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State of Utah v. Edgar Glen Cude : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent.

vs.

EDGAR GLEN CUDE,

Defendant-Appellant.

FILED
FEB 3 1 1962

Clerk, Supreme Court, Utah

Case No.

9619

BRIEF OF RESPONDENT

Appeal from the Judgment of the
2nd District Court for Weber County
Hon. Parley E. Norseth, Judge

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STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
EDGAR GLEN CUDE,
Defendant-Appellant.

Case No.
9619

BRIEF OF RESPONDENT

NATURE OF THE CASE

The appellant has appealed from his conviction of grand larceny upon jury trial in the Second Judicial District, State of Utah.

DISPOSITION IN LOWER COURT

The appellant, Edgar Glen Cude, was convicted of grand larceny by stealing his own automobile from the possession of the labor lienholder. Upon a finding of guilty

by the jury, the appellant was committed to the Utah State Prison for the indeterminate period provided by law.

RELIEF SOUGHT ON APPEAL

The State of Utah contends the conviction should be affirmed.

STATEMENT OF FACTS

The appellant, Edgar Glen Cude, brought his car to Mr. Harold H. Pettigrew, operator of Harold's Auto Sales in Ogden, Utah on August 16, 1961 (R. 7-8). The vehicle would not run and had to be towed to Mr. Pettigrew's shop (R. 8). Upon examination of the vehicle by Mr. Pettigrew and Mr. Eugene Seifert, Mr. Cude was informed that the vehicle would require substantial repairs, including replacement of the camshaft and bearings (R. 95). He was further told that he could not be given an exact appraisal of the cost of repairs since the amount of repair work necessary could not be ascertained until the vehicle's engine was torn down and examined (R. 9). Mr. Cude informed Mr. Pettigrew that he was going to be out of the State, in Montana, for about 30 days and that Mr. Pettigrew should do whatever was necessary to put the car in good condition so that he would have good transportation (R. 10). Mr. Pettigrew informed Mr. Cude that from his initial appraisal the cost might be around \$180.00, but that he could not tell what it would be until the engine was torn down (R. 9-10). Mr. Cude told Mr. Pettigrew to do whatever was necessary. Thereafter, Mr. Pettigrew repaired the vehicle, including doing several things which appeared necessary after ex-

aming the engine (R. 1). The cost of the repairs was \$345.97. On September 20, 1961, Mr. Cude returned to Ogden and was presented with the bill for repairs to his vehicle (R. 14). He made no objection to the bill (R. 70). He had only a few dollars on his person, and indicated that he would go to Salt Lake City to get the money from a friend to pay for the repairs to the car (R. 67, 70, 71, 78, 80). Thereafter, Mr. Cude left. At 9:00 p.m. that night, he had not returned and his car was locked up at Mr. Pettigrew's place of business (R. 4).

Subsequently, the night of the 20th, or the morning of the 21st of September, 1961, Mr. Cude returned to Mr. Pettigrew's business establishment and took his vehicle (R. 62-64). He testified that he took his car for the purpose of selling it to see if he could get some money to apply on the bill (R. 66-71). Cude at no time testified that he intended to return the vehicle, but rather testified that he intended to sell it, and intended to pay Mr. Pettigrew as he could. On September 23, 1961, Mr. Denny Maxwell was stopped, driving the vehicle, and at that time he indicated he had purchased the vehicle for \$50.00 from Mr. Cude. He produced the registration which had not been negotiated. Mr. Cude admitted selling the vehicle to Mr. Maxwell (R. 32-38). No monies were ever paid to Mr. Pettigrew in satisfaction of the labor lien or debt.

During the trial, defense counsel on direct examination asked Mr. Cude if he had ever been convicted of a felony, to which he replied affirmatively (R. 61). He was not asked the number of convictions or the nature of the

crimes (R. 61-62). The defense counsel also questioned (R. 61):

"Q. When was the last time you were under a felony conviction? Either serving time, or—

"A. 1952."

On cross-examination (R. 75), the prosecutor asked:

"Q. Isn't it a fact that you have been convicted of a felony?

"A. I admitted that.

"Q. How many times, Mr. Cude?

"MR. RAAT: Object, Your Honor. This is incompetent, irrelevant and immaterial to this case.

"THE COURT: Oh, I'll hear the answer. You opened it up.

"MR. NEWEY: Q. How many felonies?

