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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent,

—VS.—

HUGH F. ROWLEY and DONALD
SPENCER,

Defendants and Appellants.

SEP 16 1963

Clerk, Supreme Court, Utah

Case No. 9894

OCT 29 1963

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BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court in and for Tooele County
HON. JOSEPH G. JEPPESON, *Judge*

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

HUGH F. ROWLEY and DONALD
SPENCER,
Defendants and Appellants.

} Case No. 9894

BRIEF OF RESPONDENT

NATURE OF THE CASE

The defendants were convicted of the crimes of assault with a deadly weapon, in violation of Section 76-7-6, U.C.A. 1953, and attempted burglary, in violation of Sections 76-1-30 and 76-9-3, U.C.A. 1953, and appeal from those convictions.

RELIEF SOUGHT ON APPEAL

The respondent, State of Utah, submits that the convictions of the defendants should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts: On October 21, 1962, at approximately 8:00 p.m., Mr. Vere Lancaster, an employee of the J. C. Penney Company, went with his 15-year old son to the J. C. Penney Store in Tooele to check the store to ascertain if everything was in proper order. (R. 4). Upon entering the store, he noticed a small pile of shavings on the floor and a hole in the ceiling. (R. 6). Alarmed at this, he started to search the store when his son indicated that he heard a sound like a brace being pulled from wood. (R. 7). He told his son to call the police and then heard someone running. He went out into the alley behind the J. C. Penney Store where he saw a man who had apparently jumped off the roof, holding a revolver. (R. 7). Upon the burglar observing Mr. Lancaster, he fired at him three times, wounding Mr. Lancaster twice. (R. 8). Mr. Lancaster called for help and three men came out of Allen's Food Town, adjacent to the J. C. Penney Store. The burglar then fired in their direction, striking Mr. Sidney Smith and Mr. Dennis Jensen. Mr. Smith noticed that the burglar dropped his glasses as he fired in his direction. (R. 14). Mr. Smith retrieved these glasses and they were thereafter identified by Dr. Bruce J. Parsons, Optometrist, as being the glasses of the defendant, Donald Spencer (R. 18), having unique rims and the same prescription as glasses he had fitted for the defendant Spencer.

James T. Portwood, a soldier stationed at Dugway Proving Grounds and residing in the Kirk Hotel (R. 32),

upon hearing the shots, looked out his window and saw an individual with a revolver (R. 34) who was limping badly (R. 35) get into a running car on the opposite side of the driver (R. 35) and drive away. The car was described as a 1953 green and cream colored Dodge. (R. 36). Mr. Portwood indicated that there were two men in the car as it was driven away. (R. 36).

Police officials retrieved a spent slug in the vicinity of the J. C. Penney Store (R. 62), which was identified as a .357 Magnum bullet. Burglary equipment was recovered from the roof of the J. C. Penney Store. (R. 61). Additionally, heel prints were taken from the roof of the store as evidence. (R. 63).

At approximately 9:00 P.M. on the same night, on the road from Tooele to Lehi, police officers stopped a 1953 Dodge, 4-door, 2-toned white and green automobile, having been alerted by Mr. Portwood as to the description. In the vehicle were the defendants Spencer and Rowley. Spencer was armed with a .357 Magnum pistol in his belt, and Rowley had a .38 caliber pistol in his belt. (R. 44 through 47). Officer Vincent examined the pistol in the possession of Spencer and indicated that it smelled like it had been recently fired. At the time of the defendants being stopped by police officials, they were approximately 47 miles from Tooele. (R. 56). Mr. Portwood identified the vehicle as the car into which he had seen the man carrying the revolver enter after he had heard the shooting in Tooele. At the time of the arrest of the defendants, the appellant Spencer walked with a limp and appeared to have a badly swollen ankle.

(R. 71). The footprints taken from the J. C. Penney Store matched the shoes of the defendant Rowley in depth, width, name and design. (R. 66). At the time the defendants were stopped they had in their possession additional ammunition, wood punches and small chisels. The defendant Spencer, who was driving, was searched, and it was revealed that his driver's license called for adequate glasses, which he was not wearing. (R. 49).

