

1988

State of Utah v. James L. Sandoval, Robert L. Sandoval, and Patrick Domniguez : Brief of Respondent

Utah Court of Appeals

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Recommended Citation

Brief of Respondent, *Utah v. Sandoval*, No. 880485 (Utah Court of Appeals, 1988).
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BRIEF

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DOCKET NO. 880485-CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff-Respondent, : Case No. ~~880106-CA~~
880485-CA

v. :

JAMES L. SANDOVAL, ROBERT L. : Category No. 2
SANDOVAL, and PATRICK
DOMINQUEZ, :

Defendants-Appellants. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A CONVICTION OF BURGLARY, A
SECOND DEGREE DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 76-6-202 (1978). IN THE
FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH, THE HONORABLE
CULLEN Y. CHRISTENSEN, JUDGE, PRESIDING.

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FILED

OCT 3 1988

IN THE UTAH COURT OF APPEALS COURT OF APPEALS

THE STATE OF UTAH,

:

Plaintiff/Respondent,

vs.

:

Case No. 880106-CA

JAMES L. SANDOVAL, ROBERT L.
SANDOVAL, and PATRICK DOMINQUEZ,

Argument Priority
Classification 2

Defendants/Appellants.

:

TRIAL TRANSCRIPT PAGES CITED IN APPELLANTS' BRIEF

1 A The divorce was filed July 31, 1986.

2 Q Do you have any children?

3 A Yes, I do. I have three.

4 Q Who at the time of this occurrence, which is
5 September 6th of 1987, had custody of the children?

6 A James did.

7 Q And who has custody now?

8 A I do.

9 Q What kind of visitation rights did you have in
10 September of 1987 with the children?

11 A It was reasonable visitation.

12 Q Those were the words that are used in your divorce?

13 A Right.

14 Q Thank you. Had you prior to the 6th of September
15 1987 spoken with James Sandoval, your ex-husband, about
16 visiting with the children?

17 A Yes, I had.

18 Q Where were James and the children living?

19 A In Pocatello, Idaho.

20 Q Did you discuss visitation for around the 6th of
21 September?

22 A Yes, I did.

23 Q What was the discussion that you had with your
24 ex-husband about that visitation?

25 A I called him at his job in Pocatello and asked him

1 Q Was his face towards you or was it his back towards
2 you through the screen door, or could you --

3 A His face.

4 Q What happened then as he went back in the house?

5 A Then I talked to the children and I asked them
6 if they wanted to go for a ride with me, and they said "Yes,"
7 and we got into the car and went for a ride.

8 Q Did James Sandoval say anything to you as you
9 drove away with the children?

10 A No, he did not.

11 Q Where did you take the children when you drove
12 away with them?

13 A I took them directly up to my mother's house in
14 Provo.

15 Q And where is that house?

16 A It's up in Oak Hills, Oakmont Lane.

17 Q Is that in Utah County?

18 A Yes, it is.

19 Q Did James Sandoval follow you up there at that
20 time?

21 A No, he did not.

22 Q What did you do after you took the children up to
23 Oakmont Lane?

24 A I took the children up there, and my mother and my
25 younger brother was there. And the children were filthy,

1 A Right.

2 Q Then what happened?

3 A And they just came running from the truck up the
4 driveway. And I ran back into the front door trying to get
5 the children into the front door of the house.

6 Q And why did you do that?

7 A Because, well, because I was scared, you know,
8 they were screaming and, you know, they, they looked aggres-
9 sive.

10 Q Could you tell what they were shouting?

11 A No, I could not.

12 Q What happened as you ran up to the front door then?

13 A I went up to the front door, and the kids went
14 into the front door, and I locked it.

15 Q Where was your mother at this time?

16 A She was still out by the car.

17 MS. BARLOW: May I approach the witness,
18 your Honor.

19 THE COURT: Yes, you may.

20 Q (By Ms. Barlow) I'll show you what's been marked
21 State's Exhibit 1 for identification. Do you recognize what
22 that is a photograph of?

23 A Yes. That's a photograph of my mother's house.

24 Q And is this the house that you have been testifying
25 to?

1 A He is three.

2 Q And then what happened?

3 A Robert grabbed my son out of my arm while, and I
4 was trying to hold him, I was holding onto Robert, and he
5 was trying to get out of the front door. And I kept pushing
6 it shut, my back was to it. Finally, he got my son away
7 from me and ran down the stairs out through the basement.

8 Q And then what happened?

9 A I went up to try and use the phone again.

10 Q Were you able to get through to the police?

11 A Yes, this time I was.

12 Q What did you tell them?

13 A I just told them the address and that we, you
14 know, that there were three people there. And they wanted
15 their names. I can't remember my exact words. I was in a
16 panic. And I probably sounded really foolish anyway, but I
17 was trying to get some info to her. But I was trying, before
18 they come in the house, all I could hear was my mother
19 screaming downstairs, "Get out of my house, get out of my
20 house."

21 Q Did you hang up then after talking to the police?

22 A No. I'm trying trying to remember. I tried to get
23 through one time and I couldn't get through, I couldn't get
24 the buttons pushed right. And when I did finally get through
25 to them, I did stay on the phone.

1 BY MR. PETRO:

2 Q Mrs. Sandoval, you indicated that James had
3 custody of his three children. Is that correct?

4 A Yes.

5 Q At the time this matter happened. And immediately
6 prior to taking the children, you had not talked with Jim
7 on the phone about taking them; did you?

8 A No.

9 Q And at the time you visited James at his residence
10 or claimed you visited with him at the residence, you didn't
11 indicate to him you were taking the children at that time
12 either, did you?

13 A No.

14 Q You just merely took the children. Is that correct?

15 A Yes.

16 Q Okay. And from there you took the children to,
17 directly to your mother's house. Is that right?

18 A Yes, I did.

19 Q Okay. Now, you indicated that when Jim and the
20 other two defendants showed up at your mother's house you
21 were concerned about your safety. Is that correct?

22 A Yes.

23 Q If you were concerned about your safety, why hadn't
24 you contacted the police prior to taking the children and
25 advising them that there might be some kind of dispute?

1 A I really don't know.

2 Q You just merely took it upon yourself to go ahead
3 and seized the kids?

4 A That's not the word I would use, no.

5 Q But you took them. Is that correct?

6 A I exercised my visitation rights.

7 Q Without any kind of notification?

8 A I was instructed I have permission when I talked
9 to him in Idaho.

10 Q And you talked to him when he was in Idaho.

11 A Right.

12 Q Is that correct? You never talked to him while
13 he was in Utah?

14 A No. I wasn't allowed to.

15 Q Okay. Now, you indicated that Robert, and he's
16 the fellow seated on the left, entered through the front
17 door of the residence. Is that correct?

