1980

State of Utah v. Alan Douglas Asay : Brief of Respondent

Utah Supreme Court

Robert B. Hansen; Attorney for Respondent;
Steven L. Hansen; Hansen and Hansen; Attorneys for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16973
ALAN DOUGLAS ASAY,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT RENDERED IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE A. H. ELLETT, JUDGE

ROBERT B. HANSEN
Attorney General

ROBERT N. PARRISH
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

STEVEN L. HANSEN

800 Boston Building
Salt Lake City, Utah 84111

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

Page

CASES CITED

TABLE OF CONTENTS (Cont.)

Page

TABLE OF CASES (Cont.)

STATUTES CITED

RULES CITED

AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16973
ALAN DOUGLAS ASAY,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with theft, in violation of Utah Code Ann. §§ 76-6-404 and 76-6-412(1)(a)(i) (1953, as amended).

DISPOSITION IN THE LOWER COURT

Appellant was convicted by the unanimous verdict of a jury before the Honorable A. H. Ellett, in the Second Judicial District Court in and for Davis County, State of Utah, on February 11, 1980. Appellant was sentenced for the term provided by law, but the sentence was suspended and appellant allowed probation upon payment of a $5000.00 fine and restitution, all to be paid within one year, at which time, the probation will terminate.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court's verdict and sentence.

STATEMENT OF THE FACTS

On the evening of July 10, 1979, Eric Rasmussen drove into Salt Lake City to see a movie. He parked and left his car at approximately 8:00-8:30 p.m. (T. 95). At approximately 10:30 p.m., Mr. Rasmussen returned to find that his car was missing (T. 31). About one hour later, Wayne Pasco observed two vehicles pull up in front of his home. The first car was left in his gateway and its driver got into the second car. This car proceeded down the block to a row of storage sheds where the two individuals unlocked the gate and one of the storage shed doors. Mr. Pasco followed them on his bicycle. The two individuals then went back to the first car, drove it inside the unlocked storage shed and "pulled the door down quickly behind the car." (T. 50). Although Mr. Pasco got within 20 or 30 feet of the individuals, it was too dark for him to be able to identify either of them (T. 51).

At approximately 1:00 p.m., on July 11, 1979, Mr. Pasco observed that same storage shed door open just a couple of feet with a truck parked across the opening. This surprised Mr. Pasco since it was a very hot, July day (T. 58). Responding

to Mr. Pasco's call, Sergeant Hollbrook, of the Davis County Sheriff's Office, arrived in time to see appellant carry the hood of a car out of the shed and place it in his truck (T.36). The vehicle in the shed belonged to Eric Rasmussen (T.33). Appellant told the Sergeant that he had purchased the vehicle and had a bill of sale at home. But when the Sergeant suggested they go to appellant's home to see the bill of sale, the appellant became very evasive (T. 38). Sergeant Hollbrook testified that "it became quite apparent that he did not want us to" accompany appellant to his home (T.37). When Deputy Leonard arrived at the scene, he attempted to question appellant. Although appellant was "uncooperative," he did state "that the vehicle was stolen." (T. 42).

At trial, appellant offered an explanation of his possession of the stolen vehicle. He testified that three weeks before July 10, 1979, he picked up two hitch-hikers who said they would call appellant if they came across the auto parts he was looking for in order to fix his sister's damaged car. On July 10, 1979, these hitch-hikers called to tell appellant they had the parts to sell to him. Since appellant was going on a date, he only had time to meet these men in town and give them the key to his storage shed. Appellant alleges that it was these two hitch-hikers who were observed by Mr. Pasco (T. 68-70).

This explanation, however, was shown to be inconsistent with the facts presented in court. The hitch-hikers allegedly called and said they had the parts at 6:00-6:30 p.m. on July 10, 1979 (T. 76). But the stolen vehicle was not out of the victim's possession until 8:00-8:30 p.m. that night (T. 95). Appellant had offered to purchase individual auto parts, but the "hitch-hikers" delivered an operable motor vehicle. Appellant testified that the hitch-hikers did not tell him their names, addresses or telephone numbers. Also, they did not return to be paid for a vehicle worth in excess of $1000.00. Appellant lied to the police regarding ownership of the vehicle (T. 37). Appellant did not produce his sister to corroborate her ownership of a wrecked mustang, and failed to produce any other evidence to prove this assertion.

Appellant also testified that he thought he could remove the parts he wanted because the car looked "beat up" and like a "junk heap," (T. 77), and because the inside of the car was a mess (T. 78). But when shown photos of the car, appellant admitted that it did not look "beat up." (T. 78). The mess appellant was referring to, included a camera, cassette tapes and a check book lying on the floor of the car (T. 97).