The defendant Spencer took the stand, admitted being in Tooele on the night in question, but stated it was later in the evening, admitted that he was in Tooele with Rowley (R. 78), but stated that he did not commit the crime. He said that he had the pistol in his possession because he had been doing some shooting earlier that day, and that he put the gun in his belt when he saw the road block. (R. 82-83). He said that he had done this because he was an ex convict, having two felony convictions (R. 79), and felt that it would cause him difficulty if they found guns in the car. The defendant said he had lost the glasses that Dr. Parsons had prescribed and prepared for him (R. 78), and that the glasses that were admitted as Exhibit 7 were not his. Alice Beckstead, with whom the defendant said he had been earlier in the day, testified that at the time she was with him he was wearing glasses. (R. 91). The defense counsel, at the conclusion of the appellant Spencer's testimony, made the following proposed stipulation :

“MR. HANSEN: We would like to make a stipulation in regard to a polygraph test with the defendant, Hugh Rowley.

May it be stipulated, Robert McManama, an officer in the Salt Lake City Police Department, gave a polygraph test to Hugh Rowley, that Mr. McManama is a qualified person to give such examination; that Mr. Rowley denied he had anything to do with these particular offenses, and that Officer McManama was of the opinion he was not telling the truth when he made these statements:

It is also requested that the District Attorney stipulate at the present time, the degree of accuracy of the polygraph tests is approximately 99 degrees accurate.

May it be so stipulated?

MR. BLACK: We are certainly agreeable to that stipulation, your Honor."

The stipulation as to the results of the polygraph test were agreed to by the prosecution even though the stipulation was offered by the defense.

Prior to the time of trial, the defendants filed a notice of alibi and a request for a polygraph examination. (File No. 811). The defense counsel further entered into a written stipulation with the prosecution requesting the polygraph examination and requesting that the results thereof be introduced into evidence, and indicating that he had explained the import of the examination and the stipulation to the defendants. (File No. 881). The trial court, after the receipt of all the testimony and evidence, instructed the jury, and no exceptions to the instructions appear of record. The jury returned a verdict of guilty and the defendants were committed to the State Prison.

ARGUMENT

POINT I.

THE APPELLANTS HAVE NO BASIS TO CLAIM ANY ERROR REQUIRING REVERSAL OF THEIR CONVICTIONS WITH REFERENCE TO THE READING OF THE INFORMATION SINCE:

- A. THERE IS A PRESUMPTION OF REGULARITY OF JUDICIAL PROCEEDINGS UNLESS AFFIRMATIVELY PROVED TO THE CONTRARY AND NO AFFIRMATIVE EVIDENCE APPEARS TO REFUTE THE PRESUMPTION.
- B. APPELLANTS WAIVED ANY ERROR BY FAILING TO OBJECT.
- C. ANY SUCH ERROR WAS A MINOR IRREGULARITY THAT COULD NOT HAVE PREJUDICED THEIR CASE.

The appellants contend that there was a failure, at trial, to read the information and plea of the appellants to the jury, and that this was such an error as to vitiate their convictions. It is submitted that there was no such error. The transcript of the trial reflects that the reporter merely summarized the proceedings that occurred in impaneling the jury and failed to mention that the information was read. There does not appear to have been any objection from defense counsel, which absence would indicate regularity. Additionally, no confusion or questioning from the jury appears of record which would support a conclusion that the information was not read. No affirmative proof appears of record that would result in a conclusion that the provisions of 76-31-1, U.C.A. 1953, requiring the reading of the information

and plea, were not complied with. In 1 Wharton's Criminal Evidence, Sec. 126, it is noted:

"It is rebuttably presumed that the various phases of a criminal prosecution have conformed to the requirements of the law. ***

"All judicial proceedings in courts of general jurisdiction are presumed to be correct and regular, in the absence of proof to the contrary. * * *

"Irregularities or error in the proceedings of courts are never presumed, *but must be affirmatively shown.*" (Emphasis supplied)

See also Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 362.

In the instant case, where the record is summarized, and nothing appears therein that would support a showing of a failure to properly conduct the appellants' trial, it must be presumed that proper trial requirements were fully complied with. In *State v. Reay*, 13 Utah 2d 79, 368 P.2d 595 (1962) this court considered a contention that error had been committed in reading to the jury an information for robbery and being an habitual criminal before conviction on the robbery charge. The court rejected the contention, noting:

"The defendant would have us infer from the foregoing that both courts were read to the jury which would have been error. However, such an inference is not justified. In the absence of a showing to the contrary, it is presumed that judicial proceedings were regular in all respects. There is no affirmative showing that the second count of the information was read to the jury at

the start of the trial upon the first charge. The record is devoid of any objection being made with respect to the reading of the information."

