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IN THE SUPREME COURT OF THE STATE OF UTAH

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| THE STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | |
| ALFRED WILLIAM JOHNSON, | : | Case No. 16668 |
| Defendant-Appellant. | : | |

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## BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of Burglary in the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding.

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FILED
OCT 24 1980
Clerk, Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | |
| ALFRED WILLIAM JOHNSON, | : | Case No. 16668 |
| Defendant-Appellant. | : | |

## BRIEF OF APPELLANT

## STATEMENT OF THE NATURE OF THE CASE

The appellant, Alfred William Johnson, appeals from a conviction and judgment of Burglary, a felony of the second degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding.

## DISPOSITION IN LOWER COURT

The appellant, Alfred William Johnson, was charged with Burglary, a felony of the second degree in violation of Title 76, Chapter 6, Section 202, Utah Code Annotated, 1953 as amended, he was convicted as charged in a jury trial and was sentenced to incarceration at the Utah State Prison for the indeterminate term as provided by law.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the conviction and judgment rendered below and to have the case remanded to the Third Judicial

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District Court for a new trial.

## STATEMENT OF FACTS

At trial the victim of the offense, Mr. Ball, testified that on returning one afternoon to his apartment located at Snowbird Ski Resort he found the appellant inside (T.11). The appellant, according to Mr. Ball, was standing or crouching between the ouside glass doors and the bed (T. 11-12). This witness also testified that to the best of his recollection the apartment had been locked and secured when he left several hours before and that an outside screen, now torn or cut, previously had been intact (T. 12,17,24). Mr. Ball stated that his apartment was one of a number located in a section reserved for employees of Snowbird and that all of the other apartments were vacant, open and obviously undergoing remodeling (T.20-30). After confronting the appellant, who expressed surprise and stated he was looking for a way out of the building, Mr. Ball suggested that they contact the manager of the apartment complex (T. 12-14, 25-26). The appellant, still inquiring as to the way out, left the premises and, according to the witness, "jogged" to a car and drove away. (T. 14,27-28). Mr. Ball testified that nothing was taken from his apartment but some of his personal effects had been disturbed (T. 11,18-19).

The state then called the arresting officer who testified on direct examination that he stopped the appellant a matter of minutes after Mr. Ball had seen the appellant drive away (T. 36-



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On cross-examination defense counsel attempted to elicit a statement from the officer made by the appellant at the time of the stop (T. 38,30). The trial judge refused to allow the officer to testify about the content of this statement on the basis that it was hearsay, and that it was self serving and did not qualify as an exception to the hearsay rule (T. 29,41-45). The judge indicated, however, that he would allow the officer to answer if the questions were asked by the prosecutor (T. 43,45). The court also stated that if the defense wanted the statement to come in then the appellant would have to forego his constitutional privilege not to testify (T. 41,45). Defense counsel then made a timely proffer of the expected testimony, stipulating that the statements were voluntary and constituted an admission by the appellant to criminal activity (T. 41,45,49-50). Defense counsel further indicated that the appellant who had several prior burglary convictions which the court refused to exclude, could take the stand if the corroborative testimony of the arresting officer was allowed (T. 49-51). At the close of the trial, defense counsel requested that an instruction of the lesser included offense of Criminal Trespass be given to the jury. This request was denied and an exception was taken (T.75).



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## ARGUMENT

## POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY EXCLUDING THE APPELLANT'S HEARSAY STATEMENTS WHICH QUALIFIED UNDER AT LEAST FIVE OF THE EXCEPTIONS TO THE HEARSAY RULE.

During the cross examination of the arresting police officer, defense counsel attempted to elicit a statement that the appellant had made at the time of his arrest (T.39). The substance of the statement that was attempted to be elicited was an admission by the appellant that he had been in the room at Snowbird, but lacked the requisite intent to commit the burglar[illegible] with which he was charged (T.41). That trial court ruled that the statement was hearsay and did not fit within any of the exceptions to Rule 63 of the Utah Rules of Evidence (T.45). The primary basis stated by the court for the ruling was that the statement was self-serving (T.45).

The trial court was correct in ruling that the statement was hearsay, as described in Rule 63 of the Utah Rules of Evidence This is because it was a statement made by a person other than the witness and it was being offered to prove the truth of the matter stated. However, the trial court committed error by excluding the statement as it fit within at least five of the exceptions to the hearsay rule. These five exceptions include: Rule 63 (12)(a), statement of Physical or Mental Condition of the Declarant; Rule 63(6) Confessions and Admissions; Rule 63(7) Admissions by Parties Rule 63(10) Declarations Against Interest; and Rule 63(4)(b) Contem[illegible]

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aneous Statements.

## POINT A

THE TRIAL COURT COMMITTED ERROR BY EXCLUDING THE APPELLANT'S STATEMENT AS IT CONSTITUTED A STATEMENT OF THE MENTAL CONDITION OF THE DECLARANT.

The appellant was initially seen by Officer Church proceeding westbound on 9400 South Street in Salt Lake County, a street leading directly to the Snowbird Resort (T. 38). The defendant was then stopped and subsequently made an admission that he was at Snowbird but the court would not allow the officer to testify about what the appellant said his reason was for being at the resort.

Such statements were admissible as a statement of a mental condition of the declarant as described in Rule 63(12)(a) of the Utah Rules of Evidence. That exception to the hearsay rule states,

> Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, incldiung statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant.