18 A No, I do not.

19 Q Okay, where did Robert enter?

20 A Entered down at the basement door.

21 Q Robert came into the basement?

22 A Um-hum. (yes)

23 Q Okay. What did Robert do upon entry into the house?

24 A He went into the house and up the stairs to the
25 landing where I was at.

1 standing directly behind it, you were pushed against this
2 wall. Is that right?

3 A Yes.

4 Q Okay. How, when Robert entered did he attempt to
5 hit you or do anything to you?

6 A No, he did not.

7 Q So he just ran upstairs. Is that correct?

8 A Yes.

9 Q Now, where were the three children, do you know?

10 A They were upstairs.

11 Q And who else was upstairs?

12 A My sister.

13 Q Now, Robert ran upstairs, and you don't know what
14 happened when he was up there with your sister other than
15 what you have been told. Is that right?

16 A I, when I ran up after, I did see them scuffling.
17 And when I dialed the phone I saw him, I guess he was search-
18 ing for his glasses. They had been knocked off. And, I
19 really did not see what was going on.

20 Q Okay. So how long after Robert went upstairs did
21 you go upstairs?

22 A Just right behind him.

23 Q Immediately after him.

24 A Yes.

25 Q Okay. And where were the three children when you

1 A I didn't, know.

2 Q Were you dispatched on a report that came from
3 Mr. Sandoval?

4 A I was dispatched on three calls on the same day,
5 generated from him.

6 Q What was the first call you were dispatched on?

7 A It was approximately 11:15. It was an attempt to
8 locate call. I wasn't dispatched anywhere. A female in a
9 red Honda had abducted three children.

10 Q That's what you were told?

11 A that's what I was told. But the caller didn't
12 give any information as to where or where they were going.
13 So it was just a general attempt to locate.

14 Q Did they give you information about who the persons
15 were in the car?

16 A Mrs. Pamela Sandoval was the person in the car
17 who had taken her children from her ex-husband.

18 Q So you had been given that much information?

19 A Yes.

20 Q Did you locate that red Honda?

21 A No. We didn't even know where to start to look,
22 because the information was never given to us as to where the
23 abduction took place or where the individual was going.

24 Q What was the second call?

25 A I was dispatched a little over an hour later to

1 400 South and 604 East, on a keep-the-peace. Mr. Sandoval
2 had located his children and requested police assistance in
3 getting his children.

4 Q Did you go to that location?

5 A I did.

6 Q What did you find?

7 A There was nobody at the residence. There was no-
8 body around to meet me. The place was deserted.

9 Q What did you do then when you found no one there?

10 A As I was at the front door, dispatch put out an
11 officers requested to clear, aggravated assault in progress,
12 that three male Mexicans had entered a home, had forcibly
13 taken the children and they were using a shotgun.

14 Q Did you respond to that call?

15 A I did. It was a Code 3 response to the residence.

16 Q Was that Mrs. Preece's residence in Oakmont Lane?

17 A It was.

18 Q What did you find when you arrived there?

19 A While enroute, dispatch had also put out that some
20 three suspects had left in a gold and white Chevrolet pickup
21 truck. And Officers Halvorsen and Mason made a stop on that
22 pickup truck, and I continued alone to that residence. When
23 I arrived, Mrs. Preece was standing in the doorway, hanging
24 onto the door jamb for balance.

25 Q When you say "the doorway," was that the double-

1 out where Pam lives." And when we got up to Pam's house,
2 we had parked across the street. And we had seen the car
3 backed up in there, and we saw Pam and her mother loading the
4 car up. So I told Jimmy that maybe we better go over to the
5 telephone. And he told me he had already called the officers.
6 And I said maybe we better go do this again, call the police
7 and tell them what's happening.

8 Q And, did he go to the telephone?

9 A Yes.

10 Q Now, did Pam and her mother see you as you sat
11 watching them?

12 A I don't think they could see us from where we were
13 at, but they drove right by us and they looked right at us.

14 Q Why didn't, when you first arrived there, why
15 didn't you just merely go up to her residence and stop her
16 there?

17 A Because I thought it would be wiser if we waited
18 until an officer come.

19 Q All right. And then after they drove away what
20 happened?

21 A Well, they drove right by us. And then I told
22 Jimmy, I says "Well, what should we do?" I said "She might
23 cut out with the kids and leave the state, you know how she
24 is." And so what we did was we followed, we didn't follow
25 them really, they went one way and we went the other way; and

1 then we stopped at my ex-wife's house who lives kind of in
2 the same neighborhood as Pam.

3 Q You got some information from her?

4 A And I asked, and I went and knocked on her door
5 and I asked her --

6 Q Okay. Don't talk about what you asked her. But
7 you did get some information from her. Okay. And then where
8 did you go from there?

9 A And then we drove up to Pam's mother's house.

10 Q And that's the residence that's located on Oakmont
11 Lane?

12 A Yes.

13 Q Now, after you arrived what did you see?

14 A When we pulled up, Pam and Shenay and Shane --

15 Q Okay. Who are Shenay and Shane?

16 A Jimmy's and Pam's children.

17 Q Okay.

18 A Were coming out the front door, walking down the
19 steps. The mother was standing by the door. Car --

20 Q That's Mrs. Preece?

21 A Mrs. Preece. Car doors were open. She was coming,
22 the mother was standing there and Jesse was coming out and her
23 son standing there, too, if I remember right, by the door.

24 Q By the basement door?

25 A By the basement door. And they were coming out.

1 had ahold of the little boy, Jesse. And the grandmother had
2 the little boy by the neck. So she was tugging and I didn't
3 tug, I just followed her in. We went right through the
4 basement door into the house.

5 Q With the little boy?

6 A With the little boy between us.

7 Q All right. And then what happened?

8 A Then I got the little boy away from the grandmother.
9 And then I did, I mean, I couldn't go out the front door
10 because he had --

11 Q Who is "he"?

12 A Her son.

13 Q Uh-huh.

14 A Was blocking the way. So I just grabbed the little
15 boy and went running through the house, and then I went run-
16 ning up to the front door up, while he run up the stairs,
17 tried to go out the front door; and Pam jumped off the top
18 banister and jumped me, grabbed ahold me, and was screaming
19 and stuff and trying to scratch my eyes out, knock my glasses
20 off, was hitting on me.

21 Q Okay. And then what happened with Jesse, the little
22 boy?

23 A Oh, he was still in my arms, at the time.

24 Q And then what happened?

25 A I was trying to go out the front door, and Pam was

1 faster than that?

2 A They didn't respond.

3 Q By the time the officer got there, you had left?

4 A They had already left.

5 Q And you went to your ex-wife's house?

6 A Yes.

7 Q What made you think that perhaps they had gone to
8 Oakmont Lane?

9 A Well, what makes me think to Oakmont Lane? Because
10 the grandmother was in the car when they drove by. Where
11 else would they be going?

12 Q But you didn't go straight up to Oakmont Lane, --

13 A No.

14 Q -- you went to your ex-wife's house?

15 A I went to my ex-wife's to see if Pam had left the
16 children there.

17 Q Did you call the police and say "we think they
18 might be at Oakmont Lane" instead of this other address in
19 South Provo?