Consequently, in the instant case where the reporter has obviously summarized the record, the presumption of regularity of judicial proceedings requires a conclusion that there is no basis for error.

Secondly, it is submitted that even were such an error committed, the appellants may not complain, because they failed to object to the irregularity at the time of its occurrence or any time during trial. In 24 C.J.S., *Criminal Law*, § 1673 (4), it is noted that as a general rule the failure to object to an irregularity will be deemed a waiver, and it is stated:

"The general rule has been applied to objections that the indictment was not read to the jury.
* * *

Numerous courts have ruled that the failure to object to an irregularity in the reading of an indictment or information constitutes a waiver. *Dabney v. Commonwealth*, 226 Ky. 119, 10 S.W. 2d 612 (1928); *Crag v. Commonwealth*, 5 Ky. L. 329; *People v. Moonstan*, 17 Cal. Rptr. 79 (1961); *Orner v. State*, 78 Tex. Cr. 415, 183 S.W. 1172 (1916).

Finally, it is submitted that even were the appellants in a position to claim error, any failure to read the information would at best be harmless error. It is, of course, acknowledged that the purpose of the reading

of the information and plea is to apprise the jury of the forthcoming proceedings, *State v. Solomon*, 93 Utah 70, 71 P.2d 104 (1937), but where no obvious confusion existed, where opening arguments were made, closing arguments given, and instructions rendered, it could hardly be said that the accuseds were prejudiced. In *State v. Telford*, 89 Utah 22, 56 P.2d 1362 (1936), a claim of error was presented before this court based upon a failure of the court to read or state the plea of the defendant of "former conviction" to the information of persistent liquor law violations. This court held the failure to be error, but then stated that the failure must be weighed for specific prejudice. The court found that there was none, noting:

"It appears, therefore, that the proof tendered in support of the plea of former conviction was immaterial and would not have supported it. Failure to read or state to the jury a plea in regard to which there was no evidence to support it is not prejudicial."

Two things should be observed from the Telford case. First, the court expressly noted that the objection was taken which would preserve the issue for appellate review and disallow a presumption of regularity, and, secondly, that the court determined that no prejudice occurred.

In 24A C.J.S., *Criminal Law*, § 1898, p. 957, 1958, it is stated:

"A conviction will not be reversed for errors occurring in the conduct of the trial, where notwithstanding the errors, substantial justice has

been done accused. The rule has been applied to alleged errors as to: * * * reading, or failure to read, the statute, indictment, or plea to the jury."

Many cases have failed to find prejudice from the failure to read an information: *State v. Dawson*, 245 Iowa 747, 63 N.W. 2d 917 (1954); *People v. Ross*, 98 C.A. 2d 805, 221 P.2d 280 (1950); *State v. Ayres*, 70 Ida. 18, 211 P.2d 142. In *Dabney v. Commonwealth*, 226 Ky. 119, 10 S.W. 2d 612 (1928), the court considered a matter identical with that urged here and refused to find error, noting:

"* * * It [the record] further shows that both sides announced ready for trial, and a jury was impaneled and sworn. The bill of exceptions manifests that counsel for the commonwealth and the defendant respectively stated the case to the jury. The testimony was fully heard and strictly confined to the issue made by the indictment and the plea of not guilty. The jury was adequately instructed, and a verdict returned, responding literally to the charge, saying:

'We, the jury, find the defendant, Roy Dabney, guilty as charged in the indictment, and fix his punishment at two years in the state penitentiary.'

"No objections or exceptions on the part of the defendant to a failure, if there was a failure, to read the indictment to the jury or to state his plea, appear in the bill of exceptions. The bill of exceptions does not show affirmatively any such omission.

* * *

"The purpose of the law is fully satisfied when the defendant is informed of the issue which

he has to meet, and the jury is advised of the charge it is called upon to try."