In State v. Simmons, 573 P.2d 341 (Utah, 1977) this court was confronted with the same issue as is raised here. In that case the defendant took a car from an automobile dealer with the dealer's permission; however, when he did not return the car



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that night he was charged with auto theft. Several hours after receiving the car the defendant had made a statement to a friend that he had the car for a test drive. The trial court sustained the prosecutor's hearsay objection to this evidence and this court held that the trial court committed error as the statement was admissible as a statement of the declarant's state of mind. The court found that the error was not prejudicial. The other Utah Case which specifically addressed the use of Rule 63(12)(a) of the Utah Rules of Evidence is State v. Wauneka, 560 P.2d 1377 (Utah 1977). In that case the court held that it was error to admit statements of the victim of a homicide expressing her fear of the defendant. The court ruled that the statements lacked probative value as they were made several days prior to the homicide and they did not tend to prove a fact in issue.

In the case at bar the statement was made minutes after the appellant had been seen in Mr. Ball's room at the Snowbird resort. Such a statement was made even closer in time to the event in question than those held to be error to exclude in State v. Simmons, supra. The statement more accurately reflects the state of mind of the declarant than the statement in Simmons because in Simmons the declarant's intent to keep the car could change, thus resulting in the theft, where here the important question is the intent while the appellant was in the room. Likewise with res to time and relevancy, the appellant's statement is clearly distinguishable from the statements held to be inadmissible in State v. Wauneka, supra.

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With respect to the nature of the statement, the proffer was that the appellant had stated that he was not in the room to commit a theft (T. 45,49). Clearly this is a description of his state of mind, intent, plan, motive or design as specified in Rule 63(12)(6) of the Utah Rules of Evidence. The charge of Burglary as described in the Information in this case required the state to prove that the appellant had the intent to commit a theft. Consequently, the substance of the statement was probative of a material fact in issue, thus distinguishing this case from the statement admitted in the Wauneka case.

The trial court ruled that the appellant's statement was inadmissible because it was self-serving. Although that may be true to some extent, that is not the test for admissibility under Rule 63(12)(a) of the Utah Rules of Evidence. The only question under that exception to the hearsay rule is whether the statement was made in bad faith. The trial court did not make any such finding, but instead equated defense counsel's attempt to elicit the statement to being self-serving (T.45).

There was no showing that the statement in question was made in bad faith. It would be probative of the intent element of the offense of burglary — the only element at issue in the trial. Finally, it was an expression of the appellant's mental condition. Consequently, it was admissible as a statement of the declarant's mental condition, an exception to the hearsay rule and the trial court committed error in excluding it.



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POINT B

THE TRIAL COURT COMMITTED ERROR BY EXCLUDING THE APPELLANT'S HEARSAY STATEMENT AS IT CONSTITUTED A CONFESSION OR ADMISSION.

The circumstances surrounding the making of the statement in question previously have been described and need not be repeated here. In this statement the appellant admitted that he was in a place where he should not have been. Such an act could have constituted a Criminal Trespass in violation of Utah Code Ann. §76- (1953 as amended), which is a lesser and included offense to Burglary which was charged in the Information (See Point II, infra.

Such a hearsay statement is admissible as an admission or confession, which is an exception to the hearsay rule. This exception is described in Rule 63(6) of the Utah Rules of Evidence:

> In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the statement was made knowingly and voluntarily by the accused and the circumstances under which the statement was made were not violative of the constitutional rights of the accused;

The type of declarations covered by this exception to the hearsay rule are readily observable from a brief overview of the interpretive case law.

In State in re KDS., 578 P.2d 9 (Utah, 1978), the juvenile defendant was charged with Driving Under the Influence after he was involved in an automobile accident with a friend. He stated to the arresting police officer that he was driving the automobile but he was not under the influence of alcohol. That statement was held to be an admission even though it was partially exculpatory

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Similarly, in State v. Burr, 579 P2d 331 (Utah, 1978), the defendant went to a Salt Lake City Police Officer and told him that he would be willing to testify against others involved in the Second Degree Felony Thefts with which he was charged if the state would drop these charges to Class A Misdemeanors. This court held that such a statement constituted an admission as described in Rule 63(6) of the Utah Rules of Evidence.

As can be seen, the statements admissible under Rule 63(6) of the Utah Rules of Evidence need not be full admissions or confession to the offense charged, but may be partially exculpatory. The statement in question here is much more exculpatory than that given in State v. Burr, supra. This is because in Burr the defendant told police he was willing to make a deal, here the appellant admitted to his participation in a criminal offense. The statement here is identical in nature to the statement given in State in re K.D.S., supra. The statement in that case involved an admission by the defendant to being the driver of a car involved in an automobile accident, but he denied being intoxicated. Here the appellant admitted to being present in a place where he should not have been, but denied having the intent to commit the crime of theft while in the room.

