1980

State of Utah v. Alan Douglas Asay : Brief of Appellant

Utah Supreme Court

Robert B. Hansen; Attorney for Respondent;
Steven L. Hansen; Hansen and Hansen; Attorneys for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- ALAN DOUGLAS ASAY, Defendant-Appellant	*	CASE NO. 16973

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT RENDERED IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE A.H. ELLET, JUDGE

ROBERT B. HANSEN
Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

STEVEN L. HANSEN

HANSEN AND HANSEN
800 Boston Building
Salt Lake City, Utah 84111

Attorneys for Appellant

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800 Boston Building
Salt Lake City, Utah 84111

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by Complaint and information with one count of Theft, in violation of Utah Code Annotated, §76-6-404 and §76-6-412 (1) (a) (i) (1953).

DISPOSITTION OF THE LOWER COURT

Appellant was tried by a jury before the Honorable A.H. Ellett in the Second Judicial District Court for Davis County, State of Utah and found guilty of Theft on February 11, 1980.

Appellant was setenced for the term provided for law, but the sentence was suspended and Defendant allowed probation upon payment of a $5,000.00 fine and restitution, all to be paid within one year, at which time probation would terminate.

RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of the verdict and sentence of the lower court.

STATEMENT OF FACTS

During the evening of July 10, 1979, Eric Rasmussen and his fiance went to a theatre near Trolley Square, Salt Lake City, Utah to attend a movie. The show ended at approximately 10:30 pm and when they returned to the spot where they had left their car they discovered it had been stolen. (T.31, lines 13-22)

Mr. Wayne Pascoe resides in Bountiful, Utah in the vicinity of a business establishment which rented storage sheds to consumers. Shortly after 11:00 pm on the night of July 10, 1979, Mr. Pascoe spotted some suspicious activity in his neighborhood. (T.49, lines 24-29) His investigation lead him to a nearby storage shed where, from a distance of twenty to thiry feet, he observed two men park what he later learned was Mr. Rasmussen's car in the shed. (T.50, lines 29-3-, T.51, lines 1-2)

On the following day, the police were summoned by Mr. Pascoe to his residence in response to his report of suspicious circumstances in the vicinity of the storage shed. (T.35,line 28- T. 26, line 1) The police observed the Defendant removing automobile parts from his shed and placing them in the back of a pick-up truck. (T.36, lines 15-18) After questioning the Defendant for a few moments,

the police placed him under arrest. (T.37, lines 8-17). The automobile was later determined to be Mr. Rasmussen's auto.

At his trial, the Appellant testified as to how he came to be in possession of Mr. Rasmussen's vehicle. He related that he met two men approximately three weeks prior to his arrest who stated that they sometimes worked on automobiles. (T.68, lines 8-12, lines 21-23) As the Appellant's sister had damaged her car and needed some parts (T.68, lines 26-27), the Appellant gave the two indiviudals his phone number and asked them to contact him if they ever came across the appropriate parts. (T.69, lines 3-11) They phoned him on July 10, 1979, and told him they had the parts. (T.69, lines 15-20) As the Appellant had a date planned for that evening, he arranged to meet them briefly in order to give them the key to his storage shed so that they could place the parts there for his inspection. (T.69, lines 27-30) At no time did the individuals indicate to the Appellant that the parts were stolen. (T.69, lines 5-7)

The Appellant testified that when he visited his storage shed the following morning, he was surprised to find an entire vehicle in the shed. (T. 70, lines 24-27) He returned later in the afternoon to remove parts from the auto. (T.71, lines 3-8) Upon examining the vehicle, he determined that the parts he needed were in good shape (T.71, lines 19-21), but that the ignition was missing and the car

was otherwise inoperable. (T.71, lines 17-23) When the police arrived and began to question the Appellant, he became suspicious that the car was stolen. (T. 73, lines 16-20)

POINT I

THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY CONCERNING THE ELEMENTS OF THE CRIME AND THE DEFENDANT'S DEFENSE

At the conclusion of the Defendant's trial, defense counsel objected to the jury instructions of the Court. Specifically, the Defendant objected to Instruction No. 8 (attached) as given by the Court and the failure to include Defendant's proposed Instructions No. 1 and No. 7 (attached). Defendant has therefore preserved his right to challenge the sufficiency of the instructions provided by Rule 51 of the Utah Rules of Civil Procedure.

Defendant's objections, in general terms, center around the failure of the trial court to instruct adequately concerning the elements of the crime of theft in that neither the actus reus nor mens rea were properly defined; and the refusal of the trial court to instruct the jury concerning the Appellant's theory of defense.

A. THE INSTRUCTIONS GIVEN BY THE TRIAL COURT FAILED TO APPRISE THE JURY OF THE NEED TO FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT POSSESSED CRIMINAL INTENT AT THE MOMENT HE ACQUIRED OR EXERCISED CONTROL OF THE PROPERTY OF ANOTHER.