Certainly where the evidence of guilt is as conclusive as it is in the instant case, no prejudice can be claimed. 77-42-1, U.C.A. 1953.

POINT II.

THE APPELLANTS CAN CLAIM NO PREJUDICE FROM THE FAILURE OF THE COURT TO INSTRUCT THE JURY WITH REFERENCE TO RECEIPT OF A STIPULATION, PROPOSED AND OFFERED BY DEFENSE COUNSEL, ON THE RESULTS OF A LIE DETECTOR TEST.

The appellants contend that the trial court committed error in failing to give an instruction on the stipulated results of a polygraph test given to the defendant Hugh F. Rowley.¹ The lie detector test was performed on Rowley by his own request. The trial defense counsel filed on January 11, 1963 a "Request for Polygraph Examinations" on behalf of both defendants, which stated:

"The above defendants and witness named hereby request polygraph examinations to aid in determining the truthfulness of their alibi and their declarations of innocence and stipulate the results thereof and any statements made in the course thereof may be admitted in evidence."

On January 21, 1963, the defendants filed a stipulation, which stated:

"In aid of their defenses to the charge of attempted second degree burglary and assault with a deadly weapon alleged to have been committed

in Tooele, City, Utah on or about the 21st day of October 1962, they request that a polygraph test be given to Hugh Rowley and that regardless of results thereof said results may be used either by themselves individually or jointly or by the State of Utah and they herein specifically request and consent to the introduction in evidence of the polygraph test as evidence in their trial by themselves or by the District Attorney in the Third Judicial District Court of Utah, in and for Tooele County."

Thereafter, a statement of defense counsel appeared under the stipulation, which stated:

"Comes now Robert B. Hansen, Attorney for both of the above named defendants, and alleges that he has explained the legal import of the above to each of the defendants prior to their executing their stipulation above and further affirms that they entered into such stipulation upon advise of counsel and without any undue influence or coercion and did so voluntarily. The undersigned as their attorney further agrees and consents to said stipulation."

Thereafter, the District Attorney consented to the stipulation in a one-line acknowledgment.

At the time of trial, defense counsel, not the prosecution, offered the stipulation as to Rowley. The stipulation was merely that Rowley had denied any connection with the offenses, and that the polygraph operator was of the opinion that the defendant was not telling the truth.

1. It should be noted as to this matter that any error that might exist is limited to the defendant Rowley.

No instruction was tendered by the appellant nor was any exception taken to the failure to give an instruction. The appellant relies upon an advisory opinion of the Arizona Supreme Court, *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962), wherein that court, upon certification after conviction, and without weighing for error, laid down some guidelines for handling the admission on stipulation of the results of lie detector tests. The court said the trial court should instruct the jury on its purpose and weight. It did not state that the failure to do so would be prejudicial error or consider the question of the absence of an instruction or exception.

Several recent cases have allowed the use of stipulated testimony on the results of a lie detector test, apparently allowing their admissibility without reference to limiting instructions. *State v. McNamara*, 104 N.W. 2d 568 (Iowa 1960); *People v. Houser*, 85 Cal. App. 2d 686, 193 P.2d 937.

Consequently, unless there is some substantial prejudice, no error should be allowed to be claimed, especially where the appellant was the moving force for the admission of the testimony, and failed to tender instructions or request any. To now, for the first time on appeal, allow the appellant to claim error, would allow him to benefit by self-induced error. In *State v. Rivenburgh*, 11 Utah 2d 95, 355 P.2d 689 (1960), this court noted:

“It is of course not error for the court not to give an instruction where it is not asked. This assignment of error is without merit.”

In *State v. Miller*, 111 Utah 255, 177 P.2d 727 (1947), this court was presented with a claim that the trial court committed error for failing to instruct on the limited purpose of the use of the defendant's confession. No request for such an instruction had been made. The court noted:

"This requirement that the court instruct 'upon the law applicable to the case' does not place upon the court alone the burden of making up instructions which cover every question which may have arisen in the case.

