

1999

# West Valley City v. James Weston Decker : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs	)	Court of Appeals
	)	Docket No. 990029-CA
	)	
JAMES WESTON DECKER,	)	Priority 15
	)	
Defendant-Appellant	)	

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APPELLANT'S BRIEF

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY

The Honorable Ann Boyden, District Judge

-----

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**FILED**

JUL 13 1999

COURT -

IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	)	
	)	<b>APPELLANT'S BRIEF</b>
Plaintiff-Appellee	)	
	)	
vs	)	
	)	
JAMES WESTON DECKER,	)	Court of Appeals
	)	Case No. 990029-CA
Defendant-Appellant	)	

-----

**DESIGNATION OF THE PARTIES**

The Plaintiff-Appellee WEST VALLEY CITY is a Utah municipal corporation. [Although the caption of the Information is entitled "STATE OF UTAH (West Valley City) v. JAMES WESTON DECKER", it is assumed that the West Valley City Attorney (or his authorized assistants) have filed and prosecuted this case, as a violation of state statute, as authorized by Section 10-3-928, Utah Code.]

The Defendant-Appellant JAMES WESTON DECKER is a natural person, was charged and convicted of two misdemeanor offenses, in a bench trial in the Third Judicial District Court in and for Salt Lake County.

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**STATEMENT OF JURISDICTION OF THIS COURT**

Jurisdiction of this Court is granted pursuant to the provision of Section 78-2a-3(2)(d), Utah Code.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

This appeal and the predicate factual and legal situation in which it arose presents the following issues:

1. Whether the trial court erred in failing to require a bill of particulars to afford the accused reasonable notice of the specific offense(s) with which he was charged, because the filed Information was so lacking as to apprise the Defendant and the Court of the precise nature of the charge and the specific misconduct related to that charge. [Defendant's REQUEST FOR BILL OF PARTICULARS filed with the trial court in the RECORD at pages 12-13.]
2. Whether the Information itself actually charges a public offense and/or whether the evidence adduced at trial actually establishes, by proof beyond a reasonable doubt, the Defendant's guilt of such "charged" offense. [Defendant's "Motion to Arrest Judgment" filed with the trial court. RECORD at pages 54-57.]
3. Whether the Court erred in denying the Defendant his right to trial by jury, when a written demand was timely filed and served, because the Defendant failed to "reconfirm" his demand therefor. [Defendant's "Motion to Arrest Judgment" filed with the trial court. RECORD at pages 54-57.]
4. Whether the provisions of Section 76-1-402(3)(b), Utah Code [pertaining to and defining "single criminal episode" and "attempt" situations] preclude the conviction of both "theft" offenses, one of which was

charged as "attempt". [Defendant's "Motion to Arrest Judgment" filed with the trial court. RECORD at pages 54-57.]

A trial court's conclusions of law in criminal cases are reviewed for correctness. This standard of review has also been referred to as a "correction of error standard". The "correction of error" standard means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. **State vs Deli**, 861 P.2d 431, 433 (Utah Supreme Court 1993). Whether the trial court properly interpreted (or applied) a statute is a question of law reviewed for correctness. **State vs Larsen**, 865 P.2d 1355, 1357 (Utah Supreme Court 1993); **State vs James**, 819 P.2d 781, 796 (Utah Supreme Court 1991); **State vs Petersen**, 810 P.2d 421, 424 (Utah Supreme Court 1991); **State vs Shipler**, 869 P.2d 968, 969 (Utah Court of Appeals 1994); **State vs Simmons**, 866 P.2d 614, 616 (Utah Court of Appeals 1993); **Salt Lake City vs Emerson**, 861 P.2d 443, 445 (Utah Court of Appeals 1993); **State vs Phathamavong**, 860 P.2d 1001, 1002 (Utah Court of Appeals 1993); **State vs Paul**, 860 P.2d 992, 993 (Utah Court of Appeals 1993).

An error in a criminal prosecution requires reversal when the appellate court concludes that, absent the error, there was a reasonable likelihood of

a result more favorable to the accused. **State vs Knight**, 734 P.2d 913 (Utah Supreme Court 1987). In certain circumstances the nature of the error involved is such that the burden of convincing the appellate court that the error was "harmless" (i.e. that the error did not "unfairly prejudice the defense") shifts to the prosecution. **Knight**, supra; **State vs Bell**, 770 P.2d 100 (Utah Supreme Court 1988). In cases where the prosecution fails to convince the appellate court of the "harmless" status of the error, remand of the case is proper. **Bell**, supra.

The trial court has primary responsibility for making determinations of fact. **State vs Pena**, 869 P.2d 932 (Utah Supreme Court 1994). A trial court's findings of fact in a criminal bench trial are reviewed under a "clearly erroneous standard". **State vs Goodman**, 763 P.2d 786 (Utah Supreme Court 1988). See also Rule 52 of the Utah Rules of Civil Procedure and Rule 30 of the Utah Rules of Criminal Procedure. A trial court's finding as to a factual issue is clearly erroneous when it is against the clear weight of the evidence or, although there is evidence to support it, the appellate court reviewing all the record evidence is left with a definite and firm conviction that a mistake has been made. **Pena**, supra.



### DETERMINATIVE PROVISIONS

The following provisions may be determinative of the issues raised in this appeal:

Article I, Section 12 of the Utah Constitution  
[jury trial and bill of particulars issues]

Section 76-4-101, Utah Code ["attempt" defined]

Section 76-4-201(3)(b), Utah Code [pertaining to "single criminal episode" and "attempt"]

Section 76-1-402, Utah Code [pertaining to "single criminal episode"]

Section 76-6-405, Utah Code [pertaining to "theft by deception"]

Rule 4, Utah Rules of Criminal Procedure  
[pertaining to "bill of particulars"]

Rule 17(d), Utah Rules of Criminal Procedure  
[Jury Trial]

The complete text of these provisions are contained in the ADDENDA, at the end of this APPELLANT'S BRIEF.

### STATEMENT OF THE CASE

The appeal of this case involves issues pertaining to three distinct "sets" of facts.

Facts pertaining to alleged underlying criminal offense

On 27 February 1998 the Defendant-Appellant JAMES W DECKER went to the West Valley City Hall and made a request to inspect certain "public records" pertaining to certain real estate parcels, against which West Valley

City [hereinafter "the City"] had initiated "code enforcement" actions. The public records were the two "case files" of the two "cases", contained in manila file folders. Candace Gleed, Hearings Coordinator of the Administrative Code Enforcement program of the City, voluntarily surrendered one of the files to Mr Decker and allowed him to inspect the same---a single file---in the office foyer of the public office. [TRANSCRIPT at Page 57.]

Ms Gleed testified at trial that Mr Decker placed the files on the table, examined the documents contained in the files, and removed some of the documents from the file folder. Ms Gleed and another City employee continued to observe Mr Decker. She (Ms Gleed) testified that she observed him (Decker) place color photographs (snapshots) between two "telephone books" which were on the table at which Mr Decker was sitting to inspect the public records. [TRANSCRIPT at pages 56-63.]

Per Ms Gleed's testimony, Mr Decker was observed to reassemble the case file; he thereafter returned the file to Ms Gleed. After informing her that he was going to the

City Treasurer's office to pay for photocopies of the very records he had just inspected, he then left the room. [The citizen's right to inspect and copy governmental records is expressly controlled and authorized by statute, including but not limited to Section 10-3-603 and 63-2-201, Utah Code.] Mr Decker paid for the copies and returned to the foyer of the Code Enforcement office. [TRANSCRIPT at Page 62.]

During his absence, Ms Gleed had--- unbeknownst to Mr Decker---retrieved the photographs Mr Decker allegedly placed in between the "telephone books" and resecured them to the official City file. [TRANSCRIPT at Page 64, line 24.]

From the office foyer table Mr Decker then removed two of telephone books. The "telephone books" here at issue are the public telephone books---prepared, printed and distributed by Construction Directories Company, Incorporated, without charge, to telephone customers and other members of the public. The suppliers of the telephone books generally provide large quantities of the

telephone books to public offices (governmental offices, public libraries, utilities offices, etc.) and other "public" places, for FREE DISTRIBUTION to members of the public: the telephone books are "FREE FOR THE TAKING!" The telephone books in question were stacked in large quantities in the foyer and were for "free public distribution", as is customarily the practice by the suppliers of the telephone books. [See RECORD at page 65.] Mr Decker, seeing the large quantity of telephone books there displayed under circumstances with which he was familiar, took two telephone books, in plain view to the City employees and other persons in the foyer area.

