

1999

Utah v. Hansen : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Utah v. Hansen*, No. 990856 (Utah Court of Appeals, 1999).

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH :
Plaintiff/Appellee, : Case No. 990856-CA
v. :
DAVID L. HANSEN, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR THEFT OF A MOTOR VEHICLE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-6-404 (1999) AND 76-6-412 (1999), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

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FILED

Utah Court of Appeals

JUL 26 2000

Julia D'Alessandro
Clerk of the Court

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
I. DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE WAS NOT PREJUDICED BY TRIAL COUNSEL’S FAILURE TO REQUEST A JURY INSTRUCTION ON THE STATUTORY DEFENSES TO THEFT	10
A. The State Concedes Defendant’s Trial Counsel was Deficient In Failing to Request an Affirmative Defense Jury Instruction.	10
B. Defendant has not Met his Burden under the Ineffective Assistance Prejudice Prong.	12
II. THE TRIAL COURT’S OBVIOUS ERROR IN FAILING TO SUA SPONTE INSTRUCT THE JURY ON AFFIRMATIVE DEFENSES DID NOT RESULT IN MANIFEST INJUSTICE BECAUSE EVIDENCE OF DEFENDANT’S GUILT WAS COMPELLING . . .	17

A.	The State does not Contest that Obvious Error Prongs of the Plain Error Test have been Met.	18
B.	Defendant has not Met his Burden Under the Plain Error Prejudice Prong.	21
CONCLUSION		22

ADDENDA

ADDENDUM A - Constitutional Provisions, Statutes, and Rules

ADDENDUM B - Certificate of Title

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984)	10
--	----

STATE CASES

<i>State v. Brown</i> , 948 P.2d 337 (Utah 1997)	20
<i>State v. Bullock</i> , 791 P.2d 155 (Utah 1989)	10
<i>State v. Davis</i> , 711 P.2d 232 (Utah 1985)	19
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993)	18, 21
<i>State v. Ellifritz</i> , 835 P.2d 170 (Utah App. 1992)	21
<i>State v. Finlayson</i> , 956 P.2d 283 (Utah App. 1998), <i>aff'd</i> , 2000 UT 10, 994 P.2d 1243	12
<i>State v. Hamilton</i> , 827 P.2d 232 (Utah 1992)	12, 21
<i>State v. Labrum</i> , 925 P.2d 937 (Utah 1996)	18, 20
<i>State v. Maestas</i> , 1999 UT 32, 984 P.2d 376	11
<i>State v. Maestas</i> , 2000 Utah Ct. App. 22, 388 Utah Adv. Rep. 35	1, 2
<i>State v. Munson</i> , 972 P.2d 418 (Utah 1998)	12
<i>State v. Olsen</i> , 869 P.2d 1004 (Utah App. 1994)	13, 21
<i>State v. Parker</i> , 2000 UT 51, ___ P.2d ___	21
<i>State v. Robertson</i> , 932 P.2d 1219 (Utah 1997)	19
<i>State v. Sessions</i> , 645 P.2d 643 (Utah 1982)	19

<i>State v. Smith</i> , 706 P.2d 1052 (Utah 1985)	18
<i>State v. Standiford</i> , 769 P.2d 254 (Utah 1988)	19
<i>State v. Stringham</i> , 957 P.2d 602 (Utah App. 1998)	17, 19
<i>State v. Tennyson</i> , 850 P.2d 461 (Utah App. 1993)	10
<i>State v. Verde</i> , 770 P.2d 116 (Utah 1989)	17
<i>State v. Winward</i> , 941 P.2d 627 (Utah App. 1997)	11

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-3-201	3
Utah Code Ann. § 76-4-404 (1999)	13
Utah Code Ann. § 76-6-402 (1995)	20
Utah Code Ann. § 76-6-402 (1999)	2, 10, 20
Utah Code Ann. § 76-6-404 (1995)	1
Utah Code Ann. § 76-6-404 (1999)	2, 20
Utah Code Ann. § 76-6-412 (1995)	1
Utah Code Ann. § 76-6-412 (1999)	2
Utah Code Ann. § 78-2a-3 (1996)	2
Utah R. Crim. P.19	2, 17
Utah R. App. P. 4	3
Utah R. Crim. P. 19	18

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DAVID L. HANSEN	:	Priority No. 2
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for theft of a motor vehicle, a second degree felony, in violation of Utah Code Ann. §§ 76-6-404 (1995) and 76-4-412 (Supp. 1995), in the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable Ray M. Harding, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES ON APPEAL AND
STANDARDS OF APPELLATE REVIEW

1. Did defendant receive ineffective assistance from his trial counsel who failed to request a jury instruction on the statutory affirmative defenses to theft? A claim of ineffective assistance raised for the first time on appeal is reviewed for correctness. *State v. Maestas*, 2000 Utah Ct. App. 22, ¶ 11,388 Utah Adv. Rep. 35 (citing *State v. Simmons*, 866 P.2d 614, 618 (Utah Ct. App. 1993)).

