

1962

State of Utah v. Theodore Samuel Pacheco : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



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.

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *State v. Pacheco*, No. 9559 (Utah Supreme Court, 1962).
https://digitalcommons.law.byu.edu/uofu_sc1/3931

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 (pre-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

FILED

JAN 12 1962

Clerk, Supreme Court, Utah

STATE OF UTAH,

Respondent,

—vs.—

THEODORE SAMUEL PACHECO,

Appellant.

Case No.

17342

9559

BRIEF OF RESPONDENT

A. PRATT KESLER

Attorney General

RONALD N. BOYCE

Assistant Attorney General

Attorneys for Respondent

INDEX

	Page
STATEMENT OF CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS.....	2
ARGUMENT	3
POINT I. —	
THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE	
LARCENY CONVICTION	3
POINT II. —	
THE COURT DID NOT LET THE JURY SEPARATE	
AFTER DELIBERATION, AND THE APPELLANT	
HAS WAIVED ANY RIGHT TO OBJECT.....	7
POINT NO. III. —	
NO EVIDENCE OF ENTRAPMENT EXISTS WAR-	
RANTING REVERSAL	13
CONCLUSION	24

Cases

Berchtold v. State, 11 Utah 208, 357 P. 2d 183 (1960).....	23
Browning v. JWH Watson, 1 WLR 1172, 2 A11 E. R. 775	
(1953 England)	21
Crosbie v. State, 330 P. 2d 602 (1958 Okla. Cr.).....	22
Goins v. State, 192 Tenn. 32, 237 S. W. 2d 8 (1950).....	21
Hobson v. State, 277 P. 2d 695 (Okla. Cr. 1954).....	12
In Re. Wright, 68 Nev. 324, 232 P. 2d 398 (1951).....	21
Keith v. Commonwealth, Ky., 243 S.W. 293 (1922).....	11
Marsh v. Johnston (1959), Crim. L. R. 444 (Scotland).....	21
Martin v. State, 222 P. 2d 534 (Okla. Crim. 1950).....	13
Page v. State, Okl. Cr., 332 P. 2d 693 (1958).....	11
People v. Collins, 53 Cal. 185 (1878).....	6
People v. Gillis, 6 Utah 84, 21 Pac. 404 (1889).....	3, 5
People v. Lanzit, 70 Cal. App. 498, 233 Pac. 816 (1924).....	6
People v. Malone, 117 Cal. App. 629, 4 P. 2d 287 (1931).....	24
People v. Schacher, 48 NYS 2d 371 (1944).....	21
R. V. Nothout (1912), CPD 1037 (South AF).....	21
Salt Lake City v. Robinson, 40 Utah 448, 125 Pac. 657 (1912)....	20

I N D E X — (Continued)

	Page
Sherman v. United States, 356 U. S. 369 (1958).....	21
Smith v. O'Donovan, 28 NZLR 94 (1908 New Zealand).....	21
Sorrels v. United States, 287 U. S. 435, 451 (1932).....	22
State v. Brooks, 101 Utah 584, 126 P. 2d 1044 (1942).....	3
State v. Dyett, 114 Utah 379, 199 P. 2d 155 (1948).....	3
State v. Ferrell, 69 Ohio St. 69 N.E. 995 (1903).....	10
State v. Franco, 76 Utah 202, 289 Pac. 100 (1930).....	21
State v. Hendricks, 32 Kan. 559, 4 Pac. 1050.....	10
State v. Jansen, 22 Kan. 498.....	6
State v. McCornish, 59 Utah 58, 201 Pac. 637 (1921).....	21
State v. McKinney, 31 Kan. 570, 3 Pac. 356.....	10
United States v. Buck, 3 USCMA 341, 12 CMR 97 (1953).....	6
United States v. Markham, 191 F. 2d 936 (1951).....	23
United States v. Sherman, 200 F. 2d 880 (1952).....	22
United States v. Sherman, 356 U. S. 369 (1958).....	23
Walker v. State, 71 Ga. App. 38, 29 S.E. 2d 819 (1944).....	11

