1983

State of Utah v. Robert Mccullar : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. 19150

ROBERT MCCULLAR, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM CONVICTIONS OF AGGRAVATED BURGLARY, AGGRAVATED ROBBERY AND THEFT IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DEAN E. CONDER, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from jury verdicts finding him guilty of Aggravated Burglary, a first-degree felony, in violation of Utah Code Ann. § 76-2-203 (1953), as amended, Aggravated Robbery, a first-degree felony, in violation of § 76-6-302 (1953), as amended, and Theft, a second-degree felony, in violation of § 76-6-404 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by jury on March 10-11, 1983, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder presiding. Appellant was sentenced on March 29, 1983. On the aggravated [illegible] he was sentenced to an indeterminate term [illegible] five years nor more than life in the Utah State Prison. On the aggravated robbery conviction, he was

also sentenced to five years to life in the Utah State Prison. He was sentenced to one to fifteen years on the theft conviction. The three sentences were ordered to run concurrently.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the appellant's convictions and sentences.

STATEMENT OF THE FACTS

On December 15, 1980, Bert Holland answered the doorbell at about 10 p.m. at his home in Salt Lake City, Utah (T. 39). Two men in their twenties asked for someone who was not at the home (T. 40). One of the men pulled a gun out his coat, the two men entered the house, and they ordered Holland to call his wife into the room (T. 40). They taped Mr. Holland's hands and feet with duct tape as he lay on the floor (T. 41). They ordered Lorna Holland to lie on top of her husband and they also taped her hands (T. 41).

One of the men stayed in the same room with the Hollands, looked into a closet, went through Lorna's purse and took her wedding rings from her finger (T. 41, 65). The other man had gone upstairs to a bedroom and came back down with bedding, which he threw over the top of Bert and Lorna and which completely covered them (T. 41, 64).

The Hollands thereafter could not see the two men but heard them searching throughout the home (T. 41, 64). The men had asked for "some papers" but the Hollands did not know what they were talking about (T. 42-43, 65). They asked for the combination to a safe, which the Hollands gave them, and they also asked about gold, silver and jewelry (T. 43-44). The assailants took rings, necklaces, jewelry, a shotgun, a watch and silver coins (T. 46). The property was valued at about $1,000 (T. 46). The two men apparently had not found what they were initially looking for in the 15 minutes they were at the Hollands' home (T. 43, 66). They placed a couch on top of Lorna and Bert Holland and left the home (T. 45, 66).

The Hollands gave a description of the assailants to the investigating officers. There were no other witnesses, nor were fingerprints discovered at the scene (T. 81).

On December 22, 1980, Detective Daryle Ondrak of the Salt Lake County Sheriff's Office showed about 50 photographs of individuals to Bert and Lorna Holland but no positive identification of the two assailants was made at that time (T. 49-50, 68, 81). Photographs of appellant and James Nix Rafal were not included in that photograph book (T. 82).

In November 1981, the investigation led to several suspects, including appellant and James Nix Rafal (T. 84). [illegible] was questioned and he provided detailed accounts of various crimes, including those committed against the Hollands (T. 88-89).

A photographic display, containing six pictures of six men, was prepared by Salt Lake County Sheriff's detectives in March 1982 (T. 83). It was sent to police detectives in Idaho Falls, Idaho, where it was shown to Bert and Lorna Holland (T. 83). Bert made a positive identification of photograph number 1 (James Nix Rafal) as one of the assailants (T. 55, 92). He also choose photographs 4 and 6 (Robert Taylor and appellant, respectively), either of which he thought may have been the other assailant (T. 55, 92).

Lorna Holland, in a separate identification session, was shown the same display of six photographs (T. 69). She selected photograph 4 as representing one of the assailants (T. 69, 93). Photograph 4 depicted Robert Taylor, who apparently was not involved with the crimes (T. 94).

