2002

The State of Utah v. Roberto Tarafa : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 20561
-v-	:	
ROBERTO TARAFA,	:	Priority 2
Defendant-Appellant.	:	

AMENDED BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF TWO COUNTS OF THEFT BY RECEIVING, THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-6-408 (1978), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES CITED

STATUTES CITED

STATEMENT OF ISSUES

1. Were the eight thefts charged in the information part of a single criminal episode so that three of them were properly joined for trial under Rule 9?

2. Did the prosecutor commit reversible error in referring to defendant's prior conviction during closing argument, when that conviction was proved at trial and the prosecutor merely asked the jury to consider the conviction in weighing defendant's credibility?

3. Was the jury instructed on a mandatory rebuttable presumption in violation of State v. Chambers,, 20 Utah Adv. Rpt. 14 (Oct. 21, 1985), and Francis v. Franklin, ____ U.S. ____, 105 S.Ct. 1965 (1985)?

4. Was there evidence supporting the jury instruction that the jury may presume knowledge or belief that the items were stolen because defendant had received other stolen property within the preceeding year?

5. Did the trial court properly admit pawn cards representing other pawn transactions to show that defendant knew or believed the property at issue probably was stolen?

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-v-	:	Case No. 20561
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AMENDED BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant was charged with eight counts of theft by receiving, seven third-degree felonies, and a class A misdemeanor, in violation of Utah Code Ann. § 76-6-408 (1978). Five counts were dismissed without prejudice prior to preliminary hearing and three third-degree felonies were bound over for trial.

Defendant was convicted of two counts of theft by receiving and acquitted of a third count, in a jury trial held February 19-21, 1985, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, presiding. Judge Frederick sentenced defendant on February 21, 1985, to two indeterminate terms not to exceed five years in the Utah State Prison.

STATEMENT OF FACTS

Defendant was charged with eight counts of theft by receiving occurring on various dates between October 20, 1984 and November 14, 1984 (R. 11-15). At preliminary hearing, five of

the counts were dismissed without prejudice and defendant was bound over for trial on three counts occurring on October 27, November 3 and November 14 (R. 6-10). Prior to trial, defendant moved to sever the three remaining counts and the State moved to join the five counts previously dismissed with the three that remained (R. 21-22, 26). Both motions were denied (R. 36).

On October 27, 1984, defendant sold a toolbox full of tools and a flute to the Midtown Pawnshop in Salt Lake City for $55 (R. 199-200, 203). Earlier that day, sometime between 9:00 p.m. on the 26th and 1:00 a.m. on the 27th, a flute and the toolbox were stolen from an Orem home (T. 171-173). The owner valued the toolbox at $300-$400 and an expert valued the flute at $275-320 (T. 193).

Defendant lived in Provo at this time (R. 365). Nelson Florez, a friend of defendant's, came by defendant's apartment in Provo and asked defendant to lend Florez his car and to drive with Florez to Salt Lake City, to pawn something (T. 366). Florez told defendant that he could get more money for items pawned in Salt Lake City and that he needed defendant to help him because he did not have any identification (T. 366). This occurred several times, at least seven or eight (T. 366). Each time, defendant gave an outdated Salt Lake City address as his current address except on one occasion when he used an outdated Provo address from his driver license (T. 400, 402-404).

On November 3, 1984, defendant sold a guitar and a ring at the Mission Pawnshop in Salt Lake City at Florez's request (T. 231-235). The guitar, a steel string Ventura, with a hard

carrying case, was stolen from a Provo home in the evening hours of November 2 to early morning on November 3, 1984 (T. 218, 224). There was conflicting testimony on the fair market value of the guitar and case. The owner valued them at about $330 (T. 225). Defendant's expert witness valued them at about $175-185 (T. 349), while the State's rebuttal expert valued them at a minimum of $300 (T. 354). The jury found defendant not guilty of third-degree felony theft for this pawn transaction (R. 81).