STATUTES

22 Fla. Stat. Ann., Sec. 838.11 (1957).....	21
76-9-3, U. C. A. 1953.....	1
76-38-1-4, U. C. A. 1953.....	1, 3
77-31-27, U. C. A. 1953.....	8, 9, 10
77-31-32, U. C. A. 1953.....	9
77-32-1-4, U. C. A. 1953.....	9

TEXTS AND AUTHORITIES

Abbott, Criminal Trial Practice, 4th Ed., Sec. 691.....	11
21 ALR 2d 1093.....	9
21 ALR 2d 1139.....	10
21 ALR 2d 1149.....	11
34 ALR 1210.....	10
79 ALR 836.....	10
23A CJS, Criminal Law, p. 959.....	10
Clark & Marshall, Crimes, 6th Ed. (1958), p. 706, et seq.....	3, 5
49 Jnl. Crim. and Pol. Sci., 447, 450.....	22
Perkins, Criminal Law, p. 921-2.....	7
Wharton's Criminal Law and Procedure, Sec. 2108.....	11

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Respondent,

—vs.—

THEODORE SAMUEL PACHECO,

Appellant.

} Case No.
17342

BRIEF OF RESPONDENT

STATEMENT OF CASE

The appellant, Theodore Samuel Pacheco, was charged and convicted of grand larceny and second degree burglary, in violation of 76-38-1-4, U.C.A. 1953, and 76-9-3, U.C.A. 1953, respectively, in the Third Judicial District Court, Salt Lake County, on 3 May, 1961, and now appeals from that conviction.

DISPOSITION IN LOWER COURT

A verdict finding the appellant guilty of the crimes of grand larceny and second degree burglary was returned by the jury on 3 May, 1961, and appellant was committed to the State Prison on 4 May, 1961.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the convictions alleging the evidence is insufficient to sustain the conviction of larceny, and that the burglary conviction should be vitiated by virtue of juror misconduct and a claim of entrapment; the State contends no basis for reversal exists of record.

STATEMENT OF FACTS

The respondent, State of Utah, will adopt the appellant's Statement of Facts, but will supplement the statement in rebuttal to the points of argument raised by the appellant where necessary for clarification.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE LARCENY CONVICTION.

POINT II.

THE COURT DID NOT LET THE JURY SEPARATE AFTER DELIBERATION, AND THE APPELLANT HAS WAIVED ANY RIGHT TO OBJECT.

POINT III.

NO EVIDENCE OF ENTRAPMENT EXISTS WARRANTING REVERSAL.

ARGUMENT

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE LARCENY CONVICTION.

The appellant contends that there is insufficient evidence of record to sustain the conviction of larceny of the money from the Payless Builders Supply Co. The basis of the contention is that there is no showing that the appellant had possession of any of the money at the time he was searched at the scene. It appears that the trial judge denied the appellant's motion to dismiss on the theory that the accomplices' possession was sufficient. (R. 123). The defendant contends that since one of the appellant's co-participants, Gerald D. Shelton, did not intend to commit a crime, that his acts cannot be imputed to the appellant and, therefore, the evidence of possession is not sufficient of record.

At the outset it is to be noted that exclusive, conscious "possession," as such, is not itself an element of the crime of larceny, but is merely evidentiary under 76-38-1, U.C.A. 1953, of the required element of the "taking" of possession. The possession is indicative of the asportation and the taking of possession, which are the essential elements of larceny. *People v. Gillis*, 6 Utah 84, 21 Pac. 404 (1889); Clark & Marshall, Crimes, 6th Ed. (1958), p. 706, et seq. The absence of possession also may be some indication of the absence of taking possession. The cases of *State v. Dyett*, 114 Utah 379, 199 P.2d 155 (1948) and *State v. Brooks*, 101 Utah 584, 126 P.2d 1044 (1942), cited by the appellant, are material

only if possession is the only evidence of record sufficient to show an actual taking by the appellant. The record shows that Gerald D. Shelton testified to the appellant's taking possession of some of the money; he testified as follows: (R. 177).

“Q. Now there was a small cash box, a metal cash box there, was there not?

