

1986

The State of Utah v. David Tyrone Smith : Petition For Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent :
-v- :
DAVID TYRONE SMITH, : Case No. 19283
Defendant/Appellant. : Category No. 2

PETITION FOR REHEARING

Petition for reconsideration of a decision by the Utah Supreme Court filed September 16, 1986, in an appeal from conviction and judgment imposed for Burglary, a Third Degree Felony, and Theft, a Third Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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FILED

OCT 21 1986

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent :
-v- :
DAVID TYRONE SMITH, : Case No. 19283
Defendant/Appellant :

PETITION FOR REHEARING

STATEMENT OF THE CASE

This is a petition for rehearing of an opinion filed by the Utah Supreme Court on September 16, 1986. (A copy of that opinion, State v. Smith, 42 Utah Adv. Rep. 14, is contained in Addendum A.) Originally this case was an appeal from a conviction and judgment imposed for Burglary, a Third Degree Felony, and Theft, a Third Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding.

STATEMENT OF FACTS

The facts are set forth in the Brief of Appellant at 2 and in State v. Smith, 42 Utah Adv. Rep. at 15.

INTRODUCTION

In Brown v. Pickard, denying reh'g, 11 P. 512 (Utah 1886), the Utah Supreme Court stated the standard for the granting of a petition for rehearing: "To justify a rehearing, a strong case must

be made. We must be convinced that the trial judge's findings on some material point in the case, or that of several points, are in error, and that the conclusions," In Cummings v. Phillips, 129 P.2d 404 (Utah 1913), the Court declared:

To make an application for a rehearing in a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

The argument section of this brief will establish that, applying these standards, the Appellant's petition for rehearing is proper before the Court and should be granted.

ARGUMENT

POINT I.

THE COURT ERRED IN ITS CONCLUSIONS CONCERNING THE DISPUTED JURY INSTRUCTION IN THIS CASE AND THE RESULT OF THIS CASE DIRECTLY CONTRADICTS THIS COURT'S HOLDING IN STATE V. PACHECO

In his opening brief, Mr. Smith challenged the trial court's giving of instruction No. 20 (R.111). Over Smith's objection, the trial judge instructed the jury:

Utah Law provides that:

"Possession of property recently stolen when no satisfactory explanation of such possession is

fact, 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 possession of stolen property, that such 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.

The first full paragraph of the instruction contains the language of Utah Code Ann. §76-6-402(1) (1953, as amended), while the remainder of the instruction explains the statutory language.

A. INSTRUCTION NUMBER 20 WAS AN UNCONSTITUTIONAL MANDATORY REBUTTABLE PRESUMPTION.

In upholding Instruction No. 20, this Court held that, when read "in light of its immediate context and the context of the instructions as a whole," the jury in the case could not "have reasonably applied the instructions in an unconstitutional manner." State v. Smith, 42 Utah Adv. Rep. 14 at 16. The Court concluded that the instruction created only a permissible inference and was therefore allowable. In reaching this conclusion, the Court stated:

Lest there be a misunderstanding of our ruling in this case, we emphatically declare that we do not retreat from [State v. Chambers]. The trial court should not have used the statutory language in the instruction for the reasons stated in Chambers. We hold only that the instruction cannot be deemed reversible error in this case in light of the clear explanatory instructions . . .

Smith at 16. In fact, the conclusion reached in this case stands in direct contradiction to the conclusion of State v. Chambers, 709 P.2d 321 (Utah 1985) and subsequent cases.

In Chambers, this Court unequivocally stated:

We therefore conclude that a jury instruction using the language of U.C.A., 1953, §76-6-402(1) is unconstitutional because it directly relates to the issue of guilt and relieves the State of its burden of proof. . . . Thus, the statutory language should not be used in any form in instructing juries in criminal cases,

Id. at 327 (emphasis added). Despite this clear prohibition on use of the statutory language, in this case the Court upholds an instruction which used exactly the prohibited language.

