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IN UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20040301-CA
	)	
v.	)	
	)	
JACOB BENNETT,	)	
	)	
Defendant / Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from the Sentence, Judgment, Commitment, which was signed by the district court on April 6, 2004, and accordingly entered that same day in the Second District Court, Davis County, the Honorable Darwin C. Hansen, presiding.

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FILED
UTAH APPELLATE COURTS
DEC 13 2007

IN UTAH COURT OF APPEALS

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No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).

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RULES CITED

None.

DETERMINATIVE AUTHORITY

See cases, etc., cited above . . . . . .*in passim*

ARGUMENTS

I. THE INVITED ERROR DOCTRINE DOES NOT PRECLUDE PLAIN ERROR REVIEW OF THE TRIAL COURT'S IMPERMISSIBLY ERRONEOUS INSTRUCTION TO THE JURY, WHICH UNDERMINED THE JURY'S RESPONSIBILITY TO FIND THE ULTIMATE FACTS BEYOND A REASONABLE DOUBT AND SHIFTED THE BURDEN OF PERSUASION TO DEFENDANT.

In its Brief, the State argues that "[b]ecause Defendant affirmatively approved all of the jury instructions, he cannot prevail on his claim that the trial court plainly erred in giving Instruction 33". *See* Brief of Appellee, p. 5 (capitalization and boldface omitted). Utah Supreme Court case law and the factual circumstances surrounding this case demonstrate otherwise.

Contrary to the State's assertion, the invited error doctrine does not absolutely bar "plain error" review. In *State v. Casey*, 2003 UT 55, 82 P.3d 1106, which the Utah Supreme Court favorably cited to in the recent case of *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366, the Court noted that the invited error doctrine "*may* preclude application of the plain error analysis . . . ." *See Casey*, 2003 UT 55 at ¶39 n.10 (italicized emphasis added).[1]

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[1]The Utah Supreme Court stated the following in footnote 10 of its opinion:

> In a recent case, we held that "if counsel, either by statement or act affirmatively represented to the court that he or she had no objection to the jury instruction we will not review the instruction under the manifest injustice exception." *State v. Hamilton*, 2003 UT 22, ¶54, 70 P.3d 111. This holding is based on the invited error doctrine as explained in *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993). While it would appear that *Hamilton* may

Casey, like the instant case, involved a challenge on appeal to the jury instructions utilized at trial. *Id.* at ¶¶1, 9, 82 P.3d 1106. Notwithstanding trial counsel's indication, in *Casey*, that "he had no exceptions to the instructions offered by the State" and his affirmative response that he would not request any additional instructions,[2] the Utah Supreme Court refused to apply the invited error doctrine as a bar to its review and proceeded to examine the contested jury instructions under the plain error test. *Id.* at ¶41, 82 P.3d 1106.

In addition to Utah Supreme Court case law permitting plain error review of the erroneous jury instruction, this case is distinguishable by the fact that appointed trial counsel's failure to object to Jury Instruction No. 33 is the same affirmative representation relied upon by the State to invoke the invited error doctrine. *See* Brief of Appellee, pp. 5-6. Consequently, the State's argument is in direct contravention to the policy underlying the invited error doctrine.

> preclude application of the plain error analysis under Rule 19(e), neither party raised this question below or in their briefs or at oral argument before us. "[B]ecause the issue was neither raised below nor briefed on appeal we will not make that determination sua sponte." *Evans v. State*, 963 P.2d 177, 184 (Utah 1998).

State v. Casey, 2003 UT 33, ¶39 n.10, 82 P.3d 1106.

[2] *Id.* at ¶9, 82 P.3d 1106.

The invited error doctrine "arises from the principle that a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Winfield*, 2006 UT 4, ¶15, 128 P.3d 1171. By foreclosing appellate review, "the doctrine furthers this principle by discouraging parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal.'" *Id.*, 128 P.3d 1171 (quoting *State v. Geukgeuzian*, 2004 UT 16, ¶12, 86 P.3d 742). Hence, parties are "not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal." *State v. King*, 2006 UT 3, ¶13, 131 P.3d 202.

Mr. Bennett received neither advantage nor benefit from appointed trial counsel's failure to object to the jury instruction. Rather, the failure to object significantly increased the likelihood that he would be convicted, which, in fact, occurred.

The trial court at the close of evidence charged the jury with the following instruction concerning Mr. Bennett's possession of stolen property:

> Mere possession of recently stolen property, if not coupled with other inculpatory or incriminating circumstances, is not sufficient to support a conviction for burglary. Possession of articles recently stolen, however, when coupled with circumstances inconsistent with innocence, such as hiding or concealing them, or of making a

> false or improbable or unsatisfactory explanation of the possession, may be sufficient to connect the possessor with the offense and to justify his conviction for burglary.
>
> In order for the defendant's possession of recently stolen property to be sufficient to support a conviction of burglary, such possession must be recent, that is, not too remote in point of time from the crime, personal, exclusive (although it may be joint if definite), distinct, conscious, and such possession must be coupled with a lack of a satisfactory explanation or other incriminating circumstances as mentioned previously. If these conditions are met, then you may consider possession of recently stolen property, coupled with other inculpatory or incriminating circumstances as evidence of burglary.

(*See* R. 53, Jury Instruction No. 33). This instruction not only undermined the jury's responsibility as the fact finder, it shifted the burden of persuasion to Mr. Bennett, as the Defendant.