20 A I didn't call the police, Jimmy did.

21 Q Did any of you call the police?

22 A Jimmy.

23 Q After you left the address at, what is it, 6th
24 South and 4th East, excuse me, 6th East and 4th South, after
25 you left that address, you went to your ex-wife's house;

1 did you go then?

2 A I went back up the stairs.

3 Q Did you go all the way up or just to the level?

4 A Just to the level.

5 Q And you were looking for your glasses there?

6 A Um-hum.

7 Q And then where did you go?

8 A Then I went back down the stairs.

9 Q Where was Mrs. Preece while you were doing this?

10 A She was just standing there screaming.

11 Q Where were you when she jumped in the air to land

12 on your glasses?

13 A I was down on the bottom. I was, just as she went

14 up the steps.

15 Q She, what, went past you, and back and up the steps?

16 A She was going up the steps where Pam was on the

17 phone.

18 Q When you say she jumped in the air and landed on

19 your glasses, how did she do that?

20 A Just somebody jumping up and jump on something.

21 Q Did she jump and land with her feet or with her

22 knees?

23 A Yes, both feet.

24 Q Did you see her land on her knees?

25 A I seen her when she jumped and she landed and she

1 A Yes. I never denied her child visitations.

2 Q Okay. And did she indicate she wanted visitation
3 when she got, when you got into town?

4 A Well, when she called me and she asked me about
5 that, she was pretty radical. She was threatening me left
6 and right about taking the kids and just, and I got paranoid.
7 I told her, "If I come down, we'll sit down and talk about
8 it."

9 Q All right. And then when you got into town, into
10 Provo, did you ever hear from her before this incident took
11 place?

12 A No.

13 Q Now, the children were taken, and I guess there's
14 no question it's by Pam that they were taken.

15 A Um-hum. (affirmative)

16 Q Where were they when they were taken?

17 A Out, well, in the front of the house.

18 Q And did you initially know who took the children?

19 A No, not at, because I was inside the house.

20 Q Okay. Did you have a suspicion who took them?

21 A When I, while I was making them lunch, I was making
22 them lunch and washing them clothes at the same time. And
23 when I glanced out there, the only thing I seen was this
24 little red car pulling away. And I came out, and I ran out
25 to the road and looked down, and here this car is just taking

1 off. And I didn't know what, you know, there's been so many
2 kidnaps, you know, in this country. So I thought, well,
3 I'll call the cops, I'll call the police officers.

4 Q Okay. Did you have, after, before that happened,
5 did you have any conversation with Pam in the front yard?

6 A No. We didn't even talk.

7 Q And you called and you talked to the police. Is
8 that correct?

9 A Officer Peterson.

10 Q And you indicated the children had been taken?

11 A Yes.

12 Q All right. What happened from that point on?

13 A Well, he was telling me --

14 Q Okay, don't talk about what he was telling you.
15 What happened from that point on?

16 A Well, I sat down. I didn't, I didn't know what
17 really to do. I didn't. So I thought, well, I'll call my
18 brother. So I called my brother Bob to come up and to help
19 me.

20 Q And did he arrive?

21 A Yes.

22 Q At your place?

23 A He came.

24 Q All right. Did Patrick Dominquez ever come to
25 your residence?

1 Q -- and you didn't bother to call and tell them
2 that wasn't where they were anymore?

3 A No.

4 Q Why, when you got up there and saw that Pam didn't
5 want to talk to you and that Mrs. Preece, as you say, was
6 being hysterical, why didn't you just leave it and call the
7 police?

8 A Because Pam was always threatening me that she was
9 going to take the children. I became --

10 Q She works here in Utah, doesn't she?

11 A I don't know.

12 Q She lives here?

13 A She, she, she comes and goes, yes.

14 Q Well, has she ever lived elsewhere?

15 A Yes.

16 Q With you?

17 A No.

18 Q Isn't it true that Detective Maak said "Well, why
19 didn't you just park your truck in front of their car so
20 they couldn't leave, and go call the police"? He mentioned
21 that to you, didn't he?

22 A Um-hum. (yes)

23 Q And you said "Yes, I could have done that"?

24 A Um-hum. (yes)

25 Q But you didn't do that?

1 occurred, in that these individuals forced their way in and
2 began immediately to commit assaults upon these individuals.

3 Thank you, your Honor.

4 THE COURT: All right, thank you, counsel.
5 Where are the other exhibits? We have some photographs that,
6 would you get those for me?

7 I'll take time and look at this, counsel. I would
8 think that within a half-an-hour I'll be able to give you a
9 decision. So at this time we'll be in recess or out that
10 long. When I have gone over it, I'll call you back and
11 we'll let you know.

12 (WHEREUPON, the Court recessed at 2:17 o'clock
13 p.m. and reconvened at 3:02 o'clock p.m., as follows:

14 THE COURT: We'll continue with Case
15 No. CR-87-497, the State of Utah, Plaintiff, vs. James
16 Sandoval, and Robert L. Sandoval, and Patrick Dominquez.
17 The record should show that the state is present, represented
18 by counsel, that the defendants are present represented by
19 their counsel.

20 The Court has reviewed the evidence in this matter
21 and has reviewed the law as I see it applicable to this case.

22 In this matter the defendants are each charged with
23 two Counts, one being burglary, a second degree felony, in
24 violation of Section 76-6-202, Utah Code Annotated, 1953, as
25 amended, in that they, on or about September 6, 1987, in

1 Utah County, Utah, did unlawfully enter or remain in the
2 dwelling of LeAnn Preece, with the intent to commit assault
3 upon LeAnn Preece, David Preece, and Pamela Sandoval. Count
4 II, assault, a Class B misdemeanor, in violation of 76-5-102,
5 Utah Code Annotated, 1953 as amended, in that they, on or
6 about September 6, 1987, in Utah County, Utah, did knowingly
7 and intentionally assault LeAnn Preece, David Preece, and
8 Pamela Sandoval, by attempting to do bodily injury to LeAnn
9 Preece, David Preece, and Pamela Sandoval, with unlawful
10 force or violence.

11 The elements of the charge of burglary in this
12 matter appear to the Court to be these:

13 1. That on or about the 6th of September, 1987,
14 at Utah County, Utah, the defendants did unlawfully enter or
15 remain in the dwelling of LeAnn Preece, 3, with the intent
16 to commit an assault upon LeAnn Preece, David Preece, and
17 Pamela Sandoval, or that they did so knowingly and intention-
18 ally.

19 Burglary is defined in the statute, to which refer-
20 ence is made in the Information, is this:

21 "A person is guilty of burglary if he enters or
22 remains unlawfully in a building or a portion of a building
23 with an intent to commit an assault on any person. Burglary
24 is a felony of the third degree unless it was committed in
25 a dwelling, in which event it is a felony of the second

1 degree."

