

1999

West Valley City v. James W. Decker : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *West Valley City v. Decker*, No. 990029 (Utah Court of Appeals, 1999).
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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY, Appellee,	Case No.: 990029-CA
vs.	
JAMES W. DECKER, Appellant.	Priority Number: 15

BRIEF OF APPELLEE

Appeal From the Decision of the Third District Court, Judge Ann Boyden

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AUG - 3 1999

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over appeals from the Third District Court pursuant to Section 78-2a-3(2)(e), of the Utah Code Annotated 1953, as amended.

STATEMENT OF ISSUES FOR REVIEW AND STANDARDS OF REVIEW

ISSUE 1: Whether the trial court correctly denied Appellant's request for a bill of particulars.

STANDARD OF REVIEW: Abuse of Discretion. "We will not reverse the trial court's decision to deny a bill of particulars unless the trial court has abused its discretion." *State v. Swapp*, 808 P.2d 115, 117 (Utah Ct. App. 1991).

ISSUE 2: Whether the Information is legally sufficient.

STANDARD OF REVIEW: The sufficiency of the Information was not challenged before the trial court. The Court will not consider arguments raised for the first time on appeal.

ISSUE 3: Whether the trial court correctly denied Appellant's request for a jury trial.

STANDARD OF REVIEW: Abuse of Discretion. "[O]nce the trial court agreed to eliminate jail time from its sentencing options, it no longer was required under Utah law to grant [defendant's] right to a jury trial." *West Valley City v. McDonald*, 948 P.2d 371, 374 (Utah Ct. App. 1997). The decision to eliminate jail time as a sentencing option was within the trial court's discretion.

ISSUE 4: Whether the trial court correctly determined that two offenses had been committed.

STANDARD OF REVIEW: Correction of Error. "This court reviews questions of law under a correction of error standard, without deference to the trial court." *State v. Shipler*, 869 P.2d 968, 969 (Utah Ct. App. 1994) (citations omitted).

ISSUE 5: Whether the trial court correctly determined that the facts supported convictions.

STANDARD OF REVIEW: Clearly Erroneous Standard. "Findings of fact are reviewed by an appellate court under the clearly erroneous standard." *State v. Pena*, 869 P.2d 932, 935 (Utah 1994).

DETERMINATIVE PROVISIONS

Section 76-1-401. "Single criminal episode" defined — Joinder of offenses and defendants.

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-8a-1 in controlling the joinder of offenses and defendants in criminal proceedings.

Section 76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways

under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Section 76-4-101. Attempt — Elements of offense.

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

(3) No defense to the offense of attempt shall arise:

(a) because the offense attempted was actually committed; or

(b) due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

Section 76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(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.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment

in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Section 76-6-404. Theft --- Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Section 76-6-406. Theft by deception.

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

STATEMENT OF THE CASE

A. Nature of the Case

This matter is an appeal from the trial court's conviction of Appellant on two counts, Theft by Deception and Attempted Theft.

B. Course of the Proceedings

This case followed the ordinary course of a criminal proceeding, with pre-trials, some

continuances, and an eventual bench trial on November 4, 1998. Sentencing was conducted on December 14, 1998.

C. Disposition Before the Trial Court

Following a bench trial, the trial court found Appellant guilty on the two charges; one of Theft by Deception, and the other of Attempted Theft. (Transcript of Trial, West Valley City v. Decker, Case # 98110180 pp. 141 - 142)(*hereafter* "Trial Transcript") At sentencing, the trial judge denied Appellant's Motion to Arrest Judgment, and sentenced Appellant to a total of eighty hours of community service, and one year's probation. (Transcript of Sentencing Hearing, West Valley City v. Decker, Case # 98110180, pp. 17 -21)(*hereafter* "Sentencing Transcript").

