

1999

Utah v. Kenneth J. Webster : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

Appeal from a judgment of conviction of wrongful appropriation of a vehicle, in violation of Utah Code Annotated section 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, Judge, presiding.

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Utah Court of Appeals
MAY 01 2000

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Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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| KENNETH J. WEBSTER | : | Case No. 990764-CA |
| Defendant/Appellant | : | Priority No. 2 |

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment of conviction of wrongful appropriation of a vehicle, in violation of Utah Code Annotated section 76-6-404.5 (Supp. 1998). See Addendum A. This Court has jurisdiction under Utah Code Annotated section 78-2a-3(2)(e) (1996) which grants this Court authority to review appeals in criminal cases not involving a first degree or capital felony.

**STATEMENT OF THE ISSUES, STANDARDS OF REVIEW, AND
PRESERVATION OF THE ARGUMENTS**

1A. Under the Confrontation Clause to the Federal Constitution, courts may only admit hearsay evidence if a firmly rooted hearsay exception applies or the evidence possesses particularized guarantees of trustworthiness. The hearsay statements admitted below, in which the declarant totally exonerated herself and solely blamed the defendant

for the crime, did not fit a firmly rooted hearsay exception and were inherently unreliable.

Did the trial judge err in admitting this evidence?

Whether evidence is admissible under the Federal Constitution is a question of law which this Court reviews for correctness. State v. Ramirez, 817 P.2d 774, 781 n.3 (Utah 1991). This issue is preserved at R. 38: 96-103, 113.¹

1B. Before the trial court may admit hearsay evidence under the residual exception to the hearsay rule, the proponent of the evidence must notify the opponent before trial to provide an opportunity to prepare to meet the evidence. Utah R. Evid. 804(b)(5). The State notified the defense during the middle of trial of its intent to admit hearsay evidence identifying the defendant as the perpetrator. Did the trial judge err in admitting this evidence when defense counsel relied on the absence of notice and claimed during opening statements that the State could not identify the perpetrator?

This Court reviews the trial court's decision to admit evidence under a correctness standard. Provo City v. Warden, 844 P.2d 360, 365 (Utah Ct. App. 1992). This issue is preserved at R. 22-23; R. 38: 97-98, 103, 113.

1C. Article I, section 12 of the Utah Constitution promotes marital harmony and preserves marriages by barring the State from compelling a spouse to testify against the other spouse. The State presented hearsay evidence from a wife that solely blamed her

¹The volume marked "R. 38" contains the trial transcript. The internal page numbers of that volume are included after the volume number.

husband for a crime and that served as the only undisputed evidence of guilt. Did the admission of this divisive evidence violate the Utah Constitution by sowing marital dissension, just as if the wife had testified herself?

Interpreting a constitutional provision is a question of law which this Court reviews for correctness. State v. Maguire, 1999 UT App. 45, ¶ 5, 975 P.2d 476. This issue is preserved at R. 38: 22-23, 52, 96-102, 113.

2. Utah Rule of Evidence 404(b) bars trial judges from admitting evidence of other crimes to show a criminal defendant's criminal character or propensity to commit bad acts. The trial judge below admitted evidence of a similar act that occurred seven years previously in Virginia and was totally unconnected to the alleged facts below. Did the trial judge abuse his discretion in admitting this evidence?

This Court reviews the admission of evidence of prior bad acts for an abuse of discretion. State v. Decorso, 1999 UT 57, ¶ 18, 993 P.2d 837. Trial counsel preserved this issue at R. 25-28; R. 38: 40-46, 91-94, 111.

3. At the time of the offense, the legislature had not specified a punishment for the crime of wrongfully appropriating a motor vehicle under Utah Code Annotated section 76-6-404.5(3)(e) (Supp. 1998). In such situations, Utah Code Annotated section 76-3-105 (1999) punishes criminal offenses as infractions. Did the trial judge err in sentencing Mr. Webster for a third degree felony?

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 Ct. App. 1991). This issue is preserved at R. 42-43; R. 53: 5-15.²

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Addenda contain reprints of the following constitutional and statutory provisions:

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| Addendum B: | Utah Code Ann. § 76-6-404.5 (Supp. 1998) |
| Addendum C: | Utah Code Ann. § 76-3-105 (1999) |
| Addendum D: | Utah Code Ann. § 41-1a-1311 (1998) |
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| Addendum G: | Utah Const., art. I, § 12 |
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| Addendum L: | Utah Const., art. I, § 18 |
| Addendum M: | U.S. Const., art. I, § 9, cl. 3 |

STATEMENT OF THE CASE

The State filed an Information on July 29, 1998, charging Appellant Kenneth J. Webster with one count of theft. R. 1. On the day of trial, on April 29, 1999, Mr. Webster filed a motion to allow his wife, Elsha Gallegos, to assert her state constitutional

²The volume marked "R. 53" contains the sentencing hearing transcript. The internal page numbers of that volume follow the volume number.

right not to testify against him. R. 22. He requested the trial judge to allow Ms. Gallegos to assert her right outside the jury's presence and to instruct the prosecutor not to comment on Ms. Gallegos' invocation of that right. R. 22-23. The prosecutor agreed not to call Ms. Gallegos to testify in front of the jury. R. 38: 39.

Also on the first day of trial, Mr. Webster filed a motion in limine to prevent the State from introducing evidence that Mr. Webster had admitted to police that he had committed a similar offense in Virginia. R. 25. Similarly, Mr. Webster sought to prevent the prosecutor from presenting evidence of Mr. Webster's conviction for that conduct. R. 27. The trial judge deferred ruling on these requests because he concluded that he could best determine the relevancy of the prior act evidence and its potential for prejudice after the State presented its case. R. 38: 46. Ultimately, he admitted the prior conviction because defense counsel had raised the perpetrator's identity during opening statements. R. 38: 93-94.

After Ms. Gallegos invoked her right not to testify, the prosecutor requested the trial judge to admit Ms. Gallegos' statements through the police officer that heard them. R. 38: 96-97, 99-100. Although recognizing that Ms. Gallegos' statements as hearsay, the trial judge admitted them under the residual exception to the hearsay rule. R. 38: 102-03.

The jury subsequently acquitted Mr. Webster of theft but convicted him of the lesser included offense of wrongful appropriation. R. 34-35; 38: 147; Addendum A.

Prior to sentencing, Mr. Webster filed a motion to clarify the penalty for the crime

of wrongfully appropriating a vehicle under Utah Code Annotated section 76-6-404.5(3)(e) (Supp. 1998). R. 42. At the time of the offense, the legislature had repealed the statute that had defined the penalty for wrongfully appropriating a vehicle. R. 43. Because the legislature had failed to provide any penalty, Mr. Webster argued that the statutory provision that addresses this very scenario, Utah Code Annotated section 76-3-105 (1999), required the trial judge to treat wrongfully appropriating a vehicle as an infraction. R. 38: 43.

At sentencing, the trial judge concluded that subsection 3(a) under Utah Code Annotated 76-5-404.5 specified the punishment, not subsection 3(e). R. 53: 14. Subsection 3(a) imposes a third degree felony. Utah Code Ann. § 76-6-404.5(3)(a) (Supp. 1998).

The trial judge sentenced Mr. Webster to 180 days in jail and suspended all but 165 days of that term. R. 53: 20. The judge also placed Mr. Webster on court-supervised probation for 18 months, required him to perform 120 hours of community service, and ordered him to enroll in cognitive restructuring classes. R. 53: 20. In addition, the trial imposed a \$750 fine and ordered Mr. Webster to pay \$200 toward the costs of his court-appointed attorney. R. 53: 20-21. Mr. Webster then filed a timely notice of appeal. R. 60.

STATEMENT OF THE FACTS

The Trial Testimony

On June 22, 1998, a customer traded in a 1988 Nissan Stanza at Intermountain Volkswagen. R. 38: 71. As was Intermountain's custom, the car was placed in a secured, fenced lot until a financial institution funded the loan supporting the transaction involving the trade in. R. 38: 62-63, 73. Intermountain would then recondition the car for resale or sell it to a wholesaler. R. 38: 70, 73. However, until the loan was funded, no one had permission to drive traded-in used cars. R. 38: 63. Once Intermountain obtained legal possession of used cars, salespersons had permission to test drive them. R. 38: 79-80.

