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The State of Utah v. Raymond Jeffrey Johnson : 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. 20562
-v-	:	
RAYMOND JEFFREY JOHNSON,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1978) THEFT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-412 (1978) AND § 76-6-404 (1978), AND AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (1978), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LEONARD H. RUSSON, PRESIDING

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Was the search of defendant's vehicle justified as a reasonable inventory search?

2. Was the search of defendant's vehicle justified because police officers had probable cause to search for contraband?

3. Was the evidence introduced at trial insufficient to convict defendant of aggravated assault?

4. Was the jury instruction regarding possession of stolen property constitutional?

5. Was theft a lesser included offense of aggravated robbery with respect to the facts of this case?

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-v-	:	
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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The defendant, Raymond Jeffrey Johnson, was charged with one count of aggravated robbery, a first degree felony in violation of Utah Code Ann. § 76-2-202 (1978), Utah Code Ann. § 76-3-203(1)(4) (Supp. 1985), Utah Code Ann. § 76-6-302 (1978), aggravated assault, a third degree felony in violation of Utah Code Ann. § 76-2-202 (1978), Utah Code Ann. § 76-3-203(3)(4) (Supp. 1985), Utah Code Ann. § 76-5-103 (1978), and theft, a second degree felony in violation of Utah Code Ann. § 76-2-202 (1978), Utah Code Ann. § 76-3-203(2)(3) (Supp. 1985), Utah Code Ann. § 76-6-412 (1978), and Utah Code Ann. § 76-6-404 (1978). (See Addendum A.)

Defendant was convicted of the charged crimes in a jury trial which commenced on January 16, 1985, before the Honorable Leonard H. Russon, Third Judicial District Court in and for Salt Lake County. Defendant was sentenced to a term in the Utah State Prison for five years to life for the aggravated robbery, not more than five years for the aggravated assault, and not less than one or more than fifteen years for theft. Defendant was

also sentenced to an additional one year to run consecutively with the previous terms for the use of a firearm.

STATEMENT OF THE FACTS

On August 18, 1984, at approximately 5:15 p.m., a man entered Oakwood Jewelers, located at 2342 East 70th South in Salt Lake County (R. 616-18, 1152) and forced Joanne Knaphus, a saleswoman, at gunpoint, into a bathroom in the rear of the store (R. 616-17). The man threatened to shoot Mrs. Knaphus if she did not stay in the bathroom (R. 623). She observed that this man had a beard and was wearing a baseball cap (R. 617). Although Mrs. Knaphus identified the defendant's brother, Allen Johnson, as the man who pointed the gun and forced her into the darkened bathroom, she testified that the man explicitly warned her not to look at him (R. 618), therefore, she really did not get a close look at his face (R. 643).

Soon thereafter a second accomplice entered the jewelry store, opened the showcases, and started to collect the assorted jewelry (R. 619). During the robbery a customer, Stella Kyarsguard, entered the store and saw the second accomplice, whom she later identified as Paul Branch, standing behind one of the showcases (R. 1227-28). Branch displayed a firearm and forced Mrs. Kyarsguard to the rear of the store (R. 1215) where the first man stood guard with a gun (R. 1220). The first man pointed the gun at Mrs. Kyarsguard (R. 1229) and ordered her not to look at him (R. 1221). He then grabbed Mrs. Kyarsguard by the arm and forced her into the darkened bathroom where he had previously imprisoned the saleswoman, Mrs. Knaphus (R. 1221).

Mrs. Kyarsguard's limited description of the first man with the gun was that he seemed tall (R. 1220). After it appeared that the two men had left the store, the two ladies exited the bathroom and observed that all of the jewelry which had been located in the various showcases was missing (R. 1225).

At approximately 5:15 p.m. on the day of the robbery, Marsha Wright and her daughter, Misty, were sitting in their car in a parking lot outside of Oakwood Jewelers. Both noticed two men, one taller than the other, carrying a large plastic garbage bag which appeared to contain numerous little boxes (R. 1079, 1129). Both men were described as having beards and wearing baseball caps and dark clothes (R. 1078, 1131). They walked hurriedly in front of the Wrights' car (R. 1132) and jumped into the back seat of a tan or beige car (R. 1085, 1096, 1135) already occupied by a man and woman (R. 1095, 1135). The Wrights looked for a license plate number; however, no license plates were seen on the car (R. 1137-38), however, they did notice an oblong object on the rear window (R. 1089, 1137-38). Both Marsha and Misty Wright positively identified defendant, Raymond Johnson, and Paul Branch as the two men carrying the large garbage bag (R. 1088, 1139).

At 5:15 p.m. on the day of the robbery, Daniel B. Williams was sitting in a restaurant located near Oakwood Jewelers (R. 1181-84). Through a window in the restaurant he noticed two men, one taller than the other, bearded and wearing baseball caps, walk toward Oakwood Jewelers (R. 1188, 1192). Ten to fifteen minutes later he noticed the same two men walking in

the opposite direction (R. 1189, 1190). Mr. Williams positively identified defendant Raymond Johnson as the taller of the two men and Paul Branch as the shorter man (R. 1192).

At approximately 5:15 p.m. on August 18, 1984 Leslie Clara Butler, the owner of a dance studio located near Oakwood Jewelers, noticed two men with beards, dressed alike, enter Oakwood Jewelers (R. 1150, 1152-53). Fifteen to twenty minutes elapsed when she noticed the two men leave the store carrying a large garbage bag full of something (R. 1153-55). She identified defendant Raymond Johnson as looking similar to one of the two men (R. 1156-57).

On August 24, 1984, two plain clothes officers with the Los Angeles Police Department, Figueroa and Penrod, were routinely investigating their assigned area as part of a burglary and narcotics task force. At approximately 2:30 p.m., Officers Figueroa and Penrod drove into the parking lot of the Pink Motel in Los Angeles, California (R. 311-12). They observed defendant, Raymond Johnson in the parking lot sitting behind the wheel of a beige 1976 Chevrolet (R. 312-13). Defendant was using hydraulic lifts which are illegal in California to bounce his car up and down (R. 314). Officers noted that the car had no license plates, but had a temporary license from Utah in the rear window (R. 313, 396-97).

Officers noted a woman, identified as Jeanna Salazar, walk out of room #10 of the Pink Motel and get into the same car as defendant Johnson (R. 312-13). Miss Salazar appeared to be under the influence of an opiate (R. 390). Officer Figueroa

claimed she walked slowly and deliberately, her eyelids were droopy and her head hung forward (R. 390). The officers further observed through the open door of room #10 two people standing administering drugs intravenously (R. 315-18, 391).

Soon thereafter defendant started to leave the parking lot when the officers observed the two individuals in room #10, Allen David Johnson, brother of Raymond Johnson, and Teresa Alverez, approaching Johnson's car (R. 323). The officers stopped all four suspects, observed marijuana inside the car, saw fresh track marks on the inside of the suspects' arms, and observed that all suspects appeared to be under the influence of a controlled substance (R. 324-27, 394-96).

Officers then placed the suspects including defendant Raymond Johnson under arrest for being under the influence of a controlled substance. Officer Figueroa subsequently obtained consent from the suspects to search room #10 for illegal narcotics and stolen property (R. 397-98). In their search, officers found a substantial amount of jewelry, drug paraphernalia, and a loaded .38 caliber revolver (R. 344, 399-400). They also found jewelry and .38 caliber ammunition located in the purses and upon the persons of the suspects (R. 330, 407, 424).

