

1989

Kenneth James Morrell v. State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

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

R. Paul Van Dam; attorney general; Christine F. Soltis; assistant attorney general; attorneys for respondent.

Elizabeth Holbrook; Salt Lake Legal Defender Assoc.; attorney for petitioner.

Recommended Citation

Legal Brief, *Morrell v. Utah*, No. 890031.00 (Utah Supreme Court, 1989).
https://digitalcommons.law.byu.edu/byu_sc1/2441

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

UTAH
DOCK
KFU
56
A7

890031-CA

DOCKET NO. IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH JAMES MORRELL,	:	
Petitioner,	:	Supreme Court
	:	Case No. <u>910066</u>
v.	:	
	:	Court of Appeals
STATE OF UTAH,	:	Case No. 890031-CA
Respondent.	:	Priority No. 13

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

Petition for writ of certiorari to the Utah Court of Appeals, upon its affirmance of Mr. Morrell's conviction for robbery, a second degree felony, in violation of Utah Code Ann. section 76-6-301, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorney for Petitioner

R. PAUL VAN DAM
ATTORNEY GENERAL
CHRISTINE F. SOLTIS
ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL BUILDING
SALT LAKE CITY, UTAH 84114

Attorneys for Respondent

FILED

FEB 13 1991

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH JAMES MORRELL,	:	
Petitioner,	:	Supreme Court
v.	:	Case No. _____
STATE OF UTAH,	:	Court of Appeals
Respondent.	:	Case No. 890031-CA
	:	Priority No. 13

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

Petition for writ of certiorari to the Utah Court of Appeals, upon its affirmance of Mr. Morrell's conviction for robbery, a second degree felony, in violation of Utah Code Ann. section 76-6-301, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorney for Petitioner

R. PAUL VAN DAM
ATTORNEY GENERAL
CHRISTINE F. SOLTIS
ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL BUILDING
SALT LAKE CITY, UTAH 84114

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED FOR REVIEW	1
OPINION AND ORDER OF THE COURT OF APPEALS	Ap1
JURISDICTION OF THE UTAH SUPREME COURT	2
CONTROLLING STATUTORY PROVISION	3
STATEMENT OF THE CASE	3
A. PROCEEDINGS BELOW	3
B. FACTS	4
REASON WHY QUESTION PRESENTED JUSTIFIES ISSUANCE OF THE WRIT	8
CONCLUSION.	10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES CITED</u>	
<u>State v. Featherston</u> , 781 P.2d 424 (Utah 1989)	9
<u>State v. Guiterrez</u> , 714 P.2d 295 (Utah 1986 (<u>per curiam</u>))	7
<u>State v. Kazda</u> , 302 P.2d 486 (Utah 1964)	7
<u>State v. Morrell</u> , 149 Utah Adv. Rep. 26, (Utah Ct. App. 1990)	passim
<u>State v. Saunders</u> , 699 P.2d 738 (Utah 1985)	8
<u>State v. Shickles</u> , 760 P.2d 291 (Utah 1988)	9
<u>United States v. Ring</u> , 513 F.2d 1001 (6th Cir. 1975)	9
<u>United States v. Shackelford</u> , 738 F.2d 776 (7th Cir. 1984)	7, 8, 9

STATUTORY PROVISIONS

Utah Code Ann. § 76-1-501	9
Utah Code Ann. § 76-2-103	4
Utah Code Ann. § 76-6-301	3, 4
Utah Code Ann. § 76-6-302	4
Utah Code Ann. § 78-2-2(5)	2
Utah Rule of Evidence 403	6
Utah Rule of Evidence 404(b)	passim
Utah Rule of Evidence 609(a)(2)	5

OTHER AUTHORITIES

Graham, <u>Handbook of Federal Evidence</u> , section 404.5	7, 8
McCormick on Evidence, section 190	7

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH JAMES MORRELL,	:	
Petitioner,	:	Supreme Court
	:	Case No. _____
v.	:	
	:	Court of Appeals
STATE OF UTAH,	:	Case No. 890031-CA
Respondent.	:	Priority No. 13

QUESTION PRESENTED FOR REVIEW

Mr. Morrell was convicted of robbing Matthew Moor, a pizza delivery person, in September of 1988. Mr. Morrell admitted that it was his intent to take money from Mr. Moor, and his actions were reflective of that intent. As supposed proof of Mr. Moor's intent, the Court of Appeals condoned the admission of evidence of Mr. Morrell's robbery of a pizza delivery person in June of 1988 (hereinafter referred to as "the extrinsic robbery"). The following question is presented for this Court's consideration:

Under Utah Rule of Evidence 404(b), is evidence of other crimes, wrongs or acts admissible to show "intent" when the requisite level of criminal intent is merely a formal issue that may be inferred from the physical actions of the defendant?

