1984

The State of Utah v. Gary Vance Saunder : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 19054
GARY VANCE SAUNDERS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE JAMES S. SAWAYA PRESIDING

DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

LINDA E. CARTER
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

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236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

LINDA E. CARTER
Salt Lake Legal Defender Association
[illegible] South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Gary Vance Saunders, was charged by information with a violation of the following provisions of Utah Code Ann. (1953), as amended: § 76-6-202, burglary; § 76-6-404, theft; § 76-1-503(2), possession of a firearm by a restricted person; and § 76-8-1001, status as an habitual criminal.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury with the Honorable James S. Sawaya, Judge, presiding in the Third Judicial District Court in and for Salt Lake County, Utah on December 28-29, 1982. The jury unanimously found appellant guilty of the burglary, theft and possession of a firearm by a restricted person [illegible] on December 30, 1982, before the Honorable James S. Sawaya, appellant was convicted of habitual criminal status. Appellant was sentenced to the Utah State Prison for an

indeterminate term of 1 to 15 years for the burglary; 1 to 15 years for the theft; 1 to 15 years for possession of a firearm and 5 years to life for the habitual criminal status.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order affirming the judgment of the lower court.

STATEMENT OF THE FACTS

On the evening of April 24, 1982, appellant's brother-in-law, Stacy Williams, went to appellant's home in South Salt Lake (T. 39-40). Williams and appellant then drove appellant's truck to the Phelps's home located in Sandy, Utah (T. 43, 68). Upon arrival, they knocked on the front door (T. 46). When no one answered, they went to the side door where appellant pried the door open using a screwdriver and pliers (T. 46). Both men were wearing gloves at the time (T. 61). After checking to make sure no one was in the Phelp's home, appellant gathered together a television set, a microwave oven, and some firearms, while Williams, his accomplice, kept watch of the door (T. 47-50). Appellant and Williams then carried the stolen items out to appellant's truck (T. 50). Appellant placed one of the firearms in the cab portion of the truck and then drove home (T. 50, 51).

Following their return to appellant's home, Williams [illegible] the stolen goods to his brother's home since appellant needed to get back to the Halfway House where he was residing (T. 54). Williams then called his cousin, Amos, their "fence", to observe the goods (T. 55, 56). Amos purchased the firearms (T. 55, 56).

The next day, Sunday afternoon, April 24th, Mrs. Phelps returned from her daughter's home where she had spent the night, and she discovered her home had been burglarized (T. 15). A television set, a microwave oven, some jewelry, and two firearms were missing (T. 18). The police were notified (T. 34). Mrs. Phelps stated that neither appellant nor his accomplice, Stacy Williams, had been given permission to enter the Phelps's home and take possession of any items in the house (T. 21, 22).

Following his arrest, Williams showed Detective Duncan of the Salt Lake Police Department, which home he and appellant had burglarized (T. 65, 89). Williams also aided other officers in locating some of the stolen goods (T. 62, 63). The firearms and the television set were eventually recovered (T. 62, 63). None of the items stolen from the Phelps's residence were found during a search of appellant's home, but stolen goods identified from burglaries in Bountiful and West Jordan were seized (R. 35).

Before trial, appellant's counsel moved to sever two burglary charges arising out of separate circumstances (R. 20).

The cases were not joined (R. 38). The initial trial, for this matter, was held December 1-2, 1982; however, during the course of that trial, a motion for a mistrial was granted (R. 119, 120). The trial was rescheduled for December 28, 1982. Prior to this trial, on December 7th, appellant's counsel made a timely motion to sever appellant's burglary and theft charges from the possession of a firearm by a restricted person charge; this motion was denied (R. 127, 138). However, it was agreed that no mention of appellant's other burglaries would be made without first establishing a foundation of materiality and giving the defense an opportunity to object (T. 11).

At trial, it was stipulated that appellant was a restricted person at the time of the crime, incarcerated at the Utah State Prison, but residing at a Halfway House under a work release program (T. 74).

Following the presentation of testimony, the jury unanimously found appellant guilty of the burglary, theft, and possession of a firearm charges (T. 165, 166). Then at appellant's request, the jury was dismissed, and appellant was tried before the Honorable Judge Sawaya on the habitual criminal charge (T. 167). The State introduced three prior second degree felony convictions and commitments to the Utah State Prison to substantiate the habitual criminal charge (T. 171).

Exhibit 7 (see Appendix A) contained a certified copy of a jury verdict finding appellant guilty of second degree

burglary and theft in 1978, and a certified copy of both the judgment and commitment order.

Exhibit 8 (see Appendix B), in part, contained a certified copy of the judgment and commitment that showed appellant, at that time represented by counsel, Galen Ross, had plead guilty to a second degree burglary charge in 1964.

Exhibit 9 (see Appendix C) included an affidavit from the defendant acknowledging that he voluntarily plead guilty to a second degree burglary charge in 1977. Galen Ross, once again acting as appellant's counsel, certified that he had discussed the implications of the guilty plea with his client. The certified copy of the judgment and commitment shows that appellant had been sentenced to the Utah State Prison, but was placed on probation, then after violating the terms of his probation had his original sentence imposed.

Beverly Tisher, Records Officer at the Utah State Prison, identified appellant as Gary Vance Saunders and presented identical copies of the respective judgments and commitments which had been filed at the Utah State Prison (T. 190).

All of this evidence relating to appellant's prior felony convictions was admitted over numerous objections by appellant's counsel (T. 173, 175, 180). Judge Sawaya found appellant guilty of the habitual criminal charge (R. 276-277).

ARGUMENT

POINT I

APPELLANT FAILED TO PRESERVE THE SEVERANCE ISSUE FOR APPEAL, AND THE COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO SEVER THE FIREARM COUNT.

