

1988

# The State of Utah v. James Devon Lanier : Reply Brief

Utah Supreme Court

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BRIEF

880101

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff/Respondent, :  
v. :  
JAMES DEVON LANIER, : Case No. 880101  
Defendant/Appellant. : Priority No. 2

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REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. §76-6-302 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, Judge, presiding.

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**FILED**  
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES. . . . .	ii
INTRODUCTION. . . . .	1
SUMMARY OF THE ARGUMENT . . . . .	1
ARGUMENT	
<u>POINT I. THE TRIAL COURT ABUSED ITS DISCRETION</u> <u>IN REFUSING TO SUPPRESS MR. LANIER'S PRIOR</u> <u>CONVICTIONS.</u> . . . . .	1
A. THE STATE FAILED TO SUSTAIN ITS BURDEN UNDER RULE 609(A)(1) OF PERSUADING THE COURT THAT THE PROBATIVE VALUE OF THE PRIOR CONVICTIONS OUTWEIGHED THEIR PREJUDICIAL EFFECT . . . . .	2
B. MR. LANIER'S CONVICTIONS WERE NOT ADMISSIBLE UNDER RULE 609(A)(2). . . . .	5
C. THE TRIAL COURT'S ERROR WAS NOT HARMLESS. . . . .	7
CONCLUSION. . . . .	9

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE</u>
<u>State v. Banner</u> , 717 P.2d 1325 (Utah 1986) . . . . .	2, 3, 4, 6, 8
<u>State v. Cintron</u> , 680 P.2d 33 (Utah 1984). . . . .	5, 6
<u>State v. Gentry</u> , 747 P.2d 1032 (Utah 1987) . . . . .	2, 3, 4, 7, 8
<u>United States v. Ackridge</u> , 370 F.Supp. 214 (E.D.Pa. 1973). . . . .	6
<u>United States v. Baber</u> , 447 F.2d 1267 (D.C. Cir. 1971). . . . .	6
<u>United States v. Bianco</u> , 419 F.Supp. 507 (E.D.Pa. 1976). . . . .	6
<u>United States v. Gray</u> , 468 F.2d 257 (3d Cir. 1972) . . . . .	6
<u>United States v. Smith</u> , 551 F.2d 348 (D.C. Cir. 1976) . . . . .	6, 7

STATUTORY PROVISIONS

Rule 609, Utah Rules of Evidence (1983). . . . .	1, 2, 3, 5, 7
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INTRODUCTION

The Jurisdictional Statement, Statement of the Case, and Statement of the Facts are set forth in Appellant's opening brief at iii, 1-3.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Appellant's motion to suppress his prior convictions, and such error was not harmless. The State failed to sustain its burden of showing that the probative value outweighed the prejudicial effect of the prior convictions and therefore the convictions were not admissible under Rule 609(a)(1). Nor were they crimes of dishonesty under Rule 609(a)(2). Had Appellant testified, there is a likelihood the outcome of the case would have been different.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SUPPRESS MR. LANIER'S PRIOR CONVICTIONS.

A. THE STATE FAILED TO SUSTAIN ITS BURDEN UNDER RULE 609(A)(1) OF PERSUADING THE COURT THAT THE PROBATIVE VALUE OF THE PRIOR CONVICTIONS OUTWEIGHED THEIR PREJUDICIAL EFFECT.

"The prosecution has the burden under Rule 609(a) of persuading the court that the prior convictions should not be suppressed. . . . [Citations omitted]." State v. Gentry, 747 P.2d 1032 (Utah 1987). Pursuant to subsection (1) of Rule 609(a), this burden includes establishing "that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant. . . ." Rule 609(a)(1), Utah Rules of Evidence (1983).

As outlined in Appellant's opening brief at 9-14, an application of the five "[f]actors to be considered when balancing probative value against prejudicial effect" as set forth in State v. Banner, 717 P.2d 1325 (Utah 1986), establishes that the State did not sustain its burden under subsection (1) in the present case.

The State acknowledges that in the present case, both the remoteness of the prior convictions and the similarity between the robbery conviction and the charges in instant case weigh against admission. Respondent's Brief at 5. The State argues, however that Mr. Lanier's prior convictions are distinguishable from those involved in Banner and Gentry because they are relevant to credibility and that "people who have committed crimes in the past are more likely to try to cover up their responsibility in the crime on trial to avoid the harsher penalties associated with having been previously convicted." Respondent's Brief at 6.