With this in mind, the question of the meaning of the phrase "as against the accused" must be addressed. The trial court in this case ruled that the phrase meant that the defendant could not introduce the evidence of an admission or confession, but the state



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could do so if it desired (T. 40-45). Such a ruling is inconsistent with policies underlying the exceptions to the hearsay rule. It is generally recognized that hearsay evidence is inadmissible because it lacks the factors which have traditionally been found to insure reliability found in other types of evidence. McCormick on Evidence 2nd Edition (1977) §245. Certain types of hearsay evidence are admissible because these declarations are made under circumstances or because their contents reflect strong indicia of reliability. Binder, The Hearsay Handbook, (1975) at p.35. Consequently, it is the indicia of reliability, not the nature of the party that can introduce the evidence, that is reflcted in the phrase "as against the accused" in Rule 63(6) of the Utah Rules of Evidence. The phrase "as against the accused" must be interpreted to mean that the statement would subject the declarant to some form of criminal responsibility, "because experience teaches that it is unlikely that he would so declare unless it were true" State v. Sanders, 27 Utah 2d 354, 496 P.2d 270 (1972). Another reason for adopting this interpretation is that to give Rule 63(6) of the Utah Rules of Evidence the interpretation that the trial court thought appropriate — only the state could introduce the evidence — would require that Rule 63(7), of the Utah Rules of Evidence which begins "As against himself a statement by a person who is a party to the action...", could not be applied by a party opponent to introduce evidence against the opposing party. Such an interpretation of Rule 63(7) of the Utah Rules of

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Evidence is not reflected in the case law interpreting that rule. State in re KDS, supra, State v. Burr, supra.

As previously described the statement in question here was at least as inculpatory as that in State in re KDS, supra. This meets the first criterion of admissibility, that the statement be "against the accused". As for the other requirements there is no question that the statement was relative to the offense charged and counsel stipulated that the declaration was given knowingly and voluntarily under circumstances not violative of the appellant's constitutional rights (T.49). Consequently, the hearsay statement was admissible as an admission or confession which is exception to the hearsay rule as described in Rule 63(6) of the Utah Rules of Evidence and the court committed error by excluding it.

POINT C

THE TRIAL COURT COMMITTED ERROR BY EXCLUDING THE APPELLANT'S HEARSAY STATEMENT AS IT CONSTITUTED AN ADMISSION BY A PARTY.

The statement by the appellant that he was in Mr. Ball's room but did not intend to commit a criminal offense was admissible as an admission by a party. This exception tc the hearsay rule is described in Rule 63(7) of the Utah Rules of Evidence:

> As against himself a statement by a person who is a party to the action in his individual or a representative capacity and, if the latter, who was acting in such representative capactiy in making the statement.

The hearsay declarations which this exception covers are essentially



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the same as those covered by Rule 63(6). In fact this court held that both Rules 63(6) and 63(7) of the Utah Rules of Evidence were applicable in State v. Burr, supra, and in State in re KDS, supra. Those cases were both described in Point B, supra, and need not be discussed further here. In Watters v. Querry, 588 P.2d 702 (Utah, 1978), the court held that it was improper to preclude the plaintiff in a civil case from eliciting from a witness that one of the co-defendant's stated she was distressed because she felt like she was the cause of the accident which was eventually the subject of that civil law suit.

All of these statements express either an admission of liability in a civil case or are inculpatory in a criminal case. As has previously been discussed, the statements made by the appellant in this case admit some criminal responsibility; therefore, the statement is "as against himself" as required by the rule. Likewise, there is no question that the appellant is a party to the criminal action. The hearsay statement in this case qualifies as an exception to the general hearsay rule and the trial court erred in not admitting it into evidence.

## POINT D

### THE TRIAL COURT COMMITTED ERROR BY EXCLUDING THE APPELLANT'S HEARSAY STATEMENT AS IT CONSTITUTED A DECLARATION AGAINST INTEREST.

The appellant's hearsay statement qualifies as an exception to the hearsay rule because it was a declaration against interest. This exception is described in Rule 63(10) of the Utah Rules of



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Evidence which provides in part:

> (10) Declarations Against Interest. Subject to the limitations of exception (6), a statement which the judge finds was made by a declarant who is unavailable as a witness and which was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability ... that under the circumstances existing would not have made the statement unless he believed it to be true.

This rule was applied in State v. Sanders, supra. In that case the defendant was charged with a robbery in which four individuals were involved, his defense was that persons other than himself had committed the robbery. One of the four persons that the defendant blamed for the robbery made a statement to an attorney that he and three others, who did not include the defendant committed the robbery. The declarant refused to testify and the evidence was offered as a declaration against interest. It was argued that the basis for the statement being against the declarant's interest was the disgrace he would incur upon becoming an informant. The trial court allowed the attorney to testify only about the declarant's admissions that he was involved in the robbery but not about the participation of others. This was upheld on appeal becuase the indicia of trustworthiness of the statement was found in the fact that it was made against the declarant's penal interest; however, the court found that it was not against the declarant's penal interest to name the other participants in the robbery.

There is no question in the case at bar that the statement



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made by the appellant subjected him to criminal liability — at least to the offense of Criminal Trespass. This meets one of the criteria of Rule 63(10) of the Utah Rules of Evidence, that at the time the assertion was made it was contrary for the declarant's criminal liability. Another criterion is that under the circumstances the declaration would not have been made unless the declarant believed it to be true. The statement was made a matter of minutes after leaving the resort, under the emotional stress of the appellant's arrest. The appellant also admitted to being in Mr. Ball's room, thus corroborating his identification of the appellant. These circumstances provide sufficient indicia of reliability to establish the appellant's belief that the declaration was true for purposes of this exception to the hearsay rule.