2 An assault, by statute, 76-5-102, is defined as:
3 "An attempt with unlawful force or violence to do bodily
4 injury to another, or (b) a threat accompanied by a show of
5 immediate force or violence to do bodily injury to another."

6 "An attempt under the law is described and defined
7 as for the purposes of that part is a person is guilty of
8 an attempt to commit a crime if acting with the kind of
9 culpability otherwise required for the commission of the
10 offense, he engages in conduct constituting a substantial
11 step toward the commission of the offense."

12 The term "bodily injury" is defined in the statute
13 as being "bodily injury means physical pain, illness or any
14 impairment of physical conditions." And, "a statute deter-
15 mines and rules that a person enters or remains unlawfully in
16 or upon premises when the premises or any portion thereof
17 at the time of the entry or remaining are not open to the
18 public and when the actor is not otherwise licensed or
19 privileged to enter or remain on the premises or such portion
20 thereof."

21 There's another statute that applies, it seems to
22 the Court, in this circumstance; and that is Section 76-2-202:
23 "Criminal responsibility for direct commission of offense or
24 for conduct of another. Every person acting with the mental
25 state required for the commission of an offense, who directly

1 commits the offense, who solicits, requests, commands,
2 encourages or intentionally aids another person to engage
3 in conduct which constitutes an offense, shall be criminally
4 liable as a party for such conduct."

5 The statute further defines the words "intentional-
6 ly, or with intent, or wilfully, or knowingly, or with
7 knowledge, as follows:" This is Section 76-2-103. "Inten-
8 tionally or with intent or wilfully with regard to the nature
9 of his conduct, a person engages in conduct, intentionally
10 or with intent or wilfully with respect to the nature of his
11 conduct or to a result of his conduct when it is his con-
12 scious objective or desire to engage in the conduct or cause
13 the result." 2. "Knowingly or with knowledge, with respect
14 to his conduct or his circumstances surrounding his conduct
15 when he is aware of the nature of his conduct or the existing
16 circumstances, a person acts knowingly or with knowledge with
17 respect to a result of his conduct when he is aware that his
18 conduct is reasonably certain to cause the result."

19 "A person engages in conduct with criminal negli-
20 gence or is criminally negligent with respect to circumstances
21 surrounding his conduct as a result of his conduct when he
22 ought to be aware of a substantial and unjustifiable risk
23 that circumstances exist or the results will occur."

24 Now, how does all of that apply to the case that we
25 have before us today?

1 It appears to the Court that it has been establish-
2 ed beyond any reasonable doubt: that the incident in this
3 case occurred on the 6th of September 1987; that it did occur
4 in Utah County; that the defendants did unlawfully enter or
5 remain in the dwelling of Mrs. Preece.

6 There is nothing in the record in any way to suggest
7 that they had any right to be in that buidling, in that
8 dwelling, under the circumstances; even though they may have
9 been interested in retrieving these children. And I think
10 that's what their intent was, is to retrieve the children.
11 They had no legal right, no business going upon the premises
12 of Mrs. Preece under the circumstances and without her
13 permission.

14 It's obvious, it's on the record, even taking the
15 evidence the most favorable to the position of the defen-
16 dants in any respect, that they did force their way into
17 that building, into that dwelling, over the objection of
18 Mrs. Preece and of Mrs. Sandoval and of David Preece.

19 The question then resolves down to whether or not
20 they had an intent to commit an assault as they entered upon
21 that undertaking.

22 I think the facts are established beyond a reason-
23 able doubt, that these men were intent upon regaining posses-
24 sion, irrespective of what it took and without any assistance,
25 that they were going to do it by self-help.

1 The evidence appears to be clear and unrefuted
2 that Pamela did call James after she got up to her mother's
3 and told him that she had the children, they were there for
4 visitation, and that James said "I'm coming to get you"; that
5 Pamela felt threatened by that circumstance.

6 The evidence is certainly clear that Robert went
7 in the basement door of that dwelling, and in a contest with
8 Mrs. Preece over the physical possession of the one minor
9 child, the testimony of Mrs. Sandoval is that after they
10 got into the building that she scuffled with Robert in an
11 attempt to get her son away from Robert, the brother of the
12 father of the child; that Robert hit her, on the head, that
13 he stomped on her foot.

14 The evidence is unrefuted and agreed upon that
15 Robert and Mrs. Preece engaged in a scuffle over the posses-
16 sion of the child, and that that scuffle ensued from the
17 outside into the building, and that Robert pursued the child
18 and Mrs. Preece into the building. And the Court finds that
19 there is no doubt, any reasonable doubt, about the fact that
20 Mrs. Preece was pushed and shoved and that she did sustain
21 injury.

22 There is no dispute from anyone's part that there
23 was a considerable amount of scuffling and running about in
24 that place, there was a lot of anger exhibited. And the
25 evidence, irrespective of whether or not the poker was

1 actually used by James, the evidence is clear that he was
2 in a position standing over Mrs. Preece with the poker in
3 a spear-position and only relinquished that position when
4 David came upon the scene with the gun in his hand and
5 ordered them out or that he would shoot.

6 It appears to the Court, of course intent is a
7 subjective thing, no one can look into one's mind and tell
8 what is there. The only way we can arrive at that is by the
9 actions that one undertakes. And it appears clear to the
10 Court that there can be no doubt, no reasonable doubt, that
11 these men had the intent to enter that building, that they
12 had the intent to take whatever steps were necessary, to
13 inflict whatever injury was necessary to gain possession of
14 those children. They had the physical force, they had the
15 ability, they had a show of force. There were three men
16 against two women and a child. There isn't any question that
17 these men, in the view of the Court, were acting intentional-
18 ly, that they were acting knowingly, the consequences of what
19 they were doing; and that evidence of their intent to commit
20 assault is further substantiated by the fact that they did in
21 fact perpetrate and inflict injury upon Mrs. Preece and upon
22 Mrs. Sandoval.

23 So that the case that the Court has found and the
24 Court believes that the perpetration of a battery necessarily
25 implies intent. While "intent" may not--"attempt" may not

1 imply a battery or a completion of the act, the completion
2 of the act certainly includes the attempt that the statute
3 prohibits.

4 So the Court, consequently, finds beyond a reason-
5 able doubt that these men, and each of them, did have the
6 intent when they entered that building to perpetrate an
7 assault upon the occupants thereof.

8 The Court believes that they are each responsible,
9 under the circumstances, for the actions of the others, since
10 it was a concerted effort on their part, they were aiding
11 and abetting each other when they went into that building,
12 and that, therefore, under the statute they are all three
13 charged as principals.

14 So the Court, consequently, finds each of you men
15 guilty of the charge contained in Count I of the Information.

16 With respect to Count II, that being the assault
17 charge, it appears to the Court that since that is neces-
18 sarily an included offense with the Count I of burglary,
19 the Court could not find them guilty of Count I without
20 finding then that they are guilty of Count II, that being
21 assault. I don't believe that the law would permit them to be
22 punished or charge of convicted of that Count II.

