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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,	:	
-vs-	:	
RICHARD A. RICCI, Defendant-Appellant	:	No. 18165

BRIEF OF APPELLANT

Appeal from the Seventh Judicial District Court in and for Carbon County, State of Utah, the Honorable Boyd Bunnell, presiding.

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FILED

MAY 17 1982

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEAL 1

STATEMENT OF FACTS 2

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN REFUSING TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NUMBER 4 4

POINT II. THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S MOTION TO AMEND THE INFORMATION 7

POINT III. THE TRIAL COURT ERRED IN GIVING THE COURT'S INSTRUCTION NUMBER 4. 10

POINT IV. THE TRIAL COURT ERRED IN ADMITTING THE CONTENTS OF A WASTE CAN INTO EVIDENCE 11

POINT V. THE COURT ERRED IN PERMITTING OFFICER CHARLES SEMKEN TO TESTIFY TO A STATEMENT MADE TO HIM BY THE DEFENDANT. 12

CASES CITED

Carnley v. Cochran, 369 U.S. 506, 8 L.Ed. 2d 70, 82 S.Ct 884 (1962 13

Carter v. State (Nevada) 446 P.2d 165 11

Miranda v. Arizona 384 U.S. 346, 16 L.Ed 2d 694, 86 S.Ct. 1602 13

North Carolina v. Butler, 441 U.S. 369, 60 L.Ed 2d 286 99 S. Ct. 1755 (1980) 14

State v. Rickenberg 58 Utah 270, 198 P.767 8

State v. Rohletter (Utah) 160 P.2d. 963 8

State v. Taylor (Ore) 522 P. 2d 499 8

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STATUTES CITED

UTAH CODE ANNOTATED, 1953

Section 76-6-201(3) 5

Section 77-35-4 7

OREGON REVISED STATUTES

164.205 (4) 5,7

CONSTITUTION OF THE UNITED STATES

Fifth Amendment. .10

Sixth Amendment. 9

Fourteenth Amendment 10

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	
RICHARD A. RICCI, Defendant-Appellant	:	No. 18165
	:	

BRIEF OF APPELLANT

STATEMENT OF NATURE OF THE CASE

This is a criminal proceeding brought by the State of Utah against Richard A. Ricci charging him with having committed the crime of Burglary of a Non-dwelling in violation of Section 76-6-202, Utah Code Annotated, 1953, as amended.

DISPOSITION IN THE LOWER COURT

The defendant was found guilty of Burglary of a Non-dwelling after a jury trial on November 17, 1981 in the District Court in and for Carbon County, State of Utah, the Honorable Boyd Bunnell presiding. The court pronounced judgment on November 17, 1981 and sentenced the defendant to be imprisoned in the Utah State Prison for a term not to exceed five years.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing the judgment rendered at the trial and a ruling remanding the cause to the trial court for a new trial.

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STATEMENT OF FACTS

The defendant was charged with having burglarized the BEJO, a bar on Main Street in Helper, Utah in the early morning hours of October 11, 1981.

The testimony of witnesses called by the prosecution showed that a Helper City Police Officer, while making routine door checks, saw the defendant exiting through the rear door of the BEJO at approximately 3:50 A.M. (T.26) The officer and defendant engaged in a brief conversation until several other officers arrived, at which time the officers and the defendant entered the BEJO. The officers testified that they frisked the defendant and found a screwdriver without handle in the defendant's right pocket (T.28), observed a trash can containing certain items (T.31 & 32), observed the back door lock lying on the floor (T.45), found several vending machines to have been vandalized (T.48) and papers scattered on the floor behind the bar (T.49).

The defendant was placed under arrest at the scene and then taken to the Carbon County Sheriff's Office where he was interrogated by Officer Charles Semken. An incriminating statement was given by the defendant to Officer Semken (T.90) to which defendant's counsel objected at trial (T.90).

The defendant testified that he was walking by the back of the BEJO when he saw the rear door open and a light on. He entered the building believing that it was open for business (T.110), went to

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the front of the bar, saw the scattered papers (T.105), turned around and left and then met the officer who was making the door checks (R.107) The defendant denied having committed the burglary (T.106) and claimed that the papers were on the floor and the vending machines had been vandalized before he arrived.

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POINTS ON APPEAL

POINT I

THE TRIAL COURT ERRED IN REFUSING TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NUMBER 4.

The trial court refused to give the jury defendant's requested Jury Instruction Number 4 which read as follows:

> " You are instructed that the entry of a person into the building of another is not unlawful if the person reasonably believes that the business in the building is open to the general public at the time he enters."

