1984

The State of Utah v. Ronald Lemoyne Kelly : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
-v-	:	
RONALD LEMOYNE KELLY,	:	Case No. 19253
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

Appeal from verdict of guilty for murder in the first degree, a capital offense, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding.

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

RULE

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
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vs.	:	Case No. 19253
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Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with criminal homicide, murder in the first degree, a capital offense under Utah Code Ann. § 76-5-202(1)(d) (1953), as amended, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding.

DISPOSITION OF THE LOWER COURT

Appellant elected a bench trial and was found guilty as charged on April 14, 1983. On June 18, 1983, appellant was sentenced to life imprisonment.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of appellant's conviction and sentence rendered below.

STATEMENT OF THE FACTS

At about 3:00 a.m., February 9, 1982, Elizabeth Langford and Clark Campbell awoke to a loud scream from the apartment above them at 604 South Fifth East. The scream was followed by loud banging noises which lasted for about fifteen minutes (R. 538-40, 567-68). Elizabeth heard footsteps coming out of the apartment above them and down the steps. With Clark,

she looked through the front window, and saw a man leaving the apartment house (R. 540-43). He was dark, had dark hair, was slim and of average height. He wore dark pants and a blue or black parka with a red "V"-shaped stripe on the back (R. 544, 570). The man crossed Sixth South and headed East toward Trolley Square (R. 545). Clark went across the street and called the police on a pay phone ten to fifteen minutes later (R. 564).

Officer Frank Hatton-Ward and Officer Lyman responded to Clark's call, arriving at the apartment house at 3:30 a.m. (R. 596-7, 605). As they walked to the apartment house, both officers noticed footprints in the snow going into and leaving the apartment house for which the complaint was sent. Id. Officer Hatton-Ward proceeded upstairs and entered the victim's apartment after no one responded to his knocking. He found Carla Taylor's body, partially clothed, in a pool of blood with a blanket over her face and a large, black knife in the middle of her chest. A toothbrush had been inserted in her vagina (R. 599-600). An autopsy later revealed four stab wounds, one over the left chest, two over the left neck and one partially severing the victim's lip. There were also superficial scrapes and bruises over the victim's neck, shoulders and buttocks (R. 843-4). The chest wound went through the heart, a lung, and out the victim's back (R. 845). After determining that Carla was dead, Hatton-Ward made a quick check of the apartment and found no one other than two sleeping infants in cribs (R. 600). The children were later identified as the victim's. He then reported the death to his superiors.

Officer Martin followed the footprints a short distance east on Sixth South. Officer Ken Farnsworth continued the pursuit while Martin followed in his car and Officer Bernards paralleled Farnsworth on the opposite side of the street (R. 634-5). The prints were easy to follow because three inches of fresh snow had fallen earlier that night (R. 642). Also, the shoeprint was unique and easy to distinguish from the few others that Farnsworth saw (R. 660). At Ninth East, however, the prints left the sidewalk and disappeared into the middle of the street (R. 665). Farnsworth lost the prints and did not find them again until they came out of the street and entered Brixen Court (R. 666). Farnsworth followed the prints until they angled toward the appellant's front porch. He examined one other set of prints, which led down an alley and disappeared and also looked on all sides of the house for other prints resembling the unique ones he had been following (R. 668-671). After finding no other prints at all, Farnsworth sent Officer Bernards to the rear of the house while he knocked at the front door (R. 671). The time was 4:00 a.m.; Farnsworth had been in pursuit for fifteen minutes (R. 706). Appellant answered the door and Farnsworth said that there had been a homicide and that he had followed footprints from the scene to appellant's house. He said that he wanted to ask to appellant about it and asked for permission to enter (R. 672). Appellant stepped back, opened the door and let Farnsworth in (R. 672).

Immediately upon entering, Farnsworth saw a dark blue coat with a read "V"-shaped stripe on it similar to the

description given over the radio dispatch. Farnsworth then asked appellant if he had been out that night. Appellant replied that he had been to the Tri-Arc earlier, but that he had been home for two hours (R. 673-74). Appellant, who was wearing boxer shorts, went into his bedroom to put on a pair of pants. Farnsworth followed and asked him what shoes he had worn that night. Appellant pointed to or handed Farnsworth a pair of gym shoes at the foot of the bed (R. 674). Farnsworth looked at the shoes, noticed that they possessed the same unique print as those he had followed and that they were damp (R. 674-75).

Detective Farnsworth then asked appellant if he had stabbed or killed anyone that night. Appellant answered "Are you serious?". Farnsworth replied that he was very serious and repeated the question. Receiving no answer, Farnsworth read appellant his Miranda rights. While Farnsworth was reading the rights from a Miranda card, appellant interrupted to say that he knew his rights and was familiar with them. Appellant also stated that he was on probation (R. 677). Farnsworth said that he wanted to finish reading the card anyway as a formality. Id. Farnsworth then asked appellant if he wanted to answer any questions. Appellant responded, "I don't know, it depends". Farnsworth said "that's not the right answer. It's either yes or no". He then said that he had followed footprints from the scene of a homicide at 604 South Fifth East to appellant's home which appeared to be made by appellant's shoes. He then asked appellant if he had been to the crime scene that night (R. 675-77). When appellant made no response, Farnsworth then asked what

clothes appellant had worn that evening. Appellant indicated a pair of black pants and matching shirt and two pair of socks. Farnsworth picked up the clothing, along with the coat and shoes (R. 678-80).

Farnsworth told appellant that he would have to accompany him to the police station for questioning. However, Farnsworth did not formally arrest appellant (R. 675, 681). At this point, within a minute and a half of the Miranda waiver question, appellant told Farnsworth that "I want to level with you guys. I do know someone who lives down there. I was down to the apartment house on the other side of the street". Officer Bernards who had entered the house when Farnsworth and appellant went into the bedroom, mentioned the Caledonia across the street from the scene and appellant affirmed that he had been there, never indicating that he had visited the victim's apartment house (R. 682). From this point on, appellant showed no hesitation in his answers to Farnsworth's questions (R. 717). Before leaving with appellant, the officers conducted a quick search of the home, looking for other persons after Farnsworth received permission from appellant to do so (R. 452-3). No one else was found, but Bernards saw a pair of gloves on the bathroom floor that had dark specks on them. Farnsworth asked appellant if he had worn them that night. Appellant said he had. Farnsworth, as evidence custodian, took the gloves with him (R. 683).

Appellant and Farnsworth had several conversations in the police car on the way to the police station. Appellant admitted that he knew Darla Cates, who had lived across the hall

from the victim. Appellant then requested to be handcuffed, claiming that he was scared and did not know what he was going to do. He said that if he could kill the officers and get away, he would (R. 685-86). On the way to the station, Farnsworth, appellant and another officer returned momentarily to the scene of the murder. While they were there the two infants in the victim's apartment were brought out of the apartment. The appellant asked, with emotion, if they were dead. Farnsworth answered that he did not think so. Then the grief and appearance of crying came over appellant's face as he said, "If only Darla had been there" (R. 688-9). Darla Cates had lived with Jerome Thornton in the apartment across the hall from the victim and was a good friend of both the victim and appellant (R. 646, 648). However, she had moved three weeks before the crime (R. 649-50).

Darla had moved because of problems in her relationship with Thornton. She had on at least one occasion spent the night at appellant's house prior to moving (R. 728).

Upon reaching the police station, Farnsworth turned appellant over to Detective Chapman, who then re-read appellant his Miranda rights. Appellant indicated his understanding of those rights and agreed to talk (R. 916). During questioning, appellant stated that he was in the victim's apartment building to see Jerome Thornton, who was living in Ms. Cates' old apartment across from the victim's (R. 918). Appellant claimed he rang Thornton's door bell and left when no one answered (R. 919). Thornton indicated at trial that he had been home in his apartment on the night of the crime and had been awakened by

screams (R. 809-12). Thornton, a light sleeper, did not hear his doorbell before the screams (R. 813). The door bell is easily audible throughout Thornton's apartment (R. 921).