A. Yes, there was.

* * *

Q. Who opened that cash box?

A. I think Markham tried to open it. I had my back turned because Ted was going through some papers in this other drawer. I think Markham tried to open it and I was holding it when he opened it.

Q. Did you open that cash box?

A. No, I did not.

Q. Did you take any money out of it and give it to Markham?

A. I took a bunch of envelopes out of it that Ted said there was some money in, and Markham took some of it and *Ted took some of it* and I took some of it.”

Thus the evidence directly shows that some of the money was actually taken by the appellant. The appellant contends that since there was no showing at the time he was searched by the police at the premises burglarized, that he had possession of any of the money, that it indicates a non-taking. This is not adequately supported by the record, for at the time the appellant was searched, the police were not looking for any money, but rather for a

weapon. Thus, David T. Hill, a private policeman, testified: (R. 97).

“Q. Now you indicated that you, together with another officer, did have the occasion to search the defendant in this case?

A. That’s correct.

Q. And is it also your testimony that you found only a small pocket knife together with some keys?

A. No—I didn’t say keys. The only thing, as I recall, that I took off the man was the small pocket knife. I don’t remember exactly how long it was. It was a small pocket knife. I don’t even remember how many blades. *The only thing I was looking for at the time—and I shook him good—was some type of weapon.* That was the only thing I took from the fellow.”

In addition, Officer Don G. Ferguson testified that he only “frisked” the appellant. (R. 121). Therefore, there is nothing to overwhelmingly rebut Gerald D. Shelton’s testimony that the appellant took some of the money. Even if it is assumed that at the time he was searched he had none of the \$124.67 that was taken in his possession, it still does not rebut the taking, since he could have gotten rid of it or given it to the third accomplice, Johnny Markham. This would have been sufficient asportation to satisfy that element of the crime. *People v. Gillis*, supra; Clark & Marshall, Crimes, 6th Ed. (1958), p. 738. Under these circumstances, the evidence of taking possession is sufficient to sustain the conviction.

Even if it were determined that the evidence is insufficient to demonstrate an actual taking of a sufficient amount for grand larceny by the appellant himself, it is submitted that the trial court correctly ruled on the issue of imputing the conduct of the accomplices to the appellant. In *People v. Collins*, 53 Cal. 185 (1878), the court held that one who merely pretends to aid another in order to get evidence is not guilty of burglary and an entry by that person cannot be imputed to the other. In *People v. Lanzit*, 70 Cal. App. 498, 233 Pac. 816 (1924), the court said, with reference to imputation of conduct by a feigned accomplice to an accused:

“It is of course necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed shall alone be sufficient to make out a complete offense against the law; for no act of the feigned accomplice may be imputed to him, and if in order to constitute the offense, it is necessary that something done by the supposed confederate shall be imputed to the accused, then the prosecution will fail.”

To the same effect is *State v. Jansen*, 22 Kan. 498, and in *United States v. Buck*, 3 U.S.C.M.A. 341, 12 CMR 97 (1953), Chief Justice Quinn writing the opinion for the Court of Military Appeals, said:

“It is necessary to show that he participated in every essential act necessary to constitute the crime, however, *for obviously no act of the decoy can be imputed to him*, because they do not share a common criminal intent or purpose. The one intends a crime, while the other seeks only to apprehend the criminal.”

See also Perkins, Criminal Law, p. 921-2.

The essential factor of these cases is that the acts of a decoy or feigned accomplice may not be imputed to the defendant. In this case, the acts of Gerald D. Shelton cannot be imputed to the appellant under this theory; however, Johnny Markham was not a feigned accomplice or decoy; he was an actual accomplice with the appellant, and, hence, because appellant and Markham had a common purpose and intent, their acts are imputable to each other. By the appellant's own testimony (R. 157), he and Markham intended to take money from the Payless Builders Supply and entered for that purpose. There was a unity of intent and action between appellant and Markham, and appellant testified the money was given to Markham. (R. 158). When Markham was searched, the sum of \$80.70 was taken from him (R. 109), and the above quoted testimony of Shelton and appellant's own testimony supports Markham having taking some of the Payless money. Since Markham's actions are not those of the decoy, they may be imputed to appellant and suffice to support the conviction for larceny.

