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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff and Respondent, vs. PERRY SKINNER, Defendant and Appellant.	)	Case No.

BRIEF OF APPELLANT

ROBERT HANSEN
Utah Attorney General
Salt Lake City, Utah

Attorney for Plaintiff and Respondent

MILTON T. HARMON
36 South Main Street
Nephi, Utah 84648

Attorney for Defendant and Appellant

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36 South Main Street
Nephi, Utah 84648

Attorney for Defendant and Appellant

TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEAL 1

STATEMENT OF FACTS 1

ARGUMENT

POINT I: THE VALUE OF THE GOODS AT THE TIME OF SUCH POSSESSION SHOULD DETERMINE THE DEGREE OF THE OFFENSE............ 4

POINT II: FAILURE TO PROVE FAIR MARKET VALUE OF STOLEN GOODS SHOULD RESULT IN ACQUITTAL OF DEFENDANT CHARGED WITH THEIR THEFT................................ 7

CONCLUSION 7

CASES CITED:

State v. Logan, 563 P.2d 811.................. 6

STATUTES CITED:

Utah Code Annotated, 1953 as amended, with the following sections:

76-6-404................................ 4
76-6-412................................ 4
76-2-202................................ 5
76-6-101................................ 5

STATEMENT OF THE NATURE OF THE CASE

This is a criminal action brought by the State of Utah, wherein the defendant was charged and convicted of the Second Degree Felony Offense of Theft.

DISPOSITION IN THE LOWER COURT

On April 29, 1980, the District Court of the Fourth Judicial District, Judge J. Robert Bullock presiding, sitting in the presence of a jury, and based upon a jury verdict, found the defendant guilty of the Second Degree Felony Offense of Theft.

RELIEF SOUGHT ON APPEAL

This Appellant seeks reversal of the conviction and a remand with direction for a new trial.

STATEMENT OF FACTS

For simplicity in reference, the titles "plaintiff and "defendant" will be used herein.

On or about the 28th day of February, 1980, Seward Construction Company, at its place of business in Nephi, Utah, discovered that several

high-band two-way radios had been forcibly removed from their company trucks. In the early morning hours of said day, Officer Bruce Beal of the Nephi City Police Department, observed a brown Ranchero truck parked near the Seward business location, and observed a male occupant therein, who was not the defendant. T. 23. This same vehicle was thereafter located near Westminister, Colorado and was found to contain a portion of the radio equipment removed from the Seward trucks. The remaining radio equipment was found in a suitcase belonging to a person identified as Joseph McMurtry.

The Ranchero vehicle was parked in front of a house in which the defendant's sister and her family lived. Also, at the house at the time of the discovery, was the defendant and Joseph McMurtry. Joseph McMurtry was later identified as a room-mate of the defendant. The two having lived in Spanish Fork, Utah, prior to the date of the alleged offense.

During the trial, Charles Rawlin Coy, Jr., project manager for Seward, testified, over the objection of the defendant, as to replacement cost of the radios. T.16. However, upon inquiry by Judge Bullock, he stated that he did not know the fair market value of the radio equipment at the time it was taken. T.16.

Also, during the trial, Nephi City Chief of Police, Roy Manning, was allowed to testify, over the objection of the defendant, as to the market value of the radios. T.51. Chief Manning, further testified

that the radios, if they were not in working condition may be classified as junk, with a value of only two or three dollars. And he testified that he did not know if the radios were in operating condition.

These two witnesses offered the only testimony as to possible value of the radios.

The Court, after having instructed the jury, which instructions, over the objection of the defendant, included No. 8B, which reads as follows:

> "You are instructed that possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property."

The Court, after having given said instruction, and during the course of closing arguments made in behalf of the defendant, in which reference was being made as to the value of the radios taken, and reference was made to the testimony of Mr. Coy, who could not place a current value, and to the testimony of Chief Manning, who said they were essentially valueless if they were not in operating condition, made the following comment to the jury, after interrupting counsel for the defendant:

> "I think at this point I should tell the Jury that the allegations made by the State with respect to values are that it was $1,000, in excess of $1,000 on or about February 28, 1980, at the time that it was taken, and that this is the

proper date. In other words, it's the value of the property at the time of the taking, and not at the time of the trial. Counsel stand corrected on both sides in that regard."

The jury, after deliberation, found the defendant guilty as charged. And the defendant was subsequently sentenced to serve a sentence in the Utah State Prison.

ARGUMENT: POINT I.