Neither Ms Gleed nor the other City employees who were with her in the foyer testified they had observed him remove the telephone books. [That he took the telephone books was admitted by Mr Decker, during presentation of the defense portion of the case, but only after a motion---made at the termination of the prosecution's case-in-chief---to dismiss for failure to prove the charged offenses beyond a reasonable doubt.]

[TRANSCRIPT at Pages 87-89.]

Mr Decker was subsequently charged---in a very vague and ambiguous charging document--with two offenses: {1} theft by deception; and {2} attempted theft. [The charging document did not identify the specific property to be taken or even the owner of such property for each charged offense; the charge merely recited the Utah statute.] The case was prosecuted by attorneys from the West Valley City Attorney's Office.

Defendant's Request for Bill of Particulars

Because the filed Information was so vague and ambiguous and lacking in factual descriptions critical to the Defendant's preparation of his defense, the Defendant made repeated requests for a "bill of particulars". The Prosecuting Attorneys consistently refused to provide the same. Eventually, the trial judge reversed her earlier decision and refused to order a "bill of particulars". That the prosecution was allowed to proceed on the vague and ambiguous Information---which did not correlate specific property to the specific charge---was to have serious adverse

impact upon the Defendant. First, the Defendant was improperly placed at a disadvantage because he did not know which charge corresponded to which property (i.e. photographs or telephone books). Obviously, the City Prosecutors thought there were TWO distinct offenses, because two offenses were charged! Secondly, the two charges were so ambiguous and vague that the trial judge actually found the defendant guilty of the two offenses, exactly opposite of what the prosecutors had intended. [The trial judge's view of the disputed evidence is contained in her statements made at the 14 December 1998 sentencing hearing.]

Defendant's request for trial by jury

In August 1998 the trial court---at the request of the parties---scheduled the trial for "jury trial" on 4 November 1998.

In September 1998 the Defendant filed a timely, written demand for jury trial. A copy thereof was served upon the prosecuting attorney. [RECORD at 18. ADDENDUM #4.]

In November---two months later---the case was scheduled for "jury trial". The Court's

own "docket sheet" for the date of trial---November 4th---clearly indicates the case was scheduled for "jury trial". [See ADDENDUM #5. See also the computerized "docket history" showing the case is scheduled for jury trial. ADDENDUM #6]

On the morning of the trial, Judge Boyden refused to convene a jury. She claimed to have found that the Defendant had not "re-confirmed" with the Clerk of the Court his earlier demand for jury trial.

At no time did the Defendant ever withdraw his demand for a jury trial or agree to be tried by the judge alone.

The case proceeded as a bench trial, at which the Defendant was found guilty of both charged offenses.

#### SUMMARY OF ARGUMENTS

The Defendant's arguments in this appeal are summarized as follows:

1. The Defendant was prejudiced by the trial court's failure to order a bill of particulars so as to enable him to adequately prepare his defense. The pre-trial disclosure (via the prosecutor's "open files" actually misled the

Defendant as to the theory upon which the prosecutor was relying. The trial court's confusion as to what the evidence actually proved (and/or how the statute was to be applied) made this failure absolutely critical. Utah case law shifts to the prosecutor the burden of showing that the error was harmless.

2. The Information itself fails to actually state the charged offense. The evidence adduced at trial is lacking as to prove, beyond a reasonable doubt, the accused's guilt of the charged offense.

3. The trial court erred in denying the Defendant his right to trial by jury, when a written demand was timely filed and served, merely because the Defendant failed to "reconfirm" his demand therefor.

4. The provisions of Section 76-1-402(3)(b), Utah Code [pertaining to and defining "single criminal episode" and "attempt" situations] preclude the conviction of both "theft" offenses, one of which was charged as "attempt".

5. The prosecution-called witness



affirmatively stated there was "no deception" on her part in allowing the Defendant temporary custody of the public records. The evidence does not support the verdicts. The trial court judge found the evidence "exactly-backwards" from what the prosecution set out to prove (and still believes what it did prove) .

## ARGUMENT

### I

**THE DEFENDANT WAS UNFAIRLY PREJUDICED BY THE TRIAL COURT'S ERROR IN FAILING TO REQUIRE THE FILING OF A BILL OF PARTICULARS TO APPRISE THE DEFENDANT OF THE REASONABLE NOTICE OF THE CHARGED OFFENSES, TO ENABLE HIM TO PREPARE A DEFENSE TO THE CHARGES AGAINST HIM.**

Article I, Section 12 of the Utah Constitution provides in relevant part:

**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, . . .**

Emphasis added.

These constitutional provisions are further implemented by Rule 4, Utah Rules of Criminal Procedure [The Utah Rules of Criminal Procedure now supersede the previous "Rules", adopted by the Legislature and formerly codified at 77-35-1 et seq, which statutory provisions were repealed in 1989]. Rule 4 provides, in

relevant part:

. . .  
(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and **ownership** need not be alleged, **unless necessary to charge the offense**. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they be identified without setting forth a copy. However, **details concerning such things may be obtained through a bill of particulars**. Neither presumptions of law nor matters of judicial notice need be stated.

. . .  
(e) **When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars**. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

. . .

Emphasis added.

The Information, which forms the basis of this

prosecution, alleges in relevant part:

The undersigned, David L. Clark, under oath, states on information and belief that the defendant, on or about 03/04/98 [amended by interlineation to: 2/27/98], at the vicinity of 3600 SOUTH CONSTITUTION BLVD, West Valley City, Utah, did unlawfully commit the crimes(s) of:

COUNT 1: Attempted Theft. 76-6-404 (Class C), U.C.A. 1953, as amended. A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof. 76-6-412. Theft - Classification. (1) Theft of property and services shall be punishable as follows: (d) as a class B misdemeanor if the value of the property stolen is less than \$300.

COUNT 2: Theft by Deception. 76-6-405 (Class B), U.C.A. 1953, as amended. (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. 76-6-412. Theft - Classification. (1) Theft of property and services shall be punishable: (d) as a class B misdemeanor if the value of the property stolen is less than \$300.

[RECORD at 2. See also ADDENDUM #1, hereto.]

The Court will, at the outset, note that the Information suffers from the following shortcomings:

1. The Information DOES NOT IDENTIFY the specific property alleged to have been stolen "by deception" and/or "attempted" to have been stolen outright.
2. The Information DOES NOT IDENTIFY the specific owner (victim) of the property.
3. The Information DOES NOT IDENTIFY the specific acts of "deception".
4. The Information DOES NOT ALLEGE the standard allegations (i.e. "acting with the kind of culpability otherwise required for the

commission of the offense, [the defendant] engages in conduct constituting a substantial step toward commission of the offense") necessary to allege the "attempted theft" charge.

5. The Information DOES ALLEGE, facially, that BOTH charged crimes occurred on the same date and at the same time. [This information, together with the statements contained within the "Probable Cause Statement", should have alerted the trial court judge that both incidents were a "single criminal episode", for which the ramifications for the Defendant and for the Court would prove to be significant.]

The Information merely recited the text of the statutes; such a practice has been condemned by the Utah Supreme Court. See **State vs Bell**, 770 P.2d 100 (Utah Supreme Court 1988), discussed below.

On 23 July 1998 the Defendant filed a written "REQUEST FOR BILL OF PARTICULARS", in which he specifically sought:

1. What is the specific property alleged to have been stolen by the Defendant in Count I of the Information filed herein?
2. What is the specific property alleged to have been stolen by the Defendant in Count II of the Information filed herein?
3. What is the specific allegation of deception with which the Defendant is charged in Count II of the Information filed herein?

[RECORD at 12. See ADDENDUM #2, herein.]

Although the "Bill of Particulars" issue was argued and debated by the parties, no formalized "bill of particulars" was ever provided. The trial court did not

mandate the creation or production of the "bill of particulars" responding to the Defendant's specific inquiry. Rather, the prosecution allowed the Defendant "open file" access to the prosecutor's case file. The trial court's failure to require the "bill of particulars" responses to the Defendant's specific inquiry is significant.