Intermountain kept the keys to newly-acquired used cars inside a sales trailer in the office of Mike McGuire who oversaw the reconditioning department. R. 38: 62-63, 70, 76. At some unspecified time, the loan underlying the transaction involving the Nissan Stanza apparently was funded and Intermountain moved the keys to an unsecured box labeled "wholesale." R. 38: 78. All of Intermountain's 20 to 25 employees had access to the box. R. 38: 68-69. It is not clear from the record whether salespersons could test cars designated for wholesale.

About the same time the Nissan Stanza was traded in, Mr. Webster began working as a salesperson at Intermountain. R. 38: 63, 80. A few days later, Mr. McGuire saw Mr. Webster driving the Nissan Stanza off of the dealership lot. R. 38: 80. Mr. McGuire testified at trial that he definitely witnessed this event on the Monday or Tuesday before

July 10, 1998, which would have been July 6 or 7, 1998. R. 38: 77, 79-80, 83-84.

However, Mr. McGuire informed the police on July 10, 1998, that he saw Mr. Webster driving the car two weeks earlier on June 26, 1998. R. 38: 81. In addition, the police report of the interview with Mr. McGuire specifically stated that Mr. McGuire saw Mr. Webster driving the car two weeks previously. R. 38: 88-89. For some unexplained reason, that statement was crossed out. R. 38: 89.

Mr. McGuire testified further that he saw Mr. Webster driving the car two or three days after Mr. Webster began his employment . R. 38: 80-81. Mr. Webster began working at Intermountain about June 24, 1998. R. 38: 80-81. Moreover, it is undisputed that Intermountain inventoried the Nissan Stanza as being in stock on both July 1, and July 3, 1998. R. 38: 73.

About July 10, 1998, Intermountain discovered that the Nissan Stanza was missing. R. 38: 78-79. On that date, an Intermountain manager drove to Mr. Webster's large apartment complex and found the car in the parking lot. R. 38: 107. The manager then called the police. R. 38: 107.

Police Officer Michael Cupello contacted Mr. Webster at his apartment and asked if he had taken the vehicle. R. 38: 108. Mr. Webster denied even touching the car. R. 38: 109. Officer Cupello disbelieved Mr. Webster and arrested him. R. 38: 109. A search of the car revealed no personal belongings and the police took no fingerprints from it. R. 38: 115. In addition, the keys to the car were never recovered. R. 38: 79.

The Trial Judge's Rulings on the Hearsay and Prior Act Evidence

On the day of trial, April 29, 1999, Mr. Webster filed a motion to allow his wife, Elsha Gallegos, to invoke her state constitutional right not to testify and to allow her to assert that right outside of the jury's presence. R. 22. The defense feared that the State would call Ms. Gallegos to testify about her statements to the police following Mr. Webster's arrest. In particular, Officer Cupello telephoned Ms. Gallegos and informed her that Mr. Webster denied even touching the car. R. 38: 112. Ms. Gallegos immediately responded, "He is lying." R. 38: 113. According to Ms. Gallegos, Mr. Webster claimed that he had permission to drive the car. R. 38: 114. Ms. Gallegos admitted that "they both had been driving [the car] around" on July 8, 1998, two days before Mr. Webster's arrest. R. 38: 113-14. She thought Mr. Webster had returned the car on July 8 because Mr. Webster had quit his job at Intermountain on that date. R. 38: 113-14. When Officer Cupello replied that Mr. Webster claimed not to have driven the car, Ms. Gallegos responded, "We have a problem." R. 38: 114.

Also on the day of trial, defense counsel filed motions to prevent the prosecutor from either presenting evidence that Mr. Webster had committed a similar offense in Virginia or from allowing Officer Cupello to testify concerning Mr. Webster's statements about that offense. R. 25, 27. According to Officer Cupello, during the ride to the police station, he asked Mr. Webster if he had ever been arrested before. R. 38: 111. Mr. Webster admitted to being arrested in Virginia for "driving a vehicle off of a dealership

lot." R. 38: 112. Mr. Webster claimed in his motions that evidence of such a similar offense would unfairly prejudice the jury and would only serve to show bad character. R. 25-28.

Prior to opening statements, the trial judge addressed the motions. R. 38: 38. The prosecutor conceded that she intended to call Ms. Gallegos to testify during rebuttal but she agreed to do so outside the jury's presence. R. 38: 38-39. When the trial judge asked Ms. Gallegos if she planned to testify, she indicated that she wanted to wait to see how the trial proceeded. R. 38: 38-39.

Following a recess, defense counsel indicated to the trial judge that Ms. Gallegos may not have understood her right not to testify. R. 38: 48-49, 51-52. The prosecutor explained that Ms. Gallegos informed her that she wanted to wait until after Mr. Webster presented his defense to decide whether to testify to prevent a possible "miscarriage of justice." R. 38: 49. The trial judge explained to Ms. Gallegos that she had an absolute right not to testify, that the right promoted marital harmony and trust, and that Ms. Gallegos should base her decision on her own interests and desires rather than her desire to reveal what she knew about the case. R. 38: 52. Ms. Gallegos then reiterated her wishes to defer a decision until after the presentation of the defense case. R. 38: 51-53.

Concerning the motions to exclude evidence of prior bad acts, the prosecutor stated that she would not attempt to admit evidence of the prior conviction, but, rather, she only sought to admit Officer Cupello's testimony. R. 38: 39. The prosecutor claimed

that she needed the officer's statements to establish that Mr. Webster "intended to take the car" and "that it was [not] accidentally at his house." R. 38: 41.

Defense counsel strenuously objected to the admission of this evidence. He argued that intent was not at issue because the State could not prove who actually placed the car in the apartment complex parking lot. R. 38: 43-44. Even if the State could establish identity, defense counsel contended that the prior offense did not address Mr. Webster's intent in this case because that crime occurred in Virginia "at some undisclosed time" and it was completely separate from the present charge. R. 38: 43. Defense counsel reasoned that admitting Mr. Webster's statements simply risked the "possibility or even a probability that the[] [jury] would want to find him guilty for his past acts, rather than based on the evidence that is brought before the court today." R. 38: 43.

Defense counsel suggested that the trial judge defer ruling on the motion to exclude Officer Cupello's testimony until the State presented its case. R. 38: 45-46. Although the trial judge indicated that he was inclined to admit the evidence to show absence of mistake or intent, he agreed to defer his decision. R. 38: 46.

During opening statements, defense counsel represented to the jury that the State could not show "who drove the car to the place where the car was found." R. 38: 58. Specifically, defense counsel claimed that the State had no physical evidence linking the car to Mr. Webster. R. 38: 58-59. Instead, the State could only show that the police found the car in a public parking lot. R. 38: 58-59.

The State then presented its case detailing Intermountain's procedures in handling trade-ins and how it discovered that the Nissan Stanza was missing. Following this testimony, the trial judge revisited the motion to exclude the evidence of Mr. Webster's prior offense. The prosecutor argued that the evidence was necessary because the State had no other evidence to prove Mr. Webster's intent, knowledge and lack of mistake. R. 38: 91-92. In addition to repeating his earlier objections, defense counsel argued that Mr. Webster's mere statement about a prior offense lacked probative value without knowing any details about the crime such as when the offense occurred. R. 38: 92-93.

The trial judge ruled that "given [defense counsel's] opening statement," Mr. Webster's prior offense was relevant. R. 38: 93. Moreover, the trial judge concluded that its probative value outweighed its prejudicial effects. R. 38: 93-94.

The prosecutor then informed the trial judge that she intended to call Ms. Gallegos to testify. R. 38: 96. For the first time, the prosecutor indicated that if Ms. Gallegos invoked her right not to testify, the prosecutor would request the trial judge to admit Ms. Gallegos' hearsay statements through Officer Cupello. R. 38: 96-97. When the trial judge asked Ms. Gallegos about her wishes, she declined to testify. R. 38: 99.