On November 14, 1984, defendant sold a video cassette recorder made up of two components at Pahl's Annex Pawnshop in Salt Lake City for $150 (T. 254, 257-258). Florez accompanied defendant and approached the shop owner about the selling price for the VCR but the shop owner gave the $150 to defendant (T. 261-262, 263). The VCR and a wallet were stolen from Paul Velasco's Provo home in the early morning hours of November 14, 1984 (T. 245, 247). Velasco valued the VCR at $800 (T. 250).

When police officers arrested defendant, defendant said that Florez told defendant that Florez took the VCR but Florez would not say from where (T. 272, 371). Defendant said they received $150 for the VCR and spent $30 (T. 273). Defendant had $120 when he was booked into jail on November 14, 1984, the same day that he sold the VCR (T. 282-283).

Defendant admitted that he pawned the items that were the basis for the three counts of theft and that he pawned items for Florez on several other occasions (T. 366, 377). He claimed, nevertheless, that the did not know or believe that the items were stolen (T. 379).

Defendant identified the pawn cards from several other specific pawn transactions (T. 390-399). He also admitted to using Paul Velasco's American Express Card to buy shoes and pants for himself (T. 382-383). Velasco's wallet was stolen in the November 14 incident (T. 244-245). Defendant said he thought the credit card was stolen when he and Florez used it (T. 382). Thumbprints on all of the pawn cards matched defendant's thumbprint, without a doubt (T. 287, 292-3, 297).

SUMMARY OF ARGUMENT

Joinder was proper in this case because the three thefts by receiving were all part of a single criminal episode. The pawnshop transactions were identical in nature and involved stolen articles all received from a single source. The three counts were closely related in time and pursuant to a single criminal objective.

There was no prosecutorial misconduct during closing argument when the prosecutor referred to defendant's prior conviction. The clear import of the comments was that the prosecutor wanted the jury to consider defendant's criminal history in weighing his credibility as a witness. This is a use of the evidence that the jury may clearly make.

The jury instructions that the jury may presume knowledge or belief that the items probably were stolen did not create a mandatory rebuttable presumption. The instructions, when read together, could not have been interpreted as shifting the burden of proof to defendant by a reasonable juror.

There was evidence that defendant had received other stolen property within the year preceding at least some of the offenses. Even if this evidence was insufficient to support the presumption under § 76-6-408, it was harmless error to instruct the jury as to this presumption because there was sufficient other evidence of guilty knowledge or belief.

The pawn cards relating to pawn transactions other than those supporting the charges were properly admitted. Defendant himself provided the necessary foundation and the cards were relevant to show that, by the sheer number of identical pawn transactions, defendant knew or believed the property was stolen. Even if the cards should not have been admitted, it was harmless because the evidence had already come in through defendant's testimony to which defendant did not object nor move to strike.

ARGUMENT

POINT I

JOINDER OF THE THREE OFFENSES IN THIS CASE WAS PROPER BECAUSE THEY WERE PART OF A SINGLE CRIMINAL EPISODE.

The question of whether offenses constitute a single criminal episode arises in two contexts. The first context is Double Jeopardy. There, a defendant may find himself erroneously charged with multiple offenses which are not only part of a single criminal episode but which are also based upon the "same act" as defined in the single criminal episode statute, Utah Code

Ann. § 76-1-402(1) (1978).[1] The second context is Joinder, the situation at hand. There a defendant feels either that his multiple offenses arising from separate acts should or should not have been joined for trial because they are or are not part of a single criminal episode as defined in Utah Code Ann. § 76-1-401 (1978).

The Utah cases cited by defendant in his brief at 6-9 are all cases dealing with the double jeopardy or "same act" question. See e.g. State v. Bair, 671 P.2d 203 (Utah 1983); State v. Ireland, 570 P.2d 1206 (Utah 1977); State v. Cornish, 571 P.2d 577 (Utah 1977). The issue raised by defendant, however, is joinder--whether the offenses charged were part of a single criminal episode so that they could properly be tried together. At first blush, the cases defendant cites appear to be relevant in that they purport to delineate what is a single criminal episode. Closer scrutiny, nevertheless, reveals that these cases do not support a conclusion that defendant's crimes were not part of a single criminal episode.

