1981

The State of Utah v. George William Burton : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

-v-

GEORGE WILLIAM BURTON,

Defendant-Appellant.

Appeal from a conviction [illegible] Degree Felonies, in the [illegible] for Salt Lake County, [illegible] Wilkinson, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 17252
GEORGE WILLIAM BURTON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction for two counts of Theft, Second Degree Felonies, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding.

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Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was found guilty by a jury of a violation of Section 76-6-404, Utah Code Annotated (1953), as amended (Theft, a felony of the second degree) and the subsequent judgment was entered August 7, 1980.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury on July 14, 1980, the Honorable Homer F. Wilkinson, Judge, Third Judicial District Court, presiding.

The jury found him guilty of a violation of Section 76-6-404, Utah Code Annotated (1953), as amended, a felony of the second degree. The verdict was entered July 14, 1980. Judgment was entered August 7, 1980 and appellant was sentenced to an indeterminate term in the Utah State Prison of 1 to 15 years.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment and sentence of the court below.

STATEMENT OF THE FACTS

Appellant was convicted of two counts of theft. Count I was for Theft of a Vehicle; Count II for Theft of Property valued at more than $1,000.

On the afternoon of April 11, 1980, appellant apparently picked up an individual known as "Crazy Fish" while driving down State Street in Salt Lake City (T. 70). The next few hours found appellant and "Crazy Fish" drinking beer and smoking marijuana (T. 71, 76). Appellant claimed he personally imbibed "[m]aybe eighteen to twenty" cans of beer in "[f]ive or six hours" (T. 71).

In the late afternoon appellant and his companion went to appellant's mother's house at 256 North 800 West in Salt Lake (T. 60, 72). Appellant left "Crazy Fish" in his car while he went inside to get something to eat (T. 72).

A few minutes later appellant's foster sister entered the home and indicated someone was driving off in appellant's car (T. 60, 72). Appellant hastily left on foot in pursuit of the individual driving his car.

At approximately 8:00 p.m. (T. 15) in the area of 600 West and 200 South in Salt Lake, appellant "discovered a car with the keys in it" (T. 73), which he "took off with" allegedly to locate his car (T. 73).

The vehicle he "took off with" belonged to Cliff Bowden, who, with his wife, was visiting Elver Langdon and his wife (T. 6). Bowden had been inside for "approximately ten minutes" (T. 10) when he heard his car start up, die, and momentarily start again (T. 10). He knew it was his car as he had removed the muffler and its exhaust was quite noisy (T. 10).

Bowden and his friend Langdon ran out of the house to see his vehicle spinning its tires "going backward into the street" (T. 11). Bowden testified he "got right up . . . to the right front fender . . ." (T. 12) where he saw an individual he identified as appellant operating the vehicle. There were no other persons in the vehicle (T. 13). Bowden testified he had to jump out of the way "to keep from getting hit with the vehicle as . . . [appellant] . . . went forward" with the "tires squealing" (T. 13, 14). Bowden returned to his friend's house and reported the theft to the police (T. 14).

The car was recovered about an hour later by the police (T. 15). When Bowden claimed it he noticed that much

of the personal property he had in it was missing (T. 16). He gave a detailed list of the missing propety in Court (T. 18-32).

As noted above, appellant claimed the car had keys in it when he took it (T. 73). This conflicts with the accounts of Bowden and the arresting officer, Charles Oliver. Bowden testified the only key was "[i]n my pocket" when he went to retrieve his car from the location where police officers had stopped appellant (T. 33, 47).

The arresting officer testified he found no car keys or property when he placed appellant under arrest (T. 49-52).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE SUBJECT OF VOLUNTARY INTOXICATION.

Appellant does not, in his pleadings, assert the defense of voluntary intoxication; however, statements made by him in his testimony can be construed as an assertion of that defense at trial. It therefore became necessary to instruct the jury on voluntary intoxication to avoid confusion and error.

The facts surrounding appellant's consuming alcohol and smoking marijuana on the afternoon of the admitted theft were developed by his own counsel on direct examination. The prosecutor sought to clarify the extent of impairment to appellant's reasoning and functioning abilities on cross-examination.

