

1982

State of Utah v. Richard A. Ricci : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Bryce K. Bryner; Attorney for Appellant;

David Wilkinson; Attorney for Respondent;

Recommended Citation

Brief of Respondent, *State v. Ricci*, No. 18165 (Utah Supreme Court, 1982).
https://digitalcommons.law.byu.edu/uofu_sc2/2819

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT
- - - - -

Appeal from a conviction of Burglary of a
Non-dwelling, in the Seventh Judicial District Court in and
for Carbon County, State of Utah, the Honorable Boyd Bunnell
presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114
Attorneys for Respondent

BRYCE K. BRYNER
690 East Main Street
P.O. Box 444
Price, UT 84501

FILED

JUL - 9 1982

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

- - - - -

Appeal from a conviction of Burglary of a
Non-dwelling, in the Seventh Judicial District Court in and
for Carbon County, State of Utah, the Honorable Boyd Bunnell
presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114
Attorneys for Respondent

BRYCE K. BRYNER
690 East Main Street
P.O. Box 444
Price, UT 84501

TABLE OF CONTENTS

	<u>Page</u>
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 CORRECTLY GRANTED RESPONDENT'S MOTION TO AMEND THE INFORMATION	4
POINT II. THE TRIAL COURT WAS CORRECT IN GIVING JURY INSTRUCTION NUMBER 4.	10
POINT III. THE TRIAL COURT CORRECTLY REFUSED TO GIVE APPELLANT'S REQUESTED INSTRUCTION NUMBER 4.	11
POINT IV. APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO REMAIN SILENT.	17
POINT V. THE CONTENTS OF A TRASH BUCKET WERE PROPERLY ADMITTED INTO EVIDENCE.	22
CONCLUSION.	26

Cases Cited

Carter v. State, 446 P.2d 165 (Nevada 1968)	23
Commonwealth v. Cost, 362 A.2d 1027 (Pa. 1976).	12
Commonwealth v. Tilman, 417 A.2d 717 (Pa. 1979)	14
Cottrell v. State, 458 P.2d 328 (Okla. Cir. 1969)	21
Frazier v. Cupp, 394 U.S. 731 (1969).	18
Garner v. United States, 424 U.S. 648 (1976).	18
People v. Roybal, 609 P.2d 1110 (Colo. App. 1979)	25
People v. Truesdale, 546 P.2d 494 (Colo. 1976).	15
People v. White, 176 N.W.2d 723 (Mich. 1970).	6
Schneckloth v. Bustamonte, 412 U.S. 218 (1973).	18
State v. Allen, 29 Utah 2d 88, 505 P.2d 302 (1973).	18
State v. Asay, Utah, 631 P.2d 861 (1981).	13
State v. Ashdown, 5 Utah 2d 59, 296 P.2d 726 (1956)	21
State v. Ayers, 518 P.2d 190 (Oregon 1973).	21
State v. Brown, Utah, 607 P.2d 261 (1980)	13
State v. Carney, 533 P.2d 1268 (Kan. 1975).	25
State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969)	13

Table of Contents

	<u>Page</u>
 <u>Cases Cited</u>	
State v. Crawford, 60 Utah 6, 206 P. 717 (1922)	9
State v. Crook, 565 P.2d 576, 577 (Idaho 1977)	25
State v. Dock, Utah, 585 P.2d 56 (1978)	13
State v. Eagle Book, Inc., Utah, 583 P.2d 73, 75 (1978)	23,24
State v. Lamb, 530 P.2d 20 (Kan. 1974).	7
State v. Macumber, 582 P.2d 162 (Ariz. 1978).	25
State v. Madsen, 28 Utah 2d 108, 498 P.2d 670, 672 (1972).	23,24
State v. Martin, 463 P.2d 63 (Ariz. 1970)	5
State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971).	15
State v. McGonigle, 440 P.2d 100 (Ariz. 1968)	26
State v. Meinhart, Utah, 617 P.2d 355 (1980).	21
State v. Minnish, Utah, 560 P.2d 340 (1977)	11
State v. Moraine, 25 Utah 2d 51, 475 P.2d 831, 832 (1970)	19
State v. Richardson, 511 P.2d 263 (Idaho 1973).	12
State v. Rohletter, 108 Utah 452, 160 P.2d 963 (1945)	6
State v. Smith, 594 P.2d 218 (Kan. 1979).	6
State v. Starks, Utah, 627 P.2d 88 (1981)	11
State v. Taylor, 522 P.2d 499 (Oregon 1974)	15,16
State v. Vasquez, 492 P.2d 1005 (N.M. 1971)	15
State v. Warfield, 507 S.W.2d 428 (Mo. App. 1974)	8
State v. White, 608 S.W.2d 134 (Mo. App. 1980).	7
State v. Whittenback, Utah, 621 P.2d 103 (1980)	26
State v. Williams, 499 P.2d 97, 102 (Ariz. 1972).	9
State v. Wilson, Utah, 642 P.2d 394 (1982).	5
State v. Winkle, Utah, 535 P.2d 82, 83 (1975)	20
United States v. Washington, 431 U.S. 181, 188 (1977)	20