Upon arresting the suspects, officers impounded and inventoried defendant Johnson's car (R. 336). Backup officers arriving at the Pink Motel after the arrests followed a mandatory Los Angeles Police Department checklist in inventorying the impounded car (R. 336). In compliance with the department

checklist (Addendum B) officers opened the hood and noticed a towel with "Pink Motel" printed on it wrapped around an object secured underneath the hood (R. 340). Officers opened the bundle and found a large assortment of jewelry (R. 341). Also pursuant to the mandatory checklist (Addendum B), officers opened the trunk and saw a small unlocked box with "Oakwood Jewelry, Inc., Salt Lake City" printed on the outside of the box (R. 342). Inside the box officers found 46 bundles containing over 1,000 precious gems (R. 907-08).

Authorities in Salt Lake City were contacted and verification of the stolen property was made by the owner of the jewelry, Mr. Pahlke (R. 978). Police also obtained pawn slips from a local pawn dealer and learned that a substantial portion of the items stolen from Oakwood Jewelers had been pawned by two of the suspects (R. 1322-57). Raymond Johnson and two others were extradited to Utah and charged with the aggravated assault of Stella Kyarsguard, the aggravated robbery of Joanne Knaphus, and the theft from Oakwood Jewelers.

A motion to suppress evidence obtained in the California arrest of defendant was denied (R. 470-71). At trial, the .38 caliber pistol found during the search of room #10 of the Pink Motel was identified by Joanne Knaphus and as the pistol used in the Oakwood Jewelry Store robbery (R. 652). Furthermore, the car impounded in California was registered to Raymond Johnson and was identified by witnesses as the car in the parking lot next to Oakwood Jewelers which defendants Raymond Johnson and Paul Branch, carrying a large garbage bag, entered and hurriedly left the parking lot (R. 1097, 1136-37).

The jury found defendant Johnson guilty of aggravated robbery, aggravated assault and theft. Defendant was subsequently sentenced to the Utah State Prison.

SUMMARY OF ARGUMENT

The search of defendant's vehicle was justified as a reasonable inventory search pursuant to a necessary impoundment. Further, the officers had probable cause to believe the vehicle contained contraband. The facts as known to the officers, viewed from an objective standard, supported the officers' search. The contraband discovered in the vehicle was properly admitted into evidence.

Based upon articulable facts proved at trial, the jury found the defendant guilty of the aggravated assault of Stella Kyarsguard. The State proved each element of aggravated assault at least to the extent that a reasonable man could have reached a verdict beyond a reasonable doubt.

The trial court correctly instructed the jury regarding the possession of recently stolen property. The instruction maintained the burden of proof on the State since the instruction was only a permissive inference and not a mandatory rebuttable presumption.

Under the facts of this case, theft was not a lesser included offense of aggravated robbery since the theft and aggravated robbery were two separate acts within a single criminal episode and therefore convicitons and sentences on both could be had.

ARGUMENT

POINT I

THE WARRANTLESS SEARCH OF APPELLANT'S AUTOMOBILE AND SEIZURE OF THE CONTRABAND WAS LAWFUL AND THE TRIAL COURT CORRECTLY ADMITTED THE EVIDENCE SEIZED AS A RESULT OF THE SEARCH.

Defendant first contends the search of his automobile violated his constitutional protection against unreasonable searches and seizures as provided by the Fourth Amendment of the United States Constitution. Because defendant addresses the constitutionality of the search on Fourth Amendment grounds only and not under Art. I § 14 of the Utah State Constitution the respondent's analysis will be limited to the reasonableness of the search under the Fourth Amendment.

The question of whether a search is reasonable is an issue for the trial court and the trial court's ruling is not to be upset unless persuasively shown to be in error. State v. Lopes, 552 P.2d 120 (Utah 1976).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. A search warrant must be issued by a neutral magistrate and based upon probable cause for a search to be constitutionally permissible. However, well established exceptions exist to the warrant requirement. An inventory search of an automobile and search of an automobile based upon probable cause are two established exceptions. See South Dakota v. Opperman, 428 U.S. 364 (1976), and United States v. Ross, 456 U.S. 798 (1982).

A. THE WARRANTLESS SEARCH OF DEFENDANT'S AUTOMOBILE WAS JUSTIFIED AS AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE.

A warrantless search of an impounded vehicle for the purposes of protecting the police and public from danger, avoiding police liability for lost or stolen property, and protecting the owner's property is permitted by the Fourth Amendment. South Dakota v. Opperman, 428 U.S. 364 (1976); State v. Hygh, 711 P.2d 264, 267 (Utah 1985); , State v. Romero, 624 P.2d 699 (Utah 1981); State v. Crabtree, 618 P.2d 484 (Utah 1980). To find that officers have conducted a valid inventory search "the court must first determine whether there was reasonable and proper justification for the impoundment of the vehicle." Hygh, 711 P.2d at 268. Justification for a lawful impoundment can be obtained through explicit statutory authorization[1] or from the circumstances surrounding the initial stop. Opperman, 428 U.S. at 375-76; Hygh, 711 P.2d at 268.

In the instant case, no statutory authorization for impoundment existed under U.C.A. §§ 58-37-3, 41-6-116.10 or 41-1-115 (1953), as amended (see Addendum A). Thus the court must look to the surrounding circumstances to determine whether the impoundment was reasonable.

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[1] Utah's statutes give a police department authority to impound vehicles in several situations. Vehicles may lawfully be impounded when they are used to transport controlled substances, Utah Code Ann. § 58-37-13 (1953), as amended; when the vehicle is improperly registered or stolen, Utah Code Ann. § 41-1-115 (1953); or when a vehicle is abandoned, Utah Code Ann. § 41-6-116.10 (1953). Hygh, 711 P.2d at 268.

This Court has recently decided two cases, State v. Hygh, 711 P.2d 264 (Utah 1985), and State v. Rice, 717 P.2d 695 (Utah 1986), in which an impoundment and inventory search of a car were found unconstitutional because the impoundment and inventory were pretextual for a full-blown investigatory search. Both cases are distinguishable from the present case.

In Hygh, the officer stopped the defendant because defendant looked similar to a suspect in a recent robbery. The officer did not ask the defendant for his license and registration nor search the car until another officer was able to go to the police station and retrieve the picture of the robbery suspect. The officer in Hygh then searched the car with the picture of the suspect in his hand. Hygh, 711 P.2d at 266, 270. Further, the officer did not completely search the vehicle, did not make a list of the items in the vehicle and did not use a standard inventory form. Hygh, 711 P.2d at 270. Finally, the officer did not ask defendant if anything of value was in the vehicle nor did the officer give the defendant an opportunity to dispose of his vehicle. Hygh, 711 P.2d at 269. It is important to note the vehicle in Hygh was parked next to a curb in a lawful parking area. Hygh, 711 P.2d at 269.

In State v. Rice, 717 P.2d 695 (Utah 1986), the officer suspected defendant of drug dealing. When officers stopped defendant for a suspended license the defendant pulled over and parked his truck off the street in an office parking lot. Rice, 717 P.2d at 696. The officers refused to permit defendant to leave his truck in the parking lot or to allow it to be retrieved

by his parents. Rice, 717 P.2d at 696. Finally, the defendant was not advised of the search nor allowed to be present. Rice, 717 P.2d at 696.