D. Statement of Facts

1. Appellant, James W. Decker ("Decker") is a resident of West Valley City, Utah (the "City"). (Trial Transcript, p. 92).
2. The City cited Decker for violations of City Ordinances that occurred on his property.(*See id.*, p. 27)
3. Decker requested that he be permitted to view the City's files on the ordinance violations. *Id.*
4. On February 27, 1998, the City provided the file to Decker to review, although the City employees were suspicious of Decker. He was informed that he could obtain

copies of any material in the file. (*Id.*, pp. 26-28; 80-81).

5. Decker proceeded to review the file. (*Id.*, pp 33-34)
6. While he had custody of the file, City employees observed Decker removing photographs from the file. (*Id.*, p. 140)
7. The employees observed that Decker hid the photographs between two telephone books. (*Id.*, p. 141)
8. Decker returned the file to the City employees, and requested that copies be provided. (*Id.*, p. 34)
9. Decker left the area to pay for the copies. *Id.*
10. While Decker was absent, the City employees retrieved the photographs and returned them to the file. (*Id.*, p. 35)
11. When Decker returned approximately 15 minutes later, he was provided with the copies that he requested. *Id.*
12. The City employees observed that Decker appeared nervous, and did not promptly leave after obtaining the copies he requested. (*Id.*, pp 36, 84-86)
13. Decker finally removed the two telephone books where he had previously hidden the photographs, and left the building. (*Id.*, p. 141)
14. Decker was charged with one count of Theft by Deception, and one count of Attempted Theft. (*Id.*, p. 7)

15. Decker requested a Bill of Particulars. (*Id.*, p. 11)
16. Pursuant to policy, the City provided Decker and his counsel with complete copies of the prosecution's file. *Id.*
17. In response to Decker's request, the City summarized the facts that led to the charges.
18. Decker also requested a jury trial. (*Id.*, p. 12)
19. After several continuances, a trial date was set for November 4, 1998.
20. Decker failed to confirm his jury request, as required by the trial court. The trial judge also eliminated jail time as a sentencing option. (*Id.*, p. 16)
21. A bench trial was held on November 4.
22. The trial judge ruled that the City had met its burden, and found Decker guilty on both counts. (*Id.*, p. 141)
23. The Sentencing Hearing was held on December 14, 1998.
24. At that hearing, Decker moved to arrest the judgment, contesting the refusal to provide a bill of particulars, the denied jury request, and the verdict at the bench trial. (Sentencing Transcript, p. 6)
25. The trial judge denied Decker's Motion to Arrest Judgment, and proceeded to sentence him. (*Id.*, p. 12)
26. The trial judge sentenced Decker to a total of 80 hours of community service, and twelve months probation. (*Id.*, p. 19)

SUMMARY OF THE ARGUMENT

I THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION BY DENYING DECKER'S REQUEST FOR A BILL OF PARTICULARS

The trial judge did not abuse her discretion by denying Decker's Motion to Arrest Judgment on the grounds that the City had failed to provide a bill of particulars. It is within the discretion of the trial court to determine whether or not a defendant requires a bill of particulars. *Swapp*, 808 P.2d at 117. In this case, Decker has had full access to the prosecutor's files, and the City provided him with a factual summary prior to trial. Decker was provided with more information than a bill of particulars could have, and it was not an abuse of discretion for the trial court to deny his motion. *Blubaugh*, 904 P.2d at 702.

II THE TRIAL COURT'S DECISION DENYING DECKER'S DEMAND FOR A JURY TRIAL WAS NOT AN ABUSE OF DISCRETION

The trial court did abuse its discretion when it eliminated jail time as a sentencing option, meaning that Decker no longer had the right to a jury trial. *McDonald*, 948 P.2d at 374. Decker failed to follow a simple instruction to confirm his jury request, and the trial judge concluded that Decker would not be sentenced to jail time. This determination was not an abuse of the trial court's discretion, and Decker was not entitled to a jury trial.