It is well established that jury instructions must instruct the jury on all of the elements of a criminal offense, and that the jury must find the Defendant guilty

beyond a reasonable doubt as to each of those elements. It is further certain that the criminal intent of the Defendant is an element of theft.

Where there is a question concerning the intent of the Defendant, State v Cude (1) requires that an instruction present the question to the jury. In that case, the Defendant left his auto to be repaired at a service station. When he couldn't pay for the repairs, the station owner kept the auto to secure the Mechanic's Lien. The Defendant, believing that he had a right to reclaim his vehicle, went to the service station during the night and drove it away. The majority wrote:

> "It is fundamental that an essential element of larceny is the intent to steal the property of another. Consequently, if there is any reasonable basis in the evidence upon which the jury could believe that the accused thought he had a right to take possession of the automobile, or if the evidence in that regard is such that it might raise a reasonable doubt that he had the intent to steal, then that issue should be presented to the jury...
>
> This proposition is affirmed by the expression of the courts of numerous jurisdiction [footnote omitted]. In the Oklahoma case of Linde v State [footnote omitted], the court reversed a conviction for larceny upon the ground of the trial court's failure to give a requested instruction to the effect that:
>
> 'If at the time of the taking of the property by the Defendant he in good faith believed said property was his or they had reasonable doubt to that effect, they should acquit him. This although he may have been mistaken in such belief.' " (2)

The Defendant's testimony that he believed that he was lawfully purchasing auto parts from two acquaintances provides a "reasonable basis upon which the jury could believe that the accused thought he had a right to take possession" of the property. Therefore, State v Cude requires that the trial court have instructed the jury regarding the issue of the Defendant's intent. Further, the failure to instruct upon an essential element of the crime charged is reversible error. (3)

Looking at the instructions given by the trial court in their entirety, there are two possible instructions which might be argued as addressing the issue of intent. The first of these is Instruction No. 8, which reads in part:

> "Before you can convict the Defendant of the crime of Theft, you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime: 4. [That the Defendant] did commit the offense of theft, in that he did obtain or exercise unauthorized control over the property of another, to-wit, an automobile in operable condition, with the purposed to deprive the owner thereof..."

The phrase "he did obtain or exercise unauthorized control over the property of another" fails to address the issue of intent, as it merely specifies the forbidden conduct. The phrase contains no warning to the jury that they must find that the Defendant obtained or exercised control over property knowing that he was unauthorized to obtain or exercise such control.

The final clause of the quoted language, "with the

purpose to deprive the owner thereof", also does not inform the jury that they must find that the Defendant had criminal intent. The term "purpose to deprive" is clearly defined at 76-6-401 (3):

> " 'Purpose to deprive' means to have the conscious object:
>
> (a) To withhold permanently or for so extended period or to use under such circumstances that a substantial portion of its economic value, or the use and benefit thereof, would be lost; or
>
> (b) To restore the property only upon payment of a reward or other compensation; or
>
> (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it."

Under its statutory definition, therefore, the phrase "with the purpose to deprive the owner thereof" does not relate to intent at all, but rather to the definition of a taking as an element of theft. For example, a person purchasing merchandise in a store has the purpose to deprive the owner of the property under the definition state at 76-6-401 (3), but still lacks the criminal intent. Nothing in the statutory definition of "purpose to deprive" requires that the person know that he has no right to withhold the property from the owner, or know that his taking the property is wrongful.

One might argue that the phrase "purpose to deprive the owner thereof" was not used in a technical sense, but rather was used as customary, everyday language. As the Judge was instructing the jury on the elements of the crime

of theft, and the "purpose to deprive the owner thereof" is an element of theft (4), the more logical view is that the Judge did intend the phrase to have its statutory meaning.

The second instruction which arguably pertained to criminal intent is Instruction No. 13 (attached). The portion of this instruction which relates to mes rea reads as follows:

> "In the crime charged in the Information, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent, it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful."

Two faults lie with this instruction. First, while the Court clearly informed the jury in Instruction No. 8 that the State had to prove each of the elements of the crime beyond a reasonable doubt, Instruction No. 13 contains no similar statement placing the burden of showing intent upon the State. Nor does the instruction make clear that the criminal intent must exist at the time of the taking. Instruction No. 13, therefore, fails to adequately instruct the jury that criminal intent is an element of the crime of theft which must be proved by the prosecution beyond a reasonable doubt.