In the instant case the following circumstances distinguish this case from Hygh and Rice and justify the impoundment of the vehicle: (1) at the time of defendant's arrest, his car was parked in the middle of the parking lot blocking traffic (R. 336); (2) the defendant was arrested for being under the influence of an opiate and thus could not drive the vehicle (R. 395-96); (3) defendant did not have a driver's license (R. 394); therefore, any further driving by the defendant would be illegal; (4) defendant's friends were also arrested for being under the influence of opiates, thereby negating the possibility of one of them driving defendant's vehicle; (5) defendant had a temporary sticker from Utah in lieu of license plates and was arrested at a motel which was evidence that defendant was likely passing through town without a permanent location to store his automobile; (6) unlike the defendant in Rice the defendant in the instant case did not ask the officers or suggest that his car be disposed of differently; (7) defendant was never denied the chance to take valuables or personal property out of his car prior to the inventory; (8) the officers impounded the vehicle pursuant to Los Angeles Police Department procedure and followed a mandatory checklist in the inventory of the car.

These facts, together with rational inferences, considered in the light in which they appeared to the officers, reasonably support the impoundment of defendant's automobile.

Defendant contends the officers' stop which led to the subsequent inventory of the car was not justified by surrounding circumstances but instead was a pretext to search for stolen property. Pretextual conduct occurs when police engage in a deliberate scheme to evade the requirements of the Fourth Amendment; Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961). If a search is valid and reasonable, its validity is not vitiated by a police officer's suspicion that contraband or other evidence may be found. United States v. Staller, 616 F.2d 1284 (5th Cir. 1980). If the search is reasonable and is conducted according to routine police procedure an officer's suspicion should have no bearing on its validity. The possibility that the searching officer may have harbored a suspicion that evidence of a criminal activity might be uncovered as a result of the search should not vitiate his obligation to conduct the inventory. Commonwealth v. Tisserand, 363 N.E.2d 530 (Mass. App. 1977).

In the instant case the officers clearly were not operating under a pretext. The officers were routinely investigating their assigned area as part of a burglary and narcotics task force (R. 311) and stopped defendant's car because of the officers' observation and their reasonable belief that the suspects were under the influence of a controlled substance (R. 323-27, 390-96). The officers first observed a woman with a slow, deliberate walk and droopy eyelids enter defendant's car (R. 312-13, 390). The officers determined she was under the influence of a controlled substance (R. 395). The officers next observed the two people who officers had just seen administering drugs

intravenously approach defendant's car (R. 315-18, 323, 391). Finally, the officers approached the defendant in his car and observed fresh puncture wounds on defendant's arms (R. 395) and noted defendant had slow, deliberate speech and movements (R. 394). Clearly, the officers approached the vehicle and arrested the defendant because of their observations that the suspects were under the influence of a controlled substance. Officers neither knew nor had reason to suspect that defendant's car contained stolen property (R. 409).

Defendant next contends that an impoundment was unnecessary as police could have left defendant's vehicle in the Pink Motel parking lot. The following evidence clearly suggests that the opposite was true: (1) at the time defendant was arrested his car was parked in the middle of the parking lot blocking traffic, not in a parking stall (R. 321, 336); (2) defendant did not have a driver's license (R. 394) and was under the influence of drugs (R. 395), as were his friends (R. 396), so neither defendant nor his friends could legally move the car to a parking stall; (3) finally, there is no evidence that the motel manager would allow the car to stay in his lot, the room occupied by defendant and the other suspects was only rented up to the day they were arrested (R. 425).

The circumstances surrounding the arrest indicate the impoundment was not only justified but was necessary. Once it is determined the impoundment was reasonable this Court must determine whether the subsequent search was a valid inventory search. It is standard procedure in Los Angeles for officers to

inventory an impounded vehicle (R. 337). A standardized inventory checklist meticulously outlines the areas of an automobile where officers are required to look (Defendant's Exhibit 1, Addendum B). Standardized police procedure in this context provides a guard against arbitrariness or pretext. These regulations ensure that the police do only what is necessary in the performance of the caretaking function. Unlike the officer in Hygh, 711 P.2d at 270, who did not follow the regularized set of procedures for an inventory search, the officer in the instant case completely searched the vehicle, followed a mandatory checklist in inventorying the vehicle and made a list of the items in the vehicle (R. 336, Defendant's exhibit 1, Addendum B).

Notwithstanding the standardized practice for inventorying impounded vehicles by Los Angeles police officers, defendant claims the officers' search was unreasonable, in particular the search under the hood and in the trunk. Defendant contends there was no indication that anything of value was located in the trunk nor did the officers ask defendant if anything of value was located in the automobile.

Although defendant argues the officer should ask the driver prior to the inventory of a vehicle whether valuables or personal property are inside, the driver could lie about or not recall the contents in his vehicle. If police were to rely on a driver's negative response as to valuables or personal property within the vehicle, police could still be subject to claims of theft or lost property which belonged to individuals other than the driver.

In State v. Earl, 716 P.2d 803 (Utah 1986), this Court upheld the inventorying of a vehicle's locked trunk pursuant to impoundment. In Earl, a police officer stopped defendant's vehicle because defendant was weaving within his lane of traffic. Defendant presented his driver's license to the officer, but failed to produce a car registration. Subsequently, defendant tried to run from the officer and was placed under custodial arrest for failure to produce a registration or proof of ownership for the vehicle. Officers searched the inside of the car and found various drugs and a loaded gun. After the vehicle was towed and impounded officers inventoried the vehicle. Officers opened the car trunk and found two large, sealed, green plastic garbage bags. The officers opened these bags and found a large quantity of marijuana. The Court upheld the warrantless search of the trunk as a valid inventory search and cited Florida v. Myers, 466 U.S. 380 (1984), as support.

In the instant case, officers opened the hood and trunk of defendant's vehicle pursuant to a written inventory checklist. (Defendant's Exhibit 1). As in Earl, 716 P.2d 803, there is no evidence officers asked defendant prior to taking the inventory whether there were valuables located in his vehicle. The purpose to look in those areas was not only to determine whether valuables or personal property was secreted there, but also to determine the type and condition of engine, battery, spare tire and jack, etc., contained there. Upon opening the hood, officers noted in plain view a towel with the lettering "Pink Motel" printed thereon wrapped around a bulky object (R. 340). The bundle was secured

next to the engine by bungie cords. Similarly, a small box with a cardboard cover with the lettering "Oakwood Jewelers, Inc., Salt Lake City," printed on the side was located in plain view in the trunk (R. 342). Neither object was locked nor sealed in any manner, as were the green plastic bags in Earl. Had not the officers inventoried the contents of the bundle under the hood and the unlocked box in the trunk, the police could have been liable for claims of lost or stolen items. Indeed, Judge Russon's rationale for denying the motion to suppress evidence obtained in the inventory search is persuasive:

> [I]t would appear to the Court that it would be perfectly proper to open the trunk and to look in the trunk and make an inventory of the things that were there. . . . If you say there is a box, then the next step is what is to prevent someone from saying, "Yes, I had diamonds in the box" or "I had gold bullion in the box." Wouldn't the next normal step be to open the lid and look in to make a little inventory of that? (R. 434)

United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), cited by defendant are inapplicable to the facts in this case. Those cases involved an illegal search of locked suitcases in trunks of cars allegedly based upon probable cause, not inventory searches pursuant to impoundment. In State v. Crabtree, 618 P.2d 484, 487 (Utah 1980), this Court distinguished Chadwick and Sanders by stating "[n]either decision addressed itself to the searching of luggage as a police inventory procedure following arrest on other charges."