During trial, appellant attempted to attack the credibility of Deputy Leonard with a prior inconsistent statement (T. 43). The prosecution rehabilitated Deputy Leonard's testimony with a prior statement, from a police

report made at the time of arrest, that was consistent with his testimony at trial (T. 91).

ARGUMENT

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE PRESUMPTION FOUND IN § 76-6-402(1).

A

THE PRESUMPTION FOUND IN § 76-6-402(1) IS PERMISSIVE NOT MANDATORY.

Appellant contends that Utah Code Ann. § 76-6-402(1) (1953, as amended), which states:

> (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.

when properly interpreted, requires that once a defendant has offered an explanation of his possession, the prosecution must prove that the explanation is unsatisfactory. Appellant further argues that jury Instruction #8, given at trial, which states in part:

> You are further instructed that one who is found to be in possession of property recently stolen, may be found to be the guilty person unless he gives a satisfactory explanation of his possession thereof. (R.49)

is improper in that it fails to place the burden on the state to prove the explanation unsatisfactory.

The threshold question is whether the presumption is

permissive or mandatory. This will be determined primarily through examination of the jury instruction involved and, if necessary, through interpretation of the statute. Ulster County Court v. Allen, 442 U.S. 140, 158 n.16 (1979).

In Ulster, the United States Supreme Court said: "It is often necessary for the trier of fact to determine the existence of an element of the crime - that is, an 'ultimate' or 'elemental' fact - from the existence of one or more 'evidentiary' or 'basic' facts." Id. at 156. The Court defined a mandatory presumption to be one in which the trier of fact must find the elemental fact upon proof of the basic fact. An illustrative example of a mandatory presumption may be found in Sandstrom v. Montana, 442 U.S. 510, 515 (1979), in which the jury was instructed: "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Court found that, without further instruction, the jury could reasonably conclude that they were required to accept the presumption. A permissive presumption is one in which, upon proof of the the basic fact, the trier of fact may, but is not required to, infer the elemental fact. Ulster County Court v. Allen, supra, at 157.

Since the jury must accept a mandatory presumption, and may base its verdict solely on that presumption, the Supreme Court said that in order to be constitutionally valid,

the mandatory presumption must be proved beyond a reasonable doubt. A permissive presumption, however, may be accepted or rejected by the trier of fact. It is just one of the many pieces of evidence presented at trial, all of which are to be weighed in determining guilt. Therefore, a permissive presumption need not be proved beyond a reasonable doubt in order to be constitutionally valid.

In Ulster County Court v. Allen, supra, at 173, the jury was instructed ". . . upon proof of the presence of . . . the handweapons, [in the automobile], you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found . . ." (emphasis added). The Supreme Court found this to be a permissive presumption. Id. at 160-61.

In the instant case, the jury was instructed: ". . . one found to be in possession of property recently stolen, may be found to be the guilty person . . ." (R. 49), (emphasis added). Blacks Law Dictionary, Revised Fourth Edition, defines mandatory as "containing a command," Id. at 1114, and permissive as "that which may be done," Id. at 1298 (emphasis added). A reasonable juror would have no difficulty in discerning the permissive nature of Instruction #8.

An examination of Utah Code Ann. § 76-6-402(1) (1953,

as amended), confirms the conclusion that this is a permissive presumption. The instruction challenged in Ulster, included verbatim, N.Y. Penal Law § 265.15(3) (McKinney's 1976-77 Supp.) which states: "(3) The presence in an automobile, . . . of any firearm, . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except . . . " (emphasis added). As previously stated, this instruction was found to be constitutionally valid.

Utah Code Ann. § 76-6-402(1) (1953, as amended), states: "(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," (emphasis added). Although there is a technical difference between "presumptive evidence" and "prima facie evidence," they are often used interchangeably and are intended to convey the same idea. Watson v. Rollins, 90 So. 60, 61 (Ala. 1921); State v. Ramsdell, 45 N.W.2d 503, 507 (Iowa 1951); State v. Intoxicating Liquors, 12 A. 794, 795 (Me. 1888); State v. Simon, 203 N.W. 989, 990 (Minn. 1925); State v. Mitchell, 25 S.E. 783, 784 (N.C. 1896); Fightmaster v. Mode, 167 N.S. 407, 412 (Ohio 1928). The Utah statute was intended to and does create a permissive presumption.

B

THE PERMISSIVE PRESUMPTION IS VALID BECAUSE THE PRESUMED FACT IS MORE LIKELY THAN NOT TO FLOW FROM THE BASIC FACT.