An autopsy revealed that the victim had died of multiple stab wounds. During the autopsy, three pubic hairs were discovered on the lower portion of the victim's buttocks (R. 848). These were sent to the F.B.I. crime lab for analysis along with appellant's coat and other clothing. Analysis showed that the blood on appellant's coat and shoelace was consistent with the victim's blood type and not with appellant's (R. 962, 966). Blood was also found on the instep of appellant's gym shoe and gloves (R. 972). A pubic hair sample taken from appellant had twenty individual microscopic characteristics (R 1037-38). The three hairs from the victim's buttock's were indistinguishable from the sample taken from appellant. Mike Malone, a hair analysis expert with the F.B.I., stated that the hairs taken from the victim's body came from appellant or another person whose hair had the same twenty characteristics. He also stated that out of 20,000 samples he had examined, there were only two occasions when samples from two different people were indistinguishable (R. 1040). Also, during the autopsy a bruise pattern was discovered on the victim's neck. At trial, Monique Ryser, an assistant medical examiner, testified that the pattern was consistent with the pattern on appellant's gym shoe (R. 1073). There were also two wounds to the victim's vagina, one caused by bruising and the other by cutting (R. 855). The cutting injury was more likely caused by the toothbrush (R. 855),

while the bruising could have been caused by a forceful insertion of a penis (r. 852). No semen or seminal fluid was found in the vaginal area (R. 857). However, appellant's expert, Dr. Howard Berk, an obstetrician-gynecologist, testified that at least a third of all men have some sexual disfunction during the process of rape (R. 1138). Sexual disfunction involves either difficulty in attaining or maintaining an erection or difficulty in having ejaculation (R. 1140).

Prior to trial, appellant moved for suppression of both the clothing seized and the statements he had made to Officer Farnsworth. The motion was denied and the evidence was admitted at trial (R. 259).

POINT I

THE EVIDENCE TAKEN FROM APPELLANT'S RESIDENCE WAS PROPERLY ADMITTED AT TRIAL.

Appellant's Points I and IV both challenge the admissibility of certain items of evidence presented at trial by the prosecution. Specifically, appellant's Point I complains that his gym shoes were the product of an illegal seizure. Point IV, while mentioning the shoes, focuses on appellant's pants and gloves. Appellant claims that the pants were illegally seized and that the gloves were discovered and seized during an illegal search of his house. Respondent, in this point will present the seizure of each three items of evidence chronologically.

A. SEIZURE OF THE SHOES.

APPELLANT'S SHOES WERE PROPERLY SEIZED UNDER THE PLAIN VIEW EXCEPTION TO THE FOURTH AMENDMENT SEARCH WARRANT REQUIREMENT.

A plain view seizure is justified if an officer has lawfully made an initial intrusion or is otherwise in a position from which he can view a particular area. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Next, the evidence must be in plain view. State v. Romero, Utah, 660 P.2d 715, 718 (1983). Last, the evidence must be clearly incriminating. Romero, 660 P.2d at 718. The "clearly incriminating" standard was recently clarified by the United States Supreme Court in Texas v. Brown, ___ U.S. ____, 103 S.Ct. 1535 (1983). Recently, The Court in Brown, noted the language in Coolidge v. New Hampshire, supra, which led to the "clearly incriminating" standard used in some jurisdictions, including Utah:

> . . . It must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

Brown, 103 S.Ct. at 1540, quoting, Coolidge v. New Hampshire, 403 U.S. at 470. In Brown, supra, the Court stated that the "immediately apparent" language first enunciated in Coolidge v. New Hampshire, supra, does not require that the officer "know" that "certain items are contraband or evidence of a crime." Brown, 103 S.Ct. at 1542. Rather, a seizure of property in plain view is presumptively reasonable, assuming there is probable cause to associate the property with criminal activity." Id., quoting Payton v. New York, 445 U.S. 573, 587 (1980). Thus facts that warrant a person of reasonable caution to believe that certain items may be evidence of a crime are sufficient to support seizure of the items under the plain view doctrine.

Furthermore, the belief need not be more likely true than false. Brown, 103 S.Ct. at 1543.

The United States Supreme Court also mentioned one other requirement for a proper "plain review" seizure of evidence: the evidence must be seen inadvertently. Coolidge, supra, 403 U.S. 443, 469 (1971). The inadvertence requirement was approved by only a plurality of the Coolidge Court and was specifically rejected by this Court in State v. Romero, Utah, 660 P.2d 715, 718 (n.3) (1983). Language in a case decided shortly after Romero, State v. Harris, Utah, 671 P.2d 175, 181, (1983), suggests a reincorporation of the inadvertence requirement into the Utah plain view exception. However, Harris, supra, involved facts where the officers seizing the evidence knew to a certainty that specific incriminating evidence was present in the area that they entered. Harris, 671 P.2d at 181. Similarly, the cases cited by the Harris Court in invalidating that plain view seizure also involved situations where officers saw the evidence before entering and seizing it. State v. Lane, 175 Mont. 225, 573 P.2d 198 (1977), State v. Osborn, 63 Ohio Misc. 17, 409N.E.2d 1077 (1980), People v. Pakula, 89 Ill. App. 3d 789, Ill. Dec. 919, 411 N.E. 2d 1385 (1980). In these situations, a preintrusive siting gives rise to probable cause and the accompanying necessity of securing a search warrant absent some exigency why warrant could not be obtained. Harris, 671 P.2d 181. Thus, Harris, supra, represents a very narrow modification of the Utah plain view doctrine as stated in Romero, supra. Evidence may be seized under the plain view doctrine only if an officer did not know to a certainty via a preintrusive sighting that specific evidence

was in an area before the officer entered the area. Beyond this, Romero, supra, is controlling, and there is thus no inadvertency requirement in the Utah plain view exception.

However, the seizure of the shoes is valid even if the inadvertency requirement is totally incorporated into the Utah plain view exception under Harris, supra. The inadvertence requirement is met when police have some expectation that evidence would be discovered in plain view, but this expectation does not rise to the level of probable cause. United States v. Antill, 615 F.2d 648 (5th Cir.) (1980) (per curiam), cert. denied, 449 U.S. 866 (1980). This expectation may range from a weak hunch to a strong suspicion. United States v. Hare, 589 F.2d 1291 (6th Cir. 1979).

The facts in the present case come well within the inadvertency requirement presented above. Officer Farnsworth did not have a preintrusive view of any seized evidence. The footprints leading to appellant's residence may have given him a strong suspicion that the shoes and their owner were within the Brixen Court home, but this suspicion does not rise to the level of probable cause and, in any event, did not give Farnsworth knowledge to a certainty that the shoes were within appellant's residence. The situation in the present case is thus distinguishable from Harris, supra, and Harris is therefore not controlling. Furthermore, Harris did not specifically overrule the Court's refusal to incorporate the inadvertence requirement into Utah's plain view exception. Until that is done, Romero, supra, is controlling on the issue.

Appellant presents three major arguments in his Point I. First, he claims that Officer Farnsworth did not have prior justification to be in appellant's house; second, that Farnsworth did not have justification to follow appellant into his bedroom; third, that the incriminating nature of the shoes was not immediately apparent.

Appellant claims that he allowed Farnsworth to enter his home out of mere acquiesence to perceived police authority. Bumper v. North Carolina, 391 U.S. 543 (1968). Bumper, supra, deals with consent to search when the officer told the individual searched that he had a warrant. The search warrant, however, was invalid and was never shown to the individual. Bumper, 391 U.S. at 549. Farnsworth made no claim that he had a warrant. Nor did he make any coercive show of authority other than to identify himself as an officer looking for a suspect. Certainly it was reasonable for Farnsworth to identify himself and the business that he was about. There will always be some minimal coercion in situations like this, but it is not enough to create acquiescence. State v. Graves, Mont., 622 P.2d 203, 209 (1981).[1]

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[1] Appellant also complains in several places that even if he did give consent to Farnsworth's entry, he did not consent to officers Farnsworth's entry, he did not consent to Officers Bernard's and Martin's later entries. The number of officers entering appellant's house has no practical bearing upon the validity of his consent. Appellant waived his right to privacy when he allowed Farnsworth to enter. Appellant's expectation of privacy was not further diminished by Bernard's and Martin's later entries. United States v. Rubio, 727 F.2d 786, 796-97 (9th Cir. 1983). Furthermore, Bernard's and Martin's actions in entering are necessary steps which reasonable men of caution would take to neutralize a threat of harm which they might believe existed. Terry v. Ohio, 392 U.S. 1, 21-23 (1968). Certainly, given the nature of the crime and the possibility that the felon might be within appellant's house, the officers acted with reasonable caution to insure that Farnsworth did not come to serious harm.

