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Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - -

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

SAVADOR E. PACHECO,

Defendant-Appellant.

- - - - - - - -

BRIEF

- - - - - - - -

APPEAL FROM [illegible]
OF THE [illegible]
THIRD [illegible]
FOR SALT [illegible]
HONORABLE [illegible]

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 17527
SAVADOR E. PACHECO,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY OF THEFT, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DEAN E. CONDER, JUDGE.

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Attorney General

CURTIS J. DRAKE
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Salt Lake City, Utah 84114

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 17527
SAVADOR E. PACHECO,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1978), for the taking of two checks totalling $405.76 made out to Allstate Wholesale Distributing Company.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury on December 16 and 17, 1981 in the Third Judicial District Court of Utah, the Honorable Dean E. Conder, presiding. A verdict of guilty was returned by the jury on December 17, 1981 and on December 22, 1981 appellant was sentenced to an indeterminate term

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not to exceed five years at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the judgment and sentence rendered by the trial court.

All citations contained herein are to Utah Code Annotated, Replacement Volume 8B (1978), unless otherwise indicated.

STATEMENT OF THE FACTS

On July 28, 1980, Mr. Charles Fultz, president of Allstates Distributing, a local tire company, received one check in the amount of $292.14 and a second check in the amount of $113.62 for the purchase of tires (T.8). Mr. Fultz placed these two checks under the handle of a cash box which he kept in an inner office at his business (T.8).

Later during the same day, Mr. Fultz returned to the office area of his business from the rear of the warehouse and discovered a man later identified as the appellant standing approximately fifteen to twenty feet from the area where the cash box was located (T.11). The appellant asked Mr. Fultz about the possibility of obtaining employment, was told none was available, and left through the front door (T.12). At approximately 5:30 p.m. on July 28, Mr. Fultz discovered

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that the two checks that he had placed on the cash box were missing (T.12). Appellant was later apprehended and found to have both missing checks in his pants pocket (T.19-20).

Appellant's defense at trial was based upon his testimony that he obtained the checks inadvertently at Allstates Distributing and did not appreciate their true significance because of an alleged inability to understand the English language and American banking instruments (T.55-56). Despite appellant's testimony and his use of an interpreter at trial, the State introduced evidence that appellant conversed in English to Mr. Fultz (T.12) and Detective Riedel (T.20).

Counsel for appellant at trial vigorously submitted a novel theory of value of the stolen property to the trial judge. Counsel contended that since the checks were not endorsed by the owner, Mr. Fultz, at the time they were stolen, they had no value and, therefore, could not support a third degree felony charge. The trial judge rejected appellant's argument and found that the face amount of the checks was prima facie evidence of value.

Despite the trial judge's ruling, appellant was subsequently permitted to introduce expert testimony from Ms. Mary Lou Vrabec, a Salt Lake bank employee, in support

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of his theory. Where testifying that the checks had no value prior to the moment they were endorsed and negotiated, Ms. Vrabec admitted on cross-examination that the value of the checks to the owner "prior to processing" was the face value of the checks (T.46-50).

Based upon the evidence presented, the jury returned a verdict of guilty of theft, a third degree felony.

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ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO AMEND THE INFORMATION.

Appellant was charged by information with a third degree felony in violation of § 76-6-412(1)(b)(i), which provides:

> (1) Theft of property and services as provided in this chapter shall be punishable as follows:
>
> . . . .
>
> (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.

The property stolen by appellant in the instant case was two checks having face amounts totalling $405.76. At the close of the State's case, appellant moved to amend the information on the grounds that the prosecution had failed to establish that the value of the checks was between $250.00 and $1,000.00 (T.28). Appellant's theory was that since the checks were not endorsed by the payee at the time they were stolen, they had no value. The trial court denied appellant's motion after lengthy discussion with defense counsel.