2. Did the trial court commit plain error in failing to sua sponte give the same jury instruction on the statutory affirmative defenses to theft referenced in Point I?

This issue is reviewed under the same standard referenced in Point I. *Maestas*, 2000 Utah Ct. App. at ¶ 11.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following rules and statutory provisions are attached at Addendum A:

Rule 19, Utah Rules of Criminal Procedure;
Utah Code Ann. § 76-6-402 (1999);
Utah Code Ann. § 76-6-404 (1999);
Utah Code Ann. § 76-6-412 (1999).

STATEMENT OF THE CASE

Defendant, David L. Hansen, was charged with one count of theft of a motor vehicle, a second degree felony (R. 3). A jury found defendant guilty (R. 177). The trial court sentenced defendant on August 18, 1995, to an indeterminate term of one to fifteen years to be served concurrently with a sentence defendant was already serving for forgery (R. 183-184). The court also ordered defendant to pay \$817 in restitution (R. 183-184). Defendant requested a restitution hearing and motioned for a stay of the time requirement for filing a notice of appeal until after the restitution hearing (R. 186, 188). The trial court granted defendant's motion to stay the time for filing an appeal until thirty days following the restitution hearing (R. 190). A restitution hearing was held on October 18, 1995 (R. 193). Defendant filed a notice of appeal on November

17, 1995 (R. 199).

This Court sua sponte dismissed defendant's appeal for lack of jurisdiction due to an untimely filing of notice of appeal (R. 214-215).¹ Defendant was resentenced on September 1, 1999, (R. 239; 252), and filed a timely notice of appeal on September 30, 1999 (R. 242).

STATEMENT OF THE FACTS

Defendant borrowed Kevin Edwards' truck and Shar Pei dog on the evening of April 6, 1994, and went "up to the stripper's bar up in Salt Lake" (R. 249:57-58, 60, 70-71). Edwards never saw his truck or dog, nor heard from defendant, again (R. 249:58-60).

The Job

Defendant met Kevin Edwards in jail in early 1994 (R. 249:109). Kevin gave defendant his mother's home telephone number and told defendant to call if he ever needed a ride (R. 249:97-98). A day or so before April 6, 1994, defendant called Kevin's mother, Bethany Westwood, at her home at 139 North 500 East in Provo, Utah

¹ In a memorandum decision, this Court held that under Utah Code Ann. § 76-3-201(8)(d), "the sentencing process can be completed even if the restitution determination is deferred" (R. 214-215). Judgment was final in this case when defendant was sentenced on August 15, 1995, despite the pendency of a restitution hearing (R. 215). Thus, the trial court's extension of defendant's time to appeal until thirty days from the November 21, 1995, entry of an order modifying restitution, impermissibly extended defendant's time for filing a notice of appeal beyond the extra thirty days allowed by Rule 4(e) of the Utah Rules of Appellate Procedure (R. 214-215).

(the east-side home) (R. 249:44). Kevin was living at another home owned by his mother at 355 South 600 West in Provo, Utah (the west-side home) (R. 249:54). Defendant did not have much money (R. 249:60). “His wife had left him or kicked him out of the house. He had no place to go” (R. 249:57). Defendant briefly told Bethany that he needed a job and “asked if he could go down to the house that [Kevin] live[d] in and help clean the yard” (R. 249:44). Defendant stayed with Kevin for a few days, and Kevin put him to work “clean[ing] up the basement and the back room of the home at 355 South 600 West” (R. 249:57-58). Defendant had very little money during the time he lived with Kevin, and Kevin was not aware of defendant having any other source of income (R. 249:57, 60).

The Truck and the Dog

In 1971, Kevin’s father bought a new GMC pickup truck (R. 249:45, 55). When his father died, Kevin traded another car with his mother in exchange for the 1971 GMC truck (R. 249:55). Accordingly, Kevin’s name appeared in the “Owner Information Section” of the truck’s title (R. 249:55; State’s Exhibit 1, attached at Addendum B). In 1988, Kevin borrowed about \$3,500 from his mother to make repairs to the truck (R. 249:45, 56, 65). The repairs consisted primarily of completely rebuilding the engine (R. 45-46, 56, 65). Bethany insisted that Kevin sign the title over to her as security for the loan (R. 249:48, 50-51, 56). Pursuant to her request, Bethany’s name was added to the “New Owner’s Section” of the title, and Kevin signed

his name in the “Owner’s Transfer” section of the title on November 30, 1988 (R. 249:50-51, 53, 56; State’s Exhibit 1). A notary public witnessed Kevin’s signature, signed the title, and date stamped the document on November 30, 1988 (R. 249:50, 53, 113; State’s Exhibit 1).

