, the revocation of appellant's probation constitutes a denial of his Fourth Amendment right to be secure from unreasonable

searches, which this court must no allow.

POINT V

THE REVOCATION OF APPELLANT'S PROBATION IS NOT SUPPORTED BY THE EVIDENCE.

As discussed above in Point IV, the evidence presented at the revocation hearing showed rather clearly that the probation officer's request that appellant submit to a breathalyzer test was unreasonable, both as to the circumstances of the request, and the hour at which the request came. Evidence of a refusal to submit to an unreasonable request to take a breathalyzer test is obviously not sufficient to revoke a probation.

As to evidence that appellant had engaged in "violent behavior" sufficient to revoke his probation, it is to be noted that all "evidence" regarding the alleged assault on Ms. Begay was purely uncorroborated, unsubstantiated hearsay. The source of the hearsay, Ms. Begay herself, was, at the time she uttered the statements, intoxicated, and motivated by extreme antagonism towards appellant. Those uncorroborated hearsay statements are patently and inherently unreliable, and cannot be used as a basis to commit appellant to the penitentiary.

While there is no doubt good evidence that appellant indeed tore the probation officer's shirt, the context in which this happened must be remembered. The confrontation was "extremely short" (Hr. Tr. 8). It occurred at 1:00 a.m., at

the door to appellant's bedroom (Hr. Tr. 6). Appellant had that evening already been subjected to a rude awakening and technical battery at the hands of Ms. Begay. He was again roused from sleep, in his own home, in the middle of the night, by a persistent knocking on his bedroom door. Upon opening the door, out of the total darkness of his bedroom, he was greeted by two flashlight beams shining towards him (Hr. Tr. 43).

Appellant was, in the words of Officer Hansen, "quite upset" (Hr. Tr. 43). Under the totality of circumstances, his reaction was quite normal. It is of great significance that although two probation officers and at least three peace officers were present when the confrontation occurred, there was not the slightest suggestion that appellant had committed a crime, even a misdemeanor, in their presence. If so, appellant could have been expediently arrested on the spot.

In fact, appellant's alleged "violent behavior" was, on all counts, justified and neither a violation of any penal law, nor an episode of "bad behavior" sufficient to revoke his probation. In short, the evidence produced at the revocation hearing cannot support the revocation of his probation.

CONCLUSION

Clearly, on the morning of February 22, 1978, appellant engaged in behavior that was dangerously antisocial. He

might well have been guilty of exhibition of a deadly weapon (§ 76-10-506, U.C.A. (1953)), public intoxication (§ 76-10-506, U.C.A. (1953)), Driving Under the Influence (41-6-44, U.C.A. (1953)), as these misdemeanor offenses do not require as an element the highly culpable "intentional" or "willful" states of mind.

It is equally clear that appellant could not, and did not, entertain a specific intent to commit a robbery.

While it is unquestioned the State has a vital interest in protecting the public, it may not do so by branding one a felon, when in fact no felony was committed.

Nor may the State imprison a man (even a properly convicted felon, which appellant is not) on the basis of alleged probation violations, when there is no reliable evidence that in fact the terms and conditions of the probation were violated.

There are ample "remedies" available to the State to protect society, and appellant, from the type of incident which occurred on February 22, 1978. But charging, and obtaining a conviction for a crime which in fact could not and did not occur is not among them. To again quote State v. Brown, supra,

. . . to sentence a man to the penitentiary for a crime that he did not have the mental capacity to commit would be intolerable.
(102 P. at 646, emphasis added.)

This court should reverse and remand for an entry of acquittal to the counts charging aggravated robbery and failure to stop on command of a police officer. It should as well reverse the trial court's revocation of appellant's probation.

DATED this 15th day of October, 1979.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were served on the Utah Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 16th day of October, 1979.

