

1979

State of Utah v. Joan Marie Gorlick : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH :

Plaintiff-Respondent, :

vs. :

Case No. 16420

JOAN MARIE GORLICK, :

Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal From the Judgment Entered In the Third
Judicial District Court, In and For Salt Lake
County, State of Utah, The Honorable David B.
Dee, Judge

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Clerk, Supreme Court, Utah

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Plaintiff-Respondent,	:	
vs.	:	Case No. 16420
JOAN MARIE GORLICK,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

Appellant, Joan Marie Gorlick, appeals from a judgment of conviction of theft in violation of §76-6-404, U.C.A., 1953, on jury trial in the District Court, Third Judicial District, the Honorable David B. Dee, Judge.

DISPOSITION IN THE COURT BELOW

The appellant was charged by complaint on the 2nd day of August, 1978, with the crime of theft of property over \$1000, a second degree felony, in violation of §76-6-404, U.C.A., 1953 (R. 11). After preliminary hearing an information on the charge was filed on October 25, 1978 (R. 13). The case was tried in the Third Judicial District, Salt Lake County, on January 8, 1979, on jury trial, the Honorable David B. Dee, Judge, presiding (R. 18). On January 9, 1979, the jury returned a verdict of guilty (R. 45). On March 23,

1979, the appellant was sentenced and placed on probation for two years and fined \$1000.00 (R. 56). Appeal was timely taken from the judgment on April 13, 1979, (R. 58).

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal and dismissal of the charge or reduction to a lesser degree of theft.

STATEMENT OF FACTS

The information in the instant case charged the appellant with theft of the property of David Delgado having a value in excess of \$1000.00 and occurring in Salt Lake County on August 1, 1978 (R. 1).

The State's case was based essentially on the testimony of the alleged victim, David Delgado. Delgado testified that he saw the appellant, Joan Marie Gorlick, at the Room-At-The-Top at the Hilton Hotel in Salt Lake City, on August 1, 1978 (R. 84). Delgado was then having a drink with a friend (R. 84). Ms. Gorlick arrived with some friends and sat at another table (R. 84). The other persons with appellant were Paul Tolman and Calvin Smith (R. 85). Delgado sent over a couple of drinks to Ms. Gorlick and her friends and eventually joined her at her table (R. 85). This was about 4:00 p.m. (R. 85). The group continued drinking and socializing at the Hilton until about 10:30 p.m. (R. 85). Delgado was a twenty-year old, admitted homosexual (R. 92, 98) who had previously made the acquaintance of the appellant, and Ms. Gorlick had, on a previous occasion, stayed at Delgado's grandparents' home in Scottsdale, Arizona (R. 93). There had, at that time, been some discussion of

job for Delgado in Salt Lake City at a lingerie shop in conjunction with appellant (R. 93.).

The appellant had a gold bar and chain jewelry piece in Arizona which Delgado admired and appellant had it with her at the Hilton (R. 94, 95). Delgado had even borrowed the jewelry item on a prior occasion (R. 96). Delgado had a diamond ring containing seven diamonds which he valued between \$300 - \$700 (R. 100). There also seemed to be some dislike of appellant by Delgado over the job matter previously discussed (R. 96).

Delgado was interested in buying the gold bar, and appellant was a jewelry and diamond dealer with some experience. There were also discussions concerning Delgado's ring (R. 99). Ms. Gorlick could not put a value on the ring (R. 99). Prices had gone up, although Delgado had paid only \$250 for the ring, wholesale, four years previous (R. 101). A value of between \$300 and \$700 was discussed between Delgado and appellant (R. 100). According to Delgado, he was willing to pay \$500 for appellant's "bar and chain" (R. 102). Delgado admitted there was some discussion about taking his ring and having it appraised against the gold bar and chain (R. 104). Appellant had possession of Delgado's ring at the Hilton for about one and a half hours according to Delgado (R. 104). Delgado also showed the ring to Cal Smith and Paul Tolman (R. 103).