The final criterion for admissibility is that the declarant was unavailable. The appellant in this case was unavailable for several reasons. First of all, the appellant, like any criminal defendant, was protected by the privilege against self-incrimination as provided by the Constitutions of the State of Utah and the United States. Rule 62(7)(a) of the Utah Rules of Evidence includes exception of a witness on the grounds of privilege as a situation constituting unavailability. Furthermore, the appellant refused to testify because he would have to answer to his prior felony convictions for burglary. The trial court ruled that he could not consider the admissibility of prior



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felony convictions in light of Rule 45 of the Utah Rules of Evidence (T.50-51). That rule allows the trial court to weigh the probative value of evidence against the prejudicial effect of that evidence:

> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative vlaue is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

This ruling is clearly incorrect in light of this court's holding in State v. Roberts, 612 P.2d 360 (Utah, 1980). Because of the prejudicial nature of these prior convictions the appellant was forced to assert his constitutional privilege against self-incrimination, thus making him unavailable. Consequently, the appellant's statement was admissible as a declaration against interest as described in Rule 63(10) of the Utah Rules of Evidence, and the trial court committed error by excluding that evidence.

## POINT E

THE TRIAL COURT COMMITTED ERROR BY EXCLUDING THE APPELLANT'S HEARSAY STATEMENT AS IT WAS A CONTEMPORANEOUS STATEMENT.

The statement given by the appellant was made a matter of minutes after he left Mr. Ball's room, upon being stopped by the police, while he was under the stress and pressure of a felony arest.



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Even though such a statement is hearsay, it qualifies as an exception to the hearsay rule because it is a contemporaneous statement as described in Rule 63(4)(b) of the Utah Rules of Evidence. That rule provides:

> A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception.

The portion of this rule which is applicable to this case is part "(b)" which requires that the declarant still be under the stress or nervous excitement caused by the perception. In State v. Sanders, supra, the court found that such stress or nervous excitement was not present when one of the co-defendants was recovering property from a snowbank which was taken in a robbery. The declarant made a statement to the witness implicating himself and three others in the robbery. Apparently, this act was done some time after the actual commission of the robbery and the trial court had found that the stress of nervous excitement was not present. In contrast, the statement of the victim of a forcible sodomy and forcible sexual abuse which was made a matter of minutes after the offense occured to an adult neighbor was held to be admissible in State v. McMillan, 588 P.2d 162 (Utah, 1978). The court quoted Johnston v. Ohls, 76 Wash. 2d 398, 457 P.2d 194 (1969), to describe the nature of this exception to the hearsay rule,

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> The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. State v. McMillan, supra, at 163.

The court went on to find that a child making a statement a matter of minutes after an occurance of a sex offense would have little likelihood of fabricating the statement.

As previously noted the statement in this case was made by the appellant a matter of minutes after the event occurred. Although he was an adult, the statement was made upon arrest under the stress and nervous excitement of that sort of traumatic event. With respect to the time frame, the pressure and considering who the statement was made to, State v. Sanders, supra, is easily distinguishable. However, the facts here are very close to those of State v. McMillan, supra. This is because the statement was made a very short time after the event occurred. It was made to a person in authority, the mother of a neighbor in McMillan and a police officer here. It also was made while the declarant was still unquestionably under the stress of nervous excitement from the incident. Consequently, the appellant's hearsay statement was admissible as a contemporaneous statement as described in Rule 63 (4)(b) of the Utah Rules of Evidence and the trial court committed error in excluding it.



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## POINT F

THE ERROR IN EXCLUDING THE APPELLANT'S HEARSAY STATEMENT WAS PREJUDICIAL BECAUSE THERE IS A REASONABLE PROBABILITY THAT THE VERDICT WOULD HAVE BEEN DIFFERENT HAD THE EVIDENCE BEEN ADMITTED.

To gain a reversal of a verdict based on the erroneous exclusion of evidence two things must be shown, as described in Rule 5 of the Utah Rules of Evidence:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the Court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

The substance of the evidence in question was made known by way of a proffer out of the jury's presence (T.44,49). A lenghthy discussion on the admissibility of the evidence was had between court and counsel prior to the trial court's ruling (T. 41-45, 49-50). The question was properly raised below and the first criterion for reversal has been fulfilled.

It must now be shown that the excluded evidence would have had a substantial influence in bringing about a different verdict. In <u>State v. Simmons</u>, supra, where error was found, but held to not be prejudicial, this requirement was described to mean that "There must be a reasonable probability there would



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have been a result more favorable to the defendant in the absence of error" Id. at 343. In this case the hearsay statement was the only direct evidence of the appellant's intent in entering Mr. Ball's room. As previously described he was precluded from testifying in his own behalf by the trial court's ruling on the admissibility of the appellant's prior felony convictions. Even if the appellant had testified, this evidence, introduced from the state's witness, would have corroborated his testimony and bolstered his credibility. The only factual issue in the trial was the appellant's intent in entering into the room. In the absence of any other direct evidence on the issue of the appellant's intent the erroneous exclusion of this statement creates a reasonalbe probability that he verdict would have been different. This is because the jury would then have heard the appellant's explanation for his presence in the room, other than the equivocal statement to Mr. Ball that he was looking for a way out. The judgment of the district court should be reversed and the case remanded for a new trial.