Appellant testified he consumed "eighteen to twenty" cans of beer (T. 71) and "[a] few . . . joints [cigarettes] or pipe[s]" of marijuana in "six or seven hours easily" (T. 76). When asked by his attorney to "describe ... how your feeling was at the time with respect to the alcohol hou had?" (T. 75), appellant indicated he was "[m]ad" and "definitely" intoxicated, having "had a lot to drink" (T. 75, 82). He indicated he finished the last can of beer twenty to thirty minutes before he took Bowden's car (T. 76).

On cross examination, the county attorney asked about the effect of the alcohol and marijuana on appellant on the day in question. Appellant replied that it had "[t]oo much effect," and that he had some difficulty standing (T. 77), but that he understood what was occurring (T. 78).

The following testimony by appellant seems to assert some sort of excuse or defense related to his ingestion of alcohol and marijuana.

Q: You are not claiming that the alcohol or drugs had affected you to the point you did not understand what you were doing?

A: I think if I were sober--

Q: That is not the question. There are a lot of things people do when they are sober they wouldn't do when they are not accountable for them. Are you claiming that you didn't understand when you took the car?

A: Really I don't think I did.

Q: You don't think you knew what you were doing?

A: Yes. I really don't think I knew what I was doing (T. 79).

When questioned as to the circumstances surrounding his taking Bowden's car, appellant was asked concerning discrepancies in the facts as he remembered them and as others remembered them. Appellant attributed his lack of knowledge to the fact of his intoxication when the events occurred (T. 81) or to the fact that he just could not remember (T. 84).[1]

---

[1](a) Bowden testified he and Langdon ran out of the house and that he "got right up" next to the fender of the car--close enough to identify appellant as the driver--and that appellant took off fast (T. 12-14). Appellant testified he did not remember seeing any people when he took the car and he was so intoxicated he did not know if he took off fast or not (T. 81).
(b)Bowden testified the only key to the car was in his possession (T. 33, 34). Appellant testified the key was in the car (T. 80).
(c) Officer Oliver testified as to appellant's speed and evasive maneuvers (T. 44-46). Appellant testified he stopped right away when he saw the police officer (T. 84, 85).

Appellant's testimony on cross examination concerning his condition relative to the substances he had consumed was full of equivocal, vague answers typified by the words "I don't know" (T. 77-82). He did say he was probably so intoxicated he did not understand what was being said to him (T. 82).

Appellant testified extensively concerning the kind and amount of intoxicants he consumed on the day of the theft, the period of time during which the intoxicants were consumed, and the proximity of that time to the time when he committed the theft. However, appellant's testimony concerning the extent to which the intoxicants he had consumed on the day of the crime had affected his powers of perception and understanding was confused and unclear.

Appellant requested and received an instruction (the instruction given referred to the "defendant or a witness" (CT 60)) concerning the prior convictions of witnesses (which in this case included appellant) and the weight to be given by the jury to those prior convictions in their consideration of the instant case (the instruction given referred to the "defendant or a witness" (CT 60)). Respondent agrees that even in a case like the one at bar in which the state does not assert that the defendant is a habitual criminal or that there is a common scheme or plan, it might

be prejudicial to have evidence of appellant's prior convictions before the jury with no limiting instruction from the court to indicate how the jury must consider those convictions in their deliberations. Similarly, respondent contends it is unfair to have extensive testimony concerning appellant's voluntary intoxication at the time he committed the crime before the jury with no instruction concerning the law applicable to voluntary intoxication. Respondent asserts it was not unreasonable to give an instruction relative to the defense of voluntary intoxication. Where testimony before the jury could raise an inference that such defense was being asserted by appellant, or in the very least could create doubt in the minds of some jurors as to how they should consider appellant's testimony relative to his intoxication, an instruction as was given in this case was warranted and appropriate.