23 The Court refers in that respect to the case of
24 State of Utah vs. Bradley, 19 Utah Advance Report 4, which
25 makes reference to a case of State vs. Hill, 674 Pacific 2d

1 96, and State vs. Baker, 671 Pacific 2d 152, when it indicates
2 that those charges then as a matter of law stand in the
3 relationship of greater and lesser offenses, and the defen-
4 dant cannot be convicted or punished for both.

5 So the Court finds in this circumstance and believes
6 that the finding of guilt on the first Count necessarily
7 includes a violation of at least Count II and, therefore,
8 that they cannot be punished for both Counts and that Count
9 II should, therefore, for that reason be dismissed.

10 Gentlemen, the law provides that you cannot be
11 sentenced sooner than two nor more than 30 days from today.
12 It does permit you to have your case reviewed by Adult
13 Probation & Parole for the purpose of that Department con-
14 ducting an investigation and report to assist the Court in
15 determining what penalty should be imposed in this case.

16 You, of course, after sentence is imposed, whatever
17 that will be, have a right to appeal this decision of the
18 Court. You may do that within 30 days. And your counsel
19 will advise you concerning that.

20 The Court will remain you again after the sentence
21 has been imposed in this matter of your right to appeal the
22 decision of the Court to the Utah Supreme Court.

23 Do you have a request in that regard, Mr. Petro?

24 MR. PETRO: We would like to have it
25 referred.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 880106-CA
v. :
JAMES L. SANDOVAL, ROBERT L. : Category No. 2
SANDOVAL, and PATRICK :
DOMINQUEZ, :
Defendants-Appellants. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A CONVICTION OF BURGLARY, A
SECOND DEGREE DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 76-6-202 (1978). IN THE
FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH, THE HONORABLE
CULLEN Y. CHRISTENSEN, JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
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BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This matter is an appeal of the conviction of defendants of a second degree felony burglary. Jurisdiction over appeals from the district court of a second degree felony conviction is conferred by Utah Code Ann. § 78-2a-3(2)(e) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether there was sufficient evidence introduced at trial to support the judge's finding, as trier of fact, that defendants had the requisite intent to support a conviction for burglary.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

For purposes of this brief, the State relies on the following statutory provision.

Utah Code Ann. § 76-2-102 (1978) (amended 1983):

Culpable mental state required--Strict liability--Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state, intent, knowledge, or recklessness shall

suffice to establish criminal responsibility. An offense shall involve strict liability only when a statute defining the offense clearly indicates a legislative purpose to impose strict liability for the conduct by use of the phrase "strict liability" or other terms of similar import.

Utah Code Ann. § 76-6-202 (1978):

Burglary--(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Utah R. Civ. P. 52(a) (1988):

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. .

STATEMENT OF THE CASE

Defendants were charged with Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1978) and Assault, a class B misdemeanor, in violation of Utah Code Ann. § 76-5-102 (1978). Defendants were tried on April 7, 1988, in the Fourth Judicial District Court, by the Honorable Cullen Y. Christensen, sitting without a jury. The Court convicted defendants of the Burglary charge and dismissed the Assault charge as a lesser-included offense under State v. Bradley, 78 Utah Adv. Rep. 2 (filed March 15, 1988).

On May 20, 1988, defendants were sentenced separately to a term of one to fifteen years in the Utah State Prison and a fine of \$750.00 plus \$187.50 to the Victim Reparation Fund and to make restitution in the amount of \$944.21. Execution of their sentences was suspended and the defendants placed on probation with certain conditions.

Notice of Appeal was filed for the defendants on June 20, 1988 and a Certificate of Probable Cause for defendants was signed on June 29, 1988, by Judge Christensen.

STATEMENT OF FACTS

Prior to September 6, 1987, defendant James Sandoval was divorced from Pamela Sandoval and he retained custody of their three children (R. 86). Defendant James Sandoval was living with the children in Pocatello, Idaho, and Pamela had reasonable visitation right under their divorce decree (R. 86). Prior to September 6, Pamela telephoned defendant James at his work in Idaho and asked if he was travelling to Provo for the

Labor Day weekend which included September 6 (R. 86-87). He told Pamela that if he came down, she could see the children (R. 87). She found that he had travelled to Provo that weekend when she saw his vehicle at his parents' house (R. 87). She tried to telephone him several times but was unable to speak with him (R. 87-88).

On Sunday, September 6, 1987, Pamela went to the Sandoval home to exercise her visitation rights (R. 87). Her children were outside the house when she arrived and she went to them (R. 88). She saw defendant James at the house and spoke briefly to him then he went into the house and eventually stood at the door watching Pamela and the children (R. 88). Pamela asked the children if they wanted to go for a ride with her and they got into the car (R. 89). Defendant James said nothing to them as they left (R. 89). Pamela took the children to her mother's house in Provo and left them with her younger brother, David Preece, while she and her mother, Le Ann Preece, went to Pamela's house for clean clothing for the children (R. 89-90).

While at her mother's house, before leaving to get the clothing, Pamela received a phone call from the girlfriend who had driven the car when she picked up the children (R. 102-03). From that call, Pamela became aware that her ex-husband, defendant James, was angry so she telephoned him (R. 103). She told him that she was visiting with the children and that they were fine (R. 104). He then threatened her, saying "Well, I'm going to get you. . . . I'm coming to get you, Pam, and you'd better watch your ass, I'm coming to get you." (R. 104.) He

repeated that several times and Pamela felt threatened by him (R. 104).

Pamela retrieved a small trunk from her house which contained the children's clothes and toys (R. 90). When Pamela and her mother returned to the mother's house, the children ran out of the house toward the car (R. 90). As they did so, the three defendants pulled up in a pickup, got out and started running toward the house, yelling (R. 90-91 and 108). Pamela was frightened and tried to get the children into the house (R. 91).

The house is a split level with a front door half-way between the levels which opens to an entry way and stairs leading up or down (Photos, State's Exhibit 1, 6, 7, and 8; R. 91-92). Also at the front of the house is a newly built gray door next to the garage and leading into a room on the lower level (Photo, State's Exhibit 1 and R. 92 and 110). When Pamela ran toward the house with the children she went into the front door and locked it (R 91). Her mother was still outside the home, by the automobile in the driveway (R. 91).

Inside the house Pamela went up the stairs to the telephone to call the police and heard a commotion downstairs then saw defendant Robert Sandoval run up the stairs (R. 92). She was holding her three-year-old son in her arms but defendant Robert grabbed him away from her and tried to go out the front door (R. 92-93). In the course of struggling over the child, defendant Robert struck Pamela on the head and "stomped" on her foot (R. 99). Pamela and Robert continued to struggle over the child, then defendant Robert got the child away and ran

downstairs to the basement (R. 93). Pamela went back upstairs to the phone and was able to get through to the police (R. 93). She could hear her mother downstairs shouting to the defendants to get out of the house (R. 93).