Statutes Cited

Utah Code Annotated, § 76-6-201 (1953), as amended.	12
" " " § 76-6-202 " " " 	1,11
" " " § 76-6-412 " " " 	22
" " " § 77-35-4 (Supp. 1981)	5
" " " § 77-35-4(b) " " " 	5
" " " § 77-35-4(3) " " " 	5
" " " § 77-35-30(b)" " " 	11

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

- - - - -

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with committing the crime of Burglary of a Non-dwelling in violation of Utah Code Ann., § 76-6-202.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury which found him guilty of Burglary of a Non-dwelling on November 17, 1981 in the District Court in and for Carbon County, the Honorable Boyd Bunnell presiding. The court pronounced judgment at that time and sentenced appellant to imprisonment for a term not to exceed five years.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence rendered at the trial.

STATEMENT OF FACTS

Appellant was charged with burglarizing a bar named the BEJO on October 11, 1981, at approximately 4:00 a.m.

Although appellant was a patron of the bar during the evening of October 10 (T. 80), the barmaid saw him at a pay telephone booth outside the bar after she had closed, locked up and left for the night (T. 82, 85).

The next morning at about 4:00 a.m., a police officer discovered appellant walking out of the rear door of the BEJO (T. 26). Other officers arrived and entered the bar with the appellant (T. 45). Since the door was jammed, the officer had to enter sideways (T. 45). As he did so, he kicked the broken back door lock which was on the ground (T. 46, 47). At that time the only illumination was from the clock lights on the bar because the main lights were off (T. 49). The officer looked toward the front of the bar and saw that the front of the cigarette machine had been removed (T. 48).

The officers also entered the bar and appellant stated "I guess I'm in trouble now" (T. 28). An officer read the Miranda warnings (T. 28) to appellant, frisked him (T. 28), and seated him in the bar (T. 30). The officer found a knife in appellant's sock (T. 27) and a screwdriver without a handle in his pocket (T. 28).

An officer summoned the bar owner (T. 60). Upon arrival, the owner asked appellant "Why did you do this to me?" (T. 61). He replied "I don't know. I'm sorry. But everything you own is in this trashcan" (T. 62). Prior to appellant's statement, the officers had not discussed the contents of the trashcan in his presence (T. 73).

The juke box (T. 48), change machine (T. 51) and safe (T. 49, 25) had been broken into. As the officers prepared to take fingerprints from the machines, appellant stated "It won't do you no good. You won't get any."

The officer who searched appellant (T. 28, 29) placed the knife and screwdriver in the evidence room at the police department (T. 29). Contrary to the inference made in appellant's brief, the officer also made an inventory of the trashcan's contents and placed the can and its contents in the evidence room (T. 31, 32). The officer locked those items with his own personal lock and key (T. 32). The inventory of the can's contents included over \$250 in coins (T. 32), a claw hammer (T. 31), and food (T. 34). The inventory list was received as evidence at trial, without objection (T. 33, 34).

The court also admitted the can's contents into evidence at trial after a police officer testified that the contents were the same (T. 34) as those he found, sealed and marked as evidence.