"The general rule is that unless the party requests an instruction on a special matter he cannot predicate error upon the court's failure to charge. * * * The tenor of the cases we have considered, and here cite, support our holding that this case cannot be returned for a new trial because of the court's failure to give a proper instruction limiting the use of Miller's confession when no such instruction was requested. ***"

This has long been the rule of law in this jurisdiction. *State v. Anderson*, 108 Utah 130, 158 P.2d 127; *People v. Robinson*, 6 Utah 101, 21 Pac. 403; *State v. Woodall*, 6 Utah 2d 8, 305 P.2d 473; *State v. Peterson*, 121 Utah 229, 240 P.2d 504.

Additionally, where no exception was taken to failure to instruct on the effect of lie-detector evidence, no error can be claimed. *State v. Ferguson*, 83 Utah 357, 28 P.2d 175 (1934); Abbott, Criminal Trial Practice, 4th Ed. Sec. 672.

Consequently, appellant Rowley is without a meritorious claim on this point.

POINT III.

APPELLANT CAN CLAIM NO ERROR FROM THE COURT'S INSTRUCTIONS ON ATTEMPTED BURGLARY SINCE:

- A. NO EXCEPTION WAS TAKEN.
- B. THE ERROR COMPLAINED OF IS NOT APPLICABLE TO THIS CASE.
- C. NO PREJUDICE COULD HAVE RESULTED.

The appellants contend that the trial court erred in its instruction on the elements of the law of attempt. The appellants contend that the court should have instructed on the failure to consummate the offense. It is submitted that there is no merit to the appellants' contentions.²

First, it is submitted that the appellants have no basis to object, since no exception was taken to the instruction given. 77-37-1, U.C.A. 1953, provides that exceptions to instructions shall be "taken and preserved as in civil cases." The general rule is said to preclude a review of instructions unless an exception has preserved the contention for review on appeal. Thus it is noted in Abbott, Criminal Trial Practice, 4th Ed., Sec. 672:

"The correctness of instructions given or refused cannot be questioned in the appellate court unless a timely exception was saved in the trial court ***."

2. This issue of claimed error goes only to the conviction of the crime of attempted second degree burglary.

The Utah cases have given force to this rule. In *State v. Smith*, 45 Utah 381, 146 Pac. 286 (1915), it was said:

“So it would require hard struggling to defend and support portions of the charge, both as to substance and consistency * * *. But there is no exception, no assignment, and no claim made as to this nor to any portion of the charge. We thus leave that.”

In *State v. Ferguson*, 83 Utah 357, 28 P.2d 175 (1934), it was said:

“Other errors are assigned to instructions given to the jury, but, as no exceptions thereto appear of record, they, of course cannot be considered.”

Subsequent decisions have modified the strict exception rule noted above. Thus, in *State v. Cobo*, 90 Utah 89, 60 P.2d 952 (1936), it was said:

“We wish not to depart from the rule laid down in this jurisdiction that in ordinary cases on appeal errors relating to instructions or refusing requests to instruct will not be considered or reviewed unless exceptions thereto were properly taken by the party complaining. But in capital cases and in cases of grave and serious charged offenses and convictions of long terms of imprisonment, cases involving the life and liberty of the citizen, we think that when palpable error is made to appear on the face of the record and to the manifest prejudice of the accused, the court has the power to notice such error and to correct the same, though no formal exception was taken to the ruling. * * *”

Later cases have also given recognition to the possible exception. *State v. Peterson*, 121 Utah 229, 240 P.2d 504; *State v. Hines*, 6 U.2d 126, 307 P. 2d 887 (1957). The precedent, therefore, will excuse the failure to take an exception only if the error is palpable and so flagrant as to deny a fair trial.

It is submitted that the instruction given was not so palpably erroneous as to warrant a claim of error in the absence of an exception. If the court had instructed differently and included a phrase on the failure to consummate the offense, it could not have helped the appellants. 76-1-30, U.C.A. 1953, provides:

“Any act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit a crime. *Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt*, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime.”

The above statute allows the conviction of an accused for attempt even where it appears from the evidence that the crime was consummated. In the instant case, the evidence shows that the appellants had already bored two holes into the building. This is sufficient to constitute “entry” and to consummate the offense. Thus, in Clark & Marshall, *Crimes*, 6th Ed. (1958), it is noted:

“The slightest entry, however, is sufficient if it be with felonious intent. * * * It need not be of any part of the body, but an entry may be made by an instrument where the instrument is

inserted for the purpose of committing the felony.

