1982

The State of Utah v. Jeffery Dean Baker : Brief of Appellant

Utah Supreme Court

G. Fred Matos; Attorney for Appellant;
David WIlkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent	:	
v.	:	
JEFFERY DEAN BAKER, Defendant-Appellant	:	Case No. 18245

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Burglary, a felony of the Third Degree, and Receiving Stolen Property, a Class B Misdemeanor, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge, presiding.

G. FRED METOS
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah
Attorney for Appellant

DAVID WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

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333 South Second East
Salt Lake City, Utah
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DAVID WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, JEFFERY DEAN BAKER, appeals from a conviction and judgment of Burglary, a felony of the Third Degree, and Receiving Stolen Property, a Class B Misdemeanor, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, JEFFERY DEAN BAKER, was charged with Burglary, a felony of the third degree in violation of Title 76, Chapter 6, Section 202, Utah Code Annotated, 1953 as amended, and Receiving Stolen Property, a Class B Misdemeanor in violation of Title 76, Chapter 6, Section 408 Utah Code Annotated, 1953 as amended, he was convicted as charged in a jury trial and was sentenced to incarceration at the Utah State Prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the conviction for burglary and a judgment rendered below and to have the case remanded to the Third Judicial District for a new trial.

STATEMENT OF FACTS

On September 18, 1981 in the early morning hours the appellant was arrested hiding inside of a Conoco service station located at 904 South 1300 East in Salt Lake County. (T. 18-19) The appellant had been an employee of that establishment for several weeks but had been fired about three days prior to the arrest. (T. 12, 22) On the morning of the arrest of the appellant, the proprietor, Keith Buchi, and police officers made a search of the building after a neighbor reported noises from the building. Nothing was discovered to be missing, however, a lock on a desk drawer had been broken, the drawer opened and the papers inside of the drawer scattered. (T. 16) No other property had been moved or disturbed inside of the building. (T. 20) After questioning by the police officers on the scene, the appellant indicated that he had not done anything wrong but was just sleeping in the building. (T. 38)

In an unrelated incident in July of 1981, some items were stolen from the bedroom of Amelia Van der Mulen. (T. 27-28) These included a driver's license, a visa banking card, a savings deposit account book and a checking account book. (T. 28) The appellant's vehicle was parked at the

service station on September 18, 1981. (T. 17) The police officers who responded to the alarm at the service station impounded the vehicle and during the course of the impound the property taken from Mrs. Van der Mulen was located in the vehicle (T. 34-35). The appellant was questioned about the property and indicated that he had found it in his driveway. (T. 38) He later indicated to a police detective that the property had been found in a trash can at the carwash near his home (T. 51).

ARGUMENT

POINT I

CRIMINAL TRESPASS IS A LESSER INCLUDED OFFENSE OF THE CRIME OF BURGLARY AND THE FAILURE OF THE COURT TO SO INSTRUCT WHEN REQUESTED BY APPELLANT WAS PREJUDICIAL ERROR.

Criminal Trespass is a necessary included offense of Burglary; consequently the court's failure to instruct the jury on Criminal Trespass constituted prejudicial error and the appellant's conviction for burglary should be reversed and a new trial granted on that charge.

The appellant requested that the trial court instruct the jury on Criminal Trespass as a lesser included offense to burglary. In appellant's requested instructions an instruction was requested on the offense of Criminal Trespass, a Class B Misdemeanor, under Utah Code Ann. §76-6-206(2)(a) (1953 as amended). This requested instruction provided:

INSTRUCTION NO. _____

Before you may find the defendant, JEFFERY DEAN BAKER, guilty of the offense of Criminal Trespass, a lesser and included offense of Count I of the Information, the State must prove each and every one of the following elements to your satisfaction and beyond a reasonable doubt:

1. That on or about September 18, 1981, Jeffery Dean Baker entered or remained unlawfully on the property of Keith Buchi; and

2. That in doing so Jeffery Dean Baker acted with the intent to either:

(a) Cause annoyance to any person thereon, or damage to any property thereon; or

(b) Commit any crime other than a theft or a felony; and

3. That all such acts occurred in Salt Lake County, State of Utah.

If the State has proved each and every one of the elements described above to your satisfaction and beyond a reasonable doubt then it is your duty to find Jeffery Dean Baker guilty of the offense of Criminal Trespass, a lesser and included offense of Count I of the Information. However, if the State has failed to prove any one of those elements then you must find the defendant not guilty of Count I of the Information.