III TRIAL JUDGE CORRECTLY DETERMINED THAT THERE WERE TWO SEPARATE CRIMINAL OFFENSES

The trial judge correctly applied the law, and determined that Decker could be charged

with two crimes arising from the single criminal episode. The facts establish that Decker was guilty of theft by deception, and completed the crime by exercising control over the City's property. The facts also establish that Decker then left the area for approximately 15 minutes, and while he was absent, the factual situation was altered. When he returned, a new set of facts established that he attempted to exercise control over the City's property, thus committing two crimes. The trial court held that the two crimes could be committed independently of each other, and so Decker could be tried on both counts. *Young*, 780 P.2d at 1239. This was a correct application of the law, and it should not be reversed.

IV THE EVIDENCE ADEQUATELY SUPPORTS THE TRIAL JUDGE'S VERDICT CONVICTING DECKER OF THE TWO CRIMES

The evidence clearly supports the trial judge's verdict convicting Decker of both crimes. Decker was guilty of theft by deception. He exercised unauthorized control over property belonging to the City. Decker used deception to obtain control. He deceived the City employees by creating the impression that the files were still complete, and that he could be trusted not to disturb them. The City employees relied on his deception, and entrusted Decker with the file. Decker abused that trust, and removed the property, thus completing the crime. The fact that the City employees caught him does not excuse the violation.

The facts also support Decker's conviction of attempted theft. After he completed the crime of theft by deception, he left the area for approximately 15 minutes. While he was

gone, the City employees retrieved the property he had misappropriated from the files. When Decker returned, he paused for several minutes, and removed the two books where he had previously hidden the property. He did not ask permission to take the books, and he did not take just one. This tends to prove that he intended to remove property belonging to the City, and would have, except that the factual situation had changed making it impossible for Decker to carry out his crime. The facts clearly support both convictions.

DETAIL OF THE ARGUMENT

I THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION BY DENYING DECKER'S REQUEST FOR A BILL OF PARTICULARS

The trial court did not abuse its discretion by denying Decker's Motion to Arrest Judgment for failure to provide a bill of particulars. "We will not reverse [a] trial court's decision to deny a bill of particulars unless a trial court has abused its discretion" *State v Swapp*, 808 P 2d 115,117 (Utah Ct App 1991), *cert denied*, 815 P 2d 241(1991). "The purposes of a bill of particulars are to enable a defendant to better understand the nature of the charge against him and to better prepare his defense" *State v Strand*, 720 P 2d 425, 427 (Utah 1986). A defendant may request a bill of particulars if "facts not set out in an information or indictment are required to inform [the] defendant of the nature and cause of the offense charged." UTAH R. CRIM. P. 4(e). In addition, "the information can be supplemented with a 'fact statement' detailing the facts that support the charge." *Swapp*, 808

P 2d at 118

These cases demonstrate that the trial court did not abuse its discretion when it denied Decker's Motion to Arrest Judgment. The City filed an objection in response to Decker's Motion, in which the facts that led to the charges against Decker were set out. In addition, Decker's counsel obtained a complete copy of the prosecution's file, and the file remained available for review by Decker and any of his attorneys.¹ In short, the essential facts of the case were made available to Decker and all of the attorneys representing him.

Decker's contention is very much like the argument that was rejected by this court in *State v. Blubaugh*, 904 P.2d 688 (Utah Ct. App. 1995). Like Decker, Blubaugh argued for reversal because the prosecutor failed to provide him with a bill of particulars. However, the record plainly showed that Blubaugh received adequate notice of the facts underlying the charges against him. In the matter presently before the court, Decker and his attorneys have had access to the prosecutor's files, and the City stated the essential facts underlying the charges. This "provided sufficient information to enable the defendant to prepare his defense." *Blubaugh*, 904 P.2d at 702. The trial judge concluded that Decker had adequate information about the nature of the charge against him, and could prepare his defense. The trial court did not abuse its discretion by denying Decker's motion.