Mr. and Mrs. Holland positively identified appellant as one of the assailants at the preliminary hearing and at trial (T. 46, 53-54, 67-72, 93-94).

Out of the presence of the jury, defendant made a motion to dismiss the theft count after both the State and defense had rested (T. 217). The motion apparently was denied but there is no further discussion of it in the trial transcript. Defense counsel again moved to dismiss the theft count at sentencing (T. 270). The motion was denied by Judge Conder without explanation (T. 270).

Appellant was thereafter convicted of aggravated robbery, aggravated burglary and theft.

ARGUMENT

POINT I

APPELLANT'S SEPARATE CONVICTION OF THEFT WAS PROPER BECAUSE THEFT IS NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY.

On appeal, appellant contends that the trial judge erred by not dismissing the theft charge because it is a lesser included offense of aggravated robbery, and that the trial judge erred at sentencing because the theft conviction merged into the aggravated robbery conviction. He claims that proof of the elements of aggravated robbery also proves a theft and, therefore, he cannot be convicted of both crimes. Appellant challenges the theft conviction and seeks a dismissal of that conviction and sentence.

A. The statutory elements of theft are different than the statutory elements of aggravated robbery, and are not necessarily included in the offense of aggravated robbery.

The standards for determining when an offense is a lesser included offense of another were recently explained in State v. Baker, Utah, No. 18245 (filed September 21, 1983). When the prosecution requests a jury instruction on lesser included offenses, the proper standard requires "a comparison of the statutory elements of the offenses in the abstract." Id., slip op. at 2. When the defendant requests a jury instruction on lesser included offenses, the proper standard

"requires an analysis of the evidence offered at trial." Id.

When the prosecution charges a defendant with criminal violations, the prosecution must comply with the "narrower" standard, a comparison of the statutory elements of the various offenses. At the time a criminal information is filed, the prosecution does not know what evidence will in fact be admitted at trial, or if the evidence supports more than one conviction, or what interpretation the trier of fact will give the evidence. Thus, the prosecution at that point must comply with the standard which compares the statutory elements of the crimes. When the prosecution compares the statutory elements of the crime and concludes that one crime is not a lesser included offense of another, then the prosecution should be allowed to charge the defendant with violating each of the offenses.

The standard which compares the abstract statutory elements of the offenses states that "[t]he lesser offense must be a necessary element of the greater offense and must of necessity be embraced within the legal definition of the greater offense and be a part thereof." State v. Woolman, 84 Utah 23, 36, 33 P. 2d 640, 645 (1934). In State v. Brennan, 13 Utah 2d 195, 198, 371 P.2d 27, 29 (1962), this Court set forth the requirements of an included offense as follows:

> The rule as to when one offense is included in another is that the greater offense includes a lesser one when establishment of the greater would necessarily include proof of all the

> elements necessary to prove the lesser. Conversely, it is only when proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense. [Footnote omitted.]

The "necessarily included offense," or statutory comparison of the elements, standard has been codified in Utah Code Ann. § 77-35-21(e)(1953) as amended:

> The jury may return a verdict of guilty to the offense charged or to any offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

Utah Code Ann. § 76-1-402(5)(1953), as amended, also refers to necessarily included offenses:

> If the district court on motion after verdict or judgement, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Under the "necessarily included offense" standard, the determination of whether theft is a lesser included offense within the crime of aggravated robbery requires an examination of the respective elements of those crimes. The elements of aggravated robbery as defined in Utah Code Ann. § 76-6-302 (1953), as amended, are:

> (1) A person commits aggravated robbery if in the course of committing robbery, he:
>
> (a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or
>
> (b) Causes serious bodily injury upon another.
>
> . . .
>
> (3) For the purpose of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Robery is defined in Utah Code Ann. § 76-6-301 (1953), as amended, as:

> (1) . . . the unlawful and intentional taking of personal property, in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.

These elements of aggravated robbery were given in substantially the same form to the jury in Instructions 17 and 23 (R. 108, 117).