The test for whether a permissive presumption comports with the due process clause, is whether "there is a 'rational connection' between the basic facts that the prosecution proved and the ultimate facts presumed, and that the latter is 'more likely than not to flow from' the former." Ulster County Court v. Allen, 442 U.S. 140, 165 (1979). See Leary v. United States, 395 U.S. 6, 36 (1969); Tot v. United States, 319 U.S. 463, 467 (1943).

In McNamara v. Henkel, 226 U.S. 520 (1912), the petitioner contended that his possession of recently stolen property did not support the conclusion that he committed the burglary. The Supreme Court said:

> The evidence pointed to the appellant as one having control of the car and engaged in the endeavor to secure the fruits of the burglarious entry. Possession in these circumstances tended to show guilty participation in the burglary. This is but to accord to the evidence, if unexplained, its natural probative force. (Citations omitted) Id. at 524-525.

In State v. Eastmond, 28 Utah 2d 129, 133, 499 P.2d 276, 279 (1972), this Court said that the presumption arising from possession of recently stolen property is just "a codification of a natural process of deductive reasoning."

This Court has repeatedly upheld convictions based on this permissive presumption. E.g., State v. Sessions, 583 P.2d 44 (Utah 1978); State v. Gonzales, 30 Utah 2d 302, 517 P.2d 547 (1973); State v. Thomas, 121 Utah 639, 244 P.2d 653 (1952).

C

A PERMISSIVE PRESUMPTION DOES NOT SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

It is clear that the prosecution must prove all elements of the crime beyond a reasonable doubt. In re Windship, 397 U.S. 358 (1970). Appellant contends that Instruction #8 required him to prove his explanation satisfactory, rather than force the prosecution to prove the explanation unsatisfactory. Appellant has failed to distinguish between the burden of production and the burden of persuasion.

In Barnes v. United States, 412 U.S. 837 (1973), the jury was instructed that possession of recently stolen property, if not satisfactorily explained, allows for the inference that the person in possession knew the property had been stolen. The Supreme Court said:

> It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant

> introduces evidence, since ordinarily the Government's evidence will not provide an explanation of possession consistent with innocence . . . [and] . . . where there is a 'rational connection' between the facts proved and the fact presumed or inferred, it is permissible to shift the burden of going forward to the defendant. Id. at 846 n. 11, (emphasis added).

The Utah Supreme Court has acknowledged this in State v. Kirkman, 20 Utah 2d 44, 46, 432 P.2d 638, 639 (1967), in which it said:

> There would be a duty upon the one in possession of such property to explain his possession if he is to remove that adverse inference against him pointing toward his guilt; and if he gives a false account of how he acquired that possession, or having a reasonable opportunity to show that his possession was honestly acquired he refuses or fails to do so, such conduct is a circumstance which may be considered by the jury along with all other evidence bearing upon the case in determining guilt or innocence.

Accord, State v. Heath, 27 Utah 2d 13, 15, 492 P.2d 978, 979 (1972); State v. Little, 5 Utah 2d 42, 44, 296 P.2d 289, 291 (1956). This Court has frequently rejected the contention that the statutory presumption places an unconstitutional burden on the defendant. E.g., State v. Smelser, 23 Utah 2d 347, 350, 463 P.2d 562, 565 (1970); State v. Little, supra; State v. Wood, 2 Utah 2d 34, 37, 268 P.2d 998, 1000 (1954).

And in Ulster County Court v. Allen, 442 U.S. 140, 157 (1979), the Supreme Court said that a permissive presumption "does not shift the burden of proof."

This Court has said that an unsatisfactory explanation is one which is false, unreasonable or improbable, while a satisfactory explanation is one in which a jury of ordinary intelligence, discretion and caution may repose confidence. State v. Brooks, 101 Utah 584, 591, 126 P.2d 1044, 1046 (1942). The burden on the defendant is to explain his possession. If he is innocent of any wrondoing, then his explanation will be reasonable and satisfactory. See State v. Eastmond, 28 Utah 2d 129, 133, 499 P.2d 276, 279 (1972). To say, however, that the burden of producing a satisfactory explanation rests on the defendant is misleading, because the permissive presumption "need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of evidence in the case." Ulster County Court v. Allen, supra, at 161 n. 20.

Appellant makes the untenable argument that a defendant may offer any explanation of his possession and that explanation will be deemed satisfactory until specifically rebutted by the prosecution. This contention was rejected in State v. Thomas, 121 Utah 639, 642, 244 P.2d 653, 655 (1952), where the Court said "[The] explanation, standing by itself,

may be regarded as 'satisfactory.' However, it is to be measured in the light of all the surrounding circumstances and the other evidence in the case."

