

1986

Utah v. Gabaldon : Brief of Appellant

Utah Supreme Court

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Utah State Attorney General; Attorney for Respondent.

Thomas L. Willmore; Harris, Preston, Gutke & Chambers; Attorney for Appellant.

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BRIEF

UTAH
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DOCKET NO. 860373

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH

*

Plaintiff and Respondent

*

vs.

*

BRIEF OF APPELLANT

ROBERT M. GABALDON

*

No. 860373

Defendant and Appellant

*

APPEAL FROM A JUDGMENT OF THE FIRST JUDICIAL DISTRICT
COURT IN AND FOR CACHE COUNTY, STATE OF UTAH, THE
HONORABLE JUDGE VENOY CHRISTOFFERSEN PRESIDING

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and Appellant

FILED

NOV 24 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH

*

Plaintiff and Respondent *

vs.

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BRIEF OF APPELLANT

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IV. STATEMENT OF ISSUES PRESENTED ON REVIEW.

POINT I

A. Did the State of Utah present sufficient evidence to prove beyond a reasonable doubt that Appellant received or retained stolen property?

B. Did the State of Utah present sufficient evidence to prove beyond a reasonable doubt that Appellant knew or had reason to believe that the items were stolen?

C. Did the State of Utah present sufficient evidence to prove beyond a reasonable doubt that Appellant had the requisite intent to purposely deprive the owners of the property?

POINT II

Was Appellant deprived of his right to a fair and impartial jury trial in that he was of Mexican descent and that no members of the jury panel were of Mexican descent?

V. CONSTITUTIONAL PROVISIONS AND STATUTES.

The following are constitutional provisions and statutes whose interpretation is determinative in this case:

Constitution of the United States of America, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Constitution of Utah, Article I, Section 12:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Code Annotated Section 76-6-408 (1953 as amended):

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen with a purpose to deprive the owner thereof.

(3) As used in this section:

(a) "Receives" means acquiring possession, control, or title or lending on the security of the property;

VI. STATEMENT OF THE CASE.

A. Nature Of The Case.

The Appellant, Robert Gabaldon appeals from a conviction of receiving stolen property in the First Judicial District Court, Cache County, State of Utah.

B. Disposition In The Trial Court.

The Appellant, Robert Gabaldon, was found guilty by a jury sitting before the Honorable VeNoy Christoffersen of the crime of

theft by retaining or receiving stolen property on June 12, 1986, and was thereafter sentenced to the Utah State Prison for a term as prescribed by law.

C. Relief Sought On Appeal.

Appellant seeks a reversal of his conviction. Counsel on appeal requests permission to withdraw from the appeal and submits this brief in compliance with Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed 2d 493 (1967) and State v. Clayton, 639 P.2d 168 (Utah 1981).

VII. STATEMENT OF FACTS.

On April 29, 1986, at approximately 12:00 a.m. Patricia Ann Martinez, Appellant and Mathew E. Nevarez left Ogden, Utah, and travelled in Robert Gabaldon's car to Logan, Utah. (Trial Record of Transcript page 113. Hereinafter the Trial Record of Transcript shall be designated as "T.R.") They travelled to Logan at the request of Patricia Ann Martinez so that she could shop at various stores in Logan, Utah. (T.R. 244.)

The three individuals arrived at the Cache Valley Mall and Patricia Ann Martinez along with her four year old daughter went into a store called The Bon. (T.R. 119 and 120.) Appellant and Mathew E. Nevarez did not go into The Bon but went to other parts of the Mall. (T.R. 121.) While in The Bon Patricia Ann Martinez took Bon sacks, jeans and shirts. (T.R. 101 and 102.) After she had returned to the car she was able to put the stolen items into The Bon sacks. without Appellant's or Mathew E. Nevarez' knowledge

because they had not returned to the car yet. (T.R. 123.) When Appellant and Mathew E. Nevarez returned to the car Patricia Ann Martinez asked Appellant to place The Bon sacks with merchandise in the trunk of the car. (T.R. 124 and 248.) Patricia Ann Martinez did not inform Appellant that the items were stolen. (T.R. 237.)

After Appellant and Mathew Nevarez returned to the car, Patricia Ann Martinez asked Mathew E. Nevarez to take a pair of pants into The Bon for a refund. (T.R. 150 and 151.) Mathew E. Nevarez received a refund from The Bon of approximately \$31.00 which he gave to Patricia Ann Martinez. (T.R. 151.)

