

1961

## State of Utah v. Max Leon Reay : Brief of Respondent

Utah Supreme Court

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Walter L. Budge; Ronald N. Boyce; Attorneys for Respondent;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

*Plaintiff and Respondent,*

— vs. —

MAX LEON REAY,

*Defendant and Appellant.*

FILED

APR 29 1961

Supreme Court, Utah  
Case  
No. 9516

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## BRIEF OF RESPONDENT

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,

*Plaintiff and Respondent,*

— vs. —

MAX LEON REAY,

*Defendant and Appellant.*

}  
Case  
No. 9516

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## BRIEF OF RESPONDENT

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### NATURE OF CASE

Defendant was convicted of assault with the intent to commit robbery and with being a habitual criminal, in violation of Sections 76-51-3, U.C.A. 1953 and 76-1-18, U.C.A. 1953, respectively, upon trial by jury in the Third Judicial District Court on April 5, 1961, and claims that the insufficiency of the evidence and other irregularities require a reversal of the convictions.

## RELIEF SOUGHT ON APPEAL

The State of Utah contends the appellant's convictions should be affirmed.

## STATEMENT OF FACTS

The respondent will adopt the appellant's statement of facts as being essentially correct, but will supplement the facts therein presented where felt necessary in the argument portions of its brief.

## STATEMENT OF POINTS

### POINT I.

THE EVIDENCE IS SUFFICIENT TO SHOW THE DEFENDANT'S IDENTITY AND TO SUPPORT THE JURY'S VERDICT.

### POINT II.

THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 4 AND THE DEFENDANT HAS WAIVED HIS RIGHT TO COMPLAIN BY HIS FAILURE TO EXCEPT TO THE INSTRUCTION.

### POINT III.

THE RECORD DOES NOT SHOW THAT THE INFORMATION RELATING TO THE HABITUAL CRIMINAL CHARGE WAS READ TO THE JURY BEFORE THE ROBBERY TRIAL.

#### POINT IV.

### THE EVIDENCE SUPPORTS THE DEFENDANT'S CONVICTIONS UPON THE CHARGE OF BEING AN HABITUAL CRIMINAL.

#### ARGUMENT

#### POINT I.

### THE EVIDENCE IS SUFFICIENT TO SHOW THE DEFENDANT'S IDENTITY AND TO SUPPORT THE JURY'S VERDICT.

The defendant alleges that the evidence at trial was insufficient to sustain a conviction of robbery, and complains specifically that there is insufficient evidence of record to identify the defendant with the perpetration of the crime. The determination of guilt or innocence based upon the facts is usually a matter within the sole discretion of the jury. *State v. Green*, 78 Utah 580, 6 P. 2d 177; *State v. Harris*, 1 U. 2d 182, 264 P. 2d 284, (1953). An appellate court should not reverse a conviction unless it appears from all the circumstances, when viewed in a light most favorable to the verdict, that the verdict was unreasonable. *State v. Berchtold*, 11 U. 208, 357 P. 2d 183 (1960). The standard to be applied in reviewing the instant case on appeal is noted in *State v. Ward*, 10 U. 2d 34, 347 P. 2d 865 (1959), where the court said.

“The rules governing the scope of review on appeal as to the sufficiency of the evidence to sustain the verdict are well settled: that it is the prerogative of the jury to judge the credibility of the witnesses and to determine the facts; that the evidence will be reviewed in the light most

favorable to the verdict; and that if when so viewed it appears that the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed.”

Thus, for defendant to prevail, it must appear from the record that the trial judge was unreasonable in allowing the jury to pass on the guilt of the defendant, and that in finding him guilty the jury acted unreasonably.

Identity in a robbery or assault with intent to commit robbery case may be proved like any other element upon circumstantial evidence, *People v. Dodson*, 77 CA 2d 389, 175 P. 2d 59, and it is submitted that the evidence in the instant case, when viewed with all its logical inferences in a light most favorable to the verdict, supports the conviction.

The evidence of record shows that on Sunday night, September 25, 1960, Ronald R. Eatchel, Assistant Manager of the Safeway Store, located at 370 East South Temple in Salt Lake, closed the store at about 7:05 p.m. (R. 25). His wife Donna, had driven the family car to the store to pick up her husband. After closing the store and padlocking it, he and his wife went to their automobile that was parked in front of the store some 25 feet away (R. 26). At that time, Arthur John Witchey approached the couple, pulled a gun from his pocket, and ordered everyone back to store (R. 27). Mr. Eatchel was able to convince Witchey that he couldn't open the store, so Witchey and the couple returned to the car of Mr. Eatchel (R 29).