Appellant contends that he was prejudiced when the trial judge denied his motion to sever the possession of a firearm by a restricted person charge from the burglary and theft charges brought against him. However, this issue was not raised during the trial, and this Court has held consistently that it is precluded from considering issues raised for the first time on appeal. State v. Sparks, Utah, 672 P.2d 92, 94 (1983); State v. Starlight Club, 17 Utah 2d, 174, 176, 406 P.2d 912 (1965).

A review of the record reveals that appellant's counsel made a preliminary motion before Judge Peter F. Leary requesting severance, which was subsequently denied (T. 138). At trial, before Judge James Sawaya, appellant failed to preserve this issue for appeal. Oklahoma's Court of Criminal Appeals has addressed this issue specifically.

> The law is well settled that in order to preserve a question for review in this Court, it must be raised in the lower court and an exception taken to the ruling, preserved in the motion for new trial and presented in the petition of error.

Lovick v. State, Okl. Cr., 646 P.2d 1296, 1298 (1982).

Since appellant failed to take an exception to the denial, and have it preserved for appeal in the record, this issue is improperly before the Court at this time. Assuming, arguendo, that this particular issue had been properly preserved for appeal, it is without merit since the trial court did not abuse its discretion when it denied appellant's motion to sever the counts.

This Court has established that "[a] denial will be reversed by this Court only if a defendant's right to a fair trial has been impaired." State v. Collins, Utah, 612 P.2d 775 (1980). Furthermore, the decision to grant or deny these severance/joinder motions "[r]ests within the sound discretion of the trial judge, and this Court will not interfere with that discretion unless it is shown to have been clearly abused." State v. Peterson, Utah, ____ P.2d ____, No. 18298 (filed April 13, 1984).

It is the trial court judge who is to "[j]udge whether in a given case the prejudice resulting from joinder is too great to be justified by the broader interests of avoiding duplicative trials." United States v. Jamer, 561 F.2d 1103, 1108 (4th Cir. 1977). If it can be found that the trial court balanced the prejudicial factor with the judicial economy factor when making its decision to deny appellant's motion, then there is no abuse of discretion.

In the instant case, appellant merely speculates that the jury inferred a criminal disposition in appellant, since his charges were not severed. There is simply no proof that the jury was prejudiced against appellant because of the joinder. Moreover, judicial economy was served by joinder of the charges in order to avoid needlessly duplicative trials, since appellant's possession of a firearm by a restricted person charge arose out of the same factual situation as the burglary and theft charges.

Furthermore, in the instant case, the elements relating to each crime were sufficiently distinct so as to minimize the risk that the jury might be confused by cumulating the evidence of the respective charges. There is absolutely no indication that the jury was unable to separate what evidence related to the respective charges nor is there any evidentiary basis for appellant's claim that he was convicted solely by reason of "his criminal disposition." See Drew v. United States, 331 F.2d 85, 91 (1964). In light of the fact that there were legitimate reasons supporting Judge Leary's decision denying appellant's pre-trial severance motion, there was no abuse of discretion.

The cases appellant cites to support his position can be easily distinguished. All of the cases, namely, State v. Gotfrey, Utah, 598 P.2d 1325 (1979), State v. McCumber, Utah, 622 P.2d 353 (1980), and Drew v. United States, 331 F.2d 85 (1964) concern multiple criminal charges that arise out of

separate transactions. The charges were brought together in the trial merely because the defendant was the same person in all the different criminal transactions. The courts found reversible error in each of these cases since the charges were not from a single criminal transaction and did not share a common scheme or design. McCumber at 356, Drew at 93, Gotfrey at 1328. In the instant case, however, all of the charges arose from one criminal transaction. Moreover, Gotfrey and McCumber dealt with sexual offenses which are inherently prejudicial to a defendant.

The one case appellant cites which is factually similar to his case is State v. Studham, Utah, 655 P.2d 669 (1982), which held that the denial of a motion to sever a possession of a firearm by a restricted person charge from an aggravated assault charge did not amount to a denial of due process.

The trial court did not abuse its discretion when it denied appellant's severance motion. Indeed, in the instant case there are good reasons why judicial economy was promoted where the charges arose out of the same criminal transaction and the crimes were simple and distinct, which minimized any potential confusion by the jury. Finally, there was no proof that the jury found appellant guilty of the charges brought against him because they ignored a criminal disposition from his possession of a firearm by a restricted person charge.

POINT II

THE JURY WAS NEVER EXPOSED TO PREJUDICIAL OR INADMISSABLE EVIDENCE.

Appellant contends that when Stacy Williams, his accomplice, testified as to the location of the stolen goods following the burglary, Williams's response was a direct reference to appellant's prior burglaries. Appellant further argues that Williams's remarks with respect to his having taken the stolen items to "their fence" violated the court's order that the State was obliged to notify both the trial judge and opposing counsel before presenting evidence of appellant's prior crimes. However, it is clear following a review of the transcript that the prosecutor was not questioning Williams regarding appellant's prior crimes; the prosecutor was merely attempting to determine where appellant had taken the stolen goods following this particular burglary. Therefore, the prosecutor did not violate the trial judge's order requiring prior notification before admitting evidence under then applicable Rule 55, Utah Rules of Evidence (Supp. 1978).

The dialogue between the prosecutor and Williams is as follows:[1]

[1]Appellant, in his brief, mischaracterized the nature of Williams's testimony by omitting defense counsel's objections.

Q. Did you have a conversation about the two firearms and the television and the microwave oven?

A. Yeah.

Q. Who was participating in that conversation?

A. Me and Gary. [appellant]

Q. Who said what in that conversation?

A. Gary told me, "Well, I got to be going back to the halfway house so I might as well take that stuff down and store it where we were storing it at."

Q. Did you have a regular place to store things?

A. Yeah.

Q. Where was that?

A. My brother's.

Q. What's his name?

A. Timmy Shunk.

MS. CARTER: I have an objection. May we approach the bench?

(Off-the-record discussion held at the bench).

Q. (By Mr. Housley) In this conversation that you had at Gary's house, did he tell you what to do after you got it down to the place to store it?

