

2001

# Utah v. Douglas Doyle Dillon : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

v.

DOUGLAS DOYLE DILLON,

Defendant/Appellant.

Case No.20010384-CA

Priority No.15

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BRIEF OF APPELLEE

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**APPEAL FROM A CONVICTION FOR BURGLARY OF A BUILDING,  
A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.  
§ 76-6-202 (1999), AND RECEIVING STOLEN PROPERTY, A THIRD  
DEGREE FELONY, IN VIOLATION OF § 76-6-408 (1999), IN THE  
FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,  
STATE OF UTAH, THE HONORABLE ROBERT T BRAITHWAITE  
PRESIDING**

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v.

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Defendant/Appellant.

Case No.20010384-CA

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**BRIEF OF APPELLEE**

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**JURISDICTION AND NATURE OF THE PROCEEDINGS**

This is an appeal from a conviction for burglary and receiving stolen property in the Fifth Judicial District Court, in and for Iron County, State of Utah, the Honorable Robert T. Braithwaite presiding. This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996 & Supp. 2001).

**STATEMENT OF THE ISSUES ON APPEAL AND  
STANDARDS OF APPELLATE REVIEW**

**Issue 1:** Did the trial court correctly deny defendant's motion to exclude his prior conviction of attempted possession of stolen property?



**Standard of Review** The trial court's ruling on a motion to exclude evidence of other crimes is a legal question which this Court reviews for abuse of discretion. *State v Decorso* 1999 U T 57, ¶ 18, 993 P.2d 837, *cert denied*, 528 U.S. 1164 (2000).

**Issue 2.** Did the trial court properly accept a stipulated jury instruction stating the elements of the offense of receipt of stolen property?

**Standard of Review:** Because defendant stipulated to the jury instruction he now challenges, any error is invited and cannot warrant be reversal. *State v Chaney* 1999 U T App 309, ¶ 54, 989 P.2d 1091.

**Issue 3.** Did the trial court properly rule that clothes provided to defendant were appropriate and the fact that he is a flight risk, has an erratic temperament and an extensive criminal record required the he be partially restrained during trial?

**Standard of Review:** The trial court's ruling on questions of clothing and restraints is reviewed for abuse of discretion. *State v Archuletta*, 501 P.2d 263, 264 (Utah 1972), *People v Henderson*, 583 N.E.2d 1187, 1189 (Ill. App. 1991); *see also State v Young*, 853 P 2d 327, 350 (Utah 1993) (shackling defendant during penalty phase within trial court's discretion).

### **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The following constitutional provisions, statutes and rules are relevant to this appeal

#### **Utah Code Ann. § 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, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (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;

(b) has received other stolen property within the year preceding the receiving offense charged; . . .

### **Utah R. Evid. 403.**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

### **Utah R. Evid. 404(b).**

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

## **STATEMENT OF THE CASE**

Defendant was charged with one count of burglary of a building and one count of receiving stolen property (R. 9-10). Defendant pleaded not guilty to both counts on February 7, 2001 (R.17-18).

At the beginning of defendant's trial on March 23, 2001, he objected to being forced to wear a dress shirt and tie, which were provided by the jail (R. 89:5). Defendant stated that he wished to wear his own clothes which he claimed vanished after they were taken from his truck by police (*id.*). Defendant also objected to being restrained during the trial (R. 89:13).

The State requested that defendant be restrained because he was a flight risk, had exhibited “erratic” behavior and has a long criminal history (*id* ).

The trial court ruled that the shirt and tie provided by the jail were appropriate (R 89·12). The court also ruled that defendant needed to be restrained, but that he could have one hand free to take notes (R. 89·13).

At trial, defendant objected to the introduction of evidence concerning defendant’s involvement in other incidents involving stolen property (R. 89·71). The State wanted to introduce the fact that defendant had pleaded guilty to attempted possession of stolen property in connection with other tools found in his truck which were reported stolen in Millard County (R. 89·80-81). The State also wanted to introduce a pawn slip and swap meet receipt found in defendant’s truck (R.89:69).