After appellant was taken to the police station, Officer Semken advised him of his rights (T. 89) and asked him if he understood them (T. 90). The appellant said that he did (T. 90). Then the officer asked appellant "What happened over in Helper?" The appellant answered "I got caught." He further stated that he had hidden in the bar after closing, had seen the officer making door checks and so had locked the bar's rear door and then emerged from the bar after the officer had continued down the alley (T. 90, 91).

However, this testimony was controverted at trial when appellant testified he had merely entered the bar in search of a drink in the early morning because he thought the bar was open (T. 104). Also, the barmaid had testified that she saw appellant outside the bar after she had locked up and left (T. 82, 85). She also testified that it would have been impossible for appellant to hide in the location he had claimed earlier (T. 95).

Appellant was convicted of another burglary, a felony, in 1973 (T. 110, 115).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED
RESPONDENT'S MOTION TO AMEND THE
INFORMATION.

Appellant contends in Point II of his brief that the amendment to the information prejudiced his substantial rights.

Utah Code Ann., § 77-35-4(b) provides that an information can charge an offense by its common law name, statutory name, or by definition. Under any of the three methods, the purpose remains the same: to give the defendant sufficient notice of the charge. In this case, the charge was Burglary of a Non-dwelling, an offense which can be committed by two methods. When a defendant requires further details to defend a charge, he or she should file a Bill of Particulars as set forth in Utah Code Ann., § 77-35-4(3). In this case, appellant was charged by statute name (R. 1). If he was unsure as to whether both methods were included in the charge, he should have filed a Bill of Particulars. State v. Martin, 463 P.2d 63 (Ariz. 1970); State v. Wilson, Utah, 642 P.2d 394 (1982). However, since an offense can be charged merely by statutory name, the original information was adequate to give appellant notice of the charge sufficient to prepare his defense.

Utah Code Ann., § 77-35-4 permits an information to be amended if no additional or different offense is charged and the defendant's substantial rights are not prejudiced. In this case, the amendment did not charge an additional or different offense. The charge remained Burglary of a Non-dwelling. The amendment merely pertained to the methods of committing the crime and was not a change in the offense itself.

Appellant contends that his substantial rights were prejudiced. For the amendment to be prejudicial, however, it must alter defenses, evidence, or the potential sentence. People v. White, 176 N.W.2d 723 (Mich. 1970); State v. Smith, 594 P.2d 218 (Kan. 1979). In State v. Rohletter, 108 Utah 452, 160 P.2d 963 (1945) the Court found that defendant's rights were prejudiced when an information charging rape was amended to include a different offense, carnal knowledge. The amendment in that case was prejudicial because the defense of consent to the rape charge was unavailable to defend the carnal knowledge charge.

In the present case, as distinguished from Rohletter, supra, the same defense is available to both the original and amended informations. Appellant's defense is that he allegedly thought the bar was open and entered as a potential patron, (T. 104). When he realized the bar was not open, he allegedly planned to leave. Before doing so, however, he stuck his head out the door and saw a police officer (T. 107).

Appellant's testimony, if believed by the jury, would have been a defense to the amended information as well as to the original information. If appellant had entered believing the bar was open and had left when he realized the bar was closed, he could not have been guilty of unlawfully

remaining in the bar. Thus, his defense, if believed, was applicable to both the original and amended informations.

The evidence presented was also applicable to both informations. The knife and screwdriver found in appellant's possession (T. 28, 29), the concentration of coins into one place (T. 28), and the fact it was about 4:00 a.m. (T. 26, 27) indicate that appellant did not lawfully enter the bar. Even if appellant had entered the bar believing it was open, those facts also indicate appellant did not lawfully remain in the bar. It is unlikely that another party would have burglarized the bar and left the money behind. Appellant indicated to the bar owner that he knew what the can contained (T. 61), although none of the officers had mentioned the contents in his presence (T. 72) (Appellant stated "But everything you own is in this trash can" (T. 61)). Thus, the very evidence that shows appellant entered the bar unlawfully with the intent to commit a theft also shows appellant did not lawfully remain in the bar. State v. Lamb, 530 P.2d 20 (Kan. 1974); State v. White, 608 S.W.2d 134 (Mo. App. 1980).