In the event that this Court allows briefing on the merits, Mr. Morrell also seeks permission to address three related issues that were raised before the Court of Appeals, but omitted from the opinion, concerning (1) the failure of the extrinsic robbery to prove Mr. Morrell's intent some three months after the extrinsic

robbery; (2) the impact of instructing the jury that the evidence of the extrinsic robbery could be used for impeachment and as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"; and (3) the similarity of the extrinsic robbery and the crime charged, resulting in the heightened likelihood that the jurors convicted Mr. Morrell on the basis of his perceived propensity to rob pizza delivery people. Mr. Morrell notifies this Court of these related issues in an effort to preserve his arguments for briefing on the merits, but does not contend that these related issues justify issuance of a writ.

OPINION AND ORDER OF THE COURT OF APPEALS

The Court of Appeals' decision and order denying rehearing are reproduced in Appendix 1.

JURISDICTION OF THE UTAH SUPREME COURT

The Court of Appeals' decision was filed on November 30, 1990. The Court of Appeals' order denying rehearing was signed on January 15, 1991.

This Court's statutory jurisdiction over this petition for certiorari is provided by Utah Code Ann. section 78-2-2(5).

CONTROLLING STATUTORY PROVISION

Utah Rule of Evidence 404

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

(1) **Character of accused.** Evidence of a pertinent trait of his 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 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 crime, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted 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.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On December 2, 1988, Mr. Morrell was convicted by a jury of robbery, a second degree felony, in violation of Utah Code Ann. section 76-6-301 (R. 118). The trial court sentenced Mr. Morrell to a term of one to fifteen years in the Utah State Prison (R. 122).

The Court of Appeals affirmed Mr. Morrell's conviction in a decision filed on November 30, 1990, and denied rehearing of the case in an order filed on January 15, 1991.

B. FACTS

Mr. Morrell was tried for aggravated robbery of Matthew Moor, a pizza delivery person, and convicted of simple robbery (R. 23-24, 30; 118).¹

Mr. Morrell admitted the intent element of robbery²--it was his conscious objective and desire to take money from Mr. Moor (because Mr. Moor owed it to him from a previous illegal drug transaction) (T.2 25-27). Under either version of facts, that of Mr. Moor or that of Mr. Morrell, the facts reflect Mr. Morrell's

1. Utah Code Ann. section 76-6-301 defines robbery as follows:

(1) Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.

Utah Code Ann. section 76-6-302 defines aggravated robbery as follows:

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) causes serious bodily injury upon another.

....

2. Utah Code Ann. section 76-2-103 defines the requisite level of intent for robbery as follows:

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

conscious objective and desire to take money from Mr. Moor.³

Over Mr. Morrell's objection, evidence was admitted concerning Mr. Morrell's guilty plea to a charge involving the robbery of a pizza delivery person some three months prior to Mr. Morrell's encounter with Mr. Moor (T.2 73-80). At trial, the prosecutor argued that the evidence of the extrinsic robbery was admissible to show Mr. Morrell's intent, and explicitly disavowed the argument that the extrinsic robbery was admissible to show modus operandi (M.H. 17-21, 27). The trial court indicated that the evidence of the extrinsic robbery was admissible to show intent, plan, preparation, and modus operandi (M.H. 29, T. 100), and also ruled the guilty plea admissible under Utah Rule of Evidence 609(a)(2) as proof of a crime of dishonesty (M.H. 4-5). The jury was instructed that the evidence of the extrinsic robbery could be used for impeachment purposes and to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (R. 98-99).

On appeal, the Utah Court of Appeals upheld the admission of the evidence of the extrinsic robbery under Utah Rule of Evidence

3. According to Mr. Moor, Mr. Morrell held Mr. Moor at knifepoint, informed him that he was being robbed, and forced Mr. Moor to drive to several locations in Salt Lake City because the amount of money Mr. Moor had on his person did not satisfy Mr. Morrell (T. 12-68).