The elements of theft as defined in Utah Code Ann. § 76-6-404 (1953), as amended, are:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

In the instant case, the prosecution could reasonably conclude at the time an information was filed that theft was not a lesser included offense of aggravated robbery because the statutory elements are different. There are three elements required for proof of aggravated robbery which are not required for proof of theft. The actor must be in the

course of committing robbery, the taking must be accomplished by means of force or fear, and the actor must have used a firearm, knife or facsimile of the same or a deadly weapon or have caused serious bodily injury upon another.

There are two additional elements required for proof of theft that are not required for proof of aggravated robbery. One difference is that obtaining control with the purpose to deprive is an essential element of theft. The purpose to deprive required by the theft statute is a more specific kind of intent which goes beyond the intent required for aggravated robbery. An intentional taking is required by § 76-6-301, the robbery statute, which is incorporated by reference in the aggravated robbery statute. Intentionally is defined in Utah Code Ann. § 76-2-103(1) (1953), as amended, as:

> A person engages in conduct:
> (1) Intentionally, or with intent or wilfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

See also: Jury Instruction Number 11 (R. 102).

Theft requires that the taking be with the "purpose to deprive," which is defined in Utah Code Ann. § 76-6-401(3) (1953), as amended, as having:

> (e) . . .the conscious object:
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
> (b) To restore the property only upon payment of a reward or other compensation; or
> (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

See also: Jury Instruction Number 25 (R. 121-122).

The "purpose to deprive" is a culpable mental state required as an essential element of the crime of theft and is by definition more specific than the intentional, knowing or reckless mental state generally required by the Utah Criminal Code. Where the alleged lesser included offense requires proof of a more specific intent, it cannot stand in the lesser included relationship. State v. Laine, Utah, 618 P.2d 33 (1980), State v. Chesnut, Utah, 621 P.2d 1288 (1980), State v. Tucker, Utah, 618 P.2d 46 (1980). Thus, the appellant can be guilty of the "greater" offense (aggravated robbery) without also committing the "lesser" crime (theft).

"Purpose to deprive" is an element of theft which is required in addition to proof that the person acted intentionally or knowingly. The "purpose to deprive" is not, however, an element of aggravated robbery and it is not embraced within the legal definition of aggravated robbery.

Theft also differs from aggravated robbery because theft requires that the value of the property be proved as an

element to determine if the crime is a second-degree felony, a third-degree felony, class A misdemeanor or a class B misdemeanor. State v. Lucero, 28 Utah 2d 61, 498 P.2d 350 (1972). Aggravated robbery does not require that the value of the property be established. State in Interest of R.G.B., Utah, 597 P.2d 1333 (1979). Because value does not have to be proved for aggravated robbery, value is an additional element of theft.

Theft is also not a lesser included offense of aggravated robbery because an attempt will suffice for conviction of aggravated robbery, while theft requires a completed act. An "unlawful and intentional taking" is required for committing robbery. However, an intentional taking of personal property in the possession of another need not be proved for aggravated robbery. This is because the completed act of robbery (the intentional taking) is not required; an attempt to commit robbery is sufficient. Section 76-6-302 states in pertinent part:

> (1) A person commits aggravated robbery if in the course of committing robbery, . . .
> . . .
> (3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of the robbery.

(Emphasis added.) "In the course of committing robbery" is not a completed act, and it is different from the completed act of "obtains or exercises unauthorized control over the

property of another" for the crime of theft. Utah Code Ann. § 76-64-404 (1953), as amended.

Under § 76-4-101(1), a person is guilty of an attempt if:

> . . . [A]cting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

Because the completed act, and "unlawful and intentional taking," is required for robbery, theft may be argued to be a lesser included offense of robbery. However, under the attempt theory, no actual taking of property needs to be proved for aggravated robbery.