Appellant seems to want the benefit of having extensive testimony as to his inebriated, sorrowful condition on record before the jury without having that jury fully advised as to the manner in which they were to consider such evidence. To allow such testimony without an instruction to clarify it and without giving the jury a standard to assess its importance in this case would be error. The instruction in voluntary intoxication of which appellant now complains has avoided error.

State v. Potter, 627 P.2d 75 (Utah 1981), cited by appellant, is inapposite to the issues in this case. In Potter, the trial court erred in that it neglected to indicate the "effect of voluntary intoxication" as it related to both general and specific intent crimes, nor did "the court relate the legal effect of intoxication to the facts. . . ." Id. at 80.

In the instant case, the crime of Theft and the included offense of Unlawful Taking of a Vehicle are both specific intent crimes (CT 68-70). The court in this case properly applied the legal effect of voluntary intoxication to the charges against appellant (CT 67).

In this case, the wording of the first sentence of instruction 16B (involuntary intoxication) (CT 67) was taken almost verbatim from the statutory language cited approvingly by this court. 76-2-306 Utah Code Annotated (1953), as amended. Additions were made to relate the instruction to the facts of this case. Appellant does not assert that the statements in the instruction are inaccurate statements of Utah law, but only that they are inappropriate to the case at bar.

The general rule applicable to appellant's contention that "the instruction on voluntary intoxication presented a theory of the case advanced by neither the

appellant nor the state" (Appellant's Brief, 8) can be found in State v. Odell, 227 P.2d 710 (Wash. 1951). Quoting Corpus Juris Secundum, the court said:

> * * * An instruction which correctly states the law and is based on competent evidence in the case is not erroneous even though it is not in consonance with the theories of either party. 23 C.J.S., Criminal Law, § 1312, 912.
>
> * * * It is not, of course, improper for the court to instruct the jury that certain matters do not constitute a defense, when such is the case; * * *. 23 C.J.S., Criminal Law, § 1199, 752.

Id. at 720.

There is, then, no requirement that all the instructions given a jury in a criminal case mesh with some theory explicitly advanced by either side as long as the instruction is based on "competent evidence." Id. Here the evidence of appellant's intoxication was derived largely from his own testimony. In State v. Potter, supra, this court indicated the trial court has a "duty to instruct the jury on the law applicable to the facts of the case." Id. at 78 (Emphasis added).

The state has a right to receive an instruction on voluntary intoxication in cases like the one at bar.

In People v. Rogers, 157 N.E. 2d 28 (Ill. 1959), in which a larceny conviction was upheld by the Illinois Supreme Court, the defendant alleged it was error for the trial court to give an instruction similar to that given in the instant case.

> Defendant complains about numerous instructions given by the court at the request of the State and complains of the court's refusal to give certain instructions tendered by him. . . .
>
> The other People's instruction instructed the jury that voluntary drunkenness was no defense to the crime of larceny. Defendant argues that he never intended to use his drunkenness as a defense and therefore the State had no right to an instruction on the subject. We find that a considerable portion of defendant's testimony at the trial was taken up with evidence of his drinking and intoxication and two other witnesses who testified for him limited their testimony to that fact. With this evidence of intoxication in the record, the State was entitled to give an instruction on its theory of the case.

Id. at 32.

This same reasoning is found in State v. Lincoln, 482 S.W. 2d 424 (Mo. 1972), in which the Missouri Supreme Court upheld defendant's conviction for burglary and stealing while rejecting his assertions that the trial court committed

error in giving an instruction on voluntary intoxication when defendant had not asserted that as a defense.

> The record shows that the matter of defendant's asserted intoxication was referred to only in interrogation on behalf of defendant. He testified himself at some length on the subject.... There were numerous instances in which the subject of defendant's intoxication was referred to. Under these circumstances, the giving of the instruction was proper.

Id. at 426 (Citation omitted) [Accord: State v. Zerban, 412 S.W. 2d 397 (Mo. 1967)].

The origin of this rule in Missouri is found in State v. Sawyer, 365 S.W. 2d 487 (Mo. 1963) where the Supreme Court upheld a conviction of first degree robbery.