In this case, the Defendant's contention is NOT what he did. The Defendant knows exactly what he did. The request for the bill of particulars is significant because it forces the prosecution (1) to allege an offense AND (2) to prove that offense. That didn't happen here.

Pursuant to the "open files" inspection, the Defendant and/or his trial counsel was allowed to examine the "WEST VALLEY CITY ATTORNEY SCREENING SHEET", referring to the incident. The two charges are described. Opposite the two charges, as handwritten by the prosecutor "screening" the case for prosecution, are the similarly-handwritten descriptions of the two items alleged to have been taken, as follows:

THEFT BY DECEPTION	phone books
--------------------	-------------

ATT. THEFT	<u>pictures</u>
------------	-----------------

[See ADDENDUM #3.]

Indeed, this prosecutorial "theory" under which the

case was screened and tried was more-or-less consistent with what the Defendant would have expected. [That this is exactly the prosecutor's view of the case is CONFIRMED by the Plaintiff's attorney's statement contained in the 24 March 1999 Plaintiff's Memorandum in Support of Sua Sponte Motion for Summary Dispostion, page6, as follows: "He [Decker] was charged with the attempted theft of photographs, and with theft by deception of telephone books."] Because the pictures were actually NOT TAKEN, the pictures (snapshots) had to be the subject of the "attempted theft" charge. Similarly, because the "for free distribution" telephone books WERE TAKEN, those telephone books had to be the subject of the "theft by deception" charge.

Notwithstanding those disclosures, the prosecution was nevertheless still allowed to proceed to trial without having identified the specific property to have been taken, the specific owner of the property, and without identifying the specific "deception" alleged. In this regard, as it turns out, this "open files disclosure" still works to the procedural and substantive detriment of the Defendant who was misled into defending on a charge that wasn't really the charge; that's the very mischief a "bill of particulars" is designed to prevent and had the

Defendant's three simple questions been answered, in writing, we perhaps would not have this problem.

Of course, there was reason to fail to allege that the phone books were the property of West Valley City, because they weren't: the phone books were the property of CONSTRUCTION DIRECTORIES COMPANY, INCORPORATED, and had been delivered---in large quantities---for "FREE DISTRIBUTION" to members of the public. If the City had to allege another "owner" of the property, then the City would have had to call a representative of that owner who would have had to testify. At that juncture the entire case would collapse, because that outside witness (from Construction Directors) would have confirmed that the directories were for "free distribution". Thus, the prosecution had reason to intentionally fail to disclose the "victim".

When the case was actually tried, Judge Boyden---not necessarily privy to the prosecutor's "screening worksheet"---actually found the Defendant guilty of both offenses, but exactly opposite of what was charged! Thus, the Defendant was intentionally misled into defending against charges not precisely identified in the Information, as follows: the trial judge found the defendant guilty of the "theft by deception" charge as related to the photographs and the "attempted theft"

charge as related to the telephone books.

The trial court's confusion (as to the requirements of the statute AND the evidentiary proof presented at trial) is manifest by the comments of Judge Boyden at the December 14th sentencing, as follows:

THE COURT: . . . As to the finding of guilty on the two separate offenses, there were facts presented that showed the two separate thefts so I am also denying your motion to arrest judgment as to the fact that one is a lesser included offense. One was talking about the actual removal of the **photographs** from a file and **in a deceptive manner put hidden in a magazine, left there.** The facts show that Mr Decker left the office and then came back in and took the magazines in which he had placed the pictures and the facts show that **deception was being used to exercise unauthorized control over those pictures.** It doesn't require that he actually leave with them. The exercising of the unauthorized control was what the facts found and that was the basis of my conviction on that. So, I'm also denying it on that matter.

TRANSCRIPT OF 14 December 1998 SENTENCING HEARING, page 8. RECORD at 71.] Emphasis added. The Court later commented:

THE COURT: My finding is that the exercise of control, unauthorized control over the **pictures**, and then hiding the **pictures** is the **deception that was used and the theft is the exercised [sic] of unauthorized control over those pictures by hiding them in the book and that is the deception.** So, my finding is that the elements of theft by deception in that he hid the property after exercising unauthorized control over those was my finding and that's the distinction. Both of those I think now are on the record and will be the basis for any appellate issues.



TRANSCRIPT OF 14 DECEMBER 1998 SENTENCING, pages 11-12.  
Record at 71] Emphasis added.

That the trial court had this so mixed up indicates the problems with proceeding without the "bill of particulars" which was so consistently sought and pleaded for.

The telephone books were "free" for the asking. They were publicly displayed. They were "given away" by city employees. TRANSCRIPT, page 68, lines 12-14.

The prosecution's failure to provide a bill of particulars is significant. Not only did the Defendant not know the specific conduct he was charged with, but the Judge was also confused, as evidenced by her expressed comments at the December 14th sentencing, as shown by the Transcript thereof.

The Information filed against the Defendant merely recited the brief text of the statute itself. There was no attempt made to "personalize" the offense or conform the charge to the accused's actual conduct. [On the "attempted theft" charge, the charge does NOT quote from the statute pertaining to "attempt", but merely recites the straight-up "theft" provision, as though the offense were completely consummated!] The Information contains no description of the property over which "unauthorized control" was exercised; this

defect has had severe adverse results upon the accused. The trial judge actually found him guilty of the offense opposite to what the prosecutor had charged (and ostensibly was seeking to prove): the Defendant was found guilty of both offenses: "theft by deception" of the photos, even those photographs were not taken from the premises! Thus, the "attempted theft" charge must have applied to the telephone books, which---arguably---the evidence circumstantially showed were taken from the premises! This incongruous result was certainly not anticipated; a better-pleaded Information (or the requested bill of particulars) would have had a different result!

The decision of the Utah Supreme Court in the case of **State vs Bell**, 770 P.2d 100 (Utah Supreme Court 1988) is so precisely on point in the instant situation that detailed scrutiny of the case and its holding are warranted. In **Bell** the defendant appealed from a conviction of racketeering by means of drug trafficking. The defendant asserted that he was not given sufficiently detailed notice of the charges against him to enable him to prepare a defense. The Utah Supreme Court reversed the conviction and remanded for a new trial.

In **Bell** the Utah Supreme Court wrote:

Bell argues that the inadequate notice given on this point prejudiced his ability to prepare a defense, thus denying him the right to notice guaranteed by the Utah Constitution and by Utah Rule of Criminal Procedure 4.

The State argues that Bell was put on notice of the factual basis for the enterprise allegations by various documents, other than the indictment and the bill of particulars, and by information presented during various pretrial hearings.

Article I, section 12 of the Utah Constitution guarantees, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him [and] to have a copy thereof." Utah Const. art I, §12. In *State v. Fulton*, 742 P.2d 1208 (Utah 1987), cert. denied, U.S. , 108 S. Ct. 777, 98 L. Ed. 2d 864 (1988), we explained that this provision requires 'that the accused be given sufficient information is so that he (or she) can know the particulars of the alleged wrongful conduct and can adequately prepare his [or her) defense.'" *Id.* at 1214 (quoting *State v. Burnett*, 712 P.2d 260, 262 (Utah 1985)); see also *State v. Taylor*, 14 Utah 2d 107, 108, 378 P.2d 352, 353 (1963); *State v. Myers*, 5 Utah 2d 365, 372, 302 P.2d 276, 280 (1956).

*Fulton* also explained that this constitutional right to notice is normally implemented through Utah Rule of Criminal Procedure 4, which governs, inter alia, the contents of information, indictments, and bills of particulars. See 742 P.2d at 1214; Utah R. Crim. P. 4 (codified at Utah Code Ann. §77-35-4 (1982)). Rule 4(b)6 provides for the commencement of a criminal action by filing an information or indictment. Although an information may be accompanied by a fact statement detailing the prosecution's contentions in support of the charges, an information or indictment is legally sufficient even if it consists of nothing more than an extremely summary statement of the charge that would not provide the accused with sufficient particulars to prepare an adequate defense. *Fulton*, 742 P.2d at 1214; Utah R. Crim. P. 4(b). When an indictment or information legally sufficient under rule 4(b)

does not provide the notice guaranteed by article I, section 12, the accused may request a bill of particulars under rule 4(e). Once such a request is made, the accused is entitled to receive, and the State has the burden of providing, a written bill of particulars which, in conjunction with the indictment or information, gives notice of the particulars of the charges in sufficient factual detail to enable the accused to prepare an adequate defense. *Fulton*, 742 P.2d at 1214; *State v. Robbins*, 709 P.2d 771, 773 (Utah 1985); Utah R. Crim. P. 4(e).