The basis for the prohibition on the use of the statutory language in Chambers was that the Court found that the language formed a mandatory rebuttable presumption. The Court noted that the United States Supreme Court found the use of such presumptions unconstitutional in Francis v. Franklin, 105 S.Ct. 1965, 85 L.Ed. 344 (1985). The Chambers Court stated that instructions containing mandatory rebuttable presumptions were unconstitutional because such instructions relieved the State of its burden of proof and shifted that burden to the defendant. 709 P.2d at 325, 326. Despite the use of the same statutory language as in Chambers, which presumptively created the same burden-shifting as in Chambers, the Court in this case concluded that Instruction No. 20 created only a "permissive inference."

The Court reached this conclusion because of the language of the remainder of Instruction No. 20 and the language of Instruction No. 23 which stated:

The mere fact that a person was in conscious possession of recently stolen property is not sufficient to justify a conviction of theft. There must be proof of other circumstances tending of themselves to establish guilt. However, such proof need not be established by

additional evidence or witnesses if you find that the possession occurred under circumstances which warrants a finding of guilty. In this connection you may consider the defendant's conduct, any false or contradictory statements, and any other statements the defendant may have made with reference to the property. If the defendant gives a false account of how he acquired possession of stolen property this is a circumstance that may tend to show guilt.

In the absence of evidence as to why the defendant was in possession of recently stolen property, you may infer that the defendant stole the property.

(R.114). The Court reasoned that if both of the instructions were considered together, the jury could not have applied the instructions in an unconstitutional manner. 42 Utah Adv. Rep. at 16. This reasoning is also contradicted by Chambers in which this Court declared:

Further, although there was another instruction given, instruction No. 25, which restated the presumption in permissive form, the additional instruction failed to cure the defect. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."

709 P.2d at 326 (emphasis added, citation omitted). In State v. Tarafa, 720 P.2d 1368 (Utah 1986), one jury instruction created a mandatory presumption which another instruction restated in permissive form. This Court stated:

As in State v. Chambers where the challenged instruction was restated in permissive form, the additional instruction fails to cure the defect. . . . [A]ny reasonable juror could have been left in a quandary as to whether to follow the so-called explanatory instruction or the immediately preceding one it contradicted.

720 P.2d at 1371-1372 (footnotes omitted).

In this case, as in Chambers and Tarafa, the jury was presented with contradictory, confusing instructions. Yet, it is unclear from the Court's opinion in this case why subsequent

instructions which transform the statutory mandatory rebuttable presumption into a permissive inference result in affirmance, but reversal in Chambers and Tarafa.

Another factor is present in this case which also contributed to the reversal in Tarafa. Here, as in Tarafa, the prosecutor emphasized the mandatory nature of the presumption. In closing argument, the prosecutor stated:

Now the question then becomes one of whether we have a burglary. You have been instructed by the Judge if a burglary occurs and someone is found with the property in his possession, he may within a short period of time, it is called not too remote a time period from the time of the burglary until the time of possession, that you can infer that he committed the burglary. And taking it one step further that you can also infer that he committed the theft. This being the time period that the law provides that if you are going to have stolen property in your possession, and it is going to be right close to the time it was stolen, we can assume that you stole it. Unless you have a satisfactory explanation.

(R.419-420). In Tarafa the Court concluded that the prosecutor's statements in closing argument concerning the mandatory nature of the presumption could have easily contributed to the jury's confusion about the instructions. 720 P.2d at 1371, n.16. This confusion must have been present in this case because the prosecutor emphasized not the permissive character of the instructions but rather their mandatory nature (if you have stolen property, "we can assume you stole it." [R.420]). In this respect, this case is indistinguishable from Tarafa.