Bethany had kept the title to the truck in a drawer in her home until she transferred ownership to Kevin (R. 249:48). When Kevin signed ownership back over to Bethany, he did not give her back the title document itself; “[a]bout that time [she] had back surgery, and [she] was very ill” (R. 249:48-49). For “probably a year” before the theft of the truck, Kevin had kept the title to the truck in the truck’s glove compartment (R. 249:56-57).

Kevin also owned a pedigreed Shar Pei dog worth at least \$500, and his backyard was securely fenced to keep in the dog (R. 249:58-59, 61-62, 71, 85; State’s Exhibit 2). The Shar Pei liked defendant (R. 249:61).

The Theft

During the evening of April 6, 1994, defendant and Kevin sat around drinking at the east-side home where Kevin lived and discussed going to a stripper bar in Salt Lake City (R. 249:58, 62-63, 69-70). As they were getting ready to leave, Kevin’s friend Charlie Peterson stopped by to invite Kevin to go to an Alcoholics Anonymous meeting (R. 249:58, 69-70). While Kevin was changing his shirt, defendant told Charlie about his marital problems and that “Kevin was going to let him stay there for a few days

until he could . . . get on his feet” (R. 249:69-70, 74-75). Kevin decided to go with Charlie to the meeting instead of with defendant to the stripper bar (R. 249:58, 63, 70). Defendant, however, still wanted to go to the stripper bar and asked Kevin if he could borrow Kevin’s truck and take the dog with him (R. 249:58, 61, 70-71). Kevin was at first reluctant to let defendant take the dog, but he ultimately told defendant that he could take the truck and the dog saying, “But I want you back in a few hours” (R. 249:58, 71-72). Defendant indicated that “he was going to be back later that evening” (R. 249:70-71). As Kevin and Charlie left to go to the Alcoholics Anonymous meeting, they observed defendant “putting the dog in the front seat of the truck” (R. 249:60, 71). “And that was the last time [Kevin saw defendant] until all of this came about” (R. 249:58-60). When defendant did not return with the truck and the dog, Kevin called and informed his mother (R. 249:46, 60-61). Bethany then called the police and reported that both the car and the dog had been stolen (R. 249:46, 78-79, 84-85).

The Crash and Discovery

After taking the truck, defendant stayed in Utah for about a week and a half (R. 249:103). Although he later claimed Kevin had sold him the truck, defendant did not attempt to register it in Utah during that time (R. 249:99-100, 103, 113). Defendant then drove the truck to Montana (R. 249:102-103). He did not attempt to register the truck in Montana (R. 249:103). After two weeks in Montana, defendant crashed the

truck (R. 249:103). Defendant was taken to the hospital, and the truck was towed to a private wrecking yard (R. 249:103-104, 109).

After getting out of the hospital, defendant “parted the truck out,” selling the rebuilt 350 Chevy engine to Jerry Dawson (R. 249:89, 103). Jerry never inquired about defendant’s ownership of the truck because he intended to buy just the engine and “[defendant] was selling it, so I just assumed [he owned it]” (R. 249:89-92). The owner of the wrecking yard did not want the truck on her yard (R. 249:91, 93). She told Jerry that the truck had to be moved from her premises (R. 249:90-91, 94). Consequently, Jerry and a friend, who wanted the rear end of the truck, hauled it to Jerry’s friend’s logging property a block and a half from the wrecking yard (R. 249:93-94).

Jerry was later contacted by Provo City detectives who asked if Jerry knew where the title to the truck was (R. 249:94-95). Jerry told them he did not, “but [he] said [he] still thought the cab was down there at the logging place. So . . . [he] went down there and opened the glove box, and all the paperwork was in the glove box” (R. 249:95).

Defendant was subsequently charged with second degree felony theft of a motor vehicle (R. 3). The Shar Pei dog was never recovered (R. 249:59, 115).

