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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

STANLEY WAYNE BARAN,
Defendant-Appellant.

Case No. 11903

BRIEF OF RESPONDENT

Appeal From an Order of the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Gordon R. Hall, Judge, Presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant, Stanley Wayne Baran, was convicted of robbery in violation of Utah Code Ann. § 76-38-4 (1953), before the Third District Court for Salt Lake County, Honorable Gordon R. Hall, presiding.

DISPOSITION IN LOWER COURT

The defendant-appellant was tried by a jury, found guilty and sentenced for committing the crime of robbery.

RELIEF SOUGHT ON APPEAL

Respondent submits that the decision of the District Court should be affirmed.

STATEMENT OF FACTS

Respondent does not agree with the Statement of Facts set forth in Appellant's Brief (at ....), and therefore sets

forth its own statement as follows:

On January 10, 1969, through a prearranged plan to commit a robbery, (T. 126) Mr. Gerald Rose picked up Mr. Brian Frazier and Mr. Stanley Wayne Baran (T. 125). The three stopped at a Beeline Station for gas (T. 56) and went out looking for a car to steal (T. 136). Before finding a car to steal, the three attempted several robberies, but none worked out (T. 136). The defendant and his two companions then stole Mr. Steve Parker's 1963 Ford (T. 48), drove out to the same Beeline Station, broke a window and stole a transistor radio (T. 144).

Shortly before 10:00 p.m. the three decided to rob Smith's Independent Gas Station (T. 166). Mr. Baran, the appellant, had worked at the gas station before (T. 60), so Frazier and Rose went in first (T. 166), Frazier with a gun, and Rose with a lug wrench, and forced the station attendant and his two friends to lay on their stomachs in the back room (T. 31). Baran then came in and took the money from the cash register (T. 117) while Frazier took the attendant and his friends' wallets (T. 31). Then the three men fled. Baran knew how to work the closed cash register because he had worked there (T. 61).

The three robbers went to Mr. Rose's house (T. 118) and gave Rose his share of the robbery money and asked him to hide the wallets (T. 87, 70, 71). Mr. Rose refused the wallets, whereupon someone, according to Mrs. Rose's testimony, left the house and headed for the trailer (T. 71). Later the police recovered the wallets in Mr. Rose's trailer (T. 100).

The appellant took the stand in his own defense and claimed he could not have committed the robbery because he was at Lita Vilet's house with her mother and father (T. 197). However, Mrs. Rose testified that Baran, along with Rose and Frazier, came to her house that night with the robbery money and the stolen wallets (T. 71, 72), and Paul Rogers, a Salt Lake City policeman, testified that Mr. Baran was in the Salt Lake Police Station talking with him when appellant was supposed to be over at Lita Vilet's house (T. 223). To further substantiate this, Mr. Rogers personally typed a report of the conversation, stating in the report the time and the date of the conversation (T. 226).

Miss Carmelita Burke also testified in court that appellant told her a couple of days after the robbery that Brian was the man with the gun and that he, Baran, also participated in the robbery (T. 229).

ARGUMENT

POINT I.

THE LOWER COURT'S FINDING OF GUILT IS SUPPORTED BY THE ACCOMPLICE'S TESTIMONY AND IS CORROBORATED WITH SUBSTANTIAL INDEPENDENT EVIDENCE.

The first point raised by appellant is that there is no evidence connecting him with the robbery, other than an accomplice's statement. Appellant contends that under Utah Code Ann. § 77-31-18 (1953) conviction cannot be had on testimony of an accomplice unless it is corroborated

by other evidence, and since there is supposedly no other evidence, the conviction was not warranted.

Section 77-31-18 of the Utah Code Ann. (1953) reads:

> "A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof."

In order to help interpret this statute, Utah judges have adopted some tests which have been used as guidelines in ruling on the statute. In *State* v. *Sinclair*, 15 Utah 2d 162, 389 P. 2d 465 (1964) the court found the test to be:

> "Test of corroboration of accomplice is whether there is evidence, independent of accomplice's testimony, which jury could reasonably believe tends to implicate and connect the defendant with the commission of the crime." *Id.* at 468.

The court also said:

> "In determining corroboration of accomplice; corroborative evidence should be looked at separate and apart from his testimony to determine whether there is some independent evidence tending to connect defendant with crime, but corroborative evidence should be considered in relation to other facts shown." *Id.* at 469.

See: *State* v. *Simpson*, 120 Utah 596, 236 P. 2d 1077 (1951), *State* v. *Virgil*, 123 Utah 495, 260 P. 2d 539 (1953), and

State v. *Bruner*, 106 Utah 49, 145 P. 2d 302 (1944). Most tests cited by the courts use the words implicate or connect the defendant and the crime. Applying that test to the present case, there must be sufficient independent evidence to implicate or connect Mr. Baran, the appellant, with the crime of robbing Smith's Independent Gas Station.