In addition to the same defense and evidence, the potential sentence does not change for either entering or remaining with intent to commit a theft.

Appellant fails to show how his reliance on the original information for notice was crucial to his defense since he actually raised the issue of remaining unlawfully.

In cross examining a police officer, appellant's counsel asked "Isn't it true, Mr. Atwood, that Mr. Ricci, at the time you were rattling the doors, came to the door after you had rattled it?" (T. 38). Appellant's question raises the possibility that he remained unlawfully in the bar until an officer came to the back door rather than attempting to leave as soon as he saw that the bar had been burglarized.

Although Officer Semken testified that appellant confessed to hiding in the bar at closing time (T. 90, 93), appellant's counsel had questioned the barmaid and established that she saw appellant outside the bar as she left (T. 85). Thus it is clear that appellant was aware that the charge of Burglary of a Non-dwelling included "entering or remaining in" with intent to commit a theft.

In State v. Warfield, 507 S.W.2d 428 (Mo. App. 1974), the information charged stealing without the owner's consent (defendant exchanged rolls of coins containing washers and slugs for dollars). On the day of the trial, the state amended the information to allege stealing by deceit. The Missouri court thought defendant's substantial rights were not prejudiced because the statute merely provided two methods for stealing, either without the owner's consent or by means of deceit. The offense remained the same. In the present case, entering or remaining are the two methods provided in the statute for Burglary, but the offense remains the same.

The Arizona court, in State v. Williams, 499 P.2d 97, 102 (Ariz. 1972), fashioned a different test: "ask whether an acquittal as to the amended charge would be a defense to the original." In the present case, if appellant had been acquitted on the amended information, he obviously had a valid defense to the original information.

Respondent contends that the amendment did not prejudice appellant's substantial rights because the same offense was charged, the same defense and evidence pertained, and by appellant's counsel's questions at trial, it was clear that appellant was aware of the charge and the two methods of committing it.

Even if the trial court should not have allowed the amendment to the information, the amendment was harmless error. The information was sufficient in charging the crime by name alone. The amendment may have been unnecessary but did not result in error. State v. Crawford, 60 Utah 6, 206 P. 717 (1922).

Although appellant initially confessed and claimed to have hidden in the bar, this testimony was not supported by the facts. Appellant claimed he saw the police coming and locked the door before the officer checked it (T. 90). This was clearly impossible since the lock was broken and on the ground (T. 52). The officer testified he did not check the door, but rather saw appellant before he even reached the

door (T. 26). The barmaid testified she saw appellant outside the bar after she left (T. 82). Further, the bar had been broken into, and the burglary proceeds were still there (T. 32). Thus, even if the trial court erred in allowing the state to amend the information, the amendment was harmless error because appellant's confession raised no real "remaining in" issue.

POINT II

THE TRIAL COURT WAS CORRECT IN GIVING JURY INSTRUCTION NUMBER 4.

In Point III of his brief, appellant claims jury instruction 4 should not have been given because it included the "or remaining in" language. Jury instruction 4 states the statutory requirements of Burglary of a Non-dwelling:

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.

This instruction differed from appellant's requested version in that the court added the "or remained in" language. Utah Code Ann., § 77-35-30(b) provides that "errors in the record arising from oversight or omission may be corrected by the court at any time. . . ." The court corrected appellant's requested instruction to include both unlawful entry or remaining because both methods are included in the definition of Burglary.

This instruction did not prejudice appellant's substantial rights for the same reasons delineated in Point I above. In addition, this Court has held that it is not error to instruct according to statutory terms when the evidence (as discussed in Point I in this case) justifies the instruction. State v. Minnish, Utah, 560 P.2d 340 (1977); State v. Starks, Utah, 627 P.2d 88 (1981).

POINT III

THE TRIAL COURT CORRECTLY REFUSED TO GIVE APPELLANT'S REQUESTED INSTRUCTION NUMBER 4.