The Defendant’s Story

Defendant testified in his own behalf at trial (R. 249:96). He acknowledged

staying with Kevin and did not contest that he took Kevin's truck to Montana with the intent to keep it (R. 249:99, 102-103, 113). Defendant admitted that he had no bill of sale for the truck, that his name was not on the title to the truck, and that, in fact, there was nothing "on [the title] that would indicate to [defendant] that that vehicle [wa]s [his]" (R. 249:111-112). He maintained, however, that he paid Kevin \$650 for the truck and believed that ownership of the truck had been transferred to him (R. 249:99-100, 113). Shown the title to the truck at trial, defendant identified Kevin's signature in the "Owners Transfer" section, a notary's signature dated November 30, 1988, and Bethany's name in the "New Owner's" section (R. 249:113). Even though Bethany's name appeared in the "New Owner's" section of the title, defendant saw no need to check with her regarding sale of the truck (R. 249:113). Defendant claimed he assumed that merely having Kevin's signature, along with the notary's signature and date stamp, on the title was sufficient to transfer ownership to him (R. 249:104, 112-113).

Defendant denied taking the Shar Pei dog, asserting that it was in Kevin's back yard when he (defendant) left with the truck (R. 249:104,115).

SUMMARY OF ARGUMENT

POINT I

Although the State concedes that defense counsel was deficient in failing to request a statutory affirmative defense instruction, defendant has failed to show that he

was prejudiced because evidence of his guilt was compelling. Defendant, apparently impecunious, took the victim's truck and valuable dog, later claiming that he had purchased the former. However, no bill of sale accompanied the alleged purchase and a valid title, later found in the truck, showed no sign of defendant's alleged interest in the truck. Further, defendant never attempted to contact the victim about either the truck or the missing dog. Finally, notwithstanding the absence of an honest-claim-of-right or honest-belief-to-control instruction, the jury could not have been deaf to defendant's repeated expression of his defense theories, or failed to consider them in light of the clear language of the elements instruction.

POINT II

The State concedes that the trial court committed obvious error in failing to submit an appropriate affirmative defense instruction. Defendant's trial counsel could not have had a strategic basis for failing to request an instruction on the theory of the defense, clearly raised by the evidence, and the affirmative defenses to theft are statutorily provided for and actually appear in close proximity in the Criminal Code to the statute providing for the offense of theft. However, as fully set out in Point I, defendant was not prejudiced.

ARGUMENT

POINT I

DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO REQUEST A JURY INSTRUCTION ON THE STATUTORY DEFENSES TO THEFT

Defendant claims that his trial counsel's failure to request an instruction on the statutory affirmative defenses to theft constituted ineffective assistance of counsel. Aplt. Br. at 11-14. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel rendered a deficient performance and that but for the deficiency there was "a reasonable probability of a more favorable outcome." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *see also State v. Bullock*, 791 p.2d 155, 159-60 (Utah 1989); *State v. Tennyson*, 850 P.2d 461, 465 (Utah App. 1993).

A. The State Concedes Defendant's Trial Counsel was Deficient In Failing to Request an Affirmative Defense Jury Instruction.

Specifically, defendant claims that his trial counsel failed to request an instruction on the affirmative defenses provided for by Utah Code Ann. § 76-6-402 (1999), which states, in pertinent part:

- (3) It is a defense under this part that the actor:
 - (a) Acted under an honest claim of right to the property or service involved; or
 - (b) Acted in the honest belief that he had the right to obtain or exercise

control over the property or service as he did[.]

The State concedes that defendant's trial counsel was deficient in failing to request a jury instruction encompassing these two statutory defenses. "To prevail on a claim of ineffective assistance, appellant must demonstrate "that counsel's actions were not conscious trial strategy," and "that there was a "lack of any conceivable tactical basis for counsel's actions."'" *State v. Winward*, 941 P.2d 627, 633 (Utah App. 1997). *See State v. Maestas*, 1999 UT 32, ¶ 32, 984 P.2d 376 (finding counsel deficient for failing to request an eyewitness identification instruction when "[t]he record does not reveal any reasonable tactic that would ameliorate or explain that deficiency").

It is perfectly plain from defendant's testimony (R. 249:100-01, 104, 113, 116), and trial counsel's opening statement (R. 249:41-42) and closing argument (R. 249:130-31) that the theory of the defense was that defendant had an honest claim of right to the truck and believed he had a right to exercise control of the truck. Nothing in the record satisfactorily explains trial counsel's failure to request an instruction that would have provided the jury with clear grounds for acquittal if it found the facts accordingly. Therefore, defendant has satisfied the first prong of *Strickland*. Nonetheless, defendant's claim of ineffective assistance fails.