According to Delgado, the group eventually left the Hilton and went to the Sun Tavern on the west side of Salt Lake City (R. 86). More drinks were had by Delgado at the Sun Tavern. Delgado testified that at one point during the evening, he was ready to write a

\$500 check for appellant's gold bar and chain. Delgado said Gorlick wanted to have the ring appraised and would return it "first thing in the morning" (R. 87). Delgado said he declined. Apparently at the Sun Tavern, the discussion continued concerning the ring. Ms. Gorlick, at one point, according to Delgado, had the ring and it fell in a drink and appellant swallowed it (R. 87). Delgado then got up and called the police (R. 88). Jacquelyn Jo Kunst, a waitress at the Sun Tavern who resided in the same apartment as Delgado (R. 110), testified the party had been "drinking" and "messing around" (R. 132). When Delgado told her appellant had swallowed the ring, Kunst looked at the appellant and said "did you?" and according to Kunst, Gorlick shook her head "yes" (R. 132). Kunst admitted there was no such verbal statement from appellant (R. 140) and that she could have had ice cubes or a drink in her mouth (R. 140). Kunst also said she saw jewelry being shown around and that when the group left no one "ran out" (R. 141).

According to Delgado, the incident when Gorlick allegedly swallowed the ring occurred at about 12:00 a.m. (R. 110). When the police came, Delgado reported the theft of his ring, and, in addition, falsely accused Cal Smith, appellant's companion, of taking another ring from him. In fact, the other ring reported stolen was Cal Smith's own property (R. 91), which Delgado eventually admitted (R. 91):

"A. I also claimed Mr. Smith's ring.

Q. Oh. Explain what you mean by that?

A. Okay. I claimed his ring as being mine, for I don't know just a way of having revenge on the three parties.

Q. Did you report to them that he had stolen that ring?

A. Yes, sir, I did.

Q. And in fact it was not your ring?

A. Yes, sir.

Q. Why did you do that?

A. Just my way of getting revenge."

He also made the false accusation (R. 106):

"A. Because I knew once Joan was arrested with the ring it would be held for evidence for quite some time, so I figured I'll just have his held at the same time for a reassurance that the Court case would go."

Delgado admitted starting drinking at a bar called The Rail, went to the Hilton, where he drank from a bottle of Jack Daniels whiskey which he bought, and then at the Sun Tavern (R. 108).

According to Delgado, he drank at least three fourths of a pint of whiskey (R. 97). Others testified Delgado drank more.

After the police were called, they located appellant at her car at the Hilton where she was arrested and the ring taken from her purse (R. 150).

Milton Peterson, an employee of Schubach Jewelry, testified as an expert for the prosecution. He placed the value of the ring in question at between \$1200 and \$1400, full retail price, on August 1, 1978 (R. 127). He never did directly address the question presented to him as to market value between a willing seller and a willing buyer at the place of the theft (R. 127). He placed the value on the ring for a large buyer, "keystone value", at around five or six hundred dollars (R. 128).

The evidence for the defense showed Delgado harbored some sort of distorted attitude towards Ms. Gorlick. James K. Opp of Barbizon Models had employed Delgado for a few months as a male director (R. 165). Delgado told Mr. Opp that he, Delgado, was an undercover federal agent and that he was investigating Ms. Gorlick for drug activities (R. 172). Delgado denied ever making a statement concerning appellant to anyone at Barbizon, but did admit searching a picture of her while employed there (R. 248).