Theft does require a completed act, specifically that the person "obtains or exercises unauthorized control." Therefore, theft requires an element which is not required for aggravated robbery when aggravated robbery is proved under the attempt theory.

The result is that theft is not necessarily and not at all times a lesser included offense of aggravated robbery. Because the crime of theft in the abstract contains more elements than aggravated robbery, theft cannot be a lesser included offense of aggravated robbery. Appellant was properly charged and convicted of theft and aggravated robbery.

> B. Appellant was not entitled to a dismissal of the theft charges because under the evidence-based standard theft was not a lesser included offense of aggravated robbery.

If the defendant requests a jury instruction on lesser included offenses, the proper standard requires an analysis of the evidence offered at trial. In State v. Baker, Utah, No. 18245 (filed September 21, 1983), the defendant was charged with one offense, burglary, but the defendant argued that the evidence required a jury instruction on another crime, criminal trespass, which he argued was a lesser included offense of burglary.

The present case differs in several respects from Baker on the lesser included offense issue. In the case at bar, the prosecution charged appellant with three crimes, but appellant claims that, at the most, he could only be charged with two crimes. Baker was charged with only one crime, but he sought a smaller sentence on a lesser included offense theory. Appellant's request at trial also differs slightly from the jury instruction request made by Baker. Appellant did not request a jury instruction on a lesser included offense. Instead, appellant made a motion to dismiss the theft charge because appellant argued theft was a lesser included offense of aggravated robbery, and therefore, appellant could not be convicted of both the "greater" and the "lesser" crimes. The motion was denied at trial and at sentencing, and appellant was found guilty of theft and aggravated robbery.

The defendant in Baker requested a jury instruction on lesser included offenses. The appellant in the case at bar made a motion to dismiss. In each case, the defendants were

seeking the same result based on the lesser included offense rationale: a defendant can be convicted of the "greater" crime or the "lesser" crime but not of both crimes. Because the issue on lesser included offenses was raised by appellant, it might be argued that the standard for determining when a crime is a lesser included offense of another is that of analyzing the evidence offered at trial. Respondent submits that this standard should not apply. However, even under this standard, appellant's argument lacks merit.

The evidence-based standard is followed in cases when the evidence and circumstances justify:

> When an appellant makes an issue of a refusal to instruct on included offenses, we will survey the evidence, and the inferences, which admit of rational deduction, to determine if there exists reasonable basis upon which a conviction of the lesser offense could rest. [Footnote omitted.]

State v. Dougherty, Utah, 550 P.2d 175, 176 (1976). This evidence based standard is incorporated in Utah Code Ann. § 76-1-402(4) (1953), as amended, which provides:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Included offenses are defined in Utah Code Ann. § 76-1402(3)(1953), as amended, which says that an offense is included in a charged offense when:

> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
>
> (c) It is specifically designated by a statute as a lesser included offense.

As in State v. Baker, Utah, No. 18245 (filed September 21, 1983), this case arguably involves the definition in (3)(a), which requires an analysis of the facts at trial.

> If the same facts tend to prove elements of more than one statutory offense, then the offenses are related under § 76-1-402. The application of § 76-1-402(3)(a) will thus require some reference to the statutory elements of the offenses involved in order to determine whether given facts are "required to establish the commission of the offense charged." This requirement that there exist some overlap in the statutory elements of allegedly "included" offenses would prevent the argument that totally unrelated offenses could be deemed included simply because some of the evidence necessary to prove one crime was also necessary to prove the other. . . . [W]here two offenses are related because some of their statutory elements overlap, and where the evidence at trial of the greater offense includes proof of some or all of those overlapping elements, the lesser offense is an included offense under subsection (3)(a).

State v. Baker, Id., slip op. at 9 (emphasis in original).