¹ Decker also testified that he understood the charges. (Trial Transcript, p. 93)

II THE TRIAL COURT'S DECISION DENYING DECKER'S DEMAND FOR A JURY TRIAL WAS NOT AN ABUSE OF DISCRETION

The trial court's denial of Decker's demand for a jury trial was not an abuse of discretion. The trial court's authority to deny Decker's request for a jury trial is well settled in case law. "It is well established that the right to a jury trial is triggered by the type of punishment a defendant faces." *West Valley City v McDonald*, 948 P.2d 371, 374 (Utah Ct App 1997), *see also Lewis v U.S.*, 518 U.S. 322 (1996). Furthermore, "[it] has long been settled 'that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'" *Blanton v City of North Las Vegas*, 489 U.S. 538, 541 (1989) (quoting *Duncan v Louisiana*, 391 U.S. 145, 159 (1968)). To determine whether a defendant has a right to a jury trial, courts should consider "whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial." *Blanton*, 489 U.S. at 542.

Both charges against Decker carried maximum possible prison terms of 6 months or less. Thus Decker had no right to a jury trial. *See McDonald*, 948 P.2d at 375 n.6. This Court has held that a defendant does not have a right to a jury trial if jail time is eliminated as a sentencing option. *Id.*, 948 P.2d at 374. The trial judge eliminated jail time as a sentencing option based on review of the charging documents. This, coupled with Decker's refusal to comply with simple rules for confirming a request for a jury trial, was the basis of

the trial judge's denial of Decker's request (*See* Trial Transcript p 16, *see also* Sentencing Transcript, pp 6 – 8) The trial judge did not abuse her discretion by eliminating jail time as a sentencing option, which affected Decker's right to a jury trial

III TRIAL JUDGE CORRECTLY DETERMINED THAT THERE WERE TWO SEPARATE CRIMINAL OFFENSES

The trial court correctly held that the acts committed by Decker constituted two separate criminal offenses The Utah Code provides that a defendant may be prosecuted for all crimes committed in a single criminal episode

A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode, however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code the act shall be punishable under only one such provision, an acquittal or conviction in sentence under any such provision bars a prosecution under any other such provision

UTAH CODE ANN § 76-1-402(1) (1995)

Because there were two separate acts which could be charged under two different provisions of the code, Decker was charged with two separate offenses which arose out of the single criminal episode The first act was Decker's obtaining unauthorized control of the photographs through deceptive means That act was completed when he removed the photographs from the file and hid them in the telephone books The second act was committed later, after Decker had returned the file, left the area, and came back to obtain

copies that he had purchased. He, still thinking the photographs were hidden in the telephone books, left the building with those books. This was the basis of the trial court's ruling that there were two separate acts constituting two separate crimes.

These two acts constituted separate criminal offenses because as indicated, not only are they separate acts, they also required the proof of different factual elements. First, the act of theft by deception required proof that Decker obtained control of the City's property through deceptive means. Second, the act of attempted theft required proof that Decker attempted to obtain control of the property, but that the facts made it impossible for Decker to complete the crime. The two acts were removed in time because Decker had left the area for approximately 15 minutes, establishing different factual situations for the two acts. The trial court carefully considered the facts both at trial and again at sentencing, and found that there were two acts constituting two thefts. Because there were two separate acts constituting two separate crimes the court correctly ruled that Decker could be prosecuted for both.

The situation in this case is analogous to that addressed by The Utah Supreme Court in *State v. Young*, 780 P.2d 1233 (Utah 1989). Young was convicted of both sodomy and sexual abuse, and argued that because the acts were part of a single criminal episode he could not be convicted of both crimes. The Court agreed that the acts were a part of a single criminal episode, but they held that the forcible sexual abuse was a separate act from the

forcible sodomy. "The defendant's argument would have merit if one act could not have been committed without also necessarily committing the other. Section 76-1-402(1) provides that a defendant may be prosecuted for all offenses arising out of the same criminal episode, but may not be so prosecuted when such offenses are established by the 'same act.'" *Young*, 780 P.2d at 1239.