Instruction No. 13 is identical in all material respects with an instruction ratified in State v Smith.(5)

The second problem with Instruction No. 13 is that it was extracted from State v Smith out of context from the facts of that case. In State v Smith, the Defendant delivered a check in exchange for a deed to real property knowing that he had insufficient funds in his checking account to cover the check. His defense was that he claimed to have told the payees that the check would not be honored by the drawee but that he would call them when he deposited the necessary funds. The question presented was whether he could be convicted even though he did not realize the criminality of his conduct in issuing a check in excess of his funds, since he intended to ultimately honor the check. The Utah Supreme Court approved the language of the instruction given to the jury at Defendant Smith's trial, but Justice Wilkins explained their approval by writing, "The trial court's instruction is a statement of 'ignorance of the law is no defense', and is an accurate statement of the law applicable to the criminal charges in the instant case." (6)

It is therefore clear that the instruction approved in State v Smith is proper where the issue raised is the defense of mistake of law. But that is not the issue in the present case. The Appellant's defense is that he made a mistake in fact, in that he believed that he was authorized to remove the parts from the automobile. Instruction No. 13 could only have lead the jury to conclude that the Defendant was guilty of theft, if the State proved that he obtained

or exercise unauthorized control over the property of another, even if the jury found that he honestly believed he had a right to the property. As applied to the facts of this case, Instruction No. 13 has created a kind of strict liability theft offense, dispensing with the mens rea requirement entirely. Such a result is contrary to both Utah caselaw and Utah statutes.

Both Instruction No. 8 and Instruction No. 13 fall short of properly defining for the jury the criminal intent element of the offense of theft. Taken as a whole, the trial court's instructions fail to turn the jury's attention to the question of whether the Defendant possessed criminal intent at the time he exercised unauthorized control over the property of another.

Either Defendant's Proposed Instruction No. 1 or No. 7 (attached) would have remedied the omission of a mens rea instruction by the trial court. Defendant's Proposed Instruction No. 1 simply recites the defenses to a theft prosecution found at §76-6-402, U.C.A. 1953. These defenses each involve the Defendant's assertion that he had a right to the property which was the object of the alleged theft, and thus relate to the criminal intent of the accused. Defendant's Proposed Instruction No. 7 more directly confronts the question of intent by specifically stating that a felonious intent must exist at the time of the taking.

The error of the trial court in failing to properly

instruct regarding the element of intent is not simply harmless error. There was never any doubt that it was the Defendant who was arrested while removing parts from an automobile which he later learned was stolen; the only question was whether he honestly believed that he had a right to remove the parts. By improperly instructing the jury on the element of criminal intent, the trial court effectively removed the only genuine issue from in front of the jury and precluded the Appellant from receiving a fair trial. His conviction must therefore be reversed.

B. THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON THE APPELLANT'S THEORY OF DEFENSE

In Defendant's Proposed Instruction No. 1 (attached), the Defendant requested the trial court to instruct the jury regarding his theory of defense. The requested instruction would have instructed the jury that it was a defense to the information if the Defendant acted under an honest claim of right to the property or an honest belief that he had a right to exercise control over the property, or if he honestly believed that the owner would have consented to his exercise of control if he had been present. This instruction is certainly an accurate statement of the law, as it is taken almost verbatim from §76-6-402 U.C.A. 1953, which lists defenses to the charge of theft.

Defendant's Proposed Instruction No. 1 was denied by the trial court, and no substitute instruction on the Defendant's theory was give to the jury.

Utah caselaw clearly commands a trial court to instruct the jury on the theories of both the Defendant and the prosecution, and the failure to do so is reversible error. (7) However, before a Defendant is entitled to an instruction on his defense, there must be sufficient evidence before the jury to justify the instruction. This evidentiary burden can be conveniently divided into two components: the focus of evidence required and the quantity of evidence required.

The question of the focus of the required evidence was addressed in State v Johnson. (8) That case involved an accused charged with involuntary manslaughter who argued that the circumstances surrounding the killing entitled him to an instruction of the defense of self-defense. The majority wrote

> "It is admitted that the Defendant is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify giving such an instruction. However, when the legislature permits a Defendant to avoid the consequences of his act because the killing was excusable, an instruction is not necessary unless the facts and circumstances impelling the accused to act are in some way consistent with the legislative intent to excuse." (9)

The Court then examined several cases dealing with self-defense instructions and continued:

> "It will be noted from the resume of the evidence as given that in most of the quoted cases, the evidence of the Defendant established a state of facts which, if believed by the jury, established adequate provocation, lawful acts on the part of the Defendant, or other aggravating facts not present in the case at bar.

> Had the Defendant's evidence in this case presented an issue of fact under any one of the provisions of our excusable homicide statute, then he, too, would have been entitled to an instruction on one part or all parts of the section." (10)

State v Johnson speaks to the focus of the evidence which must be presented to entitle an accused to an instruction of his defense. The evidence which he offers must be consistent with the defense provided by the Legislature and relate to the provisions of the legislative defense. As applied to the offense of theft, State v Johnson indicates that the evidence of the accused must be consistent with the rationale behind the legislative defense and relevant to the specific provisions of §76-6-402, U.C.A. 1953.