B. Defendant has not Met his Burden under the Ineffective Assistance Prejudice Prong.

“To establish the prejudice prong [of ineffective assistance of counsel], the defendant must show ‘a reasonable probability exists that except for ineffective counsel, the result would have been different.’” *State v. Munson*, 972 P.2d 418, 422 (Utah 1998) (quoting *State v. Lovell*, 758 P.2d 909, 913 (Utah 1988)). ““A reasonable probability is a probability sufficient to undermine confidence in the outcome.”” *State v. Finlayson*, 956 P.2d 283, 293 (Utah App. 1998) (quoting *State v. Hall*, 946 P.2d 712, 719 (Utah Ct. App. 1997) (quoting *Strickland*, 466 U.S. at 694)), *aff’d* 2000 UT 10, 994 P.2d 1243. In determining whether an error was harmful, a court considers a number of factors, including “the overall strength of the State’s case.” *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992); *State v. Olsen*, 869 P.2d 1004, 1011 (Utah App. 1994). “The more evidence supporting the verdict, the less likely there was harmful error.” *Hamilton*, 827 P.2d at 240.

In order to prove defendant guilty of theft of a motor vehicle, the prosecution was required to prove that defendant “obtain[ed] or exercise[ed] unauthorized control over the property of another with a purpose to deprive him thereof.” Utah Code Ann. § 76-4-404 (1999). The evidence of defendant’s guilt is compelling. Defendant admitted that he took Kevin’s truck to Montana with the intent to keep it (R. 249:102-103, 113). The only contested issue was whether defendant acted in the honest belief

that he was owner of the truck when he took it.

Defendant admitted that he had no bill of sale for the truck (R. 249:111-112). Also, assuming *arguendo* that defendant saw the truck's title before leaving Kevin's home the evening of April 6, 1994, defendant acknowledged that he knew his name did not appear on the title (R. 249:112). In fact, defendant testified that there was nothing "on [the title] that would indicate to [defendant] that that vehicle [wa]s [his]" (R. 249:112). Defendant maintained, however, that "[Bethany's] signature was on it, [Kevin's] signature was on it, and it was notarized. I thought it was fine" (R. 249:113).

Defendant's purported reliance on these signatures is, by itself, sufficiently compelling evidence that he did not honestly believe himself to be the owner of the truck and to sustain his conviction. Kevin's signature on the title appears in the "Owner's Transfer" section plainly dated November 30, 1988 (R. 249:50, 52-53, 113; State's Exhibit 1). The notary's signature also appears in the "Owners Transfer" section in witness of Kevin's signature and is also plainly date-stamped November 30, 1988 (R. 249:50, 52-53, 113; State's Exhibit 1). Bethany's name appears directly below those signatures in the "New Owners" section of the title (R. 249:50-51, 113; State's Exhibit 1). Defendant was thirty-three years old when he allegedly purchased the truck (Defendant's Exhibit 5). He has a high school education and is able to read English well (R. 249:107). He can not reasonably be thought to have had an honest

belief that a notarized signature from November 8, 1988, could transfer ownership to him on the evening of April 6, 1994, especially when the name appearing in the “New Owners” section was Bethany Westwood’s and not his own.

Moreover, the clear weight of evidence suggests that defendant never saw the title from Kevin, but rather subsequently manufactured an inconsistent story about the alleged transfer of the title. Kevin testified that he kept the truck’s title in the glove compartment of the truck for about a year prior to defendant taking the truck (R. 249:57). Defense counsel unsuccessfully sought to elicit from Kevin that he had gone to his mother’s east-side home with defendant to get the title to give to defendant (R. 249:64). However, defendant himself testified that Kevin went into the bedroom of “his home” and came back with the title, never asserting that he went with Kevin to Bethany’s east-side home (R. 249:101). After wrecking the truck and selling the engine, defendant abandoned the truck and did not take the title with him (R. 249:88-91, 93-95). In fact, the title was eventually discovered in the glove compartment where Kevin testified it had been all along (R. 249:95).

Further, the presence of the title in the glove compartment defendant does not suggest that defendant acted with the honest belief that he owned the truck. Defendant said that he remained in Utah for a week and a half before leaving for Montana, yet he did not attempt to register the truck during that time (R. 249:103). Defendant was then in Montana for two and a half weeks before wrecking the truck, yet he never attempted

to register the truck during that time either (R. 249:103).

The taking and failure to return Kevin's dog also suggests defendant's intent to permanently deprive Kevin of his truck. Kevin testified that defendant also took Kevin's pure bred Shar Pei dog valued at \$500 (R. 249:58-59).² Although defendant claims to have legitimately purchased the truck, he never offered an explanation for his failure to return Kevin's dog, and there is no evidence that he ever tried to contact Kevin about the dog's disappearance (R. 249:60).