The trial court refused to submit the requested instruction on the lesser included offense of criminal trespass to the jury and appellant took proper exception to the court's failure to so instruct the jury.[1] (T. 75)

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1. Counsel for appellant requested the Instruction in writing and took exception to the trial court's failure to give the request to the jury, properly preserving this issue on appeal. Utah Rules of Civil Procedure, Rule 51. State v. Erickson, 563 P.2d 750 (Utah 1977); State v. Bell, 563 P.2d 186 (Utah 1977); and State v. Gleason, 17 U.2d 149, 405 P.2d 793 (1965). Accord: Rules of Practice in the District Courts, Rule 5.4.

POINT A

THE DEFENDANT IN A CRIMINAL CASE HAS A RIGHT TO SUBMIT HIS THEORY OF THE CASE TO THE JURY IN THE INSTRUCTIONS.

It has long been the law in the State of Utah, that an accused in a criminal action has a right to submit to the jury his theory of the case, and that such theory when properly requested should be given to the jury in the form of written instructions. State v. Stenback, 78 U. 350, 2 P.2d 1050 (1931). In Utah this right allows for the presentation of instructions on all defenses and theories, including lesser included offenses, when such are properly requested by the accused. State v. Gillian, 23 Utah 372, 374, 463 P.2d 811 (1970); State v. Mitcheson, 560 P.2d 1120 (Utah 1977).

An accused may make the decision as a matter of trial strategy to go "for broke" and decline to request instructions on a lesser included offense if his theory of defense so dictates. State v. Mora, 558 P.2d 1335, 1337 (Utah 1977); State v. Gellaty, 22 U.2d 149, 152, 449 P.2d 993 (1969); State v. Valdez, 19 U.2d 426, 428, 432 P.2d 53 (1967); State v. Mitchell, 3 U.2d 70, 278 P.2d 618 (1955); State v. Hendricks, 596 P.2d 633 (Utah 1979). However, when the accused as his theory of the case requests instructions on lesser included offenses and is willing to submit his guilt or innocence to the jury on that theory, the trial court as a general rule is duty bound to submit these alternatives to the trier of the fact. State v. Gillian, 23 U.2d 372, 375, 463 P.2d 811 (1970).

When the theory of defendant embaraces an argument, in effect in mitigation, that he is guilty of not the crime as charged in the Information but some lesser offense the teachings of Gillian still apply. On this point the court stated:

> One of the fundamental principles to the submission of issues to juries is that where the parties so request they are entitled to have instruction given on their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict. (State v. Gillian, supra, 23 U.2d at 374).

In Gillian this court pointed out the reasons for this rule and the instant case illustrates the soundness of such a rule. This court said it should not be the prerogative of the trial court to direct the jury as to what degree of crime they may find a defendant guilty or to direct them that they must find him not guilty if they do not find him guilty of the greater offense. To allow this permits the court to be a judge of the facts and to in effect direct a verdict on the lesser included offenses. Such a procedure violates the historical spirit as well as letter of our system of jury trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 12 of the Constitution of Utah. State v. Ferguson, 74 Utah 263, 279 P. 55 (1929) (Straup, J. concurring). See also Beck v. Alabama, 447 U.S. 625 (1980).

POINT B

CRIMINAL TRESPASS IS A LESSER AND INCLUDED OFFENSE OF BURGLARY.

The test recently given to determine if one offense is a lesser included offense of another is that found in the Utah Criminal Code. Utah Code Ann. §76-1-402(3) (1953 as amended) provides in pertinent part:

> A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
>
> (c) It is specifically designated by a statute as a lesser included offense.[2]

The process by which such a determination is made was described in State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934):

> The only way this matter may be determined is by discovering all of the elements required by the respective sections, comparing them and by a process of inclusion and exclusion, determine those common and those not common, and, if the greater offense includes all legal and factual elements, it may safely be said that the great includes the less, if, however, the lesser offense requires the inclusion of some necessary element or elements in order to cover the completed offense, not so included in the greater offense, then it may be safely said that the lesser is not necessarily included in the great. (33 P. 2d at 645)

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2. This statute was relied upon as the test for one offense being a lesser and included offense of another in State v. Lloyd, 568 P.2d 357 (Utah 1977) and its companion case, State v. Cornish, 568 P.2d 360 (Utah 1977) wherein this court held that the Utah joyriding statute is a lesser included offense of theft of an operable motor vehicle.