The quantity of the evidence which must be offered by a Defendant to entitle him to an instruction on his theory of a defense is a different question. State v Johnson refers to substantial evidence as the requisite quantum of proof, but this issue was not adequately addressed until State v Castillo. (11) Once again the Utah Supreme Court was confronted by a Defendant's claim that he killed another while acting in self defense, and the Court wrote:

> "Both the State and Defendant agree that a Defendant is entitled to have a jury instructed on his theory of the case, if there by any substantial evidence to justify giving such an instruction...
>
> If the Defendant's evidence, although in material conflict with the State's proof,be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-

> defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a Defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused." (12)

In general terms, therefore, State v Castillo held that a Defendant is entitled to an instruction on his theory of defense unless as a matter of law, he has offered so little and such poor evidence that no jury could possibly believe his story. The Court is essentially stating that the Defendant is entitled to an instruction on his defense unless his evidence fails to present a question of fact for the jury to decide, similar to where a directed verdict is appropriate in a civil suit. This standard must be construed most favorably to the Defendant, as any other reading of State v Castillo would endanger the Defendant's right to a jury trial under the Sixth Amendment to the United States Constitution.

The evidence presented at trial by the Appellant in this case easily meets the evidentiary standards declared in State v Johnson and State v Castillo. The Defendant was charged with the theft of the vehicle. In his defense, he testified that he had met two young men three weeks previous to his arrest, given them his phone number, and told them to phone him if they ever came across parts which were compatible with his sister's damaged car. (T.68, lines 4-15, T.69, lines 3-11) On the night that he received the call, he had

a date with his girlfriend planned, so he met with them only briefly. He gave them the key to his storage shed and instructed them to leave off the parts for his inspection the following day. (T.69, lines 27-30)

To an extent, this story was corroborated by Mr. Wayne Pascoe, a witness for the State. Mr. Pascoe testified that he saw two men the night the theft occurred, parking the car in Mr. Asay's storage shed, and that the was within thirty feet of them during this process; yet he could never idenfity the Appellant as either of the two men. (T.50, line 29-30, T.51, lines 1-2, T.59, lines 8-19). Even though it was dark, the failure of Mr. Pascoe to idenfity the Defendant supports the Defendant's story that he was buying parts from two men.

This evidence satisfies State v Johnson (13) insofar as the evidence pertains to the statutory defenses to the crime of theft found at §76-6-402, U.C.A. 1953. This statute creates a defense where the accused acted under an honest claim of right to the property or under an honest claim that he had the right to exercise control over the property, or where the Defendant honestly believed that the owner of the property would have consented to his control if the owner of the property would have consented to his control if the owner were present. The Defendant's testimony seeks to establish that he honestly believed that he was purchasing auto parts from persons he believed owned the auto. This

evidence is directly relevant to any of the three statutory defenses, and therefore State v Johnson provides that an instruction on the Appellant's defense was required.

The requirements of State v Castillo (14) are also met by the Defendant's testimony. No direct evidence was offered by the State to connect the Defendant to the actual theft of the car and no testimony of any kind was presented to rebut the Appellant's version of the incident. On the other hand, the testimony of the Defendant, corroborated to an extent by Mr. Pascoe, was easily sufficient to raise a reasonable doubt as to whether the Appellant had an honest belief that he was entitled to take parts from the auto. For the trial Judge to decide as a matter of law that the Appellant's testimony was insufficient to raise a reasonable doubt as to the guilt of the Defendant was a flagrant usurpation of the role of the jury. An instruction regarding the statutory defenses to the crime of theft was required.

The failure to give such an instruction was not harmless error. Coupled with the inadequacy of the instructions relating to intent, the instructions as a whole failed to present the Appellant's defense before the jury. If proper instructions had been tendered to the jury, an entirely different verdict may have been reached; the failure to adequately instruct the jury on the Appellant's defense was fundamentally unfair and deprived the Appellant of a fair trial. His conviction must therefore be reversed.

C. THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY CONCERNING THE PRESUMPTION THAT ONE IN RECENT POSSESSION OF STOLEN PROPERTY WHO CANNOT SATISFACTORILY EXPLAIN HIS POSSESSION STOLE THE PROPERTY.

The Appellant in this case was charged with the theft of an automobile owned by another. At the trial, the State offered no direct proof connecting the Appellant with the theft of the car, but relied exclusively upon the statutory presumption found at §76-6-402, U.C.A. 1953:

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

This presumption may be utilized in two ways. The primary effect of the statute allows the trial Judge to determine whether the accused is in possession of recently stolen property, and whether he has offered a satisfactory explanation of his possession. If the Judge finds the explanation unsatisfactory, he may hold that a prima facie case has been made out by the State and, even in the absence of any other evidence, deny a motion to dismiss made by the Defendant at the conclusion of the State's case. (15) More importantly in the context of this appeal, the presumption may also be placed in front of the jury for their consideration in determining the guilt or innocence of the accused.

