1984

The State of Utah v. Dennis A. Heap : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19254
DENNIS A. HEAPS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant, Dennis A. Heaps, was charged with Possession of a Dangerous Weapon by a Restricted Person, a second degree felony, in violation of Utah Code Ann. § 76-10-503 (1978). Defendant was on parole from the Utah State Prison for the crime of burglary.

Defendant waived the jury and was convicted of Possession of a Dangerous Weapon by a Restricted Person in a trial held April 25, 1983, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Judge, presiding. Defendant was sentenced on May 4, 1983, by Judge Baldwin, to serve an indeterminate term of 1 to 15 years in the Utah State Prison, to run concurrently with the term already being served by defendant for the prior burglary conviction.

STATEMENT OF THE FACTS

On the afternoon of Sunday, January 23, 1983, Brian Hargett cleaned his .380 automatic pistol and replaced the gun

and its holster between the mattress and bed frame at the foot of his waterbed in his bedroom (R. 63-64, 78). The bed covers were pulled away, exposing the handle of the gun (R. 78).

At approximately 11:00 p.m. on January 23, 1983, defendant, Doug Jensen and Gabe Gallegos visited Hargett's apartment to watch videos (R. 64-66, 72, 153-155, 165-166). Defendant had met Hargett only a day or two earlier at a small party in defendant's apartment just down the hall from Hargett's (R. 69-70, 93, 153, 189-190). During the course of their visit, each of the three visitors used Hargett's bathroom, going through Hargett's bedroom to get there (R. 66-67, 73-74). Defendant and the other two visitors left Hargett's apartment at approximately 12:30 a.m. (R. 67, 74, 166). The following Wednesday, after learning that defendant had been arrested for possession of a firearm, Hargett looked for his gun between the mattress and bed frame and discovered that the gun was missing (R. 67-68, 75-77). Hargett testified that to his knowledge no one knew he kept a gun in his bedroom (R. 70-71, 79).

On the evening of Tuesday, January, 25, 1983, at approximately 9:00 o'clock, defendant asked his friend David McCoy to drive him and his girlfriend, LaDawn Turner, to his girlfriend's house by way of North Temple (R. 82, 159, 201-202). Defendant, Turner, McCoy and McCoy's 3-year-old daughter were in the cab of McCoy's 1979 Ford pickup truck driving along North Temple when defendant pulled a gun from his waistline and showed it to McCoy (R. 84-85, 94, 199). McCoy asked defendant to put the gun back, and defendant did so (R. 85).

At defendant's request, McCoy pulled into the parking lot of Grinders 13, a restaurant located between 1100 and 1200 West on North Temple (R. 83, 93, 160, 201). Defendant exited the pickup truck and, while the others waited in the cab, walked next door to the Lake Hills Community Correction Center, a halfway house for convicts, ostensibly to pick up from his friend Mike Perry a magazine and a pair of sunglasses that defendant had left at the halfway house when he had been released therefrom in December of 1982 (R. 85, 93, 128, 159-160, 174-175). Defendant returned to McCoy's pickup truck, followed by Perry, and both got into the cab (R. 85, 94, 130, 160, 173). McCoy was sitting behind the steering wheel with his daughter seated immediately to his right, while on the other side of the gearshift sat Turner, defendant and Perry, in that order (R. 86, 96-97).

After Perry got in the cab of the pickup truck, McCoy drove out of the Grinders 13 parking lot, angling west across North Temple (R. 85, 94, 108, 115, 131-132, 160-161, 172-173). McCoy pulled into the VIP Trailer Court and came to a stop when Officer Henry Huish of the Salt Lake City Police Department pulled in behind the pickup truck with his patrol car's overhead rack lights flashing (R. 86, 94, 108, 115, 133, 162, 181). Officer Huish had been observing the pickup truck and its occupants for several minutes from his parked patrol car after having noticed the pickup truck during two passes of the Grinders 13 parking lot, and decided to stop the pickup truck when McCoy illegally changed lanes while angling across North Temple (R. 106-108, 115).

As backup units arrived, Officer Huish ordered the occupants out of the cab of the pickup truck. Dave McCoy, his daughter, LaDawn Turner, defendant and Mike Perry, in that order, then existed the pickup truck from the driver's side (R. 86, 95-96, 109, 121, 134-135). The officers then searched the occupants for firearms, and Officer Huish searched the pickup truck cab, finding the loaded .380 automatic under the seat approximately 12 to 18 inches away from the passenger door, directly below where defendant had been sitting (R. 96, 109-11, 114-115, 121). Concerned because of the discovery of the gun, the officers, for their own safety, handcuffed but did not place under arrest the occupants of the pickup truck (R. 117-120).

Office Huish interviewed each of the occupants separately regarding possession of the gun, and each initially denied any knowledge of the gun; however, upon a second interview both McCoy and Perry informed Officer Huish that defendant had been in possession of the gun, keeping it tucked in his waistband (R. 95-98, 112-114, 116-118, 181-187). Defendant was placed under arrest and questioned again regarding possession of the gun. Defendant again denied any knowledge of the gun, but then asked if it was a .380 automatic. Officer Huish responded affirmatively, and defendant volunteered that the gun belonged to someone named Brian, who had probably left it in the truck (R. 114, 162-163, 173).

Because defendant at that time was on parole from the Utah State Prison for a previous burglary conviction (R. 53-54, 151-152), he was charged with Possession of a Dangerous Weapon by

a Restricted Person. Defendant now appeals his conviction on that charge.