POINT II.

THE COURT DID NOT LET THE JURY SEPARATE AFTER DELIBERATION, AND THE APPELLANT HAS WAIVED ANY RIGHT TO OBJECT.

The appellant's contention that the court allowed the jury to separate after submission of the case to the jury is not well taken for it assumes that the case was

in fact submitted to the jury prior to their separation for lunch.

The only reference in the record to the alleged separation of the jury shows that after the charge and arguments of counsel, the court addressed the jury as follows: (R. 204).

“THE COURT: Mrs. Gunn, and gentlemen of the jury, as you have observed I am trying two cases here in effect at once. I have this other coming at two o'clock and I have to have a noon hour, and in order to have it I can't wait here while you are deliberating. So I am going to excuse you for your noon hour. I'm going to excuse you until 1:30 this afternoon and ask that you return at that time, and that you very carefully keep in mind your conduct, as I have indicated is your duty, and at that time I will send you out to deliberate on the issues in this matter.”

No objection to the court's actions was voiced by the appellant. 77-31-27, U.C.A. 1953, provides:

“The jurors sworn to try a criminal action may, at any time before the submission of the case to the jury, in the discretion of the court be permitted to separate or be kept in charge by a proper officer.”

The important part of the statute is the word “submission.” If the case is automatically submitted to the jury after charge and argument, without further action of the court, then the appellant's contention that separation occurred after submission may be correct. However, if submission of the case does not occur until the judge directs the jury to their deliberations, then the jury

in the instant case could not have been said to have separated subsequent to submission. It is submitted that 77-31-32, U.C.A. 1953, does not support a contention that the Legislature deemed the case submitted on completion of the charge, but rather the statute merely recognizes that under Utah practice the charge usually is the last act preceding the jury's deliberation.

77-32-1, U.C.A. 1953 seems to recognize that the trial is still in progress until the jury retires for deliberation. 77-32-1-4, U.C.A. 1953, are equally as susceptible to the contention that the case must be submitted by the judge to the jury for deliberation as is 77-31-32, U.C.A. 1953 to the contrary. It is submitted that the Legislature, in 77-31-27, U.C.A. 1953, by using the word "submission," meant that time of the trial that the judge surrenders the matter to the jury's determination. The danger of influence is no greater before commencing deliberation just because the charge has been given than prior thereto. The real danger sought to be avoided is outside influence upon the jury, and after commencement of deliberations, the chance for harm is greatest. As is noted in 21 ALR 2d 1093, "the trend of the decisions is away from a strict and technical approach to the question." Once the jury has entered into deliberations the minds and views of the jurors are expressed, and influence at this time may result in over-emphasis of evidence, or coercion, that could persuade the jury to a result where prior to deliberation they have no dominion over the result, and communications are less susceptible to causing mass coercion or influence. Therefore, it is contended that a case should not be deemed submitted until court

directs the jury to enter into its deliberations. This accords with decisions from other states; thus as was noted in 34 A.L.R. 1210:

“A case is finally submitted to the jury, within the meaning of a statute forbidding their separation when the case is finally submitted, at such time as the court directs the jury to enter upon its deliberations and not necessarily at the conclusion of the charge of the court to them.”

See also 21 ALR 2d 1139; 79 ALR 836.

77-31-27, U.C.A. 1953, allows separation at any time “before the submission of the case to the jury.” In *State v. Ferrell*, 69 Ohio St. 69 N.E. 995 (1903), the Ohio Supreme Court had a case before it similar to the one now before the court. The court, in that case, allowed the jury after receiving the charge, to go for their noon meal. The Ohio Appellate Court found no error. In commenting on an Ohio statute similar to that of Utah, the Ohio Court said:

“We think the natural inference is that it was intended to remove the iron clad rule and leave some discretion in the trial judge as to when he would finally submit the case.”

In *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050 and *State v. McKinney*, 31 Kan. 570, 3 Pac. 356, the court said it was not error to allow the jury to separate at any time before committed to the custody of the bailiff.