The statutory presumption was presented to the jury as part of Instruction No. 8: "You are further instructed that one who is found to be in possession of property recently stolen, may be found to be the guilty person unless

he gives a satisfactory explanation of his possession thereof." This instruction is not proper because it fails to place the burden on the State to prove the Defendant's explanation of his possession unsatisfactory, and instead requires the Defendant to prove his explanation satisfactory.

The use of presumptions in criminal cases has come under frequent attach through the years as contrary to Due Process of Law and the legal maxim of innocent until proven guilty. However, the use of presumptions has just as frequently been upheld as court have repeatedly emphasized that the burden of proof does not shift to the Defendant to rebut the presumption.

The decisions of the Utah Supreme Court are no exception to the general rule. In State v Wood (16), the Court wrote:

> "The contention that this portion of the statute forces upon the Defendant the burden of proving his innocence has been rejected by this court in many instances. The State must prove not only the larceny and recent possession but also that [the Defendant] failed to make a satisfactory explanation of his possession." (17)

And in State v Little (18), the majority held, "The burden of proving guilt remains at all times with the State and the State must prove not only the larceny and recent possession but also that Defendant failed to make a satisfactory explanation of his possession." (19)

The operation of the presumption statute was most clearly and most recently described in State v Jolley (20):

"The statute correctly read, however, states that mere possession is sufficient to establish a prima facie case of theft unless the possession of the stolen property is satisfactorily explained. This requires that the Defendant must offer his explanation as to how he came into possession of a stolen proprety; and upon that offer, the State has the burden of proving that the explanation was an unsatisfactory one." (21)

While the three cited cases above each hold that the burden of proving the accused's explanation unsatisfactory is on the State, Instruction No. 8 serves to instruct the jury that a person in possession of recently stolen property may be found guilty "unless he gives a satisfactory explanation of his possession thereof." This shifting of the burden is contrary Utah caselaw.

Only two Utah cases discuss the sufficiency of instruction dealing with the presumption arising out of possession of recently stolen property. In State v Hall (22), the Defendant challenged an instruction given by the trial court which stated that possession of recently stolen property without a satisfactory explanation constituted a prima facie case, but that the State must still prove the guilt of the Defendant beyond a reasonable doubt. The Supreme Court held the instruction improper but not prejudicial, since the erroneous instruction was coupled with an admonition to the jury to require proof of guilt beyond a reasonable doubt. The majority wrote:

"...it would have been more proper to instruct the jury in substance that if found from

the evidence beyond a reasonable doubt that someone had commited the larceny as charged, that the Defendant was found in possession of the recently stolen goods and that it further found that he failed to give a satisfactory explanation, there would arise an inference that the Defendant committed the larceny and that this inference might, with all other circumstances, be considered in determining whether or not the jury was convinced beyond a reasonable doubt of the Defendant's guilt." (23)

The second Utah Supreme Court case deciding the sufficiency of instructions describing the statutory presumption is State v Pappacostas (24). In a concurring opinion, Justice Crockett wrote:

"... I think that under some circumstances it may be both advisable and correct for the trial court to instruct the jury in simple and concise language on the subject dealt with in that statute.

The determination of the facts should be surupulously left to the jury. They could be told that if they believe from the evidence beyond a reasonable doubt that the property had been recently stolen; that it was found in the possession of the Defendant; and that when afforded an opportunity, he gave no satisfactory explanation of his possession, then if it so appeals to their minds they may draw an inference that the Defendant committed the larceny, which inference might be considered by them along with all the evidence in the case in determining whether they were convinced beyond a reasonable doubt of the Defendant's guilt." (25)

The portion of Instruction No. 8 relative to the statutory presumption, given to the jury at the Appellant's trial, fails to require the jury to find that the State has proven the explanation of the Defendant unsatisfactory beyond a reasonable doubt. To the contrary, by its own

language instruction permits the jury to find a Defendant in possession of recently stolen property guilty of theft unless the Defendant provides a satisfactory explanation. This language places both the burden of production and the burden of persuasion on the Defendant to prove that his explanation is satisfactory, in conflict with State v Wood (26), State v Little (27), and State v Jolley, (28).

