

1999

## Utah v. Kenneth J. Webster : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; Attorney General; Kris Leonard; Assistant Attorney General; Trina Higgins; Deputy Salt Lake District Attorney; Attorneys for Appellee.

Kent R. Hart; Robert K. Heineman; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

---

### Recommended Citation

Brief of Appellee, *Utah v. Kenneth J. Webster*, No. 990764 (Utah Court of Appeals, 1999).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/2327](https://digitalcommons.law.byu.edu/byu_ca2/2327)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 990764-CA  
v. :  
KENNETH J. WEBSTER, : Priority No. 2  
Defendant/Appellant. :

---

BRIEF OF APPELLEE

-----

APPEAL FROM A CONVICTION OF WRONGFUL APPROPRIATION  
OF A VEHICLE, A THIRD DEGREE FELONY, IN VIOLATION OF  
UTAH CODE ANN. § 76-6-404.5 (SUPP. 1998), IN THE THIRD  
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE MICHAEL K. BURTON,  
PRESIDING

KENT R. HART (6242)  
ROBERT K. HEINEMAN (5481)  
Salt Lake Legal Defender Assoc.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-5444

Attorneys for Appellant

KRIS C. LEONARD (4902)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Utah Attorney General  
160 East 300 South, 6th Floor  
P. O. Box 140854  
Salt Lake City, UT 84114-0854  
Telephone: (801) 366-0180

TRINA HIGGINS  
Deputy Salt Lake District Attorney

Attorneys for Appellee

**FILED**

Utah Court of Appeals

JUL 31 2000

Julia D'Alessandro  
Clerk of the Court

---

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, : Case No. 990764-CA  
 :  
 v. :  
 :  
 KENNETH J. WEBSTER, : Priority No. 2  
 :  
 Defendant/Appellant. :

---

BRIEF OF APPELLEE

-----

APPEAL FROM A CONVICTION OF WRONGFUL APPROPRIATION  
OF A VEHICLE, A THIRD DEGREE FELONY, IN VIOLATION OF  
UTAH CODE ANN. § 76-6-404.5 (SUPP. 1998), IN THE THIRD  
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE MICHAEL K. BURTON,  
PRESIDING

KENT R. HART (6242)  
ROBERT K. HEINEMAN (5481)  
Salt Lake Legal Defender Assoc.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-5444

Attorneys for Appellant

KRIS C. LEONARD (4902)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Utah Attorney General  
160 East 300 South, 6th Floor  
P. O. Box 140854  
Salt Lake City, UT 84114-0854  
Telephone: (801) 366-0180  
  
TRINA HIGGINS  
Deputy Salt Lake District Attorney

Attorneys for Appellee

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
JURISDICTION AND NATURE OF PROCEEDINGS .....	1
STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW .....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES .....	3
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	4
SUMMARY OF THE ARGUMENTS .....	6
ARGUMENT .....	8
I.    STATEMENTS MADE BY DEFENDANT’S WIFE TO POLICE HAD SUFFICIENT TRUSTWORTHINESS TO MEET CONFRONTATION CLAUSE REQUIREMENTS; DEFENDANT RECEIVED THE NOTICE REQUIRED BY RULE 804(B)(5); DEFENDANT LACKS STANDING TO ASSERT A VIOLATION OF HIS WIFE’S CONSTITUTIONAL RIGHTS, AND NO SUCH VIOLATION OCCURRED ABSENT ANY COMPULSION TO TESTIFY .....	8
A.    Background and Trial Court Ruling .....	9
B.    The Statements Possessed Sufficient Indicia of Reliability to Meet Confrontation Clause Requirements .....	11
C.    Assuming a Confrontation Clause Violation, Any Error was Harmless Beyond a Reasonable Doubt .....	18
D.    Defendant Received the Required Notice Under Rule 804(b)(5) .....	19

E.	Defendant Waived his Claim that his Wife’s Marital Testimonial Privilege was Violated; Defendant Lacks Standing to Assert the Violation; Moreover, There was no Such Violation . . . . .	23
II.	THE TRIAL COURT PROPERLY ADMITTED DEFENDANT’S ADMISSION OF PRIOR SIMILAR CONDUCT UNDER RULE 404(B) AS IT WAS RELEVANT TO THE MATERIAL ISSUES OF IDENTITY AND INTENT AND ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY A POTENTIAL FOR UNFAIR PREJUDICE . . . . .	27
III.	DEFENDANT WAS NOT CONVICTED OF AN INFRACTION BECAUSE THE JURY FOUND HIM GUILTY OF AN OFFENSE “DEFINED WITHIN THE CODE”; NEITHER WAS HE ENTITLED TO BE SENTENCED FOR THE LESSER OFFENSE OF “UNAUTHORIZED CONTROL” WHERE THE JURY CONVICTED HIM OF THE GREATER OFFENSE OF WRONGFUL APPROPRIATION . . . . .	34
	CONCLUSION . . . . .	39

ADDENDA

ADDENDUM A	- Utah Code Ann. § 76-4-404.5 (Supp. 1998)
ADDENDUM B	- Trial Court Ruling (R. 38:102-03)
ADDENDUM C	- Trial Court Ruling (R. 38:93-94)
ADDENDUM D	- Utah Code Ann. § 76-3-105 (1999) Utah Code Ann. § 76-6-404 (1999) Utah Code Ann. § 76-6-412 (1999) Utah Code Ann. § 41-1a-1311 (1993) Utah Code Ann. § 41-1a-1311 (1998)
ADDENDUM E	- Trial Court Ruling (R. 56-58; 53:13-14)
ADDENDUM F	- U.S. Const. Amend. VI Utah Const. art. I, § 12
ADDENDUM G	- Utah Rule of Evidence 804

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S. Ct. 1431 (1986) .....	18
<u>Hopkinson v. Shillinger</u> , 866 F.2d 1185 (10th Cir. 1989), <u>overruled on other grounds</u> , 497 U.S. 227, 110 S. Ct. 2822 (1990) ....	13, 15
<u>Jackson v. State</u> , 498 F. Supp. 186 (D. S.C. 1979) .....	25
<u>Lee v. Illinois</u> , 476 U.S. 530, 106 S. Ct. 2056 (1986) .....	16
<u>Lilly v. Virginia</u> , 527 U.S. 115, 119 S. Ct. 1887 (1999) .....	16
<u>Martinez v. Sullivan</u> , 881 F.2d 921 (10th Cir. 1989), <u>cert. denied</u> 493 U.S. 1029, 110 S. Ct. 740 (1990) .....	12
<u>Trammel v. United States</u> , 445 U.S. 40, 100 S. Ct. 906 (1980) .....	26
<u>United States v. Aldana</u> , 4 F. Supp. 2d 1325 (D. Utah 1998) .....	12
<u>United States v. Balano</u> , 618 F.2d 624 (10th Cir. 1979), <u>overruled on other grounds</u> , 468 U.S. 317, 104 S. Ct. 3081 (1984) .....	11
<u>United States v. Barlow</u> , 693 F.2d 954 (6th Cir. 1982), <u>cert. denied</u> 461 U.S. 945, 103 S. Ct. 2124 (1983) .....	13
<u>United States v. Brown</u> , 770 F.2d 768 (9th Cir. 1985), <u>cert. denied</u> 474 U.S. 1036, 106 S. Ct. 603 (1985) .....	2
<u>United States v. Frazier</u> , 678 F. Supp. 499 (E.D. Pa. 1986) .....	21
<u>United States v. Marchini</u> , 797 F.2d 759 (9th Cir. 1986), <u>overruled on other grounds</u> , 497 U.S. 805, 110 S. Ct. 3139 (1990) .....	13
<u>United States v. Sheets</u> , 125 F.R.D. 172 (D. Utah 1989) .....	11
<u>United States v. Weinstock</u> , 863 F. Supp. 1529 (D. Utah 1994) .....	11, 12, 13

## STATE CASES

<u>Dejavue, Inc. v. U.S. Energy Corp.</u> , 1999 UT App 355, 993 P.2d 222 .....	17
<u>Doe v. Maret</u> , 984 P.2d 980 (Utah 1999) .....	25, 26
<u>Engberg v. Meyer</u> , 820 P.2d 70 (Wy. 1991) .....	13
<u>Hoyle v. Monson</u> , 606 P.2d 240 (Utah 1980) .....	17
<u>Julian v. State</u> , 966 P.2d 249 (Utah 1998) .....	12, 13
<u>Kent v. Pioneer Valley Hospital</u> , 930 P.2d 904 (Utah App.), <u>cert. denied</u> 939 P.2d 683 (1997) .....	10
<u>Kimball Condo. Owners Association v. County Board of Equalization</u> , 943 P.2d 642 (Utah 1997) .....	20
<u>Shelledy v. Lore</u> , 836 P.2d 786 (Utah), <u>cert. denied</u> 506 U.S. 1022, 113 S. Ct. 660 (1992) .....	24
<u>State v. Anderson</u> , 789 P.2d 27 (Utah 1990) .....	24
<u>State v. Archambeau</u> , 820 P.2d 920 (Utah App. 1991) .....	24
<u>State v. Bertul</u> , 664 P.2d 1181 (Utah 1983) .....	16
<u>State v. Brewer</u> , 732 P.2d 780 (Kan. 1980) .....	24
<u>State v. Brooks</u> , 638 P.2d 537 (Utah 1981) .....	12
<u>State v. Carter</u> , 888 P.2d 629 (Utah), <u>cert. denied</u> 516 U.S. 858, 116 S. Ct. 163 (1995) .....	25, 26
<u>State v. Chaney</u> , 1999 UT App 309, 989 P.2d 1091 .....	4, 5
<u>State v. Constantino</u> , 732 P.2d 125 (Utah 1987) .....	25
<u>State v. Decorso</u> , 1999 UT 57, 993 P.2d 837 (Utah 1999), <u>cert. denied</u> 120 S. Ct. 1181 (2000) .....	2, 28-30, 33