According to Mr. Morrell, Mr. Morrell grabbed Mr. Moor during their initial encounter, but did not use a weapon or threats to collect the debt because Mr. Moor acknowledged the debt and took the initiative in driving Mr. Morrell to several locations with the stated purpose of procuring money to repay Mr. Morrell (T.2 20-66).

404(b) as proof of Mr. Morrell's intent, without any accounting for the breadth of the jury instruction on the permissible use of the evidence. The court stated,

Defendant directly challenged the element of intent. He claimed he was only trying to collect a debt through somewhat insistent, but not unlawful, means. Defendant was being tried for aggravated robbery, which is "the unlawful and intentional taking of personal property" from another, "against his will," by threat or use of "a dangerous weapon." Utah Code Ann. §§ 76-6-301(1), -302(1)(a) (1990). The only two controverted elements of the charge were the use of a weapon and defendant's intent. Therefore, it was critical for the state that it discredit defendant's claim of a coincidental encounter with Mr. Moor. Admission of prior bad acts is proper when it tends to prove a contested material element of the crime charged. Evidence of the prior robbery was highly probative of defendant's intent in the present case.

Morrell, 149 Utah Adv. Rep. 26, 27-28 (Utah Ct. App. 1990) (footnote and citations omitted).

In analyzing the admission of the evidence of the extrinsic robbery under Utah Rule of Evidence 403,⁴ the Court of Appeals did not address the concern that the similarity of the extrinsic robbery and the crime charged was likely to result in a verdict based on perceptions of Mr. Morrell's propensity to rob pizza delivery people. The court stated,

4. The rule provides,

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

Testimony concerning the prior robbery was the only evidence, other than defendant's and Moor's conflicting testimony, bearing on whether defendant's intent was to rob Moor or merely to secure payment of money defendant believed he was owed. The testimony, then, was clearly prejudicial to defendant. It was however, extremely probative of defendant's intent during the incident with Moor. The two robberies for which defendant was charged occurred within months of each other. Each manifested an almost identical factual pattern. There was strong evidence of defendant's guilt in the prior robbery in view of competent eyewitness testimony from the victim in that case. The state had a great need to present this evidence to demonstrate intent; no effective alternative proof was available.

Morrell, 149 Utah Adv. Rep. at 28.

In a petition for rehearing, Mr. Morrell argued that the Court of Appeals was incorrect in its conclusion that intent was at issue and justified the admission of the extrinsic robbery.⁵

He also asked the Court of Appeals to dispose of the concern that in light of the similarity of the extrinsic robbery and the crime charged, and in light of the confusing jury

5. Petition for rehearing at 2-4, relying on Graham, Handbook of Federal Evidence, section 404.5, at page 203 footnote 8 ("Slough, 'Relevance Unraveled,' 6 Kan. L.Rev. 28, 48 (1957), describes criminal intent 'as that state of mind which negatives accident, inadvertence or casualty.'"); McCormick on Evidence, section 190, 1987 supplement at 57 ("If the defendant does not deny that his acts were deliberate, then the prosecution may not introduce the evidence merely to show that the acts were not accidental."); United States v. Shackelford, 738 F.2d 776, 781 (7th Cir. 1984) (under federal rule of evidence, evidence of other crimes are not admissible to prove intent when intent is merely a formal issue that may be inferred from defendants' actions). For cases demonstrating that intent may be inferred from acts, see e.g. State v. Kazda, 302 P.2d 486, 488 (Utah 1964) (intent to commit aggravated robbery inferred from facts of case); State v. Guiterrez, 714 P.2d 295 (Utah 1986) (per curiam) (same).

instruction, it was practically guaranteed that the jury convicted Mr. Morrell on the basis of his perceived propensity to rob pizza delivery people.⁶

The Court of Appeals denied rehearing.

REASON WHY QUESTION PRESENTED JUSTIFIES ISSUANCE OF THE WRIT

As noted above, the question before this Court in this petition is,

Under Utah Rule of Evidence 404(b), is evidence of other crimes, wrongs or acts admissible to show "intent" when the requisite level of criminal intent is merely a formal issue that may be inferred from the physical actions of the defendant?