The Utah Supreme Court, in *State v. Chambers*, 709 P.2d 321 (Utah 1985), held that an instruction raising a presumption of guilt, and thereby impermissibly shifting the burden to the defendant to prove his innocence, is unconstitutional. *Id.* at 325-27; *see also State v. Smith*, 726 P.2d 1232, 1234 (Utah 1986). Similarly, Jury Instruction No. 33 raised an impermissible presumption of guilt in the instant case. By the instruction's plain language, the jury may presume or consider the possession of recently stolen property coupled with an unsatisfactory explanation of the possession as "evidence of burglary."

The appellate court must determine the nature of the presumption set forth in the instruction as a threshold matter to determine the applicable constitutional analysis. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 157-163, 99 S.Ct. 2213 (1979). This determination requires careful consideration of the words actually spoken to the jury, inasmuch as whether a defendant has been accorded his or her constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. *Id.* at 157-59, n.16, 99. S.Ct. 2213.

Due to the lack of qualifying instructions in this case concerning the effect of the presumption or inference, the jury could have believed that it had no alternative but to apply the presumption. *Cf. State v. Johnson*, 748 P.2d 1069, 1075 (Utah 1987) (discussing curative effect of explanatory instruction). Being instructed that "you may consider possession of recently stolen property, coupled with other inculpatory or incriminating circumstances as evidence of burglary" could reasonably be construed as being told that the matter is presumed with there being no choice as to the effect. Further, the jury likely believed that the quantum of evidence was something less than beyond a reasonable doubt due to the total lack of explanation in the instruction concerning the applicable standard of proof.

A reasonable jury could well have interpreted the conditions outlined in the instruction as an irrefutable directive by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a directive from the court to find intent upon proof of the defendant's acts,[3] unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than *some* evidence -- thus effectively shifting the burden of persuasion on the element of intent. There is a distinct possibility that the jury interpreted the instruction either of the aforementioned ways due, again, to the lack of qualifying instructions concerning the effect of the presumption or inference in Jury Instruction No. 33.

II. APPOINTED TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO JURY INSTRUCTION NO. 33, WHICH RAISED A PRESUMPTION OF GUILT AND THEREBY UNDERMINED THE JURY'S RESPONSIBILITY AS THE FINDER OF FACT, SHIFTED THE BURDEN OF PERSUASION TO THE DEFENDANT, AND FAILED TO ESTABLISH THE APPLICABLE QUANTUM OF PROOF.

In its Brief, the State argues that Mr. Bennett cannot prevail on his claim of ineffective assistance of counsel because

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[3]By way of Jury Instruction No. 39, the court instructed the jury that "[i]ntent, being a state of mind, is seldom susceptible of proof by direct and positive evidence and *may ordinarily be inferred from acts, conduct, statement and circumstances.*" (R. 59, Jury Instruction No. 39) (italicized emphasis added).

the instruction contained no error. *See* Brief of Appellee, p. 7. The error contained in Jury Instruction No. 33 is specifically demonstrated by existing United States Supreme Court and Utah case law previously discussed in detail in Argument I of both the Brief of Appellant and this Reply Brief as well as the underlying factual circumstances of this case.

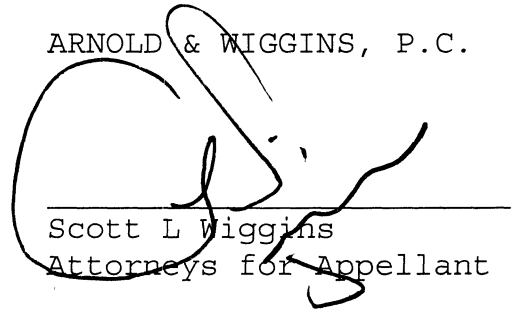
Consequently, appointed trial counsel's failure to object to the court's proposed Jury Instruction No. 33 not only fell below an objective standard of reasonable professional judgment but it resulted in substantial prejudice to Mr. Bennett. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct 2052, 2064 (1984). But for counsel's unprofessional error of failing to research the proposed instruction and object to it prior to the court utilizing it to charge the jury, the result at trial would have been different. By objecting to the instruction, the trial court more likely than not would have corrected the instruction so as not to undermine the jury's responsibility as the ultimate fact finder and shift the burden of persuasion to Mr. Bennett, as the Defendant, and by adequately explaining the applicable quantum of evidence.

CONCLUSION

Based on the foregoing, as well as that set forth in the previously filed Brief of Appellant, Mr. Bennet respectfully requests that this Court reverse his conviction of Burglary and remand the case to the district court for further proceedings consistent with this Court's instructions as set forth in its opinion.

RESPECTFULLY SUBMITTED this 13th day of December, 2007.

ARNOLD & WIGGINS, P.C.



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Attorneys for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 13th day of December, 2007:

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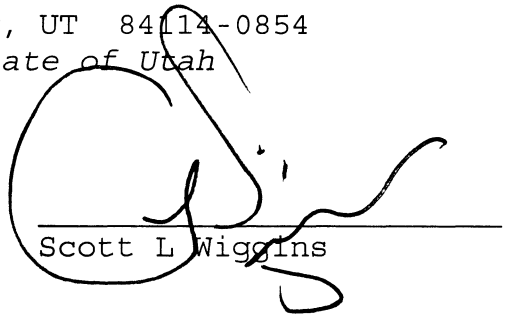

Scott L Wiggins

ADDENDA

No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).