Eatchel testified that another car was parked behind his in which Witchey and another person were riding, and which followed Eatchel's car with the lights off down Fourth East Street, after the latter refused to open the store (R. 30). Eatchel testified that another person in the robber's car was on the driver's side of the vehicle (R. 30). Thereafter, Mr. and Mrs. Eatchel proceeded in their car to the Police Station, where they reported the incident (R. 31). Mrs. Eatchel, during the course of the incident, was able to get the license number of the vehicle in which Witchey and the unidentified person were riding. She was also able to identify the color and make of the vehicle (R. 37). Mrs. Eatchel also testified that there was another unidentified person in the vehicle that, at the time of the incident, was sitting behind the steering wheel, and that he might have been the one driving at the time they were followed after leaving the store. Mr. Eatchel further identified the gun that Witchey was carrying as a .22-caliber pistol.

At approximately 7:20 p.m. (R. 44), or fifteen minutes after the incident of the assault upon Mr. and Mrs. Eatchel, Officer Michael C. Clark, a city police officer, observed the vehicle identified and reported by the Eatchels, facing east on Fourth South, where it was apprehended. The defendant, Max Leon Reay, was then behind the driver's wheel of the vehicle, and Arthur Witchey was on the passenger's side; a .22-caliber revolver was also found in the vehicle at the time of apprehension.

The only issue is whether, based upon this evidence, a jury could reasonably conclude, beyond a reasonable doubt, that Max Leon Reay was the unidentified occupant of the vehicle at the time of the attempted holdup. The State submits that a reasonable and proper inference can be drawn, that, since it was shown that an unidentified man was present with the person who assaulted the Eatchels in the attempted robbery, assisted Witchey by driving the vehicle from the store, and in the short space of 15 minutes was apprehended in the same vehicle, operating the vehicle, accompanied by Witchey, and with a .22-caliber pistol in the vehicle, that the unidentified person was Max Leon Reay, and that, therefore, he was the accomplice of Witchey. The short passage of time and the presence of other factors identified with the commission of the crime clearly support such an inference. The jury could well feel the defendant's alibi to have been untrue and concluded that he had always been present in the vehicle. The inference is reasonable under the circumstances. The circumstances proved in the instant case are clearly consistent with the inferences to be drawn. *Carter v. Standard Accident Ins. Co.*, 65 Utah 465, 238 Pac. 259.

The defendant's claim that evidence is insufficient because of the standard applied in *State v. Marasco*, 81 Utah 325, 17 P. 2d 919 (1933), misconstrues the insufficiency found in that case. In the Marasco case there was no factual evidence present at the scene of the commission of the crime that was later present with the defendant that tended to connect the defendant to the scene of the crime. Nor was the time element necessarily conducive

to the inference sought to be drawn. In Marasco a mere showing of flight plus motive existed. In the instant case, three items: Witchey, the .22-caliber pistol, and the automobile were all found in the presence of the accused in the short span of 15 minutes after the event, and it was additionally shown that Witchey was accompanied by an unidentified person, which person was in the driver's seat, where the defendant was at the time of apprehension. Marasco, in no way, supports a conclusion of insufficiency in the instant case.

The defendant has contended that since he was not identified at the scene of the commission of the crime that identity is lacking. The State contends that the facts surrounding the commission of the crime, when coupled with other circumstances connecting the defendant to the crime, clearly support a reasonable inference identifying the defendant.

In *Hardin v. State*, 65 Okla. Cr. 260, 85 P. 2d 332 (1939), the Court of Criminal Appeals of Oklahoma had before it a case similar to that now before the Court. The court noted:

“While John Phillips was at the store with A. G. Lamb one night two parties came into the store and robbed Lamb of some money and a pistol. Neither the prosecuting witness or John Phillips could recognize the defendant as being one of the parties that took part in the robbery. A car was seen near the scene of the robbery after the parties left the store, and before John Phillips and A. G. Lamb got themselves released where the robbers had tied them the car was driven away.

\* \* \*

“All of the evidence against the defendant \* \* \* is circumstantial.”