> In Instruction No. 3 the court instructed that voluntary intoxication is no excuse for the commission of crime. Defendant assigns error, saying intoxication was not raised by him as an excuse or reason for the acts that allegedly took place. The record is replete with testimony concerning heavy drinking by and the intoxication of both defendant and Boyer. Defendant testified he was sick from drinking and a little intoxicated at the time of the robbery.
>
> It is the accepted rule that voluntary intoxication is not an excuse for the commission of crime.... Our Rule 26.02 states "the court, whether or not it shall have been requested so to do by either party, must instruct the jury in writing upon all questions of law

> necessary for their guidance in returning their verdict * *." Assuming that the instruction is outside the scope of the mandatory instructions contemplated in Rule 26.02 . . . this does not mean that the trial court may not or should not give it. Even though defendant takes the position in his motion for new trial that he was not relying on drunkenness as an excuse for his alleged acts, his testimony and that of others placed that subject before the jury. It was in the interest of justice to give the jury for their guidance in returning their verdict the applicable law on this subject before them under the evidence, and the trial court did not err in so doing.

Id. at 492 (Citations omitted).

In People v. Conley, 243 P.2d 874 (Cal. 1952), the defendants' conviction for assault was upheld by the California Court of Appeal. Defendant contended the trial court had erred in giving various instructions to the jury.

> The third was the usual instruction to the effect that no act is less criminal because it was committed by a person while in a state of voluntary intoxication. It is argued that these instructions were improper since no such defenses were raised. The appellant relies on People v. Silver, 16 Cal. 2d 714, 108 P.2d 4, where it was held that in a close case a misleading instruction on an issue not raised is prejudicial where it may have confused the jury on a matter vital to the defense. No such situation here appears. These matters were not vital to the defense and there is nothing to indicate that the jury was confused or misled.

Id. at 878. In Conley, the defendant had testified he was

not drunk, but "there was evidence to support a contrary inference, and the instruction on intoxication was neither erroneous nor harmful." Id.

The rule, as stated by the California Supreme Court in People v. Silver, 108 P.2d 4 (Cal. 1940), cited in Conley, supra, is:

> Where errors in instructions occur, the question always arises as to whether or not they are prejudicial. Here it may be said that where the proof of a defendant's guilt is clear, and no extenuating circumstances appear, such errors may not be prejudicial. But where a case, . . . is what may be termed a "close" case, and where the erroneous instructions concern matters vital to the defense of the defendant, and may have resulted in a miscarriage of justice, we are of the opinion that such errors must be regarded as prejudicial and should result in a new trial for the defendant.

Silver, supra, at 9.

In the instant case, respondent submits there was no error in giving the instruction on voluntary intoxication. The instruction itself was a correct statement of the law. The matter of appellant's intoxication was not "vital" (Id.) to his defense. The record discloses the jury had an adequate foundation on which to base their inferences and conclusions as they evaluated the testimony and evidence presented by all the witnesses, including appellant.

As appellant indicates (Appellant's Brief at 4), the jury was fully aware it could find him guilty or not guilty of Theft of a Vehicle or the lesser included offense of Unlawful Taking of a Vehicle (CT 63, 64, 81). Finally, this was not a "close" case in the meaning of Silver, supra.

The cases do not disclose any essential distinction between the terms "excuse" and "defense" as used in the jury instructions in this case, and respondent submits there is no distinction worth noting.

Respondent submits that where evidence of a defendant's intoxication at the time he committed the crime comes before the jury for their consideration and this evidence was derived largely from defendant's testimony, the state is entitled to an instruction on that subject.

POINT II

AN INSTRUCTION TO THE JURY ON THE "REASONABLE ALTERNATIVE HYPOTHESIS" THEORY WAS NOT REQUIRED AND WOULD HAVE BEEN SUPERFLUOUS AS A CORRECT INSTRUCTION ON REASONABLE DOUBT HAD ALREADY BEEN GIVEN.