## POINT II

CRIMINAL TRESPASS IS A LESSER INCLUDED OFFENSE OF THE CRIME OF BURGLARY AND THE FAILURE OF THE COURT TO SO INSTRUCT WHEN REQUESTED BY APPELLANT WAS REVERSIBLE ERROR.

Criminal Trespass is a necessarily included offense of Burglary; consequently the court's failure to instruct the jury on Criminal Trespass constituted prejudicial error and the appel-



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lant's conviction for Burglary should be reversed and a new trial granted.

The appellant requested that the trial court instruct the jury on Criminal Trespass as a lesser included offense to Burglary (R. 25,27).

In appellant's requested Instruction No. 7 the appellant requested an instruction on the offense of Criminal Trespass, a Class B Misdemeanor under Utah Code Ann. §76-6-206(2)(a) (1953 as amended). This requested instruction provided:

INSTRUCTION NO. 7

> Before you can convict the defendant, ALFRED WILLIAM JOHNSON, of the crime of Criminal Trespass, a Class B Misdemeanor, a lesser included offense of burglary as charged in the Information, you must find from the evidence, beyond a reasonable doubt, every one of the following essential elements of that crime:
>
> 1. That on or about the 25th day of May, 1979, in Salt Lake County, State of Utah, the defendant, ALFRED WILLIAM JOHNSON, under circumstances not amounting to burglary as defined in these instructions, entered the dwelling of Richard Ball;
>
> 2. That the defendant, ALFRED WILLIAM JOHNSON, entered or remained unlawfully on said property; and
>
> (a) Intended to cause annoyance or injury to any person thereon or damage to any property thereon; or
>
> (b) Intended to commit any crime, other than theft or a felony; or
>
> (c) Was reckless as to whether his presence would cause fear for the safety of another.

The trial court refused to submit the requested Instruction 7 on the lesser included offense of Criminal Trespass to the jury



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and appellant took proper exception to the court's failure to instruct on the lesser included offense [1] (T.74,75).

## POINT A

### THE DEFENDANT IN A CRIMINAL CASE HAS A RIGHT TO SUBMIT HIS THEORY OF THE CASE TO THE JURY IN THE INSTRUCTIONS

It has long been the law in the State of Utah, that an accused in a criminal action has a right to submit to the jury his theory of the case, and that such theory when properly requested should be given to the jury in the form of written instructions. State v. Stenback, 78 U.350, 2 P.2d 1050 (1931). In Utah this right allows for the presentation of instructions on all defenses and theories, including lesser included offenses, when such are properly requested by the accused. State v. Gillian, 23 Utah 372, 374, 463 P.2d 811 (1970); State v. Mitcheson, 560 P.2d 1120 (Utah 1977).

An accused may make the decision as a matter of trial strategy to go "for broke" and decline to request instructions on a lesser included offense if his theory of defense so dictates.

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1. Counsel for appellant requested the Instruction in writing and took exception to the trial court's failure to give the request to the jury, properly preserving this issue on appeal. Utah Rules of Civil Procedure, Rule 51. State v. Erickson, 563 P.2d 750 ( Utah 1977); State v. Bell, 563 P.2d 186 (Utah 1977); and State v. Gleason, 17 U.2d 149, 405 P.2d 793 (1965). Accord: Rules of Practice in the District Courts, Rule 5.4.



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State v. Mora, 558 P.2d 1335, 1337 (Utah 1977); State v. Gellaty, 22 U.2d 149, 152, 449 P.2d 993 (1969); State v. Valdez, 19 U.2d 426, 428, 432 P.2d 53 (1967); State v. Mitchell, 3 U.2d 70, 278 P.2d 618 (1955). However, when the accused as his theory of the case requests instructions on lesser included offenses and is willing to submit his guilt or innocence to the jury on that theory, the trial court as a general rule is duty bound to submit these alternatives to the trier of the fact. State v. Gillian, 23 U.2d 372, 375, 463 P.2d 811 (1970).

When the theory of defense embraces an argument, in effect in mitigation, that he is guilty of not the crime as charged in the Information but some lesser offense the teachings of Gillian yet apply. On this point the Gillian court stated:

> One of the fundamental principles to the submission of issues to juries is that where the parties so request they are entitled to have instruction given on their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict. (State v. Gillian, supra, 23 U.2d at 374).

In Gillian, this court pointed out the reasons for this rule and the instant case illustrates the soundness of such a rule. This court said it should not be the prerogative of the trial court to direct the jury as to what degree of crime they may find a defendant guilty or to direct them that they must find him not guilty if they do not find him guilty of the greater offense. To allow this permits the court to be a judge of the facts and to in effect direct a verdict on the lesser included

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offenses. Such a procedure violates the historical spirit as well as letter of our system of jury trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 12 of the Constitution of Utah. State v. Ferguson, 74 Utah 263, 279 P. 55 (1929) (Straup, J. concurring). See also Beck v. Alabama, ___U.S.___ 65 LEd 2d 392 (1980).

POINT B

CRIMINAL TRESPASS IS A LESSER AND INCLUDED OFFENSE OF BURGLARY

The test most recently given to determine if one offense is a lesser included offense of another is that found in the recently revised Utah Criminal Code. Utah Code Ann. §76-1-402(3) (1953 as amended) provides in pertinent part:

> A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
> (b) If constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
> (c) It is specifically designated by a statute as a lesser included offense.[2]

The process by which such a determination is made was described in

2. This statute was recently interpreted in State v. Lloyd, 568 P.2d 357 (Utah 1977) and its companion case, State v. Cornish, 568 P.2d 360 (Utah 1977) wherein this court held that the Utah joyriding statute is a lesser included offense of theft of an operable motor vehicle.