Like the defendant in *Young*, Decker argues that because the acts arose of the single criminal episode he can only be prosecuted for one theft. However, the situation in *Young* indicates that separate crimes can be prosecuted that arise out of the single criminal episode, if the facts show that there are separate acts constituting separate crimes. A careful analysis of the facts shows that the trial judge's conclusion was correct because Decker had already completed the theft by deception by exercising control of the photographs using deceptive means. Then, he left the area. While he was gone, City employees retrieved the photographs, thus altering the factual situation. When Decker returned, he thought that the photographs were still securely hidden in the telephone books, so he attempted to exercise unauthorized control of the City's property by removing two telephone books from the building. These constitute separate acts and shows that the theft by deception was committed without necessarily committing the attempted theft which occurred later, and under different factual circumstances. The trial court held that these constituted two separate acts, and that Decker could be charged with two crimes. This conclusion was a correct application of the

law, and it should not be reversed

IV THE EVIDENCE ADEQUATELY SUPPORTS THE TRIAL JUDGE'S VERDICT CONVICTING DECKER OF THE TWO CRIMES

The evidence presented at trial supports the trial judge's verdict that Decker was guilty of the two counts. A trial judge's factual conclusions are reviewed under the clearly erroneous standard. "For a reviewing court to find clear error, it must decide the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *State v. Pena*, 869 P.2d 932, 935-936 (Utah 1994). The trial judge carefully considered all of the evidence and found the City had met its burden of proving the elements of the offenses that Decker was charged with. (See Trial Transcript, pp 139 – 142)

A The Evidence Supports the Verdict Convicting Decker of Theft by Deception

The evidence clearly supports the trial judge's verdict finding Decker guilty of Theft by Deception. "A person commits theft if he obtains or exercises unauthorized control over property of another by deception and with purpose to deprive him thereof." UTAH CODE ANN. § 76-6-406(1). Theft by deception also includes the following elements: "(1) that defendant's acts satisfied the statutory definition of deception, (2) that the deception occurred contemporaneously with the transaction, and (3) that the victim relied upon the deception, at least to some extent, in parting with the property." *State v. LeFevre*, 825 P.2d 681, 685

(Utah Ct. App. 1992).

1. Decker Exercised Unauthorized Control Over Property Belonging to the City.

The trial judge determined that Decker exercised unauthorized control over property belonging to the City. Decker removed photographs from a file belonging to the City. (Trial Transcript, p. 140). He was permitted to look at the contents of the file, but was not allowed to remove any items. By removing the photographs without permission, he was exercising unauthorized control over property belonging to the City. By hiding the photographs, Decker showed that he intended to deprive the City of the property.

2. Decker's Actions Satisfied the Statutory Definition of Deception.

Decker's actions satisfied the statutory definition of deception, which is found at Section 76-6-401(5) of the Utah Code:

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true

UTAH CODE ANN. § 76-6-401(5)(a), (b). Decker's actions satisfy both of these definitions.

First, Decker created the impression that the file was complete when he returned it to the City employees. He knew that he had removed the photographs, but he still presented the file as if nothing improper had happened. This action was likely to affect the judgment of the

employees which would permit Decker to obtain control over the photographs.

Second, Decker failed to correct the impression that the file was incomplete, when he knew that it was not. Having returned the file after surreptitiously removing the photographs, he represented by his conduct that the file was complete, and failed to correct that impression. Again, this action was likely to affect the judgment of the City employees.