The only evidence identifying the accused was that he pawned the pistol taken during the robbery. In addition, a less positive identification of the get-away car was obtained, which did not directly connect the defendant. The court further noted:

“The only circumstances upon which the state relies to convict the defendant are the circumstances that on the 22nd or 23rd of December, 1935, after the robbery is alleged to have taken place on December 6th, 1935, the defendant pawned a pistol that was taken from the Lamb store to Mrs. Bessie Templin, the witness who testified to seeing the defendant leave her place with Tom Carrick and Marvin Ward the afternoon or evening of December 6th, 1935.”

The defendant had set up alibi or at least non presence similar to the instant case. The Oklahoma Court upheld the conviction, noting:

“Where there is evidence from which the jury would reasonably and logically find the defendant guilty of the crime charged, in the absence of unusual circumstances, this court will not set aside the jury’s verdict on account of insufficiency of the evidence. \* \* \*

“The evidence is sufficient to sustain the judgment.”

It is submitted, therefore, that no merit exists to the contention that the evidence was insufficient to sustain the conviction.

## POINT II.

THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 4 AND THE DEFENDANT HAS WAIVED HIS RIGHT TO COMPLAIN BY HIS FAILURE TO EXCEPT TO THE INSTRUCTION.

The defendant contends that the Trial Court erred in giving Instruction Number 4 in which the court defined a person who aids or abets the commission of a crime as a principal. At the outset it should be noted that the defendant was represented by counsel at the trial and no exception was taken to the instruction now sought to be challenged on appeal. 77-37-1, U.C.A. 1953, provides that exceptions to instructions shall be "taken and preserved as in civil cases." The general rule is said to preclude a review of instructions unless an exception has preserved the contention for review on appeal. Thus it is noted in Abbott, Criminal Trial Practice, 4th Ed., Sec. 672:

"The correctness of instructions given or refused cannot be questioned in the appellate court unless a timely exception was saved in the trial court \* \* \*."

The Utah cases have given force to this rule. In *State v. Smith*, 45 Utah 381, 146 Pac. 286 (1915), it was said:

"So it would require hard struggling to defend and support portions of the charge, both as to substance and consistency \* \* \*. But there is no exception, no assignment, and no claim made as to this nor to any portion of the charge. We thus leave that."

In *State v. Ferguson*, 83 Utah 357, 28 P. 2d 175 (1934), it was said:

“Other errors are assigned to instructions given to the jury, but, as no exceptions thereto appear of record, they, of course cannot be considered.”

Subsequent decisions have modified the strict exception rule noted above. Thus, in *State v. Cobo*, 90 Utah 89, 60 P. 2d 952 (1936), it was said:

“We wish not to depart from the rule laid down in this jurisdiction that in ordinary cases on appeal errors relating to instructions or refusing requests to instruct will not be considered or reviewed unless exceptions thereto were properly taken by the party complaining. But in capital cases and in cases of grave and serious charged offenses and convictions of long terms of imprisonment, cases involving the life and liberty of the citizen, we think that when palpable error is made to appear on the face of the record and to the manifest prejudice of the accused, the court has the power to notice such error and to correct the same, though no formal exception was taken to the ruling. \* \* \*”

Subsequent cases have also given recognition to the possible exception. *State v. Peterson*, 121 Utah 229, 240 P. 2d 504; *State v. Hines*, 6 U. 2d 126, 307 P. 2d 887 (1957). The precedent, therefore, will excuse the failure to take an exception if the error is palpable and so flagrant as to deny a fair trial.<sup>1</sup>

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<sup>1</sup> 77-42-1, U. C. A. 1953, provides that even if error is committed it will not be presumed to have affected the substantial rights of the accused.

Viewing the present instruction against the defendant's claim, it appears that no error was committed, and even if a more articulate instruction could have been given, the instruction in the instant case in no way deprived the defendant of a fair trial. The evidence clearly discloses the need for such an instruction since the activities of the defendant were of the nature of an accomplice. He aided Witchey by driving the car, and keeping lookout. Such activities appear clearly to be those of the accessory to the assault since he did not himself directly assault the Eatichels. In addition, the defendant testified himself that he procured the car used in the crime. Although defendant has noted that in *State v. Marasco*, supra, that the court indicated that inconsistent evidence brought out by an accused in support of alibi could not be used to bolster the prosecution's case, the evidence in the instant case relating to the procuring of the vehicle was not part of the defendant's alibi nor in any manner inconsistent with the defendant's theory of the case or the prosecution's. It would appear, therefore, that the instruction was entirely proper.