Recently, in State v. Williams, 636 P.2d 1097 (Ut. 1981), this test was described then the following was quoted from People v. Escarcega, 43 Cal. App. 3d 391, 117 Cal. Rptr. 595 (1974):

> It is of no consequence that the evidence at trial might also establish guilt of another and lesser crime than that charged. As indicated, to constitute a "lesser and necessarily included offense" it must be of such a nature that as a matter of law and considered in the abstract, the greater crime as defined by statute or charged in the accusatory pleading "cannot be committed without necessarily committing [such other] offense". This rule has been constantly reiterated . . . . The lesser offense must "necessarily and at all time [be] included within another one." . . . "If, in the commission of acts made unlawful by one statute, the offender must always violate another, the one offense [i.e., the latter] is necessarily included in the other." [Citations omitted; emphasis and bracketed language in original.]

The elements which must be proved to constitute the crime of Burglary as described in Utah Code Ann. §76-6-202 (1953 as amended) are:

> (1) A person must enter or remain in a building or portion of a building;
>
> (2) The entry or presence is unlawful;
>
> (3) The actor must possess the intent to commit a felony, theft or assault.

There are two distinct offenses which constitute the crime of Criminal Trespass as described in Utah Code Ann. §76-6-206 (1953 as amended). The elements of the first type of Criminal Trespass as defined in Utah Code Ann. §76-6-206 (1953 as amended) are:

(1) A person enters or remains on property;

(2) The entry or presence if unlawful;

(3) The actor possesses the intent to cause annoyance, or commit a crime other than a theft or a felony or the actor is reckless as to whether his presence will cause fear for the safety of another.3

The elements of the second type of Criminal Trespass are:

(1) A person enters or remains on property;

(2) The person knows his presence is unlawful;

(3) Notice against entry has been given by personal communication or by a fence or enclosure, or by posting signs.4

In comparing the statutes as Woolman advises the first thing to ask is "can a Burglary be committed without committing the offense of Criminal Trespass?" If the answer is "no" to commit a Burglary one must perforce commit a Criminal Trespass, then Criminal Trespass is a lesser included offense of Burglary. State v. Woolman, supra, 84 U. at 35. An important point of note is the provision of the Criminal Trespass Statute, Utah Code Ann. §76-6-206(2) (1953 as amended), which states

> A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-2-203, 76-2-204 . . . [Emphasis Supplied]

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3. This was the character of the Criminal Trespass instruction requested in appellant's proposed Instruction.

4. This type of Criminal Trespass was not requested by appellant.

The importance of this provision is that criminal trespass requires proof of the same elements as are needed to prove the elements of the crime of burglary. In other words, criminal trespass is established by proof of less than all of the facts required to establish the commission of burglary. Obviously the legislative intent in this series of statutes is to make criminal trespass a lesser included offense to the burglary statutes. The acts to be proved in the trespass and burglary statutes are identical.[5] Both require one to enter or remain in a building and both require that such entry or presence be unlawful. The difference in the statutes is that burglary requires a more specific intent than criminal trespass. In State v. Sunter, 550 P.2d 184 (Utah 1977), this court held that possession of burglary tools, Utah Code Ann. §76-6-204 (1953 as amended), is not an included offense in the burglary statutes. This court went on to state that for an offense to be included in the greater offense of burglary, it must be embraced within the legal definition of burglary, and that the gist of the offense of burglary is the unlawful entry into a building unlike possession of burglary tools which is a possessory offense.

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5. The legislature placed the burglary and criminal trespass statutes in the same part of the code, Utah Code Ann. §76-6-201 et. seq. (1953 as amended), and provided common definitions for both burglary and criminal trespass in Utah Code Ann. §76-6-201 (1953 as amended).