Utah Code Ann. § 76-6-402(1) (1953, as amended), does not require the prosecution to prove that a silent defendant cannot offer a satisfactory explanation, State v. Jolley, 571 P.2d 582, 584 (Utah 1977), nor does it require the prosecution to produce rebuttal evidence when a defendant offers a vague, unreasonable and improbable explanation.

The Supreme Court in Barnes v. United States, 412 U.S. 837 (1973), said:

> . . . the mere fact that there is some evidence tending to explain the defendant's possession consistent with innocence . . .

a fact not present in the instant case,

> . . . does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory' . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. Id. at 845, n. 9, (emphasis added).

Since the jury is free to reject any explanation offered by a defendant in light of the evidence adduced at trial, it necessarily follows that there is no burden on the prosecution to produce additional evidence in rebuttal.

Upon completion of the prosecution's case, appellant offered a fanciful tale of mystery hitch-hikers who clandestinely delivered a vehicle to his storage shed. To aid the jury, the

prosecution highlighted several inconsistencies between this tale and the evidence.

Appellant testified that these mystery men called him at 6:00-6:30 p.m., on the night of the theft, to say they had the parts he wanted, (T. 76), but the vehicle was not out of the victim's possession until 8:00-8:30 p.m. (T. 95). The mystery men had offered to sell the parts to appellant, but they never returned to be paid for them (T. 80). Appellant testified that he thought he could remove the desired auto parts because the car looked "beat up" and like a "junk heap" (T. 77), but when appellant was shown photos of the car at trial, he acknowledged that the vehicle did not look "beat up" (T. 78). The prosecution also pointed out that a camera, cassette tapes and check book were in plain view on the floor of the vehicle, suggesting that it was unreasonable to believe the vehicle was old and abandoned (T. 97 Finally, the parts were supposedly needed to repair appellant's sister's mustang (T. 68), but appellant's sister was not called to corroborate this. The jury evaluated this explanation in light of the evidence adduced at trial and rejected it as unsatisfactory.

D

WHEN THE INSTRUCTION IS CONSIDERED IN LIGHT OF THE WHOLE CHARGE, THE JURY COULD NOT HAVE BEEN MISLED.

A permissive presumption does not shift the burden of proof. Even if we assume that there was some error in the wording of the instruction, any harmful affect was eliminated by the rest of the charge.

In State v. Criscola, 21 Utah 2d 272, 444 P.2d 517, 520 (1968), this Court said:

> If [the instructions] are looked at all together as they should be, the issues to be determined were stated to the jury in a clear and understandable manner. The trial judge adequately explained to them the elements of both [crimes] as defined in our penal code, and that they must find each and all of them beyond a reasonable doubt before they could render the verdict of guilty.

Accord, State v. Coffey, 564 P.2d 777, 779 (Utah 1979); State v. Burch, 17 Utah 2d 418, 419, 413 P.2d 805, 807 (1966).

In the instant case the jury was clearly instructed regarding the elements of theft as defined in our criminal code (Instruction #8, R. 49). The jury was further instructed that it must presume the innocence of the defendant and that it may not find the defendant guilty of the crime charged until the prosecution has proved guilt beyond a reasonable doubt. (Instructions #7, #10, R. 48, 50). When looked at as a whole, the charge properly instructed the jury on the elements of the crime of theft and on the burden of proof which the prosecution must meet.

POINT II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENT OF CRIMINAL INTENT.

The jury was instructed that in order to find appellant guilty, they must find that each of five elements has been proved beyond a reasonble doubt. The fourth element required that the defendant:

> 4. Did commit the offense of theft, in that he did obtain or exercise unauthorized control over the property of another, to-wit, an automobile in operable condition, with the purpose to deprive the owner thereof. (R.49, emphasis added.)

This is a nearly verbatim statement of the language in the Utah theft state, Utah Code Ann. § 76-6-404 (1953, as amended).

It would seem to be unnecessary to point out that the phrase "obtain or exercise unauthorized control over the property of another" constitutes the actus reus of theft, the proscribed conduct, and that the phrase "with the purpose to deprive the owner thereof" constitutes the requisite mens rea or criminal intent. Appellant, however, argues that the underlined portion of element 4 does not relate to intent, but somehow further defines the physical act. Appellant hypothesizes that "a person purchasing merchandise in a store has the purpose to deprive the owner of the property under the definition stated at

76-6-401(3) but still lacks criminal intent." (App. Brief at 7). Appellant fails to consider that once an agreed upon exchange, i.e. sale, has taken place, the purchaser is the owner of the property. The three definitions of "purpose to deprive" found in Utah Code Ann. § 76-6-401(3) (1953, as amended), all contain an element of loss or injury to the owner. No reasonable construction of the theft statute could lead to the conclusion drawn by appellant.

