1992

State of Utah v. Lawrence Pitts : Reply to Petition for Rehearing

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	45.9 .S9 DOCKET NO.	920290
Plaintiff-Respondent,	:	Case No. 20290
-v-	:	Priority No. 2
LAWRENCE PITTS,	:	
Defendant-Appellant.	:	

REPLY TO PETITION FOR REHEARING

APPEAL FROM CONVICTION OF BURGLARY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1953), AS AMENDED, IN THE THIRD JUDICIAL DISRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAY E. BANKS, JUDGE, PRESIDING.

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STATEMENT OF ISSUES

1. Did Defendant fail to properly raise his challenge to the jury instruction concerning possession of recently stolen property on direct appeal?

2. If defendant's challenge of the jury instruction was properly before this Court on direct appeal, then was the issue disposed of by this Court's *per curiam* opinion, *State v. Pitts*, Utah, ____ P.2d ____, No. 20290 (filed Janaury 28, 1986)?

3. Assuming arguendo that rehearing is warranted, did the jury instruction regarding possession of recently stolen property given in the instant case so prejudice the defendant as to require reversal of the jury's verdict and the necessity of a new trial?

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 20290
-v-	:	Priority No. 2
LAWRENCE PITTS,	:	
Defendant-Appellant.	:	

REPLY TO PETITION FOR REHEARING

STATEMENT OF THE CASE

Defendant, Lawrence Pitts, was charged with Burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (Supp. 1983).

Defendant was convicted of burglary, in a jury trial held September 25-26, 1984, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding. Defendant was sentenced by Judge Banks on September 28, 1984, to a term of zero to five years in the Utah State Prison.

This is a response to appellant's petition for rehearing of a per curiam opinion filed January 28, 1986.

STATEMENT OF FACTS

The State agrees with the fact statement set forth in the Court's opinion in State v. Pitts, Utah, ____ P.2d ____, No. 20290, slip op. at 1-2 (filed January 28, 1986) (a copy of the complete opinion is contained is contained in Appendix A.)

In addition, the following facts are pertinent to this petition for rehearing. Both the appellant's and respondent's brief on direct appeal were filed with this Court by June 10, 1985. On October 21, 1985, this Court filed State v. Chambers, 709 P.2d 321 (Utah 1985) and State v. Pacheco, 20 Utah Adv. Rep. 18 (Utah 1985). On November 5, 1985, defendant's attorney filed a letter with the Court Clerk requesting permission to incorporate Chambers and Pacheco pursuant to Rule 24(j), Utah Rules of Appellate Procedure. This Court issued a per curiam opinion in the instant case on January 28, 1986.

SUMMARY OF ARGUMENTS

Defendant failed to properly raise his challenge to the jury instruction regarding possession of recently stolen property on direct appeal and is thereby precluded from raising the issue through a petition for rehearing. If the issue was properly before this Court, it was disposed of in State v. Pitts, Utah, No. 20290 (filed January 28, 1986). Assuming arguendo that rehearing is warranted, the jury instruction concerning possession of recently stolen property given in the instant case did not shift the burden of proof to defendant. Therefore, defendant's petition for rehearing should be denied and his conviction affirmed.

ARGUMENT

POINT I

DEFENDANT DID NOT PROPERLY RAISE HIS CHALLENGE TO THE JURY INSTRUCTION CONCERNING POSSESSION OF RECENTLY STOLEN PROPERTY ON DIRECT APPEAL.

Defendant contends his letter to the Court Clerk requesting permission to argue the constitutionality of the jury instruction in a supplemental brief and to incorporate State v. Chambers, 709 P.2d 321 (1985) and State v. Pacheco, 20 Utah Adv. Rep. 18 (1985), effectively raised the issue on direct appeal. Defendant cites Rule 24(j), Utah Rules of Appellate Procedure, as authority and relies on the fact that the letter was filed on November 5, 1985 and the opinion in this case was not filed until January 28, 1986.