Ultimately, the court allowed the state to introduce evidence of defendant’s guilty plea and the State withdrew its motion to admit the pawn slip and swap meet receipt (R 89 71, 78). The court reasoned that defendant’s prior guilty plea to attempted possession of stolen property was admissible because it was an element of the crime of receipt of stolen property under Utah Code Ann. § 76-6-408 (*id* ).

Defendant was convicted on both counts and sentenced to two concurrent terms of 0-5 years in the Utah State Prison (R. 49-52).

Defendant timely appealed.

## STATEMENT OF FACTS<sup>1</sup>

Under defendant's version events, the fact that tools stolen from a work site ended up in the back of his truck was pure happenstance. As a self-described "gambler," defendant was en route from Cedar City, Utah, to Mesquite, Nevada, when he stopped at a convenience store to get gas (R. 89:97). There, he came across two friends who offered to sell him an assortment of tools, including a generator and numerous surveying instruments, for \$1,500 (R. 89:97-98). It was an offer defendant simply could not refuse, so he purchased the tools, never suspecting that they were stolen (R. 89:100).

The next day, Thomas Braun, the owner of the tools, accompanied Iron County Sheriff's Detective Mark Gower to the motel where defendant's truck was parked (R. 89:40). Peering through the windows of the truck, Braun identified the tools as those stolen the night before from his trailer at a work site (R. 89:41). Based on the information provided by Braun, Gower obtained a search warrant and confiscated the tools, which Braun confirmed were all of the items stolen from his trailer and some that were not (R. 89:41:49). Also among the tools was a bent crowbar with paint markings that matched the color of the paint on Braun's trailer (R. 89:52-53). The paint markings also matched the width of tool scratches made during the burglary of the trailer (*id.*).

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<sup>1</sup> "On appeal, the facts are recited in a light most favorable to the jury's verdict." *State v. Bradley*, 972 P.2d 78, 79 (Utah App. 1998) (internal quotations and citation omitted).

Not all of the tools belonged to Braun, however. Millard County deputies also reviewed the items recovered from defendant's truck and determined that some of them were reported stolen in that county (R:89:80-81). Defendant entered a guilty plea to charges of attempted possession of stolen property with regard to the Millard County tools (R:89:71, 81).

Despite this evidence, defendant insisted that he had purchased the tools from the two friends he met at the gas station, although he did not call them to testify and verify his story (R. 89:105). He stated that after purchasing the tools, he continued to Mesquite where he lost most of his money and returned to Cedar City (R. 89:98).

### **SUMMARY OF ARGUMENT**

**Point I:** Defendant's prior conviction of attempted possession of stolen property was properly admitted at his trial. The tools found in the back of his truck included tools stolen in Cedar City and in Millard County. Defendant pleaded guilty to the attempted possession charge in Millard County. His conviction on the attempted possession charge created a rebuttable presumption that he knew the other tools found in his truck, which he claimed he purchased from his friends en route to Mesquite were also stolen. This presumption helped establish the knowledge element of the crime of receiving stolen property under Utah Code Ann. § 76-6-408(2). For this reason, the evidence of the prior conviction was properly admitted.

**Point II** Although defendant now complains that the jury instruction concerning his prior conviction was inappropriate, he stipulated to the instruction at trial. Moreover, the instruction correctly states the law under Utah Code Ann. § 76-6-408. Accordingly, this claim is without merit.

**Point III** Defendant's attire at trial consisted of a shirt and tie loaned to him by the Iron County Correctional Facility. These clothes were clean, pressed and professional-looking. As a matter of law, no prejudice resulted from these clothes. As for the restraints, defendant failed at trial to preserve the specific constitutional claims he now raises. Accordingly, those claims cannot be raised for the first time on appeal. Moreover, the trial court acted out of legitimate concerns regarding defendant's criminal record, his erratic temperament and his being a flight risk. Moreover, the court restrained only one of defendant's hands, thus allowing him to take notes and hide the restraints under his table so the jury could not see. Thus, there was no prejudice to defendant from his clothing or the restraints.