A. Yes.

Q. What did he tell you?

A. He told me to call our fence--his name is [illegible]--to see what he wanted to buy.

Q. Amos?

A. Yeah.

MS. CARTER: Your Honor, may we approach the bench again, just briefly?

THE COURT: You are going to wear that rug out.

(Off-the-record discussion held at the bench)

Q. (By Mr. Housely) Do you know Amos's name?

A. Yes.

Q. What is it?

A. Amos Armijo.

Q. After you had that conversation with Mr. Saunders, what did you do?

A. I did what he told me.

Q. Tell us what you did.

A. I took the stuff down to my brother's.

(T. 52, 53).

Williams's testimony was obviously elicited for the purpose of establishing the course of events the night of the burglary, and more specifically in this portion, the purpose was to establish where the stolen goods had been taken. Furthermore, even if Williams's "our fence" and "regular place" comment could be interpreted as referring to appellant's prior wrongs, this evidence was not so prejudicial to constitute reversible error. This Court has previously held that evidence relevant to explain the circumstances of a crime is admissible even though it might

tend to connect the defendant with a prior wrong. State v. [illegible], Utah, 584 P.2d 880 (1978). See also, State v. [illegible], 22 Utah 2d 257, 451 P.2d 772 (1969).

More specifically, in Alger v. State, Okla. Cr., 603 P.2d 1154 (1980), the court addressed the effect to be given a voluntary, tangential remark by a witness. The defendant in Alger was on trial for taking indecent liberties with a minor. The victim's mother was called as a witness. During her testimony, in response to a question, the witness made a general reference to "it having happened before" with the defendant. Defense counsel argued that the statement was prejudicial. The court said:

> There is only an implication of another crime which is obvious only to defense counsel. To extend the protection of the rule to every possible implication which might be conceived by defense counsel is to extend the rule to far. Id. at 1156, quoting Burks v. State, Okla. Cr., 568 p.2d 322 (1977).

Williams's statement parallels the type of statement at issue in Alger; a somewhat tangential remark made in response to a question. Appellant was given adequate opportunity to rebut Williams's testimony and impeach Williams's credibility. The jury weighed the conflicting testimony and rendered its verdict. There is absolutely nothing to indicate that the jury based its verdict on William's statements that he was to take the stolen goods to his brother's home and then call Amos, [illegible] house." Furthermore, Williams's statements are not

sufficiently prejudicial under the then applicable standards of Rules 4 and 45, Utah Rules of Evidence, to warrant a mistrial.

Rule 4 provides, in pertinent part:

> A verdict shall not be set aside, nor shall the judgment or decision based thereon, by reason of the erroneous admission of evidence unless . . . the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the grounds stated and probably had a substantial influence in bringing about the verdict or finding. (emphasis added).

Therefore, the defendant must make some showing that the verdict was directly and substantialy influenced by the challenged testimony, "Under Rule 4, ...an erroneous admission of evidence is treated as harmless error absent a showing that it had a substantial influence in bringing about the verdict." State v. Malmrose, Utah, 649 P.2d 56, 59 (1982).

In State v. Creviston, Utah, 646 P.2d 750 (1982), the defendant was on trial for the sale of a controlled substance. In response to the prosecutor's question concerning the price of the cocaine, a police officer testified that the price was lower than usual because the defendant owed money to the State Narcotic and Provo Police Departments. The defendant objected to the remark as prejudicial and stated it would cause the jury to perceive him as a regular drug dealer and hardened criminal. This Court held, however, that the police officer's remark was not the type of statement which would be unduly

prejudicial to the defendant. See also, State v. Dodge, 12 Utah 2d 293, 365 P.2d 798 (1961).

A jury verdict should not be overturned in spite of error if it can be fairly concluded that the error had no prejudicial effect on the complaining party. The verdict should only be overturned when the error is so substantial or prejudicial that in its absence there would likely have been a different result. State v. Urias, Utah, 609 P.2d 1326 (1980).

Rule 45 makes clear that the admission of evidence is discretionary with the trial court. The judge may choose to exclude evidence if he finds the risk that its admission will ". . . create substantial danger of undue prejudice." (emphasis added). Although a judge may exclude evidence, he should do so only after concluding that an injustice will result by its admission. This Court:

> . . . respects [the trial judge's] prerogative in that regard and will not interfere with his ruling unless it clearly appears that he so abused his discretion that there is a likelihood that an injustice resulted.

State v. Dankers, Utah, 599 P.2d 518, 520 (1979).

This position is reiterated by the Court in State v. McCardell, Utah, 652 P.2d 942 (1982) in which the Court stated that the issue was not whether the evidence created prejudice, but whether it created undue prejudice. Furthermore, it is the discretion of the trial court to determine the prejudicial effect of the admission.

At the conclusion of Williams's testimony, defense counsel moved for a mistrial and was given the opportunity to argue the prejudicial effect of Williams's testimony to Judge Sawaya (T. 96). The motion was denied leading to the inference that the trial court weighed Williams's alleged prejudicial statement in the testimony and found it insufficiently prejudicial to warrant a mistrial.

Appellant cites two cases which held that the evidence admitted to establish prior crimes was prejudicial and therefore inadmissible. However, State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961) and State v. Kazda, 14 Utah 2d 266, 382 P.2d 407 (1963) can be distinguished from this case since they address the rare situation when the evidence of prior crimes referred to criminal charges that had been dismissed or had not yet been tried. In this situation where Williams was merely explaining what had been done with the stolen goods, there was no reference to appellant's tried or untried prior crimes.

Appellant also argues that the presence of an unrelated firearm on the evidence table prejudiced the jury against him. However, there is no proof that the jury even saw the firearm. Judge Sawaya said when denying appellant's motion for a mistrial.

> The gun, of course, was inadvertent. I don't put much store in the fact that it happened because I am not even sure the jury saw it. It was just like on the table. There is no way they can connect it up with the evidence in this case. The only evidence presented to them was the one of relevance.

(T. 97).