If an offense is included within the meaning of § 76-1-402(3),

> [u]nder § 76-1-402(4), the court is obligated to instruct on the lesser offense only if the evidence offered provides a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

Id. There are two situations when the trial court must give a jury instruction on lesser included offenses upon the defendant's request. The first situation is "[w]hen the elements of two offenses overlap . . ., if there is a sufficient quantum of evidence to" acquit him of the greater offense. State v. Baker, Id., slip op. at 10. The second situation is "when the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser." Id.

This appeal involves a motion by appellant that theft must be dismissed because it is a lesser included offense of aggravated robbery. It is the State's position that under the evidence-based standard the same facts did not prove elements of both theft and aggravated robbery. The elements of the these crimes are different, as discussed in Point IA, and that no elements of the crimes overlap.

The same facts were not used to prove theft and aggravated robbery. Appellant committed aggravated robbery when the wedding rings were taken from Lorna Holland's fingers. It was the unlawful and intentional taking, by using a firearm, of personal property from Lorna Holland's person against her will, accomplished by means of force or fear. At

that point, the aggravated robbery was only committed against Lorna Holland. The aggravated robbery was not committed against Bert Holland at that point in time because nothing was taken from "his person, or [from his] immediate presence." See Utah Code Ann. § 76-6-301 (1953), as amended.

Thefts were thereafter committed against both Lorna and Bert Holland. The separate offense of theft was committed when appellant went into other areas of the house, out of the immediate presence of Lorna and Bert Holland, and obtained unauthorized control over property of the Hollands.

Because of the presence element ("from his person, or immediate presence") in aggravated robbery, different facts were required to support the conviction for that crime. Theft does not have such an element and different evidence (items taken from other rooms of the home) was used to support the theft conviction.

Respondent can find no Utah cases which define "immediate presence". The prevailing view seems to be that the property does not need to be attached to the victim in any literal sense for property to be taken from his "immediate presence." People v. Moore, 13 Mich. App. 320, 164 N.W. 2d 423 (1968); State v. McDonald, Wash., 443 P.2d 651 (1968); Lancaster v. State, Okla. Crim., 554 P.2d 32 (1976). Taking property from one room while a victim was secured in another room was taking property from his immediate presence. State v. Campbell, 41 Del. 342, 22 A.2d 390 (1941). An automobile taken from a garage ("the curtilage of the home") was from the

immediate presence and possession of the owner, while the owner was detained inside the home. Braley v. State, 54 Okla. Crim. 219, 18 P.2d 281 (1933); People v. Bauer, 241 Cal. App. 2d 632, 50 Cal. Rptr. 687 (1966).

If this Court decides that "immediate presence" includes the various rooms in a home, then the evidence of taking property from other parts of the Hollands' home is also evidence of aggravated robbery and not evidence of theft. If the Court finds that all the evidence is not separable into the two crimes, then respondent agrees that the theft conviction should be dismissed.

Appellant also contends that the crimes were all part of a single criminal episode and that he cannot be punished for both the theft and aggravated robbery offenses. A "single criminal episode" is defined in Utah Code Ann. § 77-401-1 (1953) as amended, as "all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective."

> [W]hen the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

Utah Code Ann. § 76-1-402(1)(1953), as amended (emphasis added).

A defendant can be prosecuted for two or more criminal violations arising out of the same act or

transaction. State v. James, Utah, 631 P.2d 854 (1981). In Blockburger v. United States, 284 U.S. 299, 304 (1932), the United States Supreme Court stated:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

If each crime requires proof that the other does not, the Blockburger test is satisfied even though there is some overlap in the proof offered to establish the crimes. Brown v. Ohio, 432 U.S. 161 (1977). In Albernaz v. United States, 450 U.S. 333 (1981), the United States Supreme Court followed the Blockburger test and upheld the defendant's convictions for conspiracy to import marijuana and conspiracy to distribute marijuana in a case involving only a single agreement or conspiracy. The statutes involved in Albernaz, the Court said, proscribed two different ends, distribution as opposed to importation.