Although defendant's intentions to incorporate his challenge to the jury instruction concerning possession of recently stolen property may have been presented to the Court in a timely manner, Rule 24(j) is an improper procedural vehicle to effectuate his intentions. Rule 24(j) provides:

> When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

Therefore, defendant was limited to citing supplemental authorities with reference to a page of his brief or a point

argued orally and was precluded from arguing a new issue. Furthermore, Rule 24(j) does not provide authority for a request to submit a supplemental brief.

The proper procedural method for defendant to raise an issue not argued on direct appeal by either appellant or respondent would have been a Motion to Amend his brief. Such a motion would be governed by Rule 23(a), Utah Rules of Appellate Procedure. Significantly, Rule 23(a) provides that an application for an order or other relief shall be made by filing a motion "unless another form is elsewhere prescribed by these rules." The relief sought by defendant is not prescribed in any other section of the Rules of Appellate Procedure. Rule 23(a) outlines specific requirements including a clear statement of the relief sought, a particular statement of the factual grounds, a memorandum of points and authorities in support of the motion, and affidavits and papers, where appropriate. Defendant failed to comply with the requirements contained in Rule 23(a) to properly raise the issue on direct appeal and therefore his petition for rehearing should be denied.

Moreover, as defendant points out, he argued the precise issue at trial which now constitutes the sole basis for his petition for rehearing (See appellant's petition for rehearing brief at 4 and R. 233-34). Therefore, defendant was admittedly aware of the argument on September 26, 1984, but failed to raise the issue on direct appeal in his initial brief on appeal. This failure to address the issue in defendant's brief on direct appeal constitutes a waiver. State v. McNair,

178 P. 48, 53 Utah 99 (1918); See also State v. Gotarez, 686 P.2d 1224 (Ariz. 1984); State v. Hoisington, 657 P.2d 17 (Idaho 1983). Thus, the appropriate forum in which defendant may present his challenge to the jury instruction is pursuant to a writ of habeas corpus, not on direct appeal via a petition for rehearing.

POINT II

DEFENDANT'S CHALLENGE TO THE JURY INSTRUCTION REGARDING POSSESSION OF RECENTLY STOLEN PROPERTY WAS DISPOSED OF BY THIS COURT IN ITS PER CURIAM DECISION ISSUED JANUARY 28, 1986.

Defendant claims that because this Court did not specifically analyze his argument concerning the jury instruction which dealt with possession of recently stolen property, this Court failed to consider the issue. However, it does not necessarily follow that because the issue was not analyzed in this Court's written opinion that the Court did not summarily consider and dispose of the issue.

Defendant complains that the Court failed to answer his letter dated November 5, 1985 (See appellant's petition for rehearing brief at 3). However, that letter relied upon Rule 24(j) which only authorizes incorporation of supplemental citations. It does not support a request to file a supplemental brief, nor does it require an answer from the Court. Therefore, the only effect of defendant's letter of November 5, 1985 was to draw the court's attention to two recently decided cases and state the reasons for the supplemental citations.

Consequently, a logical conclusion for the omission of any analysis of the jury instruction issue from the Court's per

curiam opinion is that the Court considered defendant's argument and consciously disposed of the issue without comment.

POINT III

THE JURY INSTRUCTION GIVEN IN THE INSTANT CASE REGARDING POSSESSION OF RECENTLY STOLEN PROPERTY DID NOT SHIFT THE BURDEN OF PROOF TO DEFENDANT.

Defendant asserts that the jury instruction concerning possession of recently stolen property, as given in the instant case, unconstitutionally shifted the burden of proof to the defendant. He relies on State v. Chambers, 709 P.2d 311 (Utah 1985) and State v. Pacheco, 20 Utah Adv. Rep. 18 (Utah 1985) to support this contention.