Thus, neither the unrelated firearm nor Williams's [illegible] can be regarded as so severely prejudicial to the [illegible] to mandate reversible error.

POINT III

APPELLANT'S PRESUMPTION OF INNOCENCE WAS NOT DENIED WHEN THREE JURORS SAW APPELLANT IN HIS PRISON CLOTHES AND SHACKLES OUTSIDE THE COURTROOM.

In the morning, before the second day of trial began, appellant was escorted from the elevators in the Third Judicial District Court Building to a dressing room where he was to change from his prison garb to his street clothing for trial (R. 508-511). When he stepped off the elevator, three jurors, who were standing, coincidentally, near the elevator waiting for the trial to begin, saw appellant for a few seconds in his prison attire and shackles (R. 508-511). As a result, later that same morning in the judge's chambers, appellant's counsel moved for a mistrial (T. 133). Counsel argued that the jurors's momentary observation of appellant in his prison attire outside the courtroom violated appellant's presumption of innocence. Judge Sawaya denied this motion (T. 133). A month after the trial, appellant's counsel made a motion to arrest judgment and asked the court to [illegible] the issue (R. 504). The trial jduge said he could not [illegible] any point of re-arguing it" but did allow the witness, Ron [illegible]mon, Transportation Officer at the Utah State Prison, to

testify (R. 505, 506). Mr. Solomon testifed that he had escorted appellant to the dressing room to change clothes, according to the routine, but when they stepped off the elevator en route to the dressing room, three jurors standing near the elevator saw appellant for a few seconds (R. 510). Following this testimony, the motion to arrest judgment on this point was denied (R. 262). Again, appellant argues that he was prejudiced after viewing appellant in his prison attire and shackles, and he is therefore entitled to a new trial.

The cases which appellant cites in support of his position are inapposite. Appellant, in the instant case, was not compelled to stand trial in his prison clothes. Estelle v. Williams, 425 U.S. 501 (1976), Chess v. Smith, Utah 617 P.2d 341 (1980). Furthermore, appellant was not forced to stand trial wearing handcuffs, McKenzey v. State, 225 S.E.2d 512 (Georgia, 1976), nor was appellant escorted into the courtroom while all of the jurors watched when his handcuffs were removed prior to trial, Moore v. State, 535 S.W.2d 357 (Texas Crim. Ap., 1976). Appellant never appeared in the courtroom, before the jury, in his prison garb during the course of the trial; he was merely seen by a few jurors for a few seconds while he was en route to the dressing room where he changed into street clothing. This momentary, inadvertent observation by a few jurors is not tantamount to an abridgement of appellant's fundamental rights.

"Unlike the situation where a defendant is tried in jail garb, Estelle v. Williams, 425 U.S. 501 (1976) far less degree of prejudice inheres in a situation where a juror's observation of a defendant in jail uniform is fleeting and outside the courtroom." United States v. Jackson, 549 F.2d 517, 527 n.9 (8th Cir. 1977). Likewise, state courts have been disinclined to grant new trials when faced with similar issues. Colorado's Supreme Court in People v. Dillon, 655 P.2d 841, 846 (Colo., 1983) held that "The mere fact of exposure of a handcuffed defendant is not necessarily sufficient to warrant the granting of a mistrial." In an earlier case, Colorado's Supreme Court ruled that a defendant's exposure before two jurors in the hallway, when the defendant was wearing handcuffs, did not constitute reversible error. People v. McLean, 473 P.2d 715, 719 (Colo., 1970). And New Mexico's Court of Appeals in State v. Mills, 606 P.2d 1111 (N.M. App., 1980) held that when the defendant was observed in handcuffs by three jurors outside the courtroom during the noon recess, he was not prejudiced, and therefore the trial court had not erred when it denied the defendant's motion for mistrial.

In order to constitute reversible error, the exposure of the defendant must be both unnecessary and prejudicial. People v. Dillon, at 846. Moreover, the defendants bear the burden of affirmatively demonstrating prejudice. United States v. Jones, 603 F.2d 535, 549 (5th Cir. 1977), United States v. Hayes, 649 F.2d 616, 617 (8th Cir. 1981).

For valid security purposes, it was necessary to transport appellant from the prison to the court in his prison clothes and shackles. It is neither unreasonable nor unnecessary for a defendant to be handcuffed when being moved to and from the courtroom. McLean v. People, 473 P.2d 715, 719 (Colo. 1970).

Moreover, besides his bald assertion, appellant fails to affirmativley demonstrate that he was prejudiced. Appellant merely speculates that his presumption of innocence was injured and that he was forced to stand trial before a partial jury. He offers no evidence whatsoever in support of his assertions. Furthermore, the State was taking every precaution to safeguard appellant's presumption of innocence by providing him with an opportunity to remove his prison garb. There is no indication that while en route to the dressing room appellant was purposefully placed before the three jurors in his prison clothes and shackles, nor was appellant forced to stand trial in his prison clothes. Nothing on the record indicates that appellant was unduly injured by the momentary observation by the jurors. Since it cannot be shown that it was unnecessary to transport appellant in his prison garb, and the appellant failed to make a showing of any prejudice, the trial court's decision to deny appellant's motion for a mistrial was not an abuse of discretion and should therefore be affirmed.

POINT IV

THE PROSECUTOR PROPERLY COMMENTED ON THE EVIDENCE DURING CLOSING ARGUMENT.