Utah Code Ann., § 76-6-202 (1953) defines the crime of Burglary as unlawfully entering or remaining in a building

or portion of a building with intent to commit a felony, theft or assault. Utah Code Ann., § 76-6-201 defines when a person enters or remains unlawfully as "when the premises or any portion thereof at the time of entry or remaining are not open to the public. . . ."

Appellant contends in Point I of his brief that his version of what "open to the public" means should have been given as an instruction to the jury. Appellant's requested instruction is not the law in Utah and therefore should not have been given. State v. Richardson, 511 P.2d 263 (Idaho 1973). The Utah Legislature, in setting forth the requirements for burglary, merely stated that the building not be open to the public. Respondent contends that basing the lawfulness of an entry on the defendant's subjective belief as to whether a building is open would effectively repeal the burglary statute. Very few defendants would admit that they believed that a building was closed to the public, and proof of such through other evidence would be almost impossible.

To prove an unlawful entry or remaining, respondent must only show that the premises were not open to the public, and that appellant did not have consent or a license from the owner.

In Commonwealth v. Cost, 362 A.2d 1027 (Penn. 1976), the court, using a burglary statute similar to Utah's, required that the state prove the premises were not open to

the public. The state did not have to prove defendant could not have thought the premises were open to the public. In the present case the state has met its burden of showing the bar was not open since the barmaid testified she had closed the bar (T. 83).

While appellant was entitled to present his theory of the case to the jury, there was no basis in the evidence to support the requested jury instruction in this case. In several Utah cases with somewhat similar facts, the defendant was denied a proposed jury instruction on his "theory of the case" because it was not supported by any substantial evidence. State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969); State v. Dock, Utah, 585 P.2d 56 (1978); State v. Brown, Utah, 607 P.2d 261 (1980); State v. Asay, Utah, 631 P.2d 861 (1981). This Court did not focus on the defendant's subjective belief of reasonableness in these cases, but rather looked at the evidence and concluded it was too slight to raise a reasonable doubt.

In the present case, the evidence is also too slight to raise a reasonable doubt as to whether appellant could believe the bar was open. Appellant did not use the front door, which would be the normal entrance. Instead, he entered through the back door, located in a dark alley (T. 26). The rear door wouldn't open properly but rather was jammed open to a point that the police officer could only enter sideways

(T. 45). As the officer entered, he kicked the door lock which was on the floor (T. 46, 47). The bar was dark; the main lights were off (T. 84). The only lights on were tiny bar clock lights (T. 84). When one officer entered, he looked to the front of the bar and could immediately see that a machine had been broken into (T. 48). It was approximately 4:00 a.m. (T. 26), a time when no business in Helper would be open. There was no normal activity, no employees or patrons, and no noise in the bar which could lead appellant to think the bar was open. These facts clearly refute appellant's theory. Perhaps if he had entered through a front door the story might appear to be more believable, but in viewing the facts in their totality, no evidence supports the requested jury instruction.

In Commonwealth v. Tilman, 417 A.2d 717 (Penn. 1979), the court decided that a car dealership was open to the public because the state had failed to show that the dealership was not open. The defendant was seen in the building fifteen minutes before opening time, the building was not shown to be locked, the lights were on, and an employee even thought defendant was a customer.

In the present case, the time was not near opening or closing, the lights were off, the door could only be partially opened, and no employees were present. Thus, respondent contends no reasonable person could have found

that the bar was open. When a story such as appellant's is so fanciful, it does not warrant a jury instruction on his theory. State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971); People v. Truesdale, 546 P.2d 494 (Colo. 1976); State v. Dock, supra.

In State v. Vasquez, 492 P.2d 1005 (N.M. 1971), the court refused to give the defendant's requested jury instruction on excusable killing because the evidence did not support a theory of accident or provocation. The court felt that the instruction injected a false issue into the case. Respondent contends that in the present case, appellant's requested instruction would also inject a false issue into the case. If the jury had believed appellant's testimony, it would have acquitted him because he lacked the requisite intent to commit burglary. Since his testimony was not believed, and he entered the bar when it was not open, the jury correctly convicted appellant. Since the evidence overwhelmingly pointed to the fact the bar was closed, such an instruction was unmerited.