Defendant contends that the trial judge failed to define the terms "aid and abet" and that this is, therefore, error. This overlooks the direct evidence of record to the contrary (R. 61, 77), and hence this contention is unmeritorious.

Finally, the defendant contends such an instruction was error because the defendant was not charged as an aider or abettor. The defendant correctly notes that one

who aids and abets in a crime is a principal under Utah law, 76-1-44, U.C.A. 1953, but apparently feels that defendant could not be such in the instant case because he was not so charged, and relies upon *State v. Baum*, 47 Utah 7, 151 Pac. 518 (1915), where the court noted the defendant was charged directly as a principal. *State v. Baum* is not good precedent for the claim since it was decided in 1915 prior to the enactment of 77-21-39, U.C.A. 1953, which became law in 1935, and provides:

“(1) Every person concerned in the commission of an offense, whether he directly commits the offense or procures, counsels, aids, or abets in its commission even though not present shall be informed against or indicted and tried and punished as a principal.

“(2) No other facts need be alleged in an information or indictment against an accused for procuring, counseling, aiding, or abetting the commission of the offense than are required in an information or indictment against the person directly committing the act constituting the offense.”

Thus it was proper to charge the defendant in terms of a direct principal although the evidence shows him to act as an aider. In fact, had the unnecessary aider language been used it would have been mere surplusage. 77-21-42, U.C.A. 1953.

Under these circumstances, it does not appear that the defendant's contention is meritorious since: (1) no exception to the charge was taken and the charge as given would not deprive the accused of a fair trial; (2) the instruction was proper under the evidence; (3) the



instruction was proper as to the manner with which the accused was charged.

### POINT III.

THE RECORD DOES NOT SHOW THAT THE INFORMATION RELATING TO THE HABITUAL CRIMINAL CHARGE WAS READ TO THE JURY BEFORE THE ROBBERY TRIAL.

The defendant contends that at his trial on the assault with intent to commit robbery charge, the information containing that charge and the habitual criminal charge was read to the jury, and that this was error. The record does not reflect a verbatim description of the actual reading. The record discloses the following entry made by the reporter (R. 15):

“\* \* \* The Clerk read the information filed by the District Attorney in said case \* \* \*.”

This is the complete record on the matter. From this excerpt the defendant contends the whole information was read; the State submits it was not. The only case that was then before the jury was the assault with intent to commit robbery; therefore, the words “said case” apply equally as well to support an inference that only that part of the information relating to the robbery was read. Three factors support this conclusion: First, certain pen marks on the information are susceptible to an inference that the clerk marked the second count so that it would not be read (R. 8). Secondly, no objection was voiced by counsel and hence we may conclude that no impro-

priety took place. Third, the record reflects that after the conviction on the robbery aspect of the case, the Judge explained to the jury that there was an additional phase to be considered, and the clerk read the information to the jury concerning the habitual criminal charge (R. 67). All of these factors support an inference that at the time of trial on the robbery issue the habitual criminal count was not brought before the jury. The record on the matter is really not clear, and the inferences are more supportive of a conclusion that the habitual criminal count was not read than that it was.

Under such circumstances, a presumption of regularity arises. Abbott, Criminal Trial Practice, 4th Ed., Sec. 362. The great weight of authority is to the effect that in the absence of a clear showing to the contrary, it will be presumed that judicial proceedings were regular in all respects. *People v. Gazelle*, 299 Ill. 58, 132 N.E. 273 (1921). Thus, it is said in 1 Wharton's Criminal Evidence, Sec. 126:

“It is rebuttably presumed that the various phases of a criminal prosecution have conformed to the requirements of the law. \* \* \*

“All judicial proceedings in courts of general jurisdiction are presumed to be correct and regular, in the absence of proof to the contrary. \* \* \*

“Irregularities or error in the proceedings of courts are never presumed, *but must be affirmatively shown.*” (Emphasis supplied)

There is no affirmative showing that the second portion of the information relating to the habitual criminal

charge was in fact read to the jury before the proper time. The inferences are to the contrary and the presumption of regularity overcomes any inference that error was committed.