The Court of Appeals' broad interpretation of the intent exception to Rule 404(b) is a precedent that portends to defeat the well established practice of this Court to carefully limit the admission of evidence of other crimes. As this Court has recognized, evidence of other crimes is presumptively prejudicial.⁷

6. Petition for rehearing at 5 n. 2, relying on United States v. Shackelford, 738 F.2d 776, 780 (7th Cir. 1984) ("The jury was left to decide what the terms 'motive,' 'intent,' 'plan,' etc. might mean in the context of this case and whether the evidence fit into any one of these categories. The jury would have to study Weinstein's chapter on 'Relevancy and Its Limits' in order to accomplish that assignment properly."); and Graham, Handbook of Federal Evidence, section 404.5, page 223 and n. 23 (explaining that jurors are more likely to convict on the basis of a defendant's perceived propensity toward criminal action, rather than on the evidence relevant to the charge in question, in cases in which extrinsic crimes greatly resemble crimes charged).

7. State v. Saunders, 699 P.2d 738, 741 (Utah 1985).

Under Utah law, intent is an element of every crime,⁸ and this Court's opinions interpreting the intent exception to Rule of Evidence 404(b), accordingly, have been quite narrow.⁹

This Court should grant the writ to maintain the integrity of Utah Rule of Evidence 404(b). "To allow intent automatically to become an issue in that class of cases in which intent is inferable from the nature of the act charged would create an exception that 'would virtually swallow the rule against admission of evidence or prior misconduct.'" United States v. Shackelford, 738 F.2d 776, 781 (7th Cir. 1984), quoting United States v. Ring, 513 F.2d 1001, 1009 (6th Cir. 1975).

8. Utah Code Ann. section 76-1-501 explains this general principle of criminal law:

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

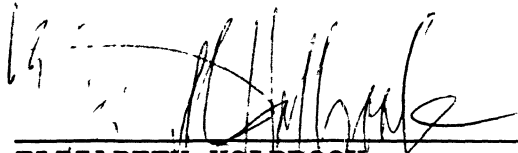
(b) The culpable mental state required.

9. E.g. State v. Shickles, 760 P.2d 291, 295-296 (Utah 1988) (evidence of extrinsic crimes admissible to show specific intent to kidnap in context of contradictory evidence on intent issue; defendant entitled to clear jury instruction on limited use of evidence); State v. Featherston, 781 P.2d 424, 426-428 (Utah 1989) (defendant's sexual conduct seven or eight hours prior to sexual assault was not admissible to show defendant's intent; even if the evidence of extrinsic wrongdoings were probative, prejudicial impact required exclusion).

CONCLUSION

Mr. Morrell requests that this Court grant a writ of certiorari on question 1.


Respectfully submitted this 13 day of February, 1991.



ELIZABETH HOLBROOK
Attorney for Mr. Morrell

CERTIFICATE OF DELIVERY

I, ELIZABETH HOLBROOK, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 13 day of February, 1991.



ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of February, 1991.

APPENDIX 1

39 (1988). See also *NOTE, Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 796-97 (1975). Also, unless a reference to a magistrate expressly states otherwise, magistrates appointed to act as masters are specifically excepted from the requirements of Rule 53 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 53(f). In my view, it is a mistake for this Court to look to the treatment of federal magistrates for purposes of analogy to the treatment of masters under Rule 53.

HOWE, Associate Chief Justice: (Concurring and Dissenting)

I concur in the majority opinion, except that I would remand the case to the trial court for final determination of the amount of fees to be awarded. Since we have determined that the trial court erroneously relied on the flawed master's report, the proper procedure in my opinion is to remand the issue back to the trial court for reconsideration and final determination without regard to the report. I believe that it is premature for us to accept and approve the stipulation without first allowing it to be presented to and considered by the trial court.

Cite as
149 Utah Adv. Rep. 26

IN THE
UTAH COURT OF APPEALS

The STATE of Utah,
Plaintiff and Appellee,

v.

Kenneth James MORRELL,
Defendant and Appellant.