Calvin G. Smith had been one of the persons with Ms. Gorlick. Mr. Delgado on August 1, 1978 (R. 184, 185). According to Mr. Smith, he owed Ms. Gorlick certain small gem stones which he took to the Hilton to give to her (R. 185, 186). Smith was wearing a ring which Delgado admired while they were at the Hilton (R. 126). Delgado told Smith when he sat at their table that Delgado had been drinking Jack Daniels whiskey all day (R. 186). Delgado also told Smith that he, Delgado, had just got out of the alcoholic ward of the hospital and had been drinking and taking drugs -- "uppers" (R. 186). Smith testified that during the evening Delgado wanted to trade his ring for Ms. Gorlick's necklace, and that appellant wanted to take the ring to have it appraised and that Delgado allowed Ms. Gorlick to take the ring to have it appraised (R. 188). Smith had told Delgado that Smith believed the ring to be worth between \$200 and \$300. Mr. Smith had been in the diamond business (R. 186). After the group was at the Hilton, Delgado suggested going to the Sun Tavern. Delgado said he was having his car fixed (R. 190) and Smith, Gorlick and Delgado went in one car and Paul Tolman in his

own. It later turned out that Delgado, in fact, had left his car somewhere and it was not being fixed (R. 120, 192). Smith said he never heard anything from Delgado about Ms. Gorlick swallowing Delgado's ring (R. 191). Later, Smith was arrested on Delgado's false accusation that Smith had taken a ring from Delgado, when, in fact, the ring he allegedly took was Smith's ring (R. 193). It was over one and a half months before Smith received his own ring back (R. 193). Even though Delgado had falsely accused Smith that night, possibly because Delgado was drunk, he repeated the accusation to the police the next day when he was sober (R. 121). Delgado admitted:

"Q. Cal Smith went to jail because you lied?

A. Yes, Cal Smith went to jail because I lied." (R. 121).

Delgado testified he called the police at the Sun Tavern and took down the license number of appellant (R. 117-119). Smith nor Tolman heard him say he was going to call the police nor heard him make such a call (R. 195, 209).

Paul Kim Tolman was also with appellant, Smith and Delgado at the Hilton on the day and night in question. He testified Delgado came over to the table where he, Smith and Gorlick had been and that there was discussion about jewelry (R. 203). Tolman said Delgado had a fifth of Jack Daniels whiskey which he was drinking (R. 204), and that a trade of the necklace of appellant for the ring of Delgado was discussed and a figure was discussed of around \$250 for the ring (R. 204). Tolman also heard Delgado talking about being in the hospital and taking drugs (R. 205). Tolman testified that

Delgado gave appellant Delgado's ring to have it appraised (R. 205) and that Ms. Gorlick put the ring in her purse to take it to have appraised (R. 206). Tolman said he never heard any conversations at the Sun Tavern about Ms. Gorlick swallowing Delgado's ring or about Delgado calling the police (R. 208, 209). In Tolman's opinion, Delgado was the only person drunk (R. 210).

Ms. Gorlick testified that she was single and the mother of four children (R. 215). She had known Delgado in Phoenix, Arizona, and had stayed at his grandparents' home (R. 216, 218). On the evening in question, Delgado joined the table where Joan Gorlick and her friends were (R. 215). Delgado had admired her necklace and wanted to buy it (R. 219) and had worn it in Phoenix (R. 219). While at the Hilton, Delgado wanted to buy her necklace or trade it for his ring (R. 220). Delgado appeared quite intoxicated and she asked Delgado to let her take the ring to have it appraised (R. 221). According to appellant, that was agreed on (R. 221). The value of Ms. Gorlick's necklace was put at \$500 (R. 221). Ms. Gorlick took possession of the ring, and Delgado gave it to her to keep until the following day in order to have it appraised (R. 222). Delgado also told Ms. Gorlick that he had just checked out of the Holy Cross Hospital where he was being treated for alcoholism and that he had taken some amphetamines (R. 223). Appellant also observed Delgado had a fifth of Jack Daniels which he was drinking (R. 223). After being at the Hilton, the party went to the Sun Tavern (R. 224). According to Ms. Gorlick, there was no conversation at the Sun about the ring. Delgado became upset when Ms. Gorlick refused to

take Delgado around town (R. 225). Later on when Ms. Gorlick was arrested, she first was apprehensive and said she didn't know Delgado -- later, she told the officer the ring was in her purse (R. 229).