The accused is found guilty or innocent, based on the evidence which connects or implicates him to the crime. If there is not sufficient evidence to connect and implicate the accused to the crime, he is free. Utah case law gives concrete and precise definitions on the amount and type of evidence needed to corroborate the accomplice's testimony.

In *State* v. *Petralia*, 118 Utah 171, 221 P. 2d 873 (1950), Petralia, along with three others, was accused of grand larceny. One of the accused confessed and implicated Petralia. The lower court found Petralia guilty and he appealed to the Supreme Court of Utah claiming insufficient evidence of corroboration of the testimony of an admitted accomplice under Utah Code Ann. § 77-31-8 (1953). The Supreme Court found there was sufficient independent evidence to connect and implicate Petralia to the crime and based it on three findings of evidence:

1. A police officer testified that he saw the defendant in Ogden on June 24, the night the plans for the robbery were made, while defendant claimed to be in California.

2. Defendant admitted to a third party that he

was involved in the crime and gave the victim back some of the money claimed stolen.

3. Defendant's own witness testified that defendant had asked someone to testify to seeing him in California before he was even accused of participation in the crime.

The independent evidence in the instant case is almost exactly the same as the *Petralia* case.

1. Petralia made an excuse to his whereabouts on the night the robbery was planned. Baran, the defendant in this case, testified that on the night of the robbery he spent most the evening from 10:00 to 12:20 p.m. at his girl friend's house. Petralia's excuse was in direct conflict with a police officer's testimony, — so was Baran's. Baran swore that he was at Westovers from 10:00-11:20 p.m. Yet, Police Officer Paul Rogers testified that he saw the appellant in the Salt Lake City Police Station the night of the robbery at 11:00 p.m., exactly when he was supposed to be over at Westovers (T. 223).

2. Petralia admitted to a third person that he had committed the crime. The appellant, in this case, did exactly the same thing. He told Miss Carmelita Burke that he and others had committed the robbery. Baran, like Petralia, admitted taking part in the robbery to a third party.

3. Petralia was worried about being convicted of the crime before he was ever accused. Baran had the

same reaction and even bet his girl friend $5.00 that the police would accuse him of the crime — then testified in court that he never thought the bet was very funny (T. 197). Respondent admits the night of the bet with his girl friend was in doubt — but the fact that appellant was worried about the police accusing him of the crime before he was charged is the important element.

Appellant, (1) had a police officer testify exactly opposite to what his excuse was the night of the robbery, (2) told a third party that he had committed the crime, and (3) was worried about being apprehended for the crime before he was ever accused. This is the same type of independent evidence found in *Petralia* that implicated and connected Petralia to the crime. The burden of proof under the *Petralia* decision was met in this case.

In *State* v. *Kazda*, 14 Utah 2d 266, 382 P. 2d 407 (1963), defendant was convicted of assault with intent to commit murder and robbery. He appealed the case on grounds that there was no corroboration of accomplice's testimony. The court held there was sufficient independent evidence to implicate and connect appellant with the crime because, appellant (1) admitted his presence in the town of Bridgeland at the time of the incident, (2) a shotgun and nylon stocking were found along the route taken by the trio after leaving the scene, and (3) an independent witness testified that the defendant admitted to him that he shot a man with a shotgun in Utah.

Similar independent facts were present in the Baran case. (1) Two different people testified that Baran was with the robbers both before and after the crime, (2) a third party testified that Baran admitted to her that he took part in the robbery, and (3) the police found the stolen wallets along the supposed route of the robbers after the robbery, plus finding the nylon stockings in the getaway car.

As held in *State* v. *Petralia, supra,* pg. .....

> "Evidence sufficiently corroborated testimony of accomplice to sustain conviction of grand larceny." *Id.* at 876.

The present case also had evidence sufficient to corroborate the testimony of the accomplice to sustain the conviction of robbery.

The above mentioned independent facts would be enough to convict appellant, but there are other facts which overwhelmingly indicate appellant's guilt. The appellant was seen with the two other robbers earlier in the night (T. 56). The appellant worked at the gas station before the robbery (T. 60); the manager testified that a person would have to know something about the cash register to get it open (T. 61); they found silk stockings in the stolen getaway car (T. 65); and Mrs. Rose, an innocent party, testified that appellant came to her house after the robbery with money and some stolen wallets he wanted to get rid of (T. 68, 69). All of these are independent facts which implicate and connect the appellant to the crime.

Taken together, they are more than sufficient to cor-

roborate the accomplice's testimony and hold appellant guilty of the crime.

POINT II.