In the cases cited above and cited in defendant's brief, the defendants argued that the multiple crimes charged were part of a single criminal episode and, therefore, claimed

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[1] Section 76-1-402(1) provides: A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision. (Emphasis added).

that to avoid double jeopardy they could only be prosecuted for one crime. This argument is flawed in that multiple acts, all part of a single criminal episode, can be the basis for multiple charges. Utah Code Ann. § 76-1-402(1) (1978); State v. Porter, 705 P.2d 1174, 1178 (Utah 1985). In two of these cases, the Court's ruling that there was no double jeopardy problem was, however, based on the preliminary conclusion that it was not even dealing with a single criminal episode.

The Court's conclusions in Ireland[2] and Cornish[3] were based on Utah Code Ann. § 76-1-401 which provides:

> In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

This Court concluded that offenses committed as part of the escape attempts in these cases were not a part of a single

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[2] In State v. Ireland, 570 P.2d 1206 (Utah 1977), the defendant was stopped for speeding, pulled a gun, took the patrolman's gun, locked the patrolman in the trunk of the patrol car and left the scene. Later, Ireland picked up two hitchhikers, related what he had done and told them they did not have to remain with him. They rode on with Ireland and when police officers began following them, Ireland told the hitchhikers they were his hostages and held the gun on them. Ireland was convicted in Sevier County of kidnapping and in Beaver County for aggravated robbery. Ireland raised a double jeopardy claim that was rejected.

[3] In State v. Cornish, 571 P.2d (Utah 1977), the defendant stole a car. The next day, the stolen car, driven by Cornish, was spotted and a high-speed chase ensued. Cornish was convicted of car theft and failure to stop in separate prosecutions. He raised a double jeopardy claim that was rejected because the Court found the acts were not part of a single criminal episode.

criminal objective shared by the original crime the defendants were attempting to avoid. While in Ireland the Court found that the two acts were not close in time (separated by the time it took to drive 65 miles), the more critical aspect of the decision was that the acts were unrelated in objective (the hitchhikers were not picked up as hostages originally but only became hostages when the necessity to avoid capture arose).

In Cornish, the Court said that a one day separation between the crimes did not meet the "close in time" requirement but focused its attention mainly on the single objective aspect. There the Court determined that the objective of the escape attempt was not the same as the objective of stealing a car. The Court wanted to avoid irretrievably entangling crimes committed to avoid arrest for prior criminal activity with the original offense.

The question remains whether the terms "closely related in time" and "single criminal objective" under § 76-1-401 should be limited by Ireland and Cornish. As noted above, Ireland and Cornish mainly focus on whether the acts were the same act for double jeopardy purposes. The separation in time of one day or the time it takes to drive 65 miles do not appear to be such long periods of time that the acts were, per se, not closely related in time. It is also difficult to understand why an escape attempt to avoid prosecution for criminal activity is not part of a single criminal objective--i.e. getting away with the crime. Apparently, the Court and the parties confused the meanings of single criminal episode and "same act." They evidently reasoned

that they could not find that a single criminal episode existed without also finding there was only one act, one crime.