* * *”

In *State v. Crawford*, 8 N.D. 539, 80 N.W. 193 (1899), the North Dakota Supreme Court held that the boring into a grainery and the insertion of the auger into the grainery was sufficient entry to make out the crime.

Thus, appellants would argue that, if the crime were not interrupted and consummated, they would be entitled to acquittal of the attempt charge. This was true at common law, but in states having statutes like ours, consummation is no defense. Consequently, there is no reason to instruct on such an issue. A careful analysis of the law in this area supports a view that where consummation of the crime may still be punished as an attempt, the absence of consummation is not a part of the crime. Thus, Clark & Marshall, *Crimes*, 6th Ed., § 4.14 (1958), correctly states:

“Because of the dominating idea that an essential element of a criminal attempt lies in the failure to consummate the target crime aimed at by the accused, questions have arisen when such crime has been completed whether there can be a conviction for an attempt. This situation is typified by *People v. Lardner*. There the accused was indicted for larceny, and the only evidence offered by the prosecution established proof of larceny, but a verdict of ‘attempt to commit larceny’ was returned. Reversing the judgment and remanding the case, the Illinois court stated: ‘A failure to consummate the crime is as much an essential element of an attempt as the intent and the performance of an overt act toward its com-

mission. Evidence that a crime has been committed will not sustain a verdict for an attempt to commit it, because the essential element of interception or prevention of execution is lacking.' While the Lardner court recognized the theory that where an indictment charges an offense which includes (§ 2.03) a lesser offense a defendant acquitted of the higher offense may be convicted of the lesser, it refused application of that rule to statutory attempts 'because an essential element of the attempt is a failure to consummate the crime.'

"In short, the Illinois court held, in substance, that only behavior described as 'a direct ineffectual act toward the commission of crime' is within the ambit of the statute proscribing and punishing attempts; that consummation of the crime, larceny in this case, took Lardner's behavior out of the reach of the statutory definition of attempt.

"But a different result can be reached in jurisdictions where there is a general statutory provision running in the terms of Rule 31, Federal Rules of Criminal Procedure, viz.: an accused 'may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.' Jones v. State is a state case, decided under a statutory provision similar to the Federal Rule, where the defendant was indicted and tried for rape and convicted of an attempt to commit that felony. Jones admitted the act but claimed the female consented. His conviction was affirmed although the court recognized the fact that the crime was consummated. This decision rests primarily on the express statutory language.

“At common law there could be no conviction where the intended (target) crime was completed. The difference between decisions following Jones and those adopting the Lardner view lies in express legislative approval of convictions for attempts though the crime aimed at was completed, e.g., committed. Such legislation frequently makes the crime of an ‘attempt to’ an included crime and permits conviction for a lesser offense. In Jones, *supra*, there is a conviction of a lesser (compared with rape) offense, e.g., an attempt to commit a felony. Of course, the problems of merger of offenses and former jeopardy can, and do, arise in these situations.”

Perkins, *Criminal Law* (1958), p. 477, analyzes the very proposition urged in the instant case by appellants and rejects it as an absurdity. It is stated:

“* * * To insure against such a conclusion a number of the statutes expressly provide that a person may be convicted of an attempt to commit a crime although it appears on the trial that the crime attempted was perpetrated by the defendant. It has been rather common to authorize conviction of an attempt to commit the crime charged in the indictment. This type of statute does not expressly authorize conviction of an attempt where the proof shows success, — nor does it expressly exclude it. Such a provision does not require submission of the attempt issue where there is no evidence to warrant it. A defendant who has been convicted of the offense charged is not entitled to a reversal by reason of the judge’s refusal to submit the attempt issue where there was no evidence of an attempt that failed. The real test comes at another point. Suppose in such a trial the uncontradicted evidence shows beyond doubt that defendant attempted to commit the of-

fense charged, but there is conflict in the testimony as to whether the attempt succeeded or failed. Some of the statements on the subject, if carried to their logical conclusion, would entitle the defendant to an instruction which would tell the jury in substance: (1) they must acquit the defendant of the completed offense unless satisfied beyond a reasonable doubt that the attempt was successful; (2) they must acquit the defendant of an attempt to commit the offense unless satisfied beyond a reasonable doubt that the attempt failed. In other words the position would be that defendant is entitled to a verdict of not guilty if there is doubt in regard to success or failure although no doubt that the attempt was made. There is no proper basis for such a position, and probably no court would carry the unsound notion to such an absurd extreme."