Appellant contends that (1) it was error to deny his request for an instruction on the reasonable alternative hypothesis, claiming that the evidence supporting Count II of the information (relating to the theft of property inside the

stolen vehicle) was "entirely . . . circumstantial" (Appellant's Brief at 9) and subject to alternative conclusions.[2] 2) Appellant further contends that there is a danger that in the absence of such an instruction the jury would not understand that if there were another explanation for defendant's conduct giving rise to a reasonable doubt as to his guilt, he should be acquitted. (3) Appellant further contends that failure to give the requested instruction could result in confusion as to the State's burden of proof. Appellant's first point is without merit. Bowden's testimony was direct evidence from which the jury could draw inferences as it recreated the facts, reconciled conflicts in a reasonable manner, and determined the weight to be given the evidence before it.

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[2] "A distinction is drawn between direct evidence and circumstantial evidence. Evidence is direct when the witness testifies as to the facts in dispute on the basis of his own knowledge of them. Circumstantial evidence assumes a witness who has no knowledge of the facts in dispute, but knows of other facts and circumstances which, when offered in evidence, may permit the fact finder to infer that the facts in dispute existed or did not exist. The inference will be drawn if, in accordance with the common experience of mankind, a reasonable relationship may be perceived between the known facts and circumstances and the facts sought to be proved. In terms of implementation, however, there is no distinction between direct evidence and circumstantial evidence . . ." Wharton's Criminal Evidence 4 (13th Ed. 1972).

Assuming, arguendo, that all the evidence on which appellant's conviction was based was circumstantial, respondent suggests there is no reason why it should be accorded less weight than so-called direct evidence. Appellant suggests that because evidence is circumstantial, it is somehow less probative than direct evidence and therefore suspect, requiring a reasonable alternative hypothesis instruction.

In this regard, Justice Wilkins had this to say in his concurring opinion in State v. John, 586 P.2d 410 (Utah 1978).

> I do not agree with the majority opinion's comment that ". . . despite whatever weaknesses circumstantial evidence may have, it is recognized as a valid method of ascertaining the truth" because it implies that generally this class of evidence is inherently less reliable than direct evidence. I do however otherwise concur in the opinion.
>
> The weight to be given to direct evidence is not--as a matter of law--necessarily greater than that given to circumstantial evidence. I believe an accurate statement of the law appears in 30 Am.Jur. 2d, Evidence, Sec. 1126, where it states:
>
> . . . Many decisions are to the effect that circumstantial evidence in a

> criminal case may be fully as satisfying as positive testimony and will sometimes outweigh it. In cases where the facts or circumstances which are proved are not only consistent with the guilt of the defendant, but also inconsistent with his innocence, such evidence, in its weight and probative force, may surpass direct evidence in its effect upon the jury ... Circumstantial evidence deserves a like consideration as to the sworn statements of a witness and may disprove the testimony of living witnesses, and there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence (Citations omitted).

Id. at 413.

In this case the court instructed the jury that:

> Where . . . [a] . . . conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are. . . . [Y]ou should carefully and conscientiously consider and compare all of the testimony, and all of the facts and circumstances, which have a bearing on any issue, and determine therefrom what the facts are. You are not bound to believe all that the witnesses have testified to or any witness or class of witnesses unless such testimony is reasonable and convincing in view of all of the facts and circumstances in evidence. . . . [I]f you believe a witness has wilfully testified falsely as to any material fact in this case, you may disregard the whole of the testimony of such witness, or you may give it such weight as you think it is entitled to.

(Instruction #8, CT 57).

The two versions the jury had before it regarding the missing property were: (1) Mr. Bowden's testimony as to what property was in the car when he and his wife entered the Langdon residence (T. 16-32); and (2) appellant's assertion that he saw no property in the car when he took it (T. 74). The fact that the vehicle sat for about 10 minutes before appellant drove it away and the fact that appellant claimed he left the vehicle unattended for a similar period were also known to the jury (T. 35, 74).

The jury could give whatever weight it wanted to the inference someone other than appellant took the property inside the car, or that the property never existed in the first place. Based on the apparent inconsistencies in appellant's testimony when factual assertions made by him are compared with the assertions of other witnesses, it is reasonable that the jury chose not to give as much weight to appellant's version of these facts as it gave to the versions given by other witnesses (See note 1, p. 6, supra). It was the jury's prerogative to reach its conclusions based upon the evidence adduced at trial, and to decide which of the witnesses to believe or disbelieve.