As in Albernaz, the objectives for punishment of the crimes in the present case are different from one another. In theft, the punishment aims to prohibit one person from obtaining control of another's property without the owner's permission. In aggravated robbery, the criminal justice system seeks to prohibit two acts: the taking of property from another and the use of force to get the property. Because the use of force in aggravated robbery involves a

greater danger to human life than the simple unauthorized control of another's property in the crime of theft, the criminal code defines differently the elements and punishments for these crimes.

In Utah, convictions of crimes arising out of the same criminal episode are not prohibited under the single criminal episode provisions where there are distinct crimes, seeking different criminal objectives. State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962) (burglary and larceny); State v. Eichler, Utah, 584 P.2d 861 (1978) (aggravated robbery and aggravated kidnapping); State v. Couch, Utah, 635 P.2d 89 (1981) (aggravated sexual assault, kidnapping and forcible sodomy). In crimes against the person (as contrasted with crimes against property), a single criminal act or episode may constitute as many offenses as there are victims. State v. James, Utah, 631 P.2d 854 (1981). Respondent urges that the crimes of theft and aggravated robbery were shown by different acts and that aggravated robbery was committed against Lorna Holland, while theft was committed against Lorna and Bert Holland.

The single criminal episode provisions are similar to the double jeopardy prohibitions. The double jeopardy clauses in the United States Constitution, Amend. V,[1]

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1 "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

in the Utah Constitution, art. I, § 12[2], and in the Utah Code of Criminal Procedure, Utah Code Ann. § 77-1-6(2)(a)(1953) as amended,[3] forbid the State from repeated attempts to convict a defendant to protect him from the hazards of trial and possible conviction more than once for an alleged offense. McNair v. Hayward, Utah, No. 18650 (filed June 9, 1983).

However, convictions of several crimes arising out of the same criminal episode may not always be barred under double jeopardy provisions. State v. Sosa, Utah, 598 P.2d 342 (1979)(carrying loaded firearm in a vehicle, marijuana possession and possession of a firearm by a convicted person). The double jeopardy rule protects against subsequent prosecution only for the same offense. State v. Harris, 30 Utah 2d 354, 517 P.2d 1313 (1974).

> Double jeopardy therefore does not prevent multiple convictions for multiple offenses arising from a single criminal episode. Likewise, offenses committed against multiple victims are not the same, for double jeopardy purposes even though they may arise from the same criminal episode.

State v. James, Utah, 631 P.2d 854, 856 (1981) (footnotes omitted).

The United States Supreme Court recently approved the the imposition of cumulative punishments for two or more

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2 "[N]or shall any person be twice put in jeopardy for the same offense."

3 "No person shall be put twice in jeopardy for the same offense . . . ."

statutorily defined offenses which constitute the "same" crime under the Blockburger test. In Missouri v. Hunter, ___ U. S. ___, 103 S.Ct. 673 (1983), the Court held that sentences for both first-degree robbery and armed criminal action in a single trial did not violate double jeopardy provisions where the legislature specifically authorized the cumulative punishment under two statutes. The court said that in a single trial, double jeopardy does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. In the present case, the appellant has been subjected to only one trial and "his right to be free from multiple trials for the same offense has [not] been violated." Missouri v. Hunter, Id., at 678.

Under the evidence-based standard, theft is not a lesser included offense of aggravated robbery in this case because different evidence in this case was used to support the two convictions. There was no rational basis for acquitting defendant of the greater offense (aggravated robbery), and convicting him of the included offense (theft). Instead, there was sufficient evidence, and different evidence, to find appellant guilty of both crimes.

POINT II

THERE WAS SUFFICENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT APPELLANT'S CONVICTIONS.

Appellant claims the evidence was insufficent to support the verdicts of aggravated burglary, aggravated

robbery and theft. To prevail on this claim, the burden rests on appellant to show on appeal that reasonable minds necessarily entertain a reasonable doubt that appellant committed the crime. State v. Wilson, Utah, 565 P.2d 66 (1977).