Clearly, therefore, the court committed no error in failing to instruct on consummation, and especially so where the Utah statute would render the instruction erroneous, and no exception was taken to the instruction given. The Utah statute was apparently taken from California which has a substantively identical provision, Cal. Penal Code § 663. California courts have taken the position that there are only two elements to the crime of attempt: (1) a specific intent to commit the principal crime, and (2) a direct act towards the commission of the crime. The California Supreme Court has recognized that failure to consummate the crime is no longer an element of attempt under the California statute, *People v. Thurman*, 62 C.A. 147, 216 Pac. 394 (1923) :

"* * * In the absence of such a permissive statutory provision as that which is contained in

section 663 of our Penal Code, it has been held that where a defendant is charged with an *attempt* to commit a crime he cannot be convicted if the evidence shows that he actually consummated the crime. * * *"

See Perkins, *Criminal Attempt and Related Problems*, 2 U.C.L.A., L. Rev. 319 (1955).

In *State v. Love*, 210 La. 11, 26 So. 2d 156 (1946), the Louisiana Supreme Court considered the new Louisiana statute similar to that of Utah, and stated:

"Failure of consummation is not an essential element of such an attempt. Under paragraph three an attempt is not merged in the completed offense, and a person may be convicted of an attempt to commit a crime, if it appears on the trial that the crime was actually consummated."

The appellants contend that *State v. Prince*, 75 Utah 205, 284 Pac. 108 (1930), supports their position. Although the Prince case has some dicta language in it that might seem to the contrary, the case does not meet the issue presented in this case. In Prince, the only issue relevant to this case was an instruction given by the trial court on the lesser included offense of attempted extortion, where extortion was *the offense charged*. There the court properly instructed on the failure to consummate the principal offense, a problem not here involved. See quote from Perkins, *infra* p. 20. This court approved the instruction, saying it was not erroneous, and in doing so merely noted the common law elements of attempt, quoting Corpus Juris. The court was not

concerned with whether a failure of consummation is an element of attempt under the Utah statute where an attempt is charged and the evidence borders on consummation of the crime. Thus the case did not concern itself with the legal issue present in this case, and did not analyze the Utah statute against a similar fact situation. Consequently, the Prince case hardly can be called precedent for the proposition now being urged on appeal.

Finally, it is submitted that no prejudice can be claimed in view of the overwhelming evidence of guilt of at least an attempt, and the fact that an attempt is the least offense of which the appellants could be convicted. Obviously, they were not harmed.

POINT IV.

THE COURT COMMITTED NO PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE LAW OF PRINCIPALS.

The appellants contend that the trial court erred in giving instruction 5-C relating to principals. (File No. 809). In the argument in their brief, however, the claim of error is not directed by appellants to any particular appellant.

What has previously been stated before with reference to the need of the appellants to have taken exceptions to the court's instruction is applicable in the instant case. Since no exception was taken to the instruction, no claim of error can be urged before this court,

since obviously the instruction was not so palpably erroneous that it denied the appellants a fair trial.

Even so, the whole of the instruction given should be examined to ascertain if it resulted in prejudice to the defendants or either of them, and should also be examined against the totality of the instructions and weighed for specific prejudice. *State v. Siddoway*, 61 Utah 189, 211 Pac. 968 (1922). The full instruction given in the instant case was :

“You are instructed that all persons concerned in the commission of the crime whether they directly commit the act constituting the offense, or aid and abet in its commission are principals in any crime committed, and are guilty of committing such offense.

“In this connection when you consider the elements of the crime of attempted burglary in the second degree, if you believe beyond a reasonable doubt that one of the defendants did the act constituting such offense, and that the other defendant knowingly aided and abetted such person in the commission of said attempted burglary in the second degree, then each of the defendants would be guilty of such offense.

“In this connection you are instructed that when you consider the evidence of the offense of assault with a deadly weapon, if you believe beyond a reasonable doubt that the defendant Spencer actually did the shooting, and performed all of the requirements for said offense, and that the defendant Rowley was knowingly aiding and abetting said Spencer in the commission of such offense, then the defendant Rowley and the de-

fendant Spencer would each be guilty of such offense."