The prosecutor contended that the trial judge could admit Ms. Gallegos' statements to Officer Cupello under Rule of Evidence 804(b)(5), the residual exception to the hearsay rule. R. 38: 97. According to the prosecutor, Ms. Gallegos' statements were trustworthy because she admitted, against her penal interest, that she drove with Mr.

Webster in a stolen vehicle. R. 38: 100-01. The prosecutor claimed that although Ms. Gallegos would not testify in front of the jury, she was willing to inform the trial judge exactly what she told Officer Cupello. R. 38: 97, 100-01.

Defense counsel objected that the prosecutor failed to give him the required notice under Rule 804(b)(5) that she would seek to introduce Ms. Gallegos' hearsay statements. R. 38: 97. Instead, defense counsel stated that Ms. Gallegos had consistently informed him that she would not testify. R. 38: 97-98. He also prepared his defense and made his opening statement "under the assumption that [the evidence] . . . doesn't fit under any of the established" exceptions to the hearsay rule. R. 38: 97-98.

Defense counsel further asserted that Ms. Gallegos' statements did not affect her penal interests because she claimed that she did not know that Mr. Webster did not have permission to use the car. R. 38: 102. He also noted that the statements did not satisfy any other hearsay exception and that the residual exception wasn't "designed to let any type of hearsay in" when other exceptions did not apply. R. 38: 100. Rather, the key to that exception was trustworthiness. R. 38: 100. Finally, defense counsel asserted that admitting Ms. Gallegos' statements would effectively deprive Mr. Webster of his right to confront and cross-examine Ms. Gallegos. R. 38: 103.

The trial judge ruled that because Ms. Gallegos' made the statements to a police officer, they were "proper" and reliable. R. 38: 102. In so ruling, the judge concluded that "[i]t is pretty clear that the rule allows this type of evidence to be admitted." R. 38:

103. The trial judge reasoned that either Ms. Gallegos uttered the statements against her penal interests or she innocently and dispassionately related facts that had "no particular impact one way or the other." R. 38: 102. In construing the evidence as "mere statements of inconsequential events," the trial judge deemed the statements trustworthy because there was "no reason she would say one way or the other." R. 38: 102-03. Concerning notice, the trial judge ruled that Rule 804(b) did not require the State to specify the method by which it would seek to introduce the evidence as long as the defense knew beforehand that the State wanted to admit Ms. Gallegos' statements. R. 38: 98, 103.

Following the trial judge's rulings, Officer Cupello testified concerning Ms. Gallegos' hearsay statements and Mr. Webster's admission to committing a prior offense. R. 38: 110-14. The State and the defense then rested. R. 38: 117-18.

The trial judge instructed the jury on the crime of theft and the lesser included offense of wrongful appropriation. R. 38: 123-24; R. 29: 5.³ The relevant jury instruction defined wrongful appropriation as exercising "unauthorized control [over an] . . . operable motor vehicle" with the intent to temporarily deprive the owner of possession. R. 29: 5.

During closing arguments, the prosecutor relied heavily on Officer Cupello's testimony concerning Mr. Webster's admission to committing a prior offense and

³The volume marked R. 29 contains the jury instructions. The individual instructions are numbered after the volume number.

Ms. Gallegos' incriminating comments. R. 38: 131-33. Defense counsel cautioned the jury not to conclude that Mr. Webster was guilty simply because he previously committed a similar offense. R. 38: 137-38. In addition, he contended that the State failed to establish that Ms. Gallegos' correctly identified the car that she and her husband drove as the missing Nissan Stanza. R. 38: 139.

The jury acquitted Mr. Webster of theft but convicted him of the lesser included offense of wrongful appropriation. R. 38: 147; Addendum A.

Sentencing

On July 22, 1999, Mr. Webster filed a motion to clarify the punishment for the crime of wrongful appropriation of a vehicle. R. 42. In his motion, Mr. Webster explained that under subsection 3(e) of the wrongful appropriation statute, "'an act of unauthorized control of motor vehicles . . . which does not constitute theft is punishable under [Utah Code Annotated] Section 41-1a-1311.'" R. 42-43 (quoting Utah Code Annotated section 76-6-404.5 (Supp. 1998)). However, effective May 4, 1998, just two months before Mr. Webster's arrest, the legislature repealed section 41-1a-1311. R. 43; Utah Code Ann. § 41-1a-1311 (1998). Mr. Webster argued that when the legislature fails to specify a punishment for an offense, Utah Code Annotated section 76-3-105(2) requires the trial court treat the offense as an infraction. R. 43-44.

At sentencing on August 24, 1999, the trial judge stated that he had not read Mr.

Webster's motion to clarify the punishment because he failed to notice it under the presentence report. R. 53: 5. Defense counsel, accordingly, reiterated his arguments in support of treating Mr. Webster's offense as an infraction. R. 53: 5-6. Alternatively, defense counsel argued that the trial judge should impose an A misdemeanor as provided under section 41-1a-1311 prior to its repeal. R. 53: 6-7.

The State countered that Mr. Webster was originally charged with theft of a motor vehicle which is punishable as a second degree felony under Utah Code Annotated section 76-6-412(1)(a)(ii). R. 53: 9; Utah Code Ann. § 76-6-412(1)(a)(ii) (1999). When a person has been charged with a second degree felony under that subsection but the jury convicts the defendant of the lesser included offense of wrongful appropriation, subsection 3(a) of the wrongful appropriation statute punishes the offense as a third degree felony. R. 53: 9-10; Utah Code Ann. § 76-6-404.5(3)(a) (Supp. 1998).

Defense counsel explained that subsection 3(e) of section 76-6-404.5 prevailed over subsection 3(a) because it specifically applied to "an act of unauthorized control of [a] motor vehicle[]." R. 53: 10-13 (quoting Utah Code Ann. § 76-6-404.5(3)(e) (Supp. 1998)). In contrast, subsection 3(a) generally addressed several theft offenses, only one of which involved theft of a vehicle. R. 53: 11. In any event, defense counsel noted that under Utah law the lesser penalty prevailed over the greater. R. 53: 11. According to defense counsel, viewing the statutory scheme as a whole and applying the specific statutory provision over the general compelled the conclusion that subsection 3(e)

applied. R. 53: 10-13.

The trial judge disagreed. He reasoned that defense counsel had erroneously equated "'unauthorized control'" of a vehicle under subsection 3(e) with the crime of "'wrongful appropriation.'" R. 53: 13-14 (quoting Utah Code Ann. § 76-6-404.5 (Supp. 1998)). The judge apparently failed to recognize that section 76-6-404.5 defines the crime of wrongful appropriation as exercising "unauthorized control" over the property of another. Utah Code Ann. § 76-6-404.5(1) (Supp. 1998). Based on this misunderstanding, the trial judge imposed a third degree felony under subsection 3(a).

The trial judge sentenced Mr. Webster to 180 days in jail and suspended all but 165 days of that term. R. 53: 20. He also placed Mr. Webster on court-supervised probation for 18 months, required him to perform 120 hours of community service, and ordered him to enroll in cognitive restructuring classes. R. 53: 20. In addition, the trial judge imposed a \$750 fine and ordered Mr. Webster to pay \$200 toward the costs of his court-appointed attorney. R. 53: 20-21. This appeal followed.

SUMMARY OF THE ARGUMENT

The admission of Ms. Gallegos' hearsay statements violated Mr. Webster's right to confront and cross-examine her. Ms. Gallegos' statements that solely blamed Mr. Webster for the crime neither satisfied a firmly rooted hearsay exception nor were they otherwise trustworthy. Statements that exonerate the declarant and solely accuse another

are inherently unreliable. Even if the trial judge correctly construed the statements as factual observations, those statements did not possess sufficient indicia of reliability to be admitted.

In any event, the trial judge erroneously admitted the statements under the residual hearsay exception because the prosecutor failed to notify defense counsel of her intent to apply the exception. The lack of notice harmed the defense because that omission caused defense counsel to represent to the jury that the State could not prove who took the car. When the State admitted Ms. Gallegos' statements accusing Mr. Webster of taking the car, both defense counsel and Mr. Webster appeared to have lied to the jury.