Appellant cites State v. Taylor, 522 P.2d 499 (Oregon 1974), for the proposition that whether a person could think a building is open to the public is a jury question. In Taylor, the reasonableness of defendant's belief was a much closer factual question. That case involved a laundry room in an apartment complex, which conceivably could be open all the

time so that tenants could do laundry. The present case involves a business entity with clearly defined hours (T. 64). In the Taylor case, the defendant would not necessarily expect any activity in the laundromat--the room would be quiet and deserted unless someone happened to be using the machines. In this case, any patron of a bar would expect some activity, noise, employees and customers whenever he entered.

In the Taylor case, the lights shown outside the laundry room, the defendant used the normal entrance and there was no sign outside the facility limiting the room to tenants only at specific times. Thus defendant's testimony was more plausible and warranted a jury instruction on his theory. In this case there were no lights on outside the bar, the appellant did not use the normal entrance and the business normally closed at 1:00 a.m. Therefore, no jury instruction was warranted on appellant's theory.

Even if the instruction should have been given, respondent contends that the error was harmless for three reasons. First, the burglary statute, the terms of which were set forth in instruction number 4, is not unclear. Instruction number 5 defines unlawful entry as occurring when the building is not open to the public. Appellant claims that if the jury is not instructed on reasonable belief as to whether a building is open, "any entry, regardless of the appearance of the business, is unlawful if the management

had intended that it be closed." While the Utah Legislature did not define "open to the public," the phrase is clear and easy to interpret under each fact situation. Whether a building is open depends on the extrinsic facts (i.e., unlocked, lights on, close to opening time), not on either defendant's or management's subjective belief.

Second, the jury instructions, taken as a whole, require the jury to consider all the evidence, including defendant's testimony. Thus, if the jury believed appellant's testimony, it would have acquitted him despite the fact that the bar was not technically open to the public because he would not have had the requisite intent.

Third, even if the jury believed that appellant entered the bar thinking it was open, his defense becomes irrelevant because he remained inside unlawfully. See Point I.

POINT IV

APPELLANT KNOWINGLY AND INTELLIGENTLY
WAIVED HIS RIGHT TO REMAIN SILENT.

In Point V of his brief, appellant contends his confession was not an implied waiver of his right to remain silent. Although appellant admits he understood his "Miranda rights," he claims he did not waive his right to remain silent. Respondent contends that appellant's voluntary

confession, made when he was aware and knowledgeable of his rights, was an effective waiver.

The Supreme Court, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), looked at the totality of all the surrounding circumstances to determine that consent to a search was voluntary. Thus, the Court considered the defendant's age, education, intelligence, lack of advice on rights, length of detention, whether the questioning was repeated and prolonged and whether physical punishment was used. The defendant's maturity and intelligence were factors considered in Frazier v. Cupp, 394 U.S. 731 (1969).

This Court, in State v. Allen, 29 Utah 2d 88, 505 P.2d 302 (1973), thought the question of whether a statement was voluntary should be determined from all the evidence produced by both sides.

In this case, the only evidence to support appellant's contention is that appellant, before he spoke, did not expressly say that he wished to freely speak (T. 90). Justice Powell, in Garner v. U.S., 424 U.S. 648 (1976), felt that it was relevant that the defendant in that case failed to claim the privilege of silence.

In considering the totality of the circumstances, the evidence supports respondent's contention that the waiver was voluntary. At trial, appellant displayed no educational deficiencies. He was a mature adult (T. 99), of presumably

normal intelligence. He, in fact, was capable of working as a skilled craftsman--a carpenter (T. 99). He spoke fluent English. He did not confess under duress after lengthy questioning. In fact, he answered Officer Semken's first question (T. 90). He had a prior felony conviction and thus was no novice in these matters. When appellant was thirsty, the officer supplied him with soft drinks (T. 92). The circumstances surrounding appellant's confession present no suggestion that the confession was coerced.