In summary, Instruction No. 20 given to the jury in this case contains the language of U.C.A. §76-6-402(1) which this Court in Chambers stated "should not be used in any form in instructing

juries." Id. at 327. Further, the opinion in this case fails to explain why subsequent instructions which restate the mandatory presumption in permissible form rescue the challenged jury instruction here while in Chambers and Tarafa "the additional instructions fail to cure the defect [of the challenged instruction]" 709 P.2d at 326 and 720 P.2d at 1371. Finally, the prosecutor's emphasis of the mandatory nature of the presumption must have confused the jury here as it did in Tarafa. Because of these factors, the result in this case cannot be reconciled with the results of Chambers and Tarafa and rehearing should be granted.

B. THE RESULT IN THIS CASE IS IN
DIRECT OPPOSITION TO STATE
V. PACHECO, WHICH CONTAINED
A VIRTUALLY IDENTICAL INSTRUCTION.

Appellant Smith further asserts that a rehearing should be granted in his case because the Court's opinion here is directly contrary to the opinion in State v. Pacheco, 712 P.2d 192 (Utah 1985), reh'g den'd 712 P.2d 192.

The opinion in Pacheco was filed the same day as State v. Chambers and involved an instruction quite similar to that given in Chambers. In Pacheco the statutory presumption found in U.C.A. §76-6-402(1) was given in a jury instruction relating to a defendant charged with burglary. 712 P.2d at 194. This Court reversed the conviction in Pacheco because of the verbatim recitation of the statutory presumption in the instruction. The Pacheco Court relied on the reasoning of State v. Chambers and the cases cited therein in reaching its decision.

In Pacheco, Instruction No. 15 read:¹

The law of the State of Utah provides as follows:

"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, (I) that the defendant was in possession of property, (II) that the property was stolen in a burglary, (III) that such possession was not too remote in point of time from the burglary, and (IV) that the defendant had made no satisfactory explanation of such possession, then you may find from those facts that the defendant committed the burglary in which such property was stolen and stole the property.

(source: State's Petition for Rehearing in State v. Pacheco at 4)(Addendum B) (emphasis added). In this case Instruction No. 15 stated:

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 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.

¹ Instruction No. 15, given in toto here, was never reproduced in its entirety in the opinion in State v. Pacheco.

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.111) (emphasis added). Even a cursory comparison reveals that the two instructions are nearly identical. Both instructions give a verbatim recitation §76-6-402(1). Both instructions then give explanations of the statutory language. Both instructions' explanations require the jury to find, beyond a reasonable doubt, that the defendant was in possession of recently stolen without giving a satisfactory explanation. If the jury finds these predicate facts, then both instructions state that the jury "may" find from those facts that the defendant committed the crime in question.

Instruction No. 15 in Pacheco restated the language of the statute in permissive form as did Instruction No. 20 in this case. Yet the Pacheco instruction was found unconstitutional while the instruction in this case was upheld. The results of the two cases are clearly not rationally compatible.

The opinion in this case notes that another instruction, number 23, also emphasizes the permissive character of the inference of guilt created by Instruction No. 20. Smith at 16,n.1. Since no other instructions are mentioned in the Pacheco opinion, one may argue that this distinguishes the two cases. However, in its Petition for Rehearing in Pacheco, the State urged this Court to consider at least four other instructions given in that case as

ameliorating the defect in the challenged instruction. (Addendum at 7-9). By denying that Petition for Rehearing, the Court repeats the very argument which is now used to rationalize the decision in this case.

One final, practical factor must be considered with respect to Pacheco. Since the Instruction No. 20 given in this case and Instruction No. 15 in Pacheco are virtually identical, practitioners and trial courts are left in a quandary by the two opinions. The Pacheco instruction was declared unconstitutional while the nearly-identical instruction in this case was upheld. Practitioners and trial courts will be hard-pressed to discern which instructions are allowable and which are defective. Indeed, the Court seems to be drawing lines so fine that they are impossible to perceive.

In summary, Instruction No. 20 which was upheld in this case is virtually identical to Instruction No. 15 which was struck down in Pacheco. The argument that was used to uphold this instruction (that other instructions tended to cure any defect) is rejected by this Court in Pacheco. No rational explanation can be advanced to allow both opinions to co-exist. The decision in this case is clearly contradictory to Pacheco and should be reconsidered.