However, Chambers is clearly distinguishable. The jury instruction in Chambers was nothing more than a verbatim recitation of Utah Code Ann. § 76-6-402(1) (1978),[1] which was found to be unconstitutional under Francis v. Franklin, 105 S.Ct. 1965 (1985). By comparison, the jury instruction given in the instant case was significantly different. Instruction No. 18 provided:

> Utah Law provides that:
>
> "Possession of property recently stolen when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."
>
> Thus, if you find from the evidence and beyond a reasonable doubt, that the defendant was in

---

[1] Section 76-6-402(1) provides:
> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

> possession of stolen property, that such possession was not too remote in point of time from the theft, and the defendant made no satisfactory explanation of such possession, then you may infer from those facts that the defendant committed the theft.
>
> You may use the same inference, if you find it justified by the evidence, to connect the possessor of recently stolen property with the offense of burglary.
>
> (R. 36).

The trial judge included an explanatory paragraph which clarified the responsibility of the jury with respect to § 76-6-402(1). When taken in total, the jury instruction did not shift the burden of proof to the defendant.

The jury instruction given in the instant case is substantively identical to the one given in State v. Pacheco, 20 Utah Adv. Rep. 18 (1985). And the State contends that this Court misapplied the holding of Francis v. Franklin, as analyzed and applied in Chambers, in deciding that the jury instruction given in Pacheco was unconstitutional. In Pacheco this Court created the impression that the challenged jury instruction was identical to the instruction stricken in Chambers. However, the records in those two cases reflect that the instructions given were indeed substantially different. See the State's brief in support of its petition for rehearing in Pacheco at 3-10. This Court in Pacheco unexplainedly cited only the first paragraph of the overall instruction given in Pacheco's case (which embodied the Chambers instruction). However, the Court failed to acknowledge, reconcile or even analyze the impact of the additional clarifying and modifying language contained in the Pacheco instruction which

is critical to the question of whether the overall instruction constituted a permissive inference or a mandatory presumption. By not analyzing the additional language in the Pacheco instruction, the Court has created confusion in the law with respect to how prosecutors should properly instruct a jury concerning a permissive inference under Utah Code Ann. § 76-6-402(1) (1953), as amended. Indeed, the concern is great given that the Pacheco/Pitts type instruction is a stock instruction used in the Third Judicial District.

The general question presented in the instant case is the same as that presented in Franklin, Chambers and Pacheco: Did the jury instruction "have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime?" Franklin, 105 S.Ct. at 1970 (citations omitted). In deciding whether the instruction is unconstitutional under Franklin, the Court must necessarily consider all three paragraphs of the instruction, as well as other instructions given to the jury. As stated in Franklin:

> The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Id., at 514, 99 S.Ct., at 2454. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see id., at 520-524, 99 S.Ct., at 2457-2459, or merely a permissive inference, see Ulster County Court v. Allen, 442 U.S. 140, 157-163, 99 S.Ct. 2213, 2224-2227, 60 L.Ed.2d 777 (1979). A mandatory presumption instructs the jury that it must infer the presumed facts if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves

> predicate facts, but does not require the jury to draw the conclusion.
>
> . . .
>
> A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Such inferences do not necessarily implicate the concerns of Sandstrom. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. Ulster County Court, supra, 442 U.S., at 157-163, 99 S.Ct., at 2224-2227.
>
> Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. Cupp v. Naughton, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This analysis "requires careful attention to the words actually spoken to the jury . . ., for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. Sandstrom, supra, 442 U.S., at 514, 99 S.Ct., at 2545.