<u>State v. Delaney</u> , 869 P.2d 4 (Utah App. 1994) .....	5, 33
<u>State v. Dillon</u> , 191 W. Va. 648, 447 S.E.2d 583 (1994) .....	21
<u>State v. Drawn</u> , 791 P.2d 890 (Utah App. 1990) .....	2, 12
<u>State v. Dudley</u> , 847 P.2d 424 (Utah App. 1993) .....	9
<u>State v. Elder</u> , 815 P.2d 1341 (Utah App. 1991) .....	10
<u>State v. Finlayson</u> , 2000 UT 10, 994 P.2d 1243 .....	37
<u>State v. Hill</u> , 674 P.2d 96 (Utah 1983) .....	38
<u>State v. Kerekes</u> , 622 P.2d 1161 (Utah 1980) .....	27
<u>State v. Kohl</u> , 2000 UT 35, 392 Utah Adv. Rep. 3 .....	4
<u>State v. Larsen</u> , 865 P.2d 1355 (Utah 1993) .....	2
<u>State v. Menzies</u> , 889 P.2d 393 (Utah 1994), <u>cert. denied</u> , 513 U.S. 1115, 115 S. Ct. 910 (1995) .....	12
<u>State v. Newman</u> , 680 P.2d 257 (Kan. 1984) .....	26
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994) .....	2
<u>State v. Redd</u> , 1999 UT 108, 992 P.2d 986 .....	20
<u>State v. Rhodes</u> , 818 P.2d 1048 (Utah App. 1991) .....	2
<u>State v. Robertson</u> , 932 P.2d 1219 (Utah 1997) .....	24, 25
<u>State v. Shepherd</u> , 1999 UT App 305, 989 P.2d 503 .....	10
<u>State v. Shickles</u> , 760 P.2d 291 (Utah 1998) .....	31, 32
<u>State v. South</u> , 924 P.2d 354 (Utah 1996), <u>cert. denied</u> 940 P.2d 1224 (1997) .....	10
<u>State v. Spurgeon</u> , 904 P.2d 220 (Utah App. 1995) .....	9



<u>State v. Teel</u> , 712 P.2d 792 (N.M. App. 1985) .....	26
<u>State v. Toney</u> , 243 Neb. 237, 498 N.W.2d 544 (1993) .....	21
<u>State v. Vigil</u> , 840 P.2d 788 (Utah App. 1992), <u>cert. denied</u> 857 P.2d 948 (1993) .....	5
<u>State v. Webb</u> , 779 P.2d 1108 (Utah 1989) .....	11
<u>State v. Whittle</u> , 1999 UT 96, 989 P.2d 52 .....	2
<u>Williams v. Collins Communications, Inc.</u> , 720 P.2d 880 (Wyo. 1986) .....	21
<u>Wright v. Carver</u> , 886 P.2d 58 (Utah 1994) .....	24

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. Amend. VI .....	3
Utah Code Ann. § 41-1a-1311 (1993) .....	3, 35, 38, 39
Utah Code Ann. § 76-3-105 (1999) .....	3, 4, 34, 36, 37
Utah Code Ann. § 76-6-404 .....	3, 34, 38
Utah Code Ann. § 76-6-404.5 .....	1-4, 8, 34-38
Utah Code Ann. § 76-6-412 (1999) .....	3, 35
Utah Code Ann. § 78-2a-3 (1996) .....	1
Utah Const. art. I, § 12 .....	3, 23
Utah R. Evidence 402 .....	3, 28, 30
Utah R. Evidence 403 .....	3, 28, 31
Utah R. Evidence 404 .....	3, 7, 28
Utah R. Evidence 502 .....	24
Utah R. Evidence 804 .....	<i>Passim</i>

---

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 990764-CA  
v. :  
KENNETH J. WEBSTER, : Priority No. 2  
Defendant/Appellant. :

---

**BRIEF OF APPELLEE**  
-----

**JURISDICTION AND NATURE OF PROCEEDINGS**

This appeal is from a judgment and conviction of wrongful appropriation, a third degree felony, in violation of Utah Code Ann. § 76-6-404.5 (Supp. 1998) (in **Add. A**).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1996).

**STATEMENT OF ISSUES PRESENTED ON APPEAL  
AND STANDARDS OF APPELLATE REVIEW**

1. Were the out-of-court statements made by defendant's wife to a police officer properly admitted under a residual hearsay exception, despite the wife's later invocation of her marital testimonial privilege, when defendant knew of the State's intent to use the statements and the statements had sufficient indicia of reliability under the Confrontation Clause?

A trial court has broad discretion to admit or exclude evidence, and its determination typically will be disturbed only if it constitutes an abuse of discretion. See State v. Whittle, 1999 UT 96, ¶20, 989 P.2d 52; State v. Pena, 869 P.2d 932, 938 (Utah 1994). A trial court abuses its discretion if it acts unreasonably. See State v. Larsen, 865 P.2d 1355, 1361 (Utah 1993); State v. Drawn, 791 P.2d 890, 892 (Utah App. 1990).

The sufficiency of notice under the residual exceptions to the hearsay rule is likewise reviewed on appeal for an abuse of discretion. United States v. Brown, 770 F.2d 768, 771 (9<sup>th</sup> Cir. 1985), cert. denied 474 U.S. 1036, 106 S. Ct. 603 (1985).

2. Did the trial court properly admit defendant's admission that he had previously committed a similar offense when that admission was relevant to the material issues of identity and intent, and its probative value was not substantially outweighed by the danger of unfair prejudice?

The appellate court reviews a decision to admit evidence of prior crimes, wrongs, or acts under an abuse of discretion standard. State v. Decorso, 1999 UT 57, ¶18, 993 P.2d 837, cert. denied 120 S. Ct. 1181 (2000).

3. Did the trial court properly refuse to reduce defendant's conviction to an infraction when defendant was convicted of third degree felony wrongful appropriation as defined in Utah Code Ann. § 76-6-404.5(3)(a) (Supp. 1998)?

Determining the penalty for a crime is a question of law which this Court reviews for correctness. State v. Rhodes, 818 P.2d 1048, 1049 (Utah App. 1991).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Relevant text of constitutional, statutory, or rule provisions pertinent to resolution of the issues presented on appeal is contained in or appended to this brief, including:

U.S. Const. Amend. VI ( <b>Add. G</b> )	Utah Code Ann. § 41-1a-1311 (Supp. 1997)
Utah Const. art. I, § 12 ( <b>Add. G</b> )	Utah Code Ann. § 76-3-105 (1999)
Utah R. Evidence 402	Utah Code Ann. § 76-6-404 (1999)
Utah R. Evidence 403	Utah Code Ann. § 76-6-404.5 (Supp. 1998)
Utah R. Evidence 404(b)	Utah Code Ann. § 76-6-412 (1999).
Utah R. Evidence 804(b)(3) ( <b>Add. F</b> )	
Utah R. Evidence 804(b)(5) ( <b>Add. F</b> )	

## STATEMENT OF THE CASE

Defendant was charged by information with theft of an operable motor vehicle, a second degree felony (R. 1-2). The morning of trial, defense counsel filed three motions. The first sought to permit defendant's wife to assert her constitutional right not to testify against defendant (R. 22-23). The trial court took the matter under consideration and revisited it before the State called its final witness at trial (R. 38: 38-39, 96-103).<sup>1</sup> Defendant's wife in fact invoked her privilege during trial, and the trial court ruled that her spontaneous pre-trial statements to a police officer when he informed her of defendant's arrest were sufficiently trustworthy to be admitted under Utah Rule of Evidence 804(b)(3) and (b)(5) (R. 38:102-03).

---

<sup>1</sup>Citation herein to transcripts will be to the volume number stamped on the cover of each transcript volume, followed by a colon and the internal page number, i.e., R. 38: 7.

The second and third motions sought to exclude defendant's statement to the arresting officer that he had previously stolen a car from a dealership lot in Virginia (R. 25-26). The court deferred ruling, opting to see how the evidence developed so that he could properly balance probative value and prejudice (R. 38:45-46). Thereafter, the court admitted the evidence, finding it to be relevant to intent, identity and absence of mistake (R. 38:93).

Following a one-day trial, the jury acquitted defendant of theft and convicted him of the lesser offense of wrongful appropriation (R. 34-35, 38:147). The court ordered a presentence investigation report, and defendant sought clarification of the degree of the offense (R. 37, 42-51, 53:5-13). The trial court found the offense to be a third degree felony under Utah Code Ann. § 76-6-404.5(3)(a) (Supp. 1998), and sentenced defendant to serve 180 days in jail (R. 55-56; 53:13-14). He suspended 165 days and imposed eighteen months probation and a fine (R. 55-56). Defendant timely appealed (R. 60-61).

### **STATEMENT OF FACTS<sup>2</sup>**

On June 22, 1998, Intermountain Volkswagen acquired a 1988 Nissan Stanza (R. 38:61, 71). The car was placed in a fenced area at the back of Intermountain's lot with other trade-ins to be kept untouched until "bought by a bank and approved and funded" (R. 38:62). Trade-ins were not driven by salesmen, as were the remaining cars on the lot,

---

<sup>2</sup>The facts are recited in the light most favorable to the jury's verdict. State v. Kohl, 2000 UT 35, n.1, 392 Utah Adv. Rep. 3; State v. Chaney, 1999 UT App 309, ¶2, 989 P.2d 1091.

and were not used for any reason to long as they remained in the fenced area (R. 38:65, 71-73). A standard monthly inventory of cars on July 3, 1998, showed the Nissan to be in the fenced area (R. 38:73).

Defendant Kenneth J. Webster began work as a salesman for Intermountain Volkswagen around June 24, 1998 (R. 38:67). Defendant got his job about two weeks after starting around July 5 (R. 38:63, 114). On approximately July 6 or 7, Intermountain's lot coordinator, Mike McGuire, saw defendant drive the Nissan from the lot but did not see him return (R. 38:75-79, 84).<sup>3</sup> On July 10 a dealership manager drove to defendant's apartment to ask about the car as it had not been returned (R. 38:107-08). He found the Nissan in a parking stall at defendant's apartment complex and notified police (R. 38: 106-07).

Detective Michael Cupello verified that the Nissan was the missing car belonging to Intermountain Volkswagen (R. 38:105-08). He then contacted defendant, who said he had never touched or driven the car (R. 38:108-09). Detective Cupello arrested defendant, Mirandized him, and drove him to the police station (R. 38:110-12). As part of the booking process, the officer asked defendant if he had been arrested before (R.

---

While the supervisor testified at different times that he saw defendant in the car during the week of July 10 and that he saw him shortly after June 26, the jury was free to believe the former testimony. State v. Delaney, 869 P.2d 4, 6 (Utah App. 1994) (it is the trier of fact's duty to assess credibility and weigh the evidence); State v. Vigil, 840 P.2d 788, 793 (Utah App. 1992), cert. denied 857 P.2d 948 (1993). The facts must be viewed on appeal in a light most favorable to the jury's verdict. Chaney, 1999 UT App 309 ¶¶

38:111).<sup>4</sup> Defendant responded that he had been arrested in Virginia for driving a vehicle off a dealership lot (R. 38:111-12).