Based on the above facts, a judgment of conviction was entered.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTION BECAUSE THE ONLY EVIDENCE OF ESSENTIAL ELEMENTS OF THE CRIME IS FROM A FULLY DISCREDITED WITNESS, UNWORTHY OF BELIEF, WHOSE TESTIMONY COULD NOT SUPPORT A CONVICTION BEYOND A REASON-ABLE DOUBT.

The appellant submits that evidence is insufficient to convict on the charge because the only evidence that would support a conclusion that the appellant took the ring in question without permission came from a fully discredited and untrustworthy witness. The evidence was uncontradicted that appellant and Delgado had known each other previously. Delgado had admired appellant's gold-bar necklace and wanted to buy it or trade for it. Delgado, by his own testimony, indicated he let Ms. Gorlick have his ring and examine it while they were socializing. The dispute in the evidence centers around whether appellant let Ms. Gorlick take the ring to have it appraised so that its value could be contrasted against the assumed value of the necklace which was put at \$500, or whether Ms. Gorlick took it without permission. Delgado admitted Ms. Gorlick had wanted to take the ring and have it appraised (R. 113). According to Delgado, Ms. Gorlick obtained the ring when it dropped into her drink and she said she swallowed it (R. 88). According to Ms.

Gorlick, Mr. Smith and Mr. Tolman, the only other persons present, Mr. Delgado had given the ring to Ms. Gorlick to have it appraised (R. 188, 204, 222). Ms. Gorlick put the ring in her purse for that purpose. The ring was found in the purse by the police.

Under usual standards of review, it might be said that the facts present a jury question and that reversal would not be in order. In State v. Mills, 530 P.2d 1272 (Utah 1975), this Court stated the rule of review concerning a verdict challenged on the grounds of insufficiency of evidence:

"It is the prerogative of the jury to judge the weight of the evidence, the credibility of the witnesses, and the facts to be found therefrom. For a defendant to prevail upon a challenge to the sufficiency of the evidence to sustain his conviction, it must appear that viewing the evidence and all inferences that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt. To set aside a verdict it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly must have entertained reasonable doubt that defendant committed the crime. Unless the evidence compels such conclusion as a matter of law, the verdict must be sustained."

See also, State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957); State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959); State v. Danks, 10 Utah 2d 162, 350 P.2d 146 (1960); State v. Bechtold, 11 Utah 2d 208, 357 P.2d 183 (1960); State v. Middelstadt, 579 P.2d 908 (Utah 1978); State in the Interest of R.G.B., ___ P.2d ___ (Utah 1979).

However, in this case it is submitted the only evidence for the prosecution was from a thoroughly discredited source which, when weighed against the testimony corroborating the appellant's version of the incident, requires the conclusion that the verdict of the jury was, under the circumstances, wholly unreasonable.

The appellant has a right to have every factual element of the offense established beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, ___ U.S. ___, 47 L.W. 4883 (1979). If the evidence for the prosecution is discredited and unworthy of belief, the standard of proof beyond a reasonable doubt is not established. Under such circumstances "reasonable minds could not believe [the defendant] guilty beyond a reasonable doubt, State v. Daniels, 584 P.2d 880, 883 (Utah 1978).

In the instant case, the testimony of Delgado is wholly unworthy of belief. First, he admitted he lied to the police and falsely accused Cal Smith of stealing a ring as a part of the same incident in which he accused Joan Gorlick. He did so out of some ill-defined feeling of revenge. He had previously expressed feelings of hostility towards appellant which he admitted to while testifying. He had made up some fantasy about being an undercover federal agent out to get Ms. Gorlick. He also made up a story about his car being fixed and not being available when, in fact, it was. On the evening of the event, Delgado had apparently just been released from an alcoholic ward, was drinking large quantities of alcohol, and mixing it with drugs. He apparently also had some sexual problems which he held against Ms. Gorlick. Thus, the following occurred (R. 98):

- "Q. During that four-and-a-half hour period, could you generally describe at this point what the conversation was about between you and Joan and Cal and Paul?
- A. Yeah. Joan seemed to be very amazed and very impressed in telling her friends I was a faggot, and that was one of the big topics at the table and then she tried pushing me on to going to bed with Paul.