The testimony of the defendant at trial shows that he reasonably believed the BEJO to be open to the public at the time he entered the door:

> Q: Did you have to force the door open at the time you went in?
>
> A: No. It was open.
>
> Q: At the time that you went in did you notice whether the bar was open or closed?
>
> A: I thought it was open.
>
> Q: Why did you think it was open?
>
> A: I saw lights and the door was open.
> (Transcript at p. 110)

The defendant's testimony showed that his expressed intent in going to the BEJO was to get a drink, (T.104) not to commit a crime. (T.111)

The issue then becomes one of whether the defendant's upon the BEJO property was unlawful even when his testimony showed he thought the premises were open to the public.

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Section 76-6-201(3) defines "enters or remains unlawfully" as used in the definition of Burglary as follows:

> "(3) A person "enters or remains unlawfully" in or upon premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not otherwise licensed or priviledged to enter or remain on the premises or such portion thereof."

Utah law does not define the phrase "open to the public" as used in the above definition. However, the State of Oregon has a burglary statute similar in wording to that of Utah's and defines "open to the public" as:

> "... premises which by their physical nature function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required." (ORS 164.205(4))

In State v. Taylor, 522 P.2d 499 (1974 Oregon) the defendant was arrested in the laundry room of an apartment complex. He testified that he was driving through the City of Eugene when he saw the apartment complex and stopped, thinking he could do his laundry. He tried its closed door, found it to be unlocked, and then entered. His defense to the burglary charge was that his entry into the laundry room was not unlawful because that room was open to the public.

Although the Court in Taylor was concerned with whether an instruction on a lesser included offense should have been given, the following statement of the Court is significant:

> "Evidence indicating that the laundry room was open to the public included the fact that it was not locked, that lights were shining outside the apartment building, and that there was no sign outside the laundry facility indicating that it was limited to private use. There was also contrary evidence: no signs or lights indicating the laundry was open to the public— or even that the room was a laundry, no lights on inside the laundry room, the early hour — 3 to 4 a.m., and a sign inside the laundry room stating the

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hours were 7 a.m. to 10 p.m. Resolution of this conflicting evidence was properly for the jury. However, it would have been quite rational for the jury to conclude that this evidence failed to prove beyond a reasonable doubt that the laundry facility was not open to the public. Defendant's requested instruction on theft should have been given. (522 P.2d at 501) (underlining added.)

Defendant's requested instruction in the instant case was an attempt to provide the jury with an opportunity to consider the defendant's contention that he did not unlawfully enter or remain on the premises and therefore committed no burglary.

The instruction was justified since it harmonized with the evidence presented by the defendant and was consistent with his theory of defense.

The Oregon statute defining the phrase "open to the public" wisely contemplated factual situations in which one might enter upon business property reasonably believing the same to be open, when the management had intended that it be considered closed. Surely the Utah Legislature, by failing to define "open to the public" cannot have intended the opposite to be the law of this state, e.g., that any entry upon property, regardless of the appearance of the business, is unlawful if the management had intended that it be closed. Since a business such as the BEJO encourages patrons to come upon its premises it ought to bear the burden of its appearance and be bound by the impression it creates on potential customers. Even though an invitation was not intended by the management, it would seem to be reasonable to conclude that the BEJO in this instance was extending an invitation to business visitors to enter upon its premises if the door was open and the lights were on at the time the defendant entered. This assertion is supportable also by the Oregon definition of "open to the public"

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since the "premises...by their physical nature, function, usage... at the time would cause a reasonable person to believe that no permission to enter or remian is required" (ORS 164.205(4)) The defendant was entitled to have his theory of the case presented to the jury.

By failing to give defendant's requested instruction No.4, the Trial Court erroneously prevented the possible determination by the jury that the entry of the defendant was lawful and that therefore no burglary occurred.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S MOTION TO AMEND THE INFORMATION.

After both sides had rested and exceptions to the jury instructions had been taken the State moved to amend the charging part of the information by adding the phrase"or remained in" so that the Information finally read as follows (T.119-120):

> "That the said defendant, at the time and place aforesaid unlawfully entered <u>or remained in</u> the building of another with the intent to commit a theft, to-wit: the Be-Jo Club"

The defendant objected to the Motion (T.120) but the Court permitted the amendment, stating that the defendant would not be prejudiced.(T.120).

Section 77-35-4, Utah Code Annotated, permits an amendment to an information to be made on the following conditions:

> The court may permit an indictment or information to be amended at any time before verdict if no additional or differenct offense is charged and the substantial rights of the defendant are not prejudiced.

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The defendant contends that his substantial rights were prejudiced by the amendment. The defendant had prepared his case by preparations designed to show that his entry onto the BEJO premises was not unlawful. The information on which the defendant relied throughout the trial claimed only that the defendant entered the premises unlawfully — it did not assert that the defendant "remained" unlawfully. Consequently, the testimony elicited by defense counsel from the defendant in cross-examination was primarily aimed at showing the defendant thought the BEJO was open at the time of entry. Had counsel known at the commencement of trial that the prosecution would attempt to show and claim an unlawful remaining, defense counsel could have and would have framed questions relating to the "unlawful remaining".