Admitting Ms. Gallegos' incriminating statements also undermined the Utah constitutional right not to testify against the other spouse. Utah is the only state in the nation that provides such constitutional protection to spouses. The framers of the Utah Constitution established that right in response to the federal government's repugnant practice of imprisoning polygamous wives who refused to testify against their husbands. The right promotes marital harmony and preserves family relationships by allowing spouses to avoid having to testify against their mates and sending them to prison. However, when the State admits a spouse's hearsay statements that incriminate the other spouse, the source of the information remains the spouse. Thus, admitting such hearsay is the functional equivalent of spousal testimony. Because the spouse's statements may result in convicting the other spouse, marital dissension results. These concerns forbid

the admission of a spouse's hearsay statements when the spouse refuses to testify.

The trial judge abused his discretion in admitting evidence of a prior offense. Mr. Webster's prior offense in Virginia had no connection to the matter below and it occurred seven years previously. The trial judge failed to consider the remoteness of the prior conviction or to inquire into the circumstances surrounding it. Because that offense was so similar to the present matter, its prejudicial effects significantly outweighed its probative value. That evidence simply served to bias the jury against Mr. Webster.

Because the legislature had repealed the statute that listed the penalty for Mr. Webster's particular offense, Utah Code Annotated section 76-3-105(2) (1999) required the trial judge to impose an infraction. The rule of lenity demands that criminal defendants be given the benefit of the doubt in such situations. Further, the prohibition against ex post facto laws barred the trial judge from imposing a sentence higher than an infraction. At the very least, the trial judge could have only imposed an A misdemeanor as under the former statute.

ARGUMENT

I. IN ADMITTING MS. GALLEGOS' HEARSAY STATEMENTS WITHOUT NOTICE TO THE DEFENSE, THE TRIAL JUDGE VIOLATED MR. WEBSTER'S RIGHT TO CONFRONTATION, GUTTED THE DEFENSE CASE UNFAIRLY, AND VIOLATED THE STATE CONSTITUTIONAL RIGHT NOT TO TESTIFY AGAINST A SPOUSE

The trial judge erred in admitting Ms. Gallegos' hearsay statements for three separate reasons. First, because Ms. Gallegos' self-serving, exculpatory statements did not satisfy a firmly rooted hearsay exception and otherwise lacked trustworthiness, admitting them violated Mr. Webster's constitutional right to confront and cross-examine his accusers. Second, the trial judge erroneously admitted the statements under the residual hearsay exception because the State's notice of its intent to apply the exception during the middle of trial unfairly blind-sided the defense. Third, admitting Ms. Gallegos' incriminating statements undermined the Utah constitutional right not to testify against the other spouse because her statements created marital dissension just as if she had testified herself.

A. Admitting Ms. Gallegos' Self-Serving, Hearsay Statements Violated Mr. Webster's Confrontation Rights

Ms. Gallegos' hearsay statements, absolving herself of all responsibility for the missing car and solely blaming Mr. Webster for taking it, lacked trustworthiness. Even

accepting those statements as mere factual assertions, the statements lacked sufficient reliability to admit them under the Confrontation Clause. Because the State presented no other evidence establishing that Mr. Webster drove the car without permission, the admission of Ms. Gallegos' hearsay statements severely harmed the defense and requires reversal.

1. **Neither the Residual Exception to the Hearsay Rule Nor the Exception for Statements Against Penal Interests are Firmly Rooted Exceptions to the Hearsay Rule**

Both the Federal and Utah Constitutions guarantee criminal defendants the right to confront and cross-examine the witnesses against them. U.S. Const., Amend. 6; Utah Const., art I, § 12; State v. Brooks, 638 P.2d 537, 539 (Utah 1981). This right promotes reliability and truth-finding in criminal trials, and its absence "calls into question the ultimate 'integrity of the fact-finding process.'" Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (quoting Berger v. California, 393 U.S. 314, 315 (1969)) (original citation omitted). In short, "'the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" Lee v. Illinois, 476 U.S. 530, 540 (1986) (quoting Pointer v. Texas, 380 U.S. 400, 405 (1965)).

Because hearsay statements deprive criminal defendants of the right to confront

and cross-examine their accusers, courts may only admit hearsay if the declarant is unavailable and the evidence "bear[s] sufficient indicia of reliability." Brooks, 638 P.2d at 539 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)). Courts may, however, infer reliability if: (1) "the evidence falls within a firmly rooted hearsay exception;" or, (2) the evidence possesses "particular guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980) (fn. omitted).

The trial judge wrongly admitted Ms. Gallegos' statements under the residual exception to the hearsay rule because that exception is not firmly rooted. For a hearsay exception to be firmly rooted, courts and legislatures must have had "longstanding . . . experience in assessing the trustworthiness of certain types of out-of-court statements." Idaho v. Wright, 497 U.S. 805, 817 (1990). Because the residual hearsay exception involves "ad hoc" determinations of trustworthiness, it does not possess the necessary tradition of reliability. Id.

The trial judge also indicated that Ms. Gallegos' statements may satisfy the hearsay exception for statements against penal interest. But, a statement "laying sole responsibility" for a crime on another "cannot satisfy a firmly rooted hearsay exception." Lilly v. Virginia, 119 S.Ct. 1887, 1905 (1999) (Rehnquist, J., concurring and endorsing plurality's view). Rather, courts have traditionally viewed such self-serving statements with suspicion. Lee v. Illinois, 476 U.S. 530, 541 (1986).

Ms. Gallegos' claim that Mr. Webster took the car and that she knew nothing

about the car's misappropriation was just such a statement. When first asked about the car, Ms. Gallegos immediately asserted that Mr. Webster was "lying" and that she knew nothing about the alleged theft. R. 38: 113. Instead, she completely absolved herself of responsibility and shifted the entire blame to her husband. Ms. Gallegos' statements exonerating herself and shifting complete responsibility to Mr. Webster are a prototypical example of the kind of self-serving statements that courts deem unreliable. Lilly v. Virginia, 119 S.Ct. 1887, 1897-98, 1905 (1999).⁴

2. The Statements Lacked Sufficient Guarantees of Trustworthiness

Because Ms. Gallegos totally exonerated herself and shifted the sole blame to Mr. Webster, her statement also lacked sufficient "guarantees of trustworthiness." Roberts, 448 U.S. at 66. When the police investigate a person for possible involvement in criminal activity with another, that person has "'strong motivation to implicate the defendant and to exonerate himself [or herself].'" Lee, 476 U.S. at 541 (quoting Bruton v. United States, 391 U.S. 123, 141 (1968)). "[S]tatements made in an obvious attempt to curry favor with the authorities by inculping defendant and exculpating declarant, lack trustworthiness." State v. Drawn, 791 P.2d 890, 894 (Utah Ct. App. 1990) (fn. omitted).

⁴ Although Lilly did not produce a majority opinion, at least seven of the justices agreed that statements exonerating oneself and blaming another are untrustworthy. 119 S.Ct. at 1897-98 (Stewart, J. plurality opinion), 1905 (Rehnquist, J. concurring).

These principles apply with particular force to this case. Ms. Gallegos had "strong motivation" to shift the blame because she admitted to Officer Cupello that "both" she and Mr. Webster had driven the car. R. 38: 114. Moreover, Ms. Gallegos fully appreciated the seriousness of her accusations as evidenced by her conclusion "We have a problem." R. 38: 114 (emphasis added).

The trial judge reasoned that the statements were trustworthy because Ms. Gallegos' made them to a police officer. R. 38: 102. Just the opposite is true. When the police interview persons who are possible suspects in a crime, those persons have "strong motivation" to lie and to implicate others. Lee, 476 U.S. at 541 (quoting Bruton, 391 U.S. at 141). Statements made under these circumstances are "presumptively suspect and must be subjected to the scrutiny of cross-examination." Id.