It is admitted that a split of authority exists in this area, 23A CJS, Criminal Law, p. 959, and some authority exists to support appellant's contention. *Page v. State*,

..... Okl. Cr., 332 P.2d 693 (1958). However, it is submitted that only by holding that submission is accomplished upon the court directing the jury to commence deliberations can the trial judge maintain adequate control over the trial, and avoid unforeseen problems that may require additional attention after the charge, but before deliberation.

It is submitted that even if it were deemed error in the instant case to have allowed the jury to separate for lunch, the appellant may not now complain since no objection was raised either by appellant or counsel to the separation. Counsel had full opportunity to object, both before and after separation, but no objection was voiced. In such circumstances as this, the courts have recognized that an accused cannot sit back and acquiesce in the separation and thereafter claim error. Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 691. In Wharton's *Criminal Law and Procedure*, Sec. 2108, it is said:

“Ordinarily the defendant must make prompt objection to the separation or he will be deemed to have waived any objection thereto.”

A substantial amount of authority has recognized the necessity of counsel or the accused to object. 21 ALR 2d 1149. In *Walker v. State*, 71 Ga. App. 38, 29 S.E. 2d 819 (1944), it was held that the defendant's failure to object operated as an implied consent where the jury was allowed to go to lunch after submission.

In *Keith v. Commonwealth*, Ky., 243 S.W. 293 (1922), the Kentucky Court of Appeals had a claim

of error before it where the trial court allowed the jury to separate for the noon meal; in holding the right to complain to have been waived, the court said:

“If appellant had objected to the separation of the jury at the time the court allowed it, or if he had moved the court at any time before verdict for a discharge of the jury, it would have been reversible error to have overruled the objection and motion. Having failed to pursue this course he waived, as he had a right to do, the error.”

Even those jurisdictions that have accepted the rule that a case is submitted after charge, have found that where counsel and the accused sit quietly by and allow the jury to be separated, they have waived any right to complain. Thus, in *Hobson v. State*, 277 P.2d 695 (Okla. Cr. 1954), the court allowed the jury to separate for lunch after beginning their deliberations. The accused and defense counsel remained silent while the trial judge announced his intentions, and the Oklahoma Court of Criminal Appeals found a waiver, noting:

“But in the within case there was no specific waiver entered of record. Could there be a waiver by implication? The record is clear that both counsel for the State and counsel for the defendant were present when the court announced his intention of permitting the jurors to separate and go to their separate places for lunch. No objection was made at the time, as heretofore recited, though there was full opportunity. The matter of permitting the jurors to separate was a matter of procedure, amounting to an irregularity, which must be taken advantage of by exception. It is true that the defendant had the right to have the jury kept together after final submission until

they agreed upon a verdict or were discharged by the court, but the right coming within the classification of those rights that can be waived, as heretofore determined, the defendant and his counsel by failure to raise the question at the time the court announced his intention of permitting the jury to separate, are deemed to have acquiesced, and objections interposed for the first time on a motion for new trial, came too late.”

Nor can appellant claim that he could not object without offending the jury, since a proper objection could have been made out of their hearing. *Martin v. State*, 222 P.2d 534 (Okla. Crim. 1950).

It is submitted that there is no merit to the appellant’s contention of jury misconduct.

POINT III.

NO EVIDENCE OF ENTRAPMENT EXISTS WARRANT- ING REVERSAL.

The appellant’s final contention is that his conviction for all offenses should be set aside because his commission of the crimes was the result of entrapment. The evidence bearing on the issue of entrapment shows that some time prior to the commission of the burglary and larceny on 12 December 1960 at Payless Builders Supply, Officer Gary Parks had several conversations with Gerald D. Shelton, and that on the 11th of December, 1960, Shelton told Parks that the defendant and Markham “had approached him with the idea of committing a burglary.” (R.128). The burglary was to be of Ream’s Bargain Center in South Salt Lake. (R. 128). Parks asked Shel-

ton to verify the information as to the proposed robbery. Parks testified that Shelton was not an undercover or agent for the City Police. (R. 130, 131). Parks testified that he did not receive any calls or notice from Shelton as to the Payless burglary, but that he heard certain information on the police radio that caused him to go to a gas station where Shelton had left a note and then on to the Payless Builders Supply Co. where the appellant, Shelton and Markham had been apprehended. Parks had been called by the appellant, and on cross-examination testified as follows: (R. 136).