The focus of the case at bar, however, is distinguishable from that of Ireland and Cornish. Here, the defendant was charged with eight separate acts of theft by receiving and he has not raised a double jeopardy claim. Each act was fairly close in time and was accomplished under nearly identical circumstances and with a single criminal objective. Each time defendant was accused of pawning stolen articles, he did so at the request of Nelson Florez. They drove together from Provo to Salt Lake City, sometimes pawning articles in more than one pawnshop in a single day. Each time defendant gave an outdated address as his current address. The incidents forming the basis for the original eight charges were all within a four week period from October 20, 1984 to November 14, 1984 (R. 11-13). While five of these charges were dismissed without prejudice at the preliminary hearing, they should all be taken into account when determining whether the three remaining charges were part of a single criminal episode.[4]

State v. Bair, 671 P.2d 203 (Utah 1983), cited by defendant, is also distinguishable from the case at hand. In Bair, the defendant was charged with multiple counts in two separate informations of theft by receiving stolen firearms which

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[4] It is not clear from the record exactly why the five charges were dismissed. At preliminary hearing, however, it appears that the State was prepared to proceed only on the three counts that were bound-over. See R. 9 at 759 (State's motion to continue); and see R. 6 at 1044 (State not ready to proceed).

were all received by him simultaneously rather than on separate occasions. After acquittal in one case, defendant was tried on the second information and found guilty. He appealed on double jeopardy grounds. This Court held that not only was there a single criminal episode but also there was only one act of theft by receiving because the firearms were all received at one time. This Court held, as defendant points out, that it was the time of receipt of the stolen goods by defendant that determines when theft by receiving occurred and not the time that the articles were taken from their true owners. 671 P.2d at 207.

While Bair does support defendant's contention that the acts charged here were not part of a single criminal episode, it appears that the Court's language in analyzing the single criminal episode statutes in Bair is somewhat imprecise. The Court apparently ascribed to the phrase "single criminal episode" the same meaning ascribed to the phrase "the same act." This cannot have been the meaning the Legislature intended because § 76-1-402(1) clearly contemplates that several acts, constituting separate offenses, could be part of a single criminal episode. See also State v. Porter, 705 P.2d at 1178.

That the Court did equate "single criminal episode" and "same act" is evident from the following passage:

> In denying defendant's motion to dismiss, the trial court stated, "[T]he discovery at one time and place of numerous articles of property stolen at various times and places does not merge the preceding offenses into a single criminal episode." The court cited and relied upon the following rule of law:
>
> [R]eceiving or concealing different articles of stolen property at different

> times and on separate and unconnected occasions even though pursuant to a single scheme constitute separate offenses and cannot be prosecuted as one crime, in one count, even where all of the property is afterwards found in possession of the defendant at the same time and place. [66 Am.Jur.2d Receiving Stolen Property § 14 (1973). See also State v. Kuhnley, 74 Ariz. 10, 242 P.2d 843 (1953); Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937).]
>
> Application of the foregoing rule is specifically conditioned upon proof that the receipt of the different articles of stolen property occurred "at different times and on separate and unconnected occasions," supra. If the evidence does not satisfy this condition, but instead shows that the stolen articles were all received on one occasion, then the converse of the foregoing rule is true, i.e., the receipt is considered a single offense and must be prosecuted as one crime. The relevance of this concept to the present issue regarding the single criminal episode should be obvious. If defendant's receipt of the various stolen guns occurred on only one occasion, it definitely satisfied the "closely related in time" requirement of the single criminal episode statute, as well as the "single criminal objective" requirement thereof; whereas, if the receipt occurred on several occasions, such requirements are clearly not satisfied.

Bair, 671 P.2d at 206 (emphasis added). The last sentence of this passage indicates that acts committed on several occasions cannot be part of a single criminal episode as defined in § 76-1-401 because separate offenses are not closely related in time nor part of a single criminal objective unless they are the same act. This statement indicates that the Court equated single criminal episode with a single offense which is inconsistent with the meaning of § 76-1-402(1). Section 76-1-402(1) read with § 76-1-401 clearly indicates that several offenses can be part of a single criminal episode if they are closely related in time (not necessarily the same time) and part of a single criminal objective.

The rule of law, quoted above, upon which the Court relied in Bair, points out that double jeopardy does not bar charging multiple counts for separate offenses which are all part of a "single scheme" (or single criminal episode). The Court's language indicates that it interpreted this rule to mean that the presence of a single criminal episode always precludes multiple charges. A conclusion which is inconsistent with both § 76-1-402(1) and State v. Porter, 705 P.2d at 1178 (two acts of burglary in same building on same occasion part of single criminal episode but not same act).