Secondly, Appellant claims that probable cause to arrest would be the only grounds for following him into his bedroom. This is not correct. Other exigent circumstances may give an officer the legal right to make a warrantless intrusion. Factors for determining the existence of exigent circumstances were defined in United States v. Robertson, 606 F.2d 853 (9th Cir. 1979).

> Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained. The need for an immediate search must be apparent to the police, and so strong as to outweigh the important protection of individual rights provided by the warrant requirement. There must be no practical way to avoid these risks and yet follow the Constitution's mandate of detached judicial supervision of such intrusions.

Robertson, 606 F.2d at 859. The question of whether exigent circumstances exist is one of fact requiring a review of the circumstance in each case. United States v. Brock, 667 F.2d 1315, 1818 (9th Cir. 1982).

In the present case, the facts support a finding of a substantial risk to Officer Farnsworth if he did not accompany appellant into his bedroom. Farnsworth had traced unique footprints from the scene of a homicide to appellant's home. He had done so in a relatively short period of time--fifteen minutes. He made his initial entrance into the house with appellant's consent and immediately saw a parka in plain view which closely matched the description of one worn by an individual who left the general scene of the crime. At this

point, Officer Farnsworth may not have had probable cause to arrest, but he certainly had reason to be concerned about his own safety and to believe that he might incur a substantial risk of harm if he allowed appellant to enter unaccompanied into his bedroom. An officer may take necessary steps to neutralize a threat of harm which a man of reasonable caution might believe existed. State v. Cole, Utah, 674 P.2d 119, 124 (1983), citing Terry v. Ohio, 392 U.S. 1, 21-23 (1968). See also, United Statesv. Jones, 635 F.2d 1357 (8th Cir. 1980) (warrantless entry allowed if wait would gravely endanger lives). As noted in the suppression hearing, Farnsworth remained with appellant at all times because of such fear. Also, there is no indication in the record that appellant complained of Officer Farnsworth's movement into the bedroom.

Appellant claims that the shoes were not clearly incriminating because they were not obviously contraband or weapons and the pattern on them was not noticed until after they were seized. He contends that the "clearly incriminating" test is not satisfied unless Officer Farnsworth had probable cause to believe that the shoes were evidence of criminal activity, citing Coolidge v. New Hampshire, 403 U.S.443 (1971). While Coolidge, supra, may simply this, recent United States Supreme Court decisions allow a much lower standard. In Texas v. Brown, ____ U.S. _____, 103 S.Ct. 1535 (1983), the Court defined the "immediately apparent" requirement of the plain view doctrine. The Court indicated that probable cause was not the standard for determining that the incriminating nature of the evidence is

immediately apparent. Instead, the officer must only have a reasonable belief that certain items may be useful as evidence of a crime. Brown, supra, at 1543. "Immediately apparent" does not demand that the officer's belief be correct or more likely true than false. Id.

Under the Brown standard, appellant's gym shoes were incriminating the moment that Farnsworth saw them. Farnsworth had followed tracks made by gym shoes to appellant's house. He had reasonable grounds to believe that shoes were in appellant's house. Upon entering the bedroom, it was apparent that the shoes were gym shoes. These facts warrant a man of reasonable caution to believe that the shoes would be useful evidence of the crime. Farnsworth's suspicion did not have to be correct; it did not even have to be more likely true than false. Farnsworth's suspicion need only have been reasonable, which indeed it was. The seizure of the shoes was therefore valid under the plain view exception.

B. THE APPELLANT'S SHOES WERE NOT SEIZED INCIDENT TO A WARRANTLESS SEARCH.

The cornerstone of appellant's argument in Point I is that his shoes were seized during a warrantless search. Respondent has shown that the Court can find that the shoes were legally seized under the plain view exception. However, this Court can find that Officer Farnsworth's actions did not constitute a search and that no warrantless search or seizure occurred respecting the shoes. A search, warrantless or otherwise, requires that an officer undertake some affirmative action to gather evidence "to 'search' is to look into or over

carefully and thoroughly in an effort to find or discover." State v. Echevarrieta, Utah, 621 P.2d 709, 710 (1980). In the present case, a search, as defined in Echevarrieta, supra, did not occur. The appellant consented to Officer Farnsworth's presence in his home. Farnsworth followed appellant into his bedroom where he --Farnsworth-- had a legal right to be. Then, in response to Farnsworth's question, appellant voluntarily indicated the shoes he had worn.

The United States Supreme Court has held that the reception of voluntarily produced evidence is not a search and seizure. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In Coolidge, supra, the defendant's wife voluntarily gave over defendant's clothing and weapons to the police. The Court held that no search had occurred even though the surrender of evidence took place at defendant's home and his wife had been told that defendant was in trouble. 803 U.S. at 486, 489.

In State v. Graves, Mont., 622 P.2d 203 (1981), the defendant was questioned by two uniformed patrol offricers who asked him if he had been in a fight at a local bar. The defendant responded that he had. The police then asked if he had used a knife. The defendant again answered yes and gave the knife to the police. The Montana Supreme Court found that no search was involved. Graves, 622 P.2d at 208. See, also, McGee v. State, Alaska, 614 P.2d 800 (1980) (surrender of a weapon treated as a plain view exception). The voluntary identification of the shoes by appellant to detective Farnsworth was similarly not a search.

Of course respondent's argument concerning the absence of a search does not hold if appellant was compelled to point out the shoes. In the present case appellant was not subjected to any undue coercion. Farnsworth was the only officer in view when he knocked on appellant's door. After receiving permission to enter, Farnsworth asked short, concise questions of an investigative nature. When appellant identified the shoes, Farnsworth was still the sole officer in the bedroom. There may be a certain amount of coercion when one is confronted by a police officer, but this in itself does not result in a coercive surrender of evidence. Graves, supra, at 207. Therefore, the admission into evidence of the shoes was proper, and the other items seized by the officers are, thus, not subject to the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471 (1963).

B. SEIZURE OF THE PANTS.

i. APPELLANT'S PANTS WERE PROPERLY SEIZED UNDER THE PLAIN VIEW EXCEPTION.

The case law and reasoning applied to the seizure of appellant's shoes also applies to the seizure of his pants. Officer Farnsworth had lawfully entered appellant's bedroom where the pants were in plain view, the pants were black and lay near appellant's bed, the only furniture in the room, obviously where he had undressed. This alone warranted Farnsworth's reasonable belief that the pants might be evidence of a crime. It was not necessary that he know that the pants or shoes had blood stains of the victim's type on them in order to have that reasonable belief.

ii. THE SHOES AND PANTS WERE NOT SEIZED DURING A WARRANTLESS SEARCH.

Respondent reiterates its position that appellant's shoes and pants were not seized pursuant to a search; instead they were voluntarily surrendered by appellant to detective Farnsworth in response to his noncoercive inquiries. As noted in Point I, the reception of voluntarily produced evidence is not a search. Coolidge, 403 U.S. at 489. There was no coercion involved in Farnsworth's requests that appellant identify the clothing he wore that night. Furthermore, the only reasonable inference to be taken from Farnsworth's requests is that he wished to determine if the clothing was evidence. Therefore, appellant's identification of the clothing was voluntary and knowing.

C. THE GLOVES.

i. THE SEIZURE OF THE GLOVES WAS JUSTIFIABLE UNDER EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT AND THE PLAIN VIEW EXCEPTIONS.

Before leaving with appellant, the officers conducted a short walkthrough of the rest of the house after receiving appellant's permission to do so (R. 452-53). The purpose of the walkthrough was to determine if anyone else was in the house (R. 421, 453). While looking in the bathroom, the officers saw a pair of gloves in plain view with "specks" on them. Farnsworth seized the gloves after asking appellant if he had worn them that night.