The State may argue that the concluding language of Instruction No. 8 requiring the jury to insist upon proof beyond a reasonable doubt as to each element of the offense serves to render any error in the presumption instruction harmless as in State v Hall. However, this concluding language operates to worsen the prejudicial effect of the erroneous instruction on the presumption, as this concluding language only requires the State to prove each element of the offense beyond a reasonable doubt while listing the elements of the offense in paragraphs one through five Instruction No. 8. Thus, by an implication which arises from omitting proof of an unsatisfactory explanation from the list of elements of the offense, Instruction No. 8 actually furthers the impression that the burden is on the Defendant to prove his explanation satisfactory. An instruction more clearly contrary to State v Hall (29) and State vs Pappacostas (30) would be difficult to fashion. A more correct statement of the law can be found in Defendant's Proposed Instruction No. 1.

When used properly, presumptions in criminal trials

serve a useful purpose by shifting the burden of producing evidence on an issue to the party with the most ready access to that information. However, this tool is not without its dangers, and principal among these dangers is that the ultimate burden of persuasion can be mistakenly shifted to the Defendant. Such a result is diametrically opposed to the fundamental precept of Anglo-American jurisprudence that an accused is innocent until proven guilty. With this in mind, the Appellant urges the Court to review the instruction on the presumption with special care and attention; and should the Court conclude, as the Appellant contends, that the instruction fails to forcefully place the burden of proof on the State as to the sufficiency of the Defendant's explanation, the conviction of the Defendant must be reversed.

POINT II

THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE WHICH WAS EITHER HEARSAY OR IMMATERIAL.

During direct examination of Detective Phil Leonard by the prosecutor, the witness testified that the Defendant told him at the time of his arrest that the Defendant knew the automobile was stolen. (T.42, lines 9-11) This statement was in sharp conflict with the story related by Detective Leonard to William Carlson, a private investigator employed by defense counsel, who interviewed Detective Leonard several days before trial. In order to impeach the testimony of Detective Leonard, defense counsel placed William Carlson on the stand to testify to the prior inconsistent statement made by Detective Leonard.

The exchange of which the Appellant complains took place during the cross-examination of Mr. Carlson by the prosecutor. (Tr. 86-90) The prosecutor asked Mr. Carlson whether he had had a copy of a police report written by a second officer at the time he had interviewed Dectective Leonard. When Mr. Carlson answered in the affirmative and a copy of the report was furnished, the prosecutor continued his questioning by inquiring whether the report contained a statement that indicated that Mr. Asay had told Detective Leonard that he knew the vehicle was stolen.

At that point, defense counsel objected to the questioning as eliciting a response which would constitute hearsay. The following exchange then took place: (Tr.88, lines 19-28)

> THE COURT: He is not trying to prove that the statement is true or untrue, he is simply asking the question as to whether or not this matter was brought to the officer's attention when the officer testified as he said he testified.
>
> MR. PHIL HANSEN: If in fact he is not offereing to prove the proof [sic] of the matter, then it's immaterial.
>
> THE COURT: Objection is overruled, you may proceed counsel.
>
> MR. PHIL HANSEN: And may I inquire him [the prosecutor] if he is offering it to prove the truth of that statement?
>
> THE COURT: No, go ahead counsel, ask your next question.

The State then offered the police report into evidence, defense counsel objected to the lack of foundation for the evidence, and the court overruled the objection stating, "The

purpose of receiving it is solely for the purpose of letting the jury know what was before the two parties at the time the conversation occurred." (TR.89, lines 7-9) The portion of the police report relating that Detective Leonard told the author of the report that the Defendant had told Detective Leonard that the Defendant knew the car was stolen was thereafter admitted.

Defense counsel have properly objected to the admission of the portion of the police report as being either hearsay or immaterial. The definition of hearsay is found in Rule 63 of the Utah Rules of Civil Procedure: "Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter is hearsay evidence and inadmissible except..." . But the portion of the report admitted is actually hearsay within hearsay within hearsay, as it consists of a statement allegedly made by the Defendant to Detective Leonard, who in turn related the statement to a second officer who wrote the report.

However, the trial court ruled that the statement in the police report, that the Defendant told Detective Leonard that he knew the car was stolen, was not hearsay, since it was not offered to prove the truth of the statement. While the prosecutor never explained for himself why he was seeking the admission of the portion of the police report, he must be bound by the explanation provided by the Court that the report was not offered for its truth, since the Court's explanation

was offered in his presence and his response was silence.

Given that the statement in the police report was not offered for its truth, the question remains whether the statement was offered for a valid purpose or whether it was immaterial as contended by the Appellant. Once again, the prosecution's silence must be viewed as assent to the statement of the Court that the purpose of receiving the evidence was to let the jury know what was before Mr. Carlson when he interviewed Detective Leonard.

What was before Mr. Carlson at the time he interviewed Detective Leonard is not material to the issue of the Defendant's guilt, certainly. Perhaps the only possibility is that the information is relevant to the impeachment of Mr. Carlson's testimony, but it is difficult even on this basis to see the connection between the contents of a police report and Mr. Carlson's statement of his conversation with Detective Leonard. The contents of a police report, even though it was available to Mr. Carlson at the time he talked with Detective Leonard, has no conceivable relation to whether Mr. Carlson truthfully related his conversation with Detective Leonard.