No. 890031-CA
FILED: November 30, 1990

Third District, Salt Lake County
The Honorable Leonard H. Russon

ATTORNEYS:

Debra K. Loy and Elizabeth Holbrook, Salt
Lake City, for Appellant

R. Paul Van Dam and Christine F. Soltis, Salt
Lake City, for Appellee

Before Judges Bench, Billings, and Orme.

ORME, Judge:

Defendant Morrell appeals his conviction for robbery, a second degree felony in violation of Utah Code Ann. §76-6-301 (1990).

Except as otherwise noted, we set forth the facts in the manner most consistent with the jury's verdict. On September 4, 1988, Matthew Moor, a pizza delivery driver employed by Ambassador Pizza in Salt Lake City, was robbed while attempting to deliver a pizza ordered by telephone. As Moor drove to the neighborhood of 813 Genessee Street, the address to which he was to deliver the pizza, Moor saw defendant Kenneth Morrell standing on a corner and asked him for directions. Moor then drove a very short distance to 813 Genessee Street and discovered that the house was dark and apparently unoccupied. As Moor returned to his car, defendant approached him and asked to purchase the pizza. Moor offered to sell defendant the pizza for five dollars. Defendant pressed an object to Moor's neck and told Moor that he was being robbed.

Defendant got into the car with Moor and demanded money from him. When Moor did not produce the amount of money that defendant wanted, defendant had Moor drive to another location in order to search the car for more money. He found none. Defendant then ordered Moor to drive to a house in the avenues area in order to set up a robbery of a Domino's Pizza delivery driver. Upon telephoning, defendant found Domino's Pizza closed and told Moor that he had better produce more money. Moor suggested that they drive to his friend's house to get money, and defendant agreed.

Moor drove to the home of Ivan Ilov and sat in the driveway honking the horn. When Ilov approached the car he discerned that Moor was in some sort of trouble. Moor asked Ilov for money, stating that defendant was holding a knife to him. Ilov broke through the window and attempted to restrain defendant. Defendant escaped and Moor and Ilov gave chase. As Moor reached him, defendant hit Moor, breaking Moor's nose. Moor caught defendant again and Ilov assisted in restraining him. A passing taxi driver summoned police.

When the police arrived, one officer took custody of defendant from Ilov and asked defendant: "What's going on?" Defendant did not respond. Defendant was arrested after Moor was interviewed by another officer and the officers concluded that a robbery had occurred.

At trial, defendant testified he saw Moor driving in defendant's neighborhood and recognized both Moor and his car. He stated that he had sold some marijuana to Moor at a party for which Moor still owed money to defendant. Defendant claimed that when Moor pulled over to ask street directions of defen-

Moor about the money owed for the marijuana. Moor did not have enough money to satisfy the debt and suggested that they go elsewhere to get more money. Eventually, defendant and Moor arrived at Ilov's home, where the defendant's account of the events largely corresponds with Moor's.

The trial court precluded defense counsel from cross-examining Moor concerning his drug and alcohol use, and any related possible effect on his ability to recall prior encounters with defendant which may have supported defendant's claim of a drug sales debt. The court also allowed testimony by a police detective that the telephone used to place the pizza order incident to the robbery in this case, like others which had occurred, was not located at the address stated by the person placing the order.

The jury convicted defendant of robbery. On appeal, defendant raises several evidentiary issues. First, defendant attacks the trial court's admission of evidence of his guilty plea to a prior robbery and of the facts underlying that plea. Second, defendant challenges the admission of evidence of his silence in response to the initial question put to him by police. Third, defendant claims that the trial court improperly limited cross-examination of the robbery victim¹ and in admitting hearsay testimony by a police officer.

EVIDENCE OF THE PRIOR ROBBERY

Defendant challenges, under rule 609(a)(2) of the Utah Rules of Evidence, the admission of his guilty plea to a similar robbery of a pizza deliveryman. Defendant claims that a guilty plea is not equivalent to a conviction and that robbery is not a crime of dishonesty automatically admissible under Rule 609(a)(2). We review the trial court's evidentiary rulings only for an abuse of discretion which results in prejudice to substantial rights. *State v. Brown*, 771 P.2d 1093, 1094 (Utah Ct. App. 1989); *State v. Jamison*, 767 P.2d 134, 137 (Utah Ct. App. 1989). The state concedes that admission of the guilty plea to theft, on the ground that theft may automatically be treated as a crime of dishonesty, was improper.² We agree.