770 P.2d at 103-104. Emphasis added. Citations to footnotes omitted.

In **Bell** the Supreme Court was critical of the indictment which "merely repeated verbatim the broad, vague language of the RICE statute without describing any facts or circumstances constituting the crime charged other than a statement that the crime had been committed". *Id* at 104. In **Bell**, the Supreme Court concluded:

This indictment met the minimal standards of rule 4(b), see *Fulton*, 742 P.2d at 1208, **but by no stretch of the imagination did it provide Bell with sufficient notice of the facts underlying the charges to enable him to prepare an adequate defense.**

*Id.* at 104-105. Emphasis added. Text contained in footnote omitted. The Court continued:

**The next question is whether Bell exercised his right to seek more particular notice by requesting a bill of particulars under rule 4(e) and, thus, preserved his claim of error.** Bell did submit a timely request that the State provide a bill of particulars describing the factual basis for the element of racketeering activity and specifically

explaining 'what enterprise is alleged as being involved." Therefore, under rule 4(e), the State had the burden of providing an adequate bill of particulars.

The final question is whether the State met that burden. The answer is that it did not. At first, the State ignored Bell's request. Bell then secured a court order directing that the bill be provided.

. . .  
. . . Under rule 4(e), a bill of particulars must contain sufficient "factual information . . . to set forth the essential elements of the particular offense charged." The ultimate test of the adequacy of such a statement, as noted above, is that the accused be enabled to prepare a defense.

The record shows that at trial, **the State presented three theories** as to who or what factually constituted the enterprise: Bell as an individual, the group of persons associated with Molly Kingston, or Bell's convenience store. By no stretch of the imagination could the single enigmatic sentence in paragraph 3 of the State's reply to Bell's request be construed as containing sufficient factual information to describe the State's actual theories of this essential element of the crime, much less to permit Bell to prepare his defense on this element.<sup>11</sup> Although Bell **persistently objected to the inadequacy of the bill of particulars**, the State refused to amend or supplement the bill as it would have been permitted to do under rule 4(e). The State failed to meet the burden of notice imposed on it by rule 4(e), and the trial court's failure to enforce this requirement was clearly error under the plain language of rule 4(e), as well as the standards described in Fulton.

The Supreme Court in **Bell** found the error to be prejudicial, as analyzed under Rule 30 standards. The **Bell** court wrote:

Under rule 30, **an error in a criminal prosecution requires reversal when we conclude that, absent the error, there was a reasonable likelihood of a result more favorable to the**

**accused.** State v. Knight, 734 P.2d 913, 919-21 (Utah 1987). Phrased differently, **the test is whether our confidence in the outcome of the trial is eroded.** Id. at 920. Applying the erosion of confidence test to a failure to give adequate notice of charges, we first ask how the error impeded the accused's ability to prepare for trial and to meet the State's case. At trial, the State presented three alternative theories as to what constituted the essential element of an enterprise. The specific question, then, is whether the State's failure to notify Bell of these three factual bases for the allegations of a RICE enterprise so impeded his ability to prepare a defense to those allegations as to require a reversal under rule 30.

Ordinarily, the practical effect of the standard imposed by rule 30 is to place on the accused the burden of persuading this Court that, in light of all the circumstances revealed through the record as a whole, there is a reasonable likelihood that the trial result would have been more favorable absent the error. See Knight, 734 P.2d at 919-21; State v. Jones, 657 P.2d 1263, 1267 (Utah 1982); State v. Hamilton, 18 Utah 2d 234, 239, 419 P.2d 770, 773 (1966). **However, as we stated in Knight, in some circumstances the nature of the error involved is such that this de facto burden should be shifted and the State required to persuade us that the error was harmless.** 734 P.2d at 920-21. In Knight, the prosecution violated the rules of discovery by failing to provide the accused with certain evidence prior to trial. We first found that **because of the nature of the error, it was difficult for this Court to determine from the record whether Knight might have been able to prepare a better defense and achieve a more favorable result at trial if the prosecution had not breached its discovery obligations.** Id. at 920. We then held that **under such circumstances, if the accused could make a credible argument that the prosecutor's errors impaired the defense, it would be appropriate "to place the burden on the State to persuade a court that the error did not unfairly prejudice the defense."** Id. at 920-21.

We are faced with analogous circumstances

in this case. First, as in Knight, the record "cannot reveal how [adequate notice of the charges] would have affected the actions of defense counsel, either in preparing for trial or in presenting the case to the jury." Id. at 920. Second, Bell has met the requirement of making a credible argument that the prosecutor's errors have impaired the defense." Id. at 921.

In Knight, we noted that in assessing whether the defendant's argument of prejudicial impairment rang sufficiently true to warrant shifting the burden of persuasion to the State, we would take into account the centrality of the matter affected by the prosecutor's errors. Id. In this case, the error involved an essential element of the crime charged. Clearly Bell's defense to the State's case on the element of an enterprise was central to the outcome, and therefore, the error "assumes heightened importance when evaluating whether the defense might have been impaired." Id. Bell contends that the prosecution's failure to sufficiently notify him of the factual basis for its allegations left him unable to make pretrial preparation for a defense or to counter the State's evidence and arguments at trial. Given the plausibility of this contention and the critical nature of the issue involved, we conclude that Bell has made a credible argument that his defense was impaired by the error.

Under Knight, then, we place on the State the burden of persuading us that the error was harmless under the standard of rule 30. The State makes only one argument in attempting to meet this burden. It argues that Bell was not prejudiced because he was effectively put on notice of the State's various theories of what constituted the element of an enterprise through the course of certain pretrial proceedings. The State refers to a complaint filed in a separate proceeding seeking forfeiture of Bell's convenience store,<sup>13</sup> to an in-court discussion at a hearing on that forfeiture complaint, and to materials provided to Bell through pretrial discovery, including transcripts of grand jury witnesses' testimony and transcripts of telephone

conversations recorded pursuant to a wiretap order. The State argues that through reading the indictment and bill of particulars in the context of these other sources of information, Bell must have gotten adequate notice of the charges.

This argument fails. Our review of the record leaves us unconvinced that Bell did in fact receive adequate notice through these convoluted means. None of the sources pointed to by the State explicitly laid out the three enterprise theories later presented at trial. Nor do we think that the three allegations are necessarily implicit in these sources of information, even when they are taken as a whole. Thus, the State has failed to meet its burden.

Also, we think it important to clarify that we reject the implication of the State's argument: that the State, having failed to provide even a minimally adequate bill of particulars despite persistent requests from Bell, can excuse that failure under the guise of harmless error by claiming that Bell had pretrial access to a mass of various items of information from which, one can conclude in hindsight, Bell could have gleaned the State's theories for the essential elements of the crimes charged. For this Court to accept such an argument would not only vitiate the specific requirements of rule 4(e), it would negate the accused's constitutional right, implemented by rule 4(e), to "have a copy" of a document setting out in clear terms "the nature and cause of the accusation." Utah Const. art. I, § 12; State v. Fulton, 742 P.2d at 1214. A defendant, having complied with the procedural requirements of rule 4(e) in requesting a bill of particulars, ought not to have to look beyond the indictment or information and the bill of particulars to obtain sufficient notice of the specific allegations to be faced at trial.

The State has not met its Knight burden of persuading this Court that the failure to provide an adequate bill of particulars did not unfairly prejudice Bell's ability to prepare and present a defense. Therefore, we reverse Bell's conviction and remand for a new trial with instructions that Bell be given an



adequate bill of particulars.

Emphasis added. 770 P.2d at 105-107. Emphasis added.  
Text contained in footnotes omitted.