In reviewing a claim of insufficient evidence, the evidence need not refute contrary allegations made by appellant if the verdict is supported by substantial evidence. State v. Lamm, Utah, 606 P.2d 229 (1980). The evidence, and all inferences that may reasonably be drawn therefrom, is to be viewed in the light most favorable to the fact finder's verdict. State v. Garcia, Utah, 663 P.2d 60 (1983); State v. Gorlick, Utah, 605 P.2d 761 (1979).

This Court recently summarized the standards to be applied in reviewing claims of insufficient evidence in State v. McCardell, Utah, 652 P.2d 942, 945 (1982):

> This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man would not possibly have reached a verdict beyond a reasonable doubt. We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it. "Thus, intent to commit [a crime] . . . may be found from proof of facts which it reasonably could be believed that such was defendant's intent." [Citations omitted.]

Notwithstanding the presumptions in favor of the jury's decision, the appellate court can review the sufficiency of

the evidence to support the verdict. In State v. Petree, Utah, 659 P.2d 443 (1983), this Court stated:

> The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt.

In any case where the sufficiency of the evidence is challenged, it is imperative that the totality of the facts and circumstances be reviewed and considered rather than isolated portions of it. Yet appellant, chooses to focus almost exclusively on the credibility of the testimony of the two eyewitness victims, Bert and Lorna Holland.

Admittedly, their testimony was important to the State's case. However, their testimony must be viewed in its proper context together with all of the evidence adduced at trial. In addition, the credibility of witnesses is an issue for the jury. State v. Romero, Utah, 554 P.2d 216 (1976). Accordingly, when the total evidence in this case is viewed in the light most favorable to the jury's verdicts, there is sufficient evidence to support appellant's convictions.

Appellant claims there is insufficient evidence because (1) Mr. Holland could not positively pick appellant out of a photographic display and (2) Mrs. Holland

positively picked a photograph of a person other than appellant in a separate photo display (appellant's brief, 3-4). A complete and careful review of the entire record reveals that the identification evidence was merely one piece of the State's total evidentiary picture. In State v. Christean, Utah, 533 P.2d 872, 876 (1975), the Court said:

> . . .it may well be that certain facts of the evidence, considered separately, coul be regarded as not inculpatory, and thus be vulnerable to the accused's claim that it does not connect him with the crime. However, the law does not require that the separate bits of evidence be viewed in isolation for it is proper to take whatever fragments of proof that can be found and piece them together with the reasonable inferences to be drawn therefrom in order to fill in the whole mosaic of the crime.

See also State v. Malmrose, Utah, 649 P.2d 56 (1982), State v. Volberding, 30 Utah 2d 257, 516 P.2d 359 (1973).

Incriminating evidence, which the jury had but which appellant overlooks, was the testimonies of James Nix Rafal and Jay Kenneth Sanchez. Rafal and Sanchez were accomplices with appellant when the crimes were committed against the Hollands. Rafal's and Sanchez's testimonies alone, even though they were accomplices to the crime, would be sufficient to sustain appellant's convictions. Utah Code Ann. § 77-17-7 (1953), as amended, provides that a "conviction may be had on the uncorroborated testimony of an accomplice." In conformity with this statute, the trial judge instructed the jury on the testimony of an accomplice:

> You are instructed that an accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the law of the state of Utah provides that a conviction may be had on the uncorroborated testimony of an accomplice. The jury, however, should keep in mind that such testimony is to be received with caution.

Jury Instruction Number 19 (R. 110).

At trial, James Nix Rafal, who was granted immunity for his testimony, testified about the events which occurred on December 15, 1980, at 6773 South Olivet Drive in Salt Lake City. Rafal said Nick Smith and Jay Sanchez arrived at his home at about 8:30 p.m. (T. 140-141). The three men were planning to rob a house that Smith said had "some coke in it and some papers" (T. 142). They then picked up appellant and drove to the Holland residence after obtaining a shotgun (T. 145). Rafal and appellant went to the home while Smith and Sanchez waited in the car (T. 146). When the Hollands denied knowledge of "the coke and the papers," Rafal said he and appellant tied their hands with duct tape (T. 147). Rafal said they searched the house for valuables before they left (T. 148).