The Court's language was:

> In light of the aforestated facts, [property received by defendant on one occasion] we conclude that the offenses allegedly committed by defendant for which he was prosecuted in the first and second (present) prosecutions were closely related in time and pursuant to a single criminal objective. Accordingly, we hold that the present prosecution is precluded by the single criminal episode statute, supra.

Bair, 671 P.2d at 208. What the Court failed to include in this holding was that not only were the offenses closely related in time, they occurred at the same time and were pursuant to a single criminal objective, thus, there was but one crime. Because there was only one crime, double jeopardy and § 76-1-402(1) precluded multiple charges and prosecutions for the "same act." Of course, indisputedly there was also a single criminal episode but that fact alone, without also the fact that there was only one act, would not preclude multiple charges.

The relevance of the above discussion is that Bair appears to stand in the way of a conclusion that there was a

single criminal episode in this case because Bair appears to hold that only stolen articles received at the same time constitute a single criminal episode. In actuality, Bair stands for the proposition that stolen articles received at the same time constitute not only a single criminal episode but also constitute only one act supporting a single charge of theft by receiving. This rule does not necessarily preclude finding several separate acts of theft by receiving to be part of a single criminal episode so long as they are close in time and pursuant to a single criminal objective.

One reason for joining related charges is to avoid the inconvenience and the expense for the State and the accused in holding separate trials where the same or similar evidence is being presented. This reason, of course, does not override a defendant's due process right to a fair trial, however, so long as joinder does not prejudice a defendant in his ability to defend himself, joinder is appropriate, Utah Code Ann. § 77-35-9 (1982), and this Court will not overturn a denial of a motion to sever unless there was a clear abuse of discretion. State v. Saunders, 699 P.2d 738 (Utah 1985). Defendant here was not prejudiced by joinder and there was no abuse of discretion.

The evidence admitted on all three charges would have been admissible if the crimes were tried separately. Utah Code Ann. § 76-6-408(2)(b) creates a presumption that if a defendant has received other stolen goods within a year prior to the present charge, there is an inference that defendant knew the goods were stolen in this case. See also, State v. Slowe, ____ P.2d ____,

slip op. at 3. (Utah Case No. 19990, 20070 filed December 30, 1985). Because the evidence would have been admissible in any event, defendant was not prejudiced by joinder of the three charges in this case as was the defendant in Saunders.

POINT II

THERE WAS NO PROSECUTORIAL MISCONDUCT IN THE STATE'S CLOSING ARGUMENT.

Defendant alleges that the prosecutor improperly argued in closing argument that defendant's prior burglary conviction demonstrated his propensity to commit crimes. See Appellant's Brief at 14. While the prosecutor did refer to defendant's prior conviction during closing argument, it was not done to denegrate his character. Instead, the reference was coupled with a request that the jury consider the prior conviction when weighing defendant's credibility. This is clear from the exchange that occurred during the argument, part of which defendant quotes in his brief.

The prosecutor argued:

> It's a criminal mind. He's a thief with a criminal mind and a criminal mind at work here. He lied to the pawn shop employees regarding whether he had a legal right to pawn the property. He lied to the pawnshop employees relative to his correct address, and I submit to you that he's lied to you when he's taken the stand. The defendant is the kind of [sic] person, ladies and gentlemen, who would use a false credit card to obtain property for himself. He is the kind of person who would commit a burglary, who would go into someone's home and steal their purse--as he admitted he did.
>
> MS. BERGESON: Your Honor, that is an improper statement of the law. That evidence is admitted only as it goes to credibility and not as it goes to propensity to commit

crime, and I think that's an improper argument.