As additional support, the Utah Supreme Court has ruled that police reports of witness statements do not satisfy the business records exception to the hearsay rule. State v. Bertul, 664 P.2d 1181, 1184 (Utah 1983). Because such reports rely on memory, perception, and the reporter's motives, they "raise a serious question of reliability." Id. The Supreme Court concluded that "statements by witnesses to a crime and recorded by officers . . . do not have the indicia of reliability" necessary to satisfy the business records exception. Id. If written witness statements to police lack reliability, certainly a police officer's memory of a witness's oral statements also lack trustworthiness.

The trial judge also claimed that Ms. Gallegos' statements were trustworthy

because they were factual assessments that had "no particular impact one way or the other." R. 38: 102. No reasonable view of the evidence supports this conclusion. Ms. Gallegos lodged her allegations to a police officer knowing that her husband was in police custody and had been accused of stealing the car. After admitting that she drove and used the car with her husband, she accused Mr. Webster of lying and she shifted the entire responsibility to him. Likewise, her statement that "We have a problem" demonstrates that she fully understood the implications of her statements. Under these circumstances, the trial judge could not have reasonably viewed Ms. Gallegos' statements as "inconsequential" factual observations. R. 38: 103.

Even if the trial judge properly could do so, Ms. Gallegos' statements did not possess sufficient "guarantees of trustworthiness" to satisfy the Confrontation Clause. Ohio v. Roberts, 448 U.S. 56, 66 (1980). In determining whether to admit hearsay evidence under the Confrontation Clause, courts must presume that hearsay lacks trustworthiness. Idaho v. Wright, 497 U.S. 805, 821 (1990). Courts may then only admit hearsay if "an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance." Id. at 821. To withstand constitutional scrutiny, the hearsay evidence also "must be at least as reliable as evidence admitted under a firmly rooted hearsay exception." Id. In other words, the evidence must contain sufficient guarantees of trustworthiness to render cross-examination "of marginal utility." Id. at 820.

Ms. Gallegos' statements fail to satisfy these stringent standards. First, instead of presuming Ms. Gallegos' hearsay statements lacked reliability, the trial judge assumed that they were reliable because she made them to the police. R. 38: 102. The judge eliminated any doubt that he failed to appreciate the inherent unreliability of hearsay by concluding that "[i]t is pretty clear that the [the residual hearsay exception] allows this type of evidence to be admitted." R. 38: 103.

Second, viewing Ms. Gallegos' statements as ordinary factual assertions does not satisfy any recognized hearsay exception. Instead, that evidence was ordinary hearsay that embodied all of the concerns associated with admitting second-hand information without the scrutiny of cross-examination.

Third, the trial judge erroneously relied on extraneous evidence in admitting the statements. In determining the reliability of hearsay, the judge must limit the inquiry to "the circumstances surrounding the making of the statement." Wright, 497 U.S. at 820. In this case, the prosecutor persuaded the trial judge that the evidence was reliable because he claimed that Ms. Gallegos had agreed to verify her statements outside the jury's presence. The Confrontation Clause bars courts from relying on corroboration in determining the reliability of hearsay. Id. at 822-23; State v. Matsamas, 808 P.2d 1048, 1053-54 (Utah 1991).

Fourth, given the circumstances of Ms. Gallegos' statements, cross-examination was essential. Wright, 497 U.S. at 820. Ms. Gallegos' blame-shifting comments raise a

host of questions about her knowledge and intent in using the car and her motives in speaking to Officer Cupello. Moreover, Ms. Gallegos' admission that she used the car required follow-up inquiries about whether Mr. Webster explained the terms of his allowed use of the car, whether she had permission to use the car herself, and why she did not question Mr. Webster about using the car other than for a test-drive. Moreover, if she believed that Mr. Webster had returned the car on July 8, 1998, why didn't she noticed it in the parking lot for two days. Too many reasonable questions surrounded Ms. Gallegos' statements for them to be admitted absent cross-examination.

Thus, even characterizing Ms. Gallegos' statements as simple factual observations fails to supply the necessary guarantees of trustworthiness to admit them without violating the Confrontation Clause. Roberts, 448 U.S. at 66.

3. Ms. Gallegos' Hearsay Statements Irrefutably Harmed the Defense

Because Ms. Gallegos' statements provided the only evidence of the perpetrator's identity and intent, admitting those statements severely harmed the defense. This Court declares federal constitutional error harmless only when the error was "'harmless beyond a reasonable doubt.'" State v. Genovesi, 909 P.2d 916, 922 (Utah Ct. App. 1995) (quoting Scott v. State, 465 P.2d 620, 622 (Nev. 1970)). Because the remaining evidence did not establish who took the car and why that person did so, Ms. Gallegos' statements

were determinative in convicting Mr. Webster.

The State produced no physical evidence connecting Mr. Webster to the car. The police found no personal belongings in the car, nor did they obtain any fingerprints from it. Mr. Webster did not possess the keys to the car, and, in fact, the police never located them.

The only other evidence the State presented that Mr. Webster used the car was Mr. McGuire's testimony. The evidence indicates, however, that Mr. McGuire only saw Mr. Webster driving the car while Mr. Webster remained employed at Intermountain and when he likely had permission to use the car. Mr. McGuire informed the police that he saw Mr. Webster in the car on June 26, 1998, four days after the car was traded in. R. 38: 81. The police report of Mr. Webster's arrest lends further support to this date because it indicated that Mr. McGuire told the police he saw Webster two weeks before July 10, 1998. R. 38: 88-89. For some unexplained reason, the police crossed out that information. R. 38: 89.

Consistent with this information, Mr. McGuire testified that he saw Mr. Webster driving the car two or three days after Mr. Webster began his employment on June 24, 1998. R. 38: 80. Moreover, Intermountain inventoried the Nissan Stanza as being in stock on both July 1, and July 3, 1998. R. 38: 73.

Although the evidence did not indicate whether salespersons could test cars designated for wholesale, Mr. McGuire surely would have objected to Mr. Webster

driving such a car if Mr. Webster had acted inappropriately. The only logical inference that could be drawn from Ms. McGuire's testimony is that Mr. Webster drove the car on June 26, 1998 when he had permission to do so.

Given this inconclusive evidence, the admission of Ms. Gallegos' statements leveled a fatal blow to the defense. Only her statements showed Mr. Webster driving the car without permission. Admitting hearsay evidence particularly harms the defendant when, as here, the State uses it as "substantive evidence" to convict the defendant. Lee v. Illinois, 476 U.S. 530, 542 (1986). Because Ms. Gallegos' statements served as the only substantive evidence of guilt, the admission of that evidence requires reversal Id.

B. The Prosecutor Severely Harmed the Defense in Failing to Give Adequate Notice of Her Intent to Admit the Hearsay Evidence

The trial judge further erred in admitting Ms. Gallegos' statements because the prosecutor unfairly sabotaged the defense when she waited until the middle of trial to notify the defense of her intent to admit the statements under the residual hearsay exception. This Court generally reviews the trial court's decision to admit evidence for correctness. State v. Alonzo, 932 P.2d 606, 613 (Utah Ct. App. 1997). To obtain admission of hearsay under the residual exception, the party seeking admission must not only establish trustworthiness but also provide the opposing party notice prior to trial of an intent to admit the evidence:

[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.

Utah R. Evid. 804(b)(5).

The prosecutor first requested to admit Ms. Gallegos' statements under the residual exception after Ms. Gallegos invoked her right not to testify and after the prosecutor had presented the evidence establishing the factual context of the case. Thus, the prosecutor plainly failed to provide Mr. Webster notice "sufficiently in advance of the trial" of her intent to apply the residual exception. Utah R. Evid. 804(b)(5).