Appellant asserts that "nothing in the statutory definition of "purpose to deprive" requires that the defendant know that he has no right to withhold the property from the owner, or know that his taking is wrongful." (App. Brief at 7). Appellant wants this Court to believe that he may obtain unauthorized possession of the property of another with the intent to benefit thereby to the detriment of the true owner, and yet, not realize that his taking is wrong. Such a position is palpably untenable.

That the instant statute and instruction say "purpose to deprive" instead of "intent to deprive" does not remove the element of intent from the consideration of the jury. Black's Law Dictionary, Revised Fourth Edition, at 1400, defines "purpose" as "an end, intention, or aim." It further defines "intent" as "purpose, signification, intendment," and "intention" as "will, purpose, design." Id. at 947. Ballantine's Law Dictionary, Third Edition,

at 1028, defines "purpose" as "an intention" and "intention" as "purpose. That which is intended," and "intent" as "with fixed purpose, Noun: purpose." Id. at 646. That "intent" and "intention" are synonymous, see Words and Phrases, Perm. Ed. Vol. 22, at 12, 22-23. This Court has frequently held that "purpose to deprive" constitutes the mens rea element of the crime of theft. E.g., State v. Norman Laine, No. 16768, decided September 12, 1980; State v. Smith, 571 P.2d 578, 581 (Utah 1977).

Appellant made no objection to Instruction #13 at trial, but now attempts to attack the instruction on appeal alleging two deficiencies. Under Utah R. Civ. P., Rule 51, appellant may not assign error to an instruction which he took no exception to. State v. International Amusements, 565 P.2d 1112, 1113 (Utah 1977); Patton v. Evans, 92 Utah 524, 529, 69 P.2d 969, 971 (1937). Valid state interests are promoted by adherence to the rule; consequently, it should be rarely circumvented. State v. Kazda, 545 P.2d 190, 192 (Utah 1976); State v. Carter, 27 Utah 2d 416, 418, 497 P.2d 26, 27 (1972).

Rule 51, however, does allow the reviewing court, in the interests of justice, to consider the giving of or failure to give an instruction where no objection was made. This Court has exercised this power where the error has amounted to a denial of due process. State v. Villiard, 27 Utah 2d 204, 205, 494 P.2d 285, 286 (1972).

see State v. Cobo, 90 Utah 89, 101, 60 P.2d 952, 958 (1936).

In the interests of justice, the state will respond to the alleged deficiencies improperly raised by appellant and to an issue presented in Instruction #13 which appellant has not addressed.

Appellant acknowledges that the instructions are to be read as a whole but fails to do just that. Appellant first alleges that Instruction #13 (R. 52), fails to instruct the jury that the state must prove intent beyond a reasonable doubt. The jury was so instructed in Instruction Nos. 7, 8 and 10 (R.48,49,50). Second, that Instruction #13 fails to require that the requisite criminal intent exist at the time of the taking. Instruction #8 states that defendant must "obtain control . . . with the purpose to deprive." (Emphasis added.) When the instructions are read as a whole, State v. Criscola, 21 Utah 2d 272, 276, 444 P.2d 517, 520 (1968), there is no error.

Appellant further attempts to argue that Instruction #13 was improper based upon State v. Smith, 571 P.2d 578 (Utah 1977), in which the defendant was charged with issuing a bad check and theft by deception. Appellant misstated the facts of that case when he said the defendant ultimately intended to honor the check he uttered in exchange for a deed (App. Brief at 9). This Court found that defendant uttered a check for $32,453 on an account whose

balance never exceeded $1,045 and which was overdrawn at that time by $539. This Court concluded that the funds promised to cover the check were nonexistent. In Smith, the jury was instructed that to find defendant guilty of theft by deception, they must find that the property was intentionally and knowingly obtained and that it was obtained by deception and with the purpose to deprive the true owners thereof. This Court said, "[t]he jury was properly instructed with regard to culpable mental state." Id. at 581.

An additional and apparently unnecessary instruction, regarding mental state, was given in Smith. Instruction #12, therein, is nearly identical to Instruction #13 given in the instant case, Defendant Smith argued that the instruction had the effect of presuming intent from the act. This Court found no error in the giving of Instruction #12 and said that it is merely a statement that "ignorance of the law is no defense." Id. at 580-581.

Appellant attempts to argue that Instruction #13 is improper in this case because the issue, herein, is a mistake of fact, while in Smith, the issue was a mistake of law (App. Brief at 9). Appellant has failed to discern the real issue raised by Instruction #13.