Defendant's impecunious circumstances also strongly suggest a motive to steal the truck and a valuable dog. Kevin testified that defendant had been kicked out of his house and needed money (R. 249:57-58, 60). Defendant admitted that he had no car, that he had stayed at least one night at Kevin's home, and that he spent at least two weekdays doing nothing but sitting around drinking Kevin's booze (R. 249:97-99, 110-111; Defense Exhibit 5 (showing April 6, 1994, was a Wednesday)). Bethany testified that defendant called saying he needed a job, (R. 249:44), and Charlie testified that defendant told him Kevin was letting defendant stay with him until "he could get a job or get on his feet" (R. 249:75). In sum, because the evidence of defendant's guilt was compelling, there was no reasonable likelihood of a more favorable outcome even if

² Police reports indicate that Bethany reported both the truck and dog missing (R. 249:84-86; Defense Exhibit 5). That defendant left with the dog is also corroborated by Charlie Peterson, who said that he saw defendant put the dog in the front seat of the truck before leaving Kevin's home (R. 249:71).

defendant's trial counsel had requested an affirmative defense instruction.

Finally, notwithstanding the absence of an appropriate affirmative defense instruction, the jury could not have been deaf to defendant's honest-claim-of-right or honest-belief-to-control theories and that they provided grounds for acquittal if proven. The elements instruction for motor vehicle theft required the jury find beyond a reasonable doubt that defendant,

4. Obtained or exercised unauthorized control over the property of another,
5. With the purpose to deprive the owner thereof[.]

(R. 119).

Defense counsel told the jury in his opening statement that defendant would claim he purchased the truck legitimately, but was inexperienced in handling the paper trail connected with such a purchase (R. 249:41-42). In accord, defendant testified that: (1) he purchased the truck for \$650 (R. 249:100); he was naive about the vehicle purchase requirements, never having purchased a vehicle privately (R. 249:100); (3) he thought all he needed was a signed title (R. 249:101); (4) he believed he was the owner of the car because the title of the truck appeared proper to him (R. 249:104, 116); (4) based on his belief that he was the owner of the truck, he did not feel any obligation to return it (R. 249:104, 106); and (5) he assumed he had good title in spite of Bethany's name being in the "New Owner's" section of the title (R. 249:113). Thereafter, defense counsel reiterated in closing argument that defendant

thought the title was legitimate, that such a title would appear valid to an inexperienced buyer, and that defendant intended to buy, not to steal the truck (R. 249: 130-33). Plainly, the jury heard defendant's theories and, considering the requirements of the elements instruction, rejected them.

Given the compelling evidence that defendant neither took the truck lawfully nor acted with the honest belief that he took the truck lawfully, defendant has not met his burden of showing that he was prejudiced by the lack of a jury instruction on the defenses to theft.

POINT II

THE TRIAL COURT'S OBVIOUS ERROR IN FAILING TO SUA SPONTE INSTRUCT THE JURY ON AFFIRMATIVE DEFENSES DID NOT RESULT IN MANIFEST INJUSTICE BECAUSE EVIDENCE OF DEFENDANT'S GUILT WAS COMPELLING

Although he did not object at trial, defendant now asserts that the trial court committed plain error by failing to instruct the jury on the same [statutory] affirmative defenses to the offense of theft which his counsel deficiently failed to request. Aplt. Br. at 9. "[J]ury instructions to which a party failed to object at trial will not be reviewed absent a showing of manifest injustice." *State v. Stringham*, 957 P.2d 602, 608 (Utah App. 1998) (quoting *State v. Gibson*, 908 P.2d 352, 354 (Utah App. 1995); Utah R. of Crim. Proc. 19(c). "[I]n most circumstances, the term 'manifest injustice' is synonymous with the 'plain error' standard[.]" *State v. Verde*, 770 P.2d 116, 121-

122 (Utah 1989). In order to show plain error, defendant must show: “(i) an error exists; (ii) the error should have been obvious to the trial court; (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant[.]” *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

**A. The State does not Contest that Obvious Error
Prongs of the Plain Error Test have been Met.**

For purposes of this appeal and in the unique circumstances of this case, the State does not contest that the obvious error prongs of the plain error test have been met. The failure to contest this issue should not, however, be construed as a concession that a trial court is generally under a duty to sua sponte instruct the jury on all defensive issues arguably raised by the evidence. *See State v. Smith*, 706 P.2d 1052, 1058 (Utah 1985) (holding that where there was no proposed instruction, and where the defense theory argued on appeal was not *obvious* to the trial court from the evidence, the trial court had no duty to sua sponte instruct the jury on the defense theory). “[C]ourts are not required to constantly survey or second-guess the nonobjecting party’s best interests or trial strategy.” *State v. Labrum*, 925 P.2d 937, 939 (Utah 1996) (only when “errors are particularly obvious or egregious and would serve no conceivable strategic purpose” that courts must act sua sponte to prevent “a manifest procedural or substantial injustice”).