In State v. Hendricks, 596 P.2d 633 (1979), the defendant charged with burglary raised the defense of voluntary intoxication and requested an instruction on criminal trespass which was denied. On appeal the defendant claimed error in the failure to give the instruction, but this court ruled that the defendant's lack of intent was inconsistent with a request for an instruction on the lesser offense. Although the court did not expressly state that criminal trespass is an included offense to the charge of burglary, that holding seems implicit in the court's ruling that "the evidence (including that presented by the defendant) establishes all of the elements of burglary but did not establish all of the elements of criminal trespass" Ibid at 634.

In State v. Brooks, 631 P.2d 878 (Utah 1981), the court held that the trial court did not err in refusing to reduce a charge of burglary to criminal trespass. The court noted that the element of the intent of the person entering a building is the difference between criminal trespass and burglary and the proof of that element is oftentimes based entirely on circumstantial evidence. Such a decision the court ruled was properly left to the trier of fact. Nowhere in the opinion did the court mention that criminal trespass is not an included offense to burglary. Logically, this issue must certainly have been resolved before the court could discuss the propriety in the reduction of the charge based on sufficient evidence. So, by the implications to be drawn from the decision made by this court in State v. Brooks, supra, this court has held that criminal trespass is a lesser and inlcuded offense to a charge of burglary.

The statutory history of the burglary and trespass sections of the Utah Criminal Code also reflects the fact that trespass is a lesser included offense of burglary. Both provisions are derived from the Texas Penal Code.[6] In Day v. State, 532 S.W. 2d 302 (Tex. 1976), the Texas Court of Criminal Appeals held that a criminal trespass offense was a lesser included offense to its burglary statute. The Texas Court said:

> As can be seen, the first three elements of each of the three types of burglary and criminal trespass are virtually identical. The fourth main element of burglary, either the specific intent to commit or the actual commission or attempted commission of a felony or theft, depending on the type of burglary involved, is absent from the offense of criminal trespass. (532 S.W. 2d at 306).

In similar circumstances wherein the prosecution was for attempted burglary, the New York Court of Appeals also found the failure of the trial court to instruct on the lesser included offense of criminal trespass reversible error. In People v. Henderson, 41 N.Y. 2d 233, 359 N.E. 2d 1357 (1976) the court reversing the attempted burglary conviction noted:

> The test of whether a "lesser included offense" is to be submitted is certainly not that it is probable that the crime was actually committed or even that there is substantial evidence to support such a view. It suffices that it is supportable on a rational basis or, put another way, by logical necessity. To warrant a refusal to submit it

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6. Jay Barney, Utah Criminal Code Outline (1973). The Texas Code provisions are in turn taken from the Model Penal Code Provision. See A.L.I. Model Penal Code (P.O.D. 1962) §§ 221.0, 221.2.

"every possible hypothesis" but guilt of the higher crime must be excluded, [citations omitted], the evidence for that purpose being required to be considered in the light most favorable to the defendant (People v. Battle, 22 N.Y. 2d 323, 292 N.Y.S. 2d 661, 239 N.E. 2d 535) since the jury is free to accept or reject part or all of the defense or prosecution's evidence [citations omitted].

The court's appraisal of the persuasiveness of the evidence indicating guilt of the higher count is irrelevant; the question simply is whether on any reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count [citations omitted] and still find him guilty on the lesser one. And it may not be amiss to observe that at time, in their projection of laymen's sensitivities to facts, "juries may, on almost any excuse, convict of a lower degree of crime although conviction of a higher degree is clearly warranted" [citations omitted] . . .

So tested, it must be concluded that, while on the evidence here, though Henderson did not gain entrance to the building (hence the charge of attempted burglary) and fled when surprised by owner, the jury nevertheless could have found an intent to commit a larceny based upon circumstantial evidence (See People v. Terry, 43 A.D. 2d 875, 351, N.Y.S. 2d 184), it could also have found that he lacked the requisite intent at the time he broke the window [citations omitted] . . . the jury could have decided that he never intended to commit a larceny, but rather was motivated by any one of a conceivable number of other puproses such as for example, an intent to bed down in the premiss, to obtain information, or to engage in an act of mischief not larcenous in nature -- all purposes, incidently, only somewhat less rational than the one the People had asked the jury to infer from the circumstantial evidence in view of the fact that there was in this case no direct or certain proof of the defendant's actual purpose. (459 N.E. 2d at 1360)

The Supreme Court of Pennsylvania has also held criminal trespass to be a lesser included offense of burglary in construing statutes akin to those found in Utah. Commonwealth v. Carter, 344 A.2d 899 (Pa. 1975).[7]

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7. Pennsylvania's statutes like Utah's appear to be a result of the Model [illegible] v. Coffin, 565 P.2d 391 (Ore. 1977).

