

1982

# State of Utah v. Jan C. Graham : Brief of Appellant on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	)	
	)	
Plaintiff and Appellant,	)	
	)	
vs.	)	No. 18123
	)	
JAN C. GRAHAM,	)	
	)	
Defendant and Respondent,	)	

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APPELLANT'S BRIEF ON APPEAL

---

Appeal from a Conviction of  
Theft a 2nd Degree Felony

---

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Clerk, Supreme Court Utah

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	)	
Defendant and Respondent,	)	
	)	

---

STATEMENT OF THE CASE

This is an action to overturn a guilty verdict and the sentence imposed by the 2nd Judicial District Court of Weber County. This verdict was guilty to violating Utah Code Annotated 76-6-408 receiving stolen property, a criminal offense and a second degree felony.

DISPOSITION BELOW

The Appellant had a Jury Trial on March 18th 1981 and was found guilty. A motion for a new trial was filed by the defense and this motion was granted by the Honorable Judge Gould. The prosecution appealed the granting of said Motion For a New Trial and the Utah Supreme Court upheld the decision of Judge Gould. A new trial was held on October 2nd, 1981 and this appeal arises from that trial.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the verdict of Guilty in the lower court overturned and to the charge dismissed for lack of evidence.

### STATEMENT OF FACTS

The facts of this case are, during the month of August 1981, the appellant, Jan C. Graham, hereafter referred to as appellant was approached by an unknown person latter identified as Jeff Smith, at a National Guard Meeting. This Jeff Smith asked the appellant if he was interested in guns and attempted to sell him a Browning high-powered Pistol. The appellant was interested and gave Smith his name and phone number. Appellant was unaware of the value or the model of the pistol Smith had shown him and he was curious. The Appellant contacted several gun shops and none of the shops had any knowledge of this type of pistol and he was referred to Mr. W. R. Betz, an expert on Browning Arms. Mr. Betz exhibited some interest but the appellant was unable to answer his questions. However, the appellant did tell Mr. Betz that a member of his National Guard Unit had the pistol and he would try to get more information. The appellant and Mr. Betz had a few telephone conversations regarding the pistol but appellant was unable to satisfactorily answer Betz's questions. Finally Mr. Betz asked to see the pistol but appellant stated he would have to find the owner.

During the first part of November 1980, the appellant was at a gun show; Mr. Smith was also present and had the pistol in his possession. Mr. Smith and the appellant had a chance meeting and the appellant

asked Smith if he could show the pistol to Mr. Betz who had an exhibit at the show. After Mr. Betz saw the pistol he became extremely interested and told appellant he would purchase the pistol if the appellant could obtain it from the owner. The appellant informed Mr. Betz he'd have to contact the owner. At this time the appellant had no phone or address for the owner (Mr. Smith) of the pistol and was hoping Smith would contact him.

After the gun show Smith called the appellant and arrangements were made for the gun to be purchased. The appellant and Smith met in West Jordan at the National Guard meeting place (Airport Number two) and appellant purchased the pistol for \$200.00, this was in November of 1980, and Smith gave appellant a bill of sale. Appellant never talked to Mr. Smith or was able to find him again after the sale of the pistol.

Appellant, after purchasing the pistol from Smith contacted Mr. Betz and sold the pistol to him for \$1000.00 and a 357 Magnum Hand Gun. The appellant gave Mr. Betz a bill of sale.

Subsequent to the purchase by Mr. Betz he contacted Browning guns to research the pistol and was informed it was a prototype pistol missing from their inventory.

The appellant worked as a night-watchman at Browning Arms for a private firm from January 1979 to January 2nd, 1980. The above discussed Browning high-power Pistol was not discovered missing until September of 1980 and then reported missing. There was an inventory taken during

December, 1979 and at this time the pistol was not missing, however, the date on the inventory was January 1980. Brownings records indicate that some 50 weapons were missing and that they could not explain why they were missing. Brownings spokesman at trial did admit that weapons are checked out to various employees, mislaid, and simply unaccounted for.

On the 5th day of December, 1980, the police approached the appellant and questioned him as to the Browning high-power Pistol he sold to Mr. Betz. The appellant was later charged with Theft by Receiving.

#### ARGUMENT

##### LACK OF SUFFICIENT EVIDENCE TO SUSTAIN A JUDGMENT

Utah State Law requires that the, "State has burden of proving each and every element of offense and if it fails to do so the defendant is entitled to an acquittal". State vs. Housekeeper 588 P. 2d 130 (Utah 1978). The appellant in this case maintains that the verdict finding him guilty was an invalid decision because the State did not prove each and every element of Utah Code Annotated 76-6-408.