The analysis and holding of **Bell** are dispositive of the case at bar. The prosecution chose the ambiguous wording of the Information. When requested for a bill of particulars asking three simple things, the Plaintiff's attorney's "stonewalled" the Defendant by refusing to provide the written "bill of particulars", specifically responding to his three cogent questions. The trial court's involvement did not make things better; ultimately, the prosecution provided for the "open files", but that only misled the Defendant and his counsel, because the court found the Defendant "guilty" of the exact opposite charges the prosecutors thought they had charged.

The Court of Appeals should reverse the convictions, order the creation and service of a bill of particulars, and remand the case for a jury trial.

## II

### **THE TRIAL COURT ERRED IN DENYING THE DEFENDANT HIS RIGHT TO TRIAL BY JURY WHEN A WRITTEN DEMAND THEREFOR WAS TIMELY FILED AND SERVED**

In the year 1215 at Runnymede, in Surrey near London, England, King John signed and sealed the Magna Carta Libertatum---the Great Charter of Liberties---to

establish the rule of law within the realm. For almost eight centuries the Magna Carta has been one of the major cornerstones within Anglo-American jurisprudence.

Central to the Magna Carta's numerous provisions was the concept that an accused person would be entitled to the "judgment of one's peers"! The "right" to a jury trial was thus guaranteed! That "judgment of one's peers" was not merely for the purpose of determining punishment after conviction, but determining the accused's guilt or innocence in the first instance!

The trial court's denial of the timely-requested "jury trial" deprived the Defendant of his constitutional rights.

Although there are "federal" court cases holding that a jury trial is not mandated by the federal constitution for trials involving "petty offenses", see, e.g. **Lewis vs United States**, 518 US 322, 116 S Ct 2163 (1996), **Blanton vs City of North Las Vegas**, 489 US 538, 109 S Ct 1289 (1989), and **Duncan vs Louisiana**, 391 Utah 145 (1968), the specifics of the charges filed against the Defendant puts the "federal" standard in a different light. We have, in this case, a SINGLE INCIDENT OF CONDUCT, consisting of at-the-most perhaps five minutes of activity, over a geographic "range"

measured in a few feet (limited to a single room), by a singular person acting alone. It is, as defined by Utah statute, as "a single-criminal episode", for which that statute PRECLUDES multiple punishments. Nevertheless, the prosecution has alleged and the trial court has accepted prosecution of TWO offenses ["theft" (by deception) and "attempted theft"], even though the statute affirmatively and unambiguously commands such should not be done! The consolidated result is to charge, effectively, "one" offense, for which the maximum prescribed penalty is 9 months' incarceration--above the "threshold" for a "petty offense".

The "jury trial" had been scheduled from the date of August 19th, as indicated by the computerized court records. [See ADDENDUM #4]. [The court's scheduling of the "jury trial" appears to have been a concession to the Defendant's "oral" request, to be followed up with by the "written demand". That written demand was filed with the Court on September 8th. See RECORD at 18. See ADDENDUM #3.] Even on the morning of trial, the Court's "daily docket" posted on the bulletin board outside the courtroom shows the case is scheduled for "jury trial". Defendant had obtained replacement legal counsel in anticipation of a "jury trial".

Then, on the morning of trial, because the Court

had NOT called the jury as demanded some two months before, is unconscionable! Although there had been considerable involvement with the Court and with the prosecutor in the two months immediately before the trial, neither the prosecutor nor the Court gave even a hint that the "jury trial" would not be granted!

The self-described "policy" [SENTENCING TRANSCRIPT at Page 7, line 12. RECORD at 71.] of the West Valley Department of the Third District Court to require "confirmation" of the jury demand, even after the written demand has been submitted, or else the jury will not be called, cannot be condoned or construed to be valid? The statute and the rules don't require such; the Rules merely require a "written demand", filed ten days before trial. To allow the Court to ignore the Defendant's timely-filed demand, merely because the Court has not called the jury, is unconscionable. It should not be condoned.

The Record is silent why this case proceeded to trial, sans jury, when the other two cases---one of which is a "Class A" misdemeanor prosecution---were similarly scheduled for "jury trial" that morning, at the same time.

The undersigned counsel is aware of this Court's holding in the case of **West Valley City vs McDonald**,

948 P.2d 371 (Utah Court of Appeals 1997), with regard to the right to trial by jury. The holding in **McDonald** is misguided and unfortunate. First, **McDonald** involved a traffic offense (i.e. speeding), charged as an infraction! By statute, there is no right to trial by jury in an "infraction" case. Thus, that is all that should have been said. All of the language of **McDonald** opinion concerning "petty offenses" and the "constitutional right" is merely obiter dicta. It is unfortunate that the Court of Appeals would involve itself with "constitutional" adjudication---arguably applicable now to the full-range of criminal defendants---when the defendant in **McDonald** was merely charged with a \$50 "infraction". The significant jurisprudential principles behind **McDonald** should be re-examined! The **McDonald** "holding" (sic) should be reversed!

Although **McDonald** holds there is no constitutional right to a jury trial in "petty offenses" (for which the charged offense is less than 6 months' possible incarceration), the trial court's EXPRESS GRANTING of the jury trial demand (on August 20th, as evidenced by the Court's own computerized minutes) and the trial court's view of the two charged offenses---which should have precluded the "attempt" conviction, are such as to

override the McDonald prescription.

The Defendant timely requested a "jury trial". The trial court even scheduled the case for "jury trial". The Defendant hired replacement counsel to assist him at the jury trial. Merely because the trial court neglects (or refuses) to then call the jury cannot be grounds to deny the Defendant his constitutional right! Such arbitrary and capricious conduct on the part of the trial court judge cannot be condoned!

### III

#### **"SINGLE-CRIMINAL EPISODE" PROVISIONS PRECLUDE CONVICTION OF BOTH OFFENSES**

The trial judge found the Defendant "guilty" of BOTH ambiguously-charged offenses, arising out of the same action, occurring at the same time and in the same geographical vicinity, and---given the prosecution's theory of the case---against the same victim!

The announced "guilty" findings (verdicts) on BOTH the "attempted theft" and the "theft by deception" charge contradict the provisions of Section 76-1-402, Utah Code. Given the prosecution's characterization of the meaning of the "single criminal episode" statute, a person---intending to steal Item #A AND Item #B, but only actually succeeding stealing Item #A---could nevertheless be additionally punished (under the "attempt" statute) for conduct not actually consummated

(because Item #B was NOT stolen)! This incongruity was expressly proscribed by the Legislature.

"Attempted theft" is a lesser included offense of the offense of "theft", which offense is---per Section 76-6-403, Utah Code---a "single offense embracing the separate offenses" of historically-distinct offenses. "Theft" is "theft", regardless of the manner in which it was conducted, as said conduct is described by statute, including the "theft by deception" charge under Section 76-6-405. The Defendant cannot be punished (with a sentence for two convictions), when in fact there should be a single conviction of a single offense, arising out of what was, in legal terms not admitted by the Defendant, a "single criminal episode"!

Viewed in a light most favorable to the prevailing party, the evidence shows the Defendant took the phone books. That he was successful in one aspect of a theft does not allow a second charge of "attempted theft" to be added (for enhanced sentencing purposes), so that the Defendant can be convicted of both offenses. Per Section 76-1-402(3), Utah Code, the Defendant may be convicted ONLY of the basic "theft" offense.

Thus, before the Court---at the conclusion of the trial---was conceptually but a single charge: "theft by deception". Was that offense proven beyond a reasonable

doubt? No. There was no deception. The City's witnesses acknowledged that they voluntarily surrendered to him temporary custody of the photographs.

The theft of the photographs was physically prevented by the City's witnesses: those officials removed the photographs, thus preventing the theft. Thus, there could be no effective "theft" (by deception, or otherwise), there could be only an "attempted theft" of the photographs.

Obviously, the evidence was confusing at best and, at worst, certainly not "proof beyond a reasonable doubt". The trial judge was confused as to the status of the proof, as evidenced by her subsequent comments.

At the Sentencing Hearing on December 14th, it was apparent from the comments of Judge Boyden that she believed that the "theft by deception" charge pertained to the photographs. [See "SENTENCING TRANSCRIPT at pages 8 and 11]. And yet the photographs were not actually taken; the "photos" could only pertain to the "attempt" charge. Thus, the telephone books were the basis for the "theft by deception" charge. Yet there was no deception.