105 S.Ct. at 1971-72 (emphasis added).

When this analysis is applied in assessing the validity of Instruction No. 18, it becomes clear that a reasonable juror could only have understood that instruction to contain a valid permissive inference. First, although the first paragraph of the instruction, if considered in isolation, could reasonably have

been understood as creating a presumption that relieves the State of its burden of persuasion on the elements of burglary, when considered in the context of the instruction as a whole, a reasonable juror could not have considered that paragraph to have created an unconstitutional presumption. The second paragraph, which clearly is stated in the form of a permissive inference, serves to explain the statement of law in the first paragraph. The words "shall be deemed prima facie evidence" are not readily understandable to the average juror. Therefore, a reasonable juror surely would have read the second paragraph which, significantly, begins with the word "thus," as explaining the statement of law in the first paragraph. No reasonable juror could have read Instruction No. 18 as requiring a finding that defendant was guilty of burglary once he found beyond a reasonable doubt the enumerated predicate facts. Given the wording of the instruction and viewing it as a whole, a reasonable juror would have understood that he may, not must, find defendant guilty of burglary once satisfied that the predicate facts had been proved

beyond a reasonable doubt.[2]

This conclusion is further supported by examining other instructions that were given to the jury. Instruction No. 3 read:

> You are instructed that to the Information the defendant has entered a plea of not guilty. The plea of not guilty denies each and all of the essential allegations of the charge contained in the Information and casts upon the State the burden of proving each and all of the essential allegations thereof to your satisfaction and beyond a reasonable doubt.

(R. 22). Instruction No. 9 read:

> You are instructed that the defendant is a competent witness in his own behalf and has the right to go upon the witness stand and testify if he chooses to do so. However, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. If he is satisfied with the evidence which has been given, there is no occasion for him to add thereto.
>
> So, in this case the mere fact that this defendant has not availed himself of the privilege which the law gives him should not prejudice him in any way. It should not be considered as any indication either of his guilt or of his innocence.

---

[2] That the instructions' first paragraph is a verbatim recitation of UTAH CODE ANN. § 76-6-402(1) (1978) does not automatically render the instruction unconstitutional. And, the use of the term "prima facie" does not in itself require a finding that there is Franklin/Sandstrom error. See Chambers, 709 P.2d at 325 (noting cases where this Court held that although the use of the term prima facie in an instruction was improper, it was not prejudicial in light of other instructions given to the jury). Instruction No. 18 does nothing more than instruct the jury on a "traditional common-law inference deeply rooted in our law." Barnes v. United States, 412 U.S. 837, 843 (1973). See also State v. Sessions, 583 P.2d 44, 45-6 (Utah 1978); State v. Kirkham, 20 Utah 2d 44, 432 P.2d 638 (1967) (cases implicitly recognizing the validity of this common-law inference in the context of approving its use in burglary cases).

> The failure of the defendant to testify is not even a circumstance against him and no presumption of guilt can be indulged in the minds of the jury by reason of such failure on his part.

(R. 27). Instruction No. 11 provided in pertinent part:

> All presumptions of law, independent of evidence, are in favor of innocence, and a defendant is presumed innocent until he is proved guilty beyond a reasonable doubt. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal.

(R. 30). Instruction No. 19 read:

> Before you convict the defendant, LAWRENCE PITTS, of the crime of Burglary, a Third Degree Felony, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that offense:
>
> 1. That on or about the 4th day of August, 1984, in Salt Lake County, Utah, the defendant, LAWRENCE PITTS, entered or remained in the building of Handy Pantry;
>
> 2. That he did so unlawfully;
>
> 3. That he did so intentionally or knowingly;
>
> 4. That he did so with the intent to commit a theft.
>
> If you are satisfied beyond a reasonable doubt that the State has proved each and every one of the above-mentioned elements, it is your duty to convict the Defendant. On the other hand, if the evidence has failed to so establish one or more of said elements, then you should find the Defendant not guilty.

(R. 37). And perhaps of most significance, Instruction No. 22 provided:

> If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you

> are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.
>
> The order in which the instructions are given has no significance as to their relative importance.

(R. 40) (emphasis added).