Next, Patricia Ann Martinez requested Appellant to take her to J. C. Penney's, on the west side of the Cache Valley Mall, which he did. (T.R. 125.) Patricia Ann Martinez along with her daughter went into the J. C. Penney's store and stole a number of shirts, jackets and socks by placing them in a large J. C. Penney bag. (T.R. 127.) Appellant and Mathew Nevarez remained in the car while Patricia Ann Martinez went into J. C. Penney's. (T.R. 249.) When Patricia Ann Martinez came out from J. C. Penney's with the stolen items Appellant and Mathew Nevarez were outside the car playing a game called hackey sack in the parking lot. (T.R. 250.) Patricia Ann Martinez did not inform Appellant that the J. C. Penney items were stolen. (T.R. 250.)

At the request of Patricia Ann Martinez the individuals then drove to the Burger King Restaurant so that her little girl could use the restroom. (T.R. 129.) Patricia Ann Martinez and her

little girl went into the restrooms first and when they returned Appellant and Mathew Nevarez had gone into the restrooms. (T.R. 130.) At this time, Patricia Ann Martinez took the items from the large J. C. Penney's bag and placed them in The Bon bags in the trunk of the car without Appellant knowing about it. (T.R. 130.)

When Appellant and Mathew Nevarez returned to the car the individuals drove again to the Z.C.M.I. store at the Cache Valley Mall. (T.R. 131.) Patricia Ann Martinez and her daughter went into the Z.C.M.I. store leaving Appellant and Mathew Nevarez in the car in the parking lot. (T.R. 131 and 132.) While in Z.C.M.I. Patricia Ann Martinez placed children's underwear and jeans in the large J. C. Penney's bag and returned back to the car. (T.R. 134 and 137.) Appellant and Mathew Nevarez were at the car when Patricia Ann Martinez returned and Patricia Ann Martinez tried to conceal the large bag from Appellant by placing it in the back seat of the car. (T.R. 138.) Patricia Ann Martinez did not inform Appellant that the items in the bag were stolen. (T.R. 255.)

Patricia Ann Martinez asked Appellant to take her to the Fred Meyers store. (T.R. 139.) After the parties had arrived at Fred Meyers, Patricia Ann Martinez and her daughter went into the store and Patricia Ann Martinez stole boxes of men's and women's cologne and a bicycle computer. (T.R. 141 and 142.) Patricia Ann Martinez placed the stolen items in her purse. (T.R. 143.) Patricia Ann Martinez returned to the car where Appellant and Mathew Nevarez were waiting. (T.R. 142.) Patricia Ann Martinez did not tell

Appellant that she had stolen the items which were in her purse. (T.R. 257.)

Patricia Ann Martinez then asked Appellant to drive her to the K-Mart store, which Appellant did. (T.R. 143.) Patricia Ann Martinez and her daughter went into K-Mart leaving Appellant and Mathew Nevarez in the car. (T.R. 215.) While in K-Mart Patricia Ann Martinez placed tape cassettes, cassette cases and a padlock in her purse. (T.R. 145.) When she returned to the car, Appellant and Mathew Nevarez were waiting at the car. (T.R. 145 and 146.) Patricia Ann Martinez did not tell Appellant that she had stolen the items from K-Mart. (T.R. 259.)

Patricia Ann Martinez then requested Appellant to drive her to The Bon store so that she could return some merchandise. (T.R. 148.) Appellant drove back to The Bon and Patricia Ann Martinez took two of the stolen shirts into the store and received a refund of \$21.00. (T.R. 149 and 153.) Patricia Ann Martinez did not inform Appellant that the returned items were stolen. (T.R. 262.) Also she did not give any of the refund money to Appellant. (T.R. 263.)

After Patricia Ann Martinez had received the refund she requested that Appellant take her to the Sunset Sporting Goods store, which he did. (T.R. 153.) Patricia Ann Martinez then went by herself into the Sunset store where she placed shirts and a jacket in her blue jacket. (T.R. 153.) Patricia Ann Martinez removed the items from the Sunset store without paying for them. (T.R. 232.) Upon returning to the car Patricia Ann Martinez asked

Mathew Nevarez if he would return some of the items to Sunset to get a refund. (T.R. 154.) Mathew Nevarez returned the items and obtained a refund for \$42.00, which he gave to Patricia Ann Martinez. (T.R. 156.) Mathew Nevarez used the name of John Martinez to obtain the refund. (T.R. 156.) Appellant remained in the car and did not participate in the refund. (T.R. 155 and 263.) At no time did Patricia Ann Martinez inform Appellant that the items from Sunset were stolen. (T.R. 262.)