Detective Cupello later called defendant's wife, Elsha Gallegos, to tell her of defendant's arrest (R. 22; 38:112). He told Ms. Gallegos that the stolen car had been found in their parking lot and that defendant denied having touched it (R. 38:112-13). Ms. Gallegos responded, "He's lying" (R. 38:113). She explained that she and defendant had both been driving the car, that she had been driving in the car with defendant just two days earlier, and that he claimed that it was all right for him to have the car (R. 38:113-14). She believed he had quit his job around July 8 and had taken the car back to the lot (R. 38:114). When told by the detective that defendant denied driving the car, Ms. Gallegos said, "We have a problem" (R. 38:114). The keys were never recovered (R. 38:109).

## SUMMARY OF THE ARGUMENTS

**Point I:** Admission of the pre-trial statements of defendant's wife to police did not violate the Confrontation Clause. The statements were admissible under a firmly rooted hearsay exception, thereby meeting the reliability requirements of the Confrontation Clause. Alternatively, a review of the circumstances under which defendant's wife made

---

<sup>4</sup>The arresting officer explained that he routinely asked this question because if an accused has been booked in jail before, he would have certain identification numbers the officer would need to have (R. 38:111).

the statements reveals several particularized guarantees of trustworthiness that satisfy Confrontation Clause requirements.

Admission of the statements did not violate the notice requirements of rule 804(b)(5), Utah Rules of Evidence, because defendant knew before trial of the challenged statements and the State's intent to use them. Nothing in the plain language of the rule or case law establishes any entitlement to express advance notice of the exact evidentiary rule under which the statements might ultimately be admitted.

Defendant did not preserve his claim that admitting his wife's pre-trial statements to police violated her constitutional marital testimonial privilege, and he lacks standing to claim a violation of her constitutional right. Even if he were able to advance his claim on appeal, it would be without merit because the State did not compel defendant's wife to testify in contravention of the constitution.

**Point II:** The trial court properly admitted defendant's statement that he had previously taken a car from a dealership lot without authorization. The admission was properly offered as being probative of the noncharacter issues of identity and intent, which were both at issue at trial. The probative value of the admission was not substantially outweighed by the danger of unfair prejudice, thereby meeting the requirements of rule 404(b), Utah Rules of Evidence. Defendant admitted committing the prior offense, the crux of both crimes was identical, the evidence was unlikely to inflame the jury, and the State's need for the evidence on the issues of identity and intent was



obvious to the court as the State had put on the majority of its case before the Court deemed the evidence admissible.

**Point III:** Because the offense of which he was convicted—wrongful appropriation—was both defined by the code and not specifically designated an infraction, defendant was not entitled to be sentenced for an infraction under Utah Code Ann. § 76-3-105(2) (1999). Further, because the jury convicted defendant of wrongful appropriation, which requires proof of intent, defendant was not entitled to be sentenced for “unauthorized control of motor vehicles,” which has no similar intent requirement. As defendant was exposed to a third degree felony conviction under Utah Code Ann. § 76-6-404.5(3)(a) when he committed the crime, the repeal of subsection (3)(e) prior to sentencing did not change the potential punishment for defendant’s crime, thereby rendering his ex post facto argument meritless.

## **ARGUMENT**

### **POINT I**

**STATEMENTS MADE BY DEFENDANT’S WIFE TO POLICE HAD SUFFICIENT TRUSTWORTHINESS TO MEET CONFRONTATION CLAUSE REQUIREMENTS; DEFENDANT RECEIVED THE NOTICE REQUIRED BY RULE 804(B)(5); DEFENDANT LACKS STANDING TO ASSERT A VIOLATION OF HIS WIFE’S CONSTITUTIONAL RIGHTS, AND NO SUCH VIOLATION OCCURRED ABSENT ANY COMPULSION TO TESTIFY**

Defendant argues that admission at trial of statements made by his wife to Officer Cupello was error for three reasons: 1) the admission violated defendant’s confrontation

right because the statements lacked the required indicia of reliability;<sup>5</sup> 2) the State allegedly failed to give defendant notice that it intended to rely on a residual hearsay exception to admit the statements; and 3) the use of the statements violated his wife's constitutional testimonial right, to defendant's detriment. Br. of Aplt. at 20-37.

**A. Background and Trial Court Ruling**

Immediately prior to trial, defendant filed a motion seeking to allow his wife, Elsha Gallegos, to invoke her right not to testify against her husband (R. 22-23). During the resulting discussion, the prosecutor noted that she planned to call Ms. Gallegos in rebuttal (R. 38:38). The court asked Mrs. Gallegos if she wanted to invoke her privilege immediately or wait until called to decide whether to testify; she decided to wait (R. 38:38, 49-51). Before calling its last witness, the State revisited the issue, noting that it had decided to call Ms. Gallegos to testify in its case-in-chief based on the defense's opening statement (R. 38:90). Ms. Gallegos then invoked the privilege, leaving the State to seek admission of her pre-trial statements through the officer to whom she made them (R. 38:96-103). The State offered the statements under rules 804(b)(3) (statement against interest) and (b)(5) (residual hearsay rule) (R. 38:96-97, 100-01).

---

<sup>5</sup>Defendant does not include a separate state constitutional argument under the confrontation clause, so this Court may conduct a federal constitutional analysis only. State v. Spurgeon, 904 P.2d 220, 224 (Utah App. 1995); State v. Dudley, 847 P.2d 424, 426 (Utah App. 1993).

The trial court found the statements to be admissible, noting that whether the statements were against her interest or not, they met the criteria of rule 804(b)(5), Utah

Rules of Evidence:

It seems to me either they [the statements] are against her interest or they are of no importance at all other than, for example, one might say, “Well, today it looks like it might rain.” They have no particular impact one way or the other. So I think for that reason, there is a trustworthy attachment because they are by and large mere statements of inconsequential events if taken in the context that you [defense counsel] described.

(R. 38:102-03) (in **Add. B**). In other words, the court felt that, to the extent the statements were against Ms. Gallegos’ interest, they were admissible under rule 804(b)(3); to the extent they were not against her interest, they were admissible under rule 804(b)(5).<sup>6</sup> The court further held that defendant received notice that the State would seek admission of Ms. Gallegos’ testimony, and thus, her prior statements, and that the language of the rule did not require the prosecution to disclose in advance the exact rule of evidence under which the testimony might be admitted (R. 38:103). Finally, the court

---

<sup>6</sup>To the extent the lower court did not find the statements admissible under rule 804(b)(3), this Court may nevertheless affirm on that ground because (b)(3) was argued below. See Kent v. Pioneer Valley Hospital, 930 P.2d 904, 906 (Utah App.) (affirming the grant of summary judgment on an alternative basis), cert. denied 939 P.2d 683 (1997); see also State v. Elder, 815 P.2d 1341, 1344 n.4 (Utah App. 1991) (the appellate court may affirm a trial court on any basis); see also State v. South, 924 P.2d 354, 357 (Utah 1996), cert. denied 940 P.2d 1224 (1997); State v. Shepherd, 1999 UT App 305 n.4, 989 P.2d 503 (the trial court may be affirmed on any proper basis).

held that admission of the statements under a residual hearsay exception did not violate defendant's constitutional confrontation rights (R. 38:103).<sup>7</sup>

**B. The Statements Possessed Sufficient Indicia of Reliability to Meet Confrontation Clause Requirements**

Defendant does not claim that the statements were admitted in violation of rule 804(b)(3). Further, he claims a violation of subsection (b)(5) only insofar as he allegedly received no sufficient notice under the rule. See Point ID, infra. However, the fact that he does not contest the ability of the statements to come in under these rules does not settle the issue of their admissibility because whether evidence meets a hearsay exception does not necessarily mean that it meets the requirements of the Confrontation Clause. State v. Webb, 779 P.2d 1108, 1111-12 (Utah 1989); see also United States v. Balano, 618 F.2d 624, 626 (10<sup>th</sup> Cir. 1979), overruled on other grounds, 468 U.S. 317, 104 S. Ct. 3081 (1984); United States v. Sheets, 125 F.R.D. 172, 173 (D. Utah 1989). Consequently, this Court should focus first on defendant's constitutional confrontation rights.

To be admissible under the Confrontation Clause, the declarant must be unavailable, and the evidence must have some "indicia of reliability" or "particularized guarantees of trustworthiness." United States v. Weinstock, 863 F.Supp. 1529, 1536 (D.

---

<sup>7</sup>Contrary to defendant's claims, the trial court did not cite as a basis for its admission of Ms. Gallegos' statements the prosecutor's assurances that Ms. Gallegos was willing to reassert the statements for the court. Br. of Aplt. at 26.

Utah 1994); Julian v. State, 966 P.2d 249, 255 (Utah 1998); State v. Menzies, 889 P.2d 393, 452-53 (Utah 1994), cert. denied, 513 U.S. 1115, 115 S. Ct. 910 (1995); State v. Brooks, 638 P.2d 537, 539 (Utah 1981) (adopting the safeguards established in Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539 (1980)). Here, defendant does not challenge Ms. Gallegos' unavailability; nor could he as she was, in fact, unavailable when she exercised her right not to testify against her husband. Utah Constit., art I, § 12; see also Utah R. Evid. 804(a)(1) (a witness is unavailable when exempted from testifying on the ground of a privilege). Cf. Martinez v. Sullivan, 881 F.2d 921, 924 (10<sup>th</sup> Cir. 1989) (a codefendant who invoked his right not to testify was "unavailable" for purposes of the Confrontation Clause), cert. denied 493 U.S. 1029, 110 S. Ct. 740 (1990).

The trustworthiness prong is satisfied when the evidence falls within a "firmly rooted" exception to the hearsay rule. United States v. Aldana, 4 F.Supp.2d 1325, 1327 (D. Utah 1998); Weinstock, 863 F.Supp. at 1536; Julian, 966 P.2d at 256; State v. Drawn, 791 P.2d 890, 894 (Utah App. 1990). If the statements do not fall within a "firmly rooted" hearsay exception, this Court must look to the circumstances of the comments to determine whether there is any indicia of reliability to support admission of the statements. Aldana, 4 F.Supp. at 1327; Weinstock, 863 F.Supp. at 1536; Julian, 966 P.2d at 256; Drawn 791 P.2d at 894. This review includes the totality of the circumstances which "surround the making of the statement and that render the declarant particularly worthy of belief." Weinstock, 863 F.Supp. at 1536 (quoting Idaho v. Wright, 497 U.S.

805, 820, 110 S. Ct. 3139, 3149 (1990), cert. denied 513 U.S. 1130, 115 S. Ct. 942 (1995)).

Defendant erroneously claims that the general guarantees of trustworthiness are absent from the challenged statements.<sup>8</sup> Br. of Aplt. at 23-27.