Q. At this conversation?

A. That conversation and the one that took place at the Sun.

Q. Well, after four-and-a-half hours of hearing that, how did you feel?

A. I didn't care what she was saying. I am what I am.

Q. But you would still characterize the conversation as being a friendly one?

A. Yes, I would.

Q. You characterize that kind of conversation as friendly?

A. Yes, I do.

This response is evidence of the distorted, troubled, confused, revengeful witness whose testimony was central to the prosecution case. Delgado was an admitted liar, he committed a serious crime when he falsely accused Smith for purposes of revenge. He had the same troubled and revengeful motives towards appellant. Under the circumstances, it cannot be said a jury could credit his testimony and as against multiple witness testimony as to the appellant's innocence. Under these circumstances, the jury's verdict was unreasonable.

In Mesarosh v. United States, 352 U.S. 1 (1956), the United States Supreme Court considered a similar issue. Defendants were charged with violations of the Smith Act (advocating overthrow of the United States) and convicted. The government candidly conceded before the Supreme Court that the principal prosecution witness, Mazzei, might not have been truthful, although contending the testimony given at trial was fully credible. It appeared that Mazzei

probably testified falsely before a Congressional Subcommittee and other places wrongfully implicating others in Communist associations. The prosecution sought remand to the lower court to consider the credibility of Mazzei. His testimony was described as "bizarre", 352 U.S. p. 8. The Supreme Court reversed the conviction stating:

"The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.

* * *

"Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124.

"The government of a strong and free nation does not need convictions based upon such testimony. It cannot

afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."

Although the posture of the instant case is not procedurally the same as in Mesarosh, the circumstances are substantively the same. This Court is obligated to protect a defendant from the whims and foolishness of an unreasonable jury verdict. Whatever pity might be felt for the troubled, tortured Mr. Delgado, it should not compel the tragic and unreasonable verdict reached in this case. This Court should reverse.

POINT II

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANT TOOK THE PROPERTY ALLEGED WITH THE INTENT REQUIRED TO CONVICT FOR THEFT.

The crime of theft, §76-6-404, U.C.A. 1953, incorporates all the various legal forms of theft that were known at common-law and at the law developed by various statutory additions. §76-6-403, U.C.A. 1953. See State v. Taylor, 570 P.2d 697 (Utah 1977). The alleged conduct of the appellant was a "taking" of the property of another and at common law would have been characterized as larceny, assuming the truthfulness of Mr. Delgado's testimony. Under such a form of theft, the taking at common law would have required that it be with intent to permanently deprive the owner of his property or the owner could not be established, Perkins, Criminal Law, 2nd Ed. p. 266; Clark and Marshall, Crimes, 7th Ed. § 12.04 p. 825; LaFare & Scott, Criminal Law, p. 637; State v. McKee, 17 Utah 488, 58 Pac. 1119 (1898). As recently stated by the Arizona Supreme Court in State v. Ross, 107 Ariz. 240, 485 P.2d 810, 812 (1971):

"It is true that intent to permanently deprive the owner of his possession is an essential ingredient of grand theft."

The mere taking of personalty of another does not constitute larceny unless there is a felonious intent. A mere trespassory interference is not enough. State v. Patterson, 110 Utah 413, 174 P.2d 843 (1946). The Utah Legislature in the 1973 Penal Code modified the common law rule. The required mental state for theft under §76-6-404, U.C.A. 1953, is "with a purpose to deprive him thereof." §76-6-401(3), U.C.A. 1953, defines the term "purpose to deprive" to mean:

"(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it."