“BY MR. LEARY:

Q. Mr. Parks, you are acquainted with Mr. Gery Shelton, aren't you? Gerald Shelton?

A. Yes.

Q. Did you on December 11, 1960, ask Mr. Shelton to set up a burglary so that Mr. Pacheco and Mr. Markham could be caught?

A. No, sir.

Q. Did you encourage him in any way?

A. No, sir.

* * *

Q. Did you tell Mr. Shelton on the 11th day of December or any day prior thereto, that Mr. Markham and Mr. Pacheco, or induce Mr. Markham or Mr. Pacheco to burglarize Payless Builders Supply?

A. No, sir.

* * *

Q. Now did you induce Mr. Shelton to commit the burglary on the Payless Builders Supply in the summer of 1960?

A. No, sir.

Q. Did you suggest to him that he commit a burglary at the Payless Builders Supply?

A. No, sir.

Q. Do you believe that he induced Mr. Pacheco to commit a burglary on the morning of December 12, 1960?

A. No, sir.

Q. Now, in truth and in fact, you suspected that a burglary might be committed at Reams Bargain Annex on the night or morning of December 11th or 12th, 1960, didn't you?

A. That's correct.

Q. Now you had asked Mr. Shelton, had you not, Mr. Parks, if he had any information concerning any burglaries to notify you by phone, is that correct?

A. That's correct.

Q. And you therefore gave him your telephone number, is that correct?

A. That's correct. Yes.

Q. Did you make any promises to Mr. Shelton concerning any crime that he may have participated in as to whether he would or would not be prosecuted?

A. No, sir.

Q. That is all."

The substance of Officer Park's testimony was that he told Shelton to keep him informed of possible burglaries that may involve the appellant. (R. 141). Finally, on redirect he testified: (R. 142).

“Q. Did you at any time prior to the Payless Builders Supply incident, use your influence or the influence of your office to permit Gerry Shelton to continue his driving of his private vehicle?

A. No, sir.”

The appellant testified that he was a convicted felon (R. 144), and that he had conversations with Shelton about the possibility of committing a crime. (R. 145). He testified that he and Shelton had discussed burglarizing the Equitable Life Insurance Co., Ream’s Bargain Basement, and an A & W Root Beer stand, and that these conversations took place on 11 December, 1960, the day before the Payless Builders burglary. (R. 147). Later that night Shelton contacted the appellant and asked about the burglary, and appellant testified he told Shelton, “Not at this time,” with reference to the burglary. After a few moments of riding around in the appellant’s car, they arrived at Ream’s Bargain Center. The appellant testified (R: 149):

“A. When we got to Reams Bargain Center and I said ‘No,’ and Johnny said ‘No,’ Gerry said, ‘Well, what about the other one?’ He said, ‘What about the Payless Lumber?’ And I told him, ‘Well, we’ll go down there and see.’”

Appellant further testified it was Shelton who suggested the possible burglaries (R. 151), but that the places suggested were not favorable to him. (R. 152). On direct examination the following testimony was elicited: (R. 152).

“Q. Now, Mr. Pacheco, when Mr. Shelton suggested that you go down to Reams, and then

when that didn't work that you go down to Payless Builders Supply, what made you go along with him?

A. Well, partly because it was myself but three fourths of it was his own reputation.

Q. Mr. Shelton's reputation?

A. That's right."

On cross-examination, the appellant testified: (R. 157).

"Q. Well, what was your particular purpose in breaking in there?

A. Well my purpose to break in there—

Q. Yes, your purpose.

A. Because it was offered to you."

He testified to breaking and entering to steal money (R. 158), and that he intended to avoid the police. He testified: (R. 158).

"A. What do you mean, I wouldn't have told anybody about it?

Q. Well I mean you wouldn't have told any officers about it?

A. I don't think anybody would have.

* * *

Q. Well you just all went over there, and you just broke in, is that right?

A. No. *I had been talking about it before.*"

Appellant testified further that he went on the burglary because he was "asked to go," and further: (R. 160).