The motion was also untimely for the reason that defendant's requested jury instruction had already been submitted to the Court by defendant. The defendant had no opportunity to prepare any instruction which would attempt to help the jury determine whether an unlawful remaining had occurred.

In State v.Rohletter 160 P.2d 963 (Utah 1945) and in State v. Rickenberg, 58 Utah 270, 198 P.767, the Utah Supreme Court held that under the then existing Utah statute,

> "...no amendment could be made which would essentially alter the nature of the case, so as to prejudice the defendant in making his defense." (160 P.2d at 964)

Although the Court in Rohletter,supra, was considering the situation where an information charging rape was amended to add a count charging the crime of carnal knowledge, the reasoning of the court in

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reversing the conviction is applicable in the case at bar:

> The defendant sought throughout his cross-examination to show that the plaintiff had consented to the sexual act—which would have defeated the charge of rape but would not have been a defense to the charge of carnal knowledge. We cannot assume that the same jury would have been selected, the same questions asked, the same evidence emphasized, had the information from the beginning contained both counts. The addition of the second count charging a new and separate offense at this stage of the proceeding was prejudicial.
>
> The judgment is reversed and the matter remanded for further proceedings.

In the Rohletter case, defense counsel concentrated on the issue of consent. It appears that "consent" was only element distinguishing rape and carnal knowledge from each other. In the instant case the addition of the phrase "or remained in" was as significant and prejudicial to defendant as was the addition of the carnal knowledge count in Rohletter—significant because defendant was not placed on notice at any time throughout the trial that he would need to defend himself against a claim that he unlawfully remained on the premises. Each step of the trial and preliminary hearing proceeded in the light of an information charging that defendant had unlawfully entered and not mentioning unlawfully remaining.

The amendment allowed the jury the possibility of finding that the defendant did not "enter unlawfully" but that he "unlawfully remained". The action of the trial court in granting the motion to amend was prejudicial by failing to timely place the defendant on notice that he would have to defend against the allegation contained in the amendment. The defendant was thus deprived of his right "to be informed of the nature and cause of the accusation" in violation of the Sixth Amendment to the Constitution of the United States and in violation of

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the due process clause of Fifth and Fourteenth Amendments of the Constitution of the United States.

POINT III

THE TRIAL COURT ERRED IN GIVING THE COURT'S INSTRUCTION NUMBER 4.

Instruction Number 4, as given by the Court read as follows:

> Before you can convict the defendant of burglary, as charged in the Information, you must find beyond a reasonable doubt the following elements:
>
> 1. That the defendant, on or about October 11,1981, unlawfully entered or remained in a building of another;
>
> 2. That at the time of such entry or unlawfully remaining he had the intent to commit a theft.
>
> If you believe that the evidence establishes each of these essential elements of the offense of burglary beyond a reasonable doubt it is your duty to convict the defendant of the crime of burglary as stated in the Information.
>
> If the evidence has failed to establish beyond a reasonable doubt one or more of the said elements, then you should find the defendant not guilty of the crime of burglary as charged in the Information. (Record at 31)

The defendant excepted to the instruction upon the grounds that the phrase "or remained" should not have been included in the instruction. (T.119) The exception finds its basis in defendant's claim that the original information did not charge the defendant with "unlawfully remaining". Defendant herein incorporates the argument and reasoning set forth in Point II as the balance of the argument for this Point III.

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POINT IV

THE TRIAL COURT ERRED IN ADMITTING THE CONTENTS OF A WASTE CAN INTO EVIDENCE

On motion of the prosecution the Trial Court admitted into evidence Plaintiff's Exhibit No.3 which purported to be a yellow trash bucket containing numerous small items. (T.58-59) Defendant's objection to the admission of the collective contents on the ground of insufficient foundation was overruled. (T.59)

In Carter v. State, 446 P. 2d 165 (Nevada 1969) the Supreme Court of Nevada set forth the standard to be met by a party seeking to admit physical evidence:

> "The statement that the exhibit is the identical object or reasonably resembles it and that it is in the same condition as at the time the offense occurred makes the exhibit admissible."

The testimony of the officer stated that the contents of the can were the identical objects as set forth in the inventory. But the second requirement of the test set forth in Carter was not met, i.e., the officer did not testify that the contents of the waste basket were in the same condition as at the time the offense occurred.

Defendant also objects to the collective admission of the contents in order to prevent any items being admitted into evidence which may not have been individually described on the inventory prepared by the officer. The inventory was prepared by the officer shortly after the contents were seized in the BEJO.(T.32) However, there was no testimony to show that the officer had reviewed the contents prior to trial to determine whether the contents corresponded to the inventory taken at the time of their seizure.