"A. Three times.

"Q. Three times?

"A. Yes sir.

"Q. Tell us what the nature of the first felony was, Mr. Cude.

"MR. RAAT: I object, Your Honor. This is incompetent, irrelevant and immaterial.

"THE COURT: You opened it up, Mr. Raat. He may answer. The objection is overruled.

MR. NEWEY: Q. What was the first felony, Mr. Cude?

"A. A statutory offense.

"Q. What was that?

"A. Statutory. You heard me.

"Q. Statutory rape?

"A. Yes.

"Q. What was the next felony you were convicted of?

"A. Armed robbery.

"Q. And what was the next felony you were convicted of, Mr. Cude?

"A. Armed robbery.

"Q. Now, if I understood your testimony right, you say that you have been out since 1952?

"A. I said that was the last time I was convicted of a felony.

"Q. When did you last get out of the penitentiary?

"A. In 1960."

The appellant took exceptions to certain instructions given to the jury by the trial judge (R. 118, 119). Based on the above record, the jury returned a finding of guilty. The appellant contends that his conviction was based on error, and now seeks reversal.

ARGUMENT

POINT I

THE CROSS-EXAMINATION OF THE ACCUSED, BY THE PROSECUTOR, AS TO PREVIOUS FELONY CONVICTIONS, THEIR NATURE AND NUMBER WAS PROPER CROSS-EXAMINATION.

The appellant contends that the trial judge "abused his discretion" in allowing the prosecutor to cross-examine appellant relative to the number and nature of his previous felony convictions. The appellant relies upon a statement extracted from *State v. Hougensen*, 91 Utah 351, 64 P. 2d 229 (1936), loc. cit. p. 371. The appellant has taken his quote from the ninth principle set out in that opinion¹. The quotation is actually inappropos for the cited proposition. What the court was actually speaking about was the liability of a defendant to be cross-examined on his criminal "acts" not amounting to a conviction, but which would relate to his veracity. This is obvious from the court's reference to rule (7), which covers that subject, and, further, it is obvious from the fact that rule (1) was not mentioned, which rule states:

"(1) Any witness may be asked on cross-examination whether he has been convicted of a felony."

It is doubtful, therefore, whether the *Hougensen* case is authority for the principle urged. However, even if it

¹The court set out some eleven rules for the guidance of the bar in cross-examining or presenting evidence on character.

is concluded that the case is proper authority in this instance, it is misapplied under the facts of this case. First, the principle urged would require a finding of abuse of discretion. It appears from the language of the *Hougensen* case that the court was attempting to allow the trial court, which has an opportunity to see and observe both the witnesses and jury, broad discretion, since the court stated:

“But we think the matter should be left to the sound discretion of the court * * *.”

In the instant case, defense counsel² himself opened the matter for inquiry, and very obviously sought to limit implications to be drawn from the evidence to a conviction of *one* unnamed felony and, further, that since 1952 the accused was able to completely rehabilitate himself. This implication was false; and if for no other reason than to correct the erroneous inference that the appellant had not been in prison since 1952, the prosecutor was properly allowed his examination. It goes without saying that the nature of the crime committed is of great importance in weighing the defendant's veracity and, consequently, inquiry into the nature of the crime or crimes committed should be allowed. McCormick, *Evidence* (1954), p. 90, 92. By the same token, where the defendant has been convicted of more than one felony, the effect of this “trait of character” is relevant to the weight to be accorded his testimony. It may be that in a particular instance the parading

²The fact that a defense counsel may put on evidence adverse to his case does not necessarily preclude a prosecutor from thereafter doing so, especially for clarification. *State V. Seyboldt*, 65 U. 204, 236 P. 225 (1925); Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 Jnl. of Crim. Law, Criminology and Police Science 15 (1962).

of a whole raft of previous convictions may become cumulative and the relation to veracity be outweighed by the inference of general criminality; but such could not be claimed in this instance, since the prosecutor did not dwell at any great length on the accused's convictions, and merely set the record straight, rebutting the obviously distorted picture that was left by the defense counsel. The trial judge himself noted the fact that defense counsel had opened the door, and in the exercise of sound discretion allowed the prosecutor fair latitude.