Undeniably, criminal trespass, as described in Utah Code Ann. §76-6-206 (1953 as amended) is a lesser included offense to the burglary provisions of the Utah Criminal Code, Utah Code Ann. §§76-6-202, 76-6-203, 76-6-204 (1953 as amended).

POINT C

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSE OF TRESPASS.

Because criminal trespass is a lesser included offense of burglary under Utah's statutes, the issue that now must be addressed is: when must the trial court instruct the jury on such a lesser included offense?

This issue raised in this case has been before this court on numerous occasions in the past and has, on occasion, brought differing views from the members of this court. The need that such an instruction be given has been ruled to be a statutory requirement. The statute in force at the time of the appellant's trial is found in Utah Code Ann. §77-34-21(e) (1953 as amended), which states:

> The jury may return a verdict of guilty to the offense charged or to any offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

A related provision was provided by the legislature in the Criminal Code Utah Code Ann. §76-1-402 (1953 as amended) which provides:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and conviction him of the included offense. [Emphasis Supplied]

The foregoing provision, as this court has noted, codifies prior existing common law principles dating back to territorial times in Utah. People v. Robinson, 6 U. 101, 21 P. 403 (1889); State v. Bender, 581 P.2d 1019 (Utah 1978).

In State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937), this court stated that the failure to give an instruction on lesser included offenses when requested ". . . clashes with two fundamental rules of trial in criminal cases: It has the effect of the court weighing the evidence and, in effect, limiting the jury to a consideration of only part of the evidence (the defendant's): and it, in effect, casts upon the accused the burden of proving his innocence or justification." 65 P.2d at 1132.

The tenor of this court's discussions in the past has been that when the accused requests a lesser included instruction there should exist a presumption that the requested instruction be given.[8] In State v. Hymas, 64 U. 285, 230 P. 349 (1924), it was stated:

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8. This seems to be the feeling of the court in State v. Gillian, supra, 23 U.2d at 376 wherein it is said:

> The usual rule on an appeal in which the challenge is to the sufficiency of the evidence to support the verdict, is that we review the record in the light favorable to the jury's verdict. However, in this situation where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offenses.

> It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense, and determine the question of the state of the evidence as matter of law. That should be done only in very clear cases. (64 U.2 at 287) Accord: State v. Barkas, 91 U. 574, 580, 65 P.2d 1130 (1937).

In recent years this court has endeavored to set specific guidelines providing for the submission of lesser included offense when requested. The statutory necessity of instructing a jury on a lesser included offense was described in State v. Dougherty, 550 P.2d 175 (Utah 1976). This court cited Lisby v. State, 83 Nev. 183, 414 P.2d 592 (1966), which followed a provision similar to Utah Code Ann. §77-35-21(e) (1953). Describing the holding of the Nevada Court this court said:

> The Court discussed three situations in which the problem of lesser included offenses are frequently encountered. First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.
>
> Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.
>
> Third, is an intermediate situation. One where the elements of the greater offense include all elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent

> in doing the acts, which constitute the lesser included offense. In such a situation instructions on the lesser included offense may be given, because all elements of the lesser offense have been given. However, such an instruction may properly be refused if the prosecution has met its burden of proof on the greater offense, and there is no evidence tending to reduce the greater offense. The court concluded by stating that if there be any evidence, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lesser included offense, the court must, if requested give an appropriate instruction. (550 P.2d at 176-177)[9]

The question that arises then when lesser included instructions are requested is: was there ". . . any evidence, however slight, on any reasonable theory under which the defendant might be convicted of the lesser [and] included offense . . . " of criminal trespass. State v. Dougherty, supra at 177; State v. Bell, 563 P.2d 186, 188 (Utah 1977) (Justice Wilkins, concurring). If there was such evidence then the instructions were properly requested and should have been submitted to the jury for consideration.