The common law modification is simply to recognize that a person may not intend to permanently deprive the owner or possessor, but may intend to act such that the property will be completely or substantially lost to the owner or possessor. The provision is substantially comparable but not quite identical to §223.0(1) of the Model Penal Code. The differences are in style of language and completeness rather than substance. See, Utah's New Penal Code: Theft, 1973 Utah L.Rev. 718, 744-745. The changes require more than a mere "joy ride" with the property, 1973 Utah L.Rev. 745, but require either an intent to permanently deprive, substantial risk of loss equivalent to an intent to permanently deprive, or a serious loss of economic value. See Model Penal Code Tentative Draft, #1, pp. 69-73 (1956).

Applying the required standard to the instant case, there is evidence of an intent on the part of the appellant at the time of the taking, State v. Bender, 581 P.2d 1019 (Utah 1978), that satisfies any of the definitions of "intent to deprive" under the statute. According to Delgado, R. 104:

"Q. Isn't it in fact true that at the Hilton Hotel you gave the ring to Joan Gorlick for the purpose of having it appraised?

A. I gave her permission to appraise it at the table and she wanted to take it home for the night to appraise it, and I told her, 'No.'"

Thus, the difference between Delgado and the other witnesses whether Delgado let appellant take the ring for appraisal over night or at the table at the Hilton. There is no evidence that Ms. Gorlick intended to keep it for any long period at all. Any contrary suggestion is pure speculation. Delgado knew appellant and knew where to find her. The ring would not depreciate in value or undergo economic deterioration or depreciation. There was no evidence the ring was taken for reward or that Delgado was unlikely to recover it. To allow a record as barren as this one to support an inference of an intent to deprive is to ignore the evidence to the contrary and to create an irrebuttable presumption that intent to deprive exists in every taking. This would do violence to the legislative intent and purpose. The evidence as it stands in the record is totally insufficient to support a conclusion beyond a reasonable doubt that appellant had the intent to deprive.

POINT III

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH APPELLANT'S GUILT OF SECOND DEGREE FELONY THEFT.

The appellant was charged with theft of property of a value in excess of \$1000 (R. 13). This is a second degree felony under Utah law, §76-6-412(a), U.C.A. 1953. The prosecution, in order to support its contention that the value of the ring in question was in excess of \$1000, offered the expert testimony of Mr. Milton Petersen, a diamond salesman for Schubach Jewelry in Salt Lake City. Mr. Petersen testified that in his opinion the ring had a retail value on August 1, 1978, of between \$1200 and \$1400 "full retail" (R. 127). However, Mr. Petersen also noted that if the ring were purchased as a part of a "keystone" purchase the value would be around \$500 to \$600 (R. 128). Keystone value was suggested as to the value to someone with large buying power (R. 128). The victim, David Delgado, had put the value at between \$300 to \$700 (R. 100). The ring had been purchased new four years before for a price of \$275 (R. 101). Cal Smith, who had jewelry experience, had advised Delgado the ring was worth between \$250 and \$300 (R. 188). According to Paul Tolman, Delgado and Gorlick in discussing the jewelry trade had put a value on the ring around \$250 (R. 204.) In rendering his opinion on value, Mr. Petersen noted that there had been a tremendous increase in the wholesale value of diamonds and that the "international money market" had a "tremendous effect" on the value of the ring because the dollar goes down in proportion to the inflation rate.

In State v. Logan, 563 P.2d 811 (Utah 1977), this Court noted that the definition of value contained in the Penal Code, §76-6-1 U.C.A. 1953, did not apply to the value of stolen property. This Court stated:

"In general, the common-law gradation of the offense of larceny that is based on the value of the property stolen has been retained in most jurisdictions, and in the absence of statutes providing otherwise, the measure of the value is its fair market value at the time and place where the alleged crime was committed. Market value has been further clarified as being a measure of what the owner could expect to receive, and the amount a willing buyer would pay to the true owner for the stolen item. In State v. Clark, the court said that to determine whether the crime charged is to be petit or grand larceny, the test is the market value of the property; that is, the price a well-informed buyer would pay to a well-informed seller where neither is obliged to enter into the transaction.