In State v. Moraine, 25 Utah 2d 51, 475 P.2d 831, 832 (1970), the defendant robbed a store and accidentally shot himself. When the police found him, he was in great pain. The officer read him his rights and the defendant said he did not wish to talk. Then the officer asked him why he committed the robbery. The defendant's incriminating answer was admitted into evidence although he claimed the state failed to affirmatively show that he waived his right to remain silent. This Court stated:

The fact that he made the statement after being warned is a clear indication that he waived any right, if any he had, to remain silent.

Respondent contends the present case clearly comes within the scope of Moraine, supra. In that case, the defendant was in great pain and had expressly said he did not

wish to talk. In this case, the defendant was not suffering from any mental or physical pain and had expressed no desire to remain silent. His confession was free and voluntary, made under ideal circumstances.

United States v. Washington, 431 U.S. 181, 188

(1977) concerned a defendant making a similar claim. Chief Justice Burger, in writing for the Court, stated:

Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled.

In State v. Winkle, Utah, 535 P.2d 82, 83 (1975), an issue was whether the defendant voluntarily waived his rights. This Court stated:

The question thus posed is whether the defendant, in awareness of his rights, and in circumstances where he was free to choose, knowingly and voluntarily waived his right to remain silent and to have counsel. It is both the prerogative and the duty of the trial court to make that determination (emphasis added).

In this case the court, after hearing Officer Semken's testimony on the circumstances surrounding the confession, decided the confession was admissible because the appellant had waived his right to remain silent. The trial court was in the best position to view the facts and determine that appellant's confession was voluntary. The evidence, viewed as

a whole, supports the trial court's view that appellant understood his rights and knowingly waived the right to remain silent. Since appellant has failed to show that the trial court abused its discretion, the finding of waiver should be upheld. State v. Ashdown, 5 Utah 2d 59, 296 P.2d 726 (1956); State v. Meinhardt, Utah, 617 P.2d 355 (1980).

Respondent contends that even if the confession should have been suppressed, its admission into evidence was not harmful error. The evidence presented at trial, in addition to appellant's confession, was sufficient to sustain the conviction. Appellant was caught exiting through the bar's back door (T. 26). The burglary proceeds were in appellant's control (T. 31). The appellant told the police they would not find fingerprints (T. 51), a fact which certainly infers guilty knowledge. When asked by the bar owner why he had committed the crime, appellant stated "I don't know. I'm sorry. But everything you own is in this trash can" (T. 61). With this evidence of guilt, appellant's confession was unnecessary to sustain his conviction. Cottrell v. State, 458 P.2d 328 (Okla. Cir. 1969); State v. Ayers, 518 P.2d 190 (Oregon 1973).

POINT V

THE CONTENTS OF A TRASH BUCKET WERE
PROPERLY ADMITTED INTO EVIDENCE.

In Point IV of his brief, appellant claims that the contents of a trash can should not have been admitted into evidence for two reasons. First, that the officer failed to testify that the contents of the can were in the same condition as at the time the offense occurred. Second, that the contents should have been individually identified.

Respondent contends that the contents of the trash bucket were properly admitted and that appellant's contentions are without merit.

In this case, the contents of the trash bucket were introduced into evidence to show appellant's intent and to allow an inference of his unlawful entry or remaining. Whether a few coins were missing or added is immaterial because the evidence was not introduced to prove the exact contents of the trash bucket.

If appellant was charged with theft instead of burglary, the exact value of the can's contents would be important because it would determine the degree of the offense under Utah Code Ann., § 76-6-412. Appellant was charged with burglary, for which the offense and sentence remains the same regardless of how much was taken.

Although it would not matter in this case if the evidence was not exactly as it was at the time of the crime, appellant contends that the state had to meet the test set forth in Carter v. State, 446 P.2d 165 (Nevada 1968). That Court required that the evidence be identical and in the same condition. This Court has set its own standard which differs from the Nevada test.

In State v. Madsen, 28 Utah 2d 108, 498 P.2d 670, 672 (1972), this Court held that to be admissible in evidence, an object must be shown to be "in substantially the same condition as at the time of a crime." In determining whether evidence is admissible, this Court considers the circumstances of preservation and custody of the item and the possibility of tampering occurring.