In addition, Decker gained permission to review the file using deception. Decker created the false impression that he could be trusted with the files, and that the City did not need to take any additional safeguards to protect the integrity of the file. Decker wanted access to the files so he could destroy the evidence that was found in them. In short, although the City trusted Decker to be honest, that trust was obviously misplaced. Had the City employees known, they would have required safeguards such as closer supervision. Decker's impression that he could be trusted with the files affected the judgment of the City employees when they allowed him to exercise control over the files and the photographs. Thus, Decker's actions satisfied the statutory definition of deception.

Decker relies on testimony stating that the employee, Candace Gleed, was not actually deceived by Decker's action. It is true that Ms Gleed saw Decker remove the photographs and hide them and was able to retrieve the photographs before Decker left the premises. The crime, however, does not require the success of the deceptive act, only that the acts satisfy the definition of deception.

3. The Deception Occurred Contemporaneously With the Transaction.

There can be no dispute that Decker's deception occurred contemporaneously with the transaction in which he was allowed to obtain control over the City's property. The deception occurred at the same time that Decker removed the photographs from the file, and was part of the reason why Decker was allowed custody of the file in first place. Decker relies on the argument that the events were part of a "single criminal episode," and thus cannot argue that the deceptive acts did not occur contemporaneously with theft.

4. The City's Employees Relied on Decker's Deception.

The City's employees relied on Decker's impression that he could be trusted with the file. As a preliminary issue, it should be noted that Decker did not raise this issue before the trial court, and thus cannot raise it now. However, the reliance by the City's employees allowed Decker to exercise unauthorized control over the City's property. As stated above, Decker created the false impression that he could be trusted not to remove items from the file. Relying on that impression, the City employees allowed Decker access to the file with only minimal supervision. Having obtained that access, Decker then continued his deception by surreptitiously hiding photographs, intending to deprive the City of that property. The City relied, at least in part, on Decker's deception.

5. Decker Completed the Crime of Theft By Deception.

Even though the City employees were able to retrieve the photographs, Decker

nevertheless completed the crime of theft by deception. "This Court has held that an item need not be taken from [the] . . . premises to constitute the crime of theft, but that a defendant's acts of exercising unauthorized control over an item within [an] . . . establishment was sufficient." *State v. Watts*, 639 P.2d 158, 162 (Utah 1981); *citing State v. Eagle*, 611 P.2d 1211, 1213 (Utah 1980); *State v. Bender*, 581 P.2d 1019 (Utah 1979). Decker exercised unauthorized control of the photographs, thus completing the crime of theft by deception. Like the defendant in *Watts*, Decker's crime was recognized immediately. However, like the defendant in *Watts*, Decker completed the crime when he exercised unauthorized control over the photographs.

To conclude, the trial judge's verdict was clearly supported by the evidence. The trial judge found that Decker had exercised unauthorized control over the photographs using deceptive means. Decker created a false impression that he could be trusted with the file. He also did not correct the falsehood that he created when his conduct represented that the file he returned was complete. He thus met the statutory definition of deception, and committed the deception contemporaneously with his unauthorized control.

The City relied on his representation that he would not remove items from the file, and also relied in part on his representation that the file was complete when he returned it. The fact that Decker was caught does not excuse the violation. The crime was committed when Decker exercised unauthorized control, even though the crime was immediately recognized.

The evidence clearly supports the trial judge's verdict, and the conviction should stand.

B. The Evidence Supports the Verdict Convicting Decker of Attempted Theft.

The evidence also supports the trial judge's verdict convicting Decker of attempted theft.

(1) . . . [A] person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) . . . [C]onduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

(3) No defense to the offense of attempt shall arise:

(a) because the offense attempted was actually committed; or

(b) due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

UTAH CODE ANN. § 76-4-101. Decker removed two telephone books from City Hall, thinking he had successfully stolen the photographs. Decker did not ask for permission to take the books, and had no way of knowing if the books were even available to the public. The trial judge noted that the removal of both telephone books proved the requisite criminal intent. (Trial Transcript, p. 141). While Decker temporarily left the area where he had hidden the property, the City employees retrieved the photographs. Decker was not aware that the factual circumstances had changed, and he took the telephone books in an attempt to obtain control over the photographs. He thus committed the crime of attempted theft.