After Patricia Ann Martinez received the refund from Sunset Sporting Goods she requested Appellant to take her to get something to eat. The individuals went to Hardees restaurant to eat. (T.R. 157.) After they had eaten the individuals began driving back to Ogden. On their way back to Ogden, Utah, the Utah Highway Patrol stopped Appellant and requested he return back to Logan. Appellant agreed to return and followed the Utah Highway Patrolman and while driving back Appellant kept wondering why the officer had stopped him. (T.R. 159 and 265.) When they had almost returned to the Cache County Sheriff's Office Patricia Ann Martinez informed Appellant that she had stolen the merchandise. (T.R. 265.) This was the first time Patricia Ann Martinez had informed Appellant she had stolen the items. (T.R. 266.) Patricia Ann Martinez had never given Appellant any of the items or refunds. (T.R. 267.)

Patricia Ann Martinez plead guilty to the charge of second degree felony theft by retaining on May 12, 1986, which was prior to Appellants trial.

VIII. SUMMARY OF ARGUMENT.

1. Plaintiff's conviction of receiving or retaining stolen property in violation of Utah Code Annotated, Section 76-6-408 (1953 as amended) should be reversed for the following reasons:

(a) That the State failed to present sufficient evidence that Appellant "received" or "retained" property which had been stolen;

(b) that the State failed to present sufficient evidence that Appellant "knew" the property had been stolen or "believed" that the property had probably been stolen; and (c) that the State failed to present sufficient evidence that Appellant acted purposely to deprive the owner of the possession of the property.

2. Appellant's conviction of receiving or retaining stolen property pursuant to Utah Code Annotated, Section 76-6-408 (1953 as amended) because Appellant was not allowed a fair trial by jury in that no members of the Mexican-American minority were present on the jury panel.

IX. ARGUMENT.

POINT I

A. THE STATE OF UTAH FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT RECEIVED OR RETAINED STOLEN PROPERTY PURSUANT TO UTAH CODE ANNOTATED, SECTION 76-6-408.

Appellant was charged and tried under Utah Code Annotated, Section 76-6-408(1) (1953 as amended) which states:

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof.

The Utah Supreme Court in reference to the crime of receiving stolen property has outlined the basic elements in the case of State v. Murphy, 617 P.2d 399-401 (Utah, 1980) which are as follows:

- (1) Property belonging to another has been stolen;
- (2) That Appellant received, retained or disposed of the stolen property;
- (3) At the time of receiving, retaining or disposing of the property the Appellant knew or believed the property was stolen; and,
- (4) The Appellant acted purposely to deprive the owner of the possession of the property.

The Court has also stated that for a criminal convicted of receiving or retaining stolen property, the prosecution must prove beyond a reasonable doubt each element of the crime. State v. Lamm, 606 P.2d 229, 231 (Utah, 1980) and State v. Lakey, 659 P.2d 1061, 1064 (Utah, 1983).

From the elements as stated above, it is Appellant's contention that the State failed to prove beyond a reasonable doubt that Appellant received or retained stolen property. Utah Code Annotated, Section 76-6-408(3)(a) (1953 as amended) defines "receives" as meaning "acquiring possession, control, or title or lending on the security of the property." It is quite clear from the trial transcript that the State relied heavily upon the testimony of Patricia Ann Martinez to attempt to prove its case. There is nothing in her testimony nor in any other testimony of the other witnesses which indicates that Appellant "received" or "retained" stolen property.

The transcript clearly indicates that Patricia Ann Martinez asked Appellant to bring her to Logan so that she could go to the

various stores. While it is true that the Appellant's car was used in the transportation from Ogden to Logan and from one store to another, Patricia Ann Martinez testified that she was the one who went into the store and stole the items and that she never told the Appellant about stealing the items until the police had requested them to return back to Logan.

Furthermore, Martinez testified that every chance she had she tried to hide the large J. C. Penney's bag and items that she had taken. (T.R. 255.) Also, Martinez testified that she did not tell Appellant about the items she took specifically from Fred Meyers because she was trying to hide her purse to conceal the fact that she had taken the items. (T.R. 257.) After Martinez had taken the items from The Bon she testified that she alone placed the items into Bon sacks so that it would appear that the items had been purchased from The Bon. (T.R. 123.) The only time that Appellant was able to see what items were placed in the trunk was after Martinez had placed the items in The Bon sacks she requested that Appellant put the sacks in the trunk without indicating to Appellant that the items were stolen. (T.R. 124.) Appellant only opened the trunk once and all the other times when the trunk of the car was opened it was done by Martinez. (T.R. 288.)