Appellant next contends that during closing argument the prosecutor inappropriately commented on appellant's failure to testify and thereby deprived appellant of both his right to an impartial jury verdict and his right against self-incrimination. However, it is clear following a review of the prosecution's closing argument that the prosecutor was only rebutting defense counsel's comments that appellant was not guilty by summarizing the evidence presented during the trial which established appellant's guilt, beyond a reasonable doubt. The prosecutor stated:

> The first thing she said [defense counsel] was that the defendant is not guilty, the defendant did not commit the burglary, the defendant did not commit this theft, the defendant did not possess these firearms. Now, there's no proof of that, absolutely no proof of that. The only proof that we have here in court and the court has instructed you to base your decision on the evidence -- the only proof, the only evidence is that he did do it. That's the testimony of Stacy Williams.
>
> In order for you to say that defendant is not guilty you would have to say that Stacy Williams is lying. You would have to say that Stacy Williams is not telling the truth about his participation, about the defendant's participation in this case. Now, that's not proof--that's not proof that he didn't do it. The most that you could say for a conclusion is that Stacy Williams is intentionally lying to you under oath. The only conclusion you could reach, if you reach that conclusion, is that the conclusion may

> create a reasonable doubt; so I urge you to look at this evidence realistically. Look at this evidence for what it is, and that is, it is not evidence that the defendant is not guilty.

(T. 149, 150).

Counsel, in a criminal case, is given considerable freedom to express views on the evidence that has been presented at trial during closing argument. State v. Wells, Utah, 603 P.2d 810, 819 (1979). There can only be a reversal of a conviction if the comments made were so prejudicial or substantial that there is a reasonable likelihood there would have been a different result if the comments had not been made. State v. Sorrels, Utah, 642 P.2d 373 (1982). In the instant cases, the prosecutor was acting well within the boundaries established for closing argument and his comments were not prejudicial toward the appellant; there would not have been a different result.

In State v. Kazda, Utah, 540 P.2d 949 (1979), this Court explained that it is the duty of counsel to analyze all aspects of the evidence and that "[t]he prosecutor, and the public whose interest he represents, should and does have a right to argue the case upon the basis of the total picture shown by the evidence or the lack thereof." Kazda, at 951. And, "[t]he prosecution has both the duty and prerogative to analyze what the evidence does or does not show, as bearing on the guilt or innocence of the defendant." State v. White, Utah, 577 P.2d 552, 555 (1978). The prosecutor, in the instant case, was merely

exercising his prerogative to comment on the evidence that had been presented; he made no direct or indirect reference to the fact that appellant had not taken the stand.[2]

In State v. Eaton, Utah, 569 P.2d 1114 (1977), the prosecutor in his closing argument said that only "[t]he defendnt really knows what took place in the house" and asked "What does the defendant tell us?" Since those statements were direct references to the defendant's failure to testify, this Court regarded the remarks as prejudicial and granted a reversal. But, in this case, the prosecutor did not make any direct or indirect statements commenting on appellant's failure to testify; the prosecutor properly used his closing argument time to present his theories of the evidence to the jury.

Moreover, any error that could be inferred from the prosecutor's comments were cured by a cautionary instruction given by the trial judge that told the jury not to assume any presumption of guilt if the defendant did not testify in his own behalf (R. 214, Instruction No. 9).

Appellant also contends that the prosecutor improperly placed the burden of proof on defense counsel. Appellant cites United States v. Segna, 555 F.2d 226 (9th Cir. 1977) where the prosecutor told the jury that they could presume the defendant sane in a murder case when it had been established by the defense

[2]Appellant inappropriately cites two cases, Doyle v. Ohio, 426 U.S. 610 (1976) and State v. Wiswell, Utah, 639 P.2d 146 (1981), which address "post arrest silence" but not the issue of "failure to testify".

that the defendant was insane and the burden was on the state to prove that the defendant was sane. In Segna, the prosecutor made direct misstatements of the law that resulted in an inappropriate shifting of the burden of proof. However, in this case, appellant asserts that the prosecutor's statements shifted the burden of proof without showing when or where the burden shifted. Moreover, a reading of the prosecutor's statements reveals that he never asked appellant's counsel to prove appellant innocent. The prosecutor just asked the jury to consider the evidence that had been given, decide whether Stacy Williams was telling the truth and if they believed Williams's testimony to find appellant guilty. The prosecutor did not misstate the law, nor did he shift the burden of proof to appellant.

The prosecutor stayed well within the bounds appropriate for closing argument. He argued the case upon the basis of the total picture shown by the evidence; he did not comment on appellant's failure to testify. Appellant was not injured by the prosecutor's appropriate comments on the evidence.

POINT V

APPELLANT'S STATUS AS A HABITUAL CRIMINAL SHOULD BE AFFIRMED.

Appellant contends that his conviction under Utah's habitual criminal statute should be reversed since two of the

three convictions which the State submitted in support of the charges were invalid guilty pleas. Appellant also claims that the sentence imposed by the trial judge following his conviction under the habitual criminal statute of five years to life imprisonment is disproportionate since his prior convictions (all for burglary) should be considered as "property offenses" and are therefore less serious than offenses involving violence. However, the two guilty pleas which the prosecutor offered were not constitutionally invalid, and appellant's sentence was not disproportionate to the crimes he had committed. Moreover, appellant's main contention that the sentence was disproportionate to his prior crimes since he considered his previous "burglary" crimes to be non-violent is without merit since burglary is considered to be, in this state, at least, a violent crime.

A. SENTENCING APPELLANT UNDER UTAH'S HABITUAL CRIMINAL STATUTE WAS CONSTITUTIONAL.

Appellant contends that Utah's habitual criminal statute is unconstitutional as applied to him since it makes no distinction between property offenses and violent crimes. The habitual criminal statute, Utah Code Ann., § 76-8-1001 (Supp. 1978) reads:

> Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state

> would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

This Court recently reviewed § 76-8-1001 in State v. Montague, Utah, 671 P.2d 187 (1983) and determined that "[t]he language of the statute was clear and unambiguous" and that its purpose is to "[m]ake persistent offenders subject to greater sanctions." Montague at 190. The Court did not distinguish between persistent "violent" offenders and persistent "non-violent" offenders, rather it grouped all persistent offenders in the same category. Moreover, the Court in Montague affirmed the defendant's conviction as an habitual criminal after considering his prior burglary convictions.