## ARGUMENT

**I. DEFENDANT'S PRIOR CONVICTION FOR ATTEMPTED POSSESSION OF STOLEN PROPERTY WAS ADMISSIBLE BECAUSE IT ESTABLISHED AN ELEMENT OF THE OFFENSE AT ISSUE IN THIS CASE.**

**A. Defendant's Claims Concerning the Admission of the Pawn Slip and the Swap Meet Receipt are Erroneous.**

Defendant spends several pages of his brief arguing that the trial court should not have admitted the pawn slip and swap meet receipt, State's Exhibits 13 and 14, which were recovered from his truck Br Aptl at 7-14. However, the pawn slip and receipt were not admitted.

The State intended to admit Exhibits 13 and 14 through the testimony of Detective Gower, who had recovered the papers from defendant's truck (R. 89:54). However, before Detective Gower could identify the exhibits, defendant's attorney objected (*id*). The jury was excused and the trial court heard arguments from both parties concerning the admissibility of the exhibits (R. 89:54-56, 70-71). Ultimately, the State opted not to move for the admission of Exhibit 13 and 14 (R. 89:71, *see also* R. 79). Thus, defendant's claims concerning the supposed admission of the pawn slip and swap meet receipt have no basis in the record.

**B. The Trial Court's Rulings Did Not Violate Utah R. Evid. 403.**

Defendant claims that the trial court's admission of "the evidence" was unfairly prejudicial under rule 403, Utah Rules of Evidence. Br. Aplt. at 14-15. Defendant is mistaken.

First, it is unclear what "evidence" defendant is referring to. He states that the court sustained defendant's objection to the "evidence" twice before finally admitting it. Br. Aplt. at 15. If defendant is referring to Exhibits 13 and 14, the court sustained defendant's objection, but it is not true that the court reversed itself on that evidence (R.89:56). However, as noted in section A. above, the State withdrew those exhibits and they were not admitted (R. 89:71).

On the other hand, if the "evidence" to which defendant refers is the testimony regarding his prior conviction for attempted possession of stolen property, its admission did not violate rule 403. As the trial court noted, "not everything prejudicial should stay out. A lot of times prejudicial evidence is very – fingerprints on a gun or something like that is prejudicial, but, obviously, it comes in" (R. 89:115). Rather, the question to be decided under rule 403 is whether the evidence is *unfairly* prejudicial. As the Utah Supreme Court has stated:

"Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: an undue tendency to suggest decision on an improper basis,



commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror ”

*State v Maurer*, 770 P 2d 981, 984 (Utah 1989) (quoting M Graham, *Handbook of Federal Evidence* § 403 1, at 178 (2d ed 1986)) Defendant’s prior conviction, although clearly damaging, does not arouse emotions of bias, sympathy, hatred, etc Accordingly, the evidence was properly admitted.

Moreover, defendant’s prior conviction is also highly probative in that it establishes an element of one of a crimes of which he stood accused Under Utah Code Ann § 76-6-408(2), it is presumed that a defendant knowingly received stolen property if he “is found in possession or control of other property stolen on a separate occasion [or] has received other stolen property within the year preceding the receiving offense charged, . . .” Defendant’s guilty plea to attempted possession of stolen property in Millard County obviously meets the requirements of Utah Code Ann. § 76-6-408(2). Accordingly, the evidence is highly probative and not “substantially outweighed” by its prejudicial effect.

Finally, defendant argues that the admission of the “evidence” after the court sustained objections “on at least two (2) prior occasions” gave the evidence “a heightened sense of importance” to jurors. Br. Appt. at 15. “That is, it put the Appellant in an even worse light than if the evidence had been admitted from the start ” *Id* Once again, defendant is mistaken. His argument presumes that the jury was present during arguments over the admissibility of the evidence. In fact, jurors were properly excused by the trial court on each of the three occasions when it considered the admissibility of the pawn slip, swap meet

receipt and defendant's prior conviction (R 89 56, 72-73, 78) Because the arguments concerning the admissibility of evidence were appropriately held outside the jury's presence defendant's claim of prejudice is baseless

**C. The Trial Court's Instruction Regarding the Presumption Created by Defendant's Prior Conviction Appropriately Cautioned Jurors that he Must be Found Guilty Beyond a Reasonable Doubt.**