Another case cited by defendant, United States v. Hellman, 556 F.2d 442 (9th Cir. 1977), is distinguishable on its

facts. In Hellman, the court disallowed the admission of evidence obtained from an inventory search for two reasons: (1) the investigating officer testified that the reason he inventoried the vehicle was because he was searching for evidence, and (2) inventory searches had not been a normal caretaking practice in the Eugene Police Department. Hellman, 556 F.2d at 444. In the case at bar, there is no evidence of investigatory motive. Officers had no reason to believe stolen property was in defendant's vehicle (R. 409). Further, an inventory search of an impounded vehicle is a normal and required practice in the Los Angeles Police Department (R. 336).

Finally, defendant argues that police should not have seized the jewelry found in the car and conducted an investigation. Such a proposition would encourage police to look the other way when they come across suspicious, potentially incriminating evidence while undertaking an inventory search. Officers were justified in seizing the jewelry at the very least to protect themselves against claims of lost or stolen property in case the jewelry had been left in the car. Further, the fact that jewelry was located under the hood and the box in the trunk had a jewelry store's name and out-of-state address printed on the side would create reasonable suspicion in a police officer's mind to follow up with an investigation.

Clearly, the officers in the instant case were acting within their scope of authority and in response to standard departmental policy. No invasion of defendant's constitutional rights occurred.

B. THE SEARCH OF DEFENDANT'S VEHICLE WAS JUSTIFIED BECAUSE OFFICERS HAD PROBABLE CAUSE TO BELIEVE THE VEHICLE CONTAINED CONTRABAND.

Police officers who have legitimately stopped a vehicle and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of containers within the vehicle that are not within plain view. United States v. Ross, 456 U.S. 798 (1982). See also United States v. Johns, ____ U.S. ____, 105 S.Ct. 881 (1985); Carroll v. United States, 267 U.S. 132 (1925). Given the nature of an automobile in transit such a search is necessary if police officers are to secure the contraband in the automobile, Ross, 456 U.S. at 806. Prior to a warrantless search officers must make a probable cause determination based on objective facts that could justify the issuance of a warrant by a magistrate. Ross, 456 U.S. at 808.

This Court has often upheld warrantless searches of vehicles and the containers therein when officers have probable cause to believe the vehicle contains contraband. See e.g. State v. Earl, 716 P.2d 803 (Utah 1986) (probable cause to continue the search of defendant's rented automobile existed when, in a preliminary search of the passenger compartment, an officer found strong air fresheners, a loaded firearm, and a quantity of controlled substances and drug paraphernalia); State v. Kent, 665 P.2d 1317 (Utah 1983) (the search of defendant's car was reasonable and lawful since he was a parolee and shotgun shells were in open view); State v. Ballenberger, 652 P.2d 927 (Utah 1982) (considering the lateness of the hour, the defendant's

suspicious movements, the officers' knowledge of the high rate of burglary in the area and unobstructed view of a CB radio in the defendant's car, the officers had probable cause to search the defendant's automobile); State v. Eastmond, 28 Utah 2d 129, 499 P.2d 276 (1976) (where an officer observes property that he has reason to believe is stolen the protection against unreasonable searches does not prevent him from further searching the immediate area for more stolen property).

In the instant case the officer had probable cause to believe defendant's vehicle contained contraband. Defendant was parked at a location where drug trafficking had been known to occur (R. 311). Upon stopping defendant, Officer Figueroa observed a marijuana cigarette in the ashtray (R. 395). Officers also observed fresh track marks on defendant's arms, and defendant had slow deliberate speech and movements. Officers concluded from their observations that defendant was under the influence of an opiate (R. 394).

Chadwick, 433 U.S. 1, and Sanders, 442 U.S. 753, previously cited by defendant are inapplicable to the present case. In Chadwick and Sanders the officers had probable cause to search luggage prior to the placement of the luggage in an automobile. The relationship between the contraband and the vehicle was purely coincidental. Ross, 456 U.S. at 8134 citing Sanders, 442 U.S. at 766-767.

In the instant case the officers had probable cause to search the entire vehicle for contraband. The scope of the warrantless search of an automobile is defined by the object of

the search and the places in which there is probable cause to believe that it may be found. Ross, 456 U.S. 824. Thus, the search of the trunk and the hood and the containers within such places was justified by the officers' probable cause to believe defendant's vehicle contained contraband.

POINT II

EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION OF AGGRAVATED ASSAULT.

Defendant claims that the evidence presented against him at trial was insufficient to support his conviction of aggravated assault. Specifically defendant alleges: (1) neither of the two witnesses inside the jewelry store at the time of the robbery identified defendant as one of the perpetrators; (2) because defendant may have committed or aided in the commission of the robbery, defendant did not necessarily commit an aggravated assault.

The standard articulated by this Court for reviewing a challenge to the sufficiency of evidence is that the evidence and all reasonable inferences drawn therefrom will be viewed in a light most favorable to the jury's verdict and to set aside a jury verdict, the evidence must be "sufficiently inconclusive or so inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Rebeterano, 681 P.2d 1265, 1256 (Utah 1984); State v. Garcia, 663 P.2d 60, 63 (Utah 1983). Moreover, it is the exclusive province of the jury to judge the credibility of the witnesses and the weight of the evidence. State v. Howell, 649 P.2d 91, 97 (Utah 1982).

When viewed in a light most favorable to the verdict, the evidence introduced at trial was sufficient to support defendant's conviction for aggravated assault.

Utah Code Ann. § 76-5-102 (1978) provides that:

> (1) Assault is:
> (a) An attempt, with unlawful force or violence, to do bodily injury to another; or
> (b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another.
> (2) Assault is a class B misdemeanor.

Utah Code Ann. § 76-5-103 (1978) provides that:

> (1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:
> (a) He intentionally causes serious bodily injury to another; or
> (b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.
> (2) Aggravated assault is a felony of the third degree.

The following articulable facts support the jury's finding that defendant committed the aggravated assault against Stella Kyarsguard: (1) several witnesses identified defendant Johnson's automobile as being the vehicle which two "suspicious" looking men carrying a large, full garbage bag jumped into and quickly departed from the parking lot (R. 1097, 1136); (2) much of the jewelry stolen during the robbery was found in defendant's automobile (R. 890-910); (3) at the time of the robbery, Daniel Williams, a customer in a nearby restaurant, saw two men walk towards Oakwood Jewelers and approximately ten minutes later, he saw the same two men walk back towards the parking lot, the shorter man identified as Paul Branch and the taller man

identified as Raymond Johnson, the defendant (R. 1192); (4) while sitting in their car in the parking lot, Mrs. Wright and her daughter, Misty, noticed two men, one taller than the other, carrying a full plastic garbage bag to a waiting, running car which matched the description of the car belonging to Raymond Johnson, and they identified the two men as Paul Branch and Raymond Johnson (R. 1088, 1139); (5) the gun found in the room where defendant, was staying in California was identified by Joanne Knaphus as the same gun used in the robbery of Oakwood Jewelers (R. 652).