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State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934):

> The only way this matter may be determined is by discovering all of the elements required by the respective sections, comparing them and by a process of inclusion and exclusion, determine those common and those not common, and, if the greater offense includes all legal and factual elements, it may safely be said that the great includes the less, if, however, the lesser offense requires the inclusion of some necessary element or elements in order to cover the completed offense, not so included in the greater offense, then it may be safely said that the lesser is not necessarily included in the great. (33 P.2d at 645)

The elements which must be proved to constitute the crime of Burglary as described in Utah Code Ann. §76-6-202 (1953 as amended) are:

> (1) A person must enter or remain in a building or portion of a building;
> (2) The entry or presence is unlawful;
> (3) The actor must possess the intent to commit a felony, theft or assault.

There are two distinct offenses which constitute the crime of Criminal Trespass as described in Utah Code Ann. §76-6-206 (1953 as amended). The elements of the first type of Criminal Trespass as defined in Utah Code Ann. §76-6-206 (1953 as amended) are:

> (1) A person enters or remains on property;
> (2) The entry or presence if unlawful;
> (3) The actor possesses the intent to cause annoyance, or commit a crime other than a theft or a felony or the actor is reckless as to whether his presence will cause fear for the safety or another.

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3. This was the character of the Criminal Trespass instruction requested in appellant's proposed Instruction.



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The elements of the second type of Criminal Trespass are:

> (1) A person enters or remains on property;
> (2) The person knows his presence is unlawful;
> (3) Notice against entry has been given by personal communication or by a fence or enclosure, or by posting signs.[4]

In comparing the statutes as Woolman advises the first thing to ask is "can a Burglary be committed without commiting the offense of Criminal Trespass?" If the answer is "no" to commit a Burglary one must perforce commit a Criminal Trespass, then Criminal Trespass is a lesser included offense of Burglary. State v. Woolman, supra, 84 U. at 35. An important point of note is the provision of the Criminal Trespass Statute, Utah Code Ann. §76-6-206(2) (1953 as amended), which states:

> A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-2-203, 76-2-204:...[Emphasis Suppled]

The importance of this provision is that criminal trespass requires proof of the same elements as are needed to prove the elements of the crime of burglary. In other words, criminal trespass is established by proof of less than all of the facts required to establish the commission of burglary. Obviously

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4. This type of Criminal Trespass was not requested by appellant.



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the legislative intent in this series of statutes is to make criminal trespass a lesser included offense to the burglary statutes. The elements of trespass and the burglary statutes are identical.[5] Both require one to enter or remain in a building and both require that such entry or presence be unlawful. The difference in the statutes is that burglary requires a more specific intent than criminal trespass. In State v. Sunter, 550 P.2d 184 (Utah 1977), this court held that possession of burglary tools, Utah Code Ann. §76-6-204 (1953 as amended), is not an included offense in the burglary statutes. This court went on to state that for an offense to be included in the greater offense of burglary, it must be embraced with the legal definition of burglary, and that the gist of the offense of burglary is the unlawful entry into a building unlike possession of burglary tools which is a possessory offense.

In State v. Hendricks, 596 P.2d 633 (Utah 1979), the defendant charged with burglary raised the defense of volunatry intoxication and requested an instruction on criminal trespass which was denied. On appeal the defendant claimed error in the failure to give the instruction, but this court ruled that the defendant's lack of intent was inconsistent with a request for an instruction

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5. The legislature placed the burglary and criminal trespass statutes in the same part of the code, Utah Code Ann. §76-6-201 et. seq. (1953 as amended), and provided common definitions for both burglary and criminal trespass in Utah Code Ann. §76-6-201 (1953 as amended).



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on the lesser offense. Although the court did not expressly state that criminal trespass is an included offense to the charge of burglary, that holding seems implicit in the court's ruling that "the evidence (including that presented by the defendant) establishes all of the elements of burglary but did not establish all of the elements of criminal trespass" Ibid at 634.

The statutory history of the burglary and trespass sections of the Utah Criminal Code also reflect the fact that trespass is a lesser included offense of burglary. Both provisions are derived from the Texas Penal Code.[6] In Day v. State, 532 S.W. 2d 302 (Tex. 1976), the Texas Court of Criminal Appeals held that a criminal trespass offense was a lesser included offense to its burglary statute. The Texas Court said:

> As can be seen, the first three elements of each of the three types of burglary and criminal trespass are virtually identical. The fourth main element of burglary, either the specific intent to commit or the actual commission or attempted commission of a felony or theft, depending on the type of burglary involved, is absent from the offense of criminal trespass. (532 S.W. 2d at 306).