Secondly, it is submitted that the appellant's contention is contrary to accepted principles of cross-examination. The general rules in this area are noted in 3 Wharton's *Criminal Evidence*, p. 370:

"Since, however, the weight of the evidence as a factor of impeachment depends upon the character of the crime involved in the previous conviction—that is, whether it involved moral turpitude or was merely *malum prohibitum*—it is held that the nature of the crime may be shown."

Further, *op. cit.* p. 384:

"The prosecution may show all convictions of the defendant, and may prove both the number and places of former convictions and the nature of the crimes involved therein."

A similar conclusion is noted in 98 C. J. S., *Witnesses*, Sec. 507c, p. 411:

"It is generally held that inquiry is not confined to the mere fact of conviction of some crime, but

the name and nature of the crime of which the witness was convicted may be brought out, * * *

and

“*Number of convictions.* It may be shown that the witness has been convicted of crime several times.”

See also 58 Am. Jur., *Witnesses*, Sec. 750; McCormick, *Evidence*, p. 89-92; Wigmore, *Evidence*, Vol. III, Sec. 980, 985-87.

In *State v. Crawford*, 60 U. 6, 206 P. 717 (1922), a similar issue was raised before this court. The court found that cross-examination of an accused into the nature of a felony conviction was permissible. The court noted:

“The defendant testified on his own behalf, and, in response to an interrogatory by his counsel, answered that he had been convicted of a felony. On cross-examination by the district attorney, defendant was asked what was the charge on which he had been convicted. To this question his counsel objected, on the ground of irrelevancy and immateriality. Defendant answered that the conviction was for robbery. It is argued that the statute of Utah requires that ‘a witness must answer the fact as to a conviction for felony,’ and that, when that question has been answered, the demands of the statute have been met. *State v. Gottfreedson*, 24 Wash, 398, 64 Pac. 523, and *State v. Strodemier*, 40 Wash, 608, 82 Pac. 915. The weight of authority, and, we think, the better reasoning, is that the jurors are entitled to know of what particular felony a witness has been convicted. The evidence of conviction is admissible for the purpose of affecting the credibility of the witness. Some crimes involve a greater degree of moral turpitude than

others. Some felonies are more heinous than others. Some convictions on felony charges affect the credibility of witnesses much more than others."

In addition, the court approved cross-examination by the district attorney into another felony conviction of the defendant not admitted on direct examination, and where the appeal from the conviction was not final. The instant case gives little room for distinction. In *State v. Owen*, 73 Ida. 394, 253 P. 2d 203 (1953), the Idaho Supreme Court was faced with a similar contention as that now made by the appellant. The accused on direct examination testified that he had been convicted of a felony. On cross-examination, the prosecutor brought out the fact that there had been three felony convictions and also established their nature. The court cited the *Crawford* case, *supra*, with approval and concluded:

"We conclude that no error was committed by requiring the appellants to state the nature of the felonies for which previous convictions had been admitted."

The same conclusion was recently affirmed in *State v. Roderick*, Ida., 375 P. 2d 1005 (1962), where the prosecutor asked of the accused the number of felonies for which he had been convicted.

Other cases from this court and other courts support the prosecutor's action. *State v. Johnson*, 76 U. 84, 287 P. 909; *State v. Wood*, 2 U. 2d 34, 268 P. 2d 998 (1954); *State v. Goodloe*, 144 Ore. 193, 24 P. 2d 28; *Dively v. People*, 74 Colo. 268, 220 P. 991; *State v. Sorrell*, 85 Ariz. 173, 333 P. 2d 1081; *People v. Guiterrez*, 152 Cal. 2d 115, 312 P. 2d

291. It is submitted that the appellant's contention is without merit.

POINT II

THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO INSTRUCTING THE JURY.

The appellant in two points in his brief has claimed three instructional errors of the court. The State will meet these claims in one point of argument.

The appellant's first claim of error relates to the trial court giving the following instruction:

"Before you can find the Defendant guilty of the offense of grand larceny, as charged in the information, the State must prove to your satisfaction, beyond a reasonable doubt, the following:

* * * *

"That the taking away of said automobile was done with the wilful, unlawful and felonious intent of depriving the said Harold's Auto Sales of its right, as a lienholder, to the possession of said automobile."

The appellant contends that the court should have added the word "permanently" before the word "depriving."