The validity of "protective sweeps" like that in the present case has been upheld. In United States v. Briddle, 436 F.2d 4 (8th Cir. 1970), cert. denied, 401 U.S. 921 (1971), after

arresting defendant, officers fanned out to make a quick search of his apartment to see if there were others who might present dangers to the officers. The officers discovered a shotgun which was admitted into evidence. The appellate court upheld the admission of the shotgun:

> The distinguishing and controlling fact, as we view the case before us, is that the shotgun was not discovered as a result of any search whatsoever. Rather, it was discovered by being in plain view in the bedroom which Special Agent Hancock entered in the exercise of his conceded right to
>
> conduct a quick and cursory viewing of the apartment area for the presence of other persons who might present a security risk.

Id. at 7.

In United States v. Clemons, 503 F.2d 486 (8th Cir. 1974), a quick search of a hotel room incident to arrest revealed heroin in the bathroom. The seizure of the heroin was upheld as a plain view discovery incident to a protective sweep. Clemons, 503 F.2d at 488.

The court in United States v. Agapito, 620 F.2d 324, 327-28 (2d Cir. 1980), cert. denied, 449 U.S. 834 (1980) approved of the protective sweep concept and called it a modest intrusion:

> The reasonableness of a security check is simple and straightforward. From the standpoint of the individual, the intrusion on his privacy is slight, the search is cursory in nature and is intended to uncover only "persons, not things." Once the security check has been completed and the premises secured, no further search--be it extended or limited--is permitted until a warrant is obtained. From the standpoint of the public, its interest in a security check is weighty. The delay attendant upon obtaining a warrant could enable accomplices lurking in another room to destroy evidence. More important,

> the safety of the arresting officers or members of the public may be jeopardized. Weighing the public interest against the modest intrusion on the privacy of the individual, a security check conducted under the circumstances stated above satisfies the reasonableness requirement of the Fourth Amendment.

Id. at 336 (citations omitted).

The protective sweep conducted in Agapito was not upheld for two reasons: the arrest was made outside the hotel room and there were no exigent circumstances. There were no exigent circumstances because the officers had the room under close surveillance for two days and knew that no one was in the room. Agapito, supra, at 336.

Finally, in United States v. Vasquez, 638 F.2d 507 (2d Cir. 1980), cert. denied, 454 U.S. 975 (1981), the court approved a security sweep incident to arrest as a ". . . minimal additional intrusion of a quick check through the home to detect the presence of others who might attack the arresting officer or destroy evidence." Vasquez, 638 F.2d at 530.

In the present case, officers conducted a quick protective sweep, after arresting appellant. They did so in order to protect themselves and any evidence which might be injured or removed by others. Exigent circumstances existed because the officers had no knowledge of whether anyone else was in the home or not. During the sweep, an officer noticed the gloves in plain view on the bathroom floor. He also noticed that they had "dark specks" on them. Under Texas v. Brown, supra, it was reasonable for the officer to believe that the gloves might

be useful evidence. Nevertheless, the gloves were not removed until Detective Farnsworth asked appellant, who had already waived his Miranda rights ("I want to level with you guys") if appellant had worn them that night. The appellant answered that he had. The answer was not coerced or the result of extended questioning or trickery on Farnsworth's part. Only at that time did Farnsworth seize the gloves. Appellant contends that the officers used the protective sweep doctrine as a "pretext" for gathering incriminating evidence. The facts simply do not support this claim. Given the circumstances, the district court did not abuse its discretion or clearly err in admitting the gloves into evidence.

POINT II

APPELLANT'S STATEMENTS MADE BEFORE HE HE WAS READ HIS MIRANDA RIGHTS WERE PROBABLY ADMITTED BECAUSE THEY WERE NOT THE RESULT OF A CUSTODIAL INTERROGATION.

Miranda v. Arizona, 384 U.S. 436 (1966), holds that an individual held for interrogation must be informed of his constitutional right to remain silent. The Miranda rule is triggered when a suspect is subjected to custodial interrogation, which is defined as taking a person into custody or otherwise depriving him of his freedom of action in any significant way. Miranda, 384 U.S. at 444. Appellant claims that he was so deprived at the moment Detective Farnsworth entered his residence. Thus appellant's claim focuses on the aspect of custody and not interrogation. This claim is not justifiable under Utah or Federal case law.

The factors involved in determining custodial interrogation are set forth in Salt Lake City v. Carner, Utah, 664 P.2d 1168 (1983). They are: "(1) the site of the interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of the interrogation. Carner, supra, at 1171. None of these factors singly, short of an arrest, is sufficient in itself to require a Miranda warning. Thus in Oregon v. Mathiason, 429 U.S. 492 (1976), the Court said that the fact that questioning took place in a police station or that the questioned one is the person whom the police suspect will not automatically mandate a Miranda warning. Mathiason, 429 U.S. at 495. Furthermore, the test is an objective one. Neither the officer's nor the appellant's subjective state of mind is a standard for determining deprivation of freedom of movement. Bocodine v. Douganis, 592 F.2d 1202, 1205-6 (1979); People v. Johnson, Colo., 671 P.2d 958, 961 (1983). This objective standard is consistent with United States Supreme Court constructions of "seizure" for Fourth Amendment purposes. United States v. Mendenhall, 446 U.S. 544, 554 (1980); See also, Waring v. State, Alaska, 670 P.2d 357, 361 (1983). Nor does the mere presence of an officer constitute a show of authority. Gomez v. Turner, 672 F.2d 134 (D.C. Cir. 1982).

Appellant cites a number of cases dealing with interrogation at a defendant's residence, which he says support his claim that he was in custody from the moment Farnsworth

entered his house. The cases cited by appellant do not apply to the present situation.

In People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515 58 Cal. Rptr. 115 (1967), the defendant was told to come to the district attorney's office and, upon his arrival, he was questioned for an hour and forty-five minutes. The defendant then gave a statement at the conclusion of the interrogation. All of the preceding occurred without defendant being given a Miranda warning. Arnold, 58 Cal. Rptr. at 118.

In Orozco v. Texas, 394 U.S. 324 (1969), the defendant was questioned at his apartment in the early morning. However, any resemblance to the present case stops at this point. First, Orozco did not admit the police to his apartment, an unidentified woman did. Second, there were four officers in Orozco's apartment at all times. Third, the officers testified that Orozco was under arrest during questioning. Fourth, the officers immediately asked Orozco if he had been at the scene of the crime--a murder--and if Orozco owned a pistol. Orozco admitted to owning a weapon and told its location. Orozco's gun was proved to be the murder weapon. Both of the incriminating questions were asked under coercive conditions before Orozco received a Miranda warning. Orozco, 394 U.S. at 325.

Similarly, in Rosiario v. Guam, 391 F.2d 869 (9th Cir. 1968), a forgery case, the civil commissioner asked the defendant the ultimate question, did you forge the check. After the question was repeated the defendant answered yes. Rosiario, 391 F.2d at 871. The court, in finding a Miranda violation, noted

that defendant's testimony was extremely prejudicial. Id. at 872.

In People v. Glover, 32 Misc. 2d 520, 276 N.Y.S. 2d 461 (1966), the court focused exclusively on the officer's subjective intent that defendant was arrested. From this the court determined that since suspicion was focused on the accused, he was subjected to custodial interrogation. Glover, 276 N.Y.S. 2d at 466. This standard no longer complies with federal case law. Oregon v. Mathiason, supra, Bocodine v. Douzanis, supra.

Appellant cites other cases which state that being the focus of an investigation is a critical factor in determining whether the accused was subjected to custodial interrogation. Appellant also cites cases dealing with the presence of probable cause to arrest. Both sets of cases center around the concept of the focus of the investigation and will be discussed together.

Windsor v. United States, 389 F.2d 530 (5th Cir. 1968) is an example of the focus of investigation as a crucial factor in giving a Miranda warning. In Windsor, supra, a co-defendant had given sufficient evidence including identification of the defendant to focus suspicion specifically on the defendant and during questioning the defendant gave a confession. Windsor, 389 F.2d at 531-32. Thus, there was enough evidence to give the officers probable cause to arrest defendant. Under those circumstances, a Miranda warning should have been given. Windsor, 389 F.2d, at 534.