Furthermore, appellant's argument that Utah's habitual criminal statute as applied to him is cruel and unusual punishiment because his burglary convictions were not "crimes of violence" is without merit since burglary is considered a violent crime. Appellant conveniently classifies all of his prior burglary convictions in the "non-violent" crime category. However, the Utah Legislature has included burglary in the "violent" crime category along with assault, rape and murder. Utah Code Ann., § 76-10-501(5) (Supp. 1978) reads:

> (5) "Crime of violence" means murder, voluntary manslaughter, rape, mayhem, kidnapping, robbery, burglary, housebreaking, extortion, or blackmail accompanied by threats of violence, assault with a dangerous weapon, assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable by imprisonment for more than one year, or an attempt to commit any of the foregoing offenses.

(Emphasis added). See also 18 U.S.C.A. § 4251.

Finally, despite appellant's contention to the contrary, when using the first prong of the proportionality review test established in Solem v. Helm, ____ U.S. ____, 103 S.Ct. 3001, 77 L.Ed.2d No.2 637 (1983), appellant's sentence is not so disproportionate to the crimes he has committed to constitute cruel and unusual punishment under the Eighth Amendment. The Supreme Court in Solem v. Helm held that South Dakota's recidivist statute, which imposed a life sentence without possibility of parole, was significantly disproportionate to the felony which triggered employment of the recidivist statute, that of uttering a "no-account" check for $100.00. In its analysis, the Court narrowly limited the extent of their ruling and reiterated the statement made in Rummell v. Estelle, 445 U.S. 263, 272 (1980) that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare." Solem v. Helm,

The Helm Court then carefully limited its holding to the fact that the felony that triggered the defendant's life

sentence without possibility of parole was issuing a no-account $100.00 check. Helm, at 653, n.21. The Court narrowly tailored the opinion of Helm to leave intact the Court's previous decision in Rummell v. Estelle where it held that sentencing a persistent "non-violent" offender under Texas's recidivist statute was not unconstitutional. Helm could be distinguished from Rummell since defendant Rummell was eligible for parole twelve years after his initial confinement while Helm was to be imprisoned for life with no possibility of parole.

The case at hand is substantially different from Helm since the felonies that triggered the imposition of Utah's habitual criminal statute were burglary, theft, and possession of a firearm by a restricted person, all serious offenses if contrasted with uttering a no-account check for $100.00. Moreover, Utah's habitual criminal statute does not prohibit the possibility of parole. For these reasons, appellant's indeterminate sentence of five years to life imprisonment, with a possiblity of parole, is not so significantly disproportionate to the crimes appellant has committed to be prohibited by the Eighth Amendment.

B. APPELLANT'S PRIOR CONVICTIONS WERE BASED, ON VALID GUILTY PLEAS.

Appellant argues that two of his three prior convictions were the result of invalid guilty pleas, and

therefore, these convictions could not be used in charging him as an habitual criminal. However, all of the convictions were constitutionally valid and able to support appellant's conviction of habitual criminal status.

This Court has ruled that if the Custodian of the Records at the Utah State Prison positively identifies petitioner and produces copies of commitments on file at the prison, State v. Washington, 24 Utah 2d 111, 476 P.2d 1019 (1970) or if the State produced a certified copy of the commitments, State v. Reay, 13 Utah 2d 79, 368 P.2d 595 (1962), such proof is sufficient to support an habitual criminal conviction.

In this case, the State produced certified copies of the judgments and commitments on file at the district court clerk's office. (See Appendix A, B, C). The State also produced the identical judgment and commitment orders kept on file at the Utah State Prison. Furthermore, Beverly Tisher, Records Officer at the Utah State Prison, testified to the authenticity of the copies and identified appellant as Gary Vance Saunders listed in the prior convictions (T. 188-190). The evidence presented to establish appellant's status as an habitual criminal was sufficient.

Nevertheless, appellant contends that his 1976 conviction is invalid since there is a blank space where his middle name should be in the affidavit, wherein he knowingly and voluntarily plead guilty. However, stapled to the affidavit is a statement by appellant's attorney certifying that he had

discussed the implications of the affidavit with appellant and believed that appellant understood what he was doing. Moreover the judgment and commitment indicate that appellant was represented by an attorney. Appellant's argument that no attorney was listed is rendered frivolous after a more thorough examination of the records submitted (See Appendix C).

Appellant's 1976 burglary conviction, when combined with the 1978 burglary conviction not contested on appeal, constitute the two convictions necessary to support an habitual criminal charge under § 76-8-1001. However, even the 1964 conviction which appellant argues is invalid is found to be valid following a review of the pertinent documents.

Appellant asserts that his 1964 guilty plea was not voluntarily entered since (1) he was promised probation if he would plead guilty, yet he was committed to the Utah State Prison, and (2) he could not recall being advised of the consequences of his guilty plea in 1964, which was later required by Boykin v. Alabama, 395 U.S. 288 (1969); Burgett v. Texas, 389 U.S. 109 (1967) and McCarthy v. United States, 394 U.S. 459 (1969).

First, a promise of probation by the District Attorney and appellant's attorney has no affect on the validity of a guilty plea. When sentencing criminals, the trial judge is not bound by any promises made to the defendants by the attorneys.

State v. Harris, Utah, 585 P.2d 450, 453 (1978), State v. Garfield, Utah, 552 P.2d 129, 130 (1976).

Next, appellant contends that his 1964 conviction did not meet the standards established in Burgett, Boykin and McCarthy. Appellant's assertions rests upon his own recollection of what took place when he plead guilty. While the record does not indicate whether the plea was voluntarily entered, the record does indicate that appellant was represented by counsel. And in habitual criminal cases, the State does not have the burden of proving that a guilty plea was voluntarily made if it can be shown that a defendant is represented by counsel at the time of entering the plea. State v. Malone, Wash. App., 582 P.2d 883, 886 (1978). Moreover, appellant is contesting this conviction on his recollection alone and this Court has stated, "In the absence of record evidence to the contrary, we assume regularity in the proceedings below." State v. Jones, Utah, 657 P.2d 1263 (1982). Since the judgment and commitment indicate that appellant was represented by counsel when entering his guilty plea, and appellant makes only bald assertions that his plea was not voluntarily entered, this Court must assume regularity in the proceedings below and hold that in the use of the 1964 conviction was based upon a valid guilty plea. With the affirmation of the 1964 conviction, there are three valid convictions upon which appellant's habitual criminal charge can rest.