The specific problem with Instruction #13 is that it defines general criminal intent, while the crime of theft requires a specific criminal intent. The argument to be made is that the jury might convict upon finding general intent, i.e., that defendant intentionally did that which the law declares to be a crime, even though he may not know that his actions are unlawful. The crime of theft however, requires the specific intent of, "with the purpose to deprive the owner thereof." It appears that neither party in State v. Smith, supra, adequately presented this issue to the Court.

The California courts have held that giving the irrelevant general intent instruction is error, but not necessarily prejudicial error. For example, in People v. Butcher, 345 P.2d 127 (Cal. 1959), the defendant was charged with rape, robbery and burglary. The jury was instructed on both general and specific criminal intent but was not instructed as to which intent was required for each crime. The court found that where the only real evidence was uncontradicted by the defendant, the evidence was so conclusive that the error did not influence the verdict. Id. at 134. In the instant case, the state's evidence was essentially uncontradicted. The only evidence presented by appellant was the patently unbelievable tale he told in court. When the jury properly rejected this tale as false, the only evidence to be considered

was the state's case in chief.

In People v. Booth, 243 P.2d 872 (Cal. 1952), the jury was instructed on general criminal intent and on the specific intent required for the crime of lewd and lascivious acts with a child under 14. This error was found to be non-prejudicial where the acts were "such as to preclude the belief they were committed without criminal intent." Id. at 874. In the instant case, appellant was found in possession of recently stolen property, under circumstances suggesting that he was attempting to conceal that property from view while he secured the fruits of the crime (T. 58). At the time of his arrest appellant made an incriminating statement, (T. 42), and at trial he gave an unreasonable and unbelievable explanation of his possession of the stolen property. These actions are wholly inconsistent with innocence, and preclude any belief that they were committed without criminal intent. It was error to give Instruction #13, in the instant case, because that instruction was irrelevant to the matter to be considered by the jury. But that error has not prejudiced appellant and therefore does not warrant reversal of his conviction. Utah Rules of Criminal Procedure, Rule 30; see also, State v. Villiard, 27 Utah 2d 204, 205, 494 P.2d 285, 286 (1972).

POINT III

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON APPELLANT'S THEORY OF THE CASE.

Appellant correctly states that in order to receive an instruction based upon the statutory defenses found in Utah Code Ann. § 76-6-402(3) (1953, as amended), he must present evidence which is consistent with the legislative intent embodied in the statute. The focus of the evidence, however, is of secondary concern. The real question is whether appellant has presented substantial evidence to support his theory. State v. Maestas, 564 P.2d 1386, 1390 (Utah 1977); State v. Newton, 105 Utah 561, 564, 144 P.2d 290, 292 (1943).

This Court set the standard in State v. Castillo, 23 Utah 2d 70, 72, 457 P.2d 618, 620 (1969):

> If the defendant's evidence, although in material conflict with the state's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-defense, he is entitled to have the jury instructed. . . [on that theory]. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused.

Appellant's fanciful tale, presented at trial, is nothing more than a self-serving fiction, totally devoid of substance or corroborating facts. Appellant attempts to find corroboration in the testimony of Wayne Pasco (App. Brief at

15). When asked if he got close enough to identify the two men at the storage shed, Mr. Pasco testified, "I got at one point within 20 or 30 feet, but being near 11:30 [p.m.], it was very dark." (T.51). It requires a rather tortured reading of Mr. Pasco's testimony to conclude that it somehow supports the story of appellant. In State v. Talarico, 57 Utah 229, 234, 193 P. 860, 861 (1920), this Court said: "While the theory of counsel, persistently and strenuously urged, was that of self-defense, it was nevertheless all theory and no evidence, all shadow and no substance." Appellant's story, herein, is nothing more than shadow. A spectre of the truth.

Even if the trial court had erred in refusing to give the requested instruction, that error would have been harmless. Utah Rules of Criminal Procedure, Rule 30. The instructions, when read as a whole, require the jury to consider the testimony of appellant in reaching its verdict.

Instruction #2 (R. 43), instructed the jury to "weigh and consider all of the evidence and circumstances shown by the evidence," in arriving at a verdict. Instruction #4 (R. 45), informed the jury that the defendant is a competent witness and that his testimony should be weighed the same as that of any other witness. Instruction #11 (R.51), required the jury to impartially consider and compare all of the evidence. Instruction #7 (R. 48)

required the jury to find appellant not guilty so long as a reasonable doubt exists. See State v. Maestas, 564 P.2d 1386, 1390 (Utah 1977).

The trial court properly refused to instruct the jury on the appellant's theory of the case. If this ruling was error, appellant was not substantially prejudiced since the jury heard and considered his testimony in reaching a verdict.