Appellant then called Mary Lou Vrabec, a local bank employee, who testified that the checks were of no value at the moment they were stolen because of the missing endorsements. Appellant contends that this evidence was unrebutted and,

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therefore, the trial court was bound to grant appellant's motion. Respondent maintains that appellant's argument must fail because the face amount of the checks was prima facie evidence of value and provided the jury with evidence upon which to base their verdict.

In People v. Marques, 184 Colo. 262, 520 P.2d 113 (1974), the Colorado Supreme Court stated,

> [T]he prima facie value of a check is its face value. First National Bank v. Montgomery Cotton Co., 211 Ala. 551, 101 So. 186. This rule comports with the general rule that value in a theft case is market value, where market value is what a willing buyer will pay in cash to the true owner for the stolen item. Maisel v. People, 166 Colo. 161, 442 P.2d 399. Where a check is the thing to be valued, the willing buyer is normally the drawee bank. In the overwhelming majority of ordinary commercial transactions, the drawee bank will pay the face amount of the instrument, or the drawer will make good the instrument. E. Fransworth & J. Honnold, Cases and Materials on Commercial Law, 47-54 (2d ed. 1968). Therefore, we hold that the face amount of the instrument is presumptive evidence of its value (citations omitted). The value of the thing lost is not limited to what the thief could realize on the instrument. As we pointed out above, the loss is measured by what the owner could expect to receive for the instrument.

520 P.2d at 116-117 (emphasis added). See also: United States v. Aberico, 604 F.2d 1315 (10th Cir. 1979).

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The analysis of the Colorado Supreme Court in Marques is a logical extension of this Court's decision in State v. Logan, 563 P.2d 811 (Utah 1977), cited by appellant in support of his argument. In Logan, this Court adopted the fair market value test for assessing the value of property which was stolen but not destroyed. Applying this test to the facts of this case, it is apparent that the willing buyer, the drawee bank, would (and did) pay the willing seller, Allstates Wholesale, the face amount of $405.76 for the two checks.

As was cogently pointed out by the prosecutor in her closing argument, prudent people do not endorse checks until immediately before negotiation. If appellant's argument were to be followed, relative impunity would be extended to thieves who steal unendorsed commercial paper. If the thief could successfully forge the endorsement and negotiate a check, he would net the face amount; if caught with only unendorsed stolen checks, he could avoid felony prosecution. Appellant's own witness, Ms. Vrabec, testified on cross-examination that the value of the checks to Allstate "prior to processing" was the face amount of the instruments (T.50). Respondent submits that the face amount of the checks in this case was the proper measure of value and constituted competent evidence upon which the jury could convict appellant of a third degree felony.

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POINT II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON APPELLANT'S THEORY OF THE CASE.

A substantial amount of time at trial was spent in considering appellant's theory of value of the two checks at issue. In support of his contention that the checks had no value at the time they were stolen, appellant submitted the following proposed instruction:

> When the value of property alleged to have been taken by theft must be determined, the market value at the time and in the locality of the theft shall be the test. The value is the highest price, estimated in terms of money, for which the property would have sold in the open market at the time and in the locality, if the owner was desirous of selling, but under no urgent necessity of doing so, and if the buyer was desirous of buying but under no urgent necessity of doing so, and if the seller had a reasonable time within which to find a purchaser, and the buyer had knowledge of the character of the property and of the uses to which it might be put.

(R.88).

The trial court rejected appellant's proposed instruction and submitted Instruction No. 22 (R.55) and Instruction No. 23 (R.56) to the jury:

INSTRUCTION NO. 22

> You may find that a check is a writing which represents value to the owner. <u>In determining the amount of value of a check, you may consider</u> the written face value of the

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> check and the testimony of competent witnesses as to the value of the check. (emphasis added).
>
> INSTRUCTION NO. 23
>
> When the value of property alleged to have been taken by Theft must be determined, the measure of the value is its fair market value at the time and place of the Theft.
>
> You are instructed that the owner of an article is a competent witness as to its value and any such expression of opinion may be considered by you in determining value. (emphasis added).