Second, Instruction No. 18 contains an acceptable permissive inference given that "the suggested conclusion is . . . one that reason and common sense justify in light of the proven facts before the jury." Franklin, 105 S.Ct. at 1971. The Supreme Court made this clear in Barnes v. United States, 412 U.S. 837 (1973), which held that an instruction on the common-law inference of guilty knowledge from the unexplained possession of recently stolen property satisfied the requirements of due process. Id. at 841-46. See also State v. Sessions; State v. Kirkham, (supra, 432 P.2d at n. 2).

Significantly, the Pitts instructions do not have the problems identified by the Court in the instructions it found to be unconstitutional in Chambers. There, the verbatim recitation of § 76-6-402(1) appeared alone, without the explanatory paragraph included in Pitts Instruction No. 18. Chambers, 709 P.2d at 324. Furthermore, in Chambers a separate instruction defined the term prima facie in such a way that it "could well have indicated to a juror that the defendants were required to disprove guilt"--a defect that could not be cured by another instruction that restated the presumption in permissive form. Id. at 326.

In sum, Chambers is clearly distinguishable from the instant case. Furthermore, this Court misapplied Franklin, as

analyzed and applied in Chambers, in holding that the jury instruction in Pacheco was unconstitutional. Therefore, the jury instruction given in the instant case did not unconstitutionally shift the burden to defendant to establish his innocence.

CONCLUSION

First, defendant failed to properly raise his challenge to the constitutionality of the jury instruction on direct appeal. Secondly, this Court disposed of the issue without comment in its per curiam opinion issued January 28, 1986. Finally, assuming arguendo that rehearing is warranted, the jury instruction given in the instant case did not unconstitutionally shift the burden of proof to defendant to prove his innocence. Consequently, defendant's petition for rehearing should be denied and his conviction affirmed.

DATED this 26th day of February, 1986.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius

EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copy of the foregoing Reply to Petition for Rehearing, postage prepaid, to Nancy Bergeson, attorney for appellant, Salt Lake Legal Defender Assn., 333 South Second East, Salt Lake City, Utah 84111, this 28th day of February, 1986.

Earl F. Dorius

ADDENDUM

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

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The State of Utah,
Plaintiff and Respondent,

v.

Lawrence Pitts,
Defendant and Appellant.

No. 20290

F I L E D
January 28, 1986

Geoffrey J. Butler, Clerk

PER CURIAM:

Defendant contests his conviction of burglary under U.C.A., 1953, § 76-6-2 (as amended), claiming that he was entitled at trial to a jury instruction on the lesser offense of theft.[1] He also appeals his conviction on the basis that the evidence fails to show an unlawful entry with the intent to commit theft. We affirm.

The Handy Pantry is a convenience store located on Salt Lake City's west side. The front area of the building, where the retail goods are displayed and sold, is open to the public. At the rear of the retail area, a door opens into an office and other rooms behind. The door from the retail area into the office is generally left open unless the store's manager is working in the office. On both sides of the door, signs printed in red ink indicate to the public that the office area is for employees only and others will be prosecuted. Nonemployees are never permitted to enter into the office or the rooms behind except by specific invitation of the manager. The store's business records are kept in a small desk located in a far corner of the office away from the door. The store's blank checks are kept in the desk and a metal box underneath the desk.

On Saturday morning, August 4, 1984, the store received in the mail a dark yellow bank envelope containing its bank statement and cancelled checks. The envelope was placed on the desk in the back corner of the office.

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1. A person is guilty of burglary "if he enters or remains unlawfully in a building or any portion of a building with the intent to commit a felony or theft . . . ." U.C.A., 1953, § 76-6-202 (1978 ed.). A person commits theft if "he obtains or exercises unauthorized control over the property of another with the purpose to deprive him thereof." U.C.A., 1953, § 76-6-404 (1978 ed.).

On Saturday evening, defendant drove to the Handy Pantry store with two women--Miss Longton, who testified, and an unidentified woman--ostensibly to buy baby formula for defendant's child. Longton was the owner of the car which defendant was driving that evening and the next day when arrested. Defendant entered the store with the unnamed woman, while Longton remained outside to make a telephone call.