MR. GURULE': It's being offered, your Honor, relative to whether he told the truth on the stand.
THE COURT: Well, the ladies and gentlemen of the jury have been told that what counsel say to them during closing argument or at any other time is not evidence. You've heard the evidence and you'll draw your own conclusions from it.

Three minutes, Mr. Gurule'.

MR. GURULE': Thank you.

He is the kind of person who would obtain property by fraudulent use of a credit card, and I ask you to weigh that and weigh that heavily when you examine the testimony that he gave you. He's the kind of person who would walk into somebody's home and steal their purse. He's a thief, and I'd ask you to weigh that carefully when you weigh his testimony.

And he is the type of person who would lie on the stand to save himself from conviction in this particular case. I submit to you, ladies and gentlemen, that it is now time for the lying to stop.

(Supp. T. 17-18). Use of a prior conviction to show knowledge and impeach a defendant's credibility as it was used here is permissible under Utah R. Ev. 404 and 609 (Supp. 1985).

Even if the prosecutor intended to imply something other than the permissible use of this evidence, he was stopped by defense counsel and the jury was reminded through the above conversation of the use of the evidence only for impeachment purposes. Contrary to defendant's assertion on appeal, the prosecutor did not then go on to discuss defendant's propensity to commit crime, but instead asked the jury to use the evidence when weighing defendant's credibility. In any event, defense counsel

did not object again to the prosecutor's reference to the prior conviction to give the judge another opportunity to correct the error, if in fact it was error. Defendant must make a timely objection to prejudicial argument to preserve the issue for appeal and to give the trial court an opportunity to correct the alleged error. State v. Smith, 675 P.2d 521, 526-527 (Utah 1983); State v. Hales, 652 P.2d 1290 (Utah 1982). Although defendant did move for a mistrial on this basis after the jury retired for deliberations, this was not sufficient to preserve the issue. Hales, 651 P.2d at 1292.

In support of his argument, defendant cites State v. Troy, 688 P.2d 487 (Utah 1984) in which this Court laid out a two-step test for determining whether prosecutorial comments required reversal. At the outset, this case is distinguishable from Troy. The prosecutor in Troy made comments that were not permissible for any reason; the comments on defendant's former name and request that the jury consider matters not in evidence were not only irrelevant but prejudicial and improper in any event. In this case, the prosecutor's comments were permissible if the jury interpreted them as comments on defendant's credibility as a witness.

These comments do not even meet step one of the Troy test which requires that "the remarks call[ed] to the attention of the jurors matters which they would not be justified in considering in determining their verdict." 688 P.2d at 486, because the jury may consider prior convictions in weighing credibility. Since step one is not met in this case, this Court

need not consider step two; whether they probably influenced the jury.

Because the jury may properly consider prior convictions in weighing credibility, it was proper for the prosecutor to comment on defendant's prior conviction, proved at trial, for the purpose of pointing out to the jury that the State believed defendant's testimony was not credible. The prosecutor's argument clearly intended to do only that, therefore, it was not prosecutorial misconduct to make the comments or to continue with them after defendant objected, nor was it error for the trial court to deny defendant's motion for a mistrial.

POINT III

THE JURY WAS NOT INSTRUCTED THAT THE § 76-6-408 PRESUMPTION WAS A MANDATORY REBUTTABLE PRESUMPTION.

Defendant contends that the trial court erred in giving certain jury instructions. The record indicates that defendant objected to these instructions but that objection was on other grounds argued in Point V below. Normally failure to make a specific objection to a jury instruction at trial precludes appellate review. State v. Noren, 704 P.2d 568 (Utah 1985). But in State v. Lesley, 672 P.2d 79 (Utah 1983), this Court reviewed a jury instruction in the absence of an objection to avoid injustice. Should this Court choose to review the challenged instruction, there was no error.

The jury was given the following instructions:

INSTRUCTION NO. 22

The knowledge or belief which the State must prove is presumed in the case of an actor who:

(a) Is found in possession or control of other property stolen on a separate occasion; or
(b) Has received other stolen property within the year preceding the receiving offense charged.