Thus the court did not merely limit the instruction to an abstract principle of law, but rather in accord with previous directions from this court, it tailored the instruction to meet the particular evidentiary issues raised at trial. *State v. Thompson*, 110 Utah 113, 170 P.2d 153. The appellant contends that the decision of this court in *State v. Baum*, 47 Utah 7, 151 Pac. 518 (1915), supports the position that the court's instruction in the instant case was erroneous. In the Baum case the defendant was convicted of burglary. It appeared that the defendant entered the building in question and removed goods therefrom. Thus the evidence in the Baum case specifically showed the participation of the defendant, and made the instruction as to aiding and abetting the commission of the crime erroneous. The facts of the instant case are not of that nature. In the Baum case this court noted of the instruction given, which is similar of the first paragraph of the instruction given in this case:

"Such a charge may be proper enough in a proper case. * * *"

Thus the court noted there was nothing inherently erroneous in the instruction given, and indicated where the facts warrant it such an instruction is proper. In the instant case the evidence was not clear as to the attempted burglary charge as to what part each defendant played. The evidence showed both defendants as being present, but it did not show what part they specifically

played in cutting into the roof, using the tools, etc. An inference of joint participation based upon circumstantial evidence, including the fact that Rowley as well as Spencer were armed, and Rowley apparently drove the vehicle in aid of their escape from the scene of the crime and was also present at the scene, was enough to warrant an instruction being given on the law of principals. In addition, it should be noted that the court specifically tailored the instruction on principals to fit Rowley's situation on the question of assault with a deadly weapon. His presence was only circumstantially shown, whereas Spencer's direct commission of the act was apparent. Rowley's participation was also shown by his operating the escape vehicle, and carrying a gun. This demonstrates that he acted in concert with Spencer. Consequently, the instruction, carefully drawn as it was, was absolutely correct. In *People v. Pianezzi*, 42 C.A. 2d 270, 108 P. 2d 685 (1940), a murder case, a similar fact situation raised a similar objection. The California court failed to find any impropriety, and stated:

"The instructions set forth in paragraphs (e) and (f) of defendant's fifth proposition were likewise properly read to the jury. From the evidence in the present case it appears that two or more persons participated in the murders of which defendant stands convicted. The court, therefore, properly gave an instruction in the language of section 971 of the Penal Code, for it may be that the jury believed from the evidence that defendant did not fire the shot which killed decedent Greuzard but that one of the other participants in the crime did so, and that defendant aided and abetted in the commission of the offense."

A similar result was reached in *Schreiner v. People*, 360 P. 2d 443 (Colo. 1961), where the Colorado court commented:

“* * * It is obvious that coloring this entire assignment of error is the belief that because the People’s theory of the case was that defendant was physically present in the pharmacy, an instruction on accessory is thereby rendered inapplicable. Such is not the law. The statute quoted, *supra*, clearly states that one who is present and aids, abets or assists is deemed, considered and punished as a principal. Where, as here, two persons are acting in concert, one holding the victims at bay, the other emptying the cash register, an instruction on accessory is in order. In the absence of such an instruction the jury might conceivably acquit the one who held the victims at bay in the mistaken belief that since he did not *personally* take the money from the register he was therefore innocent of the charge of robbery. It has long been the law in Colorado that an accessory who stands by and aids in the perpetration of a crime may properly be charged as a principal, and in the case of co-defendants it is unnecessary to spell out which one is the principal and which the accessory, nor is it necessary to characterize and classify the specific acts of each. * * *”

Clearly, where the evidence in the instant case inferentially raises a probability of guilt by virtue of being an aiding principal, the instruction was proper.

Finally, it is submitted no prejudice could occur even if such instruction were deemed erroneous. *Wilson v. State*, 150 Neb. 436, 34 N.W. 2d 880 (1948).

It is obvious that appellants have no claim for reversal on this point.

CONCLUSION

Appellants have raised several claims of error, all of which are raised for the first time on appeal, and all of which, when analyzed for legal merit and compared against the factual certainty of the guilt of the appellants, demonstrates only that the jury rendered a proper verdict in accordance with due process and essential justice.

This court should affirm.

Respectfully submitted,

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