If after consideration of these factors the trial court is satisfied that the article or substance has not been changed or altered, he [sic] may permit its introduction into evidence. While it is the duty of the court to make the first determination, the jury may disregard the evidence should they determine the custody of the article or substance has not been sufficiently shown, or that it has been altered or changed.

The standard set forth in Madsen, supra, was applied in State v. Eagle Book, Inc., Utah, 583 P.2d 73, 75 (1978). The witnesses in the case who had purchased the pornography and submitted it to the county attorney could only testify

that the covers on the magazines in question were the same. They were unable to say whether the magazines' contents were the same because they had failed to examine the contents at any time. This Court, in following Madsen, admitted the magazines into evidence despite the fact the witnesses could not say the contents were in the same condition as when purchased. This Court stated:

Once in the hands of the County Attorney, it is generally presumed that the exhibits were handled with regularity, absent an affirmative showing of bad faith or actual tampering. At trial, the exhibits were identified by the purchasers by the materials' outer covers and the purchasers' markings although it could not unequivocally be said that the material was identical page for page as when earlier purchased. (emphasis added)

In that case, the magazines' contents were extremely important to the defendant because the offense depended upon whether the contents were pornographic and thus whether alteration occurred was relevant. In the present case, the can's contents are not that important because the offense of burglary does not hinge on the amount and value of coins (or other proceeds) found at the scene.

In Eagle, the evidence was admissible because the likelihood of tampering was remote and the chain of custody was established. In this case, the chain of custody has been established through the officer's testimony and the likelihood

of tampering is remote. The officer took the can and contents, made an inventory, and kept the evidence locked up (T. 31, 32). Thus, the trial court was correct in admitting the evidence. State v. Crook, 565 P.2d 576, 577 (Idaho 1977); State v. Macumber, 582 P.2d 162 (Arizona 1978); People v. Roybal, 609 P.2d 1110 (Colo. App. 1979).

In this case the chain of custody was established. Even when the chain is defective, it affects the weight, not the admissibility of the evidence. State v. Carney, 533 P.2d 1268 (Kansas 1975).

Appellant also claims that each item in the waste can should have been initialed to insure that the inventory list corresponded with the exhibit at trial. However, this procedure is impractical and unnecessary. At trial, the custodial officer testified that the exhibit was the same trash can with the same contents that he found at the scene of the crime (T. 34). "This is everything that I found and sealed and marked as evidence" (T. 34). "It's all in there" (T. 34). In viewing the testimony, it appears that the contents of the can remained the same. Appellant has failed to support his bald assertion that the contents might be different, nor has he shown what harm he would have suffered if the contents were somewhat different.

It is not necessary to mark each individual coin, even in a theft case where the exact amount is important to determine the charge. State v. McGonigle, 440 P.2d 100 (Arizona 1968); State v. Whittenback, Utah, 621 P.2d 103 (1980). Marking each coin would serve no useful purpose. In this case, the inventory was made to insure that the bar owner received the stolen money after appellant's trial was over. Merely totaling the amount of coins was adequate to serve that purpose.

In addition to the bucket and contents, appellant's confession, the police officer's and bar owner's testimony, and the inventory list, all showed that the proceeds of the burglary were still on the premises when appellant was arrested. This evidence--and not the exact or unaltered amount taken--was sufficient to allow the jury to infer appellant's intent to commit a theft in the BEJO. The admission of the bucket and its contents merely confirmed the testimony of the presence of the bucket at the scene, allowing the inference of intent, and was not intended to prove the contents of the bucket.

CONCLUSION

In conclusion, respondent contends that appellant's rights were not prejudiced by the amendment to the information; that the jury instruction defining burglary in

statutory terms was proper; that appellant's requested jury instruction was correctly refused; that appellant waived his right to remain silent; and that the bucket and its contents were admissible because the chain of custody was established. Since appellant's contentions are without merit, the conviction and sentence should be affirmed.

Respectfully submitted this 9th day of July, 1982.

DAVID L. WILKINSON
Attorney General

Robert N. Parrish

ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Bryce K. Bryner, Attorney for Appellant, 490 East Main Street, P.O. Box 444, Price, Utah, 84501, this 12 day of July, 1982.

Susan Patton