In State v. Hendricks, 596 P.2d 633 (Utah 1979), a criminal trespass instruction was refused when the defendant was charged with burglary and that ruling was upheld on appeal because the court found that the evidence did not warrant the instruction. The defendant had raised the defense of voluntary intoxication and testified that he entered the building to search for friends. He was found hiding in a closet and typwriters had been moved to the point of entry.

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9. The test given in State v. Dougherty, supra, has been followed in State v. Pierre, 572 P.2d 1338, 1355 (Utah 1977), State v. Bell, 563 P.2d 186, 188 (Utah 1977), State v. Chestnut, 621 P.2d 1228 (Utah 1980), and State v. Elliot, 641 P.2d 122 (Utah 1982).

In this case the appellant was found by the police inside of the building in question (T. 18-19). He was not found in possession of any property belonging to the business and in fact no valuables had been moved even though the appellant had access to them while in the building (T. 16,20). Although a lock on a desk drawer had been broken and the drawer opened and the contents had been disturbed, nothing was taken from the drawer. (T. 16) Under these facts one reasonable theory would be that the appellant did not have the intent to commit a theft when he unlawfully entered the building or remained in it. Consequently, under the facts of this case the trial court committed error in failing to give the requested instruction of the lesser offense of criminal trespass.

Appellant's actions in the instant caser are similar to those of the accused in Crawford v. State, 241 N.E. 2d 795 (Indiana 1968). In Crawford the accused was found hiding inside a building at an unusual hour. The Indiana Court in reversing his conviction for burglary noted that his denial of intent to commit a theft was sufficient to raise an issue as to such intent, 241 N.E. 2d at 797. Although unauthorized entry into a building at an unusual hour may give rise to an inference that the appellant had the intent to commit a theft, it is by no means the one and only reasonable inference that may be drawn from such evidence State v. Brooks, supra.

Several cases involving similar facts have required that the charge of burglary be reduced to criminal trespass. In State v. Rood, 462 P.2d 399 (Ariz. 1969) the defendant was seen inside of a building with his hand on a television

neighbor came to investigate the defendant fled. The court held that the State must prove that the defendant had the intent to commit a specific crime to sustain the charge of burglary and not just the intent to do some undetermined thing at the time he was inside of the building. Similarly, in State v. Kahinu, 53 Haw. 646, 500 P.2d 747 (Haw. 1972), the defendant was found in the victim's hotel room, when asked what he was doing there the defendant stated that it was his room and he then fled from the hotel. The court held that the mere fact that the entry was forced or unlawful did not establish the requisite intent for burglary. The court then held that the evidence was insufficient to establish a prima facie case for burglary and the charge should be reduced to criminal trespass.

When a court has erred by failing to give a requested instruction the error is deemed to be prejudicial "if the requested instruction had been given and the jury had so considered the evidence, there is reasonable likelihood that it may have some effect on the verdict rendered." State v. Mitcheson, 560 P.2d 1120 (Utah 1977). The evidence offered in this case on the issue of intent was all circumstantial. It is quite reasonable for the jury to infer from this evidence that the appellant had some intent other than to commit a theft when he entered the building. This is especially true when this court considers the holding of the courts in State v. Rood, supra and State v. Kahinu, supra. In light of those holdings there is not only a reasonable likelihood that the verdict would have been different had the jury been properly instructed, but that outcome would have been a distinct possibility. This

is because the jury would not have to be asked to acquit the appellant who was in Mr. Buchi's service station without permission to be there, they could have found that he was guilty of the lesser offense.

CONCLUSION

The offense of criminal trespass is a necessarily included offense to the offense of burglary. Both offenses may be established by proof of the same acts. The only difference in the two offenses is the intent element. Therefore, the trial court's refusal to give the requested instruction was error. This error was prejudicial in light of the facts of this case: even though the appellant was arrested inside of the building, nothing had actually been taken, although a desk drawer had been forced open. These facts are, at best, equivocal on the element of intent to commit a theft, as required to prove the offense of burglary. Consequently, the appellant's conviction for burglary must be reversed and the case remanded to the District Court for a new trial.

DATED this _____ day of August, 1982.

G. FRED METOS
Attorney for Appellant

DELIVERED a copy of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this 2nd day of August, 1982.