Defendant claims that the trial court erred in instructing the jury that defendant's prior conviction in Millard County created a rebuttable presumption that he knowingly received stolen property in Cedar City Br Aplt at 16 "No part of this instruction attempts to caution the jury to not find the Appellant guilty of this offense upon a belief that he was guilty of offenses in another case " *Id*

As a preliminary matter, the contention must be rejected because defendant stipulated to the instruction he now attacks as improper During a break in defendant's trial, the prosecutor and defense counsel discussed the instruction and presented the stipulated instruction to the court, which accepted it (R 89 92) Because defendant stipulated to the instruction in the trial court, any error was invited error which cannot accrue to defendant's benefit *State v Chaney*, 1999 UT App 309, ¶ 54, 989 P 2d 1091 ("[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error") (quoting *State v Anderson*, 929 P 2d 1107, 1109 (Utah 1996))

Additionally, even assuming that the alleged error was preserved, defendant's claim must still be rejected because Instructions 14 and 14a were entirely appropriate. The instructions caution the jury that the presumption of Utah Code Ann. § 76-6-408(2) does not relieve the State of the burden of establishing defendant's guilt beyond a reasonable doubt<sup>2</sup> (R. 57-58). Instruction 14 reads in pertinent part:

Before you may find Defendant DOUGLAS DOYLE DILLON guilty of the offense of Receiving Stolen Property as charged in Count II of the Information, the state must prove and you must find, unanimously and *beyond a reasonable doubt* . . . [t]hat [defendant], while knowing that property had been stolen, or believing that it probably had been stolen did knowingly and intentionally receive, retain or dispose of the property of another; . . .

Instruction 14a states:

The knowledge or belief that the property is stolen, required by the Receiving Stolen Property Instruction, is presumed in the case of an actor who is found in possession or control of other property stolen on a separate occasion.

*This presumption does not relieve the State from proving every element of the offense beyond a reasonable doubt.* In speaking of the receiving or having possession of other stolen property the fair interpretation includes "knowing it to have been stolen." Knowing that the property is stolen is what law condemns; and *it should not be deemed to include any innocent or unaware possession of stolen property.*

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<sup>2</sup> The Utah Supreme Court has specifically held that the presumption created by subparts (1) and (2) of Utah Code Ann. § 76-6-408 are constitutional because a presumed fact must be proven beyond a reasonable and "'the law regards the facts giving rise to the presumption as evidence of the presumed fact.'" *State v. Mullins*, 549 P 2d 454 (Utah 1976) (quoting Utah Code Ann. § 76-1-503 (1999)); *see also State v. Plum*, 552 P 2d 124 (Utah 1976).

While the presumed fact that the defendant was possessing stolen property must be proved by the evidence beyond a reasonable doubt, the law regards the facts giving rise to the presumption as evidence of the presumed fact

(Emphasis added).

These two instructions demonstrate the care exercised by the trial court in instructing the jury on the proper function of the presumptive knowledge provision of the statute. Both instructions stress that the State is required to prove each element of the offense beyond a reasonable doubt and that the presumption that defendant knew the tools were stolen does not relieve the State of its burden of proof. The instruction also cautioned the jurors that defendant's prior conviction is merely "evidence of the presumed fact" that defendant knew the tools were stolen, language which tracks the text of Utah Code Ann. § 76-1-503 (1999) explaining evidentiary presumptions.

Clearly, Instructions 14 and 14a were not erroneous because they are a correct statement of the law. Accordingly, defendant's argument is without merit.

**D. Evidence of Defendant's Prior Conviction Was Properly Admitted Pursuant to Rule 404(b) of the Utah Rules of Evidence.**

Defendant claims the trial court erred in allowing the State to introduce evidence of defendant's prior conviction during its case in chief. Aplt. Memo. at 27. This contention fails as a matter of law.