The statements were admitted under the residual hearsay exception, rule 804(b)(5). Rule 804(b)(5) is not a firmly rooted hearsay exception. Hopkinson v. Shillinger, 866 F.2d 1185, 1200 (10<sup>th</sup> Cir. 1989), overruled on other grounds, 497 U.S. 227, 110 S. Ct. 2822 (1990); Weinstock, 863 F.Supp. at 1536. Consequently, this Court looks to the circumstances surrounding the declaration to determine whether particularized guarantees of trustworthiness exist to support the statements' admission. Weinstock, 863 F.Supp. at

---

<sup>8</sup>To the extent he complains that he was unable to exercise his right to cross-examine Ms. Gallegos, the claim is without merit. Cross-examination of the declarant is not a prerequisite to the statement's admission under the Confrontation Clause. United States v. Barlow, 693 F.2d 954, 964 (6<sup>th</sup> Cir. 1982) (introduction of defendant's wife's grand jury testimony upheld despite no opportunity for cross-examination where the requisite reliability was shown), cert. denied 461 U.S. 945, 103 S. Ct. 2124 (1983); United States v. Marchini, 797 F.2d 759, 765 (9<sup>th</sup> Cir. 1986) (same), overruled on other grounds, 497 U.S. 805, 110 S. Ct. 3139 (1990). Moreover, defendant has not established that he was unable to examine his wife about the statements. Ms. Gallegos' exercise of her marital testimonial privilege rendered her unavailable as a witness for the State. However, that privilege does not extend to prevent her from testifying when called as a witness by the defendant. See Engberg v. Meyer, 820 P.2d 70, 83-84 (Wy. 1991) (defendant's claim that his wife's invocation of her marital testimonial privilege rendered her unavailable to him at trial failed where he did not make any effort to call her as a witness in his behalf in order to establish her unavailability to him). As defendant made no effort to call her as a witness in his behalf, he cannot contend that he was unable to examine her as to her statements.

1536. Those guarantees are present in this case when the challenged statements are viewed under the circumstances surrounding their making.

Rule 804(b)(5) provides that the following is not excluded by the hearsay rule:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

Following up on his investigation, Officer Cupello waited until defendant's wife was off work the day he arrested defendant, then called her at home to tell her of her husband's arrest (R. 38:112-13). Nothing suggests that Ms. Gallegos was forewarned about the arrest or the possibility that she would be speaking to the arresting officer. Accordingly, her responses to the officer's statements were spontaneous and wholly her own. Further, nothing suggests that the officer was investigating Ms. Gallegos or that she believed that she was a suspect in the crime, thus making her more likely to be candid with the officer. When informed about the arrest and defendant's claim that he "never touched the vehicle," Ms. Gallegos blurted, "He is lying" and went on to briefly explain that she believed her husband had permission to drive the car, and that they had driven the car until she got her husband to quit his job at Intermountain Volkswagen around July 8, at which time she believed the car was returned to the dealership (R. 38:113-14). She was very surprised to hear that it was discovered in her own parking lot (R. 38:114).

These circumstances give rise to several particularized guarantees of trustworthiness. Ms. Gallegos had personal knowledge of the matters about which she spoke, and the matters were recent events. Hopkinson, 866 F.2d at 1201. This suggests intimate familiarity and recall of the events. She stated that they drove the car until it was returned, she believed, on July 8, when defendant in fact left his job (R. 38:63, 80, 114). Ms. Gallegos said she had not driven the car after July 8. This is in keeping with the other evidence of defendant's failure to appear at work, and the timing of the car's disappearance.

Ms. Gallegos volunteered the statements, and there is no reason to suspect that she was not telling the truth. Hopkinson, 866 F.2d at 1201. She was not required to make any comment and was under no compulsion to discuss the details with the officer. The exchange was not such that she reasonably would be motivated to divorce herself from the car at her husband's expense. There is no evidence that she was threatened with criminal prosecution or otherwise made to feel a need to distance herself from the car. Instead, it appears that she made the statements in a spontaneous discussion with the officer, making it more likely that the statements accurately reflect the facts as she remembered them.

Neither did she "absolve[] herself of all responsibility" for the offense, as defendant claims. Br. of Appt. at 20. She admitted that both she and defendant drove and rode in the car in the days preceding her talk with Officer Cupello, and she revealed her



own knowledge that the car came from the dealership (R. 38:114). The fact that she did not wholly exonerate herself from the situation suggests that she was being truthful in her statements.

The mere fact that she implicates defendant does not render her statements either unreliable or inadmissible. Br. of Aplt. at 22-24. Instead, careful review of the circumstances surrounding her statements determines their admissibility. Lilly v. Virginia, 527 U.S. 115, 118, 119 S. Ct. 1887, 1889 (1999) (while “accomplices’ confessions that inculcate a criminal defendant” are not per se admissible and must be carefully reviewed, they are not necessarily incapable of qualifying for admission under a hearsay exception); Lee v. Illinois, 476 U.S. 530, 541, 106 S. Ct. 2056, 2062 (1986). The circumstances surrounding Ms. Gallegos’ statements suggests that she did not have the strong motivation to shift the entirety of the blame for the offense to the accused, as might occur with accomplices or co-defendants. While she arguably could have been pursued as an accomplice, nothing shows that she believed she would be or that the State took steps to do so. Further, she did not seem anxious to inculcate her husband or to get him in trouble, as evidenced by her refusal to testify. Consequently, her statements have an added indicia of honesty or guarantee of trustworthiness under the circumstances.

Defendant contends that an officer’s memory of a witness’ oral statements necessarily lacks trustworthiness because written witness statements to police have been deemed to be unreliable. Br. of Aplt. at 24. In support, he cites to State v. Bertul, 664

P.2d 1181, 1184 (Utah 1983), which held that police reports of witness statements do not satisfy the business records exception to the hearsay rule. However, the case does not say that such reports cannot meet other exceptions to the hearsay rule, such as the residual hearsay exception. See id. at 1184 n.3. Thus, while such reports may lack the reliability required for the business records exception, in the right case, the circumstances surrounding the making of the report may well establish sufficient indicia of reliability to qualify under the residual exception. Such is the case here, where the circumstances establish sufficient indicia of reliability to permit admission of the statements under rule 804(b)(5).

Combined with the fact that the statements meet the additional specified requirements of rule 804(b)(5), the totality of the circumstances surrounding the making of the statements supplies sufficient indicia of reliability to weigh in favor of the truthfulness of the statements and to support their admission.<sup>9</sup>

---

<sup>9</sup>Rule 804(b)(5) requires additionally that the trial court find that:

. . . (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The trial court held that these factors were all met in this case (R. 38:103), and defendant does not challenge that ruling on appeal. Br. of Appt. at 20-37. Hence, this Court may accept as true the unchallenged finding as to these factors. Dejavue, Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶21, 993 P.2d 222 (accepting as true undisputed factual findings); see also Hoyle v. Monson, 606 P.2d 240, 243 (Utah 1980) (accepting the trial

**C. Assuming a Confrontation Clause Violation, Any Error was Harmless Beyond a Reasonable Doubt**

Assuming, arguendo, that Ms. Gallegos' statements lacked sufficient indicia of reliability to meet Confrontation Clause concerns, reversal is not warranted as the admission was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986) (concluding that confrontation clause error is subject to harmless-beyond-a-reasonable-doubt standard).

Aside from Ms. Gallegos' statements, the jury had before it other compelling evidence which established defendant's guilt of wrongful appropriation of the vehicle. Notwithstanding defendant's claim that he never touched the car, Mr. McGuire saw defendant behind the wheel of the car the week it was discovered missing when he saw him drive it off the dealership lot without any justification or authority (R. 38:76-78). No one else was seen driving the car or had authority to do so. When defendant quit his job, the car was still missing, only to be found within days at defendant's apartment complex (R. 38:63, 73, 77, 80, 106-08). There is no evidence that anyone else living at that complex had access to the Nissan. That defendant was the one to take the car and that he did so intentionally is reinforced by defendant's own admission that he did the same thing at another dealership in Virginia (R. 38:111-12).<sup>10</sup> The only reasonable inference the jury could draw from the above evidence is that defendant drove the car off the lot without \_\_\_\_\_ court's unassailed findings that parties were not indigent).

<sup>10</sup>See Point II, infra, for a discussion of the admissibility of this evidence.

permission, took it to his apartment complex, and did not return it after he had quit his job. This made out all the elements of wrongful appropriation independent of Ms. Gallegos' statements. Accordingly, any error in the admission of those statements was harmless beyond a reasonable doubt.

**D. Defendant Received the Required Notice Under Rule 804(b)(5)**

Defendant argues that the statements were erroneously admitted under rule 804(b)(5) because he received inadequate notice under the rule of the prosecutor's intent to admit the evidence. Br. of Aplt. at 29-32. Defendant does not claim that he did not know that the State anticipated using Ms. Gallegos' statements: the trial court found that defendant knew sufficiently in advance of trial that the State wanted to call Ms. Gallegos to the stand (R. 38:103), and defendant does not challenge that finding. Br. of Aplt. at 30. Defendant even admits that he took steps to ensure that his wife would not testify, including the filing of a pretrial motion seeking to ensure that she could invoke her marital testimonial privilege. Br. of Aplt. at 30.

Instead, defendant claims that he lacked notice that the State anticipated using rule 804(b)(5) as the method by which it intended to admit the statements (R. 38:97-99). Br. of Aplt. at 30, 32.

Rule 804(b)(5) provides that:

... a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to

meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Defendant argues, without authority, that this language requires that he receive not only notice of the statements and the State's intent to use them, but notice of the actual rule under which the State will be seeking their admission (R. 38:97-99). Br. of Aplt. at 30, 32.

The analysis starts with the rule's plain language. "The fundamental rule of statutory construction is that statutes are generally to be construed according to their plain language. Unambiguous language in the statute may not be interpreted to contradict its plain meaning." State v. Redd, 1999 UT 108, ¶11, 992 P.2d 986 (citations omitted); see also Kimball Condo. Owners Ass'n v. County Bd. of Equalization, 943 P.2d 642, 648 (Utah 1997).

In this case, the rule speaks repeatedly in terms of "the statement": "the proponent of it [the statement]" must make the statement known to the adverse party; there must be "a fair opportunity to prepare to meet it [the statement]," there must be disclosure of an "intention to offer the statement" as well as of "the particulars of it [the statement]." Utah R. Evid.804(b)(5). Nothing on the face of the rule speaks in terms of disclosing the particular evidentiary rule itself.