Defendant's contention that neither of the two witnesses inside the jewelry store at the time of the robbery identified defendant as one of the perpetrators is deceiving. Stella Kyarsguard did not clearly see the man who threatened her with the gun; therefore, it was impossible for her to identify the defendant as that person. The man with the gun repeatedly told the women not to look at his face (R. 1221) and they both obeyed his order. Similarly, although Joanne Knaphus identified Allen Johnson, the defendant's brother, as the man with the gun, she too admitted that she did not get a good look at his face (R. 643).

The defendant next contends that the State blended the offense of aggravated robbery with aggravated assault. Defendant argues that although defendant may have committed or aided in the commission of a robbery, defendant did not necessarily commit an aggravated assault.

Utah Code Ann. § 76-2-202 (1953), as amended, extends criminal responsibility and liability to any party to a criminal offense as follows:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Also, Utah Code Ann. § 76-2-307 (1953), as amended, does not relieve a principle or a party to an offense (as defined in § 76-2-202) from criminal responsibility unless prior to the commission of the offense, he voluntarily terminates his effort to promote or facilitate its commission and either gives timely warning to the proper law enforcement authorities or the intended victim, or wholly deprives his prior efforts of effectiveness in the commission of the offense.

In State v. Murphy, 26 Utah 2d 330, 489 P.2d 430 (1971), two men, Murphy and Jordan, drove to a store in Salt Lake City. Jordan went into the store to commit a robbery while Murphy waited outside in his parked, running car. During the robbery, Jordan killed a man then reentered Murphy's car and both drove to another nearby car. At trial two witnesses identified Murphy as one of the two men in the car. In upholding the jury's guilty verdict, this Court reasoned:

> We agree that in order to justify the conviction of murder in the first degree for the homicide which resulted in the perpetration of the robbery . . . , the evidence must justify the jury believing and finding beyond a reasonable doubt, . . . , that the defendant was aware of Jordan's purpose and thus had the intent to participate in the robbery as a principal. The converse is also true: If the evidence did so justify such finding, then the defendant, in so participating in the robbery as a principal, was responsible for the

> natural and probable consequences that occurred in the robbery, including the homicide which resulted therein even though he did not so personally participate in the killing [citations omitted] [emphasis added].

Murphy, 489 P.2d at 431.

Under the Murphy rationale, the driver who waited in the car is presumed culpable for the natural and probable consequences that occur during the time of the aggravated robbery. If a murder is a natural and probable consequence of an armed robbery as in Murphy, surely an aggravated assault of a customer who walked in a store during an armed robbery would also be natural and probable. Therefore, even if defendant was not in the store but was the driver of the car at the time of the robbery, he would still be accountable for the aggravated assault of Stella Kyarsguard.

The State recognizes that the Murphy case was decided under Utah Code Ann. § 76-1-44 (1953) which was replaced in 1973 by the current statute, § 76-2-202. However, in State v. Shupe, 554 P.2d 1332, 1333 (Utah 1976), this Court, in comparing the old statute, § 76-1-44, with the new one, § 76-2-202, stated:

> Though not identical in wording, there is no essential difference between them. Under either [statute], a party may be found guilty as a principal to a crime if she solicited, requested, encouraged, aided or abetted another in its commission.

Schupe, 554 P.2d at 1333.

No fewer than three witnesses positively identified defendant Raymond Johnson as one of the two men at or near the scene of the armed robbery (R. 1088, 1187-88, 1138-39). His companion, Paul Branch, who was also identified as one of the men

by these same three witnesses, was also identified as one of the perpetrators of the robbery of Oakwood Jewelers by Stella Kyarsguard (R. 1227-28).

The jury was not obligated to believe the evidence at trial which was most favorable to defendant. State v. Howell, 649 P.2d 91, 97 (Utah 1982). Furthermore, when there is conflicting evidence, the Utah Supreme Court is "obligated to accept that version of the facts which supports the verdict." Id. at 93. Therefore, the jury need not have believed the testimony most favorable to defendant; and the reviewing court must accept the version of the facts which supports the verdict.

POINT III

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING POSSESSION OF STOLEN PROPERTY SINCE THE INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW AND MAINTAINED THE BURDEN OF PROOF ON THE STATE.

Defendant claims jury instruction 19 is a legally incorrect statement of the law and unconstitutionally shifts the burden of proof from the State to the defendant. The instruction informed the jury that:

> Under the law of the State of Utah, possession of property recently stolen, when a person in possession fails to make a satisfactory explanation of such possession, is a fact from which you may infer that the person in possession stole such property.

Defendant concedes the constitutionality of the doctrine embodied in Utah Code Ann. § 76-6-402(1) (1978), which states:

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

In State v. Graves, 717 P.2d 717 (Utah 1986), this Court recently reaffirmed the constitutionality of § 76-6-402(1). Quoting Barnes v. United States, 412 U.S 837, 839-40 (1973), this Court recognized the deeply embedded common law tradition embodied in this doctrine:

> [P]ossession of recently stolen property if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the *inference* and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. [emphasis added]

Graves, 717 P.2d at 718.

In questioning the validity of the jury instruction as an accurate description of the law, the defendant focuses on the word "fail" in the jury instruction as opposed to the word "no" in the statute, § 76-6-402(1). Similarly, the defendant compares the word "infer" in the jury instruction with "prima facie" in § 76-6-402(1), claiming that infer has the capacity to create a more powerful presumption of guilt of the defendant.

The defendant offers no legal authority to support his argument. This Court should refuse to rule on points on appeal when no legal authority or analysis has been offered. State v. Amicone, 689 P.2d 1341 (Utah 1984).

Assuming defendant had supported his argument with legal authority, defendant's attempt to distinguish the jury instruction and § 76-6-402(1) is not persuasive. First, the word

"fails" in the jury instruction and "no" in § 76-6-402(1) should be compared in the context of the phrases they are embodied in; not individually as in defendant's analysis. The phrase "when no satisfactory explanation of such possession is given", § 76-6-402(1), compared to "when a person in possession fails to make a satisfactory explanation of such possession," are so similar, their meanings are undistinguishable. In the context of both phrases, "fails" and "no" possess the same meaning.

Similarly, defendant's attempt to distinguish "infer" and "prima facie" is not persuasive. In State v. Graves, 717 P.2d 717 (Utah 1986), this Court, in paraphrasing § 76-6-402(1), stated the following:

> Such failure to explain his possession raises an inference that he knew the property was stolen. U.C.A., 1953, § 76-6-402(1) articulates this general principal [statute omitted] [emphasis added]

Graves, 717 P.2d at 717. Furthermore, the use of the word "infer" does not necessarily create a more powerful presumption than the word "prima facie", since the validity of the inference depends upon there being a rational connection between the proven and the inferred fact. Tot v. United States, 319 U.S. 463, 467-68 (1943).

The defendant next contends that instruction 19 unconstitutionally shifts the burden of proof from the State to the defendant. The State does not contest the unconstitutionality of jury instructions in criminal cases which shift the burden of proof to the defendant. This Court has frequently remanded cases for new trials when trial courts have permitted jury instructions which create a mandatory rebuttable presumption of guilt of the

defendant. State v. Chambers, 709 P.2d 321 (Utah 1985); State v. Pacheco, 712 P.2d 192 (Utah 1985) (cert. pending); State v. Tarafa, 36 Utah Adv. Rep. 4 ___ P.2d ___, ___(June 30, 1986). Such instructions unconstitutionally shift the burden of proof to the defendant.