Pamela was still on the phone when she turned and saw her mother coming up the stairs with defendants James and Robert behind her (R. 94). Pamela saw defendant James push her mother head long into the front door and then lift a fireplace poker as if to stab Mrs. Preece with it (R. 94). At that point, Pamela's 15-year-old brother, David, pointed an empty gun at defendants and told them to leave (R. 94). Defendants dropped the fireplace tools and left the house going back down the stairs and through the basement door (R. 95).

Mrs. Preece testified that, when defendants first arrived at her house, they ran toward the house, screaming (R. 108-09). She had never met defendant Patrick Dominguez before but knew defendants James and Robert Sandoval (R. 105) and had previously told the Sandovals to stay away from her property (R. 117-18 and 129-30).

When the defendants ran toward the house as Pamela pushed the children in the front door and locked it, David, her brother, closed and locked the gray basement door (R. 109). Mrs. Preece was startled by the arrival of defendants and still stood in the driveway, by the car she had just gotten out of (R. 108-09 and 119). She saw defendant Robert try to get in the front door then he evidently ran to the other door (R. 110 and 121). Defendant Robert knocked on that basement door and David Preece,

thinking it was his mother, unlocked it (R. 132). Defendant Robert shoved the door open, sending David back against the wall behind the door and hitting David with the door (R. 132). David saw defendant Robert run up the stairs and ran after him and saw the struggle between Pamela and defendant Robert (R. 132-33).

Mrs. Preece saw that the basement door was open and ran to it and tried to close and block it (R. 110). One or both of the defendants still outside (James and Patrick) kicked the door, leaving marks and indentations in the new door (R. 110). The kicking jammed the lock so that Mrs. Preece was unable to secure the door (R. 110). The two defendants forced their way into the room and defendant James grabbed Mrs. Preece and knocked her to the floor (R. 111 and 123-24). Defendant James then kicked her and he and defendant Patrick grabbed her as she tried to crawl away (R. 111). She was screaming at them to leave the house and struggled toward the door of a downstairs bathroom (R. 111). She was able to open the door to the bathroom where her doberman was shut in (R. 111). Defendant James threatened to kill the dog as the dog came out then it cowered back in the bathroom (R. 111).

At one point, as defendants James and Patrick came in the basement door, they grabbed fireplace tools including the stand, which were on the hearth near the door (R. 112). Defendant James still had the poker in his hand and he and defendant Patrick were still trying to hold Mrs. Preece as she made her way to the stairs leading to the upper floor (R. 112-14). They both were hitting her as she approached the stairs (R. 114-15).

As Mrs. Preece approached the stairs, defendant Robert came down them holding Pamela's youngest child (R. 115). Defendant Robert handed the child to defendant Patrick and Mrs. Preece was able to get away and start up the stairs (R. 115). As she started up the stairs, defendant James came after her and pushed her on to the landing and into the doors (R. 115). She then saw David with the gun at the top of the stairs telling defendants to get out (R. 115). During this time the hardwood banister and the steel front door sustained damage which, inferentially, occurred during the struggle (R. 116-17).

David Preece had seen defendants arrive and locked the basement door (R. 131-32). After the door was forced open, David followed defendant Robert up the stairs and saw him struggle with Pamela (R. 132-33). David tried to get the two other children into another room so that they wouldn't be hurt and then helped Pamela dial the police (R. 133). He heard screaming and remembered the competition rifle in his mother's room (R. 133). He retrieved it and pointed it at defendant James who was holding a fireplace poker as if to spear Mrs. Preece in the entry way (R. 133). When David pointed the gun and told defendants to leave, they did (R. 134).

Two or three days after the occurrence, Pamela took photographs of the bruises sustained by Mrs. Preece and these were entered into evidence (R. 95-96 and Photos, State's Exhibit 11).

The defendants testified that they had never forced their way into the house and that they had never struck or pushed

Pamela Sandoval or LeAnn Preece (R. 166, 188 and 196).

Evidently, defendant James had called the police regarding his children being taken at approximately 11:15 a.m. on September 6, 1987 (R. 139). He did not tell the police where the alleged abduction occurred or where the car with the children might be going (R. 139). An hour later in response to a second call by James, police went to Pamela's home to assist James in getting his children (R. 139-40). When the officer arrived the house was deserted and, as he was at the door, a call went out for officers to respond to the Preece residence on an assault in progress (R. 14). Defendant James was unable to explain why he directed police to his ex-wife's house but never called them again when he went to the Preece residence (R. 118).

SUMMARY OF ARGUMENT

Burglary, in this case, must be proven by showing that defendants had both the general intent to unlawfully enter Mrs. Preece's residence and the specific intent to commit an assault. Such a specific intent need not exist at the time of entry because the elements of burglary include entering or remaining with an unlawful purpose.

While unlawful entry alone may not support a burglary conviction, the trial court correctly inferred defendants' specific intent from the circumstances surrounding their entry into the Preece home. One defendant had threatened Pamela over the phone and the defendants forced their way into the house in a tumultuous fashion which obviously could cause injury. Two of the defendants, immediately upon entering the house, began to

kick and strike Mrs. Preece and the other raced upstairs and fought with Pamela. From the circumstances, the judge could and did reasonably infer an intent to assault on the part of defendants.

ARGUMENT

POINT I

THE JUDGE'S FINDING, FROM THE FACTS AND REASONABLE INFERENCES, THAT DEFENDANTS INTENDED TO COMMIT ASSAULT IS SUPPORTED BY AMPLE EVIDENCE TO SURVIVE APPELLATE REVIEW.

The Utah Supreme Court has recently established the appellate standard of review for bench trials in State v. Walker, 743 P.2d 191 (Utah 1987). Since there is no rule of criminal procedure specifically dealing with that point, the Court cited Rule 52(a) of the Utah Rules of Civil Procedure (1988) and established the "clearly erroneous" standard for reviewing a trial court's finding. The Court said:

On January 1, 1987, however, new Utah Rule of Civil Procedure 52(a) took effect, providing:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

(Emphasis added.)

. . . .

The language of Rule 52(a) is similar to the Federal Rules of Civil Procedure. Federal case law has defined the standard of review in the federal rule and Wright & Miller summarizes that standard as follows:

[I]t is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. All of this is true in reviewing a jury verdict. It is not true when it is findings of the court that are being reviewed. Instead, the appellate court may examine all of the evidence in the record. It will presume that the trial court relied only on evidence properly admissible in making its finding in the absence of a clear showing to the contrary. It must give great weight to the findings made and the inferences drawn by the trial judge, but it must reject his findings if it considers them to be clearly erroneous.

Wright & Miller, Federal Practice and Procedure, § 2585 (1971) (citations omitted).