THE COURT DID NOT COMMIT ERROR IN PERMITTING PROSECUTION TO INTRODUCE EVIDENCE OF DEFENDANT'S PRIOR GUILTY FINDINGS IN A MISDEMEANOR CASE AND OF OTHER CRIMES.

The appellant is contending that evidence was admitted at the trial which tended to show that he was guilty of other crimes. He feels that this evidence was inadmissible and resulted in prejudicial error. He cites the examples of: theft of radio, taking of pennies, conspiring to rob a theatre and a cafe, stealing a car, and a misdemeanor charge of destruction of property.

Appellant cites several cases which he claims support his point, but a careful reading shows that at least one of these cases holds exactly opposite to appellant's point.

State v. *Kappas,* 100 Utah 274, 114 P. 2d 205 (1941), which appellant relies on, held:

> "* * * and that proof of his commission of other unconnected crimes must be excluded, is *subject to exception* permitting proof of identification of accused, motive, *intent, plan or knowledge* * * * and to exception permitting showing to be made that *offense charged was part of common scheme* which may include one or more other offenses." *Id.* at 278. (Emphasis added.)

Later that same holding was affirmed in *State* v. *Montayne,* 18 Utah 2d 38, 414 P. 2d 958, *cert. denied,* 385

U. S. 939 (1966) when the court stated:

> "Testimony which established that defendant had embezzled or stolen automobile which he was driving at time of his arrest was relevant to issue of whether defendant had standing to object to unlawful search and seizure and also tended to show a scheme or plan associated with charged crime of robbery, and such testimony was admissable notwithstanding contention that it tended to prove commission of another unrelated crime." *Id.* at 960.

The alleged crimes brought up in court, except the misdemeanor charge, were all part of a common scheme — thus, under *State* v. *Kappas* and *State* v. *Montayne, supra,* they are clearly an exception and therefore admissible in court.

Appellant has shown no grounds for prejudice. Utah law indicates that crimes which are part of a common scheme, show intent, plans or knowledge, are exceptions to the rule of nonadmissibility. All of the crimes appellant alleged, except a misdemeanor, clearly fall within the exception to the rule and are admissible in court.

The admission of the misdemeanor is harmless, and in no way could lead a court to believe it was prejudicial error against the defendant.

POINT III.

IF THE COURT ERRED IN ADMITTING THE EVIDENCE COMPLAINED OF, IT WAS NOT PREJUDICIAL.

The general rule is set forth in Section 77-42-1, Utah Code Annotated, 1953, as amended, to-wit:

> "After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment."

"Erroneous admission of evidence does not call for reversal of the judgment where the guilt of the accused is otherwise satisfactorily proved," *State* v. *Cox*, 74 Utah 149, 277 P. 972 (1929). "It must be shown that the natural effect of the error is to do harm and affect the substantial rights of the parties," *State* v. *Dodge*, 12 Utah 2d 293, 365 P. 2d 798 (1961).

In *State* v. *Lyman*, 10 Utah 2d 58, 348 P. 2d 340 (1960), the legislature intended by the statute that cases should not be reversed unless the alleged error prejudicially affected the substantial rights of the parties and that prejudice should not be presumed but must be shown. *Id.* at 342.

We submit that in the instant case the error, if the Court determines that such is the case, did not effect the substantial rights of the party because the guilt of the accused was certainly satisfactorily proved and the alleged prejudicial errors would have no effect on the outcome.

POINT IV.

DEFENDANT WAS GIVEN A FAIR AND IMPARTIAL TRIAL.

Appellant claims he was denied a fair and impartial trial. To support this he lists a vast array of alleged errors by the court. However, there are three reasons why appellant's contention that the court committed prejudicial error was wrong. The first is when appellant states (contrary to Utah case law), "hardly any of these errors alone would justify a new trial, *but taken together* * * * the jury could not help but have been influenced and prejudiced * * *." Appellant's Brief, pg. 33 (Emphasis added.) In *State* v. *Moore,* 111 Utah 458, 183 P. 2d 973 (1947), the court held exactly opposite to what appellant is advocating. The Court stated:

> "Where none of specified error relied on by appellant constitutes reversible error, *combination of such errors does not constitute prejudicial error,* unless some error, in combination with other factors creates prejudice." *Id.* at 979. (Emphasis added.)

Appellant has merely stated the errors, showing no combination with other factors. Under the holding of *State* v. *Moore, supra,* "there was no combination of other factors" and hence no prejudicial error, thus, giving Baran a fair and impartial trial.

Secondly, appellant's list of alleged errors are all conclusions. He failed to show why the list of errors constituted prejudice. In *State* v. *Sibert,* 6 Utah 2d 198, 310 P. 388 (1957), the court stated, "The Supreme Court is not allowed to presume prejudice from mere error." *Id.* at 392. Later, in *State* v. *Lyman,* 10 Utah 2d 58, 348 P. 2d 340 (1960), the court said, "* * * and that prejudice

should not be presumed but must be shown." *Id.* at 342. I, the present case no prejudicial error was shown. The appellant wrote a large list of conclusions and left it to the court to presume prejudice — contrary to Utah law.