SUMMARY OF ARGUMENTS

Point I. Defendant cannot raise for the first time on appeal a claim that excluded testimony should have been admitted at trial under the prior inconsistent statement exception to the hearsay rule because defendant failed to so inform the trial court. This Court will not review claims in such circumstances because the trial court was not afforded the opportunity of addressing defendant's concerns, failure to raise the claim at trial indicates acquiesence in the trial court's ruling, and the granting of a new trial in such circumstances would contravene considerations of finality.

Defendant has not shown that the trial court abused its discretion by excluding hearsay testimony proposed by defendant or that he was unfairly prejudiced thereby. The trial court properly excluded the hearsay testimony because the testimony was no so inherently reliable that it could be admitted under an exception to the hearsay rule and because defendant did not provide the hearsay declarant an opportunity to deny or explain the alleged statement. Finally, in light of the overwhelming evidence of defendant's guilt, any error in the exclusion of the testimony was harmless.

Point II. Defendant waived any challenge to the admissibility of the gun by failing to make a pre-trial motion to suppress such evidence in accordance with Rule 12, Utah Rules of Criminal Procedure, and his interposing an objection at trial at

the end of the State's case-in-chief does not preserve the issue for appeal. Defendant has shown no cause warranting relief from Rule 12's waiver provision, and the waiver should be enforced because defendant long before the first day of trial was aware of the facts and circumstances surrounding the arrest and of the possibility of the introduction into evidence of the gun.

Because defendant failed to discharge his burden of proof with respect to the alleged inadmissibility of the gun, the record does not reveal the extent of the police officer's probable cause for the stop, search and arrest; therefore, this Court has no basis upon which to review defendant's allegation of irregularities in the stop, search or arrest. Defendant should not be permitted to challenge on appeal issues he failed to develop adequately at trial.

Finally, under Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978), defendant has no standing to challenge the search of the passenger compartment of David McCoy's pickup truck because as a mere passenger he had no legitimate expectation of privacy therein.

Point III. Defendant's conviction is supported by sufficient evidence. The testimony of David McCoy and Officer Henry Huish, the police report and other circumstantial evidence all established that the gun was in defendant's possession.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY EXCLUDED THE HEARSAY TESTIMONY OF DEFENDANT'S WITNESS.

A. DEFENDANT CANNOT CHALLENGE ON APPEAL THE TRIAL COURT'S RULING

Defendant at trial sought to elicit from defense witness, Mike Perry, on direct examination the substance of a statement allegedly made by David McCoy at the VIP Trailer Court just after they had been released. The trial court sustained the prosecutor's objections to this hearsay testimony because the testimony was intended only to establish the truth or falsity of McCoy's alleged statement (R. 103, 140-146) [See Appendix "A"]. Defendant did not object to the trial court's ruling.

Defendant on appeal alleges as error the trial court's exclusion of Perry's testimony and now claims for the first time that the testimony should have been allowed as a prior inconsistent statement, an exception to the hearsay rule. Rule 63(1)(a), Utah Rules of Evidence (1977). (The new Utah Rules of Evidence did not become effective until September 1, 1983, after defendant's trial was completed.) Defendant in his brief speculates that in the absence of the trial court's rulings Perry would have impeached McCoy by testifying that McCoy told him that the gun was not in defendant's possession but was in fact in McCoy's possession (Brief of Appellant, p. 7).

Rule 5, Utah Rules of Evidence, provided that a party may challenge on appeal the exclusion of evidence only if the record shows that the party made known the substance of the evidence or indicated the substance of the anticipated evidence by questions indicating the desired testimony. In the instant case the substance of the excluded testimony was adequately indicated by the questions asked; however, this Court in

Bradford v. Alvey & Sons, Utah, 621 P.2d 1240 (1980), expanded the requirements of Rule 5 by affirming the trial court's exclusion of hearsay testimony on the grounds that at trial the plaintiff-appellant "did not make any offer of proof as to what evidence would be adduced, nor the purpose it would serve, as required by Rule 5, Utah Rules of Evidence." Id. at 1243 (emphasis added).

In the case at bar, the trial court repeatedly asked defendant the purpose of the desired testimony and indicated that the testimony would be admissible if the reason for the questions was other than to establish the truth or falsity of McCoy's alleged statement (R. 141-142) [See Appendix "A"]. Defendant never advised the trial court that he was offering the testimony as a prior inconsistent statement to impeach McCoy. For defendant now to challenge the trial court's ruling on that basis violates the well-settled rule in this jurisdiction that absent exceptional circumstances a party cannot raise an issue for the first time on appeal. State v. Steggell, Utah, 660 P.2d 252 (1983); Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1971). Since defendant has not alleged any exceptional circumstances justifying his failure to take advantage of the ample opportunities presented at trial to raise this claim, he is precluded from challenging the trial court's ruling.

This Court's language in Bradford, indicating that a party cannot challenge on appeal the trial court's exclusion of testimony unless that party informed the trial court of the purpose to be served by the testimony, is supported by Rule 20,

Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-20 (1982)), which provides:

> Exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party state his objections to the actions of the court and the reasons therefore. If a party has no opportunity to object to a ruling or order, the absence of an objection shall not therefore prejudice him.

Thus, although Rule 5, Utah Rules of Evidence, did not expressly require a contemporaneous objection to a trial court's ruling excluding testimony as did Rule 4, Utah Rules of Evidence (1977), in cases involving the admission of evidence, under Rule 20, Utah Rules of Criminal Procedure, and this Court's ruling in Bradford, a party has a duty at trial to raise the legal grounds supporting the admissibility of excluded testimony and to inform the court of the purpose to be served by the excluded testimony.