The definition of "clearly erroneous" in the federal rule comes from United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 543 92 L.Ed. 746 (1948):

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Further clarification is offered by Wright & Miller:

The appellate court . . . does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

Thus, the content of Rule 52(a)'s "clearly erroneous" standard, imported from the federal rule, requires that if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside.

743 P.2d at 192-93.

For this Court to overturn the trial court's finding of intent and verdict of guilt in this case, it must find that the trial court was clearly erroneous in its decision. This Court would have to rule that the verdict and finding were against the clear weight of the evidence. Such a ruling cannot be made in this case; the clear weight of the evidence does support the trial court's finding of intent and its verdict.

The crime of burglary has two intent elements. The State must prove first that a defendant intentionally, knowingly or recklessly entered or remained unlawfully in a building. See Utah Code Ann. § 76-2-102 (1978) (amended 1983) for culpable mental state requirement. Defendants do not dispute in their brief that they entered and remained unlawfully at the Preece residence. The evidence at trial also supports the finding of that element.

The specific intent element in this case was that the defendants entered the Preece residence with the intent to commit assault. Defendants' main contention is that their intent in going in the house was to retrieve the children so the trial court erred when it found that the defendants had the requisite specific intent to commit assault. The intent with which a person acts is rarely susceptible to direct proof and courts usually must determine intent based on circumstantial evidence. As the Utah Supreme Court said in State v. Peterson, 453 P.2d 696 (Utah 1968):

It is true that the State was unable to prove directly what was in the defendant's mind relative to doing harm to the victim; and that he in fact denied having any such intent. However, his version does not establish the fact, nor does it ever necessarily raise sufficient doubt to vitiate the conviction. If it were so, it would lie within the power of a defendant to defeat practically any conviction which depended upon his state of mind. As against what he says, it is the jury's privilege to weigh and consider all of the other facts and circumstances shown in evidence in determining what they will believe. This includes not only what was said and what was done, but also the conduct shown, which in this instance they may well have regarded as speaking louder than the defendant's later defensive claims as to what his intentions were. This is in accord with the elementary rule that a person is presumed to intend the natural and probable consequences of his acts.

453 P.2d at 697.

The fact that defendants claim that they never struck anyone nor forced their way in nor intended to hurt anyone does not make the trial court's finding of intent "clearly erroneous." The court was able to judge the credibility of the witnesses and

determine that the testimony of the State's witness was more consistent and credible. A reading of the testimony of defendants displays inconsistencies between the stories told by each defendant and inconsistencies within each defendant's testimony.

The Utah courts have consistently held that a requisite specific intent to support a burglary conviction may be inferred from the circumstances surrounding the entry. The Utah Supreme Court said in State v. Brooks, 631 P.2d 878 (Utah 1981):

Since the intent to commit a theft is a state of mind, which is rarely susceptible of direct proof, it can be inferred from conduct and attendant circumstances in the light of human behavior and experience.

631 P.2d at 881.

More recently, in State v. Porter, 705 P.2d 1174 (Utah 1985), the Utah Supreme Court upheld a conviction in which the trial court had informed the jury that they could infer intent from all of the defendants' conduct at the scene on the date of the offense. The trial court had:

clarified a point of law regarding how the jury may infer an actor's intent.

We have defined an "inference" as: a logical and reasonable conclusion of the existence of a fact in the case, not presented by direct evidence as to the existence of the fact itself, but inferred from the establishment of other facts from which, by the process of logic and reason, based upon common experience, the existence of the assumed fact may be concluded by the trier of the fact.

Wyatt v. Baughman, 121 Utah 98, 109, 239 P.2d 193, 198-99 (1951). An inference goes to the

trier of fact to be weighed along with the contravening evidence because such inference, like all inferences capable of being drawn from evidence intrinsically containing the seeds from which logical deductions may be made, rests on basic facts which remain in the case. Id. at 110, 239 P.2d at 198-99

[3] Burglarious intent "is a mental state of the actor. [T]he trier of fact must resort to reasonable inferences based upon [an] examination of the surrounding circumstances to reasonably infer its existence." Farno v. State, 159 Ind.App. 627, 629, 308 N.E.2d 724, 725 (1974); see State v. Sisneros, Utah, 631 P.2d 856 (1981); State v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961); see also State v. Brooks, Utah, 631 P.2d 878 (1981); State v. Tellay, 7 Utah 2d 308, 324 P.2d 490 (1958). Intent with which an entry is made is rarely susceptible of direct proof. It is usually inferred from circumstantial evidence: the manner of entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation. See 12A C.J.S., Burglary §§ 85 and 104; 13 Am.Jur.2d, Burglary § 52.

705 P.2d at 1177. See also State v. Sisneros, 631 P.2d 856, 859 (Utah 1981); State v. Wilson, 701 P.2d 1058, 1060 (Utah 1985), and State v. Pitts, 728 P.2d 113, 116-17 (Utah 1986).

In the present case, the trial court did infer the defendants' specific intent from their conduct. He found that defendants had forced their way into the Preece residence (R. 230); that defendant James Sandoval had threatened Pamela over the phone before arriving at the house (R. 231); that there was a scuffle between defendant Robert Sandoval and Mrs. Preece and that she was pushed and shoved and was injured (R. 231); that there was a lot of scuffling and anger and running about the house (R. 231); that defendant James had threatened Mrs. Preece with

the fireplace poker (R. 232); and that the defendants has indeed inflicted injury on Mrs. Preece and Mrs. Sandoval (R. 232). (A copy of the trial court's findings as given in the transcript is attached in the Addendum.) These circumstances were well supported by both the State's and the defendants' evidence. The evidence also showed that the defendants had approached the house and its occupants in a tumultuous manner and forced their way in, knocking people away with the force of their entry. The trial court's inference of defendants' intent from this conduct is supported by the clear weight of the evidence and should not be disturbed.

In their brief, defendants argued that their intent in entering the house was to retrieve the children so they couldn't have intended to assault anyone. They then argue that the court must have confused general with specific intent when it found that defendants intended to do whatever necessary to retrieve the children. Defendants misunderstand the court's finding.

The court's decision that defendants intended "to take whatever steps were necessary, to inflict whatever injury was necessary to gain possession of those children " (R. 232) is not a finding solely of general intent. The court found that defendants intended to enter or remain unlawfully in the Preece residence (R. 230) then found that they intended whatever was necessary to accomplish their purposes. The manner of their entry and the injuries inflicted inside support the court's inference that defendants intended to assault, if necessary, to accomplish their ends.