First, as noted above, defendant's prior conviction for attempted possession of stolen property was admissible because it constituted an element of the offense of receipt of stolen

property under Utah Code Ann. § 76-6-408(2). “Admission of prior bad acts is proper when it tends to prove a contested material element of the crime charged.” *State v. Morre*, 2003 P.2d 292, 294 (Utah App. 1990). Thus, admission of the prior conviction was proper under rule 404(b). *Id.*

Second, the evidence was properly admitted during the State’s case in chief because defendant’s not guilty plea placed into contention every element of the crimes of which he was charged. As this Court has stated:

Because the prior bad act evidence at issue here related to defendant’s intent or knowledge, it was admissible in the State’s case in chief. By pleading not guilty, defendant placed all elements of the crime at issue, including knowledge and intent.

*State v. Widdison*, 2000 UT App 185, ¶ 33, 4 P.3d 100. Here, similarly, defendant’s not guilty plea placed at issue his knowledge of whether the tools were stolen. Thus, the evidence was properly admitted.

## **II. DEFENDANT WAS NOT PREJUDICED BY BEING UNABLE TO WEAR HIS OWN CLOTHING OR BY BEING RESTRAINED DURING HIS TRIAL.**

Defendant suggests that he did not receive a fair trial because the court did not allow him to wear his own clothes and required him to be partially restrained. These claims are unpersuasive.

A defendant’s appearance before a jury in prison or jail clothing is a per se violation of his right to a fair trial, unless that defendant specifically waives his right to be tried in civilian clothing. *State v. Bennett*, 2000 UT 34, ¶¶ 3-4, 999 P.2d 1. However, a defendant’s

appearance in street clothes does not violate his due process rights. *See State v. Archuleta*, 501 P.2d 263, 264 (Utah 1972) (“civilian shirt,” a T-shirt, and denim overalls not prejudicial). Here, defendant was clothed in a dress shirt and tie, an ensemble that the trial judge deemed “casual,” but still “at the top end of the scale” (R. 89:12).’ *See Chess v. Smith*, 617 P.2d 341, 345 (Utah 1980) (defendant not entitled to “expensive wardrobe”, rather, defendant should have “clean, respectable clothes, not identifiable as peculiarly prison clothes”). As such, defendant’s clothing was superior to jail clothing or even to the shirt and denim of the *Archuleta* defendant. Accordingly, defendant suffered no prejudice.

Restraining a defendant during trial present similar constitutional issues. “The sight of shackles and gags might have a significant effect on the jury’s feelings about the defendant.” *Illinois v. Allen*, 397 U.S. 337, 344 (1970). However, restraints are sometimes necessary when a defendant is a flight risk, has a history of violence or an erratic temperament. *See, e.g., People v. Henderson*, 583 N.E.2d 1187, 1189 (Ill. App. 1991) If a defendant requires restraint, the trial court should take measures to ensure that the restraints are not apparent to jurors. *See State v. Young*, 853 P.2d 327 (Utah 1993) (trial court’s efforts

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Because the actual shirt has apparently not been preserved, or at least it is not part of the record transmitted from the trial court, this Court should defer to the trial court’s characterization. *See State v. Wulffenstein*, 657 P.2d 289, 293 (Utah 1982), *cert denied* 460 U.S. 1044 (1983) (stating that when “a defendant predicates error to [an appellate court], he has the duty and responsibility of supporting such allegation by an adequate record;” an appellate court “simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record ”)

to minimize the effect of defendant's shackles by placing them beneath defendant's clothing likely prevented prejudice).

Here, the prosecutor requested that the defendant be restrained because he "has an extensive criminal record," is a "flight risk" and "an erratic person" (R. 89-13). The defendant objected obliquely, stating "I just object to the handcuffs" and requesting that his hands be unrestrained during trial (*id*). As a compromise, the trial court opted to have only one hand restrained so that defendant could take notes (*id*). Defendant made no further objections.

Defendant's challenge to the use of restraints must be rejected. First, the constitutional challenges defendant now raises were not preserved at trial and, accordingly, cannot be raised on appeal. As the Utah Supreme Court has stated:

A defendant cannot preserve issues for appeal by generally objecting or nominally invoking the state and federal constitutions. . . . [A] 'contemporaneous objection or some form of *specific* preservation of claims of error must be made a part of the trial court record before an appellate court will review such a claim on appeal.'