The application of Rule 20, Utah Rules of Criminal Procedure, to this case is clear. Because defendant had ample opportunity to object to the trial court's exclusion of Mike Perry's hearsay testimony on the grounds that the testimony was admissible as a prior inconsistent statement offered for the purpose of impeaching David McCoy, defendant's failure to do so precludes him from now raising the issue on appeal.

This result is supported by solid policy considerations. The court in Rice v. State, 567 P.2d 525 (Okl. Cr. 1977), outlined several important reasons for such a rule. In Rice, the prosecutor objected to testimony which the defendant sought to elicit on direct examination from her own witnesses. The Rice court stated:

> The court, rightfully or wrongfully, sustained the State's motion. Defendant thereupon took no exception to the court's ruling. An exception here would have been no mere formality for by not taking it defendant apparently acquiesced in the court's ruling. Had an exception been taken argument could have been had with the chance of changing the court's mind. Since the exception was not taken, the trial court was denied an opportunity to correct itself. A prosecutor's objection to evidence introduced by the defendant does not preserve the record for defendant when the court rules adversely to defendant.

Id. at 530.[1]

These considerations are similar to those supporting the contemporaneous objection rule applied to cases in which the admission of evidence is challenged on appeal. This Court recently in State v. McCardell, Utah, 652 P.2d 942 (1982), endorsed the following statement of the Kansas Supreme Court in State v. Moore, 218 Kan. 450, 543 P.2d 923, 927 (1975):

> The contemporaneous objection rule long adhered to in this state requires timely and specific objection to admission of evidence in order for the question of admissibility to be considered on appeal. The rule is a statutory procedural tool serving a legitimate state purpose. By making use of the rule, counsel gives the trial court the opportunity to conduct the trial without using the tainted evidence, and thus avoid possible reversal and a

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[1] Under Rule 20, Utah Rules of Criminal Procedure, a party would object rather than take exception to a trial court's ruling. In light of Rule 20's objection requirement, the elimination of any requirement to except to a trial court's rulings is obviously intended to eliminate superfluous exceptions when a timely and specific objection has already been interposed and not to relieve a party of the duty to raise his or her concerns for the trial court's consideration.

> new trial. Furthermore, the rule is practically one of necessity if litigation is ever to be brought to an end.

McCardell, 652 P.2d at 947. After noting that defendant McCardell failed to make a specific objection to the admission of the challenged evidence, this Court further stated:

> This is clearly a case where a timely and specific objection would have afforded the trial court the opportunity to address McCardell's concerns and at the same time permit the State to proceed with the evidence most relevant to its case. A new trial should not be the result of McCardell's failure to provide the trial court that opportunity.

Id.

The considerations outlined by the Rice court and this Court in McCardell apply to the instant case. By failing to raise this claim at trial, defendant apparently acquiesced in the trial court's exclusion of the testimony. The prosecutor's objection should not preserve the issue for defendant because the prosecutor's position is at odds with defendant's position and the prosecutor's objection did not provide the trial court with the opportunity to address defendant's concerns. Defendant's failure to provide the trial court with such an opportunity should not result in a new trial at the expense of finality considerations and the conservation of already extended judicial resources. Also, the opportunity to conduct a trial using all admissible evidence is just as important as the opportunity to conduct a trial without using tainted evidence. Finally, all of these considerations are in harmony with the previously cited rule that a party cannot raise an issue for the first time on appeal.

Therefore, in compliance with Rule 20, Utah Rules of Criminal Procedure, and this Court's ruling in Bradford v. Alvey & Sons, Utah, 621 P.2d 1240 (1980), defendant is precluded from now challenging the exclusion of Mike Perry's hearsay testimony because he neither objected to the trial court's ruling stating the grounds therefor nor informed the trial court of any permissible purpose of the excluded testimony.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE HEARSAY TESTIMONY

This Court has consistently held that the trial court's rulings on the admissibility of evidence will not be disturbed unless there is a clear showing that the judge abused his discretion and that a party has been unfairly prejudiced. In Interest of S---J---, Utah, 576 P.2d 1280 (1978); In re Baxter's Estate, 16 Utah 2d 284, 399 P.2d 442 (1965); see also State v. Carlson, Utah, 635 P.2d 72 (1982) ("clear showing" requirement).

Moreover, when, as here, the trial is to the court, review of the trial court's rulings on the admissibility of evidence is less strict because the trial judge has superior knowledge as to the competency and effect that should be given evidence and will include this knowledge and judgment in his consideration of the admissibility of the evidence. Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972); In re Baxter's Estate, 399 P.2d at 445.

Defendant has made no clear showing that the trial court abused its discretion by excluding Mike Perry's hearsay testimony or that defendant was unfairly prejudiced thereby. Since, as discussed above, defendant failed to inform the trial

Since, as discussed above, defendant failed to inform the trial court that the purpose of the excluded testimony was to impeach David McCoy by means of a prior inconsistent statement the trial court's failure to admit the testimony on this basis cannot be an abuse of discretion. Also, defendant was not unfairly prejudiced by the exclusion of the testimony because, as discussed below, any error was harmless in light of the overwhelming evidence of defendant's guilt.

C. THE TESTIMONY WAS NOT ADMISSIBLE UNDER AN EXCEPTION TO THE HEARSAY RULE BECAUSE IT LACKED THE INDICIA OF RELIABILITY.

Hearsay testimony generally is excluded because the credibility of testimony is best tested when the witness testifies under oath in open court and is subject to cross-examination. State v. Sanders, 27 Utah 2d 354, 496 P.2d 270 (1972); People v. Dement, 661 P.2d 675 (Colo. 1983); McCormick on Evidence, § 245 (2d ed. 1972).