Martinez also testified that at no time did she give any of the items from any of the stores to Appellant. (T.R. 259 and 267.) Furthermore, Martinez stated that at no time had she ever given Appellant any of the refund money that was received from The

UTAH COURT OF APPEALS
BRIEF

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THE ATTORNEY GENERAL
STATE OF UTAH
DAVID L. WILKINSON
ATTORNEY GENERAL

FILED

DEC 9 1986

Utah Supreme Court, Utah

PAUL M. TINKER
CHIEF DEPUTY ATTORNEY GENERAL

DALLIN W. JENSEN
Solicitor General

WILLIAM T. EVANS, CHIEF
Human Resources Division

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December 9, 1986

PAUL M. WARNER
ASSOCIATE DEPUTY ATTORNEY GENERAL

STEPHEN G. SCHWENDIMAN, CHIEF
Tax & Business Regulation Division

STEPHEN J. SORENSON, CHIEF
Litigation Division

MICHAEL D. SMITH, CHIEF
Civil Enforcement Division

Honorable Gordon Hall
Chief Justice
Utah Supreme Court
State Capitol
Salt Lake City, Utah 84114

Re: State of Utah v. Robert M. Gabaldon
Case No. 860373

Dear Chief Justice Hall:

The appellant's attorney in the above entitled case, in harmony with Anders v. California, 386 U.S. 738, 87 S.Ct. 1296, 18 L.Ed.2d 493 (1967), stated that it is his opinion that the issues raised on appeal are not sound and has requested that he be allowed to withdraw. Respondent feels that the brief filed by appellant's counsel is in substantial compliance with the requirements of State v. Clayton, Utah, 639 P.2d 168 91981) (Nos. 16996 and 17140 decided December 15, 1981).

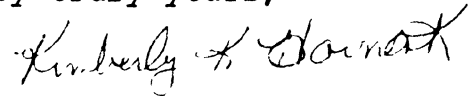
This office feels that it would be futile to respond to a brief of this nature when likely the only assistance we could lend the Court would be to repeat the statements of the appellant's attorney and perhaps give some light as to the broad area of law surrounding the issues raised in the case.

We feel that this would not benefit the Court, but we are willing to respond to any particular issues or do additional research at the Court's direction if requested.

Honorable Gordon Hall
December 9, 1986
Page Two

We would appreciate it if you would accept this letter as a formal response in lieu of filing a brief and either proceed to dismiss the appeal on its merits or in harmony with Anders v. California. If the Court is desirous of having additional input from our office in any particular, we would be happy to comply upon direction.

Very truly yours,

A handwritten signature in cursive script, reading "Kimberly K. Hornak".

KIMBERLY K. HORNAK
Assistant Attorney General

KKH:dc

cc: Thomas L. Willmore

BRIEF

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THE ATTORNEY GENERAL
STATE OF UTAH

DAVID L. WILKINSON
ATTORNEY GENERAL

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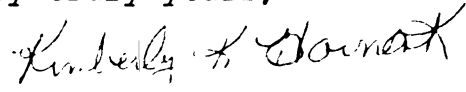
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Very truly yours,

A handwritten signature in cursive script, reading "Kimberly K. Hornak".

KIMBERLY K. HORNAK
Assistant Attorney General

KKH:dc

cc: Thomas L. Willmore

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Supreme Court Utah

STATE of Utah ✕
PLAINTIFF AND RESPONDENT ✕
VS. ✕ BRIEF of APPELLANT
ROBERT M. GABALDON ✕ NO. 860373
DEFENDANT AND APPELLANT ✕

DEAR SIRs, this is my ADDITIONAL
INFORMATION ON my behalf of my APPEAL...
I ALSO feel I WAS ALSO MISREPRESENTED
by MR. THOMAS WILLMORE. At the time of my
TRAIL. AND that the ADVICE he GAVE me
WAS WRONG. ON ONE OCCASION I told him
About the money that WAS ON ME. I had
got it FROM my UNEMPLOYMENT INSURANCE
I had told him SEVERAL times to
MENTION this IN my behalf IN the TRAIL
But he DECLINED to do so. AND did NO
MENTION it what so EVER. ANOTHER WAS
the padlock I had bought A padlock
that day. AND GAVE OFFICER CROCKETT A
RECIET. Showing him that I had bought
A padlock that day. WHEN I WAS
ASKED About the padlock I WAS NOT
SHOWN the lock. I WAS JUST ASKED
about it. WHEN I ANSWERED they H
pulled the lock out AND showed it to
ME. I then told them that. that WA
NOT the lock I PURCHASED. But I HA
PURCHASED A lock that day AND