"Q. And nobody forced you to go down there, did they?

A. Nobody forced me to do anything.

Q. And you went down there because you wanted to go down?

A. I went down because I wanted to go down there."

Appellant testified he was not offered money to commit the burglary. (R. 161).

Gerald D. Shelton was also called as a defense witness and testified that he had a conversation with the appellant the day before the burglary. He testified to the substance of the conversation as follows: (R. 163).

"A. Yes. He was talking, Ted, we was talking about hitting some place, about burglarizing some place, and I says, 'Okay, I'll go with you.'

Q. And that was the extent of the conversation?

A. Yes."

Shelton further testified that he contacted Officer Parks the day before the burglary and informed him of the planned incident. Parks told him to go ahead, that he would be protected. (R. 165). Shelton's testimony, however, was that the appellant induced and conceived of the burglary (R. 167), and that he just went along. He testified on cross-examination that he never suggested to the appellant or Markham the commission of the burglary. (R. 171). In this particular the record shows the following: (R. 172).

"Q. Did you ever encourage either Mr. Pacheco or Mr. Markham to burglarize or attempt to burglarize Reams Bargain Annex?

A. We had talked about it, but I never encouraged it.

Q. Did you ever suggest the burglary at Payless Builders Supply Company?

A. No, I did not.

Q. Did you ever induce Mr. Pacheco to even commit a burglary at the Payless on the morning of December 12, 1960?

MR. MITSUNAGA: I object to that. I believe it calls for a —

THE COURT: Well, he may answer.

Q. Did you ever encourage Mr. Pacheco to commit the burglary at the Payless Builders Supply on the morning of December 12, 1960?

A. No, I didn't. We had talked about it but I didn't encourage it.

Q. Was it your idea that you burglarize the Payless Builders Supply Company on the morning of December 12, 1960?

A. No.

Q. When did you first talk about the burglary of Payless Builders Supply?

A. It was after this Reams Food Bargain Center — Ted said he knew of another place that we had hit before that he wanted to do.

And further: (R. 173).

“Q. Mr. Pacheco said ‘I know of another place that I burglarized before. Let’s go do it? Is that right?

A. That's right.

Q. And you did go there, didn't you?

A. Yes.

Q. Now did Mr. Parks of the Salt Lake City Police Department tell you to induce Mr. Pacheco to commit a burglary?

A. No.

Q. Did he tell you to encourage Mr. Pacheco—

A. No.

Q.—to commit a burglary, any burglary?

A. No, he did not.

Q. Did he ever offer you any money if you encouraged or induced Mr. Pacheco to commit any burglaries?

A. No, he did not."

The substance of Shelton's testimony was that appellant conceived of the burglary, and that he, Shelton, went along after informing the police, but that he did not encourage the burglary nor did Officer Parks encourage him to encourage others to commit the crime.

The above testimony, it is submitted, conclusively shows that no entrapment was committed, and that the trial court gratuitously allowed an instruction on the matter where none was warranted.

In *Salt Lake City v. Robinson*, 40 Utah 448, 125 Pac. 657 (1912), the Supreme Court, although not characterizing the defense as one of "entrapment," set down a similar substantive test as to when a conviction was to be vitiated because of police inducement. The court said:

“No doubt if public offices have induced or procured a defendant to commit a burglary or larceny or other offense which he did not intend to commit nor would have committed except for the inducement of such officer, public policy will not justify a conviction for an offense committed under such circumstances.”

The rule followed in *State v. McCornish*, 59 Utah 58, 201 Pac. 637 (1921); and found not applicable to the facts of *State v. Franco*, 76 Utah 202, 289 Pac. 100 (1930). Thus it can be said that entrapment is a recognized doctrine in Utah.¹ The rule is the same as that applied in other cases. In *Sherman v. United States*, 356 U.S. 369 (1958), the United States Supreme Court stated:

“However, the fact that government agents ‘merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was the ‘product of the creative activity’ of law enforcement officials.”