Finally, the police report was not admissible to rehabilitate Detective Leonard through a prior consistent statement because of the hearsay problem. The report asserted that Detective Leonard made a statement to the author of the report, but the admission of a written report to prove that Detective Leonard made the statement would be hearsay.

Consequently, the admission of the portion of the police report, relating that Detective Leonard said that the Defendant told Detective Leonard that the Defendant knew the car was stolen, was error. Although Detective Leonard had already testified to this orally, the improper admission of the contents of the report was not harmless in that such statements have a cumulative effect and also the jury might easily be unduly influenced from the fact that the statement was found in a police report, rather than made from memory. The conviction of the Defendant must therefore be reversed.

POINT III

THE EVIDENCE IS INSUFFICIENT TO PROVE THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT.

The Appellant contends that the evidence presented by the State is insufficient to prove his guilt beyond a reasonable doubt. In order to determine the sufficiency of the evidence three matters must be determined: the offense with which the Defendant was charged, the evidence which is required to convict him, and the evidence presented against the Appellant.

The Defendant was charged with theft, in that he allegedly obtained or exercised unauthorized control over the property of another. It was further alleged that the property stolen by him was an operable motor vehicle.

The evidence required to convict a Defendant, in general terms, was defined in State v Romero (31):

> "...the evidence required need be only that which is sufficient to conform to the statutory definition of the crime charged, and the 'element of offense' is defined as (a) conduct, attendant circumstances, or results of conduct; and (b) the requisite mental state." (32)

More specifically, "The only elements needed to be proved under the statute are (1) the intent to deprive another of his property, and (2) the obtaining unauthorized control over the property." (33) When the State intends to rely, as in the instant case, on the statutory presumption that one in recent possession of stolen property has stolen the property unless a satisfactory explanation is give therefore, the prosecution is also required to prove the explanation of the Defendant unsatisfactory. (34)

The question of whether a conviction may rest entirely upon the failure of a Defendant to a satisfactorily explain his possession of recently stolen property has been decided by the Utah Supreme Court on two occasions. In the earlier of the two cases, State v Dyett (35), the majority wrote:

> "Under Sec. 10303601, U.C.A. 1943 an accused may be convicted of larceny without direct proof identifying him as the thief, if he is found in possession of recently stolen property and fails to give a satisfactory explanation of how he acquired such possession. Many convictions of the crime of larceny have been affirmed in this Court when there has not been any evidence connecting the Defendant with the theft apart from his possession of the stolen goods." (36)

However, the resolution of this question pronounced in State v Dyett was reversed by implication in 1972 in State v Heath (37):

> "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." (38)

The standard applied to evaluate the sufficiency of the evidence was most recently pronounced in State v Daniels (39):

> "For the Defendant to successfully challenge the sufficiency of the evidence underlying his conviction, he must show, 'when viewing the evidence and all inference that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt'. State v Mills, Utah 530 P.2d1272 (1975)." (40)

However, where the prosecution relies on circumstantial evidence, State v Romero (44) places a heavier burden on the State:

> "When the only proof of presumed facts consists of circumstantial evidence, the circumstances must reasonably preclude every reasonable hypothesis of Defendant's innocence, but this is not controlling when only part of the evidence is circumstantial.: (42)

The evidence presented by the State fails to meet the tests of State v Daniels and State v Romero. While the Defendant is charged with the theft of an operable motor

vehicle, the last moment at which the State proved that the auto was operable was approximately 11:30 pm on the night of July 10, 1979. This was established by Mr. Pascoe, who testified that he saw the auto being driven into a storage shed at that time; (t.50, lines 16-22) however, he was unable to identify the Defendant as one of the two men he viewed on that occasion from just thirty feet. (t.50, lines 29-30, T.51, lines 1-2, T.59, lines 8-19) In addition, when the Defendant was arrested on the following afternoon dismantling the auto the ignition switch was not in the vehicle and was not found in the possession of the Defendant. There is no evidence, circumstantial or direct, connecting the Defendant to an operable motor vehicle.

The only evidence connecting the Defendant to the theft is the presumption arising from his possession of recently stolen property. Under State v Heath, this is insufficient by itself to support a conviction, but rather the presumption requires some corroborating evidence. This the State did not provide. Should the State argue that the Defendant's actions and statements at the time of his arrest tended to show his guilt, this too, would be only circumstancial evidence of guilt, and under State v Romero the prosecution would be required to show that the circumstances precluded every reasonable hypothesis of the Defendant's guilt. But here again, it is important to recall that the Defendant is charged with the theft of an operable motor vehicle and not mere

possession of stolen property, and while the Defendant's conduct at the time of his arrest may be argued to imply guilt of some crime, his conduct does not show that the Defendant has committed a theft of an operable motor vehicle.