"We accept the market-value test as the appropriate test to be used in determining the value of stolen property not otherwise provided for in our statute, and the trial court correctly stated the law in its jury instructions." (Emphasis added).

Based on the standard in the Logan case, it is submitted the prosecution's evidence failed to establish the value of the ring as being in excess of \$1000 as is required to support a conviction for a theft felony in the second degree. It appears that Mr. Petersen's testimony, although directed to the value of the ring on August 1, 1978, was never related to the "place". This Court adopted the time and place standard of market value in the Logan case referenced above. This is in accord with the rule from other jurisdictions. People v. Kolego, 554 P.2d 712 (Colo.App. 1976); Oldham v. The State, 534 P.2d 107 (Wyo. 1975); Wise v. The State, 494 S.W.2d 91 (Tex.Crim.App. 1973). At no time did the prosecution direct Mr.

Petersen's attention to the need to relate value to the place of the theft. As noted in Mr. Petersen's testimony, market value on diamonds may be based on a worldwide or international market standard. It is important that the value of the item being appraised be tied to the market for the item at the place where the theft occurred and not to some other general or nebulous standard. Since the prosecution did not relate the evidence of value to the place of the theft, there is no evidence in the record from which the jury could have found the value of the diamond ring which was the subject of the theft to have been \$1000 at the time and place where the crime occurred. Therefore, the evidence is insufficient to support a conviction for a felony in the second degree.

In addition, it is submitted that the evidence is insufficient for another reason. The crime of theft as defined in §76-6-404, U.C.A. 1953, is defined with reference to "the property of another". Property is defined in §76-6-401, U.C.A. 1953, as including many items including "anything of value to the owner". It is submitted that where the evidence of value to the owner is before the jury that such a standard governs the value of the item for the purposes of determining value under the theft statute. In the instant case, the value to Mr. Delgado was no more than \$700 according to the testimony in the record and could have been as low as \$300. Other evidence corroborates the willingness of Delgado to trade the item for other property having a value within the stated range. Since the bartering for the ring took place immediately before the theft and the value to the owner was established at less

than \$1000, it is submitted that such value governs over the testimony of experts addressing the value of an item in a hypothetical marketplace. It is, therefore, submitted that this Court should find that the prosecution's evidence was insufficient to establish the crime of theft as a second degree felony and order the judgment to be affirmed at no higher level than a third degree felony.

CONCLUSION

The evidence in this case, when examined against the burden of proof on the prosecution to establish the defendant's guilt beyond reasonable doubt and, when appraised against traditional standards of appellate review, was insufficient to establish the appellant's guilt. A defendant's guilt cannot be based upon the testimony of a witness whose credibility has been so thoroughly undermined as was the testimony of the victim in this case. The State of Utah does not need convictions based on such evidence.

Additionally, it is submitted that the evidence of the appellant's "intent to deprive" is wholly speculative and insufficient to meet the legal standards of "intent to deprive" as it is defined in the Penal Code. At the most, the evidence would support a finding that any taking that occurred without the permission of the owner was a mere temporary trespass and not under circumstances that would meet the statutory standard for a theft conviction. Finally, it is submitted that the evidence of value is insufficient to support a

conviction for a second degree felony and that this Court should, at the very least, reverse and direct a conviction be entered on the basis of a felony in the third degree.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered ten true and correct copies of the foregoing BRIEF OF APPELLANT to the Utah Supreme Court, State Capitol Building, Salt Lake City, Utah 84114, and two true and correct copies to Robert B. Hansen, Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114; this 2 day of August, 1979.

A handwritten signature in dark ink, appearing to read "Stephen K. Hansen", is written over a horizontal line.