In similar circumstances wherein the prosecution was for attempted burglary, the New York Court of Appeals also found the

6. Jay Barney, Utah Criminal Code Outline (1973). The Texas Code provisions are in turn taken from the Model Penal Code Provision. See A.L.I. Model Penal Code (P.O.D. 1962) §§221.0, 221.2



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failure of the trail court to instruct on the lesser included offense of criminal tresspass reversible error. In People v Henderson, 41 N.Y. 2d 233, 359 N.E. 2d 1357 (1976) the court reversing the attempted burglary conviction noted:

> The test of whether a "lesser included offense" is to be submitted is certainly not that it is probable that the crime was actually committed or even that there is substantial evidence to support such a view. It suffices that it is supportable on a rational basis or, put another way, by logical necessity. To warrant a refusal to submit it "every possible hypothesis" but guilt of the higher crime must be excluded, [citations omitted], the evidence for that purpose being required to be considered in the light most favorable to the defendant (People v. Battle, 22 N.Y. 2d 323, 292 N.Y.S. 2d 661, 239 N.E. 2d 535) since the jury is free to accept or reject part or all of the defense or prosecution's evidence [citations omitted].
>
> The court's appraisal of the persuasiveness of the evidence indicating guilt of the higher count is irrelevant; the question simply is whether on any reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count [citations omitted] and still find him guilty on the lesser one. And it may not be amiss to observe that, at time, in their projection of laymen's sensitivities to facts, "juries may, on almost any excuse, convict of a lower degree of crime although conviction of a higher degree is clearly warranted" [citations omitted] . . .
>
> So tested, it must be concluded that, while on the evidence here, though Henderson did not gain entrance to the building (hence the charge of attempted burglary) and fled when surprised by owner, the jury nevertheless could have found an intent to commit a larceny based upon circumstantial evidence (see People v. Terry, 43 A.D. 2d 875, 351 N.Y.S. 2d 184), it could also have found that he lacked the requisite intent at the time he broke the window [citations omitted] . . .

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> the jury could have decided that he never intended to commit a larceny, but rather was motivated by any one of a conceivable number of other purposes such as for example, an intent to bed down in the premises, to obtain information, or to engage in an act of mischeif not larcenous in nature — all purposes, incidently, only somewhat less rational than the one the People had asked the jury to infer from the circumstantial evidence in view of the fact that there was in this case no direct or certain proof of the defendant's actual purpose. (359 N.E. 2d at 1360)

The Supreme Court of Pennsylvania has also held criminal trespass to be a leser included offense of burglary in construing statutes akin to those found in Utah. Commonwealth v. Carter, 344 A.2d 899 (Pa. 1975).[7]

Undeniably, criminal trespass, as described in Utah Code Ann. §76-6-206 (1953 as amended) is a lesser included offense to the burglary provisions of the Utah Criminal Code, Utah Code Ann. §§76-6-202, 76-6-203, 76-6-204 (1953 as amended).

POINT C

WHEN MUST THE TRIAL COURT INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES.

Because criminal trespass is a lesser included offense of burglary under Utah's statutes, the issue that now must be addressed is "when must the trial court instruct the jury on such a lesser included offense?"

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7. Pennsylvania's statutes like Utah's appear to be a result of the Model Penal Code. Accord: State v. Coffin, 565 P.2d 391 (Ore. 1977).



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The issue raised in the instant case has been before this court on numerous occasions in the past and has, on occasion, brought differing views from the members of this court.

The need that such an instruction be given has been ruled to be a statuttory requirement. The statute in force at the time of the appellant's trial is found in Utah Code Ann. §77-33-6 (1953 as amended), which states:

> The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.

This provision was expounded upon by the legislature in the 1973 Criminal Code Revision in §76-1-402(4) which provides:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. [Emphasis Supplied]

The foregoing provision, as this court has noted, codifies prior existing common law principles dating back to territorial times in Utah. People v. Robinson, 6 U. 101, 21 P.403 (1889); State v. Bender, 581 P.2d 1019 (Utah 1978).

In State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937), this court noted that the failure to give an instruction on lesser included offenses when requested ". . . clashes with two fundamental rules of trial in criminal cases: It has the effect of the court weighing the evidence and, in effect

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limiting the jury to a consideration of only part of the evidence (the defendants'): and it, in effect, casts upon the accused the burden of proving his innocence or justification." (65 P.2d at 1132).

When the accused requests a lesser included instruction there should exist a presumption that the requested instruction be given.[8] Such is the tenor of this court's discussions in the past. In State v. Hymas, 64 U.285, 230 P. 349 (1924), it was stated:

> It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense, and determine the question of the state of the evidence as matter of law. That should be done only in very clear cases. (64 U.2 at 287) Accord: State v. Barkas, 91 U.574, 580, 65 P.2d 1130 (1937).

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8. This seems to be the feeling of the court in State v. Gillian supra, 23 U.2d at 376 wherein it is said:

> The usual rule on an appeal in which the challenge is to the sufficiency of the evidence to support the verdict, is that we review the record in the light favorable to the jury's verdict. However, in this situation where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offenses.



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In recent years this court has endeavored to set specific guidelines providing for the submission of lesser included offense when requested.