The trial judge actually found directly opposite: in the Judge's mind, the "theft by deception" charge pertained to the photographs. Thus, by implication, the



"attempted theft" charge had to relate to the telephone books.

Obviously, that's inappropriate because the "attempted theft" was for the photos. The telephone books WERE, in fact, taken out the door and were not recovered. [Although technically the prosecution may, theoretically, "undercharge" an offense, that is not what happened here. The "photos" were to be the "attempt" (because the City officials' physical removal of the photos from the telephone books precluded there actual removal. The prosecutors thought (and have so stated to this Court) that the "theft by deception" pertained to the telephone books!]

Mr Decker was "guilty" of ONLY an "attempt". The "deception" found by the trial judge is now what the statute requires.

The announced "guilty" finding (verdict) on the "attempted theft" and the "theft by deception" charge contradicts the provisions of Section 76-1-402, Utah Code. "Attempted theft" is a lesser included offense of the offense of "theft", which offense is---per Section 76-6-403, Utah Code---a "single offense embracing the separate offenses" of historically-distinct offenses. "Theft" is "theft", regardless of the manner in which it was conducted, as said conduct is described by

statute, including the "theft by deception" charge under Section 76-6-405. The Defendant cannot be punished (with a sentence for two convictions), when in fact there should be a single conviction of a single offense, arising out of what was, in legal terms not admitted by the Defendant, a "single criminal episode"!

Section 76-1-402(3), Utah Code, provides in relevant part:

(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:**

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

In the instant proceeding, the City charged two offenses:

1. Theft by deception AND
2. Attempted theft.

The "facts" surrounding the alleged "theft" incident---viewed in a light most favorable to the prevailing party (the City)---is basically the following:

The Defendant attempted to hide the photographs AND the Defendant left the premises with the telephone books in hand.

The actions of the Defendant were but one "single

criminal episode". [This particular theory of the commission of the alleged offenses has to be the prosecutions view thereof; otherwise the case falls apart: there is no "substantial preparation" and the City loses the "theft by deception". While the Defendant hesitates to utilize the terminology "single criminal episode", because such terminology implies criminality to his conduct, the statute utilizes that term. The term is utilized herein for analytical purposes.] Viewed in a light most favorable to the prevailing party, the evidence shows the Defendant took the phone books. That he was successful in one aspect of a theft does not allow a second charge of "attempted theft" to be added (for enhanced sentencing purposes), so that the Defendant can be convicted of both offenses. Per Section 76-1-402(3), Utah Code, the Defendant may be convicted only of the initial offense.

Mr Decker was "guilty" of only an "attempt"

That the trial court had this so mixed up indicates the problems with proceeding without the "bill of particulars" which was so consistently sought and pleaded for.

#### **IV THE EVIDENCE DOES NOT SUPPORT THE VERDICT**

The witnesses for the prosecution testified they observed the Defendant place the two photographs inside

(or between) the telephone books; he, on the other hand, testified that the papers and photographs from the City's file were spread over the table, and that if the photographs were inadvertently intermingled with the telephone books, such was not indicative of criminal behavior, but merely innocent inadvertence and neglect. In this context, the Prosecution has not alleged---or proven---that the Defendant, "acting with the kind of culpability otherwise required for the commission of the offense, engages in conduct constituting a substantial step toward commission of the offense", as required by Section 76-4-101(1), Utah Code. Furthermore, Section 76-4-101(2) is even more demanding, by stating:

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

Emphasis added. With regard to the photographs, there is no evidence of "strongly corroborative" evidence showing, beyond a reasonable doubt, a "substantial step towards commission of the offense" by the Defendant "acting with the kind of culpability otherwise required for the commission of the offense", as the statute requires.

Under the prosecution's "theory"---obviously not understood or followed by the trial judge---the

placement of the photographs within or between the two telephone books might have been "a substantial step", except for the fact that the telephone books were "free", for "free distribution" to the public. The prosecution cannot "bootstrap" itself in a "theory" (of guilt) by showing the placement of the pictures between the telephone books, and then ignore the implications of the status of those telephone books: i.e. that it was essential that the telephone books be "free" for taking, or else how would the Defendant have "by deception" effected the theft. Without the telephone books being "free" for the taking, the other conduct (i.e. misplacing the photographs) has no "criminal" significance. The telephone books had to be "free", so as to enable the Defendant to take them from the room without suspicion. That being the case, the prosecution cannot advance a conflicting theory which says those telephone books were "the property of West Valley City" [which they weren't].

The telephone books had been delivered at the City, for subsequent "free" distribution to members of the public. The two telephone books which were placed in the "code enforcement" office of West Valley were not--as the Plaintiff's attorney has stated [page

The telephone books were "free" for the taking, by

citizens. They were publicly displayed.

Section 76-6-401, Utah Code, providing for certain "definitions" pertinent to "theft" offense, provides in relevant part:

(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 that 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 does not intend to perform or knew the promise would not be performed.

Section 76-6-405, Utah Code, defining and describing the actual substantive offense of "theft by deception", provides:

(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.**

Emphasis added. Two observations are in order. First, it is apparent that "theft by deception" presupposes an almost "economic" status to the transaction (i.e. an "economic" or "financial" component to the basic transaction, as evidenced by either the exchange of actual economic value---i.e. money or economic equivalent---or by the expectation to receive economic value as a result of the transaction), or, (2) in cases where the actual property so transferred has recognizable "economic" or monetary value. Neither is present in the instant case.

That City officials surrendered to the Defendant the files and allowed him to inspect the same is not "theft by deception". It was his absolute statutory right to inspect such public records. See, for example, Section 10-3-603 and Section 63-2-201, Utah Code. There

was NO "deception" in obtaining those files, for public inspection, when such files were contained with the City Hall and for which the Defendant later left to pay the City Treasurer for copies of the very records he had inspected. [His payment for those copies also negates any mens rea required for "theft".]

It is also noteworthy that whereas the Information charging the Defendant with the two offense recites what appears to be the statutory text for the offense, omits subparagraph (2) which specifies when theft by deception does NOT occur.

Assuming, for the sake of argument, that the proscribed conduct was that "Mr Decker implicitly promised to return all the 'public records' documents surrendered to him", that conduct does not facially contain the required "deception", because there was "only falsity as to matters having no pecuniary significance"! As Ms Gleed described, his getting the photographs mixed up with the other documents on the table---which has an otherwise explainable (and innocent) explanation---is not probative, particularly "beyond a reasonable doubt", of the Defendant's guilt of "theft by deception".

Utah law requires that there be "reliance" in "theft by deception" cases. In **State vs Jones**, 657 P.2d



1263 (Utah Supreme Court 1982), the Utah Supreme Court wrote:

It is clear from the face of the statute that **reliance by the victim is an element of the crime of theft by deception. In context, obtaining property "by deception" can only mean "by means of deception."** Deception, followed by transfer of property to the deceiver, does not add up to theft by deception without the causal element of **reliance**. Even though the alleged victim is deceived, **if he does not rely on the deception in parting with his property, there has been no theft "by deception"**. State v. Vatsis, 10 Utah 2d 244, 246-47. 351 P.2d 96, 97-98 (1960) (involving statutory predecessor of §76-6-405(1), which also contained no express reference to "reliance"); State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978).

657 P.2d at 1267. Emphasis added.

Ms Candace Gleed---the West Valley City employee who had surrendered temporary custody of the "case file" to Mr Decker for him to inspect the same---affirmatively testified THERE WAS NO DECEPTION on her part associated with Mr Decker's receiving the "file" containing the photographs. Ms Gleed testified:

Q (by Mr BRADFORD [Defense Counsel]): Well, whatever he did, **he didn't deceive you, did he?**

A (by Ms GLEED): I believe he did.

Q: How?

A: In that he was putting those photographs in between the directories while I was standing right there, in an attempt to take them.

Q: That didn't deceive you. You saw what he did.

A: Yeah, he didn't know that I saw it.

Q: Sure. **So, he didn't deceive you.** You watched him.

A: He tried to.  
Q: Well, but he didn't.  
A: **No, he didn't.**  
Mr BRADFORD: Thank you.