POINT IV

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE A PORTION OF THE POLICE REPORT IN ORDER TO REHABILITATE THE CHALLENGED TESTIMONY OF DEPUTY LEONARD.

Appellant contends that the trial court erred in admitting into evidence the following portion of a police report prepared by Deputy Esplin who recorded the information relayed by Deputy Leonard:

> Deputy Esplin then took charge of the case and Deputy Leonard talked to the individual, Doug Asay, who had already been advised of his rights and was asked if the vehicle had been stolen, at which time Mr. Asay admitted that the vehicle had been stolen (T.91).

Appellant's hearsay objection to this evidence was overruled at trial.

In order to be hearsay, the admitted portion of the police report must have been offered in evidence to prove the truth of the statement made. The report was not offered to prove that the car was stolen, but to show that Deputy Leonard reported that such a

statement had been made by the appellant. The report relayed information, based on the personal knowledge and observations of Deputy Leonard, that the statement was made, without regard to its being true or false. See State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957).

Even if the prior consistent statement was found to be hearsay, it was, nevertheless, admissible as an exception to the hearsay rule. Utah R. Evid. 66, makes admissible hearsay within hearsay, where each level of hearsay is itself admissible under an exception to the hearsay rule. The two levels of hearsay in this case would be (1) the prior consistent statement of Deputy Leonard, and (2) the police report prepared by Deputy Esplin.

As for Deputy Leonard's prior consistent statement, Utah R. Evid. 63(1)(c), makes admissible a prior statement of a witness where "it will support testimony made by the witness in the present case when such testimony has been challenged."

Deputy Leonard testified at trial that, at the time of arrest, appellant said "that the vehicle was stolen" (T.42). Appellant attempted to challenge this statement on cross-examination and through the testimony of a Mr. Carlson, asserting that a few nights before trial, Deputy Leonard told Mr. Carlson that at the time of arrest, appellant "made no statements to him whatsoever" (T.86). Where a witness' testimony has been so challenged, prior statements of that witness are admissible where they are consistent [illegible]

testimony at trial.

The police report is admissible under Utah R. Evid. 63(15) as the report of a public official, prepared within the scope of his duty to investigate the incident. In Barney v. Cox, 588 P.2d 696 (Utah 1978), apparently the only case in which this Court has addressed the scope of Rule 63(15), the Court suggested that a computer printout of a driver's accumulated point totals may be admissible under Rule 63(15), as an exception to the hearsay rule. Id. at 698. A computer printout presents the possibility, not present in the instant case, of a programming error when the information is typed into the computer. In this case, however, Deputy Esplin made the report at the time of the arrest and Deputy Leonard was available at trial, to be cross-examined as to the accuracy of the statement he heard and relayed to Deputy Esplin.

If the prior consistent statement had been offered to prove the truth of the matter stated therein, it would have been admissible for the reason that both the statement and the police report were individually admissible under exceptions to the hearsay rule.

Since this prior statement was not hearsay, the real issue is whether the trial court properly allowed the state's witness' testimony to be bolstered by prior consistent statements.

The rule in Utah is that prior consistent statements are admissible where credibility has been attacked through introduction of prior inconsistent statements. See Utah R. Evid. 20.

In State v. Mares, 113 Utah 225, 192 P.2d 861 (1948), a first degree murder case, the testifying medical examiner was cross-examined regarding alleged inconsistencies in his previous statements. The trial court refused to admit into evidence the full autopsy report prepared by that individual, but did allow a portion of the report to be read into evidence. This court found that the portion read, was consistent with the witness' testimony at trial and admissible.

In the instant case, the trial court admitted into evidence only that portion of the police report which went to Deputy Leonard's challenged testimony. That portion was consistent with his testimony at trial and was properly admitted.

In State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957), involving the offense of robbery, a state's witness was cross-examined regarding prior inconsistent statements. In order to rehabilitate the witness, a police officer was allowed to testify to a prior statement of the witness, essentially consistent with the witness' testimony at trial, which had been made to that officer. This Court said: "We

think the better view is that where there has been an attempt to impeach or discredit a witness, prior statements consistent with his present testimony may be offered to offset the impeachment." Id. at 391. The Court found the prior statements to be relevant to credibility and therefore of aid to the jury in arriving at the truth. The case was, however, reversed and remanded on other grounds.

In the instant case, Deputy Leonard's testimony was discredited through evidence of an alleged prior inconsistent statement. The trial court properly admitted into evidence that portion of the report which was relevant to Deputy Leonard's credibility and which was consistent with his testimony at trial.

POINT V

THE EVIDENCE WAS SUFFICIENT TO PROVE THE APPELLANT GUILTY BEYOND A REASONABLE DOUBT.