In addition, the State contends that even if the information relating to the charge of being an habitual criminal was read, that the defendant cannot now complain because he raised no objection and proceeded to trial and judgment without raising any protest. Certainly, under such circumstances, where defendant was represented by experienced counsel, and knowing of possible error proceeds to trial, when timely objection could have possibly corrected the matter, the defendant must be deemed to have waived any objection or be estopped.

Finally, it is submitted that under the circumstances it could not have prejudiced the defendant even if such occurred since during the trial the defendant took the stand and on cross-examination admitted the convictions (R. 50, 56), which would have been read to the jury.

In *State v. Dodge*, No. 9500, Nov. 1, 1961, a similar objection of prejudice was raised by a claim that an unsolicited answer of a witness disclosed previous crimes of the accuseds. The court noted that on cross-examination the accuseds admitted their convictions and said:

“Also, on cross-examination of appellants both admitted that they had been previously convicted of felonies. Under such circumstances it is apparent that the harm, if any, this statement could have caused appellants was insufficient to warrant a granting of a motion for a mistrial.”

Certainly, in the instant case, where no objection was raised, and subsequently the jury had before it similar disclosures, even if the full information had been read, it could not have prejudiced the defendant.

It is submitted that there is no basis for a claim of error based upon an improper disclosure of the habitual criminal information.

#### POINT IV.

#### THE EVIDENCE SUPPORTS THE DEFENDANT'S CONVICTIONS UPON THE CHARGE OF BEING AN HABITUAL CRIMINAL.

The defendant finally contends that the trial court erred in admitting Exhibits 3 and 4 without foundation to further identify them with the accused. The nature of the defendant's contention, however, is unclear since the substance of his argument seems to go not only to the issue of admissibility but to the sufficiency of the evidence to sustain the conviction.

Exhibit 4 is a certified copy of the information and commitment for the crime of forgery in violation of 76-26-1, U.C.A. 1953, upon which a plea of guilty was entered on January 25, 1957, in the District Court of Salt Lake County. Exhibit 3 was an exemplified copy of a conviction and judgment for armed robbery on January 12, 1953 in the State of Idaho. The objection of the trial defense counsel was only upon the theory that they were not "the best evidence." No objection was raised that insufficient foundation was laid or lack of identity. The

objection was specific, and therefore, if it was not well taken, the failure to raise an otherwise proper objection will not overturn the case on appeal. *Kroger Grocery & Baking Co. v. Harpole*, 175 Miss. 227, 166 So. 335 (1936). Thus, McCormick, Evidence, p. 117, notes:

“Similarly, the overruling of an objection based on an untenable ground, will not be overturned on appeal on the basis that there was a tenable ground for exclusion which could have been urged.”

In 23A C. J. S., Criminal Law, Sec. 1963, it is said:

“Accordingly, an objection to evidence on specific ground will not raise the objection that it is inadmissible on any ground other than that specified, since if the particular objection assigned is not apt, the court will not be put in error for overruling it, although the evidence may be subject to other objections.”

The Utah Court has also adopted the requirement that an objection on a specific ground, not proper, will not suffice to exclude evidence and preserve the appeal where another ground, had it been urged, would have been proper. *State v. Musser*, 110 Utah 534, 558, 175 P. 2d 725 (1947). Therefore, unless the objection based upon the “best evidence rule” is proper, the defendant may not now claim error to admit the exhibits if otherwise relevant.

In the instant case what was sought to be proved was a previous conviction. Although some other evidence rather than the record of conviction might be more per-

suasive, this is not grounds for the best evidence objection. The best evidence rule is applicable where the thing to be proved is the contents of a writing. In *McCormick, Evidence*, p. 409, et seq, it is noted:

“The specific tenor of this requirement needs to be definitely stated and its limits clearly understood. The rule is this: *in proving the terms of a writing*, where such terms are material, the original writing must be produced, unless it is shown to be unavailable for some reason other than the serious fault of the proponent. \* \* \*”

In the instant case the Court was concerned not with the proof of the contents of any writing, but with proof of a conviction which happened to be recorded. See 76-1-18, U. C. A. 1953. Under these circumstances, the “best evidence” rule was in no way applicable. If the defendant had felt that identity evidence should be admitted first, the objection should have been to lack of foundation or authentication. The specific objection made by defense counsel was, therefore, error, and the matter is not preserved for appeal.