Moreover, this Court will find a trial court’s instructions adequate if they “g[ive]

defendant the legal framework for his theory of the case.” *State v. Standiford*, 769 P.2d 254, 266 (Utah 1988). Instructions will be sufficient so long as they correctly state the law and “allow[] defendant to argue his theory of the case.” *State v. Davis*, 711 P.2d 232, 233 (Utah 1985). *See also State v. Sessions*, 645 P.2d 643, 647 (Utah 1982) (the trial court need not give a proposed instruction “if the point is properly covered in the other instructions”).

Arguably the trial court did not commit plain error because, as suggested above, *see* Aple. Br. at 15-16, the elements instruction necessarily required the jury to consider defendant’s affirmative defense theory. The instruction required the jury to find defendant guilty only if it found beyond a reasonable doubt that, “with a purpose to deprive,” he “obtained or exercised unauthorized control over [Kevin’s truck]” (R. 119). Given that the jury could satisfy this requirement only if it rejected defendant’s honest-claim-of-right or honest-belief-in-control theories, which were plainly before the jury, the elements instruction necessarily embraced the affirmative defense theories set out in section 76-6-402(3). In conjunction with the elements instruction, other instructions would have assisted in informing the jury as to defendant’s affirmative defense. Specifically, the jury was instructed that it was to consider all the evidence, determine its force, and reconcile conflicts to the extent reasonably possible to determine the ultimate truth (R. 108-09, 114), and that a verdict of guilt required proof beyond a reasonable doubt (R. 107). *See State v. Stringham*, 957 P.2d 602, 608 (Utah

App. 1998) (the appellate court “review[s] jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law”) (citation omitted).

Notwithstanding the foregoing, the State does not oppose defendant’s assertion of obvious error. “A trial court has a duty to instruct the jury on the law applicable to the facts of the case.” *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997) (citation omitted). It should have been obvious to the trial court from the evidence that defendant’s only defensive theory was that he “[a]cted in the honest belief that he had the right to obtain or exercise control over the property . . . as he did[.]” Utah Code Ann. § 76-6-402(3)(b) (1995). Aple. Br. at 15-16. The trial court should also have seen that there was “no conceivable strategic purpose” for defense counsel to fail to request an instruction on the relevant statutory defense to theft. *Labrum*, 925 P.2d at 939. *Cf. State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (“The plain error rule exists to permit review of trial court rulings as a way of protecting a defendant from the harm that can be caused by less-than-perfect counsel.”). Most importantly, the affirmative defenses to theft are provided for by statute, section 76-6-402(3), in the very same chapter as, and separated by only a few pages from, the statute providing for the crime itself, section 76-6-404. In these unique circumstances, the State concedes that the trial court plainly erred in failing to give the appropriate affirmative defense instruction provided for by section 76-6-402(3). Nonetheless, defendant was not prejudiced.

**B. Defendant has not Met his Burden
Under the Plain Error Prejudice Prong.**

To establish the prejudice prong of plain error, defendant must show that “absent the error, there is a reasonable likelihood of a more favorable outcome[.]” *Dunn*, 850 P.2d at 1208. “The prejudice test for ineffective assistance of counsel claims is equivalent to the harmfulness test applied in assessing plain error.” *State v. Parker*, 2000 UT 51, ¶ 10, ___ P.2d ___ (still subject to revision or withdrawal before publication); *State v. Ellifritz*, 835 P.2d 170, 174 (Utah App. 1992). In determining whether an error was harmful, a court considers a number of factors, including “the overall strength of the State’s case.” *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992); *State v. Olsen*, 869 P.2d 1004, 1011 (Utah App. 1994). “The more evidence supporting the verdict, the less likely there was harmful error.” *Hamilton*, 827 P.2d at 240.

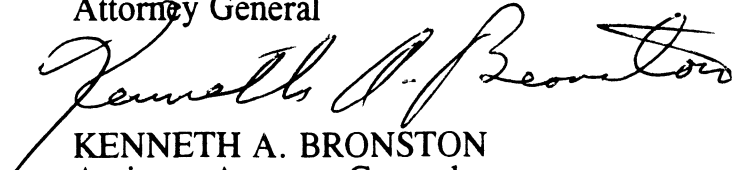
For the same reasons that his claim fails on the prejudice prong for plain error, defendant has not met his burden of showing that he was prejudiced by trial counsel’s deficient performance. Aple Br. at 11-16.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 26th day of July, 2000.