Neither does the case law suggest that such a requirement be read into the rule. The State could find no case directly on point. However, the jurisdictions that have addressed the notice language of rule 804(b)(5), the identical language of rule 803(24), or

other similar language have interpreted that language as requiring notice of the proponent's *intent* to use the *statements* or notice of the *statements* themselves. See generally State v. Toney, 243 Neb. 237, 498 N.W.2d 544, 550-51 (1993) (under the residual exception to the hearsay rule, requiring notice of the statement and its prospective use); State v. Dillon, 191 W.Va 648, 447 S.E.2d 583, 594, 595 n.19 (1994) (under rules 803(24) and 804(b)(5), requiring disclosure of statement contents so the opposing party can meet the evidence); Williams v. Collins Communications, Inc., 720 P.2d 880, 886 (Wyo. 1986) (requiring notice of use under a residual exception to the hearsay rule). None have required notice of the actual rule under which the evidence would be offered. This is consistent with the purpose of the notice requirement, which is to afford the adverse party an opportunity to attack the statement's trustworthiness. See United States v. Frazier, 678 F.Supp. 499, 503 (E.D. Pa. 1986).

That defendant had an opportunity to meet the statement is evidenced by the sequence of events below. Defendant knew before trial of the State's intent to use the statements. Immediately prior to trial, defendant sought to have the declarant invoke her spousal privilege, which she in fact did after trial began. The prosecutor, who appeared at trial hoping to introduce the statements through the declarant herself, found herself unable to proceed as planned once Ms. Gallegos refused to testify. The State was then required to look at other means to admit the statement, which defendant anticipated inasmuch as he admits that he reviewed and excluded the use of "other hearsay exceptions" in planning

his defense. Br. of Aplt. at 30-31. That defense counsel missed the residual hearsay exception or miscalculated his ability to exclude the evidence under this exception does not establish that he received inadequate notice of the statement or its intended use by the State.<sup>11</sup>

As stated, the plain language of the rule does not require notice of the specific evidentiary rule under which a statement will be offered, and it is clear from the record that defendant had sufficient notice of the statements as well as the prosecutor's intent to use them at trial to meet the notice requirements of rule 804(b)(5). Any failure of counsel to succeed in excluding the statements does not stem from inadequate notice that they were important to the State and does not establish that defendant was not prepared to meet the challenged statements.

In light of the plain language of the rule, the trial court properly found that defendant received adequate notice of the statements as required under rule 804(b)(5).

Defendant nevertheless claims prejudice, arguing that the lack of notice of the specific rule prevented him from preparing to meet the statement and resulted in great harm because admission of the statements necessarily required the jury to label both defendant and his counsel liars. Br. of Aplt. at 31-32. Defendant fails, however, to

---

<sup>11</sup>Defendant does not explain why defense counsel apparently did not review the residual exceptions to the hearsay rule or account for them in planning the defense. Neither does defendant raise any claim of ineffective assistance with regard to his counsel's trial preparation on this issue.

acknowledge that the jury was free to believe or disbelieve the officer's rendition of the statements. Mere admission of the statements does not establish the credibility of the respective witnesses.

Defendant also overemphasizes the importance of the statements at trial, claiming that they alone established the essential elements of wrongful appropriation. Br. of Aplt. at 31. However, in addition to Ms. Gallegos' statements, the jury had before it defendant's claim that he never touched the car, Mr. Maguire's testimony that he saw defendant drive the car off the lot during the first week of July without authority or justification, the fact that the car was parked at defendant's complex, as well as proof of defendant's identity and intent through his admission of having committed the same act before. See Point IB, supra. In short, there was no reasonable probability that defendant would have been acquitted had the statements not been admitted. Consequently, defendant's claim of prejudice is without merit.

**E. Defendant Waived his Claim that his Wife's Marital Testimonial Privilege was Violated; Defendant Lacks Standing to Assert the Violation; Moreover, There was no Such Violation**

Defendant claims that the admission of his wife's statements amounted to a constitutional violation because the statements were the "functional equivalent" of testimony by one spouse against another in violation of Utah Constitution, Article I,



section 12, which provides that “a wife shall not be compelled to testify against her husband, nor a husband against his wife.”<sup>12</sup> His argument fails on three bases.

First, defendant failed to raise the issue below and does not mention plain error or exceptional circumstances. Consequently, he cannot assert it as a basis of error on appeal, even though it involves a constitutional right. State v. Archambeau, 820 P.2d 920, 922 n.3 (Utah App. 1991); see also State v. Anderson, 789 P.2d 27, 29 (Utah 1990).

Second, to the extent any constitutional violation occurred, it would have been a violation of *Ms. Gallegos*’ right not to testify, as the privilege runs to the declarant spouse and not to the accused spouse. Defendant cannot invoke his wife’s marital testimonial privilege. See State v. Robertson, 932 P.2d 1219, 1228 (Utah 1997) (the privilege may be invoked only by the witness spouse). Neither can he assert his wife’s constitutional rights or a violation thereof. See Jackson v. State, 498 F.Supp. 186, 190 (D. S.C. 1979) (“constitutional rights are personal” and a husband has “no standing to assert his wife’s rights”); State v. Brewer, 732 P.2d 780, 783 (Kan. 1980). Accordingly, defendant is without standing to assert this claim on appeal. See Wright v. Carver, 886 P.2d 58, 60 (Utah 1994) (accused has no standing to challenge the trial court’s dismissal of a complaint against another person); see generally Shelledy v. Lore, 836 P.2d 786, 789 (Utah) (third-party standing rule requires litigants to assert their own legal rights and does

---

<sup>12</sup>Defendant does not assert a claim under rule 502(a), Utah Rules of Evidence, involving the same marital testimonial privilege.

not allow them to claim relief on the legal rights or interests of third parties), cert. denied 506 U.S. 1022, 113 S. Ct. 660 (1992); State v. Constantino, 732 P.2d 125, 127 (Utah 1987) (absent claimed right to possession, defendant had no standing to object to search of third party's car).

Third, the State did not violate Ms. Gallegos' constitutional right not to testify against her spouse because the State did not compel Ms. Gallegos to testify, as is forbidden by the state constitution.

The text of the constitutional marital testimonial privilege is identical to rule 502(a), Utah Rules of Evidence, is plain and unambiguous, and deals only with compelled testimony of one spouse against the other:<sup>13</sup>

. . . The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Const. art I, § 12; Robertson, 932 P.2d at 1228. Accordingly, interpretations of the rule apply equally to interpretations of the constitutional right.

The state constitutional marital testimonial privilege is a limited privilege that does not extend beyond the witness stand. State v. Carter, 888 P.2d 629, 638 (Utah), cert. denied 516 U.S. 858, 116 S. Ct. 163 (1995). It does not prevent admissibility or use of

---

<sup>13</sup>In contrast, rule 502(b) deals with the marital *communication* privilege, which is designed to protect "confidential communications" between spouses only and can be asserted by either spouse. Doe v. Maret, 984 P.2d 980, 806-07 (Utah 1999); Robertson, 932 P.2d at 1228. Defendant presents a constitutional argument only, and has not challenged the communication privilege provided by the rule.

everything a spouse might say. Trammel v. United States, 445 U.S. 40, 45, 49-50, 52-53, 100 S. Ct. 906, 911 (1980) (noting that the Model Code of Evidence expressly rejects allowing defendant to claim the privilege against all adverse testimony given by his wife); Carter, 888 P.2d at 638-39 (agreeing with Trammel and noting that the police may actively use spousal statements in their investigation). “It is only the spouse’s testimony in the courtroom that is prohibited.” Carter, 888 P.2d at 638-39. When the spouse voluntarily speaks to police and was not forced to take the stand in person or by way of sworn documentation, the marital privilege is not violated. Id., at 639. Cf., Doe v. Maret, 984 P.2d 980, 986-87 (Utah 1999) (the marital communication privilege can be waived through “voluntary disclosures”); also State v. Newman, 680 P.2d 257, 263 (Kan. 1984) (statements made within hearing of a third person are not covered by marital communication privilege); State v. Teel, 712 P.2d 792, 794 (N.M. App. 1985) (same). Prosecutorial use of Ms. Gallegos’ out-of-court comments to police does not undermine the marital relationship any more than in-court testimony from a third person as to statements overheard between spouses, which testimony is admissible at trial. Newman, 680 P.2d at 263.

In this case, Ms. Gallegos was not compelled to testify. Once she invoked her marital testimonial privilege, it was scrupulously honored and she was not required to take the stand against her spouse. She did not submit her statements under oath, submit to cross-examination, or provide sworn documentation of her statements. Moreover, she

was not compelled to speak to the police. Defendant has not claimed that her statements were anything other than voluntary, although he impugns her motive for making them. The jury was free to reject Ms. Gallegos' statements in their entirety.

Ms. Gallegos' pre-trial statements to the police were therefore admissible, notwithstanding her right to claim a marital testimonial privilege. Hence, even assuming defendant were in a position to assert a violation of his wife's constitutional testimonial privilege, no such violation occurred in this case.

## POINT II

### **THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S ADMISSION OF PRIOR SIMILAR CONDUCT UNDER RULE 404(B) AS IT WAS RELEVANT TO THE MATERIAL ISSUES OF IDENTITY AND INTENT AND ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY A POTENTIAL FOR UNFAIR PREJUDICE**

Defendant challenges the trial court's decision to let the jury hear that he admitted to committing a similar crime once before. While being taken to the police station after being arrested and Mirandized, defendant was asked if he had been arrested before (R. 38:111). Defendant stated that he had been arrested in Virginia because he had driven a car off a dealership lot (R. 38:111-12, 131, 137). The State introduced defendant's statement through the arresting officer at trial (R. 38:111-12).<sup>14</sup>

---

<sup>14</sup>As suggested by the prosecutor below, the statement concerning defendant's earlier arrest was admissible under Utah Rule of Evidence 801(d)(2), because it qualifies as a nonhearsay admission by a party-opponent (R. 38:40). State v. Kerekes, 622 P.2d 1161, 1164 (Utah 1980) (an out-of-court statement made by a criminal defendant that constitutes an admission is admissible under rule 801(d)(2)).

Defendant argues that the trial court's admission of this statement violates Utah Rule of Evidence 404(b), which addresses the admission of evidence of other crimes, wrongs, and bad acts.<sup>15</sup> Br. of Appt. at 37-42. He contends that such evidence was too remote, had no bearing on identity, intent or absence of mistake, and carried a potential for unfair prejudice which outweighed any possible probative value. Id. Defendant's analysis, however, is flawed.

Before evidence of other crimes is admissible under rule 404(b), the trial court must determine:

- (1) whether such evidence is being offered for a proper, noncharacter purpose under 404(b),
- (2) whether such evidence meets the requirements of rule 402, and
- (3) whether this evidence meets the requirements of rule 403.

State v. Decorso, 1999 UT 57, ¶20, 993 P.2d 837 (Utah 1999), cert. denied 120 S. Ct.

1181 (2000). The trial court's decision is reviewed on appeal for an abuse of discretion.