POINT II. INSTRUCTIONS 20 AND 23 COMBINED TO FORCE THE DEFENDANT TO TESTIFY IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS.

In his opening brief, Appellant Smith argued that the statutory presumption as manifested in the jury instructions forced him to testify in violation of his Fifth Amendment rights. The

opinion in this case relies on several cases to defeat this argument. However, careful examination of the primary cases cited by the Court shows that they are distinguishable from the present case.

Instruction No. 20, supra at 3, clearly stated that the defendant himself was required to give a satisfactory explanation of his possession of recently stolen property. Instruction No. 23 (Addendum C) continued to keep the focus on the defendant by allowing the jury to reach the statutory presumption by simply disbelieving the defendant's explanation or finding it contradictory.

The opinion in this case relies on Barnes v. United States, 412 U.S. 837 (1973) to defeat Mr. Smith's claim. However, in Barnes the instruction given to the jury did not require an explanation directly from the defendant. In Barnes, the defendant's possession of recently stolen property could simply be explained by "facts and circumstances in [the] case which are in some way consistent with the defendant's innocence." 512 U.S. at 840, n.3. No direct testimony from the defendant was required.

State v. Chambers, supra, also cited by the Court in this case, presented a similar question. However, as in Barnes, the Chambers Court stated: "Nothing in the instruction required testimony by defendants, because an explanation of possession could have been made by the testimony of other witnesses or by other evidence." 709 P.2d at 325.

The distinction between Barnes and Chambers and this case is subtle but important. As noted above, neither the Barnes nor the

Chambers instructions required the defendant to testify. In these cases a "reasonable explanation" of possession of recently stolen property could emanate from any source, including the State's witnesses. However, Instruction No. 20 in this case specifically required that the defendant himself provide the explanation of possession. According to the instruction, if the defendant did not testify, the jury was virtually bound to enter a verdict of guilt. Such a result clearly violates the protections secured by the Fifth Amendment. Because the cases cited by the Court in support of its opinion are distinguishable and because of the uniqueness of the instruction in this case, which could be satisfied only by the defendant's testimony, a rehearing should be granted.

CONCLUSION

Because the opinion in this case misapplied State v. Chambers and State v. Tarafa and erroneously applied Barnes v. United States and because the opinion in this case is in direct conflict with State v. Pacheco, the Appellant, David Tyrone Smith respectfully petitions this court to reconsider its decision and reverse his conviction and remand the case for a new trial or dismissal of the charges.

Respectfully submitted this 20th day of October, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Petitioner

I hereby certify that I delivered four copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 20th day of October, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Petitioner

CERTIFICATION

I, CURTIS C. NESSET, do hereby certify the following:

(1) I am the attorney for appellant/petitioner in this case and;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this 20th day of October, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Appellant/Petitioner

ADDENDUM A

IN THE SUPREME COURT
OF THE STATE OF UTAH

The STATE of Utah,
Plaintiff and Respondent,

v.
David Tyrone SMITH,
Defendant and Appellant.

No. 19283

FILED: September 16, 1986

THIRD DISTRICT

Hon. Homer F. Wilkinson

ATTORNEYS:

David L. Wilkinson, J. Stephen Mikita,
Thomas D. Vuyk for Plaintiff and
Respondent

Connie L. Mower for Defendant and
Appellant

STEWART, Justice:

The appellant, David Tyrone Smith, was convicted by a jury of burglary and theft, both third degree felonies. On appeal he argues (1) U.C.A., 1953, §76-6-402 establishes an unconstitutional presumption that one in possession of recently stolen property is guilty of having stolen it and that that presumption is not constitutionally sufficient by itself to support a guilty verdict; (2) his wife should not have been permitted to testify against him over his objection; (3) he was forced to testify to rebut the presumption contained in §76-6-402 in violation of his

the defendant might not be guilty, and (4) the prejudicial evidence was admitted again in violation.