However, testimony that is otherwise hearsay may be admitted into evidence if it falls under an exception having circumstantial guarantees of trustworthiness, and absent such guarantees, the testimony is inadmissible. State v. Martin, 686 P.2d 937, 949 (N.M. 1984); State v. Robinson, 94 N.M. 693, 616 P.2d 404 (1980); People v. Howard, 198 Colo. 317, 599 P.2d 899 (1979); cf. Rule 803(24), Utah Rules of Evidence (Supp. 1983) (Hearsay statements are covered by this "catchall" exception only if they have "circumstantial guarantees of trustworthiness"

equivalent to those of the other exceptions.).[2] The Robinson court stated unequivocally: "Guarantees of reliability are and must be the key to open the door to the exceptions." 616 P.2d at 411. The court in Howard equally emphatically stated: "The trier of fact will only be permitted to receive hearsay testimony as evidence only in those limited circumstances where the inherent reliability of the hearsay clearly outweighs the strong policy reasons for excluding it." 599 P.2d at 899. The exceptions dealt with in both Robinson and Howard were, as here, established statutory exceptions to the hearsay rule.

In the instant case, Mike Perry's hearsay testimony could not have been admitted under an exception to the hearsay rule because it lacked the indicia of reliability. The court in Stanberry v. State, 637 P.2d 892 (Okl. Cr. 1981), outlined several factors to be considered in determining the reliability of a hearsay statement:

> The trustworthiness of a statement should be analyzed by evaluating the facts corroborating the veracity of the statement, the circumstances in which the declarant made the statement, and the incentive he or she had to speak truthfully or falsely; and careful consideration should be given to factors bearing on the reliability of the reporting of the hearsay by the witness.

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[2] The new Utah Rules of Evidence, though not in effect at the time of defendant's trial, reflect this Court's acknowledgement of the fact that exceptions to the hearsay rule depend on circumstantial guarantees of reliability that substitute for the oath and cross-examination. Although under the new rules a prior inconsistent statement is not hearsay, under the prior rules governing this proceeding, such a statement was admissible only as an exception to the hearsay rule and as such must have circumstantial guarantees of reliability.

Id. at 895, citing United States v. Bailey, 581 F.2d 341 (3rd Cir. 1978). Although the Stanberry court considered the reliability of a hearsay statement in the context of the residual exception to the hearsay rule, its test is equally applicable to the present situation.

The defendant's questions of Mike Perry were clearly intended to elicit from Mike Perry testimony regarding an alleged statement by David McCoy to the effect that the gun was not in defendant's possession. The alleged statement fails the first test of reliability as set out by the Stanberry court: the alleged statement's veracity is not corroborated by other evidence. In fact, as noted below in the harmless error discussion, all of the evidence contradicts the substance of the alleged statement. The alleged statement also fails the Stanberry court's last test because the reliability of Mike Perry's reporting of the alleged statement was eroded by Officer Huish's testimony that Perry had informed him at the scene of the arrest that the gun was in defendant's possession and that he, Officer Huish, had so recorded the incident in his official report (R. 117, 181-187).[3]

Finally, the hearsay testimony need not have been admitted merely because the alleged declarant was available for cross-examination. Beavers v. State, 492 P.2d 88 (Alaska 1971). The Beavers court reasoned:

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[3] The other Stanberry tests apply to cases in which the trustworthiness of the declarant is suspect and so do not apply to the case at bar.

> if the person to whom the statement is attributed is indeed present at the hearing and can testify, that person himself should testify to the facts contained in the statement which the first witness would have attributed to him. If he does, there is nothing lost to the party who sought to introduce that testimony as hearsay. However, if he does not, or will not, then an unproductive swearing contest, in which witnesses are attributing statements to each other, is avoided.

Id. at 96.

McCormick, in support of the admissibility of inconsistent statements of a witness, noted: "It is hard to escape the view that evidence of a previous inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony." McCormick on Evidence, § 251 (2d ed. 1972). In the present case, although David McCoy was on the stand, defendant never questioned McCoy regarding the alleged statement during his initial cross-examination of McCoy in the prosecution's case-in-chief or during his re-cross-examination of McCoy when McCoy was recalled as a rebuttal witness. Thus, defendant failed to provide McCoy an opportunity to deny, admit or explain the alleged statement, thereby eliminating the increased safeguards noted by McCormick.

Therefore, defendant's belated claim that Perry's testimony should have been admitted under the prior inconsistent statement exception to the hearsay rule is without merit because the testimony lacked the indicia of reliability, and the fact that McCoy was available to testify does not increase the reliability of the hearsay testimony because defendant gave McCoy no opportunity to explain the alleged statement.

D. ANY ERROR IN THE EXCLUSION OF THE HEARSAY TESTIMONY WAS HARMLESS

Rule 5, Utah Rules of Evidence, provided that the exclusion of evidence shall not result in a reversal of a conviction unless the proponent of the evidence makes an adequate offer of proof and the reviewing court determines that "the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding." Rule 61, Utah Rules of Civil Procedure, also provides:

> No error in either the admission or the exclusion of evidence, and no error in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

This Court in State v. Urias, Utah, 609 P.2d 1326, 1329 (1980), further stated:

> The mandate of our statute, and the policy firmly established in our decisional law, is that we do not upset the verdict of a jury merely because some error or irregularity may have occurred, but will do so only if it is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result.