*State v. Alvarez*, 872 P.2d 450, 460 (Utah 1994) (citation omitted) (emphasis added by *Alvarez* court). At trial, defendant failed to state any basis for his objections to the handcuffs, other than perhaps that they were inconvenient (R. 89-13). Moreover, defendant voiced no objection to the trial court's compromise that he be allowed to keep one hand free (*id*). Thus, defendant failed to preserve the constitutional claims he attempts to raise on appeal.

Second, even assuming that the issues were properly preserved the trial court properly took steps to minimize both the inconvenience to defendant and the possibility of prejudicing the jury by allowing defendant to keep one hand free so that he could take notes and, presumably, prevent the jurors from seeing the restraints. The court also made sure that jurors were not in the courtroom when the defendant moved back and forth from the witness stand so that they would not see the restraints (R. 89 6-7, 95). In addition, even if jurors did glimpse defendant's restraints during the trial, this would not necessarily "dilute the presumption of innocence." See *State v. Wetzel*, 868 P.2d 64, 80 (Utah 1993) (citing *United States v. Williams*, 809 F.2d 75, 83 (1st Cir. 1986), *cert. denied* 481 U.S. 1030 (1987)).

Defendant also appears to argue that his restraints prevented him from effectively participating in trial and assisting his attorney. Br. Aplt. at 18-20 (citing *People v. Duran*, 545 P.2d 1322, 1326 (Cal. 1976)). In effect, defendant seems to suggest that the restraints violated his right to be *mentally present* at his trial. *Id.* at 19. However, defendant cites no authority for this "right" and the State could find no case explicitly recognizing such a right. See e.g., *People v. Jenkins*, 997 P.2d 1044, 1116 (Cal. 2000) (no right to be "mentally present" at trial). As the California Supreme Court stated "Even total physical absence from a hearing is not reversible unless the defendant's presence bears a reasonably substantial relation to the fullness of the defendant's opportunity to defend against the charges." *Id.* (citation and internal quotation marks omitted). Additionally, the trial court's decision to allow defendant to keep one free hand "to write a note if he wants to" (R. 80 13)



demonstrates the trial court's sensitivity to the issue and that it took measures to ensure defendant could assist his attorney at trial

Finally, even if the issues were properly preserved and the trial court erred in requiring restraints, any error is harmless beyond a reasonable doubt. *See Chapman v California*, 386 U.S. 18 (1967) (upholding the application of harmless error analysis to federal constitutional errors in state criminal trials). The *Chapman* court noted that harmless error rules

serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

*Id.* at 22. However, before a constitutional error can be deemed harmless, it must be determined that it was harmless beyond a reasonable doubt. *See State v Thompson*, 832 S.W.2d 577, 582 (Tenn.Crim.App.1991) (shackling of defendant during trial harmless beyond a reasonable doubt).

Even assuming restraining defendant was error, the error was harmless beyond a reasonable doubt. The evidence of defendant's guilt was overwhelming. *See State v Peek*, 2000 WL 565129, \*22 (Tenn. Crim. App) (no prejudice to defendant from shackles given the strength of state's case and efforts taken to prevent jury from seeing shackles). The stolen tools were found in his truck along with the crowbar used to pry open the trailer from which the tools were stolen (R. 89:52-53). Moreover, defendant's "alibi" – that he purchased

the tools from friends at a gas station – actually inculpated him on the receiving stolen property count because he admitted he received the tools under circumstances which indicated they were stolen (R. 89:98, 105). Moreover, as already noted, the trial court took measures to prevent the jury from seeing the restraints and defendant has not pointed to any instances in which jurors could have seen them. *Peek*, 2000 WL at \*22. Under these circumstances, it is clear beyond a reasonable doubt that any error was harmless.

### CONCLUSION

For the foregoing reasons, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of March, 2001.

MARK L. SHURTLEFF  
Attorney General

A handwritten signature in cursive script, appearing to read "Brett J. DelPorto".

BRETT J. DELPORTO  
Assistant Attorney General

### **CERTIFICATE OF MAILING**

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to.

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A handwritten signature in black ink, appearing to read "Brett J. Smith". The signature is written in a cursive, flowing style.