Although the events took place in a short period of time, and constituted a single

criminal episode, the factual differences between the two events demand prosecution for two separate crimes. As has been shown, Decker exercised unauthorized control over the photographs by surreptitiously removing and hiding them. Decker then left the area briefly, and the City employees retrieved the photographs. The factual situation had thus changed, and Decker committed the second crime of attempted theft. The evidence clearly supports that conclusion, and so the trial judge's verdict should not be reversed.

CONCLUSION

By attempting to tamper with a public record, Decker committed an egregious wrong against society. Public records are a public trust, and Decker desecrated the public's honor by unilaterally removing items from a publicly-held record. As the custodian of the record, West Valley City is directly affected as Decker's victim; but, in a larger sense, Decker's crime violates the order and decency of our entire society. We make our public records available to all; one individual, even if he is the subject of the record, cannot be allowed to alter a publicly-held record except by following accepted procedures.

The City provided Decker with a complete copy of the prosecutor's file. A bill of particulars would merely summarize the information already available to Decker. The trial judge did not abuse her discretion when she denied Decker's Motion to Arrest Judgment on the grounds that the bill of particulars was not provided. *Swapp*, 808 P.2d at 117; *Blubaugh*, 904 P.2d at 702.

The trial judge eliminated jail time as a sentencing option, which meant that Decker no longer had a right to a jury trial. *McDonald*, 948 P.2d at 374. This, coupled with Decker's failure to follow simple instructions to confirm his request, led to the trial court's denial of his request for a jury trial. These actions were not an abuse of discretion.

The trial court correctly concluded that there were two separate acts constituting two separate crimes, because the facts established two acts. *Young*, 780 P.2d at 1239. The facts that led to the conviction of theft by deception were different than those that led to the attempted theft, and the two events were separated in time, and by Decker's absence. Thus, the trial court correctly determined that there were two separate acts.

Decker obtained unauthorized control over property belonging to the City through the use of deception. UTAH CODE ANN. § 76-6-406. The property was photographs which were included as part of a public record maintained by the City. Decker's deception was creating a false impression that he would not remove items from the file, and that the file he was returning was complete. The City relied on Decker's representation that he would not damage, destroy, or alter the record he requested. The City's trust was broken when Decker removed the photographs from the file, and then returned it, giving the false impression that the file was still complete. In fact, he had taken advantage of the City's reliance, in order to accomplish his goal of destroying evidence found in a public record. The theft was complete, and Decker is guilty of theft by deception.

Decker then committed attempted theft. Having consummated his theft by deception, Decker left the area. When he returned, the relevant facts of the situation had changed. Unbeknownst to Decker, City employees had retrieved the photographs from their hiding place. When Decker returned, he attempted to steal the photographs, but could not, because they were no longer located where he had deceitfully hidden them. Decker could have abandoned his intended theft and returned the photographs to their rightful owner, but chose not to, which shows that he was using deceptive means to obtain the City's property. Because of the separation in time, and also because of the factual differences between the two acts, the trial court found that Decker committed two crimes: theft by deception and attempted theft.

Decker committed a serious wrong. The facts show that he exercised unauthorized control over property belonging to the City using deceptive means, and that he later attempted to exercise control over property belonging to the City. The trial judge correctly applied the law, and her factual conclusions are clearly supported by the evidence. There is no need to reverse the verdict. The City respectfully asks that this Court uphold the verdict of the trial court.

RESPECTFULLY SUBMITTED this 3rd day of August, 1999.


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CERTIFICATE OF MAILING

This certifies that two copies of the foregoing Brief were mailed to the following:

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DATED this 3rd day of August, 1999.

A handwritten signature in cursive script, reading "Elliot R. Lawrence", is written over a horizontal line.