(R. 65).

INSTRUCTION NO. 23

The court has instructed you that you may presume Mr. Tarafa knew the property was stolen because he had received other stolen property within a year preceding these charges. This presumption is permissive in nature. That is, you may or may not employ it. The inference is also rebuttable. Mr. Tarafa's testimony that he had no knowledge the property was stolen is offered to rebut the inference. It is for you to determine whether this evidence is sufficient to overcome the presumption of knowledge.

The fact that an inference may arise and is or is not rebutted by evidence of the defendant in no way changes the burden of the state. The burden remains with the state to prove beyond a reasonable doubt that Mr. Tarafa knew or believed the property was stolen.

(R. 66). (Emphasis added).

INSTRUCTION NO. 28

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

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

(R. 71) (Emphasis added).

Defendant contends that Instruction No. 22 creates a mandatory rebuttable presumption like that disapproved in State v. Chambers, 20 Utah Adv. Rpt. 14 (Oct. 21, 1985). No doubt,

Instruction No. 22 standing alone would improperly shift the burden of proof to the defendant. Sandstrom v. Montana, 442 U.S. 510 (1979). Read together with Instruction No. 23 and 28, however, it is evident that the presumption was permissive and did not shift the burden of proof.

In Francis v. Franklin, the Supreme Court stated:

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

105 S.Ct. 1965, 1972 (1985). A reasonable juror could not have concluded that the jury instructions in this case, taken as a whole, created a mandatory rebuttable presumption. Instruction No. 23 stated specifically that the presumption was permissive and that the burden remained on the State. Instruction No. 28 instructed the jury to read all of the instructions as a whole. For these reasons, no juror could have reached the conclusion that he must employ the presumption or that defendant was required to rebut it.

Although defendant does not cite it, this Court decided State v. Pacheco, 20 Utah Adv. Rpt. 18 (Oct. 21, 1985), after Chambers. While the Court in Pacheco only quoted the offending portion of the jury instruction, there was additional language in the instruction which the State argued cured the error. While the Pacheco instruction employed the phrase "prima facie" the instruction in this case did not, and they are not the same statutory presumption. Compare Utah Code Ann. § 76-6-402(1) (1978) with Utah Code Ann. § 76-6-408(2)(a) and (b) (1978). This difference in the basis of the instruction does not appear significant. There is, therefore, only one way in which the State can square this case with Pacheco and square Pacheco with Francis v. Franklin. That is to assume that Pacheco is to be read no more expansively than is Chambers. There was, therefore, no error in instructing the jury in this case.

POINT IV

THERE WAS EVIDENCE SUPPORTING THE COURT GIVING INSTRUCTION NOS. 22 AND 23.

Defendant argues that the jury should not have been instructed on the presumption of knowledge found in § 76-6-408, and outlined in Instructions 22 and 23 quoted in Point III above, because there was no evidence supporting the presumption. There was, however, evidence to support the inference.

Defendant admitted that he participated in using Paul Velasco's stolen credit card to purchase shoes and pants for himself. Use of this credit card could satisfy part (b) of Instruction 22--receipt of other stolen property within the year preceding the receiving offense charged.

Furthermore, each count of receiving stolen property could raise an inference that defendant knew the other property was stolen. This is especially true where defendant said he knew Florez "took" the VCR which was the basis for count III.

Finally, "[i]t is blackletter law that this Court will not reverse for erroneous jury instructions unless there is a reasonable likelihood that absent the error, there is a reasonable possibility that the defendant might have prevailed. State v. Fontana, Utah, 680 P.2d 1042, 1048 (1984)." State v. Slowe, case nos. 19990 and 20070, slip op. at 4 (Utah filed Dec. 30, 1985). Although the only issue in this case was defendant's knowledge that the property was stolen, there was other evidence from which the jury could infer that knowledge. First, there was the sheer number of pawn transactions involved, second was defendant's admission that he knew Florez "took" the VCR. If the instructions were erroneous, therefore, they were harmless.