(Emphasis added.) Because of the overwhelming evidence of defendant's guilt and because Mike Perry's credibility was impeached by Officer Huish's testimony, there is no reasonable likelihood that the admission of Perry's hearsay testimony would have resulted in defendant's acquittal.

All of the evidence pointed to the fact that the gun was in defendant's possession. Officer Huish testified, and the police report confirmed, that both David McCoy and Mike Perry informed him that defendant was in possession of the gun (R. 117-118, 181-187). David McCoy also testified that the gun was in defendant's possession (R. 84-88, 94-98, 198-200). Of those present in the cab of McCoy's pickup truck on the night of Tuesday, January 25, 1983, only defendant had been in Brian Hargett's bedroom between the time Hargett had cleaned and replaced the gun between the mattress and footboard of his bed on Sunday afternoon, January 23, 1983, and the time Hargett discovered that the gun was missing on Wednesday, January 26, 1983 (R. 63-68, 72-77, 80, 85-86, 129-130, 191, 194). Finally, Officer Huish found the gun under the seat directly below where defendant had been sitting, 12" to 18" from the passenger door (R. 86, 96-97, 109-111, 121, 134-135). Thus, even if Perry's hearsay testimony had been allowed and had damaged the credibility of McCoy's testimony, the remaining evidence was more than sufficient to warrant the trial court's finding defendant guilty.

However, because Officer Huish impeached Perry's credibility, there is no reasonable likelihood that the trial court would have believed Perry's testimony at the expense of McCoy's testimony. At trial, Perry denied having told the officer that the gun was in defendant's possession (R. 149-150), but Officer Huish testified that Perry had told him that defendant was in possession of the gun and the police report recorded that fact (R. 117, 181-187).

Therefore, any error in the trial court's exclusion of the hearsay testimony was harmless, and the conviction should be affirmed.

POINT II

THE TRIAL COURT PROPERLY ADMITTED THE GUN INTO EVIDENCE.

A. DEFENDANT WAIVED ANY CHALLENGE TO THE ADMISSION OF THE GUN INTO EVIDENCE BY FAILING TO FILE A PRE-TRIAL MOTION TO SUPPRESS.

Rule 12(b), Utah Rules of Criminal Procedure, (Utah Code Ann. § 77-35-12) (1982)), provides:

> Any defense, objection or request, including request for rulings on the admissibility of the evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion. The following shall be raised at least five days prior to the trial:
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> . . .
>
> (2) Motions concerning the admissibility of evidence.

(Emphasis added.) Subsection (d) of Rule 12 further provides:

> Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(Emphasis added.)

Defendant failed to make a pre-trial motion to suppress the gun found by Officer Huish in his search of David McCoy's pickup truck on the evening of Tuesday, January 25, 1983. Therefore, in accordance with the provisions of Rule 12, Utah Rules of Criminal Procedure, defendant's failure to so object to

the gun before trial constituted a waiver of his objection. Furthermore, defendant has not sought relief from such waiver and has shown no cause warranting this Court's granting of such relief. Indeed, defendant could not show sufficient cause to warrant the granting of relief. Defendant knew that the gun had been seized and the circumstances surrounding that seizure and had ample opportunity before trial to voice any objection to the admissibility of the gun in accordance with the Rules of Criminal Procedure.

This Court recently in State v. John, Utah, 667 P.2d 32 (1983), held that under Rule 12, Utah Rules of Criminal Procedure, the defendant's failure to timely object to the victim's identification constituted a waiver of the objection. The Court stated: "It is held generally that where there is a claim of irregularity in obtaining evidence, such claim should be asserted before trial, or at the least, at the trial at the first opportunity." Id. at 33. The Court supported this rule by quoting from Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939), to the effect that auxiliary inquiries should not be allowed to disrupt the course of the trial.

In the instant case, defendant neither asserted his challenge to the constitutionality of the search that resulted in the seizure of the gun before trial not asserted such claim at the first opportunity at trial. Defendant waited until the prosecution finished its case-in-chief to object in conclusory terms to the admission of the gun. By that time, Brian Hargett had identified the gun as his and had testified that after

defendant had been in his bedroom he discovered the gun missing; David McCoy had identified the gun as the one defendant had in his possession while riding in the cab of McCoy's pickup truck on the evening of January 25, 1983; and Officer Huish had already identified the gun as the one he found under the seat in the cab of McCoy's pickup truck directly below where defendant had been sitting. This cannot constitute the raising of the claim at the first opportunity at trial since it contravenes the purpose of requiring early objection to alleged irregularities in the obtaining of evidence as outlined in Nardone; to wit, defendants must raise timely challenges to obtaining of evidence in order to avoid the disruption of the course of the trial.

Although the defendant in John also failed to interpose a timely objection as required by the "contemporaneous objection" rule, that ground for the Court's ruling was separate and independent from the Rule 12(d) waiver ground. The Rule 12(d) waiver provision alone is sufficient to warrant this Court's refusal to review an allegation of error on appeal. See State v. Miller, Utah, 674 P.2d 130 (1983) (Rule 12(d) waiver alone precluded review of allegation of error regarding trial court's failure to inquire of the jurors if they would be prejudiced because the case involved motorcycle clubs).