In conclusion, the evidence presented by the State is not sufficient to prove beyond a reasonable doubt that the Defendant obtained or exercised unauthorized control over an operable automobile. The prosecution's evidence consists merely of the statutory presumption, uncorroborated by other evidence connecting the Defendant to the theft, and this is insufficient as a matter of law to convict the Defendant. Therefore, the conviction must be reversed.

1. 14 Utah 2d 287, 383 P.2d 399 (1963)
2. 383 P.2d, at 400-401
3. Dougherty v State, 471 P.2d 213 (Nev 1970); State v Miller, 564 P.2d 228 (Kan 1977)
4. See &76-6-404, U.C.A. 1953
5. 571 P.2d 578 Utah 1977)
6. 571 P.2d at 581
7. State v Newton, 105 Utah 561, 144 P.2d 290 (1943); State v Maestas, 564 P.2d 386 (Utah 1977)
8. 112 Utah 130, 185 P.2d 738 (1947)
9. 185 P.2d at 743
10. 185 P.2d at 745
11. 23 Utah 2d 70, 457 P.2d 618 (1969)
12. 457 P.2d at 72-73
13. Supra, footnote 8
14. Supra, footnote 11
15. State v Pappacostas, 17 Utah 2d 197, 407 P.2d 576 (1965); State v Brooks, 101 Utah 584, 126 P.2d 1044 (1942)
16. 2 Utah 2d 34, 268 P.2d 999 (1954)
17. 268 P.2d at 1000
18. 5 Utah 2d 42, 296 P.2d 289 (1956)
19. 296 P.2d at 291
20. 571 P.2d 582 (Utah 1977)
21. 571 P.2d at 584
22. 105 Utah 162, 145 P.2d 494 (1944)
23. 145 P.2d at 500
24. 17 Utah 2d 197, 407, P.2d 576 (1965)
25. 407 P.2d at 201
26. Supra, note 16
27. Supra, note 18
28. Supra, note 20
29. Supra, note 22
30. Supra, note 24
31. 554 P.2d 216 (1976)
32. 554 P.2d at 217
33. State v Cauble, 563 P.2d 775, 779 (Utah 1977)

34. State v Gillespie, 117 Utah 114, 213 P.2d 353 (1950); State v Wood, 2 Utah 2d 34, 268 P.2d 998 (1954); State v Little, 5 Utah 2d 42, 296 P.2d 289 (1956); State v Gellatly, 22 Utah 2d 149, 449 P.2d 993 (1969)
35. 114 Utah 2d 379, 199 P.2d 155 (1948)
36. 199 P.2d at 156
37. 27 Utah 2d 13, 492 P.2d 978 (1972)
38. 492 P.2d at 15
39. 584 P.2d 880 (Utah 1978)
40. 584 P.2d at 882-3
41. 554 P.2d 216 (Utah 1976)
42. 554 P.2d at 219

INSTRUCTION NO. 8

Before you can convict the Defendant of the crime of Theft, you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime:

1. That the Defendant, Alan Douglas Asay,
2. On or about the 11th day of July, 1979,
3. At Bountiful, County of Davis, State of Utah,
4. Did commit the offense of theft, in that he did obtain or exercise unauthorized control over the property of another, to-wit, an automobile in operable condition, with the purpose to deprive the owner thereof.
5. Contrary to the Statutes of the State of Utah.

You are instructed that a person is guilty of theft if he participates in planning a theft or in concealing the theft from the owner or the law officers and it is not required that he act alone in the matter. However, in order to be guilty of the offense, he must be involved in the commission of the crime.

You are further instructed that one who is found to be in possession of property recently stolen, may be found to be the guilty person unless he gives a satisfactory explanation of his possession thereof.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the Defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the Defendant no guilty.

INSTRUCTION NO. 13

In the crime charged in the Information, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent, it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law delcares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

The intent with which an act is done is shown by the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act.

DEFENDANT'S PROPOSED

INSTRUCTION NO. 1

You are instructed that it is a defense to a charge of theft by receiving and/or theft that the Defendant: (a) acted under an honest claim of right to the property or service involved; or (b) acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did, or (c) obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

That is to say, if you believe that the Defendant has show the existence of any of the foregoing defenses, you must acquit the Defendant of the charge of theft by receiving or of the charge of theft by deception or both.

You are instructed that the burden is not upon the Defendant to prove such a defense beyond a reasonable doubt. It is sufficient if the Defendant proves any one of the above enumerated defenses by a preponderance of the evidence.

DEFENDANT'S PROPOSED

INSTRUCTION NO. 7

You are instructed that the required felonious intent must exist at the time of the taking.

The mere taking of personalty of another does not constitute theft unless the taking was with felonious intent.