Id. at ¶18.

The trial court determined that in light of defense counsel's opening statement stressing that the State would not be able to prove identity, the challenged statement was

---

<sup>15</sup>Rule 404(b), Utah Rules of Evidence, provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

“relevant and probative,” and was more probative than prejudicial (R. 38:93-94) (in **Add. C**). While the court did not articulate a detailed map of its analysis, the analysis is readily ascertainable from the record.

The first part of the rule 404(b) analysis requires that the evidence be offered for a proper, noncharacter purpose. Decorso, at ¶¶20-21. The prosecutor offered it in this case to establish identity, intent, and absence of mistake, all of which were at issue (R. 38:91-93). Defendant’s brief opening statement below emphasized the defense strategy of stressing that no direct evidence put defendant in or near the car during the time it was found to be missing (R. 38:58-59). His closing statement followed suit (R. 38:136-37). He also argued in closing that the evidence did not suggest the appropriate intent, and that the possibility existed that defendant was framed (R. 38:137-38, 140-41). Clearly, both identity and intent were at issue below.

Little was offered below by either party regarding the specifics of the Virginia offense.<sup>16</sup> However, the trial judge knew that the basic crime paralleled the crime at hand—driving a car off a dealership lot without authorization. He also knew that the admission of the Virginia offense came from defendant himself, so that the jury was not left in a position of deciding whether defendant had committed the prior offense before using it to determine the issues of identity and intent in this case. See Decorso, at ¶27

---

<sup>16</sup>No one below identified for the trial court the specific details of the Virginia offense, and defendant has not claimed his counsel rendered ineffective assistance for not doing so.

(where the jury was required to decide whether defendant had participated in both the charged and the prior offense ).

Because both identity and intent were at issue below, and the evidence was relevant to these points, the trial judge did not abuse his discretion in finding that defendant's admission to the Virginia offense was offered for a proper noncharacter purpose.

The second part of the analysis requires a determination that the evidence meets the requirements of rule 402, which requires that evidence be relevant.<sup>17</sup> Decorso, at ¶¶20, 22. Evidence is relevant when it is probative of a material fact to the crime charged. Decorso, at ¶28. Both identity and intent were material and controverted issues at trial, as evidenced by defendant's opening and closing remarks, and the State was entitled to establish evidence relating thereto. That defendant admitted to having previously committed the same type of offense is probative of identity and intent because the offenses were committed in a similar manner—driving someone else's vehicle from a car dealership lot—and because the evidence is in the form of an admission of responsibility by defendant. Hence, the evidence met the relevancy test of rule 402.

---

<sup>17</sup>Rule 402, Utah Rules of Evidence, reads:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

The final part of the analysis requires that the court conduct the balancing test articulated in rule 403. That rule provides:

Although relevant, evidence may be excluded if its *probative value is substantially outweighed by the danger of unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403 (emphasis added). The trial court acted within its discretion in determining that the evidence of the Virginia offense met the requirements of rule 403.

In making such a determination, several factors may be considered, including “the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.” State v. Shickles, 760 P.2d 291, (Utah 1998).

The mere fact that the trial court did not, on the record, specifically walk through each factor does not mean that the factors were not duly considered. Several factors are readily apparent from the record. For example, the strength of the evidence that the other crime was committed came from the fact that it was defendant himself who admitted the criminal conduct (R. 38:111-12). Also readily apparent is a basic similarity between the offenses—both involved cars being driven off a dealership lot without authority. Whatever other similarities might or might not exist between the offenses, this basic similarity was obvious and was the crux of both crimes. Further, defendant himself recognizes the



strength of “the similarities” between the facts below and the Virginia offense, and notes that the latter offense was a “near[ly] identical crime” to the current one. Br. of Aplt. at 41.

The State’s need for the evidence is also readily apparent. Intent is not readily susceptible to direct evidence, and defendant made it perfectly clear below that he would highlight to the jury the minimal evidence of identity he thought the State would adduce (R. 38:58-59). Defendant did his best to limit the State’s identity evidence, making motions immediately prior to trial to exclude his own statement as well as his wife’s testimony, which reflected on both identity and intent (R.22-28; 38:38-51). By the time the court decided to admit the challenged statement, the State had already put on the majority of its case, giving the court some idea of the State’s evidence, or lack thereof, on these issues and the low efficacy of alternative proof.

Moreover, hearing that defendant admitted to driving a vehicle off a dealership lot is not the sort of evidence which is likely to inflame the jury or to “rouse the jury to overmastering hostility.” Shickles, 760 P.2d at 296. It is not a crime of passion, physical injury or extreme emotion, and there was no suggestion that defendant acted maliciously or damaged the vehicle he took. Further, the absence of surrounding details sanitizes the offense.

Additionally, the jury was unlikely to convict defendant in order to punish him for having committed the Virginia offense where defendant admitted that he had already been

caught in Virginia (R. 38:111-12). Further, there was other evidence suggestive of identity and intent before the jury, minimizing whatever prejudicial effect admission of this evidence may have generated. See Point IB, supra.

Defendant contends that once his wife's statements were admitted, identity, intent and absence of mistake were no longer at issue. Br. of Aplt. at 38. However, defendant placed identity and intent at issue from the moment he made his opening statement, thereby putting the State to its burden of adducing sufficient evidence to establish each element. He went on to argue both issues in his closing remarks, notwithstanding admission of his wife's statements. Further, his wife's statements were not conclusive of identity and intent when the trier of fact is entitled to reject the testimony, if it so desires. State v. Delaney, 869 P.2d 4, 6 (Utah App. 1994) (it is the trier of fact's duty to assess credibility and weigh the evidence). Finally, defendant calls "identity" and "intent to deprive" "critical elements of the offense." Br. of Aplt. at 31. Accordingly, his claims that these points were no longer at issue is incredible.

In sum, the trial court did not abuse its discretion in admitting defendant's statement that he committed a similar crime where the statement was offered for the proper, noncharacter purpose of establishing identity and intent, and it met the requirements of rules 402 and 403. Decorso, at ¶¶20-35.

### POINT III

**DEFENDANT WAS NOT CONVICTED OF AN INFRACTION BECAUSE THE JURY FOUND HIM GUILTY OF AN OFFENSE “DEFINED WITHIN THE CODE”; NEITHER WAS HE ENTITLED TO BE SENTENCED FOR THE LESSER OFFENSE OF “UNAUTHORIZED CONTROL” WHERE THE JURY CONVICTED HIM OF THE GREATER OFFENSE OF WRONGFUL APPROPRIATION**

Defendant claims that he was entitled to be convicted of an infraction or a misdemeanor, not a third degree felony. Br. of Aplt. at 42-45. He argues that the legislature failed to specify a punishment for the crime of wrongful appropriation as set forth in Utah Code Ann. § 76-6-404.5(3)(e) (Supp. 1998), therefore requiring that he be sentenced to an infraction under Utah Code Ann. § 76-3-105(2) (1999). Id. at 42-44. Alternatively, he argues that he was entitled to be sentenced under the more specific of two possible code sections dealing with operable motor vehicles, which section should be punished as an infraction. Defendant’s claim fails on both points.

Defendant was charged with theft under Utah Code Ann. § 76-6-404, which provides:

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

(R. 1) (in **Add. D**). At defendant’s request, the jury was instructed on the lesser included offense of wrongful appropriation under Utah Code Ann. § 76-6-404.5, which provides:

(1) A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily

appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property.

(R. 29, jury ins. 4) (in **Add. A**). In both cases, the jury was instructed that it must find that the property consisted of an operable motor vehicle (R. 29, jury ins. 3 and 4).

The punishment for theft is set forth in section 76-6-412:

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

...

(ii) property stolen is a firearm or an operable motor vehicle;

...

(in **Add. D**). At the time the offense occurred, section 76-6-404.5(3) set forth the punishment for wrongful appropriation as follows:

(3) Wrongful appropriation is punishable one degree lower than theft, as provided in Section 76-6-412, so that a violation which would have been:

(a) *a second degree felony under Section 76-6-412 if it had been theft is a third degree felony if it is wrongful appropriation;*

(b) a third degree felony under Section 76-6-412 if it had been theft is a class A misdemeanor if it is wrongful appropriation;

...

(e) *an act of unauthorized control of motor vehicles, trailers, or semitrailers which does not constitute theft is punishable under Section 41-1a-1311."*

(Emphasis added). Section 41-1a-1311 provided:

(1) It is a class A misdemeanor for a person to exercise unauthorized control over a motor vehicle, trailer or semitrailer not his own, without the consent of the owner or lawful custodian and with intent to temporarily deprive the owner or lawful custodian of possession of the motor vehicle, trailer, or semitrailer.

....

(in **Add. D**).

Section 41-1a-1311 was repealed, effective May 4, 1998. Defendant committed the instant offense in July 1998. Section 76-6-404.5(3)(e) remained in effect until it was repealed by the legislature the following year on May 3, 1999, even though it referred to a statute no longer in existence. It was during this time that defendant committed the offense, was charged, and was tried.

The jury rejected the second degree theft charge and convicted defendant of the lesser offense of wrongful appropriation, a third degree felony (R. 34-35). Defendant moved to clarify the degree of offense, arguing that he was entitled to be punished for less than a third degree felony (R. 42-51; 53:4-12). The trial court rejected defendant's claim, ruling that defendant was convicted and should be punished for a third degree felony pursuant to section 76-6-404.5(3)(a) (R. 56; 53:13-14) (in **Add. E**).

On appeal, defendant argues that he should have been sentenced under section 76-3-105(2) (1999), which provides:

...

(2) Any offense which is an infraction within this code is expressly designated and any offense defined outside this code which is not designated as a felony or misdemeanor and for which no penalty is specified is an infraction.

(in **Add. D**). Defendant argues, without supporting authority, that because section 76-6-404.5(3)(e) referred to a non-existent code section, there was no penalty specified, making the offense of which he was convicted—wrongful appropriation of an operable

motor vehicle—necessarily punishable as an infraction under section 76-3-105(2). Br. of Aplt. at 44-45. Defendant misinterprets the latter section.

Section 76-3-105 applies to “any offense *defined outside this code* . . . and for which no penalty is specified . . . .” Even assuming that no penalty was specified for wrongful appropriation, as defendant complains, the plain language of section 76-3-105 prevents its application here because defendant was convicted of a crime defined within the code, and that crime was not specified to be an infraction. Utah Code Ann. § 76-6-404.5. Accordingly, defendant is not entitled to be convicted of an infraction.

Defendant also contends that because section 76-6-404.5(3)(e) deals specifically with operable motor vehicles, while subsection (3)(a) deals with wrongful appropriation generally, the former section is “more specific” and should take precedence over the more general provision. Br. of Aplt. at 43-44. However, the subsections stand in a greater/lesser relationship, and defendant was convicted, and properly sentenced, under the greater provision.