Other courts have also ruled under similar statutory schemes that the defendant's failure to make a pre-trial motion to suppress waives the issue even if the defendant subsequently objects at trial to the admission of the evidence. The Montana Supreme Court has stated the rule as follows:

> One wishing to preclude the use of evidence obtained through a violation of his constitutional rights must protect himself by timely action. If he has had opportunity to suppress the evidence before trial and has failed to take advantage of his remedy, objection to the evidence upon trial will not avail him.

State v. Briner, 567 P.2d 35, 37-38 (Mont. 1977), quoting State v. Gotta, 71 Mont. 288, 290, 229 P. 405, 406 (1924). The Montana Supreme Court in Briner held that the defendant's failure to file a pre-trial motion to suppress was not excused by good cause because the defendant, like the defendant in the instant case, was aware of the facts and circumstances surrounding the arrest and the possibility of the introduction of certain evidence long before the first day of trial.

The Supreme Court of Arizona in State v. Marahrnes, 114 Ariz. 304, 560 P.2d 1211 (1977) (En Banc), refused to reach the merits of the defendant's challenge to the admissibility of certain evidence because the defendant had waived the issue by failing to make a pre-trial motion to suppress even though the defendant raised the objection at trial and his co-defendant filed a pre-trial motion to suppress the same evidence.

Therefore, in compliance with the provisions of Rule 12, Utah Rules of Criminal Procedure, and this Court's rulings in John and Miller, defendant's failure to challenge the admissibility of the gun in a pre-trial motion to suppress waives the objection, precluding the Court's reaching the merits of defendant's allegation of error on appeal, despite defendant's objection at trial.

B. DEFENDANT FAILED TO DISCHARGE HIS BURDEN OF PROOF REGARDING THE ALLEGED INADMISSIBILITY OF THE GUN.

Rule 12(g), Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-12 (1982), provides that in a motion to suppress evidence upon grounds of unlawful search and seizure, the defendant or applicant has the burden of proving by a preponderance of the evidence that a substantial violation has occurred. Once the defendant or applicant has established by a preponderance of the evidence that the search and seizure was unlawful, only then does the peace officer have the burden of proving by a preponderance of the evidence that he was acting in good faith.

This Court's rulings are to the same effect as Rule 12(g):

> Evidence is suppressed or excluded only if the same was obtained by a violation of the Fourth Amendment, designed to protect a person's right to privacy and property. Evidence sought to be excluded is admissible, however, until the accused has established that his rights under the rule have been invaded.

State v. Sessions, Utah, 583 P.2d 44 (1978), quoting State v. Montayne, 18 Utah 2d 38, 414 P.2d 958, cert. denied, 385 U.S. 939, 87 S.Ct. 305, 17 L.Ed. 2d 218 (1966) (emphasis added).

The burden is properly on the defendant or applicant because the burden should be on the moving party, there is a presumption of regularity attending the actions of law enforcement officials, relevant evidence is generally admissible and exceptions must be justified by the party claiming the exception, and this burden will deter spurious allegations that

are wasteful of court time. LaFave, SEARCH AND SEIZURE, § 11.2 (1978), and cases cited therein.

Defendant did not discharge his burden of proving by a preponderance of the evidence that the gun was obtained by a violation of the Fourth Amendment of the United States Constitution. To the contrary, defendant at trial was in effect "sandbagging," waiting to challenge on appeal issues he failed to develop fully at trial. As noted above, defendant failed to file a pre-trial motion to suppress the gun, in which defendant could have raised facts, if any, tending to establish that the search and seizure was unlawful and that a a substantial violation had occurred.

Moreover, defendant also failed to pursue obvious lines of questioning that would have elicited more information regarding the existence or lack of probable cause on the part of Officer Huish with respect to the stop, the search or the arrest. For example, during defendant's cross-examination of Officer Huish, the following exchange occurred:

> Q. The reason you pulled the vehicle over was because of the improper lane change or the pulling out of the driveway without a signal on?
>
> A. That was one reason.

(R. 115). Defendant failed to follow up Officer Huish's response with a question asking what other reasons he had for stopping McCoy's pickup truck. As a result, the record does not reveal what more probable cause existed for the stop, search or arrest, other than the above and David McCoy's speculation that Officer Huish had received a "tip" that there was a gun in the truck (R. 98).

Because under Utah law defendant has the burden of establishing a substantial violation in a search and seizure case, defendant's failure to develop a record upon which the Court could review the propriety of the search and seizure should preclude his present claim, and in the absence of any evidence that the search and seizure was unlawful and constituted a substantial violation, the Court should presume that the trial court properly admitted the evidence resulting therefrom.

C. DEFENDANT HAS NO STANDING TO CHALLENGE THE SEARCH OF McCOY'S VEHICLE.

It is well settled that a defendant has no standing to challenge the admissibility of evidence on the grounds of unlawful search and seizure if he claims prejudice only through the use of evidence gathered as a result of a search or seizure directed at another person; rather, the defendant must have been the victim of a search or seizure. Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960). In other words, the fundamental inquiry regarding standing is whether the conduct challenged by the defendant involved an intrusion into his reasonable expectation of privacy. Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed. 2d 1154 (1968).

The United States Supreme Court in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387, reh. denied, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed. 2d 83 (1978), held that passengers are without standing to object to the search of the vehicle in which they are riding because they have no legitimate expectation of privacy therein.

In Rakas, a police officer stopped what he believed was a getaway car after receiving a radio report of a robbery. After the occupants were ordered out of the car, a search of the interior revealed a sawed-off rifle under the front passenger seat and a box of rifle shells in the glove compartment. The defendants admitted they owned neither the vehicle nor the rifle and shells and that they were simply passengers in the vehicle.