PRESENTED A RECEIT TO PROVE I did.
I told MR. WILLMORE ABOUT THIS. BUT
HE MADE NO EFFORT TO DEFEND ME ON
THIS. HE ALSO ONLY SEEN ME TWICE BEFORE
THE TRIAL AND DID NOT TAKE THE RIGHT
AMOUNT OF TIME TO PREPARE FOR THE TRIAL.
I TRIED SEVERAL TIMES TO CONTACT HIM
FROM THE CACHE COUNTY JAIL. BUT COULD
NOT GET IN TOUCH WITH HIM. THE ONLY
WAY OF CALLING HIM WAS COLLECT. BECAUSE
THAT WAS THE ONLY PHONE SERVICE IN THE
PLACE. AND HE DECLINED TO ACCEPT MY COLLECT
CALLS. THE TESTIMONY FROM THE PLAINTIFFS
WERE ALL MIXED UP. EVERY TIME THEY
TESTIFIED, THEY CHANGED THEIR STORY.
BUT WHAT IT COMES DOWN TO IS THAT
I NEVER HAD POSSESSION OR THE INTEN
TO DEPRIVE ANYBODY OF ANYTHING. NOR
DID I HAVE KNOWLEDGE OR HAD I
BELIEVED THE PROPERTY WAS STOLEN. AND
BASED ON WHAT HAS HAPPENED I
BELIEVED THAT MY CONVICTION SHOULD
BE CHANGED TO NOT GUILTY.

THANK-YOU FOR LISTENING
ROBERT GABACDON
~~Robert Gabacdon~~

Bon or Sunset stores. (T.R. 263 and 265.)

Therefore, the State failed to present sufficient evidence at trial to show that Appellant either received or retained stolen property. Pursuant to the definition of receives in Utah Code Annotated, Section 76-6-408(3)(a) at no time did Appellant acquire possession, control or title of the property. Each time any property was obtained it was obtained by Patricia Ann Martinez. She exercised control and possession over the properties by either putting the properties in other sacks, her purse or placing them loose in the trunk of the car or under the front seat. The control and possession that Martinez exercised over the property was not known to Appellant because Martinez concealed from Appellant that fact that the items were stolen.

B. THE STATE OF UTAH FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT KNEW OR BELIEVED THE ITEMS OF MERCHANDISE HAD BEEN STOLEN PURSUANT TO UTAH CODE ANNOTATED, SECTION 76-6-408(1).

Appellant's next point of contention is concerning the element that at the time of receiving or retaining of the property that Appellant knew or believed the property had been stolen. In the present case, Appellant was never told that the items from The Bon, J. C. Penney's, Z.C.M.I., Fred Meyers, K-Mart and Sunset were stolen. (T.R. 247, 250, 255, 257, 259 and 262.) There was no evidence that Appellant participated in any of the thefts from any of the stores. The only evidence the state could present at trial was that Appellant was driving the car and transporting Patricia Ann Martinez to the different stores. His transportation of

Patricia Ann Martinez was done without any knowledge or reason to believe that any of the items were stolen. As stated above, Patricia Ann Martinez made every effort to hide and conceal the thefts from Appellant. (T.R. 267.)

The prosecutor in his closing argument attempted to make an issue out of the fact that Patricia Ann Martinez had been to six different stores over a 4½ hours period of time. The prosecutor also argued that because of the time period and the amount of stores that there was no way that Appellant did not know or have reason to believe that the items were stolen. However, from the testimony at trial it is important to note that Patricia Ann Martinez stated she never informed Appellant of the items being stolen nor did she ever give any of the items or refund monies to Appellant. She indicates that she was stealing these items for her own benefit to sell the merchandise and receive money to live on. (T.R. 127 and 257.) Therefore, the State has failed to show with any evidence that Appellant knew or believed that the items had been stolen.

- C. THE STATE OF UTAH FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT HAD THE REQUISITE MENTAL INTENT TO PURPOSELY DEPRIVE THE OWNER OF THE STOLEN MERCHANDISE, PURSUANT TO UTAH CODE ANNOTATED.