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Defendant submits that the better procedure would have been for each item in the waste can to have been individually marked and identified so as to prevent any item from being included as part of the exhibit when it may not have been listed on the inventory. There is now no way in which any reviewing court can determine whether the items in the waste basket were the same items presented for admission at trial.

POINT V

THE COURT ERRED IN PERMITTING OFFICER CHARLES SEMKEN TO TESTIFY TO A STATEMENT MADE TO HIM BY THE DEFENDANT.

Over objection of counsel, Deputy Charles Semken testified to an incriminating statement made to him by the defendant shortly after the arrest.(T.90-91) The defendant acknowledges that his "Miranda Rights" were given to him prior to the statement but denies that he waived them.(T.90)

There can be no doubt that the statement of the defendant was extremely damaging to him and constitutes reversible error if improperly admitted.

A review of the record shows that the defendant was told of his rights and then the following dialogue occurred:

> "...and I asked him if he understood those things. And he said, yes, he did.
>
> Q. Then what happened?
>
> A. I asked him what happen over in Helper. He said, "I got caught." (T.90)

The transcript as set forth above shows that there was no

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express waiver — the defendant merely affirmed that he understood those rights. The issue presented is whether waiver can be implied by reason of the fact that the defendant responded to the questioning by Deputy Semken.

The U.S. Supreme Court in Miranda v. Arizona, 384 US 346, 16 L.Ed.2d 694, 86 S.Ct. 1602, clearly defined the principles that govern once the required warnings have been given:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel...This Court has always set high standards of proof for the waiver of constitutional rights..., and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, (444 US 471) the burden is rightly on its shoulders." 16 L.Ed2d at 724

Applying the test set forth in Miranda it is clear that the burden is on the State to demonstrate waiver — it is not required of the defendant to show that he did not waive his privilege against self-incrimination and his right to appointed counsel. Even prior to Miranda in Carnley v. Cochran, 369 US 506, 8 L.Ed 2d 70, 82 S.Ct.884 (1962) the U.S. Supreme Court stated:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 8 L.Ed. 2d 77

Although the "warning" was given to the defendant the transcript is void of any evidence which would show that the defendant intelligently and understandingly rejected the offer.

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In North Carolina v. Butler, 441 U.S. 369, 60 L.Ed 2d 286, 99 S.Ct. 1755 (1980) the U.S. Supreme Court held that a court may find an intelligent and understanding rejection of counsel in situations where the defendant did not expressly state as much:

> [1b] An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case. As was unequivocally said in Miranda, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great;but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

Defendant submits that his actions and words did not constitute a waiver of his rights. The prosecution's burden requires that more care be taken than in this situation where the defendant was given his warnings, asked if he understood those rights, and then questioned with regard to the incident. No good faith effort was made to determine whether the defendant wanted an attorney present or whether he wanted to make a statement.

Where the record fails to reveal that the defendant made an intelligent waiver the court under the principle of Butler, supra, "must presume that a defendant did not waive his rights..." (60 L.Ed 2d. 286

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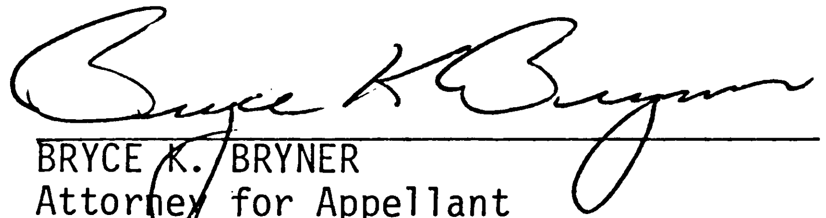
CONCLUSION

On the basis of the foregoing points, the Appellant respectfully submits that the judgment rendered at trial be reversed and the cause remanded to the trial court for the purpose of a new trial.

Respectfully submitted,



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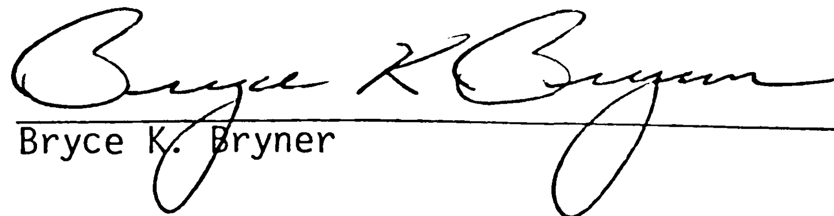
CERTIFICATE OF SERVICE

I, BRYCE K. BRYNER, hereby certify that I personally served two (2) copies of the above and foregoing BRIEF OF APPELLANT upon DAVID WILKINSON, Attorney General of the State of Utah, by delivering said copies to the Office of the Attorney General at 236 State Capitol, Salt Lake City, Utah this 17th day of May, 1982.



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