Defendants also maintain that the specific intent to commit assault must exist at the time of entry. They cite State v. Evans, 74 Utah 389, 279 P. 950 (1929) in support of that theory. In 1929, the law read that, in order to commit a burglary, defendant must enter a building with the intent to commit a larceny. That is no longer the full law in Utah. Since 1973, the law is that a burglary is committed when a person "enters or remains unlawfully in a building" and with the intent to commit a felony or theft or assault. A reading of the second case cited by defendants for their proposition confirms that the intent to commit a theft need not be formed at the time of entry into the building. In State v. Pitts, 728 P.2d 113 (Utah 1986), the conviction for burglary was upheld. Defendant had lawfully entered a convenience store but, when he left the store, possessed a bank envelope which had been in a back office which was closed to the public. A day later he was stopped in a car which he had borrowed and not returned. The bank envelope and checks from the convenience store were found in his possession and other missing store checks were later rejected as forged by the bank. The Supreme Court said that there was sufficient evidence to affirm that defendant's burglary conviction. They held that "[e]ven an innocent entry into the office would not acquit defendant if he remained therein with the unlawful purpose of stealing the checks." 728 P.2d at 116. The Court also said that unlawful entry into a private area alone may not support a finding of intent but, coupled with evidence of other surrounding circumstances, specific intent was properly inferred.

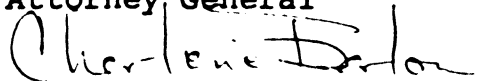
In the present case, the trial court correctly inferred from all of the surrounding circumstances that defendants entered or remained unlawfully in the Preece residence with the intent to commit assault. Before they entered, doors were locked against them but they forced their way in. After they entered, they were told to leave but they remained and assaulted the two women in the house. After they got one child they stayed solely to assault the women, from all appearances. Defendants appear to argue at the end of their brief that the assaults occurring after the defendants' entry could not support a finding of entry with intent to assault. They appear to argue that an assault must occur simultaneously with the entry in order to show intent but that notion is not supported by the statute nor case law. The State must only show that defendants intended to commit assault, not that an assault occurred. The fact that in this case actual physical striking occurred is merely another circumstance that affirms the trial court's inference that defendants had the requisite specific intent.

CONCLUSION

Based on the foregoing, and on oral arguments, if any, the State requests that this Court affirm the trial court's verdict.

RESPECTFULLY submitted this 7th day of November, 1988.

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Attorney General


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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to J. Bruce Reading, attorney for defendant, 261 East 300 South, No. 200, Salt Lake City, Utah 84111, this 17th day of November 1988.

Christene F. [Signature]

ADDENDUM

1 It appears to the Court that it has been establish-
2 ed beyond any reasonable doubt: that the incident in this
3 case occurred on the 6th of September 1987; that it did occur
4 in Utah County; that the defendants did unlawfully enter or
5 remain in the dwelling of Mrs. Preece.

6 There is nothing in the record in any way to suggest
7 that they had any right to be in that buidling, in that
8 dwelling, under the circumstances; even though they may have
9 been interested in retrieving these children. And I think
10 that's what their intent was, is to retrieve the children.
11 They had no legal right, no business going upon the premises
12 of Mrs. Preece under the circumstances and without her
13 permission.

14 It's obvious, it's on the record, even taking the
15 evidence the most favorable to the position of the defen-
16 dants in any respect, that they did force their way into
17 that building, into that dwelling, over the objection of
18 Mrs. Preece and of Mrs. Sandoval and of David Preece.

19 The question then resolves down to whether or not
20 they had an intent to commit an assault as they entered upon
21 that undertaking.

22 I think the facts are established beyond a reason-
23 able doubt, that these men were intent upon regaining posses-
24 sion, irrespective of what it took and without any assistance,
25 that they were going to do it by self-help.

1 The evidence appears to be clear and unrefuted
2 that Pamela did call James after she got up to her mother's
3 and told him that she had the children, they were there for
4 visitation, and that James said "I'm coming to get you"; that
5 Pamela felt threatened by that circumstance.

6 The evidence is certainly clear that Robert went
7 in the basement door of that dwelling, and in a contest with
8 Mrs. Preece over the physical possession of the one minor
9 child, the testimony of Mrs. Sandoval is that after they
10 got into the building that she scuffled with Robert in an
11 attempt to get her son away from Robert, the brother of the
12 father of the child; that Robert hit her, on the head, that
13 he stomped on her foot.

14 The evidence is unrefuted and agreed upon that
15 Robert and Mrs. Preece engaged in a scuffle over the posses-
16 sion of the child, and that that scuffle ensued from the
17 outside into the building, and that Robert pursued the child
18 and Mrs. Preece into the building. And the Court finds that
19 there is no doubt, any reasonable doubt, about the fact that
20 Mrs. Preece was pushed and shoved and that she did sustain
21 injury.

22 There is no dispute from anyone's part that there
23 was a considerable amount of scuffling and running about in
24 that place, there was a lot of anger exhibited. And the
25 evidence, irrespective of whether or not the poker was

1 actually used by James, the evidence is clear that he was
2 in a position standing over Mrs. Preece with the poker in
3 a spear-position and only relinquished that position when
4 David came upon the scene with the gun in his hand and
5 ordered them out or that he would shoot.

6 It appears to the Court, of course intent is a
7 subjective thing, no one can look into one's mind and tell
8 what is there. The only way we can arrive at that is by the
9 actions that one undertakes. And it appears clear to the
10 Court that there can be no doubt, no reasonable doubt, that
11 these men had the intent to enter that building, that they
12 had the intent to take whatever steps were necessary, to
13 inflict whatever injury was necessary to gain possession of
14 those children. They had the physical force, they had the
15 ability, they had a show of force. There were three men
16 against two women and a child. There isn't any question that
17 these men, in the view of the Court, were acting intentional-
18 ly, that they were acting knowingly, the consequences of what
19 they were doing; and that evidence of their intent to commit
20 assault is further substantiated by the fact that they did in
21 fact perpetrate and inflict injury upon Mrs. Preece and upon
22 Mrs. Sandoval.

23 So that the case that the Court has found and the
24 Court believes that the perpetration of a battery necessarily
25 implies intent. While "intent" may not--"attempt" may not

1 imply a battery or a completion of the act, the completion
2 of the act certainly includes the attempt that the statute
3 prohibits.

4 So the Court, consequently, finds beyond a reason-
5 able doubt that these men, and each of them, did have the
6 intent when they entered that building to perpetrate an
7 assault upon the occupants thereof.

8 The Court believes that they are each responsible,
9 under the circumstances, for the actions of the others, since
10 it was a concerted effort on their part, they were aiding
11 and abetting each other when they went into that building,
12 and that, therefore, under the statute they are all three
13 charged as principals.

14 So the Court, consequently, finds each of you men
15 guilty of the charge contained in Count I of the Information.

16 With respect to Count II, that being the assault
17 charge, it appears to the Court that since that is neces-
18 sarily an included offense with the Count I of burglary,
19 the Court could not find them guilty of Count I without
20 finding then that they are guilty of Count II, that being
21 assault. I don't believe that the law would permit them to be
22 punished or charge of convicted of that Count II.

23 The Court refers in that respect to the case of
24 State of Utah vs. Bradley, 19 Utah Advance Report 4, which
25 makes reference to a case of State vs. Hill, 674 Pacific 2d