It is submitted that the appellant can claim no basis for reversal on this point for two reasons. First, it is submitted that use of the word "permanently" would require the jury to find a deprivation of something greater than the right the lienholder had, and consequently, could only confuse the jury. In order to put the matter clearly before

this court, it is essential to determine what rights the lienholder had. It is submitted that he has two independent rights. First, he has the right to receive payment for his labor, and, secondly, he had the right to maintain possession of the property he labored on in security for payment of his bill. These rights are separate and distinct, but related to the extent that payment ends the possessory right. Section 38-2-3, Utah Code Annotated 1953. However, loss of the possessory right does not excuse payment. By the same reasoning, if the possessory right is interfered with or destroyed, payment coming some time in the future cannot change the fact that the lienholder lost an otherwise valuable right to possess the enliened property as security or foreclose his lien if necessary. With these distinctions in mind, the problem involved becomes clear. The possessory right is *not* a right to permanent possession of the lien property, but rather the right is a *temporary* one, *conditioned* upon payment. Under the provisions of Section 38-2-3, Utah Code Annotated 1953, the lienholder only has a right to retain the property for the period until the labor debt is satisfied. As a consequence, an instruction which would require the jury to find a permanent interference with possession is misleading since the right of possession is conditional and temporary. There is a distinction between the conditional right of the lienholder and the fee right of the owner. Each is different and as a consequence makes a difference in the intent required in larceny of such interests. Perkins, *Criminal Law*, (1958) p. 224, notes the distinction and states:

“The common statement is that the intent to steal—or *animus furandi*, to use the Latin substitute—requires an intent to deprive the owner *permanently* of his property. This conveys the idea in a general way but requires some explanation. Mention has been made of the possibility of larceny committed by the owner himself, by taking possession from another for the purpose of defeating a property right of the possessor. Hence it must be understood that *an intent to deprive a possessor of the benefit of a property right he has by reason of his possession may be sufficient for the intent to steal.*”

The real problem is obviously what is the requisite *mens rea*. The answer is: to destroy the lienholder’s possessory right to the property for the period for which he is entitled to possession. *State v. Parker*, 104 U. 23, 137 P. 2d 626 (1943). When this principle is compared to the instruction given by the court, it appears that the jury was sufficiently appraised of the requisite intent. The requested instruction of the appellant would have been misleading and confusing, which rendered the instruction improper. *State v. Hougensen*, *supra*. The court possibly might have been more precise in the instructions given by stating that the jury must find that the appellant intended to deprive the owner of his possessory interest as security for payment for as long as the lienholder was entitled to such security, but it is doubtful if this would be any-the-more comprehensible to the jury than the instruction given. However, one thing is certain, that the requested instruction was not sufficiently definite as to require the court to present it to the jury, and no error could be claimed from the failure to do so.

Additionally, it is submitted that another substantial reason exists why no error can be claimed by appellant. It is simply that there was no evidence before the jury that would warrant their finding an intention to return the *res*. Appellant's testimony, and judicial admission, was that he took the automobile to sell it to satisfy the debt. Thus, he never intended to allow the lienholder to regain his possessory interest, and can claim no error from a failure of the trial court to be more definitive in this area. The error of the appellant's defense was to conclude that the intent to pay could absolve him from the interference with the possessory security interest. As seen above, the possessory interest is a right in addition to the right to request payment, although allied thereto. Since no evidence was before the jury as to an intended limited deprivation of the possessory interest, and since the judicial admissions of the appellant show an intent to sell, thus depriving the lienholder of his possessory interest³ the jury could have found no other way than against the appellant. The appellant, therefore, could not conceivably claim any prejudice. Since Section 77-42-1, Utah Code Annotated 1953, requires this court to weigh for specific substantial prejudice, no basis for reversal can be claimed in its absence. In *State v. Anderson*, 100 U. 468, 116 P. 2d 398 (1941), this court noted:

“* * * The instructions objectionable as they are nevertheless covered the issues and the evidence. Under the evidence the jury were justified in finding the verdict of guilty. The objectionable

³The question of whether after sale the lien would continue as against a third person purchaser is not before the court.

instructions given *or those requested and refused* could not as we view the matter have changed the result."

The recited principle is equally applicable to the instant case, since, in view of the appellant's judicial admissions, no other instruction could have changed the result and consequently no prejudice can be claimed⁴.