Another case cited by appellant, State v. Kennedy, 166 Ariz. 566, 570 P.2d 508 (1977), also talks about focus of

suspicion in terms of probable cause to arrest. In Kennedy, probable cause to arrest was a factor in determining the necessity for a Miranda warning, but did not in itself trigger the need for a Miranda warning. Kennedy, 570 P.2d at 510.

Both State v. Meunier, 137 Vt. 586, 409 A.2d 583 (1979) and Spears v. State, 383 N.E.2d 282 (Ind. 1978), talk about footprints and probable cause but they are not directly applicable to the present case. Meunier deals with a warrantless seizure of evidence incident to arrest. Meunier, 409 A.2d at 584-85. In Spears, supra, the officers also had name identification of the defendant, based upon a card of defendant's parole officer found in defendant's clothing.

Thus the cases cited by appellant do not support his claim that he was in custody and subjected to interrogation. Those cases dealing with questioning at a defendant's residence involve fact situations radically different from the present case, usually culminating in a highly incriminating confession. The cases dealing with focus of suspicion require a much higher degree of focus than exists in the present case, usually involving identification of a specific suspect by another--Windsor, supra, or the presence of other evidence which specifically focuses the investigation on the accused--Spears, supra.

The single Utah case cited by appellant, State v. Largo, 24 Utah 430, 473 P.2d 895 (1970), also requires "specific accusations directed specifically toward one person. . . ." before a Miranda warning is required. Largo, 473 P.2d at 896.

Although no Miranda violation was found, Largo, supra, also centered around the admissibility of a confession given by the defendant.

The United States Supreme Court discussed the importance of the focus of the investigation in determining the custodial natureof interrogation in Beckwith v. United States, 425 U.S. 341 (1976). The Court reiterated its adherence to the principle that the custodial nature of the interrogation creates the necessity for a Miranda warning. Beckwith, 425 U.S. at 346. Furthermore, the coercive aspect of the situation as determined by its nature and setting determines whether the questioning was custodial. Id. The fact that the "focus" of an investigation is upon a suspect because his activities are under scrutiny does not create a custodial situation and the resulting necessity for a Miranda warning. Beckwith, supra, at 347.

Given the above law, the circumstances in the present case do not show that appellant was subjected to custodial interrogation from the moment Farnsworth received permission to enter his residence. The questioning did take place at an early hour in appellant's residence, but entry was gained through appellant's consent. Only one officer was present in the house before the appellant entered his bedroom. Nor were any of the objective indicia of arrest present. Appellant was not told that he was under arrest nor was he presented with any show of authority which would indicate arrest. There is no record of guns being drawn or threatening statements being made. Detective Farnsworth did testify that he would not have left appellant's

home if requested, but the request was never made and Farnswroth never communicated this intent to appellant. Therefore Farnsworth intention to remain was totally subjective and not part of the objective indicia of coercion or arrest associated with custodial interrogation. Bocodine v. Douganis, supra, United States v. Mendenhall, supra. Furthermore, the time between consent to entry and the reading of the Miranda warning was short and the questions asked were generally investigatory in nature.

Farnsworth's last question before reading appellant his Miranda rights was "have you killed or assaulted anyone?" The asking of this question alone does not create a Miranda violation because the appellant was not in custody when the question was asked. Rhode Island v. Innis, 446 U.S. 291, 300-1 (1980). Also, it is significant that appellant made no incriminating statements until after he had been given the Miranda warnings. State v. Meinhart, Utah, 617 P.2d 355, 357 (1980).

Finally, the investigation had not focused on the appellant as defined in Beckwith, Largo, or Meunier, supra. Appellant had not been identified by eyewitnesses as the specific individual who committed the crime, nor was there other evidence that specifically linked appellant to the crime such as fingerprints or other identifying evidence left at the scene of the crime. Appellant, in analyzing the facts, concentrates on the officer's subjective intent not to leave appellant's residence if requested to do so. This fact is of no consequence,

since it was never communicated to appellant and cannot form the basis of any objective indicia of arrest. Carner, supra.

Certainly, the officer investigating the crime was concerned with finding additional evidence leading to an arrest. There are no other reasonable grounds for an investigation. However, a reasonable suspicion that the shoes responsible for the footprints were in the house does not provide probable cause as claimed by appellant. Until Detective Farnsworth determined that the shoes were in the house and that they belonged to appellant, no probable cause to arrest existed. It would be unreasonable to assume that appellant owned the shoes when Farnsworth did not know if anyone else either resided at the house or was visiting at the time.

In conclusion, until the time that a Miranda warning was given, there were insufficient indicia that appellant was deprived of his freedom of action in any significant way, either through physical coercion or an overt assertion of police authority. Therefore, the trial court properly refused to suppress appellant's statements made prior to the Miranda warning.

POINT III

APPELLANT'S POST-MIRANDA STATEMENTS WERE PROPERLY ADMITTED BECAUSE APPELLANT INITIALLY FAILED TO AFFIRMATIVELY INVOKE THOSE RIGHTS AND THEN VOLUNTEERED STATEMENTS WHILE NOT UNDER INTERROGATION.

A valid waiver of Miranda rights must be voluntary and also be based upon a knowing, intelligent understanding of those rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1968); Stumes v. Solem, 671 F.2d 1150, 1157 (8th Cir. 1982).

Silence is not sufficient to establish waiver, but silence, coupled with an understanding of the rights and a particular course of conduct may constitute waiver. North Carolina v. Butler, 441 U.S. 369 (1979); United States v. Foskey, 636 F.2d 517 (D.C. Cir. 1980). Furthermore, a suspect must in some manner affirmatively invoke his right to silence or counsel, Miranda v. Arizona, 384 U.S. 436, 473 (1965); United States v. Bosly, 675 F.2d 1174, 1182 n.13 (11th Cir. 1982). The court must look at the totality of the circumstances to determine if a valid waiver has been made. Fare v. Michael C., 442 U.S. 707, 725 (1979). This involves an evaluation of the suspect's native intelligence and educational level, his experience with the criminal justice system, the manner in which the warnings were given, and the nature of any statement or action by the accused which potentially shows his understanding and waiver of his rights. Fare, supra, Tolliver v. Gothright, 501 F.Supp. 148. (E.D.Va. 1980) Finally, Miranda principles do not apply to volunteered statements of the accused made without interrogation. Miranda, 384 U.S. at 478, State v. Jiminez, 22 Utah 2d 233, 451 P.2d 583, 585 (1969); State v. Scandielt, 24 Utah 2d 202, 468 P.2d 639, 642 n.5 (1970). The "[c]ourts should indulge every reasonable presumption against waiver" of fundamental constitutional rights." State v. Meinhart, Utah, 617 P.2d 355, 357 (1980), quoting Johnson, supra, at 464. However, this Court recognizing the advantageous position of the district courts, reverses a finding of waiver or voluntary admission only when that finding is clearly in error or the district court abused its discretion. Meinhart, supra.

In this case, the only evidence to support appellant's contention is that he did not expressly say that he wished to freely speak.

In considering the totality of the circumstances, the evidence supports the state's contention that appellant's communications were voluntary. Appellant is a mature adult of above-average intelligence (I.Q. of 119) (R. 272). He is a high school graduate who, at the time of the crime was attending Utah Technical College. He had a prior conviction and was thus no novice in these matters. Indeed, while Farnsworth was reading appellant's rights from a Miranda card, appellant interrupted him to say that he had heard his rights before and knew them. Farnsworth finished reading appellant his rights despite this. There can be no doubt that appellant was aware of his rights.

When asked if he wished to answer any questions, appellant responded "I don't know". Although this may not constitute an express waiver, neither does it communicate an affirmative intention by appellant to invoke his rights. Then Farnsworth asked appellant to give a yes or no answer to the question. This was only reasonable because Farnsworth could not otherwise be sure if appellant had invoked his rights or not.

Appellant's reply "well, it depends" can be construed as "It depends upon what questions you ask." Appellant, in essence, was selectively waiving his Miranda rights. His intention was to answer those questions that he wished and to leave others unanswered. Farnsworth then asked appellant two questions: had appellant been at the scene of the crime and what

other clothing had appellant worn. Appellant did not answer the first question, but readily pointed out the clothes he had worn.