Third, none of the alleged errors on their face is sufficient to prove significant or substantial prejudice. (See also Point III of this brief.)

State v. *Seymour*, 18 Utah 2d 153, 417 P. 2d 655 (1966) held:

> "There should be no dismissal of charge nor reversal of judgment unless there was significant failure or abuse of due process of law, or unless there was error or defect which it could reasonably be supposed put defendant at some substantial disadvantage or had substantial prejudicial effect upon his rights." *Id.* at 156.

The Utah courts hold that the prejudice must be substantial or significant; most were mere errors in court which every trial is bound to have. As stated in *State* v. *Hamilton*, 18 Utah 2d 234, 419 P. 2d 770 (1966):

> "The purpose of the law and of the rules of procedure is not only to safeguard the rights of an accused, but also to see that the guilty are brought to justice." *Id.* at 772.

Appellant did not receive a perfect trial — no one has; however, he did receive a fair and impartial one.

As stated in *Harvey* v. *United States*, 306 F. 2d 523, *cert. denied*, 371 U. S. 911 (1962), "A defendant is entitled to a fair trial but not a perfect one."

See also *State* v. *Ingle*, 64 Wash. 2d 491, 392 P. 2d 442 (1964).

Because appellant is arguing a point contrary to Utah law, stating nothing but conclusions, and alleging errors that are not prejudicial on their face, the errors complained of do not constitute violation of defendant's right to a fair and impartial trial.

POINT V.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN ITS SELECTION OF THE JURY.

The court followed Utah laws and procedure when choosing the jury and therefore was not prejudicial in its selection. Section 77-30-18 of Utah Code Ann. 1953 states on what basis a juror can be disqualified. It reads:

> "A particular cause for challenge is: (1) For such bias as, when the existence of the facts is ascertained, in judgment of law disqualified the juror, and which is known in this Code as implied bias.
>
> "(2) For the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality, which is known in this Code as actual bias."

Under this code section there must be some type of bias to disqualify a juror.

The judge in examining the jury was very explicit in determining whether or not each of the potential jury members was biased. On several occasions he asked the jury whether or not they were biased. On no occasion did any juror indicate they were biased.

Appellant puts great stress on the fact that eight of the potential jurors had been robbed; one was a neighbor of appellant's wife, and two of them had read about appellant's prior case. Of the final eight members of the jury, the neighbor of appellant's wife was omitted, and five of the eight that had been robbed were omitted. Of the three on the jury who had been robbed, one robbery happened ten years ago, and another was not actually robbed — it was her husband's store which had been robbed. Only one of the two which had read about the prior case was on the jury. All eight of those selected indicated in the affirmative that they were in no way biased against the Appellant.

Utah case law points out that there is no bias if each juror states he is impartial and will try defendant according to instructions. In *State* v. *Musser,* 110 Utah 534, 175 P. 2d 724 (1946), the court held:

> "On trial of information charging conspiracy to induce others to practice polygamous or plural marriages, charge of bias on part of members of Mormon church called to serve on the jury were not substantiated, where each said that he would try case according to the evidence and court's instructions. Nor could defendant object to jurors who had knowledge that said defendants had been excommunicated from Mormon church for advocat-

> ing or practicing polygamy, where such information was conveyed to jury by their own attorneys." *Id.* at 738.

In *State* v. *Convey*, 23 Wash. 2d 539, 161 P. 2d 442 (1945), there was no prejudice or bias found even when a juror told a third party before trial that he did not like the accused and seemed very antagonistic towards him. The court held:

> "Where prospective juror testified on preliminary examination that his acquaintance with accused or his family would not weigh with juror and that he knew no reason why he could not act as fair and impartial juror, whereupon he was passed by accused's counsel for cause, affidavit that such juror told affiant before trial that juror did not like accused and seemed very antagonistic to him was insufficient to entitle accused to new trial, in absence of any suggestion in record that such juror was influenced in his verdict by any prejudice against accused." *Id.* at 446.

The lower court judge did everything necessary to insure a fair and unbiased jury. As indicated by statute and case law, appellant has no grounds to allege the jury was prejudicial — on the contrary, all past law indicates and affirms appellant, Mr. Baran, had a fair and impartial jury.

CONCLUSION

The respondent respectfully submits that the conviction should be affirmed. The appellant, Mr. Baran, had a

fair trial, the conviction was rendered by an impartial and unbiased jury, and the evidence supports the finding. Based on cases cited and reasoning herein of the above statements, the lower court conviction should be upheld.

Respectfully submitted,

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