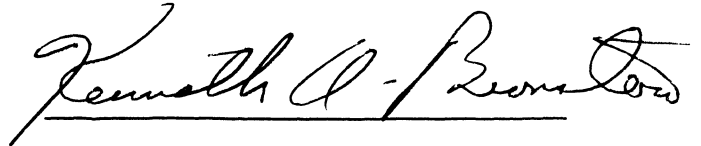
JAN GRAHAM
Attorney General



KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Margaret P. Lindsay, Aldrich, Nelson, Weight & Esplin, attorneys for defendant, 43 East 200 North, P.O. Box "L," Provo, Utah 84603-0200, this ²⁴26 of July, 2000.



ADDENDA

ADDENDUM A

Rule 19. Instructions.

(a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

(b) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

UTAH CRIMINAL CODE

76-6-402. Presumptions and defenses.

The following presumption shall be applicable to this part:

(1) Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

(2) It is no defense under this part that the actor has an interest in the property or service stolen if another person also has an interest that the actor is not entitled to infringe, provided an interest in property for purposes of this subsection shall not include a security interest for the repayment of a debt or obligation.

(3) It is a defense under this part that the actor:

(a) Acted under an honest claim of right to the property or service involved; or

(b) Acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or

(c) Obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

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.

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 B

UTAH CERTIFICATE OF TITLE

(SEE REVERSE SIDE FOR INSTRUCTIONS AND INFORMATION)
THIS CERTIFIES THAT THE PERSON NAMED BELOW, AS OWNER, HAS BEEN DULY REGISTERED
IN THE OFFICE OF THE UTAH STATE TAX COMMISSION AND THAT APPLICATION FOR CERTIFICATE
OF TITLE SHOWS SUCH LIENS ENUMERATED BELOW AND NO OTHERS.



OWNER INFORMATION SECTION

①
NAME EDARDS KEVIN DAVID
ADDRESS 355 S 600 WEST
CITY-STATE-ZIP PROVO UT 84601

VEHICLE
TITLE # 3475596
LIC = 0529AB

IDENTIFICATION SECTION

● **TITLE NOT VALID WITHOUT SECURITY FILM STRIP OVER THIS AREA**
YEAR-71 MAKE-GMC MODEL-C15C15
TYPE-PR CYL- 8 FUEL-G
VIN-CE1345117185 PREV-31-UT
DATE ISSUED-11/13/87 *ODOMETER

FIRST LIEN-HOLDER SECTION

●
NAME PROVO RAILROAD CR UN
ADDRESS BX 25
CITY-STATE-ZIP PROVO UT 84603

SECOND LIEN-HOLDER SECTION

②
NAME
ADDRESS
CITY-STATE-ZIP

FIRST LIEN RELEASE SECTION

●
PROVO RAILROAD CREDIT UNION
SIGNATURE OF LIEN-HOLDER RELEASING INTEREST
5-16-88 Secretary

SECOND LIEN RELEASE SECTION

●
SIGNATURE OF LIEN-HOLDER RELEASING INTEREST
DATE TITLE

OWNERS TRANSFER AND ODOMETER DISCLOSURE SECTION

③ I, the undersigned owner, as recorded herein, hereby convey, transfer and assign all rights title and interest in the new owner as shown in Section 8 hereunder and warrant the title to be free and clear of any liens or encumbrances whatsoever except a lien which may be in favor of the person shown as new lien holder Section 9 hereunder
I further certify the vehicle odometer reading is _____ and this reading reflects the actual mileage of the vehicle, unless one of the following statements is checked.

☐ 1. The amount of mileage stated is in excess of 99,999 miles, or

☐ 2. The odometer is not actual mileage

●
SIGNATURE OF TRANSFEROR IN INK (MUST BE NOTARIZED) IF TWO OR MORE NAMES APPEAR ON TITLE WITH A 'I' OR AN 'AND' EACH PERSON MUST SIGN

SUBSCRIBED AND SWORN TO THIS 30 DAY OF NOV

●
SIGNATURE OF NOTARY PUBLIC

NEW OWNERS SECTION

●
NAME Bethany A Westwood
ADDRESS 139 N 520 EAST
CITY-STATE-ZIP PRAIRIE UT 84661

NEW LIEN-HOLDER SECTION

●
NAME
ADDRESS
CITY-STATE-ZIP

● * The Tax Commission will not be responsible for false or fraudulent odometer statements made in the assignment of the Certificate of Title or for errors made in recording.

CONTROL NO.
3528088

THIS CERTIFICATE IS EVIDENCE OF OWNERSHIP. WHEN THE VEHICLE IS SOLD OR TRANSFERRED, THIS INSTRUMENT, PROPERLY ENDORSED, MUST BE PRESENTED TO THE STATE TAX COMMISSION MOTOR VEHICLE DIVISION BEFORE TRANSFER CAN BE MADE.

ALTERATIONS, ERASURES OR OBLITERATIONS VOID THIS CERTIFICATE