This Court has stated that, "The trial court should mold the instructions to fit the facts shown, using language understood by lay people and blend the instructions to the facts disclosed by the evidence and make them as clear in meaning and concise as possible without requiring belabored legal definitions." State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414, 416 (1964). Respondent maintains that Instructions 22 and 23 are concise and clear and adequately instruct the jury on appellant's argument concerning value. In Instruction No. 22, the alleged relevance of the testimony of appellant's expert witness, Ms. Vrabec, is understood by the language referring to the "testimony of competent witnesses." The fair market value theory as well as the important of the time the theft occurred (relevant to the issue of endorsements) urged by appellant are plainly stated

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in Instruction No. 23. The trial court was not required to accept the precise language of appellant's proposed instruction. Moreover, the instructions, when read as a whole, adequately instructed the jury. State v. Burch, 17 Utah 2d 418, 413 P.2d 805 (1966). The trial court's rejection of appellant's proposed instruction should be affirmed.

POINT III

INSTRUCTION NO. 18 AND INSTRUCTION NO. 22 WERE PROPERLY SUBMITTED TO THE JURY.

A

APPELLANT WAIVED HIS RIGHT TO OBJECT TO THE SUBJECT INSTRUCTIONS BY FAILING TO RECORD HIS EXCEPTIONS THERETO AT TRIAL.

In State v. Kazda, 545 P.2d 190, 193 (Utah 1976), this Court approved the "standard rule" that a failure to object to an instruction at trial precludes the raising of the issue on appeal. At the stipulated time for exceptions to instructions, counsel for appellant lodged a single exception to Instruction No. 13, and failed to object to Instruction No. 18 or Instruction No. 22 (T.74). Because of the failure to enter a timely exception, appellant may not raise the alleged error of the instructions as an issue on appeal.

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B

EVEN IF APPELLANT DID NOT WAIVE HIS RIGHT TO OBJECT TO THE INSTRUCTIONS, THE INSTRUCTIONS AT ISSUE WERE CORRECT AND PROPERLY SUBMITTED.

Instruction No. 18 reads as follows:

> You have been instructed regarding the essential elements of the crime of theft which the State must prove beyond a reasonable doubt. The State need only prove those essential elements.
>
> In other words, in the crime of Theft, it is not necessary for the State to prove and you are not to consider in your deliberations, whether the checks had any value to the person who took them from the owner. (R.51).

The obvious function of Instruction No. 18 is to emphasize that it is the value of the stolen property to the owner that determines the true value. See: State v. Logan, supra. The soundness of this proposition is admitted by counsel for appellant in her colloquy with Judge Conder at trial (T.30-31). Appellant's citation to Section 76-6-101(4)(a), (b) and (c) is misdirected and has no relevance to the propriety of Instruction No. 18.

Appellant's objection to Instruction No. 22 is equally unavailing. The language of Instruction No. 22 merely directs the attention of the jury to the evidence presented by the state ("face value of the check", i.e., the checks themselves) and the evidence presented by

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appellant ("testimony of competent witnesses," i.e., Ms. Vrabec). The language of the instruction hardly "distorts the law by weighting the testimony of the State's witness and giving no legal credit to the evidence that appellant presented." (Brief of Appellant at 11).

The assessment of the value of the checks was a question of fact for the jury and Instruction No. 22 correctly highlighted the competent evidence which could be considered in reaching their verdict.

POINT IV

THE COMMENT OF THE PROSECUTOR DURING FINAL REBUTTAL WAS NOT PREJUDICIAL AND DOES NOT CONSTITUTE REVERSIBLE ERROR.

A

APPELLANT WAIVED HIS RIGHT TO RAISE AN OBJECTION ON APPEAL BY FAILING TO OBJECT AT TRIAL.