. This late notification deprived Mr. Webster of a "fair opportunity to prepare to meet" Ms. Gallegos' allegations. Utah R. Evid. 804(b)(5). The trial judge concluded that Mr. Webster had fair notice of the prosecutor's intentions because the defense knew before trial that the State wanted to call Ms. Gallegos to the stand. But, the trial judge failed to appreciate the severe harm the lack of notice caused the defense. Throughout the proceedings, defense counsel had communicated with Ms. Gallegos and assured himself that she would not testify. Defense counsel was so satisfied that Ms. Gallegos would not testify that he filed a pretrial motion requesting the trial judge to allow Ms. Gallegos to invoke her right not to testify outside the jury's presence. Defense counsel also properly concluded that no other hearsay exceptions supported admitting Ms. Gallegos'

statements. He then planned his defense accordingly.

Relying on his belief that the prosecutor could not admit Ms. Gallegos' statements, defense counsel argued during opening statements that the State could not establish "who drove the car to the place where the car was found." R. 38: 58. Defense counsel also emphasized the lack of physical evidence linking Mr. Webster to the car and he noted further the absence of any witnesses who saw Mr. Webster park the car in the apartment complex parking lot. R. 38: 58-59.

When the trial judge admitted those statements anyway, defense counsel was not prepared to rebut them. Instead, he could only claim in closing arguments that Ms. Gallegos hearsay statements did not conclusively establish that the car she and Mr. Webster had used was the same one missing from Intermountain. R. 38: 139. In contrast, the State heavily relied on Ms. Gallegos' statements during closing arguments to establish the critical elements of the offense of identity and intent to deprive. R. 38: 131-33.

The prosecutor's failure to adequately notify the defense devastated the defense case. Once the State admitted Ms. Gallegos' statements in the middle of trial, the jury could have only concluded that defense counsel lied during opening arguments. Likewise, the jury likely concluded that Mr. Webster lied when he told the police that he had not even touched the car. The hearsay evidence destroyed the defense's credibility and established the essential elements of the crime of wrongful appropriation.

Had the defense known the State planned to admit the hearsay statements under

the residual exception it likely would have prepared for trial much differently. The defense may have entered plea negotiations with a different perspective. It might have also reevaluated whether to oppose Ms. Gallegos' testimony, or, alternatively, to try to impeach her credibility. Instead, given the lack of notice, defense counsel could only argue unpersuasively that the State failed to prove that the car that Ms. Gallegos and Mr. Webster used was not the missing Nissan Stanza. It should also be remembered that the trial judge based his decision to admit evidence of Mr. Webster's prior offense on defense counsel's opening statement that the State could not prove the perpetrator's identity. The lack of notice, thus, had huge implications for the defense.

The notice requirement is designed to avoid these precise problems. Because the prosecutor failed to notify the defense before trial of her intent to apply the residual exception, the defense was not "prepare[d] to meet" the State's case in violation of Rule of Evidence 804(b)(5).

C. The Trial Judge Violated the Utah Constitutional Right Against Compelled Spousal Testimony When He Admitted Ms. Gallegos' Hearsay Statements After She Invoked That Right

Admitting Ms. Gallegos' hearsay statements violated the spousal right not to testify against the other spouse as guaranteed under Utah Constitution, Article I, section 12. That provision states in relevant part that "a wife shall not be compelled to testify

against her husband, nor a husband against his wife." Addendum G. Identical provisions are contained in Utah Code Annotated section 77-1-6(2)(d) (1999) and Utah Rule of Evidence 502(a). Although Ms. Gallegos did not testify against Mr. Webster, the trial judge's admission of her hearsay statements were the functional equivalent of spousal testimony.

The right of a spouse not to testify dates back to medieval common law. Trammel v. United States, 445 U.S. 40, 43-44 (1980). Traditionally, the common law barred a wife from testifying, at all, for or against her husband. Id. Today, spouses may testify on behalf of or against the other spouse but the witness spouse holds the privilege of choosing whether to do so. Id.; State v. Robertson, 932 P.2d 1219, 1227 (Utah 1997).

The chief policy supporting the privilege is to foster "the harmony and sanctity of the marriage relationship." Trammel, 445 U.S. at 44. Allowing a spouse to choose whether to testify avoids placing the spouse "in the unenviable position of either committing perjury or testifying to matters that are detrimental to his or her spouse, which could clearly lead to marital strife." Robertson, 932 P.2d at 1227. The privilege also avoids "the 'natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation.'" Id. (quoting 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2228 (McNaughton rev.1961)).

Most states have established some form of the privilege by statute, court rule or judicial decision. Despite the privilege, several of these jurisdictions allow the State to

admit a spouse's hearsay statements even when the spouse chooses not to testify. See, e.g., State v. DeWitt, 433 N.W.2d 325, 327 (Mich. Ct. App. 1988). These jurisdictions only bar actual testimony. Id.

In contrast, Utah protects the spousal right not to testify under its constitution. Utah is the only jurisdiction in the country that not only establishes a statutory privilege for spouses not to testify, but also deems the privilege as so important as to create a constitutional right against compelled spousal testimony. Utah's constitutional framers "enshrined" this right in the constitution in response to the federal government's practice of imprisoning and fining polygamous wives for their refusal to testify against their husbands. Paul G. Cassell, The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example, 1993 Utah L. Rev. 751, 816-17, 820 n.431. In numerous instances, the federal government imprisoned wives and their babies for several months. Edwin B. Firmage & Richard C. Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830-1900* at 138, 167, 149-50, 205-09. (1988). The risk of imprisonment created the "cruel dilemma" for wives of testifying and sending their husbands to prison or being sent to prison themselves.

Recognizing the potential for disrupting families and creating marital strife, the framers of the Utah Constitution included the spousal right not to testify in the Declaration of Rights. Cassell, supra at 820 n.431. According to the chairperson of the committee that drafted the Declaration, the committee included all those rights "which a

free and enlightened people, who have been too long kept in territorial bondage, have the right to expect." Official Report of the Proceedings and Debates of the Convention for the Constitution of the State of Utah at 200 (1989). The framers, thus, considered the spousal right not to testify as fundamental and essential.

Admitting a spouse's statements at trial through a third party undermines this right just as if the spouse had testified. When a spouse invokes the right not to testify, presumably that spouse does so with the design of promoting marital harmony and preserving the relationship. But, when the State skirts around the right and admits a spouse's incriminating statements through a third-party, marital harmony suffers just as if the spouse had testified. Whether the incriminating evidence comes from the spouse or through another, the source of the damaging information remains the same. In either case, the witness spouse reveals information that may convict and possibly imprison the defendant spouse.

Admitting a spouse's statements through another has the same effect as compelling the spouse to testify. Even though the spouse does not actually testify, the concerns for marital harmony and dissension remain. Not only will the defendant spouse likely harbor ill feelings against the witness spouse, but the witness spouse may also resent being the source of incriminating information. Robertson, 932 P.2d at 1227. The admission of the spouse's statements, even if the spouse asserts the right not to testify, may also cause the spouse to rethink the decision not to testify. In that situation, the witness spouse is placed

anew in the "unenviable position of either committing perjury or testifying to matters that are detrimental to his or her spouse, which could clearly lead to marital strife." Id. at 1227.

This case vividly illustrates these concerns. Ms. Gallegos' statements established the only evidence that Mr. Webster took the car without permission. This evidence provided substantive evidence of guilt and directly led to Mr. Webster's conviction. Given the damage Ms. Gallegos' statements caused Mr. Webster, it takes little effort to imagine the strife that the statements likely injected into their marriage.

The Utah Supreme Court implicitly recognized this potential for marital dissension. In State v. Carter, 888 P.2d P.2d 629 (Utah), cert. denied 516 U.S. 858 (1995), the Court considered whether the police may use a spouse's statements to investigate a crime which the police suspect that the other spouse has committed. There, the Court ruled that the marital privilege does not "'prevent[] the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.'" Id. at 638-39 (quoting Trammel v. United States, 445 U.S. 40, 52 n.12 (1980)) (fn. omitted). The Court added, however, that the State could only use such information to investigate a crime if "the witness spouse's statement is not introduced into evidence at trial over the objections of the accused spouse." Id. at 639. In that case, the State did not appear to have admitted the wife's statements but only used them to investigate the case.