In State v. Moraine, 25 Utah 2d 51, 475 P.2d 831, 832 (1970), the defendant robbed a store and accidentally shot himself. When the police found him, he was in great pain. The officer read him his rights and the defendant said he did not wish to talk. Then the officer asked him why he committed the robbery. The defendant's incriminating answer was admitted into evidence although he claimed the state failed to affirmatively show that he waived his right to remain silent. This Court stated:

> The fact that he made the statement after being warned is a clear indication that he waived any right, if any he had, to remain silent.

Respondent contends the present case clearly comes within the scope of Moraine, supra,. In that case, the defendant was in great pain and had expressly said he did not wish to talk. In the present case the appellant was not suffering from either mental or physical pain and had expressed at best an ambivalent desire to selectively invoke his rights. Appellant's identification of his clothing was free and voluntary, under conditions that he had specified. In effect, appellant "indicated his disinclination to assert his known right to remain silent by freely and willingly answering the officer's question." State v. Ricci, Utah, 655 P.2d 690, 692 (1982).

At this point, after gathering the clothes that appellant had indicated, Farnsworth told him that he would have to accompany the officers to the station. Almost immediately

thereafter appellant said "I want to level with you guys. I do know somebody at that house you talking about" (R. 4201). This statement was voluntary, it occurred within one and a half minutes after his Miranda rights were read and it was not in response to any question by an officer. From here, the conversation between appellant and Detective Farnsworth was a free dialogue devoid of any coercion or indices of interrogation. Indeed, appellant's quoted statement would be admissible in court without a Miranda warning and certainly serves as a proper waiver of Miranda rights after a warning. Miranda, 384 U.S. at 478.

POINT IV

THE STATEMENTS MADE AND EVIDENCE SEIZED SHOULD NOT BE SUPPRESSED UNDER THE FRUITS OF THE POISONOUS TREE DOCTRINE.

Appellant claims that all evidence seized and statements he made resulted from alleged unlawful acts of the police in violation of the Fourth and Fifth Amendments. Without reciting all of the arguments made in the previous three points, respondent asserts that this is not the case.

Appellant was properly informed of his Miranda rights. He freely chose to waive those rights, first by agreeing to answer questions selectively ("I don't know. It depends."), and second, by agreeing to "level" with the officers. This last full waiver was volunteered within a minute and a half after appellant was informed of his rights and indicated his understanding of them.

Appellant voluntarily identified his shoes, pants and gloves. No coercion was involved. Under Coolidge v. New

Hampshire, supra, the shoes and pants were not the product of a seizure; they were evidence voluntarily surrendered by appellant to Detective Farnsworth. The gloves were discovered in plain view during a lawful protective sweep search of appellant's house. None of this evidence is subject to the exclusionary rule.

Appellant attempts to apply the poisonous tree doctrine, Wong Sun v. United States, 371 U.S. 471 (1963), to statements made by appellant while he was being transported to the police station. That doctrine is not applicable here because appellant had already given a full waiver of his Miranda rights before he entered the police car. Furthermore, statements by appellant while in the car that were admitted at trial were not the product of interrogation; they were either assertions made or questions asked by appellant without Detective Farnsworth's prompting. Finally, appellant claims that evidence seized under the search warrants must be suppressed because the probable cause statement was based upon the allegedly illegally seized shoes. Respondent has already demonstrated in Point I that the shoes were either not seized at all, or were properly seized under the plain view exception.

Furthermore, appellant overlooks the fact that the probable cause statements also list footprints leading from the scene of the crime, the valid plain view discovery of the coat closely matching that worn by the suspect, and the fact that appellant was sole occupant of the house. These facts alone, without the shoes would give a cautious mind reasonable suspicion

to believe that useful evidence was in the house. Such a reasonable suspicion would be sufficient probable cause for issuance of a search warrant. United States v. Wiecking, 703 F.2d 408, 410 (9th Cir. 1983). The warrants in the present case are still valid even assuming, arguendo, that the shoes were improperly used as probable cause. Nor does the alleged fact that the officers did not correctly state the grounds for the search if, from an objective viewpoint, probable cause existed. White v. United States, 448 F.2d 250, 254 (1971), cert. denied, 405 U.S. 926 (1972). The above holds true even if the officers acted in bad faith, a claim that appellant does not make. Blair v. United States, 665 F.2d, 500, 506 (1981). The issuance of the search warrants in the present case was lawful, even granting appellant's spurious claim that the shoes could not serve as grounds for probable cause. Thus under any argument the evidence seized under the search warrants is not subject to the fruit of the poisonous tree doctrine. Wong Sun v. United States, supra.

POINT V

EVIDENCE SEIZED UNDER THE WARRANTS IS EITHER ADMISSIBLE OR ITS ADMISSION AT TRIAL WAS HARMLESS ERROR.

A. THE ALLEGED ILLEGAL ENTRY AND SEIZURE OF APPELLANT'S HOME BY OFFICER BERNARDS DOES NOT AFFECT THE ADMISSIBILITY OF EVIDENCE OBTAINED UNDER THE SEARCH WARRANTS.

The crux of appellant's theory in Point VI of his brief is that the "impoundment" of his home by Officer Barnards was an illegal seizure of that home and all of its contents which could not be cured by issuance of valid search warrants. The cases cited for this principle by appellant, while valid law, are more

restrictive than recent United States Supreme Court cases and should not be adopted by this jurisdiction.

In Mincey v. Arizona, 437 U.S. 385 (1978), the Court reviewed a situation where a police guard was placed at the entrance of a residence to preserve the status quo while a search warrant was being sought. The Court approved this procedure even though "[T]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant" Mincey, 437 U.S. at 394.

In Rawlings v. Kentucky, 448 U.S. 98 (1980), officers secured the home from within of a person for whom they had a valid arrest warrant. The officers detained all of the home's occupants while a search warrant was being obtained. The Court did not question the admissibility of evidence seized under the warrants. Rawlings, supra, at 106-10.

Finally, in Segura v. United States, ____ U.S. ____, 104 S.Ct. 3380 (1984), the Court found that the illegality of an initial entry and securing of a house from within has no effect upon the validity of a subsequent search based on a valid search warrant. Segura, 104 S.Ct. at 3382-83.

In Segura, supra, narcotics agents arrested the defendant under a valid warrant in the lobby of his apartment building. They then took defendant upstairs to his apartment where they were met by a third person. The agents entered the apartment without receiving or requesting permission. The agents conducted a limited security sweep of the apartment to insure that no one else was there who might destroy evidence. In the

process the agents discovered useful evidence in plain view, but disturbed none of it. Two agents remained behind in the defendant's apartment awaiting a warrant which was issued 19 hours after the agents' initial entry. Segura 104 S.Ct. at 3384. Numerous items were seized pursuant to the warrant.

The defendant claimed that all evidence seized under the warrant was tainted by the illegal initial entry and therefore should be suppressed. The Court accepted the lower court's determination that the entry was illegal, but said that the illegality of this entry did not affect the validity of the seizures under the warrants as long as the warrant was based on validity obtained probable cause. Segura, 104 S.Ct. at 3389-980.

In the present case, appellant does not contest the validity of Detective Farnsworth's entry. That entry, appellant concedes, was based upon appellant's consent. Furthermore, probable cause for the search warrants was based upon information legally obtained by Farnsworth; e.g., the prints noticed before the entry, and the coat and shoes legally viewed after the entry. All of this information was gained prior to or independently of Officers Martin's and Bernard's entry and the subsequent securing of appellant's home. The warrants were there based on legally obtained probable cause untainted by the complained of police actions. Under Segura, supra, that evidence is admissible and not subject to the exclusionary rule.

The subsequent entry by the video tape technician is of no consequence in the present dispute. No evidence was disturbed, and tapes were made only of the front room and the bedroom of appellant's home. The only reasonable purpose for

these tapes was to verify the location of evidence in appellant's house which might later be seized. The suppression of these tapes would be of no consequence because testimony at the suppression hearing verified that all evidence was seized from appellant's home.

Considering all of the above, the evidence seized under the warrants was admissible.