Rafal's testimony is supported by Sanchez, who also received immunity from prosecution. Sanchez was living at the Bonneville Corrections Center in Salt Lake City in December 1980 (T. 182). On the night of December 15, 1980, he obtained a sponsor to allow him to leave the Corrections Center (T.

183). Sanchez met Smith and they went to Rafal's home (T. 184). Sanchez said Rafal went with them to appellant's home and appellant also got into the car (T. 185). They then proceeded to the Holland residence where they planned to commit a robbery (T. 186). Sanchez said Rafal and appellant went into the house and committed the crimes (T. 186).

In addition to the testimony of these two accomplices, Mr. and Mrs. Holland also testified at trial. Mr. Holland told about the crimes and he identified appellant at trial as one of the men who entered his home on December 5, 1980 (T. 46). Mr. Holland said he was asked to look at some photographs about one week after the crimes occurred (T. 49). He was not able at the time to make a positive identification (T. 50). Appellant's photograph was not among those in the display. While the police investigation continued, the Hollands moved to Idaho and they later participated in another photograph identification attempt in March 1982 (T. 56, 83). Mr. Holland made a positive identification of Rafal at the time (T. 55, 58, 92). He also choose two photographs which possibly were of the other assailant (T. 55, 92). Appellant's photograph was one of the photographs Bert Holland thought could be of the other assailant (T. 55, 92).

At trial, Bert Holland positively identified appellant as one of the assailants (T. 46). At the preliminary hearing, Bert Holland testified that he was 75 percent sure that appellant was one of the assailants (T. 53). Under cross examination at trial, Bert Holland said he

remained 75 percent certain that appellant was one of the assailants (T. 54).

The testimonies of Rafal, Sanchez and Bert Holland are also corroborated by Lorna Holland. After testifying about the crimes, Mrs. Holland identified appellant as one of the perpetrators of the crime (T. 67). When asked if his appearance had changed since the day of the crimes, she said, "His eyes look the same. Don't think it changed a lot" (T. 67). She also said she could not make a positive identification when Detective Daryle Ondrak showed her some photographs about one week after the crimes (T. 68). At the photograph identification in Idaho, she made an identification of one photograph she thought was one of the assailants (T. 69, 93-94). The picture she choose was of Robert Taylor, who apparently was not involved with the crime (T. 94).

At trial, Lorna Holland identified appellant as one of the assailants (T. 67). At the preliminary hearing, she also identified appellant as an assailant (T. 70). Under cross examination, she was asked if she had positively identified appellant at the preliminary hearing (T. 72). She said appellant looked similar to one of the persons inside her house and "I was very sure that was him, but I don't suppose I could say a hundred percent. Not positive" (T. 72).

Both Mr. and Mrs. Holland testified that they could not be 100 percent certain that appellant was one of the persons who entered their home. However, this does not make the identification evidence inconclusive. Mr. Holland was 75

percent sure (T. 54) and Mrs. Holland was "very sure that was him" (T. 72). Moreover, Rafal and Sanchez were also present at the crime scene and positively identified appellant as one of the persons who committed the crimes.

From all of the evidence presented, the jury could fairly and reasonably conclude that appellant committed aggravated burglary, aggravated robbery and theft. This Court should not disturb the convictions.

CONCLUSION

Based upon the foregoing, respondent urges that the convictions and sentences of appellant be affirmed.

RESPECTFULLY SUBMITTED this 25th day of October, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Stephen R. McCaughey, attorney for defendant, 72 East 4th South, Suite 300, Salt Lake City, Utah, 84111, this ____ day of October, 1983.