In the store, defendant made no purchase of his own, but was observed hanging around the cash registers, apparently waiting for the woman to make her purchase. No one saw defendant leave the store, but when he returned to the car he had a dark yellow envelope similar in appearance to the store's bank envelope delivered that morning. Longton inquired regarding the envelope, and defendant told her that the envelope contained checks, but "they weren't for him, somebody else could use them."

Defendant drove to Miss Longton's home, where he dropped her off. Later that night, he drove her car to the home of another female friend, Sharon Spencer. She observed the bank envelope next to defendant in the car. He took the envelope with him into her house and kept it in front of him while watching television on the sofa. Early the next morning, defendant left the house, taking the bank envelope with him.

On Sunday morning, August 5, Miss Longton reported to the police that defendant had not returned her car. A police investigation located defendant and Longton's car later that same morning. An officer found in the glove compartment of the car the Handy Pantry bank envelope delivered to the store on Saturday. In the envelope were the store's cancelled checks and five blank checks. Four additional blank checks were still missing and were later rejected by the bank when their forged negotiation was attempted.

Defendant was charged with burglary of the checks and bank statements from the store. Defendant did not testify at trial. He offered no evidence to deny his entry into the store's office, explain his possession of the checks, or otherwise rebut the prosecution's evidence. He only attempted impeachment of Longton by reading a portion of her testimony at the preliminary hearing.

On appeal, defendant claims that the prosecution failed to establish that when he entered into the back of the Handy Pantry, he did so unlawfully, with the intent to commit theft. Defendant argues that the evidence of theft was sufficient to require the giving of an instruction on theft as a lesser offense to burglary. Inconsistently, he also claims that the State failed in its burden to prove his intent to commit theft.

In State v. Baker, Utah, 671 P.2d 152 (1983), and subsequent cases,[2] we clearly delineated the necessary elements that require the giving of a jury instruction on a lesser included offense when requested by the defendant: (1) To constitute an "included offense," elements of both the greater and lesser offenses must be related and there must be some overlap of the evidence required to establish the commission of each offense. Id. at 158-59. (2) Before the trial court must instruct the jury on the included offense, there must be a sufficient quantum of evidence to provide a rational basis for a verdict acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. Id.; see also U.C.A., 1953, § 76-1-402(3)(a) & (4) (1978 ed.).

Defendant argues that theft is an offense included in burglary because there is an obvious relationship between the elements of each when an accused enters or remains unlawfully in a portion of a building "with the intent to commit a theft." The State replies that the societal interests protected by each offense are distinct and different. Therefore, under its proposed "inherent relationship" test, the State argues that there is no connection between burglary and theft.

At common law, the societal interests protected from burglary were the sanctity and security of occupancy and the dwelling place. 3 Torcia, Wharton's Criminal Law § 326, at 186 (14th ed. 1980). The interest violated by a theft was the right of ownership and possession of property. Id. § 354, at 298. According to the State, because each crime was intended at common law to protect separate interests there was no "inherent relationship" between the offenses, and theft cannot be a lesser included offense of burglary. United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971). However, such an evaluation of offenses based solely upon common law expectations reflects the very same rigidity we rejected in Baker. Such a test is inconsistent with and defeats the purpose of section 76-1-402(3), which requires a factual analysis. Our statutory definitions of criminal conduct and culpability are significantly different from the old common law. The State's analysis ignores the plain language of section 76-6-202(1), which includes the intent to commit a theft in the definition of "burglary."

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2. State v. Smith, Utah, 700 P.2d 1106 (1985); State v. Brown, Utah, 694 P.2d 587 (1984); State v. Oldroyd, Utah, 685 P.2d 551 (1984); State v. Shabata, Utah, 678 P.2d 785 (1984); State v. Bales, Utah, 675 P.2d 573 (1983); State v. Crick, Utah, 675 P.2d 527 (1983). We reject the suggestion by the State that State v. Brown, 694 P.2d at 590, is inconsistent with State v. Baker.