POINT V

THE TRIAL COURT PROPERLY ADMITTED PAWN CARDS THAT RELATED TO OTHER PAWN TRANSACTIONS INTO EVIDENCE.

On cross-examination, defendant identified seven pawn cards from transactions other than those that were the basis for the three charges tried in this case. He admitted that he signed the cards and provided the information, including thumbprints, which the cards contained (T. 390-399). He also explained that all of these pawn transactions were done by him for Nelson Florez in the same manner as those for which he was on trial. All of the transactions took place within the same time frame as the three

theft charges. They were on October 27, 30 and 31 and November 3, 5 and 6 (See Ex. P-18-24).

Defense counsel did not object to defendant's testimony concerning these transactions. When the State moved for admission of the cards as evidence (Ex. P-18-24), defense counsel objected to admission of the cards because they lacked foundation and relevance (T. 426). The trial court admitted the cards, ruling that foundation was established by defendant's own testimony and that they were relevant (T. 426).

Because defense counsel did not object to defendant's testimony, the evidence which he claims was prejudicial had already come in and could be considered by the jury. Moreover, the specific facts surrounding these pawn transactions merely corroborated defendant's direct testimony that he had pawned items for Florez on at least 7 or 8 occasions (T. 366). Thus, even if the pawn cards themselves were erroneously admitted, their admission was harmless.

This Court has held that the trial court's ruling on admissibility of evidence will not be overturned unless the court so abused its discretion as to create a likelihood that injustice resulted. State v. Royball, 17 Utah Adv. Rpt. 16 (Sept. 3, 1985). There was no abuse of discretion where the evidence had already come in through defendant's testimony and defendant did not object to the testimony nor move to strike it.

Notably, although defendant argues that the pawn cards were admitted as evidence of prior bad acts, he also argues that there was no evidence that any of these items were stolen (See

Appellant's Brief at 27-28). If none of the items were shown to be stolen then pawning them was not a "bad act." Thus, even if the judge had excluded evidence of prior bad acts, the prosecutor would not have violated the order by offering this evidence as defendant claims he did. Notwithstanding defendant's claim to the contrary, the judge, in fact, did rule that this evidence could come in to rebut defendant's claim that he did not know nor did not believe that the property probably was stolen (T. 151). The sheer number of pawn transactions under similar circumstances was offered to show that defendant did in fact know or believe that the items were stolen. For this reason the evidence was relevant and the trial court did not err in admitting it.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm defendant's conviction and deny his request for a new trial.

DATED this 24th day of February, 1986.

DAVID L. WILKINSON
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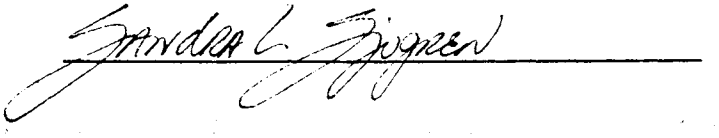
CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing brief, postage prepaid, to Nancy Bergeson, attorney for appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 24th day of February, 1986.



ADDENDUM

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	DESIGNATION OF RECORD ON APPEAL
Plaintiff/Respondent	:	
vs.	:	
ROBERTO TARAFA,	:	Case No. CR 85-54 (Judge Frederick)
Defendant/Appellant	:	

TO THE CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY:

You are hereby requested to prepare, certify and transmit to the Supreme Court of the State of Utah, with reference to the Notice of Appeal heretofore filed by the defendant/appellant, in the above cause, all documents contained in the file in the above-entitled matter, together with a transcript of the entire record of the hearing held on the 19th and 20th days of February, 1985 and the Motion to Sever heard on the 15th day of February, 1985, before the Honorable J. DENNIS FREDERICK, Judge, Third District Court.

DATED this 18 day of March, 1985.

NANCY BERGESON
Attorney for Defendant/Appellant