The Nevada Supreme Court in *In re Wright*, 68 Nev. 324, 232 P.2d 398 (1951) defined entrapment as follows:

“Entrapment is the seduction or improper inducement to commit a crime for the purpose of instituting a criminal prosecution, but if a person

1. Entrapment is not recognized in all jurisdictions. Thus New York does not recognize it, *People v. Schacher*, 48 NYS 2d 371 (1944) nor Tennessee, *Goins v. State*, 192 Tenn. 32, 237 S.W. 2d 8 (1950). Florida has partially abolished it by statute, 22 Fla. Stat. Ann., Sec. 838.11 (1957). It is questionable as to whether several other common law jurisdictions approve of the American rule as such. *Browning v. JWH Watson*, 1 WLR 1172, 2 All E.R. 775 (1953 England); *Smith v. O'Donovan*, 28 NZLR 94 (1908 New Zealand); *Marsh v. Johnston* (1959) Crim. L.R. 444 (Scotland) contra: *R. v. Nothout* (1912), CPD 1037 (South AF).

in good faith and for the purpose of detecting or discovering a crime or offense furnishes the opportunity for the commission thereof by one who has the requisite criminal intent it is not entrapment.”

The Oklahoma Court of Criminal Appeals has defined the concept of entrapment in *Crosbie v. State*, 330 P.2d 602 (1958 Okla. Cr.) as follows:

“Entrapment is the planning of an offense by an officer, or someone acting under his direction, and his procurement by improper inducement of its commission by one who would not have perpetrated it except for the trickery of the officer.”

Thus there appear to be two essential elements to the defense of entrapment: (1) the unlawful inducement, and (2) the commission of the crime as the direct result of the trickery and not the result of a willingness or preconceived criminal intent. *United States v. Sherman*, 200 F. 2d 880 (1952). In determining whether the police inducement provided the unlawful intent, Justice Learned Hand said in *United States v. Sherman*, 200 F. 2d 880, 882:

“(I)t is a valid reply to the defense, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offense charged, whenever the opportunity offered.”

It is also the generally accepted rule in the majority of jurisdictions that evidence of previous convictions and misconduct of the same may be considered in determining the “ready compliance” or “criminal design” of the defendant. *Sorrells v. United States*, 287 U.S. 435, 451 (1932); 49 Jnl. Crim. & Pol. Sci., 447, 450.

By applying the above noted rules to the instant situation, it appears clear that the defendant was not entrapped. Both Officer Parks and Gerald Shelton testified that the original idea to burglarize Reams market and Payless Builders came from the defendant. Both testified that they in no way encouraged the crimes to be committed. The defendant's own testimony shows that he was not forced to go along, but committed the crimes readily because he was "asked to." He was not induced over a long period of time, but rather, assuming that Shelton suggested the idea, the appellant readily complied. His objection to burglarizing Reams Market was not because of a lack of criminal desire, but rather because he felt Payless Builders would be better. The issue of entrapment is one for the jury, *United States v. Markham*, 191 F.2d 936 (1951), unless as a matter of law it appears that entrapment was present. *United States v. Sherman*, 356 U.S. 369 (1958). The jury could well have believed Parks and Shelton that the criminal conduct originated with the appellant; hence sufficient evidence to sustain the conviction in spite of the entrapment plea exists, and the jury's decision must be upheld. *Berchtold v. State*, 11 Utah 208, 357 P. 2d 183 (1960). Even were the appellant's testimony believed in full, the second element for the defense of entrapment is expressly negated by appellant's ready compliance. For this reason the trial court's instruction placing the defense in issue for the jury was a mere gratuity, as the issue was not raised as a matter of law.

The evidence is similar in the instant case to that before the court in *People v. Malone*, 117 Cal. App. 629,

4 P. 2d 287 (1931), where the court held that no entrapment existed. It is submitted, therefore, that the claim of entrapment is not well taken.

CONCLUSION

The appellant's claims show no basis for reversal of his convictions, and it is submitted the conviction should be affirmed.

Respectfully submitted,

A. PRATT KESLER

Attorney General

RONALD N. BOYCE

Assistant Attorney General

Attorneys for Respondent