“[T]he inquiry of whether one crime is a lesser included offense of a greater crime under section 76-1-402, turns on the statutorily defined elements of the two crimes. That is, the court looks to the facts to determine what crime, or variation of the crime, was proved, but once this determination is made, the court looks to the statutory elements of the crime to determine whether it is an included offense.” State v. Finlayson, 2000 UT 10, ¶16, 994 P.2d 1243, 1247 (quoting State v. Brooks, 908 P.2d 856, 861 (Utah 1995)).

See also State v. Hill, 674 P.2d 96, 97 (Utah 1983). Section 76-1-402 provides, in relevant part, that a crime is a lesser included offense when “[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged . . . .”

Theft, with which defendant was charged, is the unauthorized control over another’s property with a specific intent. Utah Code Ann. § 76-6-404. Wrongful appropriation, of which defendant was convicted, is the exercise of “unauthorized control over the property of another” with a specific intent. Utah Code Ann. § 76-6-404.5(1). In contrast, section 76-6-404.5(3)(e), which defendant seeks to have applied, involves a lesser included offense of wrongful appropriation. It deals with acts of “unauthorized control of motor vehicles . . . which do[] not constitute theft. . . .” Utah Code Ann. § 76-6-404.5(3)(e). No intent requirement is specified, and no additional element is included.<sup>18</sup> Accordingly, guilt of unauthorized control of a motor vehicle under subsection (3)(e) does not automatically establish guilt of wrongful appropriation—for the latter, the State had to establish the additional element of the appropriate intent (R. 29, jury in. 5).

Given that the jury found the requisite intent and convicted defendant of wrongful appropriation, the trial court did not err in sentencing defendant under subsection (3)(a) of

---

<sup>18</sup>While section 41-1a-1311(1) included an intent requirement, that section was not in existence at the time of the instant offense. Accordingly, it does not factor into the analysis.

the wrongful appropriation statute, which makes wrongful appropriation of an operable motor vehicle a third degree felony (R. 29, jury ins. 5, 11, 12).<sup>19</sup>

Defendant makes an ex post facto argument, claiming that he was entitled to an infraction upon conviction and that the repeal of subsection (3)(e) before sentencing unfairly subjected him to a higher third degree felony conviction. Br. of Appt. at 45. However, as established above, defendant was exposed to the third degree felony conviction under subsection (3)(a) when he committed the crime, and the repeal of subsection (3)(e) did not change the potential punishment for his crime. Accordingly, his argument is without merit.

### CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of July, 2000.

JAN GRAHAM  
Attorney General



KRIS C. LEONARD  
Assistant Attorney General

---

<sup>19</sup>If this Court deems subsection (3)(e) to be applicable, then defendant is guilty of no more than a class A misdemeanor under repealed section 41-1a-1311. Defendant agrees with this proposition.



MAILING CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed by first class mail, postage prepaid, to Kent R. Hart and Robert K. Heineman, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 31<sup>st</sup> day of July, 2000.

A handwritten signature in cursive script, appearing to read "K. C. Howard", is written over a horizontal line.

## **ADDENDA**

## **ADDENDUM A**

**UTAH CODE  
ANNOTATED**

---

**1998 Supplement**

---

**REPLACEMENT VOLUME 8B**

**1995 EDITION**

**76-6-404.5. Wrongful appropriation — Penalties.**

(1) A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property.

(2) The consent of the owner or legal custodian of the property to its control by the actor is not presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the property by any person.

(3) Wrongful appropriation is punishable one degree lower than theft, as provided in Section 76-6-412, so that a violation which would have been:

(a) a second degree felony under Section 76-6-412 if it had been theft is a third degree felony if it is wrongful appropriation;

(b) a third degree felony under Section 76-6-412 if it had been theft is a class A misdemeanor if it is wrongful appropriation;

(c) a class A misdemeanor under Section 76-6-412 if it had been theft is a class B misdemeanor if it is wrongful appropriation;

(d) a class B misdemeanor under Section 76-6-412 if it had been theft is a class C misdemeanor if it is wrongful appropriation; and

(e) an act of unauthorized control of motor vehicles, trailers, or semi-trailers which does not constitute theft is punishable under Section 41-1a-1311.

**History: C. 1963, 76-6-404.5, enacted by L.  
1998, ch. 138, § 1.**

## **ADDENDUM B**

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

MURRAY DISTRICT

\* \* \* \* \*

-----  
The State of Utah

Transcript of:

Plaintiff.

TRIAL

Kenneth J. Webster

Defendant.

Case No. 9812201411

-----  
The above entitled cause of action came on regularly for hearing before the Honorable Michael Burton, a judge of the Third District Court of the State of Utah, at Murray, Utah, on Thursday, April 29, 1999.

Appearances

For the State: Trina Higgins  
Deputy District Attorney  
231 East 4th South  
Salt Lake City, Utah

For the Defendant: Robert K. Heineman  
Legal Defender Assoc.  
424 East 5th South  
Salt Lake City, Utah

FILED

JAN 18 2000

FILED

JAN - 5 2000

COURT OF APPEALS

ORIGINAL

COURT OF APPEALS

990264-CA

1 thoughts from you?

2 MR. HEINEMAN: I don't know see how it can  
3 be against her interest. If she doesn't know a car  
4 is stolen, and saying I drove around in that car.  
5 It is just a statement, "I drove around in that  
6 car." She faces no possible criminal charges for  
7 it. No other possible repercussions from it. It is  
8 not a statement against interest. It is does not  
9 have the guarantees of trustworthiness that we need  
10 to have here.

11 THE COURT: Okay, fair enough. Well, in  
12 handling some of your objections, I hope I covered  
13 them all because I am going to admit this proper  
14 statement by the State. I think there are guarantees  
15 of trustworthiness. I am guessing the officer is going  
16 to tell us she made these statements in his presence,  
17 and more importantly, I think that they are statements  
18 that, as you say, Mr. Heineman, there is no reason she  
19 should say one way or the other.

20 It seems to me either they are against  
21 her interest or they are of no importance at all other  
22 than, for example, one might say, "Well, today it looks  
23 like it might rain." They have no particular impact  
24 one way or the other. So I think for that reason,  
25 there is a trustworthy attachment because they are

1 by and large mere statements of inconsequential events  
2 if taken in the context that you described. Clearly  
3 meets the other criteria.

4 And then the last issue you raised, the  
5 last one I will address is this idea that somehow  
6 you were not given notice so you could prepare to  
7 meet the evidence. It is pretty clear that these  
8 folks intended to have Ms. Gallegos testify if she  
9 were willing. So you knew that they wanted her to  
10 make those statements. Clearly you had the  
11 opportunity to prepare to meet those.

12 If they are offered in that context then I  
13 am going to allow that to be admitted.

14 MR. HEINEMAN: Your Honor, I will raise an  
15 additional objection on confrontation grounds. That  
16 there is no way we can cross examine her. She is  
17 refusing to testify.

18 THE COURT: That is right.

19 MR. HEINEMAN: And so there is nothing we  
20 can do with those statements. Effectively, it is  
21 allowing her to testify without having to testisfy  
22 and that violates Mr. Webster's confrontation right.

23 THE COURT: You have made that for the  
24 record. It is pretty clear that the rule allows  
25 this type of evidence to be admitted.



## **ADDENDUM C**

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

MURRAY DISTRICT

\* \* \* \* \*

-----  
The State of Utah

Transcript of:

Plaintiff.

TRIAL

Kenneth J. Webster

Defendant.

Case No. 9812201411

-----  
The above entitled cause of action  
came on regularly for hearing before the Honorable  
Michael Burton, a judge of the Third District Court  
of the State of Utah, at Murray, Utah, on Thursday,  
April 29, 1999.

Appearances

For the State:

Trina Higgins  
Deputy District Attorney  
231 East 4th South  
Salt Lake City, Utah

For the Defendant:

Robert K. Heineman  
Legal Defender Assoc.  
424 East 5th South  
Salt Lake City, Utah

FILED

JAN 18 2000

FILED

JAN - 5 2000

COURT OF APPEALS

ORIGINAL

COURT OF APPEALS

990764-CA

to the jury, they are going to say, "He did it before and let's send him." I don't see that it adds anything to their case.

If she establishes that he took the car and kept it, what flows from that and his prior statement of something that occurred in the past, who knows how much years in the past even, doesn't add anything to that.

THE COURT: Any other thoughts, Ms. Higgins?

MS. HIGGINS: Just quickly. Mr. Heineman mentioned that we have shown that he took it and kept it, but I believe their defense is he didn't keep it. He didn't take it to keep it.

THE COURT: I heard the opening statement, Mr. Heineman, he found the car in a public parking lot used by 300 other people. So, I guess I will back track one more time. I will have to conclude based on the opening statement I have heard, that portions that I have seen you want excised, and I am speaking to Mr. Heineman now, those portions seem to be to relevant given the opening statement. In that context of the opening statement, it seems to me then it becomes relevant and probative, and the balancing test becomes more probative than it is

1 prejudicial. That would be my conclusion. I am  
2 glad to put that to rest. I thank you. I  
3 appreciate it.

4 All right, I guess we will wait for Mr.  
5 Webster to go on back with Ms. Gallegos.

6 MS. HIGGINS: Yes.

7 THE COURT: Have any of you have any idea  
8 what the instructions should look like? Mr.  
9 Heineman, you submitted many.

10 MR. HEINEMAN: I submitted many. I don't  
11 necessarily want to have all of those go to the  
12 jury.

13 THE COURT: You want the lesser included  
14 one?

15 MR. HEINEMAN: At this point I don't  
16 believe I do. Of course, it depends on how the  
17 total evidentiary picture is at the end, but I am  
18 inclined for all or nothing at this point.

19 THE COURT: Okay.

20 (Off the record discussion)

21 MR. HEINEMAN: Your Honor, I do have a  
22 couple of objections to the State's instructions.  
23 First, on the possession of recently stolen property.

24 THE COURT: I am not into that one at all.  
25 What do you want me to do, Ms. Higgins, just say,

## **ADDENDUM D**

**UTAH CODE**  
**ANNOTATED**  

---

**1953**  
  
**VOLUME 8B**  
**1999 REPLACEMENT**  
  

---

**Titles 76 and 77**  
  

---

**76-3-105. Infractions.**

- (1) Infractions are not classified.
- (2) Any offense which is an infraction within this code is expressly designated and any offense defined outside this code which is not designated as a felony or misdemeanor and for which no penalty is specified is an infraction.

History: C. 1953, 76-3-105, enacted by L.  
1973, ch. 196, § 76-3-105.