Before appellant can object to the allegedly prejudicial comment of the prosecutor on appeal, he must have preserved his right to do so by lodging an objection at trial. State v. White, 577 P.2d 552 (Utah 1978). In White, this Court stated,

> If counsel desires to object and preserve his record as to such an error during argument, he must call it to the attention of the trial court so that

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> if he thinks that it is necessary and appropriate to do so, he will have an opportunity to rectify any error or impropriety therein and obviate the necessity of an entire new trial. (citation omitted).

Id. at 555. Accord: State v. Winger, 26 Utah 2d 118, 485 P.2d 1398 (1971). Appellant failed to object to the prosecutor's statement and, therefore, cannot raise the issue in this appeal.

B

EVEN IF APPELLANT DID NOT WAIVE HIS RIGHT TO RAISE THE ISSUE OF ALLEGED PREJUDICIAL COMMENT, THE PROSECUTOR'S REMARK WAS PROPER.

A prosecutor has the right and a duty to analyze the evidence as a whole and to include any statements or deductions reasonably to be drawn from such evidence. State v. Kazda, 540 P.2d 949 (Utah 1975); State v. Eaton, 569 P.2d 1114 (Utah 1977). The prosecutor is also given "wide discretion and is entitled to exercise considerable freedom in expressing to the jury his view of the evidence." State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973).

Appellant cites the case of State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973), in support of his argument concerning asserted prejudicial comment. Respondent concurs with the controlling test stated therein, with

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special emphasis on the necessity that the remarks must call the attention of the jurors to matters which they would not be justified in considering. In the instant case, the prosecutor merely referred to the testimony of the state's principal witness, Mr. Charles Fultz. Having heard Mr. Fultz testify in the State's case in chief, the jury's attention was simply recalled to the substance of his testimony.

Respondent maintains that the remark of Ms. Strachan was not so prejudicial as to constitute reversible error. In State v. Eaton, 569 P.2d 1114 (Utah 1977), cited by appellant, the prosecutor at trial stressed that the defendant had not taken the stand to testify on his own behalf and stated, "I listened to the entire defense in this case and never heard one shred of evidence from the defendant to prove any motive any reason that showed that Ken Goode was out to get blacks in this community." Id. at 1115. In condemning the prosecutor's remarks, this Court stated,

> Upon a fair analysis of the prosecutor's remarks here, the conclusion cannot be escaped that it was but a thinly disguised attempt to do indirectly what the prosecutor knew could not properly be done directly: that is, to comment on the fact that the defendant had chosen not to take the witness stand; and to persuade the jury to draw inferences as to his guilt because of his exercise of that constitutional privilege.

569 P.2d at 1116.

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The remarks in Eaton infringed upon a constitutional right of the defendant; in this case, no such prejudice exists. While the transcript does not include the closing argument of Ms. Fletcher, it seems clear that Ms. Strachan's remark was in direct response to something contained in defense counsel's argument. The comment of the prosecutor was apparently spontaneous and not calculated to prejudice the appellant.

If every statement by a prosecutor in closing argument were to be subjected to such close scrutiny, the legitimate right of the state to place its view of the evidence before the jury would be severely curtailed. The comment in the instant case did not improperly influence the jury and does not constitute reversible error.

CONCLUSION

Respondent urges this Court to affirm the finding of the trial court that the face amount of a check is prima facie evidence of its value. Such a rule would further sound public policy and is solidly supported by case law.

Appellant's remaining claims of error are without substance, and the failure of counsel for appellant to enter timely objections at trial precludes appellant

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from raising the majority of the issues on appeal. The verdict of the jury should be affirmed.

Respectfully submitted,

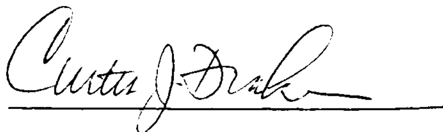
DAVID L. WILKINSON
Attorney General

CURTIS J. DRAKE
Assistant Attorney General

Attorneys for Respondent

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing Brief of Respondent to Ms. Ginger L. Fletcher, Attorney for Appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 20th day of August, 1981.



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