It is well established in Utah that in order for a convicted defendant to succeed in challenging on appeal the sufficiency of evidence adduced at trial, he must establish that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained reasonable doubt that the defendant committed the crime. State v. Daniels, 584 P.2d 880 (Utah 1978); State v. Wilson, 565 P.2d 66 (Utah

1977); State v. Jones, 554 P.2d 1321 (Utah 1976). Those cases also establish that in considering a claim of insufficiency of the evidence on appeal, this Court must assume that the trier of fact believed those aspects of the evidence and drew such reasonable inferences therefrom as support the verdict.

Appellant correctly points out that mere possession of recently stolen property, when not coupled with other culpatory or incriminating facts, does not alone justify a conviction.

In State v. Kinsey, 77 Utah 348, 295 P. 247 (1931), this Court said: "[p]ossession of articles recently stolen, when coupled with circumstances of hiding or concealing them, or of disposing or attempting to dispose of them, or of making false or unreasonable or unsatisfactory explanations of the possession, may be sufficient to connect the possessor with the commission of the offense." Id. at 249. Accord, State v. Thomas, 121 Utah 639, 244 P.2d 653 (1952).

In the instant case, while dismantling the vehicle, appellant attempted to conceal it from view by opening the shed door just a couple of feet and parking his truck in front of the door (T. 58). Appellant was, in a sense, disposin of the vehicle by removing the parts that he wanted (T. 36,56). Finally, appellant presented a patently unbelievable story

at trial.

In State v. Heath, 27 Utah 2d 13, 492 P.2d 978 (1972), the Court said "[i]n addition to the . . . possession by the defendant, there must be proof of corroborating circumstances tending of themselves to show guilt. Such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of the defendant which tend to show his guilt." Id. at 979.

In the instant case, when appellant was first confronted at the storage shed by the police, he stated the car was his and that he had a bill of sale at home. When asked if the police could accompany appellant to his home to see the bill of sale, appellant became very evasive. (T. 36-38). Appellant basically conceded that his conduct at the time of arrest implied guilt (App. Brief at 30). These corroborating facts tend to show guilt and when considered in conjunction with appellant's possession of the stolen vehicle, are sufficient to support his conviction. See State v. Sessions, 583 P.2d 44, 46 (Utah 1978).

Appellant attacks the sufficiency of the evidence in two ways. First, appellant relies on dicta in State v. Romero, 554 P.2d 216 (Utah 1976), to suggest that where the case is based on circumstantial evidence, "the circumstances must reasonably preclude every reasonable hypothesis of

defendant's innocence . . ." Id. at 219. It is unclear how much, if at all, this increases the burden of the prosecution. In any event; the uncontrovertible evidence presented, herein, by the prosecution, appellant's admission at the time of arrest and the unbelievable story he told in court, preclude any reasonable belief in his innocence.

Second, appellant attempts to argue that the evidence never showed that he was in possession of an operable motor vehicle as he was charged in the complaint (App. Brief at 28). Appellant argues that when he was first found in possession of the vehicle, on the afternoon of July 11, 1979, it was not operable. Once the jury rejected appellant's explanation as false, they could reasonably find that he was one of the two individuals who delivered the vehicle to his storage shed on the night of July 10, 1979, and that the auto was not operable the next day when the police confronted him because he was in the process of dismantling it.

Appellant has failed to demonstrate that reasonable minds must have entertained reasonable doubt about his guilt. State v. Daniels, supra; State v. Wilson, supra; State v. Jones supra.

CONCLUSION

The permissive presumption found in § 76-6-402(1) does not shift the burden of proof to the appellant. It may,

however, require that the appellant came forward with evidence consistent with innocence.

The jury was properly instructed as to the intent required for the offense of theft. Instruction #8 recited the language of § 76-6-401(3) regarding criminal intent. The general intent instruction was irrelevant to the issue to be decided by the jury, but under the circumstances of this case, the appellant was not prejudiced.

Appellant was not entitled to have the jury instructed on his theory of the case because he presented no credible evidence to support that theory.

The portion of the police report admitted in evidence was admissible to bolster the discredited testimony of Deputy Leonard. Even if that report was hearsay, it was admissible as an exception to the hearsay rule, to rehabilitate the witness' challenged testimony.

The prosecution proved that appellant was in possession of recently stolen property and that his explanation of that possession was unsatisfactory. Appellant has failed to show that reasonable minds must have entertained some doubt as to his guilt. The evidence was sufficient to support the conviction. The judgment of the Second Judicial

District Court should be affirmed.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

ROBERT N. PARRISH
Assistant Attorney General

Attorneys for Respondent