B. ASSUMING THE EVIDENCE GATHERED UNDER THE SEARCH WARRANTS SHOULD HAVE BEEN SUPPRESSED, IT WAS CUMULATIVE AND ITS SUPPRESSION WOULD HAVE NO EFFECT ON THE OUTCOME OF THE CASE.

Appellant claims that evidence gathered under the search warrants must be suppressed because that evidence was already illegally seized when Officer Bernard remained on the premises after appellant was taken to the police station. Granting, arguendo, appellant's claim, the suppression of the evidence gathered pursuant to the warrants would not result in reversal because that evidence was merely cumulative in effect.

Only one item of evidence seized pursuant to the warrants was introduced at trial; a shoelace covered with blood. Roy Tubergen, an F.B.I. expert on examining physical evidence for blood, determined that the blood on the shoelace was the same type as the victim's. However, Tubergen also located blood on the back of appellant's parka, on the cuff of his pants and on the instep of his right tennis shoe. The blood on the parka and the pants was consistent with the victim's blood. As has been shown, the parka, pants, and shoes were all lawfully obtained by the police by either voluntary surrender or warrantless seizure. Under these facts, the blood discovered on appellant's shoelace

is merely cumulative evidence and adds nothing new or of importance to the state's case. Furthermore, the other evidence is more than sufficient to support appellant's conviction See State v. Griffin, Utah, 626 P.2d 478 (1981). Therefore, since appellant's substantial rights were not affected by admission of the shoelace, the error, if any, should be disregarded. Rule 30, Utah Rules of Crim. Procedure.

POINT VI

THE SEIZURE OF EVIDENCE NOT LISTED IN THE SEARCH WARRANT HAS NO EFFECT UPON APPELLANT'S TRIAL BECAUSE THIS EVIDENCE WAS NOT INTRODUCED AT TRIAL.

Appellant complains of the seizure of certain items, specifically various purses, a toilet token, a red nipple stuffed with cotton, a bed sheet, a bed cover, a blue and white sweater, a red scarf with a knot and miscellaneous papers. Appellant presents a well reasoned argument citing many cases. Assuming the validity of this argument, it is unclear what the purpose of appellant's claim is, since none of the evidence complained of was introduced at trial. The only item introduced at trial and seized pursuant to the warrant was a shoelace. This shoelace was specifically mentioned in the affidavit for the warrant and in the warrant itself.

Appellant also notes that the wrong address appears on one warrant and that the correction gives no indication of when or by whom it was made. It should also be noted that there is no indication of who made the initial error in the address. However, the affidavit for the warrant does contain appellant's correct address. The mistaken address appears in the probable

cause statement at the end of the affidavit. It is apparent that the individual responsible for writing the affidavit Detective Abbott was aware of the correct address.

A description in a warrant of a place to be searched is constitutionally adequate if the officer executing the warrant can locate the place to be searched with reasonable effort.

A wrong address on the warrant will not in itself invalidate a warrant if an officer, through personal knowledge of the premise's address, is able to locate it. State v. Rood, 18 Wash. App. 740, 573 P.2d 1325 (1977). See also U.S. v. Avarello, 592 F.2d 1339, 1344 (5th Cir. 1979). In the present case, Detective Abbott wrote the affidavit containing the correct address and executed the warrant. (Suppression hearing transcript 459). He therefore had sufficient personal knowledge to locate appellant's house with reasonable effort.

Finally, appellant claims that the warrants were based on illegally seized articles. Respondent has previously demonstrated the error in this allegation. Nor is there anything in the affidavits from which the magistrate would necessarily infer that the articles were still in appellant's house.

Before a hearing reviewing the accuracy of an affidavit is required, appellant must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiaint in the warrant affidavit." Franks v. Delaware, 438 U.S. 154, 155 (1978). Under Franks, supra, appellant's challenge to

the facial adequacy of the affidavit in the present case fails on several grounds. First, appellant has failed to show from the record that there was any intentional, knowing or reckless disregard of the truth by the affiant. Secondly none of the statements in the affidavit are false. Appellant's claims that the facts upon wichh the affidavit is based are either misleading or conclusory is itself conclusory and without support. The claim should be disregarded.

POINT VII

THE DISTRICT COURT'S REFUSAL TO DISMISS FOR FAILURE TO HOLD THE PRELIMINARY HEARING WITHIN TEN DAYS WAS BASED ON GOOD CAUSE SHOWN. MOREOVER, ASSUMING ARGUENDO, THAT THERE WAS ERROR, APPELLANT IS NOT ENTITLED TO THE RELIEF REQUESTED.

Prior to trial, appellant filed a motion on April 5, 1982, to dismiss the information based upon an alleged violation of his rights as expressed in Utah Code Ann. § 77-35-7(c) (Supp. 1981). This motion was denied. Appellant renewed the motion in District Court on December 7, 1982. The District Court, in denying the motion noted that the matter had already been ruled on by the Circuit Court and that it, the District Court, was not in a position to review that ruling (R. 363). In both the motions and the present appeal, appellant claims in essence that his statutory and constitutional right to a speedy trial was violated when the preliminary hearing was postponed, supposedly without good cause shown.

Two continuances were granted. The first was set for March 5, 1982. At that time the State moved to continue because evidence sent to the F.B.I. for analysis had not been returned

and the State needed the evidence in order to proceed with the hearing. Judge Gowans granted the motion and set the hearing for March 24, saying that this was good cause (R. 359). On March 23, Judge Jones' clerk reported that the judge had been assigned the hearing, that he was unavailable to hear the case the next day and that the hearing was continued on the Court's order until April 5 (R. 360). At that preliminary hearing the judge addressed the question of cause for the extension. He stated that unavailability of a judge for the hearing was good cause and that the continuance was properly granted (R. 360).

Notably, appellant stated at the District Court hearing that the State could refile if the information was dismissed (R. 362). Yet, on the present appeal, appellant asks for reversal of the judgment and dismissal of charges.

The continuances were indeed granted for good cause. The first continuance was granted because vital evidence was still in the F.B.I.'s possession. The absence of a material witness, where the State is not at fault, has been ruled good cause. State v. Goodmiller, 86 Idaho 233, 386 P.2d 365 (1963). A delay occasioned by the State's awaiting a laboratory report on evidence has been ruled good cause. State v. Anonymous, 29 Conn. Sup. 193, 218 A.2d 151 (1971).

In Morton v. Supreme Court, 411 P.2d 170 (Arizona 1966), a case cited by appellant, unavailablity of a judge to preside over a preliminary hearing was said to be good cause for a continuance. Morton, 411 P.2d at 173. In State v. Moore, Utah, 521 P.2d 556 (1974), the decision granting continuance was

reversed because the State made no attempt to show good cause. Rather the State attempted to avoid making the showing by dismissing the complaint and then refiling. The State attempted no such subterfuge in the present case. Instead both continuances were based upon findings of good cause. Those findings should not be reversed unless the lower courts abused their discretion, a fact clearly not evident in the present case. People v. Ludviksa, 15 Cal. 3d 481, 87 Cal. Rptr. 182 (1971).

Even if the alleged error did occur, it would not be grounds for reversal of the trial court's judgment. Appellant admits that dismissal of the Information at the pretrial level would not have resulted in prejudice against the State. Refiling would always be a possibility and logically would have occurred in a case such as the present one. It follows that errors at the pretrial level which would not irreversibly deny the trial court jurisdiction should not be grounds for reversal of an otherwise valid conviction.

The United States Supreme Court has addressed this issue in a similar setting--a purported lack of jurisdiction to tray a plaintiff who has been arrested on a warrant issued without adequate probable cause. In Gerstein v. Pugh, 420 U.S. 103, 119 (1974), the Court said that it is an "established rule that illegal arrest or detention does not void a subsequent conviction." The Court reaffirmed that position in Stone v. Powell, 428 U.S. 465, 485 (1976) and in United States v. Crews, 445 U.S. 463, 478 (1979) (White, J. concurring). Like the dismissal of an arrest warrant, the dismissal of the Information

in the present case would not have put appellant forever beyond the court's jurisdiction. Also, it is notable that the Court in Gerstein, supra, stated that illegal detentions do not void a subsequent conviction. The avoidance of illegal detentions is the crux of the right to a speedy trial or preliminary hearing. These are the rights that appellant claims the State violated. Furthermore, appellant has not shown, or even alleged that his right to a fair trial was prejudiced by the continuances. It has not been shown that the State gained an unfair advantage from or that appellant was disadvantaged by the continuances. Errors by a magistrate at a preliminary hearing are not grounds for reversal if an accused is afforded a proper trial unless such prejudice is shown. State v. Seymore, 18 Utah 2d 153, 417 P.2d 655 (1966). Where, as in the present case, appellant has been properly convicted in an otherwise error free trial, it would be anomalous indeed if the judgment could be reversed for a supposed lack of good cause to continue a preliminary hearing.