In barring the State from presenting a spouse's statements at trial, the Court implicitly recognized that it is the admission of the spouse's statements themselves that undermines marital harmony, not the spouse's act of testifying. This concern for preserving marriages bars courts from admitting a spouse's statements incriminating the other spouse. Because the trial judge violated this constitutional provision in admitting Ms. Gallegos' hearsay statements, reversal is required.

II. THE ADMISSION OF AN UNCONNECTED PRIOR OFFENSE THAT OCCURRED SEVEN YEARS PREVIOUSLY WAS NOT RELEVANT TO THIS CASE BUT, INSTEAD, SHOWED BAD CHARACTER AND UNFAIRLY PREJUDICED THE JURY

Like the erroneous admission of the hearsay evidence, the trial judge abused his discretion in admitting evidence of a prior offense. See State v. Decorso, 1999 UT 57, ¶ 18, 993 P.2d 837 (applying abuse of discretion standard of review). Mr. Webster's prior offense in Virginia had no connection to the matter below and it occurred seven years previously when Mr. Webster was 18 years old. That incident simply served to bias the jury against Mr. Webster.

"It is fundamental to our law that a person may be convicted criminally only for his acts, not for his general character . . . or propensity to commit bad acts." State v. Saunders, 1999 UT 59, ¶ 15, 992 P.2d 951. Because "prior crimes may have such a powerful tendency to mislead the finder of fact," such evidence has limited admissibility.

Id. Under Rule of Evidence 404(b), the trial court may only admit evidence of prior bad acts for "noncharacter purpose[s]" such as motive, intent, common plan, or absence of mistake. Decorso, 1999 UT 57, ¶ 21, 993 P.2d 837; Addendum H.

Given the tremendous potential for confusing the jury, "admission of prior crimes evidence itself must be scrupulously examined by trial judges." Id. at ¶ 18. The trial judge failed to do so here. The trial judge admitted the prior offense based on defense counsel's claim during opening statements that the State could not identify who stole the car. R. 38: 93-94. But, once the trial judge admitted Ms. Gallegos' statements, identity was no longer at issue. Neither was intent or absence of mistake. The admission of Ms. Gallegos' statements, thus, obviated any need to admit the prior crime evidence. When the reasons for admitting evidence are not at issue, the trial court abuses its discretion in admitting such evidence. State v. Featherson, 781 P.2d 424, 430 (Utah 1989) (concluding trial judge "erred" in admitting prior crime evidence to show identity or intent when those issues not disputed).

Should this Court conclude that Ms. Gallegos' statements were inadmissible and a new trial become necessary, the prior act still would not be admissible to prove identity. The trial judge failed to specify how evidence of a similar crime that occurred seven years previously shows that Mr. Webster committed this offense. According to the presentence report, the prior offense occurred in Virginia on June 18, 1991, when Mr.

Webster was 18 years old.. R. 54: 1, 5.⁵ The present matter arose on July 10, 1998. The trial judge below failed to even consider this time gap.

The trial judge similarly failed to consider the circumstances surrounding the prior offense. When he admitted the statement, the judge only knew that Mr. Webster had been arrested in Virginia for "driving a vehicle off of a dealership lot." R. 38: 112. He did not inquire about whether the dealership employed Mr. Webster at the time of his arrest, the factual context when he took the car, or the disposition of the arrest. The trial judge's blanket acceptance of the evidence could hardly be considered a "scrupulous[] examin[ation]." Decorso, 1999 UT 57, ¶ 18, 993 P.2d 837.

Even if the trial judge had considered the details of the prior offense, the remoteness of that incident renders it of little probative value in establishing identity. Had the events occurred more closely together, perhaps the Virginia offense may have indicated some likelihood that Mr. Webster was the same person who committed both offenses. But, when the events occurred far apart, that offense offered the jury little use in establishing identity. Instead, it simply communicated to the jury a propensity to commit similar crimes. State v. Saunders, 1999 UT 59, ¶ 15, 992 P.2d 951.

The stale Virginia conviction similarly failed to address intent or absence of mistake. To be admissible, a prior act must have "clearly probative value with respect to

⁵The volume marked "R. 54" contains the presentence report. The internal page numbers of that volume follow the volume number.

the intent of the accused at the time of the offense charged.” State v. Featherson, 781 P.2d 424, 430 (Utah 1989) (quoting United States v. Scott, 701 F.2d 1340, 1345-46 (11th Cir.), cert. denied 464 U.S. 856 (1983)) (emphasis in original) (original citation omitted). This Court has concluded that offenses committed far more closely in time were still too remote to show the defendant’s intent in the present case. In State v. Cox, 787 P.2d 4, 5 (Utah Ct. App. 1990), the State accused the defendant of rape. After the defendant’s arrest, two women reported to police that the defendant had raped them two years previously. Id. The trial judge allowed both women to testify over the defendant’s objections. Id. This Court concluded that the two prior rapes were "too remote in time to the crime charged . . . [because] [t]here [wa]s no apparent connection between defendant’s earlier conduct and his intent" in the present situation. Id. at 6.

Like the prior offenses in Cox, Mr. Webster previously committed a similar offense. But, that crime was totally unconnected to this matter and does not address his intent below. It not only occurred seven years previously but it happened on the opposite side of the country.

Even if the trial judge did not abuse his discretion in admitting the prior conviction, the trial judge erred in concluding that the probative value of the evidence outweighed its potential for prejudice. State v. Decorso, 1999 UT 57, ¶ 23, 993 P.2d 837. In weighing the probative value and the potential for prejudice, courts consider several factors:

"[A] variety of matters must 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, 295-96 (Utah 1988) (quoting E. Cleary, McCormick on Evidence § 190 at 565 (3d Ed. 1984)).

As discussed above, the significant time gap between the offenses diminished the probative value of the prior conviction. In addition, the similarities between the facts below and the prior offense created a "powerful tendency to mislead the trier of fact." Saunders, 1999 UT 59, ¶ 15, 992 P.2d 951. Although the State presented no details about the Virginia offense, that evidence obviously implied that Mr. Webster had committed the same crime before. In fact, the similarities between the crimes may explain why the prosecutor only admitted Officer Cupello's statements rather than seeking actual evidence of the crime itself. The only logical and virtually inescapable inference the jury could have drawn from the admission of this near identical crime was that Mr. Webster committed both crimes.

The admission of the Virginia offense particularly packs a punch if this Court properly eliminates Ms. Gallegos' hearsay statements from the State's case. No physical evidence linked Mr. Webster to the car and no other witnesses saw him with it near the time the car was reported missing. Given the absence of evidence of guilt, the admission

a similar crime would simply invite the jury to convict Mr. Webster based on his prior offense. The potential for prejudice is too great to allow the jury to hear the evidence.

III. BECAUSE THE LEGISLATURE FAILED TO SPECIFY THE PUNISHMENT FOR THE CRIME OF WRONGFUL APPROPRIATION, UTAH LAW IMPOSED AN INFRACTION, OR, AT THE VERY LEAST, THE RULE OF LENITY REQUIRED THE TRIAL JUDGE TO IMPOSE A MISDEMEANOR

The trial judge erroneously sentenced Mr. Webster to a third degree felony.

Because the legislature had repealed the statute that listed the penalty for Mr. Webster's particular offense, Utah Code Annotated section 76-3-105(2) (1999) required the trial judge to impose an infraction. The rule of lenity and the prohibition against ex post facto laws also demand this result. The most the trial judge should have imposed was an A misdemeanor under the former statute.

As a threshold matter, the trial judge erroneously imposed a sentence "one degree lower" than theft as provided under subsection 3(a) of Utah Code Annotated section 76-6-404.5. Utah Code Ann. § 76-6-404.5 (Supp. 1998); Addendum B. The record establishes that the jury specifically convicted Mr. Webster under subsection 3(e) for "an act of unauthorized control of [a] motor vehicle[]." The State charged Mr. Webster in the information with misappropriating a "motor vehicle." R. 1. Likewise, the jury was specifically instructed that to convict Mr. Webster of wrongful appropriation, it had to

find that he exercised unauthorized control over a "motor vehicle." R. 29.5. Thus, the jury had to specifically find, as an element to the offense, that Mr. Webster took a vehicle.