Smith was charged with burglary and the theft of a saxophone worth \$850 which belonged to LaRae Francis, who stored it in an apartment for her in a locked basement storage unit assigned to her sister, Annette Nielsen. Sometime between December 24, 1982, when Nielsen last visited the storage unit, and December 27, 1982, the day the saxophone was pawned, someone broke into the unit and stole the saxophone. Smith lived nearby. His wife Tonia was staying with a friend in the same apartment complex occupied by Nielsen, where Smith visited her several times.

At trial, Jennifer Kearns, a supervisor at St. Mark's, where Smith lived, testified that she saw the defendant at St. Mark's with the saxophone. He told her that the saxophone was his and that he had used it at a performance the previous weekend. She testified that Smith made no attempt to hide the instrument or to be evasive about it during the conversation. Kearns could not precisely date the conversation. However, Smith admitted the conversation and testified that it occurred on the morning of December 27, 1982. Another supervisor, Tom Webb, testified that sometime, probably shortly after Christmas, he noticed a saxophone in a case in the St. Mark's main office with a piece of paper attached to one side near the top bearing Smith's full name. The supervisor identified the saxophone by a round white seal on the case which he remembered seeing when the saxophone was in the office. He also was unable to pinpoint the date any more exactly.

Belinda Williams, a friend of both Smith and his wife, Tonia, testified that on December 27, Tonia called her and asked her to pawn something for her. She said Tonia told her that she needed money. When Williams picked Tonia up a few minutes later, Tonia directed her to go to Smith's place to pick up something that he was going to let her pawn. Williams did not know what was to be pawned until Tonia went into St. Mark's and returned with the saxophone. At first, Tonia indicated that she wanted Williams to pawn a ring. After they arrived at the pawn shop, Williams presented her identification, but the negotiations took place between Tonia and the pawnbroker.

Tonia was allowed to testify, over Smith's objection based on the spousal evidentiary privilege, that he told her he had a saxophone and asked her if she could persuade Belinda to pawn it. She also testified that he told her she could pawn the saxophone up at St. Mark's and that he needed money. Tonia further testified that at first, he just wanted to pawn her ring but that when he could not

get enough money for it, she pawned the saxophone instead.

Smith's version of the facts was substantially different than Tonia's. He admitted he had had possession of the saxophone, but testified that Tonia had given it to him on December 26, 1982, and had asked him to hold it for her until the next day. This evidence contradicted his testimony that he told Kearns, the St. Mark's supervisor, that he either had, or was supposed to have, pawned the saxophone at a performance in Ogden the previous weekend.

The trial judge instructed the jury, over Smith's objection, as follows (the first paragraph being the language of §76-6-402(1)):

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 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.

I.

On appeal, Smith argues that §76-6-402(1) is unconstitutional because it imposes a statutory presumption of guilt that is not rational and therefore is a violation of due process under *Tot v. United States*, 319 U.S. 463 (1943), and *Leary v. United States*, 395 U.S. 6 (1969). He claims that his convictions were based solely on the statutory presumption and that they therefore must be reversed.

The defendant is in error. At the outset, we note that the statute, properly construed, does not establish an evidentiary presumption, but alone a presumption of guilt. *State v. Chambers*, 709 P.2d 321, 326-27 (Utah 1985). In *Chambers*, we held that a jury instruction using the language of §76-6-402(1) is unconstitutional because it "relieves the State of its burden of proof." *Chambers*, 709 P.2d at 327. See also *State v. Pacheco*, 712 P.2d 192 (Utah 1985). An instruction that simply incorporates the statutory language is unconstitutional when the statutory term "

prima facie" is defined as a presumption, as was the case in *Chambers*. Nevertheless, it is elementary that we read the language of an instruction in light of its immediate context and the context of the instructions as a whole. In the same instruction that incorporated the statutory language of §76-6-402(1), the trial court carefully stated that the statutory language meant only that if the jury found certain facts that "you may infer from those facts that the defendant committed the theft." (Emphasis added.) The court also instructed the jury that it could infer a burglary "if you find it justified by the evidence." Thus, the court explained that the statutory language incorporated in the instruction allowed only an inference of guilt, and then only if justified by the facts. Indeed, the court made the same point even more extensively in a later instruction.¹

We do not believe that the jury, in the face of these instructions, could have reasonably applied the instructions in an unconstitutional manner.