Justice Rehnquist, writing for the majority, determined that the defendants had no "legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger qua passenger simply would not normally have a legitimate expectation of privacy." Id. at 148-149.

In the instant case, defendant also owned neither the vehicle in which he was merely a passenger nor the gun discovered under the seat directly below where he was sitting. Therefore, defendant had no legitimate expectation of privacy in the area under the seat and thus cannot challenge the search of McCoy's pickup truck.

Defendant seeks to distinguish Rakas by claiming that the search was incident to an illegal arrest, a circumstance in which he claims Rakas dictum preserves defendant's standing. However, defendant does not cite to that portion of Rakas that allegedly supports his contention. Furthermore, even if such dictum exists, it is merely dictum and is not binding on this Court. Finally, as previously discussed, as a result of

defendant's failure to discharge his burden of proof, the record does not reveal whether the initial detention was supported by adequate probable cause. Therefore, defendant fails in his attempt to distinguish Rakas and thus under the terms of Rakas has no standing to challenge the search of McCoy's pickup truck.

POINT III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION.

This Court has recently determined that the following standard should be applied on challenges to the sufficiency of evidence in jury trials:

> This Court definitively laid down the standard of review on challenges to the sufficiency of evidence in State v. Petree, Utah, 659 P.2d 443 (1983), in stating at 333: [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

State v. Griffin, Utah, 685 P.2d 546, 547 (1984). This standard should apply with equal force to non-jury trials because when, as here, the trial court is the finder of fact, it has the prerogative to determine the substantiality of the evidence. State v. Romero, Utah, 684 P.2d 643 (1984). Defendant in his brief acknowledges that the above is the appropriate standard of review (Brief of Appellant, pp. 25-26).

Defendant was charged under Utah Code Ann. § 76-10-503(2), which provides in pertinent part: "Any person who is on

parole for a felony or is incarcerated at the Utah State Prison shall not have in his possession or under his custody or control any dangerous weapon as defined in this part." Defendant does not challenge his status as a felony parolee, nor does he claim that the gun found under the seat in the passenger compartment of McCoy's pickup truck is not a dangerous weapon. Defendant claims only that the evidence did not support a finding that the gun was in defendant's possession or under defendant's custody or control.

Contrary to defendant's contentions, defendant's possession of the gun was established by more than just David McCoy's testimony. Officer Huish testified, and the police report confirmed, that both David McCoy and Mike Perry informed him that defendant was in possession of the gun (R. 117-118, 181-187). Of those present in the cab of McCoy's pickup truck on the night of Tuesday, January 25, 1983, only defendant had had the opportunity to steal Brian Hargett's gun after Hargett had cleaned the gun on the afternoon of Sunday, January 23, 1983, (R. 63-68, 72-77, 80, 85-86, 129-130, 191, 194). Finally, Officer Huish found the gun under the seat directly below where defendant had been sitting (R. 86, 96-97, 109-111, 121, 134-135).

Thus, the evidence was not so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt as to defendant's guilt. To the contrary, the evidence established beyond a reasonable doubt that the gun was in defendant's possession. Furthermore, because the conviction is supported by more than McCoy's eyewitness testimony, the cases

cited by defendant in his brief on this point are inopposite. Finally, the trial court had ample opportunity to assess the credibility of the witnesses and whether their testimony was tainted by any self-interest, so the conviction should not be disturbed because of an allegation on appeal of tainted testimony. Therefore, the conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State seeks affirmance of the conviction below.

DATED this 24th day of January, 1985.

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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 Lisa J. Remal, attorney for appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111.

APPENDIX A

A true and exact copy of pages 103, 140-146 of the Record on Appeal (Transcript page numbers 90-97), covering the portions of the trial transcript involving the exclusion of Mike Perry's hearsay testimony, is attached hereto as Appendix "A".

A I thought I was at one time, but apparently I was not.

Q Then what happened after you seen the individuals where you said?

A After he informed me of the warrants that I had pending, he says, "You're free to go now," okay? And at that time this -- I didn't know her last name, LaDawn, I will refer to her as LaDawn. She was standing there next to me and David McCoy Crawled out of the police officer's car and came over and stood next to me.

I kind of grabbed him by the elbow and pushed him to the side and said, "Hey, what is going on here? You indicated to me that was not Dennis Heaps' gun."

MR. SOLTIS: Well, I will object to this, your Honor.

THE COURT: Be sustained.

Q (By Mr. Valdez) Did you ask him any questions?

A Yes, I asked him whose it was.

MR. SOLTIS: Now, who is this conversation with, Counsel?

Q (By Mr. Valdez) Who was the conversation with?

A With Mr. David McCoy.

Q What did he reply?

MR. SOLTIS: I will object, your Honor.

Mr. McCoy --

THE COUPT: Be sustained as to -- who was present at the time? Was McCoy there of the defendant or whom?

Q (By Mr. Valdez) Who was present at the t

A Mr. Heaps was escorted to the Salt Lake County Jail. At the time this conversation was taking place, as I indicated, I grabbed him by the elbow and pulled him to the side. I was talking to him, just me and this man.

Q Nobody else was present?

A Oh, no.

Q Did you ask him whose gun it was?

A Yes, more or less indicated. Yes.

MR. SOLTIS: Same objection, your Honor.

Q (By Mr. Valdez) Well, he replied; is that correct?

A Yes, he did.

Q Did he say it was Mr. Heaps' gun?

A No, he did not.

THE COURT: That will be stricken as a violation of the hearsay rule.