Under Baker, an offense is included in a greater offense when there is "some relationship" between them and "some overlap" in the proof required to establish the elements of both offenses (e.g., the intent requisite to commit theft). See State v. Hill, Utah, 674 P.2d 96 (1983) (theft may be a lesser included offense of aggravated robbery). In this case, theft is a lesser included offense of burglary. A significant relationship exists between these two offenses because the same specific intent is required for each. The fact that the intent to commit theft is not a necessary element of all burglaries does not obviate the relationship between the two offenses in this case.

However, the court did not improperly refuse the instruction because the requirement was not satisfied that there must be evidence to provide a rational basis for acquitting him of burglary and convicting him of theft. State v. Baker, 671 P.2d at 159; State v. Bales, 675 P.2d at 576; State v. Smith, 700 P.2d at 1110-11. There is no such evidence in this case.

Specifically, there was no evidence presented to the jury that defendant lawfully entered or remained in the rear portion of the building where the store's checks were located. The evidence was undisputed that the office was not a retail sales area and not open to or used by the public. The area was off limits to customers and clearly so marked. Defendant offered no evidence that the back office was open to the public at any time, that he entered for any lawful purpose whatever, or that his purpose or intention in entering was benign.

Defendant is entitled to an instruction on theft to advance his theory only if there is any evidence that, if believed by the jury, would acquit defendant of the charge of burglary. Defendant does not claim that he never entered the back room at all. He did not testify that he mistakenly picked up the store's blank checks and bank records. There was no evidence that would permit the jury to find that defendant entered or remained in the back room for any purpose other than with the intent to commit a theft or other felony. The theory that defendant may have just innocently wandered back to find a restroom or that the office was open to the public is unsupported by any evidence. A mere theory argued by counsel but unsupported by any evidence will not satisfy the Baker analysis. Without offering any evidence that his entry into the rear office was lawful, defendant was not entitled to an instruction on theft. Martinez v. State, Tex. App., 635 S.W.2d 629 (1982). See also Leppek v. State, Wyo., 636 P.2d 1117 (1981); State v. Ocean, 24 Or. App. 289, 546 P.2d 150 (1976).

Defendant also argues that the evidence was insufficient to prove the requisite intent. Although the

evidence as to defendant's unlawful entry and intent was circumstantial, it was not so ambiguous as to be susceptible to the interpretation that defendant was not guilty of burglary but was guilty of theft. Even an innocent entry into the office would not acquit defendant if he remained therein with the unlawful purpose of stealing the checks. Section 76-6-202(1); People v. Blair, 52 Ill. 2d 371, 288 N.E.2d 443 (1972) (entrance into a public place is authorized only for the lawful purpose consistent with the reason the building is so opened). But defendant did not testify, and there was no evidence that his entry or presence was with any intent other than to commit theft. State v. Bales, 675 P.2d at 576.

The mere unlawful entry into private premises may not alone support a finding of intent. But defendant's unexplained possession of another's property, his subsequent statements and conduct, and other unrebutted evidence of the surrounding circumstances also support the reasonable inference that defendant entered or remained in the office with the specific intent to commit theft. Sims v. State, 272 Ark. 308, 613 S.W.2d 820 (1981); State v. Harper, 235 Kan. 825, 685 P.2d 850 (1984); see State v. Sisneros, Utah, 631 P.2d 856 (1981); State v. Brooks, Utah, 631 P.2d 878, 881 (1981); Wharton's Criminal Law, supra §§ 338-40, at 217-22. To prove intent, the State is not required to show circumstances that are identical to the circumstances in the cases cited above. The circumstances evidenced in this case are more than sufficient to justify a finding of intent to commit theft. That finding is supported by substantial evidence,

We affirm the conviction.

Stewart, Justice, concurs in the result.