Crimes of burglary and robbery do not "inherently reflect on a defendant's character for truth and veracity[]" and "shed[] about the same light as any crime involving moral turpitude." State v. Banner, 717 P.2d at 1334-5. The State's argument that persons who have felony convictions are more likely to lie to avoid harsher penalties fails to distinguish between felonies and comes very close to arguing that simply because an individual has a felony conviction, he is likely to lie under oath.

The State's assertion that burglary and robbery are deceitful acts since "[t]he burglar who secretly enters the private home concealing his or her presence" (Respondent's Brief at 10) is dishonest as is the robber who enters a store beforehand, then later disguises himself<sup>1</sup> is also applicable to most crimes. A rapist often sneaks around a house or other premises, concealing his presence until he locates a victim. An inmate attempting to escape similarly conceals his whereabouts. Yet, this Court has suppressed convictions for both rape and escape under subsection (1) of Rule 609. See Banner, 717 P.2d at 1334-35; Gentry, 747 P.2d at 1037-38.

The State also seems to suggest that where "credibility issues" are crucial, the Court should be more lenient in admitting

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<sup>1</sup> The State's suggestion that the male robber in this case was deceitful since "the robber enter[ed] a store posing as a customer and later on, disguises himself to avoid identification" (Respondent's Brief at 10) is misleading since, in this case, there was no evidence that the male robber entered the store prior to the robbery. Furthermore, there was no evidence that such "deception" occurred in the robbery for which Appellant had been previously convicted and which the trial court refused to suppress.

the prior convictions. Respondent's Brief at 6-7. On the contrary, in both Banner and Gentry, this Court focused on the importance of the accused's testimony in conjunction with the role of credibility issues in the case and found in favor of exclusion because "the accused's testimony and the importance of credibility in this case were critical in determining whose version of the facts was correct since the prosecution's case included no decisive nontestimonial evidence." Banner, 717 P.2d at 1335; see also Gentry, 747 P.2d at 1037-8. In the present case, where the State's case depended primarily on the long-winded and often inconsistent testimony of Mr. Martinez, Mr. Lanier's testimony was critical, "warranting exclusion of the convictions." Banner, 717 P.2d at 1334.

The State's attempt to argue that Mr. Lanier's testimony was not crucial instead emphasizes just how crucial the testimony was in this case. As the State points out, defense counsel attacked the testimony of the witnesses and impeached their identification of him. Respondent's Brief at 7. The State points out that Mr. Lanier's testimony would have been in direct conflict with "the two prior identifications." Respondent's Brief at 7. Because the testimony would have been in conflict with that of the witnesses, and due to the impeachment of the witnesses' identification testimony, including evidence that Mr. Martinez was unable to describe the hair color of the robber immediately after the incident (R. 249) and was ninety percent certain that a photograph of someone other than the defendant showed the robber (R. 255), the testimony of Mr. Lanier was critical to this case.

The only arguments advanced by the State are that robbery and burglary may be slightly more probative of credibility than some other crimes because a defendant might lie to avoid harsher penalties and that because credibility was important to the case, the convictions should be admitted. Even if such positions were accepted by this Court, they fail to outweigh the prejudicial effect of the convictions due to the similarity between them and the crime charged, the remoteness of the convictions, and the need for the testimony of the defendant.

The trial court abused its discretion in finding that the State sustained its burden of showing that the probative value of the convictions outweighed their prejudicial effect, and in finding the convictions admissible under Rule 609(a)(1), Utah Rules of Evidence (1983).

B. MR. LANIER'S CONVICTIONS WERE NOT ADMISSIBLE UNDER RULE 609(a)(2).

The State mistakenly relies on State v. Cintron, 680 P.2d 33 (Utah 1984), for the proposition that theft crimes are crimes of dishonesty. Respondent's Brief at 9. The State v. Cintron per curiam opinion was decided under the old rules of evidence and does not reflect the new direction taken in Utah since adoption of the federal rules of evidence. Specifically, State v. Cintron is inconsistent with Rule 609's more narrow interpretation of "dishonesty." This Court has stated that previous opinions which are inconsistent with the new direction taken since adopting the

federal rules are overruled. State v. Banner, 717 P.2d 1325, 1334 n. 40 (Utah 1986). State v. Cintron is just such an opinion and therefore should not be applied under Rule 609(a)(2).