The jury instruction in the instant case does not fit within the Chambers, Pacheco or Tarafa rulings for two reasons. First, jury instruction 19 is not verbatim of § 76-6-402(1). Second, the instruction does not create a mandatory presumption, but a permissive inference. This Court has determined that the language in § 76-6-402(1), "shall be deemed prima facie evidence," when used verbatim in a jury instruction, creates a mandatory rebuttable presumption. However, the language in jury instruction 19, "may[2] infer," does not create a mandatory rebuttable presumption. The United States Supreme Court in Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965 (1985), recognized a distinct difference between mandatory and permissive presumptions in the context of jury instructions:

> "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." [citations omitted] The court must determine whether the challenged portion of the instruction creates a mandatory presumption, or merely a permissive inference. [citations omitted] A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. [footnote omitted] A permissive inference suggests to the jury a possible conclusion to

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2 Webster's New International Dictionary 1396 (3rd ed. 1971), defines 'may" as "have permission to."

> be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.
>
> Mandatory presumptions must be measured against the standards of Winship as elucidated in Sandstrom. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. . . . A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Such inferences do not necessarily implicate the concerns of Sandstrom. [emphasis added]

Francis, supra at 1971. Since the language in instruction 19 was clearly permissive in nature, the burden of proof remained with the State; therefore, the jury instruction must be upheld as valid and constitutional. In addition, the trial court in the instant case clearly instructed the jury that the State has the burden of proof in several other jury instructions (Addendum C).

POINT IV

THEFT IS NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY UNDER THE FACTS OF THIS CASE.

Prior to trial, defendant filed a motion to dismiss the theft count contained in the information, contending that theft was a lesser included offense of aggravated robbery under State v. Hill, 674 P.2d 96 (Utah 1983). In response, the prosecutor, apparently in an effort to avoid the holding of Hill, argued that theft was not a lesser included offense in this case because the information alleged that Joanne Knaphus, the store clerk, was the victim of the aggravated robbery and Oakwood Jewelers, the store, was the victim of the theft. The prosecution alternatively argued

that because second degree felony theft--as it was charged in this case--requires proof that the property stolen had a value in excess of $1,000 (see Utah Code Ann. § 76-6-412(1)(a)(i) (1978), an element that need not be proved for aggravated robbery, this variation of theft is not a lesser included offense of aggravated robbery under the holding of Hill. Although it is not particularly clear from the record, the trial court apparently agreed that the prosecutor's dual victim theory distinguished defendant's case from Hill and denied the motion to dismiss. On appeal, defendant claims that this ruling was erroneous.

Although both of the prosecutor's theories for distinguishing this case from Hill may be valid, it is not necessary to discuss them, or the trial court's reliance on at least one of them, in resolving the issue defendant presents. It is well settled that this Court may affirm a decision on any proper ground "even though the trial court assigned another reason for its ruling." State v. Bryan, 709 P.2d 257, 260 (Utah 1985). Here, the trial court presumably analyzed defendant's motion to dismiss under the holding of Hill which relied on Utah Code Ann. § 76-1-402(3) (1978). However, a Hill analysis was not appropriate under the circumstances. This case involved, in a legal sense, two distinct acts by defendant, committed within a single criminal episode--one constituted aggravated robbery and the other theft. Whether a greater-lesser offense relationship exists in a particular case, under either Hill or State v. Baker, 671 P.2d 152 (Utah 1983) (which sets forth the test to determine whether a defendant is entitled to a requested lesser included offense

instruction), is an issue only where a single act of the defendant is involved. For example, in a criminal homicide case the question may be whether the defendant's single act of killing constituted second degree murder or manslaughter (a lesser included offense of second degree murder). If the defendant had committed two acts of killing within a single criminal episode, one constituting second degree murder and the other manslaughter, the defendant could not successfully argue that, because the two offenses fall within the greater-lesser offense relationship, he could be convicted of only one offense. It is clear that if "the crimes were a result of separate and distinct acts that resulted in separate and distinct crimes," a defendant may be convicted and sentenced for each of the offenses arising out of a single criminal episode. State v. O'Brien, 37 Utah Adv. Rep. 3, 4, ___ P.2d ___, ___ (1986). See also State v. Jolivet, 712 P.2d 843 (Utah 1986); State v. Porter, 705 P.2d 1174, 1178 (Utah 1985).

In defendant's case, the evidence established that defendant and a companion, who were armed with guns, entered a jewelry store where one of them threatened the clerk with the gun and took her and locked her in a back room. Either defendant or his companion then removed jewelry from the showcase. Based upon this criminal episode, defendant was charged with aggravated robbery and theft.[3] At trial, the court gave the jury the following instructions regarding those offenses:

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[3] As noted earlier in this brief, defendant was also charged with and convicted of aggravated assault. However, that count is not pertinent to the issue discussed in this point.

Instruction No. 20

Each defendant has been charged by Count I of the Information in this case with violation of a statute which provides, in part pertinent to this case, as follows:

> ". . . a person commits Aggravated Robbery if in the course of committing robbery, he. . . uses a firearm or a facsimile of a firearm. . . or a deadly weapon. . ."
>
> ". . . for the purpose of this part, an act shall be deemed to be in the course of committing a robbery if it occurs in an attempt to commit, during the commission of, or the immediate flight after the attempt or commission of a robbery."

(R. 189)

Instruction No. 21

A related statute provides, in part pertinent to this case, as follows:

> ". . . Robbery is the unlawful and intentional taking of personal property from the possession of another from his person, or immediate presence, against his will, accompanied by means of force or fear."

(R. 190)

Instruction No. 22

The elements of Robbery, as they relate to this case, are;

1. The taking of personal property from another person; and
2. The possession or immediate presence of such other person of said property; and
3. The taking of such property against the will of such other person; and
4. The accomplishment of such taking by means of force or fear; and
5. Such taking being then and there unlawful:
6. Such taking being then and there intentional.

(R. 191)

Instruction No. 26

Each defendant has been charged by Count III of the Information in this case with violation of a statute which provides, in part pertinent to this case, as follows:

"A person commits theft if he obtains or exercises unlawful control over the property of another with the purpose to deprive him thereof."

(R. 195)

Instruction No. 35

Before you can convict the defendant, Raymond Jeffrey Johnson, of the crime of Aggravated Robbery as charged in Count I of the Information on file in this case, you must believe from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 18th day of August, 1984, within the corporate limits of Salt Lake County, the defendant, Raymond Jeffrey Johnson, either attempted or committed or fled from the attempt or commission of a robbery of Joanne Knaphus or solicited or requested or commanded or encouraged or intentionally aided another person or other persons to engage in the commission of said robbery of Joanne Knaphus; and

2. That said defendant then and there either used or solicited or requested or commanded or encouraged or intentionally aided another person or other persons to use a deadly weapon; and

3. That said defendant then and there did so intentionally or knowingly.

If, after careful consideration of all of the evidence in this case, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant, Raymond Jeffrey Johnson not guilty of Count I. If, on the other hand, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt then you must find the defendant, Raymond Jeffrey Johnson, guilty of Aggravated Robbery as charged in Count I of the Information on file in this case.