The statutory necessity of instructing a jury on a lesser included offense was described in State v. Dougherty, 550 P.2d 175 (Utah 1976). This court cited Lisby v. State, 83 Nev. 183, 414 P.2d 592 (1966), which followed provision similar to Utah Code Ann. §77-33-6 (1953). Describing the holding of the Nevada Court this court said:

> The Court discussed three situations in which the problem of lesser included offenses are frequently encountered. First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.
>
> Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.
>
> Third, is an intermediate situation. One where the elements of the greater offense include all elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser included offense. In such a situation instructions on the lesser included offense may be given, because all elements of the lesser offense have been given. However, such an instruction may properly be refused if the prosecution has met its burden

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> of proof on the greater offense, and there is no evidence tending to reduce the greater offense. The court concluded by stating that if there be any evidence, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lesser included offense, the court must, if requested, give an appropriate instruction. (550 P.2d at 176-177)[9]

The question that arises then when lesser included instructions are requested is: was there ". . . any evidence, however slight, on any reasonable theory under which the defendant might be convicted of the lesser [and] included offense. . ." of criminal trespass. State v. Dougherty, supra, at 177; State v. Bell, 563 P.2d 186, 188 (Utah 1977) (Justice Wilkins, concurring). If there was such evidence then the instructions were properly requested and should have been submitted to the jury for consideration.

In State v. Hendricks, 596 P.2d 633 (Utah 1979), a criminal trespass instruction was refused when the defendant was charged with burglary and that ruling was upheld on appeal because the court found that the evidence did not warrant the instruction. The defendant had raised the defense of voluntary intoxication and testified that he entered the building to search for friends. He was found hiding in a closet and typewriters had been moved to the point of entry.

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9. State v. Dougherty, supra, has been followed in State v. Pierre, 572 P.2d 1338, 1355 (Utah 1977), and State v. Bell, 563 P.2d 186, 188 (Utah 1977).



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In this case the appellant admitted that he was present in Mr. Ball's apartment at Snowbird (T. 38-39). He was also identified by Mr. Ball as the individual who was observed in the apartment (T. 19). Mr. Ball had not given the appellant authority to enter the apartment (T. 19), and entry was apparently gained by cutting the screen to a sliding door (T. 12). The only evidence that could conceivably explain the appellant's presence was that a wooden box had been moved from a shelf at the head of the bed to the center of Mr. Ball's waterbed (T. 18) and the statement made by the appellant to Mr. Ball when Mr. Ball questioned him about his presence. The appellant stated that he was "looking for a way out" and that he was staying upstairs (T. 12-13). The box, however, had not been opened and the appellant did not have any property in his hands, nor was any property missing. Under these facts a reasonable theory was that the appellant had entered the apartment for some reason other than to commit a theft.

Appellant's actions in the instant case are similar to those of the accused in Crawford v. State, 241 N.E. 2d 795 (Indiana 1968). In Crawford the accused was found hiding inside a building at an unusual hour. The Indiana Court in reversing his conviction for burglary noted that his denial of intent to commit a theft was sufficient to raise an issue as to such intent (241 N.E. 2d at 797). Moreover, witho



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further evidence his mere unauthorized entry[10] into the building containing articles which could easily be carried away was insufficient in and of itself to prove the intent to steal those articles. (241 N.E. 2d at 798, DeBruler, Judge concurring).

Several cases involving similar facts have required that the charge of burglary be reduced to criminal trespass. In State v. Rood, 462 P.2d 399 (Ariz. 1969), the defendant was seen inside of a building with his hand on a television set. When the neighbor came to investigate the defendant fled. The court held that the State must prove that the defendant had the intent to commit a specific crime to sustain the charge of burglary and not just the intent to do some undetermined thing at the time he was inside of the building. Similarly, in State v. Kahinu, 53 Haw. 646, 500 P.2d 747 (Haw. 1972), the defendant was found in the victim's hotel room, when asked what he was doing there the defendant stated that it was his room and he then fled from the hotel. The court held that the mere fact that the entry was forced or unlawful did not establish the requisite intent for

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10. It has long been the rule in Utah that mere presence where a crime is being committed is in and of itself insufficient upon which to base a conviction. State v. Helm, 563 P.2d 794, 797 (Utah 1977); State v. Gee, 28 U.2d 96, 498 P.2d 662 (1972); and State v. Fertig, 120 U. 224, 233 P.2d 347 (1951).



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burglary. The court then held that the evidence was insufficient to establish a prima facie case for burglary and the charge should be reduced to criminal trespass.

When a court has erred by failing to give a requested instruction the error is deemed to be prejudicial "if the requested instruction had been given and the jury had so considered the evidence, there is reasonable likelihood that it may have some effect on the verdict rendered." State v. Mitcheson, 560 P.2d 1120 (Utah 1977). The evidence offered in this case on the issue of intent was all circumstantial. It is quite reasonable for the jury to infer from this evidence that the appellant had some intent other than to commit a theft when he entered the apartment. This is especially true when this court considers the holding of the courts in State v. Rood, supra, and State v. Kahinu, supra. In light of those holdings there is not only a reasonable likelihood that the verdict would have been different had the jury been properly instructed, but that outcome would have been a distinct possibility. This is because the jury would not have to be asked to acquit the appellant who was in Mr. Ball's apartment without permission to be there, they could have found that he was guilty of the lesser offense.



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## CONCLUSION

The only element of the offense of burglary which was at issue in the trial was the appellant's intent to commit a theft. The court committed prejudicial error by refusing to allow counsel to question the arresting officer about the appellant's hearsay statement in which he denied that he had requisite intent. This statement was admissible under at least five of the exceptions to the hearsay rule. Likewise, the trial court committed prejudicial error by refusing to instruct the jury on the lesser and included offense of trespass. This is because the only difference between burglary and criminal trespass is the intent to commit a theft.

DATED this ____ day of October, 1980.

Respectfully submitted,

G. FRED METOS
Attorney for Appellant



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