Appellant' second contention is that the court erred by instructing the jury that certain facts had been established (R. 112). This the court did not do. It instructed the jury that they had to find certain facts beyond a reasonable doubt or else acquit. All the court did was to instruct the jury with reference to the evidence before them. It merely tailored the instructions to meet the evidence. This is a far cry from instructing a jury that certain facts are "established beyond controversy," which was the complaint made in *State v. Green*, 78 U. 580, 6 P. 2d 177 (1931). In many cases, this court has directed that the court tailor its instructions for the jury, based on the evidence before them. Thus, in *State v. Aures*, 102 U. 113, 127 P. 2d 872 (1942), the court approved of instructions that were stated to the specific facts and testimony of the case, similar to those given in this case. Thus, the court noted:

"Instruction No. 7 was properly given, as such instruction *went to testimony given at trial.*"

⁴The State submits that since the definition of larceny under the Utah statute contains no reference to "permanency", such is not a part of Utah law so long as the taking is otherwise "felonious." This is obvious, since the only degrees of larceny are grand and petty, and no reference is made to a temporary taking—wrongful appropriation. However, since the matter need not be decided, the issue may be reserved until necessary for decision.

In *State v. BeBee*, 110 U. 484, 175 P. 2d 478 (1946), this court stated:

“* * * we emphasize that the court should apply the law to the facts of the case as they appear in the evidence * * *.”

In the *BeBee* case, the court called attention to the decision of *State v. Thompson*, 110 U. 131, 170 P. 2d 153 (1946), wherein the court directed trial judges to do what was done in the instant case. The court said:

“Defendant urges that the court erred in giving general abstract instructions, using ancient and highly technical legal terms not understood by laymen, giving instructions which had no application to the facts in this case, and in not applying the law to the facts which were supported by the evidence, and that the jury was probably misled thereby and the case should be reversed on that account. We have repeatedly criticized the giving of abstract statements of the law to the jury, and held that it is the duty of the court to apply the law to the facts supported by the evidence and to not instruct on any question which is not involved in the case under the evidence. * * * (Cases cited.) We think that it cannot be too strongly emphasized that the court should apply the law to the facts as they appear from the evidence, and should instruct only on the law which has a bearing on facts, *and in stating the necessary elements to constitute the crime charged it should submit to the jury the facts involved in the case and not merely generalizations*, and where possible should avoid the use of technical legal terms and cumbersome definitions thereof, by using terms which will readily be understood by laymen. In that way, the jury will be given a much clearer understanding of its problems.”

A similar conclusion has been reached by the Washington Supreme Court, *State v. Phillips*, 42 Wash. 2d 137, 253 P. 2d 919. Abbott *Criminal Trial Practice*, 4th Ed., Sec. 668, states:

“The charge and instructions, whether given by the court of its own motion or upon request, should be so framed as to conform to the facts in evidence.”

No error can be claimed from the court's instructions based on the evidence and testimony received at trial where the jury was still allowed to find as it pleased.

Finally, the appellant contends that it was error not to give the following instruction (R. 19):

“In theft by larceny, the felonious intent that I have mentioned must exist when possession of the property is originally obtained by the person not entitled thereto, and it is not larceny to take property of another through mistake or under an honestly entertained claim of ownership or right to possession.”

The trial court apparently refused the instruction on the grounds that its substantive content was otherwise adequately “covered” by other instructions. The appellant apparently contends that the court's failure to so instruct ignored an issue or an affirmative defense. In both respects, the contention is erroneous. The court instructed the jury as follows (R. 112):

“Before you can find the Defendant guilty of the offense of grand larceny, * * * the State must prove to your satisfaction,

“* * * That the taking away of said automobile was done with the wilful, unlawful and felonious intent of depriving the said Harold's Auto Sales of its right as a lienholder to the possession of said automobile.”

The court further instructed the jury that (R. 112) :

“‘Felonious’ means proceeding from an evil heart or purpose, done with a *deliberate* purpose to commit a crime. A malicious wrongful act.”

The jury was, consequently, fully instructed on the intent that the accused had to possess in order to be convicted of the crime. It is generally recognized that the court need not give a requested instruction in the language of its proponent. Thus, Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 663, notes the rule:

“So, too, as a general rule, the court is not obliged to give requested instructions in the language precisely as framed and submitted, however correct they may be; but he may, in lieu thereof, give instructions prepared by himself, covering, as he views the case, all the questions of law presented upon which it is necessary and advisable to instruct the jury, * * *.”