(R. 205-06)

Instruction No. 40

Before you can convict the defendant, Raymond Jeffrey Johnson, of the crime of Theft as charged in Count III of the Information on file in this case, you must believe from all of the evidence and beyond a reasonable doubt each and every

one of the following elements of that offense;

1. That on or about the 18th day of August, 1984, within the corporate limits of Salt Lake County, the defendant, Raymond Jeffrey Johnson, either:

   a. Obtained or exercised unauthorized control over property; or

   b. Solicited or requested or commanded or encouraged or aided another or others in obtaining or exercising unauthorized control over such property; and

2. That said defendant did so intentionally or knowingly; and

3. That said property then and there belonged to Oakwood Jewelry; and

4. That said defendant then and there had a purpose to deprive another; and

5. That said property then and there had a value in excess of $1,000.00.

If, after careful consideration of all of the evidence in this case, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant, Raymond Jeffrey Johnson, not guilty of Count III. If, on the other hand, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant, Raymond Jeffrey Johnson, guilty of Theft as charged in Count III of the Information on file in this case.

(R. 215-16)

These instructions made clear to the jurors that, in order to convict defendant of aggravated robbery, they need only find that defendant used a deadly weapon in an attempt to commit a robbery; and, an attempted robbery, of course, would not require a finding that property had been taken. "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense." Utah Code Ann. § 76-4-101(1) (1978). This means that, to be guilty of an attempt, a defendant must possess the mental state required for commission of the offense. State v.

Maestas, 652 P.2d 903, 904 (Utah 1982). And, on the question of what constitutes a substantial step toward commission of the offense, this Court has observed:

> The [attempt] statute adopts the definition of an "attempt" employed in the Model Penal Code, § 5.01, purposed on drawing the line further away from the final act and enlarging the common law concept. It emphasizes what the accused has done, not what remains to be done.

State v. Pearson, 680 P.2d 406, 408 (Utah 1984) (footnote omitted). Under these standards, it is clear that defendant committed aggravated robbery the moment he entered the jewelry store. See Pearson (holding that evidence was sufficient to support conviction of attempted burglary and robbery where defendant was stopped and arrested while driving to the location where he planned to commit the offenses). In short, defendant's actions, prior to the actual taking of the jewelry, established an attempt to commit a robbery, and his use of a deadly weapon converted that attempt into aggravated robbery. That the robbery was subsequently completed is of no consequence; a finding of an attempt would still be possible. See, e.g., State v. Gallegos, 193 Neb. 651, 228 N.W.2d 615 (1975); Lightfoot v. State, 278 Md. 231, 360 A.2d 426 (1976); Perkins and Boyce, Criminal Law 612 (3d ed. 1982). Thus, it does not matter whether the jury found a completed robbery or an attempted robbery. If the jury found a completed robbery, it necessarily found an attempt to commit that crime--the necessary element of aggravated robbery that the State is relying upon in this case.

For the additional and distinct act of taking the jewelry, defendant could validly be convicted of theft, which requires that

the actor "obtain[ ] or exercise[ ] unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (1978). Therefore, after a close examination of the manner in which defendant was charged and the instructions to the jury, it is clear that the trial court's denial of defendant's motion to dismiss can be justified on the "distinct act" analysis set forth above. Accordingly, this Court should affirm defendant's convictions for both aggravated robbery and theft. *See O'Brien; Jolivet; Porter.*

CONCLUSION

The search of defendant's vehicle was reasonable and the trial court's denial of defendant's motion to suppress the evidence should be affirmed. In addition, the jury's verdict as to the charge of aggravated assault should be upheld since a reasonable man could have reached the same verdict beyond a reasonable doubt. Furthermore, the trial court correctly instructed the jury regarding recently stolen property since the instruction was permissive not mandatory and the burden of proof remained on the State. Finally, under the facts of this case theft is not a lesser included offense of aggravated robbery since the theft and aggravated robbery were two separate acts within a single criminal episode. The State seeks affirmation of the verdict and judgment of the lower court as to aggravated robbery aggravated assault, and theft.

DATED this 30 day of July, 1986.

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KIMBERLY K. HORNAK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief of Respondent, postage prepaid, to Joseph C. Fratto, Jr., attorney for appellant, FRATTO & FRATTO, Metropolitan Law Building, 431 South 300 East, Suite 101, Salt Lake City, Utah 84111, this 31 day of ~~June~~ July, 1986.

Kimberly K. Hornak

ADDENDUM

ADDENDUM A

Utah Code Ann. (1974)

41-1-115. Seizure of vehicles stolen, improperly registered. The department or any peace officer, without a warrant, may seize and take possession of any vehicle which is being operated with improper registration, or which the department or the peace officer has reason to believe has been stolen, or on which any motor number, manufacturer's number or identification mark has been defaced, altered or obliterated. Any peace officer so seizing or taking possession of such vehicle shall immediately notify the department of such action and shall hold the vehicle until notified by the department as to what further action should be taken regarding the disposition of the vehicle.

41-6-116.10. Abandoned vehicles — Police officer removing — Report — Procedure if not reclaimed. (a) No person shall abandon a vehicle upon any highway.

(b) No person shall abandon a vehicle upon any public or private property without the express or implied consent of the owner or person in lawful possession or control of the property.

(c) Any police officer who has reasonable grounds to believe that a vehicle has been abandoned may remove the vehicle or cause it to be removed, at the expense of the owner, to the nearest state impound yard or if none, to a garage or other place of safety and shall immediately send a written report of such removal to the state tax commission, motor vehicle division, which report shall include a description of the vehicle, the date, time and place of removal, the grounds for removal, and the name of the garage or place where the vehicle is stored. Upon receipt of a report as provided, the state tax commission, motor vehicle division shall attempt to notify the registered owner of the vehicle, or any lien holder, giving the grounds for removal and the name of the garage or place where the vehicle is stored. If the vehicle is not registered in this state, the state tax commission, motor vehicle division shall make a reasonable effort to notify the registered owner or any lien holder of the removal and the location of the vehicle. The state tax commission, motor vehicle division shall forward a copy of the notice to the owner or person in charge of the garage or place where the vehicle is stored.

(d) For the purposes of this section, a vehicle shall be presumed to be abandoned if it is left unattended on a highway for a period in excess of 24 hours or on any public or private property without express or implied consent of the owner or person in lawful possession or control of the property for a period in excess of seven days.

(e) In any case where the motor number, manufacturer's number or identification mark of the abandoned vehicle has been defaced, altered or obliterated, the vehicle shall not be released or sold until the original motor number, manufacturer's number or identification mark has been replaced, or until a new number assigned by the motor vehicle division has been stamped thereon.

(f) If the abandoned vehicle is not reclaimed by the registered owner or any lien holder within 30 days after actual notice or reasonable attempt to give notice to the registered owner or any lien holder, the provisions of sections 41-1-79.5 and 41-1-116 shall apply, and the abandoned vehicle may be sold as provided in section 41-1-185.

Utah Code Ann. (Supp 1985),

58-37-3. Substances which are controlled — Revised federal schedules govern. (1) All controlled substances listed in section 58-37-4 are hereby controlled.

(2) All controlled substances listed in the Federal Controlled Substances Act (Title II, P.L. 91-513), as it is amended from time to time, are hereby controlled.