Furthermore, the trial court explained to the jury that possession alone of a stolen object is not sufficient to support a conviction, a rule that has been reiterated in numerous opinions. In *State v. Heath*, 27 Utah 2d 13, 15, 492 P.2d 978, 979 (1972), the Court stated:

The mere possession of stolen property unexplained by the person in charge thereof is not in and of itself sufficient to justify a conviction of larceny of the property. It is, however, a circumstance to be considered in connection with the other evidence in the case in the determination of the guilt or innocence of the possessor. Such possession is a circumstance tending in some degree to show guilt, although it is not sufficient, standing alone and unsupported by other evidence to warrant a conviction. In addition to the proof of the larceny and of the possession by the defendant, there must be proof of corroborating circumstances tending of themselves to show guilt. Such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of the defendant which tend to show his guilt.

See also *State v. Clayton*, 658 P.2d 621, 623 (Utah 1983); *State v. Thomas*, 121 Utah 639, 641, 244 P.2d 653, 654 (1952); *State v. Kinsley*, 77 Utah 348, 352, 295 P. 247, 249 (1931). See also *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982).

Defendant's reliance on *Tor v. United States*, and *Leary v. United States* is misapp-

hed. As indicated, the instructions did not permit the defendant to be convicted solely on the basis that he was in possession of stolen goods. There was, in fact, other evidence that Smith stole the saxophone that a St. Mark's supervisor saw him with, and that another St. Mark's supervisor saw the saxophone with a piece of paper bearing Smith's name attached to it. Smith admitted having the saxophone in his possession immediately prior to the time it was pawned. His explanation, for his possession of the saxophone, that his wife asked him to hold it for her overnight, was inconsistent with her testimony and with his own admission on the stand that he had told the St. Mark's supervisor that he had, or was to have, played the saxophone at a "gig" in Ogden the previous weekend.² Belinda Williams testified that Tonia told her Smith had something that he was going to let Tonia pawn and that the object picked up by Williams and Tonia from St. Mark's was a saxophone. In addition, Tonia testified that Smith told her that he had a saxophone, needed money, and wanted her to ask her friend Belinda to pawn it. There was sufficient corroborating evidence to support the necessary inference of guilt given the instructions and the evidence.

Lest there be a misunderstanding of our ruling in this case, we emphatically declare that we do not retreat from *Chambers*. The trial court should not have used the statutory language in the instruction for the reasons stated in *Chambers*. We hold only that the instruction cannot be deemed reversible error in this case in light of the clear explanatory instructions that all that the jury could make of the term "prima facie" was a permissible inference.

II.

Smith also claims that §76-6-402(1) forces a defendant to take the stand in violation of his Fifth Amendment right not to take the stand to testify. The United States Supreme Court and other state courts have held that the privilege is not violated by such a statute. *E.g., Barnes v. United States*, 412 U.S. 837, 846-47 (1973); *State v. DiRienzo*, 53 N.J. 360, 251 A.2d 99, 110 (1969); *State v. Chambers*, 709 P.2d 321, 325 (Utah 1985). See also Annot., 38 A.L.R.3d 1178 (1972); 1 *Wharton's Criminal Evidence*, §139, at 235 (1972). Smith's decision to testify to rebut the prosecution's case did not violate his Fifth Amendment right. "Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime, increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination." *Barnes v.*

United States, 412 U.S. at 847.

III.