Contrary to the jury instructions and the jury's verdict, the trial judge reasoned that because the State had charged Mr. Webster with a second degree felony under section 76-6-412, subsection 3(a) of section 76-6-404.5 imposed a third degree felony. The trial judge failed to recognize that subsection 3(e) of section 76-6-404.5 specified that "an act of unauthorized control of [a] motor vehicle[] . . . is punishable under Utah Code Annotated section 41-1a-1311." Utah Code Ann. § 76-6-404.5(3)(e) (Supp. 1998). Instead, the trial judge concluded that subsection 3(e) did not apply to Mr. Webster because that provision applied to "unauthorized control" of a motor vehicle rather than wrongfully appropriating a vehicle. R. 53: 13-14. The trial judge further failed to realize that section 76-6-404.5 defines the crime of wrongful appropriation as exercising "unauthorized control" over property. Utah Code Ann. § 76-6-404.5(1) (1999). The term "unauthorized control" is simply an element of the crime of wrongful appropriation. The trial judge's mistake is understandable because he admitted at sentencing that he had not read the defense motion to clarify the sentence. R. 53: 5.

Rules of statutory construction required the trial judge to sentence Mr. Webster under subsection 3(e). In construing statutes, "a more specific provision always takes precedence over a more general provision." State v. Hinson, 966 P.2d 273, 277 (Utah Ct.

App. 1998). The trial judge's reliance on section 76-6-412 was misplaced because that statute lists various punishments for theft depending on the type and value of the property taken. Utah Code Ann. § 76-6-412 (1999). Contrary to those general provisions, subsection 3(e) specifically applied to "an act of unauthorized control of [a] motor vehicle[.]" Utah Code Ann. § 76-6-404.5(3)(e) (Supp. 1998). Thus, under the rules of statutory construction, subsection 3(e) controlled.

However, at the time of Mr. Webster's offense, the legislature had not specified the punishment under subsection 3(e). Effective May 4, 1998, two months prior to Mr. Webster's offense, the legislature repealed Utah Code Annotated section 41-1a-1311, the statute referred to in subsection 3(e) that listed the penalty. Utah Code Ann. § 41-1a-1311 (1998); Addendum D. Accordingly, at the time of Mr. Webster's offense, the legislature had failed to specify the punishment for his crime.

The legislature has provided a remedy when it fails to specify the penalty for an offense. Under Utah Code Annotated section 76-3-105(2) (1999), "any offense defined outside this code which is not designated as a felony or a misdemeanor and for which no penalty is specified is an infraction." Thus, by default, the legislature punished wrongful appropriation of a vehicle as an infraction.

The rule of lenity in criminal cases agrees. It is well-settled that "'in case of doubt or uncertainty as to the degree of crime, [the accused] is entitled to the lesser.'" State v. Patience, 944 P.2d 381, 385 (Utah Ct. App. 1997) (quoting State v. Tapp, 490 P.2d 334,

336 (Utah 1971)). Given the uncertainty surrounding the punishment under subsection 3(e), the trial judge was required to impose the least possible punishment.

The constitutional prohibition against ex post fact laws lends further support to this conclusion. Utah Const. art. I, § 18; U.S. Const. art. I, § 9, cl. 3. An amendment to a sentencing statute violates the ban against ex post facto laws if it makes the punishment for a crime more "'burdensome'" after the crime is committed. State v. Dominguez, 1999 UT App. 343, ¶12, 992 P.2d 995 (quoting Dobbert v. Florida, 432 U.S. 282, 292 (1977)). In this case, the punishment under subsection 3(e) was, by default, an infraction. But, at the time of sentencing, the legislature had repealed subsection 3(e). Utah Code Ann. § 76-6-404.5 (1999). Instead, the unauthorized use of a vehicle was punishable as a third degree felony either under section 76-6-404.5(3)(a) or under Utah Code Annotated section 41-1a-1314 (1998), commonly referred to as the "joyriding statute." This increased punishment, thus, created an ex post facto law.

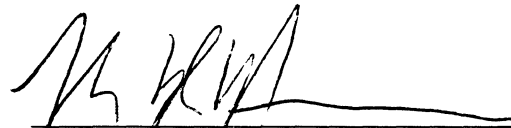
At the very least, the trial judge could have only sentenced Mr. Webster for an A misdemeanor. Prior to its repeal, section 41-1a-1311 imposed an A misdemeanor for unauthorized use of a vehicle. Because the legislature had failed to specify the punishment for Mr. Webster's crime, the trial judge could have reasonably applied the former punishment.

CONCLUSION

This Court should reverse Mr. Webster's conviction and remand for a new trial, or in the alternative, vacate his sentence and order the trial judge to impose an infraction.

Dated this 1st day of May, 2000.

KENT R. HART
Attorney for Defendant/Appellant



ROBERT K. HEINEMAN
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, KENT R. HART, hereby certify that I have caused to be delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of May, 2000.


KENT R. HART

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of May, 2000.

ADDENDA

ADDENDUM A

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. BURTON
District Court Judge

ADDENDUM B

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.

(Supp. 1998)

ADDENDUM C

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.

ADDENDUM D

~~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.

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. 50, § 1; 1941 (2nd S.S.), ch. 12, § 1; C. 1943, 57-3a-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, § 168.

Amendment Notes. — The 1992 amendment, effective January 30, 1992, renumbered this section, which formerly appeared as § 41-1-109; substituted "motor vehicle, trailer, or semitrailer" for "vehicle" in three places; de-

leted former Subsection (2) which made an offense under the section a third-degree felony if the vehicle was not returned within 24 hours; redesignated former Subsections (3) and (4) as Subsections (2) and (3); and made stylistic changes.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

ADDENDUM E

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.

ADDENDUM F

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.

ADDENDUM G

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.

ADDENDUM H

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes. .

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* 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.

(Amended effective October 1, 1992; February 11, 1998.)

ADDENDUM I

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; and

(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.

(1999)

ADDENDUM J

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.)

Advisory Committee Note. — Subdivision (a) is comparable to Rule 63(7) [Rule 62(7)], Utah Rules of Evidence (1971). Rule 62(7)(e)], Utah Rules of Evidence (1971), seems to be encompassed in Rule 804(a)(5). Subdivision (a)(5) is a modification of the federal rule which permits judicial discretion to be applied in determining unavailability of a witness.

Subdivision (b)(1) is comparable to Rule 63(3), Utah Rules of Evidence (1971), but the

former rule is broader to the extent that it did not limit the admission of the testimony to a situation where the party to the action had the interest and opportunity to develop the testimony. *Condas v. Condas*, 618 P.2d 491 (Utah 1980); *State v. Brooks*, 638 P.2d 537 (Utah 1981).

Subdivision (b)(2) is comparable to Rule 63(5), Utah Rules of Evidence (1971), but the former rule was not limited to declarations

ADDENDUM K

41-1a-1314. Unauthorized control for extended time.

(1) Except as provided in Subsection (3), 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 the 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) Violation of this section is a third degree felony if:

(a) the person does not return the motor vehicle, trailer, or semitrailer to the owner or lawful custodian within 24 hours after the exercise of unlawful control; or

(b) regardless of the mental state or conduct of the person committing the offense:

(i) the motor vehicle, trailer, or semitrailer is damaged in an amount of \$500 or more;

(ii) the motor vehicle, trailer, or semitrailer is used to commit a felony; or

(iii) the motor vehicle, trailer, or semitrailer is damaged in any amount to facilitate entry into it or its operation.

(4) It is not a defense to Subsection (3)(a) that someone other than the person, or an agent of the person, returned the motor vehicle, trailer, or semitrailer within 24 hours.

ADDENDUM L

Art. I, § 18

CONSTITUTION OF UTAH

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

ADDENDUM M

Sec. 9. [Powers denied Congress.]

[1.] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No Bill of Attainder or ex post facto Law shall be passed.

[4.] No Capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5.] No Tax or Duty shall be laid on Articles exported from any State.

[6.] No Preference shall be given by any Regulation of Commerce of Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7.] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8.] No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.