CONCLUSION

Appellant failed to properly preserve the severance issue for review on appeal. Furthermore, the trial court did not abuse its discretion when it denied appellant's motion to sever the possession of a firearm by a restricted person charge from the burglary and theft charges since the charges arose from the same criminal transaction, and the elements of the charges were simple and distinct, thereby reducing the risk of confusion by the jury. Moreover, the appellant failed to establish any prejudice against him.

The jury was not exposed to prejudicial or inadmissible evidence. The testimony of appellant's accomplice was elicited to establish the events that took place the night of the crime. The prosecutor was not attempting to place evidence of appellant's previous crimes before the jury. Even if the statements inferred prior burglaries, they were not so prejudicial to constitute reversible error. Finally, the unrelated firearm was inadvertent, and there was no way the jury could connect it with the case.

Appellant's presumption of innocence was not denied when three jurors saw appellant in his prison attire. The trial court did not abuse its discretion when it denied appellant's motion for a mistrial. It was necessary for security purposes to transport appellant in his prison garb and shackles, and appellant failed to make an affirmative showing of prejudice.

The prosecutor properly commented on the evidence during closing argument. He did not comment on appellant's failure to testify at trial; he merely presented the State's theory of the case based on the evidence presented.

Finally, appellant's sentence for his habitual criminal status was not significantly disproportionate to his crimes. And, the prior convictions that supported appellant's habitual criminal status were based on valid guilty pleas.

Therefore, appellant's convictions should be affirmed since there was no reversible error in the proceedings at trial.

DATED this 13th day of August, 1984.

DAVID L. WILKINSON
Attorney General

Dave B. Thompson for
J. STEPHEN MIKITA
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Linda E. Carter, Attorney for Appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 13th day of August, 1984.

Mildred E. J. Martinez

APPENDIX A

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH JUL 7 51 PM '78

COPY

W. STERLING EVANS, CLERK
By Lynda Hartt DEPUTY CLERK

J U D G E M E N T and C O M M I T M E N T

STATE OF UTAH
Plaintiff

-vs-

GARY V. SAUNDERS
Defendant

11567A

CASE NO. 31349

BURGLARY & THEFT

On this being the time fixed for passing of sentence upon the above named defendant, the said defendant appearing in person and being represented by Galen Ross as counsel, the State of Utah being represented by David Yocum as counsel. The defendant is now asked if he has any legal cause to show why sentence should not be passed upon him, the defendant answering he has none. Judgement and sentence is pronounced as follows:

"It is the judgement and sentence of this Court that you Gary V. Saunders be confined and imprisoned in the Utah State Prison for the Indeterminate Term of 1-15 years as provided by law for the crime of Burglary (2nd Degree Felony)."

"It is the judgement and sentence of this Court that you Gary V. Saunders be confined and imprisoned in the Utah State Prison for the Indeterminate Term of 1-15 years as provided by law for the crime of Theft (2nd Degree Felony)."

STATE OF UTAH
COUNTY OF SALT LAKE } ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A FULL, TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT OF FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND SEAL OF SAID COURT

THIS 7th DAY OF July 1978

W. STERLING EVANS, CLERK

BY _____ DEPUTY

It is further ordered that the sentences are to run concurrently.

Commitment to issue forthwith.

The Sheriff, Rex Varce, Sheriff of Salt Lake County, Utah are hereby commanded to take the said Gary V. Saunders and deliver him without unnecessary delay to the Utah State Prison, then and there to be confined in accordance with the commitment heretofore imposed.

Dated this June 29, 1978.

HON. ERNEST E. BALDWIN, Judge

APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

- - - - - - -ooOoo- - - - - - -

COMMITMENT

- - - - - - -ooOoo- - - - - - -

STATE OF UTAH)
VS)
GARY VANCE SAUNDERS)

Case No. 18748
BURGLARY IN SECOND DEGREE

February 18, 1964.

This being the time heretofore set for the passing of sentence upon the within named Defendant, the Defendant appearing in person and being represented by Galen Ross as counsel; Assistant District Attorney, Peter F. Leary appearing in behalf of the State of Utah. Whereupon, the Defendant is asked if he has any legal cause to show why sentence should not be passed upon him, the Defendant answering that he has none, the following judgment and sentence is pronounced as follows, to-wit:

> "The Judgment and Sentence of this Court is that you, Gary Vance Saunders, be confined in the Utah State Prison for the indeterminate term of from one (1) to twenty (20) years as provided by law for the crime of Burglary In The Second Degree, as charged in the Information".
>
> COMMITMENT TO ISSUE FORTHWITH.

And, you George Beckstead, Sheriff of Salt Lake County, Utah are hereby commanded to take the said Gary Vance Saunders, and deliver him without delay to the Utah State Prison then and there to be confined in accordance with the sentence and commitment heretofore imposed.

February 18, 1964

Dated February 18, 1964.

MERRILL C. FAUX
JUDGE

STATE OF UTAH)
COUNTY OF SALT LAKE)

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 11th DAY OF June 1982

W. STERLING EVANS, CLERK
BY [signature] DEPUTY

DEPUTY

APPENDIX C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JUDGEMENT and COMMITMENT

STATE OF UTAH
Plaintiff

-vs-

GARY VANCE SAUNDERS
Defendant

CASE NO. 30202
CITY NO. 66617

BURGLARY

This being the time fixed for passing of sentence upon the above named defendant, the said defendant appearing in person and being represented by Grad Rich as counsel, the State of Utah being represented by Glenn Iwasaki as counsel. The defendant is now asked if he has any legal cause to show why sentence should not be passed upon him, the defendant answering he has none. Judgement and sentence is pronounced as follows:

> "It is the judgement and sentence of this Court that you Gary Vance Saunders be confined and imprisoned in the Utah State Prison for the Indeterminate Term of 1-15 years as provided by law for the crime of Burglary (2nd Degree Felony)."