The final point which Appellant asserts is that the State failed to provide sufficient evidence to prove beyond a reasonable doubt that Appellant acted "with a purpose to deprive the owner thereof." As the Court stated in the case of State v. Murphy, 617 P.2d at 402 (Utah, 1980):

"A defendant's intent is rarely susceptible of direct proof and therefore the prosecution usually must rely on a combination of direct and circumstantial evidence to establish this element."

The Court goes on to say that criminal convictions cannot be based upon conjectures or probabilities but must be supported by a quantum of evidence concerning each element so that the jury may find guilt beyond a reasonable doubt.

In conjunction with the argument stated above concerning whether Appellant received or retained the property it is important for the Court to note that at no time did Patricia Ann Martinez inform the Appellant that she was stealing the items or that she had received refunds for stolen items. Furthermore, at no time did Patricia Ann Martinez give or provide any of the items to Appellant. In fact as stated above, it was her testimony that she made every effort to conceal and hide the merchandise and the fact it was stolen from Appellant. (T.R. 267.) If Appellant did not receive or retain any of the items and if Appellant did not know or have a belief that the items were stolen, then how could he have acted with the mental intent to purposely deprive the owners of the property. Appellant submits to the Court that the State did not prove beyond a reasonable doubt or with sufficient evidence that Appellant had the requisite mental intent to purposely deprive the stores of any merchandise.

POINT II

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL PURSUANT TO THE CONSTITUTION OF UTAH ARTICLE I, SECTION 12 AND THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE HE WAS OF MEXICAN DESCENT AND NO MEMBERS OF THE JURY PANEL WERE OF MEXICAN DESCENT.

The following argument is submitted to the Court at the request and insistence of Appellant and counsel for Appellant makes the argument with an understanding and in light of the Court's prior ruling in the case of State v. Leggroan, 475 P.2d 57, 59 (Utah, 1970).

At trial, counsel for Appellant and counsel for Mathew E. Nevarez objected to the jury panel on the basis that the defendants would not get a fair and impartial trial because there were no minorities on the panel. (T.R. 14 and 15.) The Judge denied the objections stating the jury panel selection process was done randomly. Further, the court took "judicial notice" that there are few individuals who would fit within the minority classification and that to insure that minorities were present on the panel would in itself be a contravention of the law. (T.R. 15.)

The Constitution of the State of Utah, Article I, Section 12 provides that the accused in all criminal prosecutions shall have the right to have a speedy public trial by an "impartial jury". The Sixth Amendment to the United States Constitution similarly provides that "...the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state of district wherein the crime shall have been committed..."

Appellant is of Mexican descent. There was not present on the jury panel any individuals of Mexican descent. Appellant contends that pursuant to the Constitution of Utah, Article I, Section 12 and the Sixth Amendment of the United States Constitution he did not receive a fair and impartial jury, thus violating his constitutional right.

X. CONCLUSION.

Based upon the above-cited authorities and references from the trial record Appellant respectfully requests the Court reverse his conviction because the State of Utah failed to present sufficient evidence to prove beyond a reasonable doubt that he received or retained the stolen merchandise; or that he had knowledge of or believed it to be stolen merchandise; or that Appellant had the required mental intent to purposely deprive the owners of the merchandise.

Furthermore, Appellant respectfully requests the Court to reverse his conviction because his constitutional right to a fair and impartial trial was denied because Appellant is of Mexican descent and there were not any individuals on the jury who were of Mexican descent.

Counsel for Appellant respectfully requests permission to withdraw as counsel, believing the appeal is without meritorious grounds. The foregoing brief discusses the law applicable to the only points that could arguably support the appeal. Counsel for Appellant has instructed Appellant that he will be allowed time to

raise any points he chooses. This brief is submitted pursuant to State v. Clayton, 639 P.2d 168 (Utah, 1981).

RESPECTFULLY SUBMITTED on this ____ day of November, 1986.

HARRIS, PRESTON, GUTKE & CHAMBERS

By: _____
Thomas L. Willmore
Attorney for Defendant and
Appellant

MAILING CERTIFICATE

I hereby certify that I mailed 4 true and correct copies of the above and foregoing BRIEF OF APPELLANT to Utah State Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 and 1 copy to the Defendant and Appellant, Robert Gabaldon at P.O. Box 250, Draper, Utah 84020, on this ____ day of November, 1986.

I hereby certify that I hand delivered to the Clerk of the Supreme Court of the State of Utah 10 copies of the above and foregoing BREIF OF APPELLANT on this ____ day of November, 1986.