POINT VIII

THERE WAS SUFFICIENT EVIDENCE TO FIND APPELLANT GUILTY OF FIRST DEGREE MURDER.

A. THE EVIDENCE ESTABLISHES APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

This Court's ability to review a conviction on the sufficiency of the evidence is well established. State v. Griffin, supra. In any event, the evidence and all favorable inferences in the present case is not merely sufficient to sustain appellant's conviction; it strongly mandates appellant's conviction.

At 3:00 a.m. on February 10, 1982, two people, Elizabeth Langford and Clark Campbell, awoke to a loud scream from the apartment directly above them. They both heard what sounded like a fight, followed by loud banging noises. One of the voices was full of fear. After fifteen minutes, the noise suddenly stopped. They then were able to trace the sound of footprints leaving the apartment above them, going downstairs towards the apartment house's front door. They both looked out their front window and saw the back of a man at a distance of eight feet. Obviously this man was the one who had been in the apartment above them, Carla Taylor's apartment. The man paused long enough for Clark and Elizabeth to notice that he was dark and dressed in dark pants and wore a dark parka with a bright colored V-stripe on the back.

Then the man headed east leaving footprints in the fresh snow along Sixth South, a direction that would lead him to appellant's residence. Two officers responded to a call by Clark Campbell. The first thing they noticed as they approached the apartment house was a single set of prints both entering and leaving the front of the apartment, prints left by the man whom Clark and Elizabeth had seen leaving the apartment house. The officers entered the apartment house and immediately proceeded to Carla's second floor apartment. There they discovered her partially nude body, badly beaten, covered with multiple stab woulds, the murder weapon left in her chest and a toothbrush thrust into her vagina. They were the type of wounds and beating that would require a good fifteen minutes of violent effort to

inflict; a badly slashed lip, severe stab wounds on the shoulder and the fatal wound, entering the chest and penetrating the back. There was a print on the victim's neck, as if the murderer held her down with his foot while inflicting many of the blows or while attempting to disrobe her.

Other officers arrived. They followed the footprints easily, quickly, to appellant's house. The pattern of the print was unique, obviously left by a gym shoe. Officer Farnsworth knocked on appellant's door after determining that the footprints terminated there. Farnsworth entered with appellant's consent and immediately saw a coat matching the one seen by Clark and Elizabeth . The coat had blood on it matching the victim's, not appellant's. Whoever wore that coat had been at Carla Taylor's apartment. Appellant then indicated what shoes he had worn that night. They were gym shoes, with a tread matching that of the prints Farnsworth had followed and they were wet. Obviously appellant had been at Carla's apartment and, equally as obvious, he had been there recently.

There was blood on the shoes and on dark pants appellant said he wore that night. The blood matched the victim's. It was easy to see how that blood might have got there as appellant placed his foot on the victim's body and inflicted a knife wound on her chest or upper body or, equally as reasonable, blood flowed across appellant's shoe from a fresh wound while he held the victim down, preventing any escape.

Later, appellant admitted that he was at Carla Taylor's apartment house, but that he went to see Jerome Thornton who

lived across the hall from Carla. Appellant claimed that he was in the apartment house only long enough to ring Thornton's doorbell and then left when there was no answer. Thornton was home, however, and was awakened by screams from the victim's apartment. Furthermore, he never heard his doorbell. Thornton is a light sleeper and his doorbell is easily audible from his bedroom. Appellant was indeed at Thornton's apartment house, but he obviously made no attempt to see Thornton.

For a short moment, appellant and the arresting officers returned to the scene. Appellant requested to be handcuffed. He was afraid, and did not know what he was going to do. He said that if he could kill the officers and get away, he would do so. Appellant wept as he saw Carla Taylor's two young children carried from the apartment. "If only Darla (Darla Cates) had been there," he said. We know that Darla was not getting along with Jerome. We also know that Darla had spent at least one night with appellant, although Darla claimed that they did not have intercourse. Apparently, he got drunk and passed out before things got that far along.

Yet it is easy to see how appellant might have remembered that night and also have remembered the discord between Darla Cates and Jerome. Appellant and Darla are quite possibly attracted to each other. Appellant went to see her, intending perhaps not to pass out this time, but Carla is no longer in Jerome's apartment or in the apartment of her friend, Carla Taylor. However, Carla, a mutual acquaintance of Darla's and appellant's was there. But she resisted his advances. We

know that she refused to date black men (A. 653). Appellant persisted in his attempts, which changed from sexual advances to attempted rape. Enraged at her refusal, appellant assaulted her. A loud scream and the noises of a fight ensued. Carla continued to resist as appellant beat, stabbed and finally murdered her. Sometime, either before or after the fatal blow, appellant thrust a toothbrush into Carla's vagina. We can only guess what this act symbolized to him. The above scene is reasonable and the evidence is sufficient to support it beyond a reasonable doubt.

Appellant makes two claims; one, the evidence does not support attempted rape and/or sexual assault; two, Jerome Thornton had a motive for the murder.

The evidence supports the attempted rape charge. A public hair was found on the lower portion of the victim's buttocks which matched appellant's own pubic hair. Twenty individual characteristics found in appellant's hair exactly matched those of the hair found on the victim. Out of 10,000 samples, F.B.I. expert Mike Malone had seen only two occasions when samples from two people were indistinguishable. Furthermore, the hair on the victim had been forcibly removed from its host; it had not fallen off by natural shedding. Also, there were <u>two</u> wounds to the victim's vagina; one probably caused by a sharp object--the toothbrush--and another more likely caused by the violent penetration of a penis. Coupled with the fact that ejaculation often does not occur during rape, it becomes reasonably apparent that appellant attempted to penetrate the victim and, during the act several of his public hairs broke off

and was left on the victim. Appellant's attempts were so violent that he bruised the victim's vagina.

Secondly, appellant presented some evidence tending to show that Thornton had a motive for killing the victim. Yet, appellant presented no evidence showing that Thornton acted upon this motive. The presence of another's motive to kill a victim is simply not enough, by itself, to create a reasonable doubt that the accused did not commit the crime. If the above were not true, then conviction would never be had, for there are few people indeed who have not, like Carla, participated in a fallout between lovers. Appellant's argument is merely an attempt to misdirect the court's attention and does nothing to lessen the substantiality of the evidence supporting appellant's own guilt.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DISMISS THE AGGRAVATING CIRCUMSTANCES

Appellant also claims, in Point IX of his brief, that the evidence was insufficient to support even a charge of capital homicide. Respondent has already shown that the evidence was sufficient to support a conviction based on the aggravating circumstances. It follows that the district court could not have erred in refusing to dismiss the aggravating circumstances of attempted rape or sexual assault.

CONCLUSION

All evidence gathered by the investigating officers either falls under exceptions to the prohibition against warrantless searches or was freely volunteered by the appellant. The search warrants were based on adequate, legal, and

independent probable cause. Appellant freely and knowingly waived his Miranda rights. Any statements made before the waiver were not coerced by the police, but were voluntary responses to investigatory questions. There was reasonable cause shown for granting the continuances to appellant's preliminary hearing. Furthermore, appellant's right to a fair trial was not prejudiced by any alleged errors in the preliminary proceedings. Therefore those alleged errors can be grounds for reversal. Finally, the evidence is sufficient to support both the charge of and conviction for capital homicide. The trial court verdict should be affirmed.

Respectfully submitted this 15th day of November, 1984.

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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 David C. Biggs, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South Second East, Salt Lake City, Utah 84111, this 15th day of November 1984.

Kathleen Dugan