(1) A person commits Theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withhold or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof."



In a recent case State vs. Murphy, 617 P. 2d 399,401 (Utah 1980)

This Court says, "Implicit in the language of the State are the basic elements of the crime;

- (1) Property belonging to another has been stolen.
- (2) The defendant received, retained or disposed of the stolen property.
- (3) At the time of receiving, retaining or disposing of the property the defendant knew or believed the property was stolen; and
- (4) The defendant acted purposely to deprive the owner of the possession of the property."

The appellant believes and maintains that the prosecution in this matter at no time proved any of the basic elements as outlined above.

1. There was never any direct evidence to support the element that the property of another had been stolen, only that this particular gun was missing from inventory. During his direct Examination, Mr. Don Durrant, Security Supervisor of Browning Arms Company Mountain Green, Utah stated the gun turned up missing T.V1-22. Later in Redirect the witness Durrant testified the pistol didn't come up missing until later in 1980 T. V1-36. At no time did Mr. Durrant testify the gun was stolen. There was, however, testimony by Mr. Durrant that there was a definite security problem with guns leaving the premises. T. V1-36. Mr. Betz during his testimony stated that frequently the Browning Arms Company held raffles of weapons and that this particular pistol would be the type likely to be raffled T. V1-75.

2. The appellant does not argue that he had this pistol in his possession or that he disposed of said pistol.

3. The appellant does not argue that he did not have any knowledge or belief that this pistol was stolen. Black's Law Dictionary on the work knowingly states,

"The use of the work in an indictment is equivalent to an averment that the defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged p. 1012.

The prosecution in its case never offered evidence either directly or indirectly that the appellant had any knowledge that the pistol was stolen. The prosecution never introduced the original thief to testify nor did they meet any of the elements necessary to show a presumption.

Utah Code Annotated 76-6-408 (2) states

"The knowledge or belief required for paragraph (1) is presumed in the case of an actor who: (a) Is found in possession or control of other property stolen on a separate occasion; or (b) Has received other stolen property within the year preceding the receiving offense charges . . . ." and is not a pawn-broker or a dealer in pistols.

The appellant maintains that " In order to submit a question to the jury it is necessary that the prosecution establish a prima facie case. That is, "It is necessary to present some evidence of every element needed to make out a cause of action, . . . ." State vs. Romero 554 P. 2d. 216 (Utah 1976)

4. The appellant further argues that he did not act purposely to deprive the owners of the possession of the property. The appellant at all times during his testimony maintained he brought the pistol and at no time did the prosecution prove otherwise. Therefore, the appellant believed that he was the rightful owner of the pistol.

"It is elementary when a specific intent is required to make an act an offense, that the doing of the act does not raise the presumption that it was done with the specific intent," State vs. Whittinghill 109 Utah 48, 163 P. 2d 342 (Utah 1945). When appellant sold the pistol he had no intent to deprive the rightful owner possession because he believed he was the rightful owner. The appellant never acted as if he was not the rightful owner. The appellant never acted as if he was not the rightful owner or that he had not purchased the pistol. At all times he told Mr. Betz he would have to contact the previous owner (Mr. Smith) to purchase the pistol for Mr. Betz. When Mr. Betz informed appellant that he was going to authenticate the pistol and find out what the pistol was and how it got here the appellant never questioned Mr. Betz's motives nor appeared concerned. T. V1-72-73. This would also apply to appellants knowledge as to this pistol being a stolen item.

"Before the defendant can be convicted of the crime of receiving stolen property the prosecution must present a quantum of evidence sufficient to establish each element of the Crime. "State vs. Murphy 617

P.2d 399,402 (Utah 1980) Utah Code Annotated 76-1-501 provides

- (1) "A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof the defendant shall be acquitted."

The appellant argues that each and every element of this crime was not proved beyond a reasonable doubt and that when his attorney at trial made motion to dismiss (T. V11-62) said motion should have been granted.

#### CONCLUSION

Utah Code Annotated 76-1-501 provides (1) a defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable proof. In absence of such proof, the defendant shall be acquitted." The appellant argues that each and every element of this crime was not proved beyond a reasonable doubt and that when his attorney at trial made motion to dismiss (T. V11-62) said motion should have been granted.