Q (By Mr. Valdez) Did he make any indicatic to you as to whose gun it was, and that's a yes or no answer.

A. Yes, he did.

Q. May I ask the follow-up question to that, your Honor, as to whether or not he indicated it was Mr. Heaps' gun? That's a yes or no question also.

THE COURT: You may not. You can't do by indirect examination what you can't do by direct examination. Are you taking it as proof of the fact of whose gun it was or what, sir?

MR. VALDEZ: As an indication as to whose gun it was. I don't think this is going --

THE COURT: All right. As to whose gun it was. I will not accept it for whose gun it was as being a hearsay statement. If you have some other reason. I will not accept it for the truth or falsity of the contents thereof. Is this what the officer says?

MR. VALDEZ: No. This is what Mr. McCoy said to this individual.

THE COURT: All right. But as -- what was it you asked him? What McCoy said to him?

MR. VALDEZ: I asked him whether or not Mr. McCoy said it was Mr. Heaps' gun to him.

THE COURT: Well, I will not accept what Mr. McCoy said as to the truth of falsity of the contents thereof. If you have some other reason for the question, sir, you may proceed.

Q (By Mr. Valdez) Did he make any -- well, did he say to you why he said he told the police officer it was Mr. Heaps' gun?

A Yes, he did.

MR. SOLTIS: Well, it's the same objection, your Honor.

THE COURT: No. He can answer yes or no, whether he did or did not say so. What is the purpose of this, as to --

MR. VALDEZ: Just the reasons as to why Mr. McCoy would have said that it was Dennis Heaps' gun.

THE COURT: To the police officer in his presence?

MR. VALDEZ: Yes.

THE COURT: Well, I will sustain the objection if that's the basis for the question.

Q (By Mr. Valdez) Did he make any indication to you as to why he may have been scared?

A Yes, he did.

Q What were those?

MR. SOLTIS: Same objection, your Honor.

THE COURT: No. As to why he was scared, I can get his state of mind. It's not a relation to what somebody else did or didn't do.

Q (By Mr. Valdez) What did he say about his

being scared?

A. He said that really the reason why he said what he said is because he was on probation and that he would be violated if caught in the act of, I don't know, in -- I can say that. But the gun, because it was in his vehicle, he was scared he was going to get violated on his probation.

Q. And he told you that?

A. Yes, he did.

Q. Did you have any further conversation with him after that?

A. Other than telling him that it was much worse situation for Mr. Heaps because he was on parole, I didn't see where he would get off on the --

MR. SOLTIS: Well, objection to the materiality of that, your Honor.

THE COURT: Well, I can disregard it, Mr. Soltis.

Q. (By Mr. Valdez) I will withdraw the question on that. Have you ever had any further conversations with Mr. McCoy?

A. No, not prior to this time.

Q. Did you know at that time whose gun that was?

A. Not for sure. I was indicated to whose it was.

Q. Who made that indication to you?

A. Mr. McCoy did when he said there was a gu in his vehicle.

MR. SOLTIS: All right. Same objection, your Honor.

THE COURT: Ask another question, please.

Q. (By Mr. Valdez) Who was present at that time?

A. Me, Mr. Heaps, this girl, LaDawn, and the child, and Mr. McCoy.

Q. Okay. And whose gun did he say at that tim it was?

MR. SOLTIS: Same objection, your Honor.

THE WITNESS: At that time he didn't say whose gun it was. He said --

MR. VALDEZ: Hold on until the judge rules.

THE COURT: Let's get another answer. He didn't say whose --

THE WITNESS: He didn't say whose gun it was. He just indicated there was --

THE COURT: Just a moment, sir. The questi was did he say whose gun it was. And you have answered that question.

Q. (By Mr. Valdez) Okay. Whose gun did he say it was?

MR. SOLTIS: I object on hearsay, your Honor.

THE COURT: That will be sustained.

THE WITNESS: At what time?

Q. (By Mr. Valdez) Who was present when he told you whose gun he thought it might be or gave an indication as to whose gun it was?

A. The indication came when we were in the vehicle and we asked him why he was paranoid. Mr. Heaps asked him why he was paranoid of the police officer. That's the indication, because he says, "There's a gun in this truck." I don't know if he said, "I have a gun," or "There's a gun in this truck."

Q. Okay. But what I am asking you --

MR. SOLTIS: It has been asked and answered, your Honor.

THE COURT: It has.

MR. VALDEZ: I don't know if he understood the question, your Honor. Maybe if I ask it in a different way.

THE COURT: If he will answer the questions and stop volunteering and giving me -- if you listen to Mr. Valdez, he's offering very good, to-the-point, concise questions. Just answer his question and don't try to throw in all this other stuff that I am -- that you want to get in here. Just answer Mr. Valdez' question simply and

to the point. You may ask another question, sir.

Q. (By Mr. Valdez) At any point in time was the actual ownership of the gun indicated to you?

A. Yes, it was.

Q. Okay. And who was present at that time?

A. Me and Mr. McCoy.

Q. And who made that indication?

A. Mr. McCoy did.

Q. Was anybody else present?

A. No.

Q. Did he give you a name as to who the gun belonged to?

A. He didn't have to. It was just me and him standing there.

Q. And was that Mr. Heaps?

A. No.

MR. SOLTIS: Well, again, it's hearsay, your Honor.

THE COURT: Be sustained.

Q. (By Mr. Valdez) Were you -- you were never arrested on that particular night then; is that correct?

A. No, sir, I was not.

Q. Police allowed you to go then?

A. Yes, they did.

Q. Who was arrested?