TRANSCRIPT at Page 86, lines 12 thru 25. RECORD at 70.  
Emphasis added.

When the prosecution's own witness testifies that there was "no deception", the trial court's finding is not supported by the evidence. The conviction cannot stand!

#### CONCLUSION

The Defendant has been unfairly prejudiced by the prosecutions repeated failure to provide the "bill of particulars", specifically describing the items of property alleged to have been stolen or attempted to have been stolen. This failure resulted in the Defendant---misled by the "open file" disclosure as to the prosecutor's theory---defending against charges exactly opposite of what the trial court judge found him guilty of! This judicial result could not have happened, were the trial court judge to have been informed as to what the prosecutor was attempting to prove.

The trial court's refusal to grant the timely-demanded "jury trial", for these serious misdemeanor offenses, is unjustified. The Rules do not require the Defendant to "reconfirm" his "demand". The trial

court's failure to properly convene the jury---when the "jury trial" had been so scheduled for months---did deprive the defendant of his rights.

The "dual" convictions (i.e. of both offenses) is clearly precluded by the "single criminal episode" statute. Furthermore, the status of the confusing evidence is such that the trial court's own findings evidence the prosecution's failure to prove the accused's guilt "beyond a reasonable doubt".


The prosecution has, in this case, the burden of showing that the failure to provide the requested bill of particulars was not "harmless" error.

The verdict is not supported by the evidence. During the trial there was introduced no evidence "strongly corroborative" of the accused mental state as to when he was handling the photographs. Furthermore, the telephone books were "for free" distribution. The Defendant's taking of the books cannot be the basis of a criminal conviction.

The Defendant's conviction of both offenses should be set aside. The case should be remanded to the District Court for a jury trial, following the providing of a "bill of particulars" identifying the property in question. In the alternative, the charges should be dismissed, outright, as the prosecution

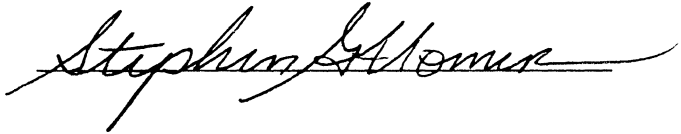
simply failed to prove its case beyond a reasonable doubt.

Respectfully submitted this 12th day of July, 1999.

  
STEPHEN G. HOMER  
Attorney for Appellant  
JAMES WESTON DECKER

**CERTIFICATE OF DELIVERY**

I certify that I caused two copies of the foregoing APPELLANT'S BRIEF to be mailed, first-class postage prepaid, to Mr Elliot R Lawrence, Attorney at Law, Office of the West Valley City Attorney, 3600 South Constitution Boulevard, West Valley City, Utah 84119, this 12th day of July, 1999.



ADDENDA

ADDENDUM 1:  
INFORMATION  
[2 PAGES]

ADDENDUM 2:  
DEFENDANT'S MOTION FOR BILL OF PARTICULARS  
[2 PAGES]

ADDENDUM 3:  
WEST VALLEY CITY ATTORNEY SCREENING WORKSHEET  
[1 PAGE]

ADDENDUM 4:  
DEMAND FOR JURY TRIAL  
[1 PAGE]

ADDENDUM 5:  
COMPUTERIZED DOCKET HISTORY OF TRIAL COURT  
[1 PAGE]

ADDENDUM 6:  
4 NOVEMBER 1998 DAILY CALENDAR  
[1 PAGE]

ADDENDUM 7:  
Article I, Section 12, Utah Constitution

ADDENDUM 8:  
Section 76-4-101, Utah Code ["attempt" defined]

ADDENDUM 9:  
Section 76-1-402, Utah Code [pertaining to  
"single criminal episode"]

ADDENDUM 10:  
Section 76-6-405, Utah Code [pertaining to  
"theft by deception"]

ADDENDUM 11:  
Rule 4, Utah Rules of Criminal Procedure  
[pertaining to "bill of particulars"]

Keith L. Stoney (3868)  
David L. Clark (6199)  
John W. Huber (7226)  
West Valley City Prosecutors  
3600 Constitution Boulevard  
West Valley City, Utah 84119  
(801) 963-3331

IN THE THIRD DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

STATE OF UTAH (West Valley City)

Plaintiff,

v.

JAMES WESTON DECKER  
3247 WEST 3650 SOUTH  
WEST VALLEY CITY UT 84119  
10/02/50

Defendant.

INFORMATION

Court No. 181101620 DMC

The undersigned, David L. Clark, under oath, states on information and belief that the  
defendant, on or about ~~03/04/98~~ <sup>8/27/98</sup>, at the vicinity of 3600 SOUTH CONSTITUTION BLVD, West  
Valley City, Utah, did unlawfully commit the crime(s) of:

**COUNT 1: Attempted Theft, 76-6-404 (Class C), U.C.A. 1953, as amended.**

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

**76-6-412. Theft - Classification.**

**(1) Theft of property and services shall be punishable as follows:**

**(d) as a class B misdemeanor if the value of the property stolen is less than \$300.**

**COUNT 2: Theft by Deception, 76-6-305 (Class B), U.C.A. 1953, as amended.**

**(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.**

**76-6-412. Theft - Classification.**

**(1) Theft of property and services shall be punishable:**

**(d) as a class B misdemeanor if the value of the property stolen is less than \$300.**

This information is based on the evidence obtained from the following witnesses:

MIKEL BIRCH

APPENDIX 1


CANDACE GLEED

**PROBABLE CAUSE STATEMENT:**

Your affiant is informed by West Valley Report No. 98-11931 and the above named witnesses as follows:

WITNESS STATED THAT THE DEFENDANT EXERCISED CONTROL OVER THE PROPERTY OF WEST VALLEY ORDINANCE ENFORCEMENT BY TAKING TWO TELEPHONE BOOKS HE HAD ATTEMPTED TO HIDE PHOTOGRAPHS IN THAT BELONGED TO ORDINANCE ENFORCEMENT; DEFENDANT WITHOUT THE PERMISSION OF WEST VALLEY ORDINANCE, CONCEALED PHOTOGRAPHS IN BETWEEN TWO PHONE BOOKS, AND ATTEMPTED TO LEAVE WITH SAME.

DATED this 12<sup>th</sup> day of Mar, 1998

  
David L. Clark

98-11931, SU, March 09, 1998

**ADDENDUM 1**

PAGE 1 OF 2 PAGES

JASON R. RAMMELL 7287  
LARSEN & RAMMELL  
Attorney for Defendant  
3600 South Market St., 100  
West Valley City, Utah 84119,  
Telephone: 964-1200

IN THE THIRD DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

-----ooOoo-----

WEST VALLEY CITY,	:	
	:	REQUEST FOR BILL
Plaintiff,	:	OF PARTICULARS
vs.	:	
JAMES W. DECKER,	:	Case No. 981101080
	:	Judge Ann Boyden
Defendant.	:	

-----ooOoo-----

COMES NOW James W. Decker, by and through his attorney, Jason R. Rammell, pursuant to URCrP Rule 4 and hereby files a Request For a bill of Particulars to assist in understanding nature and cause of the charges herein and assist the Defendant in preparation of his defense as follows:

1. What is the specific property alleged to have been stolen by the Defendant in Count I of the Information filed herein?

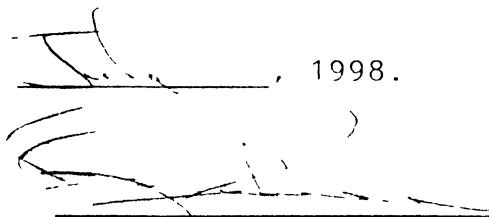
2. What is the specific property alleged to have been stolen by the Defendant in Count II of the Information filed herein?

3. What is the specific allegation of deception with which the Defendant is charged in Count II of the Information filed herein?

**ADDENDUM 2**

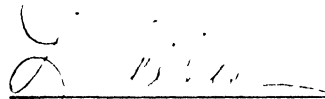


DATED this 22 day of July, 1998.