(3) Whenever any substance is designated, rescheduled or deleted as a controlled substance in schedules I, II, III, IV or V of the Federal Controlled Substances Act (Title II, P.L. 91-513), as such schedules may be revised by Congressional enactment or by administrative rule of the United States Attorney General adopted pursuant to section 201 of that act, that subsequent designation, rescheduling or deletion shall govern.

h Code Annotated (1953)

76-1-44. "Principals" defined.—All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, have advised and encouraged its commission, and all persons counseling, advising or encouraging children under the age of fourteen years, lunatics or idiots to commit any crime, and all persons who by fraud, contrivance or force occasion the drunkenness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command or coercion compel another to commit any crime, are principals in any crime so committed.

h Code Annotated (1953), as amended

76-1-402. Separate offenses arising out of single criminal episode—Included offenses.—(1) 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.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court, and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) 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) It 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.

(4) 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.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.—Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

76-3-203. Felony conviction — Indeterminate term of imprisonment — Increase of sentence if firearm used. A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(3) In the case of a felony of the third degree, for a term not to exceed five years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(4) Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

76-5-103. Aggravated assault.—(1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:

(a) He intentionally causes serious bodily injury to another; or

(b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a felony of the third degree.

76-6-301. Robbery.—(1) Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.

(2) Robbery is a felony of the second degree.

76-6-302. Aggravated robbery.—(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or

(b) Causes serious bodily injury upon another.

(2) Aggravated robbery is a felony of the first degree.

(3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

76-6-402. Presumptions and defenses.—The following presumption shall be applicable to this part:

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

(2) It is no defense under this part that the actor has an interest in the property or service stolen if another person also has an interest that the actor is not entitled to infringe, provided an interest in property for purposes of this subsection shall not include a security interest for the repayment of a debt or obligation.

(3) It is a defense under this part that the actor:

(a) Acted under an honest claim of right to the property or service involved; or

(b) Acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or

(c) Obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

76-6-404. Theft—Elements.—A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

76-6-412. Theft—Classification of offenses—Action for treble damages against receiver of stolen property.—(1) Theft of property and services as provided in this chapter shall be punishable as follows:

(a) As a felony of the second degree if:

(i) The value of the property or services exceeds $1,000; or

(ii) The property stolen is a firearm or an operable motor vehicle; or

(iii) The actor is armed with a deadly weapon at the time of the theft; or

(iv) The property is stolen from the person of another.

(b) As a felony of the third degree if:

(i) The value of the property or services is more than $250 but not more than $1,000; or

(ii) The actor has been twice before convicted of theft of property or services valued at $250 or less; or

(iii) When the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry.

(c) As a class A misdemeanor if the value of the property stolen was more than $100 but does not exceed $250.

(d) As a class B misdemeanor if the value of the property stolen was $100 or less.

(2) Any person who has been injured by a violation of subsection (1), of section 76-6-408 may bring an action against any person mentioned in (d) for three times the amount of actual damages, if any sustained by the plaintiff, costs of suit and reasonable attorneys' fees.

ADDENDUM B

LOS ANGELES POLICE DEPARTMENT

VEHICLE INVESTIGATION

IMPOUND — [x] Hold [ ] OK Rel.

DR: 89-11-21193

PRINTS/EVID. Give Special Care — FILE COPY

Present owner (last, first, middle): JOHNSON, RAYMOND JEFFREY

LIC. NO.: WWN 720465 — STATE: UT

Make & Model: 75 CHEV CAPRICE — Body Type: 2DR

VIN: 1L17L65333598

Color: SILVER

Connected Reports: A22 & EVID THIS DR

Officer: MARKEL — DMV TT [x] Attached

Location of occurrence: 9457 SAN FERNANDO RD 1556

Occurred: 8 26 89 1735

Garage: RICK & WHITTOW

PR of stolen/lost notified by phone [ ] Yes [ ] No

CODE: R-Person Rptg | RO-Registered Owner | LO-Legal Owner | D-Last Driver | W-Witness

Name	Code	Residence & Business Addresses	City	Phone
Present Owner - Name listed above. Same as: [ ] R [x] RO [ ] LO	H-4-58	342 OAKLEY ST SALT LAKE CITY UTAH		NONE
		NONE		—

Suspect	Sex/Desc	Hair	Eyes	Height	Weight	Age	Name & Address / Charge
1	M HISP	BLK	BRN	6'0	180	26	JOHNSON, RAYMOND JEFFREY BKG 7722964 11550 H&S SUSP FUG
2	F HISP	BLK	BRN	5'6	125	26	[illegible] MARIA BKG 7722 556 11550 H&S F.U.G.

Reason for impound: [ ] 22651 VC; or

INVENTORY (Y/N): items checked per form; Odometer reg.: 97299

REMARKS (describe property left in vehicle; if needed, clarify damage noted in inventory; abandoned info; etc.)

Garage Employee Complete This Section — Serial No.: 16 — Daily Storage Rate: $6 — Estimated Value: 6100

NARRATIVE

SUSP-3 JOHNSON, ALLEN DAVID M HISP BRN GRN 5'8 160 25 YRS BKG 7723021 11550 H&S 1551.1 P.C. FUG UTAH

SUSP-4 ALVAREZ, THERESA ANN F HISP BLK BRN 5'2 110 20 YRS BKG 7722956 11550 H&S SUPP 1551.1 P.C. FUG UTAH

SUSPS ARR 11550 H&S SUPPLEMENT CHARGE OF 1551.1 P.C. FUG UTAH ROBBERY NO BAIL. VEH IMPOUNDED WITH HOLD. SEE ARR RPT. SUSP-1 HAD BILL OF SALE FOR VEH [illegible] REG BKD AT [illegible] PROP WITH PLATES.

Use continuation sheet if more space is needed.

Interviewing/Impounding Empl.: MARKEL 21866 16 11 E

Person reporting signature: X OFC

Cleared By Arrest: [ ] Yes [ ]

VEHICLE RELEASE ORDER — GARAGE REPORT OF RELEASE OF SALE

ADDENDUM C

INSTRUCTION NO. 3

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

INSTRUCTION NO. 11

The burden of proving a defendant guilty beyond a reasonable doubt rests upon the State. This burden never shifts to a defendant. The law does not require a defendant to prove his innocence, to call any witnesses, or to produce any evidence. If the State fails to prove a defendant guilty beyond a reasonable doubt, the jury must acquit him.

INSTRUCTION NO. 14

The law expressly gives each defendant the privilege of remaining silent at all stages of any proceedings against him. The fact that he has not taken the witness stand must not be considered as any indication of defendant's guilt, nor should you indulge in any presumption or inference adverse to defendant by reason thereof. The burden remains with the State to prove, by evidence, guilt beyond a reasonable doubt.

INSTRUCTIO NO. 19

Under the law of the State of Utah, possession of property recently stolen, when a person in possession fails to make a satisfactory explanation of such possession, is a fact from which you may infer that the person in possession stole such property.

INSTRUCTION NO. 43

You are instructed that each defendant has claimed that at the time of the alleged Aggravated Robbery, Aggravated Assault, and Theft, for which the charges in this case have been made by the State, that at said time he was at another place and therefore could not have committed the crimes in question. Such evidence as has been presented with respect to this claim is to be weighed and considered by you in considering all the evidence received in this case. The defendant has no burden to establish such defense by any particular degree of proof. The burden remains with the State throughout the course of the trial to establish the guilt of the defendant by evidence which convinces you beyond a reasonable doubt. The evidence bearing upon the defendant's claim should be considered by you in connection with all the other evidence bearing upon this case.