Appellant's second and third points can be disposed of together. Appellant has not shown why the alternative hypothesis instruction was required. There has been no

authority cited which supports the contention that the omission of the alternative hypothesis was improper.

The standard in Utah as to the giving of such an instruction was stated in State v. Fort, 572 P.2d 1387 (Utah 1977); and State v. Garcia, 355 P.2d 57 (Utah 1960):

> [W]here the only proof of material fact or one which is a necessary element of defendant's guilt consists of circumstantial evidence, such circumstances must reasonably preclude every reasonable hypothesis of defendant's innocence . . .
>
> This rule is applicable only where the proof of a material issue is based solely on circumstantial evidence . . .

355 P.2d at 59, 60 (emphasis added). The principle was cited and reaffirmed in State v. Schad, 470 P.2d 246, 247 (Utah 1970); State v. Romero, 554 P.2d 216 (Utah 1976); State v. Dumas, 554 P.2d 1313 (Utah 1976); and State v. Bender, 581 P.2d 1019 (Utah 1978).

As was pointed out above, the proof in this case was not solely circumstantial as it related to the theft of Mr. Bowden's property.

In State v. Hopkins, 359 P.2d 485 (Utah 1961), a similar situation to the one presented before this Court existed in that the defendant's version was totally different from that of the prosecution's, especially as to the issue

of intent. There, the Court refused to give a reasonable hypothesis instruction, saying that the jury must decide which version of the evidence to believe:

> The difficulty with defendant's position is that the rule he relies on is not applicable where, as here, there is dispute in the evidence and one version thereof does not support his thesis. He errs in assuming that the jury was obliged to believe his story as to what happened . . .

Id. at 487.

This Court recently affirmed the rule that an alternative hypothesis instruction is superfluous. State v. Eagle, 611 P.2d 1211 (Utah 1981). This rule has been gaining momentum in other jurisdictions as well as in the federal courts. Basically, the analysis is as follows:

> "[S]ubstantial evidence" is necessary to warrant submission of a case to the jury. Proof beyond a reasonable doubt, of course, is a jury question. . . . The substantial evidence required to warrant a conviction may be either circumstantial or direct. . . . The probative value of evidence is not reduced simply because it is circumstantial. . . . The probative value of direct and circumstantial evidence is essentially similar, and there is no distinction as to weight assigned to each. A conviction may be sustained on circumstantial evidence alone. . . . The prosecution is no longer required, in a case based wholly upon circumstantial evidence, to negate every conceivable hypothesis of innocence....

State v. Blevins, 623 P.2d 853, 856 (Ariz. App. 1981) (Citations omitted).

This Court said in State v. Eagle, 611 P.2d 1211 (Utah 1981):

> In regard to the propriety of the so-called "reasonable alternative hypothesis" jury instruction, any controversy over its use constitutes nothing more than a tempest in a teapot. The prosecution's burden of proof in any criminal case, whether the evidence be direct or circumstantial, or a combination of both, is that of beyond a reasonable doubt. The use of the reasonable alternative hypothesis instruction is merely one way of expressing that necessary burden of proof and there is no apparent reason to mandate that one, and only one, particular instruction be used by trial judges in conveying to the jury the meaning of that elusive phrase, "proof beyond a reasonable doubt." It may well be that one of our astute jurists may make even a substantial improvement of the reasonable alternative hypothesis instruction, if in fact one has not already done so. In any event, the "reasonable doubt" instruction given in the instant case clearly and appropriately informed the jury of the legal standard to be applied.

Id. at 1213 (See also: State v. Stacks, 627 P.2d 88, 92 (Utah 1981); State v. Lamb, 606 P.2d 229 (Utah 1980); State v. King, 604 P.2d 923 (Utah 1979); State v. Peoples, 605 P.2d 135, 141 (Kans. 1980); State v. Seelen, 485 P.2d 826, 828-9 (Ariz. 1971).