  
\_\_\_\_\_  
JASON R. RAMMELL  
Attorney for Defendant

CERTIFICATE OF MAILING

This will certify that on the 22 day of July, 1998, a true and correct copy of Request for bill of Particulars, was mailed, postage prepaid, to the West Valley City Prosecutor at 3600 Constitution Blvd., West Valley City, Utah 84119

  
\_\_\_\_\_

# WEST VALLEY CITY ATTORNEYS

FENDANT NAME		JAMES, JAMES		DOB	10.12.56	RACE	C	SEX	M
D		3277 W. 3rd St. S.W.		H PHONE		W PHONE		775 1407	
CRIMINAL RECORD		YES	<input type="checkbox"/>	NO	<input type="checkbox"/>	DL #		ALIAS	

- OFFENSE INFORMATION -

SE #	98-11931	DATE		ADD	3492
REENING OFC	Rec. Office				
RESTING OFC				DATE SUBMITTED	3/5/98
				ASSISTING OFC	

- VICTIM INFORMATION -

NAME	CAWACE GLENN	SEX	F	DOB	N/A	H-PHONE	
ADDRESS	3600 S W. ST GLEN					W-PHONE	963 3384

- WITNESS INFORMATION -

NAME	MIKE BIRCH	AGE	23	CODE	H #	W #	963-3547
DD	<del>[REDACTED]</del> SINE						
NAME		AGE		CODE	H #	W #	
DD							
NAME		AGE		CODE	H #	W #	
DD							
ARREST OFC	BASSIST OFC	CORRECTION OFC	W-EYE WITNESS	EXHIBIT WITNESS	D-COMPL.	F-OTHER WITNESS	

CHARGE(S)	WARRANT <input type="checkbox"/> (INCLUDE P C STATEMENT)	SUMMONS <input type="checkbox"/>
THEFT BY DECEPTION <sup>Adm</sup> <sub>260</sub>	CODE 76-6 405	CLASS B FILED DECL KB-
ADJ. THEFT <sup>Adm</sup> <sub>10145</sub>	CODE 76-6 404	CLASS C FILED DECL KB-
	CODE 76-6 402	CLASS FILED DECL KB-
	CODE	CLASS FILED DECL KB-

CB or DECLINE REASONS: DATE		
-----------------------------	--	--

OFFICER'S RESPONSE- DATE 

### CASE NARRATIVE

**CASE NARRATIVE** Decker called INSPECTING AN A.C.E. FIRE ATTEMPTED TO  
SIGNAL PHOTOGRAPHS FROM THE FIRE BY FLASHING AN FLARED TWO ALONG BRICKS  
LATER DECKER TOOK THE PHOTO BRICKS NO LONGER IN IT HE HAD BEEN CARRIED  
AND WITH THE PHOTO, HAD BEEN RETURNED

Post Address 1731 W 2100 S #101 - LENOX 87118

$\Sigma U = A \nabla AC \nabla B$ .

**WARRANT-P.C. STATEMENT:**

# ADDENDUM 3

VERS 32 Aug 1, 1992

7:00  
MWB

WEST VALLEY CITY, )  
 )  
 ) DEMAND FOR JURY TRIAL  
 )  
 ) Plaintiff )  
 )  
 )  
 )  
 ) vs )  
 )  
 )  
 ) JAMES W DECKER, )  
 )  
 ) Case No. 98-1101080  
 )  
 ) Defendant )

Respectfully submitted this 8th day of September, 1998.

Jim Drake

I certify that I caused a copy of the foregoing DEMAND FOR JURY TRIAL to be mailed to Mr David Clark, Assistant City Attorney, West Valley City Attorney's Office, 3600 South Constitution Boulevard, West Valley City, Utah 84119, this 8th day of September, 1998.

THIS 8th day of September, 1998.

Jan Deke

No confirmation  
to the Court.  
by day before trial +  
in so many ways & lack of history

**ADDENDUM 4**

PAGE 1 OF 1 PAGE

Clerk: sandeeb  
Prosecutor: DAVID CLARK  
Defendant  
Defendant's Attorney(s): L. BRUCE LARSEN

Audio  
Tape Number: 17636 Tape Count: 5890

Deft present with counsel, no resolution case set for Jury Trial.  
Defendant stated that he will seek own counsel. Bruce Larsen  
motioned for withdrawel of counsel, motion granted.

JURY TRIAL is scheduled.

Date: 11/04/1998

Time: 09:00 a.m.

Location: SECOND FLOOR

THIRD DISTRICT COURT

3636 SOUTH 2700 WEST

WEST VALLEY, UT 84119

before Judge ANN BOYDEN

-20-98	Filed: Notice of Withdrawal of Counsel-Larsen & Rammell	janetl
-08-98	Filed: Renewed Motion to Dismiss (prosecutorial Failure to Provide Requested Bill of Particulars)-James W Decker	janetl janetl
-08-98	Filed: Demand for Jury Trial-James W Decker	janetl
-09-98	Filed: Plaintiff's Objection to Defendant's Request for A Bill of Particulars	carole
-21-98	Filed: Plaintiff's Objection To Defendant's Renewed Motion To Dismiss	carole
-07-98	AB/cce Court orders Defendant's motion to dismiss - denied. Because plaintiff has informed defendant of the nature and cause of the charges against him, has reasonably provided discovery to the defendant, & has made evidence available to defendant	cindy
-07-98	there is no basis in law or fact to dismiss case for lack of Bill of Particulars.	cindy
-07-98	Filed: Notice to Submit for Decision - J Decker	cindy
-07-98	Filed: Notice to Submit for Decision-James W Decker	janetl
-07-98	Note: Defendant contacted clerk by phone regarding motion. Defendant was read court's decision. Copy of case history mailed to defendant this date.	cindy
-14-98	Filed: Motion Notice And Order For Continuance - Keith L Stoney	carole
-03-98	AB/SAB deft phoned this date regarding jury, clerk told Mr. Decker that the continuance was not granted and a jury was not called because of timeliness.	sandee
1-03-98	Filed: Motion , notice and order for continuance	barbar
1-03-98	AB/cce Def was contacted this date to determine if a resolution had been reached on this case or if a jury still needed to be filed. Def stated that he had relied on the city's motion which stated that the case had been continued and was not	cindy
1-03-98	prepared to go forward. Def was informed that the city had withdrawn the motion and the case would go forward. Def stated	

## ADDENDUM 5

D DISTRICT COURT  
BOYDEN  
ND FLOOR

November 04, 1998  
Wednesday

0 AM 1 JURY TRIAL  
WEST VALLEY CITY  
VS. DECKER, JAMES WESTON  
OTN:

DOB: 10/02/1950

WVC 981101080 Other Misdemeanor  
ATTY:  
ATTY: LARSEN, L. BRUCE

MC - THEFT  
MB - THEFT BY DECEPTION

DOB 10-2-50

> NO OTN NUMBER <

052

3498

2 JURY TRIAL  
WEST VALLEY CITY  
VS. MOWER, JEAN FRANCIS

WVC 981100340 Other Misdemeanor  
ATTY:  
ATTY:

MA - THEFT

DOB: 10-17-97

> NO OTN NUMBER <

by Bruce Larsen 964-1200

10-17

3 JURY TRIAL  
WEST VALLEY CITY  
VS. PIENEZZA, JOSEPH ROBINSON

WVP 971003766 Other Misdemeanor  
ATTY:  
ATTY:

OTN: 848975 DOB: 06/25/1979

MB - SIMPLE ASSAULT  
MB - CRIMINAL MISCHIEF  
MB - CARRYING CONCEALED DANGEROUS WEAPON

DOB 6-25-79

by Charles Loyd 531-7171

8-25-99

## ADDENDUM 6

Article I, Section 12 of the Utah Constitution  
provides in relevant part:

**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, . . .**

Emphasis added.

Section 76-4-101, Utah Code

**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 76-1-402, Utah Code

**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 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.

. . .

## **ADDENDUM 9**



Section 76-6-405, Utah Code, defining and describing the actual substantive offense of "theft by deception", provides:

(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.

Emphasis added.

Rule 4, Utah Rules of Criminal Procedure, provides, in relevant part:

. . .  
(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and **ownership** need not be alleged, **unless necessary to charge the offense**. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they be identified without setting forth a copy. However, **details concerning such things may be obtained through a bill of particulars**. Neither presumptions of law nor matters of judicial notice need be stated.

. . .  
(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a **written motion for a bill of particulars**. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

. . .

Emphasis added.

## ADDENDUM 11