Even if we assume that the objection made was sufficient to preserve the admissibility issue for appeal, the defendant’s contention is still unmeritorious. The records of conviction were properly authenticated in the instant case and, therefore, admissible, if relevant. The records were public records, and were properly certified by the custodian and hence admissible. *Richfield v. Cottonwood Irr. Co.*, 84 Utah 107, 34 P. 2d 945 (1934); *Talbot v. Seeman*, 1 Cranch 1 (1801); see also Rule 44, U. R. C. P.

The defendant's major contention as to the admissibility of the exhibits is the claim that there was insufficient showing to connect them with the defendant. The defendant, in this regard, relies upon *State v. Bruno*, 69 Utah 444, 256 Pac. 109 (1927). The defendant contends that this decision requires more than a mere showing of similarity of names. The defendant has confused the rule of the Bruno case, since it in no way deals with the question of admissibility, but, rather, goes to the weight to be given a showing of similarity of names. At this point it is sufficient to point out that two properly authenticated documents showing that a Max Leon Reay had been convicted of felonies and committed were proffered. The defendant is also named Max Leon Reay, and the charge is habitual criminality. It appears clear that the documents were, therefore, admissible. *State v. Payne*, 223 Mo. 112, 122 S.W. 1062 (1909); *State v. Keely*, 52 Wash. 2d 676, 328 P. 2d 362; *Brown v. People*, 124 Colo. 412, 238 P. 2d 847. The defendant has contended that the similarity of names was not sufficient to allow the exhibits to be admitted. Neither, *State v. Aime*, 62 Utah 476, 220 Pac. 704 (1923) nor *State v. Bruno*, 69 Utah 444, 256 Pac. 109 (1927), support the defendant's contention. Since defendant has also attacked the sufficiency of the evidence based upon a lack of identity, an analysis of these cases will disclose the lack of merit in the defendant's argument. First, it should be remembered that neither the Bruno case nor the Aime case dealt with the evidentiary problem of admissibility of records of conviction, but rather, both cases were concerned with substantive problems.

In Aime, the defendant contended that the evidence of a previous conviction was insufficient for the purposes of sustaining an increased verdict in a liquor possession case. The court noted:

“The matter of identity was submitted to the jury as a fact to be determined by them from the evidence, under the usual instructions, and a verdict of guilty as charged was returned.”

The court further noted that:

“The proof consisted of the record of the previous conviction of John Aime, in the justice’s court of the precinct where the defendant resided, of the offense of manufacturing intoxicating liquor. No additional evidence was offered to show the identity of defendant and the person described in the record of conviction.”

The court held the evidence sufficient to sustain the conviction, and in so doing, noted:

“It is a general rule that identity of names is prima facie evidence of identity of persons.”

Subsequently, in *State v. Bruno*, 69 Utah 444, 256 Pac. 109 (1927), the defendant, Mary Bruno, challenged a persistent violator conviction of the prohibition law. The only evidence introduced was records of previous convictions showing that one Mary Bruno had been convicted. The error found by the Supreme Court was not in the admissibility of the records nor in their sufficiency, but rather an instruction by the judge that the records con-



clusively showed her conviction and that the jury must regard that as prima facie evidence. The court noted the Aime case and said:

“The Aime case is authority for submitting to the jury in this case, *with proper instructions*, the question of whether or not Mary Bruno who pleaded guilty to having intoxicating liquor in her possession as shown by the records of the city court which were received in evidence. There is, however, a vast difference between holding that evidence is sufficient to *sustain* a verdict and holding that as a matter of *law* a given fact is established.” (Emphasis supplied)

The court held that since the instruction took from the jury their prerogative to find the facts, that it was error. Neither Aime nor Bruno hold that identity of names is not sufficient to admit records of previous conviction, nor that based upon such identity and records a jury may not find the defendant guilty. In fact, both cases seem to support a conclusion that this is at least sufficient to put the matter before the jury, and where defendant offers no rebuttal, that a conviction may be sustained.<sup>2</sup> Although there is some weight to the contrary, it would appear that the greater majority of cases support the rule that identity of name is at least sufficient to make out a prima facie case. 11 ALR 2d 870; *People v. Crawford*, 128 CA 2d 699, 275 P. 2d 931 (Cal.); *People v. Ahouse*, 162 CA 2d 586, 328 P. 2d 227; *Jenkins v. United*

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<sup>2</sup> Although the annotation in 11 ALR 2d 870 seems to find a conflict between Aime and Bruno, this is a failure of the author to comprehend the Bruno decision.