The test, then, is whether the "reasonable doubt" instruction given in a case "clearly and appropriately inform[s] the jury of the legal standard to be applied." Eagle, supra, at 1213.

Even assuming, arguendo, that the evidence was all circumstantial, an instruction on reasonable alternative hypothesis need not be given. In Holland v. United States, 348 U.S. 121, reh. denied 348 U.S. 932 (1954),[3] the petitioners assailed the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than guilt. The Supreme Court admitted that there was some case law supporting that type of instruction, but then stated:

> . . . the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect [citations omitted].
>
> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weight the chances that the evidence correctly points to guilt

[3] See also: United States v. Battista, 646 F.2d 237, 246 (6th Cir. 1981); United States v. Patterson, 644 F.2d 890, 894 (1st Cir. 1981); United States v. Dwoskin, 644 F.2d 418, 420 (6th Cir. 1981).

> against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Supra, at 139-140.

The law is primarily concerned that an accused shall be presumed innocent until proved guilty beyond a reasonable doubt. Utah Code Annotated, § 76-1-501 (1953), as amended. There is no need to risk confusing the jury with instructions to the effect that if the evidence is circumstantial it must exclude every reasonable hypothesis other than guilt. If a jury, upon weighing all evidence whether circumstantial or direct, is convinced of a defendant's guilt beyond a reasonable doubt the law is satisfied.

An instruction on reasonable doubt provides an understandable criterion for decision making; an instruction on reasonable alternative hypothesis is unnecessary and may confuse the jury. In the instant case, the jury was properly instructed on reasonable doubt. See Instruction #7 (CT 56). The trial judge evidently concluded a reasonable alternative hypothesis instruction was superfluous. Such a determination was within his discretion and was properly exercised.

The jury in this case, consistent with their careful instruction on reasonable doubt, logically excluded all reasonable alternative hypothesis by their guilty verdict.

Appellant has not only failed to show that his requested instruction is required but has also failed to show that if it would have been given in this case, it would have made some difference.

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; Utah Code Ann. § 77-35-30 (1980). The instructions, when read as a whole, require the jury to consider the testimony of appellant in reaching its verdict (See Instruction 23, CT 74).

Instructions Numbers 7 and 8 (CT 56, 67) instructed the jury to weigh and consider all of the evidence and circumstances shown by the evidence in arriving at a verdict. Instruction Number 10 (CT 59) 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 Number 5 (CT 54) required the jury to impartially consider and compare all of the evidence. Instruction Number 3 (CT 53) 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 weight of both state and federal authority is to the effect that a complete instruction on reasonable doubt is sufficient to advise a jury of the burdens that must be

borne by each party and the manner in which it is to evaluate and weigh the evidence presented in a criminal case. Such an instruction was given in this case.

Discussing the standard of review where insufficiency of evidence is alleged this Court said:

> It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of this Court to substitute its judgment for that of the factfinder. This Court should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt (footnote omitted).

State v. Lamm, 606 P.2d 229 (Utah 1980) at 231. See also: State v. Logan, 563 P.2d 811 (Utah 1977); State v. Asay, 631 P.2d 861 (Utah 1981); State v. Romero, 554 P.2d 216 (Utah 1976); State v. Granato, 610 P.2d 1290 (Utah 1980); State v. Fort, 572 P.2d 1387 (Utah 1977); State v. Wilson, 565 P.2d 66 (Utah 1977); and State v. Erickson, 568 P.2d 750 (Utah 1977). Moreover, "the evidence is to be viewed in the light most favorable to the jury's verdict." State v. Gorlick, 605 P.2d 761 (Utah 1979).

CONCLUSION

Based upon the foregoing authorities and arguments, respondent respectfully submits that the conviction and sentence of the appellant were proper and schould be affirmed by this Court.

DATED this 9th day of November, 1981.

Respectfully submitted,

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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to G. Fred Metos, Attorney for Appellant, Salt Lake Legal Defender Association, 333 South 200 East, Salt Lake City, Utah, 84111, this 9th day of November, 1981.

Craig L. Barlow