**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.

History: C. 1953, 76-6-404, enacted by L.  
1973, ch. 196, § 76-6-404.

**76-6-412. Theft — Classification of offenses — Action for treble damages.**

(1) Theft of property and services as provided in this chapter shall be punishable:

- (a) as a felony of the second degree if the:
  - (i) value of the property or services is or exceeds \$5,000;
  - (ii) property stolen is a firearm or an operable motor vehicle;
  - (iii) actor is armed with a dangerous weapon, as defined in Section 76-1-601, at the time of the theft; or
  - (iv) property is stolen from the person of another;
- (b) as a felony of the third degree if:
  - (i) the value of the property or services is or exceeds \$1,000 but is less than \$5,000;
  - (ii) the actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or
  - (iii) in a case not amounting to a second-degree felony, the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing animal raised for commercial purposes;
- (c) as a class A misdemeanor if the value of the property stolen is or exceeds \$300 but is less than \$1,000; or
- (d) as a class B misdemeanor if the value of the property stolen is less than \$300.

(2) Any person who violates Subsection 76-6-408(1) or Section 76-6-413, or commits theft of property described in Subsection 76-6-412(1)(b)(iii), is civilly liable for three times the amount of actual damages, if any sustained by the plaintiff, and for costs of suit and reasonable attorneys' fees.

History: C. 1953, 76-6-412, enacted by L.  
1973, ch. 196, § 76-6-412; 1974, ch. 32, § 18;  
1975, ch. 48, § 1; 1977, ch. 89, § 1; 1989, ch.  
78, § 1; 1995, ch. 291, § 14; 1996, ch. 139, § 1;  
1997, ch. 119, § 1; 1997, ch. 289, § 8.

**41-1a-1311. Unlawful control over motor vehicles, trailers, or semitrailers — Penalties — Effect of prior consent — Accessory or accomplice.**

(1) It is a class A misdemeanor for a person to exercise unauthorized control over a motor vehicle, trailer, or semitrailer not his own, without the consent of the owner or lawful custodian and with intent to temporarily deprive the owner or lawful custodian of possession of the motor vehicle, trailer, or semitrailer.

(2) The consent of the owner or legal custodian of a motor vehicle, trailer, or semitrailer to its control by the actor is not in any case presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the motor vehicle, trailer, or semitrailer by the same or a different person.

(3) Any person who assists in, or is a party or accessory to or an accomplice in, an unauthorized taking or driving is guilty of a class A misdemeanor.

**History:** L. 1935, ch. 46, § 100; 1941, ch. 10, § 1; 1941 (2nd S.S.), ch. 12, § 1; C. 1943, 27-3a-110; L. 1983, ch. 190, § 2; 1986, ch. 32, § 1; 1987, ch. 92, § 52; C. 1953, 41-1-109; renumbered by L. 1992, ch. 1, § 163.

# UTAH CODE ANNOTATED

---

**1953**

## VOLUME 5A 1998 REPLACEMENT

---

**Titles 39 to 46**

---

### **~~41-1a-1311, 41-1a-1312.~~ Repealed.**

**Repeals.** — Laws 1998, ch. 315, § 2 repeals § 41-1a-1311, as renumbered and last amended by L. 1992, ch. 1, § 168, concerning exercising unlawful control over motor vehicles, trailers, or semitrailers, effective May 4, 1998.  
Laws 1993, ch. 58, § 2 repeals § 41-1a-1312,

as enacted by Laws 1992, ch. 1, classifying the unlawful transfer of a motor vehicle as a Class A misdemeanor, effective May 3, 1993. For present comparable provision, see § 41-1a-711(2).



IN THE THIRD JUDICIAL DISTRICT COURT  
STATE OF UTAH, MURRAY DEPARTMENT

\* \* \*

FILED DISTRICT COURT  
Third Judicial District

NOV 1 1999

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

Case No. 981201411FS

THE STATE OF UTAH, )  
 )  
Plaintiff/Appellee, )  
 )  
-v- )  
 )  
KENNETH J. WEBSTER, )  
 )  
Defendant/Appellant. )  
 )

REPORTER'S TRANSCRIPT OF PROCEEDING

BEFORE THE HONORABLE MICHAEL K. BURTON

SALT LAKE CITY, UTAH

AUGUST 24, 1999

FILED  
Utah Court of Appeals

JAN 18 2000

Julia D'Alessandro  
Clerk of the Court

FILED

JAN 18 2000

COURT OF APPEALS

FILED

JAN - 5 2000

COURT OF APPEALS

008 2141 CA

981201411 CA

1 MR. HEINEMAN: Which is an act of  
2 unauthorized control of a motor vehicle.

3 THE COURT: Well, okay. So you're acquainting  
4 the term "wrongful appropriation" to unauthorized control,  
5 you're saying those are synonyms?

6 MR. HEINEMAN: Yes. Unauthorized control of  
7 a motor vehicle, which is tantamount to theft, so he was  
8 charged with theft of a motor vehicle. He was acquitted  
9 of that, he was convicted of something less than that.  
10 It's the unauthorized control of a motor vehicle, and it  
11 tells us to go to 1311.

12 THE COURT: Okay. I actually don't read it  
13 that way but I follow at least what you're saying, which  
14 makes me comfortable. Okay. Anything more I need to  
15 hear?

16 MR. HEINEMAN: And if you don't read it the  
17 way I read it, then that just merits her question at the  
18 end there, we have to read statutes so that we give  
19 effect and meaning to all of their provisions.

20 THE COURT: Okay. I think it's not mere  
21 (Inaudible), I think it's just a clarification. The way  
22 I read it, 76-6-405.5(3)(e) is telling us if it were  
23 unauthorized control of a motor vehicle, then he'd do it  
24 as punished in 1311. But if it's wrongful appropriation  
25 in either A, B, C or D, then this is how we punish it.

1 So I appreciate that in your mind it's mere surplusage,  
2 but in my mind, just a clarification of how you would  
3 deal with it. That's how I read it and that's how I see  
4 it.

5 So I think that the correct reading of this is  
6 the crime for which Mr. Webster was convicted by sub 3,  
7 sub a of that section is a third degree felony, so  
8 that's how I see that. What do we do next? We have to  
9 sentence him.

10 MS. HIGGINS: Yes, thank you.

11 THE COURT: And I don't know, did you want to  
12 respond to her thoughts? I mean I hold you both in the  
13 utmost esteem so I --

14 MR. HEINEMAN: My recollection of our --

15 THE COURT: I can't think of either of you  
16 pulling shenanigans so she's upset that I don't think  
17 you're the kind of guy who does that kind of stuff,  
18 so...

19 MR. HEINEMAN: Well, I have an ethical  
20 obligation to represent my client to the fullest of my  
21 abilities and I have to raise this matter, even though  
22 it appears that it's the Legislature that --

23 THE COURT: No, no, don't -- no, no, we're  
24 talking about another thing now. She thought you laid  
25 the trap.

THIRD DISTRICT COURT MURRAY COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	MO: TO CLARIFY DEGREE/CHARGE
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 981201411 FS
	:	
KENNETH J WEBSTER,	:	Judge: MICHAEL K. BURTON
Defendant.	:	Date: August 24, 1999

---

PRESENT

Clerk: lindav

Prosecutor: HIGGINS, TRINA

Defendant

Defendant's Attorney(s): HEINEMAN, ROBERT K

DEFENDANT INFORMATION

Date of birth: November 19, 1972

Audio

Tape Number: 99 441 Tape Count: 4410

CHARGES

2. WRONGFUL APPROPRIATION - 3rd Degree Felony

Disposition: 04/29/1999 Guilty

HEARING

DEFT MAKES MOTION TO COURT.

COUNT: 4600

STATE REBUTTAL

COUNT: 5530

COURT ORDERED DEFT WAS CONVICTED OF A THIRD DEGREE FELONY.

Case No: 981201411  
Date: Aug 24, 1999

---

#### SENTENCE JAIL

Based on the defendant's conviction of WRONGFUL APPROPRIATION a 3rd Degree Felony, the defendant is sentenced to a term of 180 day(s). The total time suspended for this charge is 165 day(s).

#### SENTENCE FINE

Charge # 2            Fine: \$750.00  
                      Suspended: \$0.00  
                      Surcharge: \$344.59  
                      Due: \$750.00

                      Total Fine: \$750.00  
                      Total Suspended: \$0  
                      Total Surcharge: \$344.59  
                      Total Principal Due: \$750.00  
                                  Plus Interest

The fine is to be paid in full by September 30, 2000.

#### SENTENCE FINE PAYMENT NOTE

\$75.00 PER MONTH BEGINNING 9/30/99  
Complete 120 hour(s) of community service in lieu of 15 days in jail.

#### SENTENCE TRUST

The defendant is to pay the following:  
Attorney Fees:            Amount: \$200.00 Plus Interest  
Pay in behalf of: SALT LAKE COUNTY TREASURER

#### ORDER OF PROBATION

The defendant is placed on probation for 18 month(s).  
Probation is to be supervised by Murray District Court.  
Defendant to serve 15 day(s) jail.

Defendant is to pay a fine of 750.00 which includes the surcharge.  
Interest may increase the final amount due.  
Pay fine on or before September 30, 2000.

Case No: 981201411  
Date: Aug 24, 1999

---

Pay fine to The Court.

PROBATION CONDITIONS

Pay fines and fees as agreed  
No Violations of the Law  
Evaluation and Treatment as deemed necessary.  
NO RESTITUTION DUE ON THIS CASE.  
COURT ORDERED 120 HOURS COMMUNITY SERVICE IN LIEU OF 15 DAYS JAIL.  
TO BE COMPLETED AT 20 HOURS PER MONTH AND COMPLETED BY 2/28/2000  
COURT ORDERED DEFT TO COMPLETE COGNITIVE RESTRUCTURING  
CLASS/COUNSELING THROUGH VALLEY MENTAL HEALTH.  
DEFT TO NOT BE EMPLOYED BY A CAR DEALERSHIP DURING PROBATION  
PERIOD.

Dated this 24 day of Aug, 1999.

*Michael K. Egerton*

MICHAEL K. EGERTON  
District Court Judge



## **ADDENDUM F**

#### **Rule 804. Hearsay exceptions; declarant unavailable.**

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death.* In a civil or criminal action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, if the judge finds it was made in good faith.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Amended effective October 1, 1992.)



## **ADDENDUM G**

**AMENDMENTS TO THE  
CONSTITUTION OF  
THE UNITED  
STATES**

**AMENDMENT VI**

**[Rights of accused.]**

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

**CONSTITUTION OF UTAH**

**Sec. 12. [Rights of accused persons.]**

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