The defendant is now placed on probation under the supervision of the Adult Probation and Parole Department on the conditions as ordered in the clerk's minute entry.

Tuesday, December 12, 1978:

This being the hour set for an order to show cause hearing. The defendant appearing in person and being represented by Gaylen Ross as counsel, the State of Utah being represented by Spencer Austin as counsel. Comes now the defendant and admits the allegations set forth in the affidavit on file herein. Based on the defendant's admission the Court finds the defendant has violated the terms and conditions of his probation and the Court orders the probation commitment is to issue forthwith in accordance with the sentence heretofore imposed on June 17, 1977.

The Court further ordered that the above sentence is to run concurrently with any other sentences the defendant is now serving.

STATE OF UTAH }
COUNTY OF SALT LAKE } ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 8th DAY OF June 1982

W. STERLING EVANS, CLERK
By [signature] DEPUTY

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

FEB 11 1977

W. Sterling Evans, Clerk 3rd Dist. Court
Deputy Clerk

FILED

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, :

Plaintiff, : Criminal No. 30202

vs. : AFFIDAVIT OF DEFENDANT

Gary Vance Saunders :

Defendant. :

I, Gary Vance Saunders, the above-named defendant, under oath, hereby acknowledge that I have entered a plea of guilty to the charge of Burglary (2nd Degree) contained in the Information on file against me in the above-entitled court, a copy of which I have received, (or to the lesser offense of _____ _____ included in the charge contained in the Information on file against me in the above-entitled court); that I understand the nature of that charge and that it is a 2nd Degree (degree or class), and that I am entering such plea voluntarily and of my own free will after conferring with my attorney _____ and with a knowledge and understanding of the following facts:

1. I know that I have a constitutional right under the Constitution of Utah and of the United States to plead not guilty and to have a jury trial by 8 persons upon the charge to which I have entered a plea of guilty, or to a trial by the court should I elect to waive a trial by jury.

2. I know that if I wish to have a trial in court upon the charge, I have a right to be confronted by the witnesses against me by having them testify in open court in my presence and before the court and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to

STATE OF UTAH } ss
COUNTY OF SALT LAKE }

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 7th DAY OF June 1982

W. STERLING EVANS, CLERK

BY _____ DEPUTY

have witnesses subpoenaed by the state at its expense to testify in court upon my behalf and that I could, if I elected to do so, testify in court on my own behalf, and that if I chose not to do so, the jury can be told that this may not be held against me.

3. I know that if I were to have a trial that the state must prove each and every element of the crime charged to the satisfaction of the court or jury beyond a reasonable doubt; that I would have no obligation to offer any evidence myself; and that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a unanimous agreement of all jurors.

4. I know that under the Constitutions of Utah and of the United States that I have a right against self-incrimination or a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify in court upon trial unless I choose to do so.

5. I know that under the Constitution of Utah that if I were tried and convicted by a jury or by the court that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the state without cost to me.

6. I know and understand that by entering a plea of guilty I am waiving my constitutional rights as set out in the five preceding paragraphs and that I am, in fact, fully incriminating myself by admitting I am guilty of the crime that my plea of guilty is entered to.

7. I know that under the laws of Utah that the sentence that can and may be imposed upon me upon my plea of guilty is imprisonment in the Utah State Prison for a term of 1-15 years or in the County Jail for any term not exceeding _____ (months), or fined any amount not in excess of $10,000.00, or both, and that this is the same sentence that could be imposed upon me as if I had stood trial and been convicted upon a plea of not guilty

STATE OF UTAH)
COUNTY OF SALT LAKE)

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT
THIS 6th DAY OF June 19 82

W. STERLING EVANS, CLERK
BY [signature] DEPUTY

8. I know that the fact that I have entered a plea of guilty does not mean that the court won't impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be if I plead guilty or that it will be made lighter because of my guilty plea.

9. No one has threatened or coerced me to make me plead guilty and I am doing so of my own free will and after discussing it with my attorney. I know that any opinions he may have expressed to me are not binding on the court.

10. No promises of any kind have been made to me to induce me to plead guilty, except that I have been told that if I do plead guilty to the charge mentioned above, other charges pending against me in this or other courts will be dismissed and that no other charges will be filed against me for other offenses, if any, that I am known to have also committed and for which no charges have as yet been filed.

11. I am not now under the influence of either drugs or alcohol.

12. I have read this affidavit, or I have had it read to me by my attorney, and I know and understand its contents. I am 35 years of age, have attended school through the 10th grade, and I can read and understand the English language. I have discussed its contents with my lawyer and ask the court to accept my plea of guilty to the charge set forth above in this affidavit because I did, in fact, on the _____ day of Guilty, 19 76.

Dated this 11th day of Feb., 1977.

Gary Saunders
Defendant

Subscribed and sworn to before me in court this 11 day of Feb., 1977

Bruce [illegible]
JUDGE

ATTEST
W. STERLING EVANS
CLERK
By [illegible]
Deputy Clerk

Certificate of Lawyer:

I certify that I am the lawyer for Gary [illegible] the defendant named above and I know he has read the affidavit, or that I have read it to him, and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing affidavit are in all respects accurate and true.

[signature]
Lawyer

O R D E R

Based upon the facts set forth in the foregoing affidavit and certification, the court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "guilty" be accepted and entered.

Done in court this 1st day of Feb, 1977.

[signature]
Judge

ATTEST
W. STERLING EVANS
CLERK
BY [signature]
DEPUTY CLERK

STATE OF UTAH }ss
COUNTY OF SALT LAKE }

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 9th DAY OF June 1982
W. STERLING EVANS, CLERK
BY [signature] DEPUTY