In *State v. Chadwick*, 7 U. 134, 25 P. 737 (1891), the Territorial Supreme Court recognized the above rule. In that case, the trial court instructed the jury as to what it would affirmatively have to find to convict the defendant of larceny. The defendant had proposed another instruction on the same aspect of the case. The court found no error in refusing the instruction, stating:

"While the above instruction was not given in the language of the learned counsel presenting them, yet it embodies the substance of the request, and leaves the question to the jury as a circumstance for them to consider, and to say whether, under all the facts and circumstances shown, possession of stolen property was evidence of guilt or not; and at the same time the court instructed the jury that possession alone is not sufficient evidence upon which to convict. These instructions were given with reference to the proofs before them at the time, which the jury must have understood and applied with reference to such facts of possession as were shown; and, while the instruction was not as full and explicit as it might have been, yet it sufficiently covered the question presented." (7 Utah at 140.)

In *State v. Campbell*, 116 U. 74, 208 P. 2d 530 (1949), the court again recognized the rule, noting:

"The court did not give the instruction desired by the defense in the form so requested; but he did define the greater and the lesser offense each in detail, and pointed out that the latter was included in the former. He then instructed the jury to consider, first, the greater offense and its elements; and if the State failed to prove any one or more of the elements of that offense beyond a reasonable doubt, then the jury should consider the lesser offense. The Court followed this with an instruction that if the State failed to prove any one or more of the elements of this offense, then they should acquit defendant. Although not stated in its exact words, the jury could not apply the instructions given without applying the requirements of Section 105-32-5, quoted." (116 Utah at 82.)

In the instant case, the requested instruction of the appellant went to the theory of claim of right. However, neither mistake nor claim of right are affirmative defenses, but are matters that go to the question of whether the defendant had the required *mens rea*. *State v. Parker*, supra. This is not a situation where an affirmative defense such as self-defense, necessity, or insanity are involved. The taking under a claim of right or belief of legality only negatives the "felonious intent" required as an element of larceny. A clear statement of the defense is contained in "The Claim of Right as a Defense to Theft Cases," 4 Utah L. Rev. 528, (1954) :

"The elements of intent is a material consideration in all areas of the criminal law. In the field of theft offenses, the claim of right *is of considerable importance in determining the existence of the required criminal intent.*

* * * *

"* * * With these factors in mind, the courts have held that if the taking is open and avowed and under a good faith claim of title, *the intent necessary to justify a theft conviction is lacking.*" (Emphasis added.)

Williams, *Criminal Law*, 2nd Ed., Gen. Part, p. 322 (1961), notes:

"Claim of right in larceny, as elsewhere, covers not only mistake of law but mistake of fact, but with the latter the present discussion is not primarily concerned. Either kind of mistake shows that the taking *was without the requisite intent.*" (Emphasis added.)

Keeping this concept in mind, it becomes clear that the only difference between the instruction given by the court and that requested by the appellant was that the former instructed the jury, affirmatively, as to what it must find to convict, and the latter would instruct, negatively, as to what would diminish the required intent. It is clear then that the instructions given by the court adequately covered the issue, and the jury could not have followed the instructions as given and convicted if it found, as the appellant asserted, that he took his automobile under a mistaken claim of right.

Additionally, it is submitted that the requested instruction was misleading and for such reason the court properly refused to give it. As was noted above, the concept of claim of right is not an affirmative defense, but negatives intent. The instruction proposed by the appellant is couched in language as though a claim of right were an absolute defense. The proposed instruction did not appraise the jury that they should consider the nature and circumstances of the claim in determining whether the appellant had the required intent. *R. v. Boden*, 174 E. R. 863 (1844); *Dominion v. Shymkovich*, S. C. R. 606, Sup. Ct. of Canada (1954). Consequently, no claim of error can be justified.

Finally, it is submitted that reversal for instructional error would only be warranted if the instructions, when taken as a whole, failed to adequately appraise the jury. Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 669. The

instructions, when viewed as a whole clearly show that the jury was fairly appraised as to the issues of the case.

CONCLUSION

The legal issues raised on appeal show that no basis for a claim of error which would warrant this court in reversing has been made out. Appellant's extraneous references to a police decision that this case was civil in nature are more than offset by the surreptitious and felonious actions of appellant, the jury's verdict, and the judge's sentence. This court has no other reasonable alternative but to affirm the conviction.

Respectfully submitted,

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