*States*, 146 A. 2d 444; *Jordan v. State*, 218 Miss. 337, 67 So. 2d 371; *State v. Wycoff*, 27 N. J. Super 322, 99 A. 2d 365; *Jackson v. State*, 308 P. 2d 323 (Okla.); *State v. Reed*, 298 S.W. 2d 426, (Mo.). It appears that California and Missouri have both changed their former positions to one supporting a conviction on the basis of identity of names. *People v. Clinesmith*, 175 CA 2d Supp. 911, 346 P. 2d 923; *State v. Romprey*, 399 S.W. 2d 746 (Mo.). It is submitted, therefore, that the evidence introduced, being un rebutted, is sufficient to sustain the conviction.

In addition, it is noted that there is additional supportive evidence of record. The defendant took the stand on the robbery charge, and there admitted the crimes, dates and places that were the subject of the habitual criminal charge (R. 50, 56). Under such circumstances, the jury had before it the admission of the accused himself of his convictions and identity therewith. Under these circumstances the accused's admission, plus the certified prior convictions, are more than sufficient to sustain the conviction for being an habitual criminal. 11 ALR 2d 870, 875, 876. *State v. Graham*, 172 Kan. 627, 242 P. 2d 1067; *People v. Herod*, 112 CA 2d 764, 247 P. 2d 127.

The defendant's contention that the admissions made during the robbery charge may not be carried over to the habitual charge overlooks the general weight of authority to the contrary. See cases collected 11 ALR 2d 875. It also fails to comprehend the nature of the habitual criminal charge. This charge is not a crime, but a status; it is not presented to the jury during the principal charge,

since conviction upon the principal charge is a prerequisite to consideration of the habitual status. The same jury is used, 76-1-19, U.C.A. 1953, with two charges being considered, but only one trial. *State v. Rassum*, 107 Utah 94, 152 P. 2d 88; *State v. Stewart*, 110 Utah 203, 171 P. 2d 383. Since it is a status, not a crime, the accused is charged with, and the same jury is involved, it would seem an unnecessary formality to refuse to consider evidence of which the jury is already possessed.<sup>3</sup>

It is noted that in *State v. Wood*, 2 U. 2d 34, 268 P. 2d 998 (1954), that the defendant contended that it was error to allow him to be impeached by showing prior convictions at the time of the principal charge, since this, it was said, was evidence of his crimes tending to prove the habitual criminal charge. The court did not say that the impeaching evidence could not be used to support the conviction; it merely said impeachment was still allowable, that the State still bore the burden of proof, and then noted:

“It is to be noted that the state did not rely on appellant’s single admission of conviction, *but introduced proof by way of court records.*” (Emphasis supplied)

The court thus sustained the habitual criminal conviction on the basis of the same evidence now before the Court.

It is also noted that in *State v. Zeimer*, 10 U. 2d 45, 347 P. 2d 1111 (1960), the Court held that the habitual

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<sup>3</sup> It is submitted that to hold to the contrary would duplicate evidence and thus to “march the King’s troops up the hill in order to march them down the hill.”

criminal portion of the trial is severable from the main charge for the purpose of granting a new trial, so that a new trial could be granted on the habitual criminal charge alone. However, the Court was there clear to note that the habitual criminal charge was not for a crime but as to a status. There is nothing in the Zeimer case to preclude using admissions made by the accused on the main charge before the same jury to prove the habitual charge.

It is submitted, therefore, that defendant's contention is unmeritorious since (1) improper objection was made at the trial to the admission of Exhibits 3 and 4, and he may not now complain; (2) the exhibits were properly admitted; (3) the defendant's identity was sufficiently shown by similarity of names so as to make out a prima facie case upon which the jury could convict; (4) the defendant's admissions support defendant's guilt on the habitual criminal charge.

## CONCLUSION

The defendant has suggested various alternative forms of relief. It is submitted the defendant is entitled to none of these requestes. The defendant's conviction on the charge of assault with the intent to commit robbery is fully sustained by the evidence, and no instructional or other errors appear of record. The evidence amply supports the conviction of the defendant on the charge of

being a habitual criminal.<sup>4</sup> Therefore, the Court should affirm both convictions.

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<sup>4</sup> If error were committed as to the habitual criminal charge, reversal of only that portion of the charge would be warranted. *State v. Zeimer*, *supra*.

Respectfully submitted,

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