IN DETERMINING THE GUILT OR INNOCENCE OF A DEFENDANT CHARGED WITH THEFT, WHERE HIS ONLY CONNECTION TO THE STOLEN ARTICLES IS AN APPARENT POSSESSION AFTER THE ACT, THE VALUE OF THE GOODS AT THE TIME OF SUCH POSSESSION SHOULD DETERMINE THE DEGREE OF THE OFFENSE.

The defendant was charged under Section 76-6-404 U.C.A. 1953 as amended, which reads as follows:

> "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof."

The degree of offense to be charged in theft is governed by Section 76-6-412 (1) U.C.A. 1953 as amended which reads as follows:

> (1) Theft of property and services as provided in this chapter shall be punishable as follows:
> (a) As a felony of the second degree if:
> (i) The value of the property or services exceeds $1,000; or
> (ii) The property stolen is a firearm or an operable motor vehicle; or
> (iii) The actor is armed with a deadly weapon at the time of the theft; or
> (iv) The property is stolen from the person of another.
>
> (b) As a felony of the third degree if:

(i) The value of the property or services is more than $250 but not more than $1,000; or
(ii) The actor has been twice before convicted of theft of property or services valued at $250 or less; or
(iii) When the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry.

(c) As a class A misdemeanor if the value of the property stolen was more than $100 but does not exceed $250.
(d) As a class B misdemeanor if the value of the property stolen was $100 or less.

Thus a critical element of the offense charged is the value of the goods taken. And for this defendant the critical question is, when in time are we going to place value?

The defendant contends that the time is when there was evidence that he had possession. Or when we can show his act of mind, the guilty intent, joined in the physical act of unlawful possession. From the facts presented, that occurred in the State of Colorado. And the radios were in the same condition in the Court in Nephi on the date of trial, as at such time of alleged possession. And there is no evidence whatever, nor was any presented as to the value at such time.

This contention comes from application of other applicable provisions of the criminal law. Section 76-2-202 U.C.A. 1953 as amended provides as follows:

> "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct."

If this defendant is tied to this crime he became so after the fact, when he was allegedly found in possession of the radios. Thus he became what we had formerly classified as an "Accessory after the Fact", in that it could be interpreted that he encouraged the crime after the stealing had occurred. At this point his culpability arises. And it is at this time that value should be placed in determining the degree of the offense. The only value testified to at that time was that of Chief Manning who testified that inoperative radios had a value of only two or three dollars. T.52.

The definition of value found in section 76-6-101 U.C.A. 1953 as amended is applicable to the extent of fair market value at the time only. See State v. Logan 563 P.2d 811 (Utah 1977). And cannot be extended to replacement cost, since in this case there is no evidence the radios were in any way destroyed or injured.

Therefore, the Court's instruction to the jury that it was the value at the time of taking was in error, since it contemplated value at the time of the act of another person other than this defendant. His participation being shown only at the later time in Colorado.

ARGUMENT: POINT II.

FAILURE TO PROVE FAIR MARKET VALUE OF STOLEN GOODS SHOULD RESULT IN ACQUITTAL OF DEFENDANT CHARGED WITH THEIR THEFT.

Based upon the Statutory provisions cited in the above argument, it was incumbent upon the State to prove the fair market value of the radios which were allegedly stolen. There were no witnesses who were called for the State who so testified. In fact, the only witness who was asked this question stated that he did not know the fair market value. T.16. The only other testimony was as to values of similar radios in new condition. This is of no help to us. However, when these matters were pointed out to the jury during closing arguments, the Court, by interrupting the argument of counsel, with the comments made, would,in the natural course of human events, tend to confuse the jury on this point, and thus lead them into an erroneous conclusion. The totality of this event, and the admission of prices of new radios mislead the jury and prevented the defendant from having a fair trial.

CONCLUSION

The judgment of the trial court should be reversed and this matter remanded for a new trial, with instructions that the degree of the offense of the defendant, if any, should be determined by the fair market value of

the stolen goods at the time the defendant is shown to have been associated therewith, either by direct taking, or at the time he is found in possession of the same.

Respectfully submitted,

MILTON T. HARMON
36 South Main Street
Nephi, Utah 84648

Attorney for Defendant
and Appellant

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that copies of the instant Brief on Appeal were delivered on the 2nd day of October, 1980, as follows:

To the Utah Supreme Court	Original and 9 copies
To the Utah Attorney General	2 copies
To the Juab County Attorney	2 copies
To the Defendant	2 copies

DATED this 2nd day of October, 1980.