Smith also argues that his wife's testimony was erroneously admitted because he had a right to prevent her from testifying pursuant to U.C.A. 1953, §78-24-8, which provides:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage, but this exception does not apply where it is otherwise specifically provided by law.³

In 1971, this Court promulgated Rules of Evidence pursuant to §78-2-4, which grants this Court power to promulgate rules of procedure and evidence and which nullifies laws in conflict with such rules.⁴ Rule 23(2) of those rules states:

An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife.

This rule provides a more limited privilege than that set forth in §78-24-8. Pursuant to §78-2-4, Rule 23(2) nullified §78-24-8 insofar as it was inconsistent with Rule 23(2). See especially Rule 28(2)(e) quoted below. *State v. Benson*, 712 P.2d 256, 258 (Utah 1985); *State v. Bundy*, 684 P.2d 58, 61 (Utah 1984). Smith therefore had no right under §78-24-8 to bar his wife from testifying, but did have the right under §78-24-8 and Rule 23(2) to bar her from testifying about any confidential communications between them.

Very little of Smith's wife's testimony concerned confidential communications with Smith. For example, her testimony that she obtained the saxophone from St. Mark's, where Smith lived, that she gave him money after passing the instrument and that she and Belinda in fact pawned it was not barred by the privilege. Her testimony as to any conversations between her and the defendant was to the effect that he told her he needed money and that he had a saxophone he wanted her to pawn.

The trial judge ruled that the privilege was

unavailable pursuant to Rule 28(2)(e), which states that neither spouse may claim the privilege

if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.

The evidence discussed above, aside from the confidential communications, was sufficient in this case to justify a finding that the communications between Smith and his wife were made during the planning or commission of a crime. Therefore, even the more limited spousal evidentiary privilege was not available to Smith to bar his wife's testimony.

IV.

Smith's other claims are also without merit. He claims that testimony that he lived in a half-way house informed the jury of the fact that he had been convicted of a prior felony. Smith recognizes that under Rule 55 "such evidence is admissible to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity"; however, he claims that no special relevance was demonstrated in this case. In addition, he claims that under Rule 45 the evidence should have been excluded because its prejudice outweighed its probative value.

Contrary to Smith's claim, the trial court only permitted parties and witnesses to refer to his residence as "St. Mark's." Except for Smith's own testimony, no other evidence indicated that St. Mark's was a half-way house. It was not until Smith took the stand that the jury heard that he had previously been convicted of a felony and that his residence was a half-way house. Even then, the judge gave an appropriate cautionary instruction to the jury that the evidence could only be considered in assessing Smith's credibility. Clearly the trial judge dealt with the problem in a proper manner, and the claim of error has no substance.

Affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

I. The Court also instructed:

The mere fact that a person was in conscious possession of recently

stolen property is not sufficient to justify a conviction of theft. There must be proof of other circumstances tending of themselves to establish guilt. However, such proof need not be established by additional evidence or witnesses if you find that the possession occurred under circumstances which warrants [sic] a finding of guilty. In this connection you may consider the defendant's conduct, any false or contradictory statements, and any other statements the defendant may have made with reference to the property. If the defendant gives a false account of how he acquired possession of stolen property this is a circumstance that may tend to show guilt.

In the absence of evidence as to why the defendant was in possession of recently stolen property, you may infer that the defendant stole the property.

2. This inconsistency is one of the sort of corroborating circumstances which warrant application of the statutory inference. *State v. Heath*, 27 Utah 2d at 15, 492 P 2d at 979.
 3. Smith does not claim a violation of the marital privilege set forth in Utah Constitution Article I, §12 and §77-1-6(2)(b), which state: "A wife shall not be compelled to testify against her husband nor a husband against his wife."
 4. The Rules of Evidence adopted in 1971 were superseded by new rules of evidence which became effective September 1, 1983. However, the old rules were still in effect at the time of Smith's trial, and will therefore be applied in this case.
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ADDENDUM B