This analysis is buttressed by footnote 45 of State v. Banner where this Court pointed out that the prosecutor's reliance at the trial court level on case law established prior to Rule 609(a) was significant--and presumably not persuasive on appeal. Both this Court and the Utah State Bar Commission's Rules Committee's Preliminary Note to the Utah Rules of Evidence indicate a serious commitment to using the adoption of the federal rules of evidence as a fresh starting place for the law of evidence in this state, taking aim at seeking uniformity between the rules by looking to the federal rules for interpretation. State v. Banner, 717 P.2d at 1333-34. The Cintron opinion violates this new direction and should not be relied upon.

The State contends that "[o]ther courts have ruled that the theft-burglary-robbery type of crimes are admissible as crimes of "dishonesty" under Rule 609(a)(2)." Respondent's Brief at 11. Three of the four cases cited in support of this proposition--United States v. Ackridge, 370 F.Supp. 214 (E.D.Pa. 1973); United States v. Gray, 468 F.2d 257 (3rd Cir. 1972); and United States v. Baber, 447 F.2d 1267 (D.C. Cir. 1971)--predate Congress' adoption of the federal rules of evidence. The fourth case, United States v. Bianco, 419 F.Supp. 507 (E.D.Pa. 1976), decided after enactment of the federal rules, relied only upon pre-federal rules cases. As the District of Columbia Circuit Court pointed out in United States v.

Smith, 551 F.2d 348, 364 (D.C. Cir. 1976), "[t]he simple answer to the government's argument is that none of these cases involved Rule 609." The Smith court further explained that these opinions relying on pre-609 cases "are not controlling in this case and indeed are essentially irrelevant." Id. at 365.

The enactment of the federal rules in 1975, and their adoption in Utah in 1983, represented significant changes in the treatment of prior convictions as impeachment evidence. The burden shifted, the judge's discretion was altered, and the analysis is distinct. Cases predating these changes therefore do not offer helpful insights.

As discussed in Appellant's opening brief at 6-8, robbery and burglary are not crimes of dishonesty or false statement within the meaning of Rule 609(a)(2), and the trial court erred in admitting the convictions under this rule.

C. THE TRIAL COURT'S ERROR WAS NOT HARMLESS.

As the State points out, the relevant standard of review is as follows:

[T]he standard for error in cases involving a wrongful failure to exclude prior convictions is whether "there was 'a reasonable likelihood of a more favorable result for the defendant' [quotations omitted]."

State v. Gentry, 747 P.2d at 1038.

In Gentry, this Court determined:

After a review of the record, we are persuaded that there is a reasonable likelihood that the result would have been different had defendant's prior convictions been excluded and had defendant

taken the stand. Defendant's testimony might have convinced the jury that the events related by the victim were untrue. Because of this, we reverse defendant's conviction and remand for a new trial.

Id.

Similarly, in Banner, this Court reversed the defendant's conviction where the defendant did not take the stand after the trial court denied his motion to suppress his prior convictions. 717 P.2d at 1335. This court pointed out that the defendant had filed a notice of alibi which he withdrew after the denial of the motion. The lack of corroborating nontestimonial evidence and the fact that the State relied chiefly on the testimony of two witnesses, one of whom had a past sexual relationship with the defendant, impacted on this Court's decision that "[a]fter a review of the record, we are not convinced that had the defendant testified, the outcome in this case would necessarily have been the same." Id. at 1335.

The present case is similar to Banner in that the defendant had an alibi defense which was not pursued after the motion to suppress was denied. The State relied primarily on two witnesses, one of whom was involved in the robbery, and had a history of drug problems.

In addition, Mr. Martinez' testimony was not overly compelling. At one point, Mr. Martinez was ninety percent certain someone other than the defendant committed the robbery. Under such circumstances, there is a likelihood that the outcome of this case would have been different had the defendant testified.

CONCLUSION

Defendant/Appellant, JAMES DEVON LANIER, respectfully requests that this Court reverse his conviction and remand this case to the District Court for a new trial.

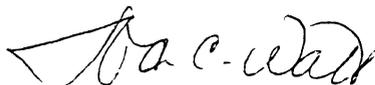
Respectfully submitted this 16 day of November, 1988.



\_\_\_\_\_  
JOAN C. WATT  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 322 State Capitol, Salt Lake City, Utah 84114 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 16 day of November, 1988.



\_\_\_\_\_  
JOAN C. WATT

DELIVERED by \_\_\_\_\_  
this \_\_\_\_\_ day of November, 1988.

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