Rule 609(a)(2) provides that evidence of conviction for any crime involving dishonesty or a false statement is admissible to attack the credibility of a witness. The focus of the rule concerns impeachment based on the probability that a particular witness may not be telling the truth as evidenced by prior acts of dishonesty on the part of that witness. Any act done with knowledge of its unlawfulness involves a measure of dishonesty as commonly defined. Nonetheless, Rule 609(a)(2) was drafted to restrict automatic admissibility to

mony. See *State v. Morehouse*, 748 P.2d 217, 222 (Utah Ct. App. 1988) (Jackson, J., dissenting) (citing legislative history of subsection 609(a)(2)).

While some dispute exists as to whether robbery should be classified as a crime of dishonesty, see *State v. Wight*, 765 P.2d 12, 21-22 (Utah Ct. App. 1988) (Garff, J., concurring), it is established under Utah law that the crime of robbery does not automatically qualify for admission under Rule 609(a)(2). *State v. Bruce*, 779 P.2d 646, 656 (Utah 1989) (robbery conviction not automatically admissible); *State v. Brown*, 771 P.2d 1093, 1094-95 (Utah Ct. App. 1989) (conviction of theft crimes not automatically admissible); *State v. Wight*, 765 P.2d at 17-19 (aggravated robbery conviction not automatically admissible).

The trial court made no inquiry into the facts underlying defendant's guilty plea in its consideration of admissibility. Therefore, nothing in the record demonstrates a consideration of facts relative to defendant's prior theft to determine their relevance, if any, to defendant's propensity to tell the truth.³ See *Wight*, 765 P.2d at 18 (under 609(a)(2), crime of robbery may be admissible if underlying facts demonstrate impairment of credibility).

Although conceding the guilty plea could not properly come in under Rule 609, the state claims we should nonetheless affirm because evidence of the facts underlying the prior robbery charge, offered through the testimony of the victim in that case, was admissible under Rule 404(b) as probative of defendant's intent to rob Moor, and in refutation of defendant's claim that he was merely attempting collection of a debt. Rule 404(b) establishes certain circumstances in which evidence of other crimes may be admitted:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted 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.

Utah R. Evid. 404(b).

Defendant directly challenged the element of intent. He claimed he was only trying to collect a debt through somewhat insistent, but not unlawful, means. Defendant was being tried for aggravated robbery, which is "the unlawful and intentional taking of personal property" from another, "against his will," by threat or use of "a dangerous weapon." Utah Code Ann. §§76-6-301(1), -302(1)(a)

defendant's intent. Therefore, it was critical for the state that it discredit defendant's claim of a coincidental encounter with Moor. Admission of prior bad acts is proper when it tends to prove a contested material element of the crime charged. *State v. Featherson*, 781 P.2d 424, 426 (Utah 1989); *State v. Shaffer*, 725 P.2d 1301, 1307 (Utah 1986). Evidence of the prior robbery was highly probative of defendant's intent in the present case.

Even though the evidence was otherwise admissible under Rule 404(b), we must nevertheless determine whether the prejudicial nature of the evidence substantially overshadowed its probative value under Utah Rule of Evidence 403. See *State v. Gotschall*, 782 P.2d 459, 462 (Utah 1989). This is a fact-intensive question, delegated by the Rules of Evidence to the discretion of the trial court. We therefore review determinations of admissibility under Rule 403 only for abuse of discretion. *Id.* Only if discretion is abused and prejudice results will the court's mistake constitute reversible error. *Id.*

In *State v. Shickles*, 760 P.2d 291 (Utah 1988), the Utah Supreme Court listed several factors which are helpful in balancing probativeness and prejudice.

In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, 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.

Id. at 295-96 (quoting E. Cleary, *McCormick on Evidence*, §190 at 565 (3d ed. 1984)). The record reflects that counsel for defendant and the state presented arguments based on these factors. The trial court then ruled that the evidence was admissible.

Testimony concerning the prior robbery was the only evidence, other than defendant's and Moor's conflicting testimony, bearing on whether defendant's intent was to rob Moor or merely to secure payment of money defendant believed he was owed. The testimony, then, was clearly prejudicial to defendant. It was, however, extremely probative of defendant's intent during the incident with Moor. The two robberies for which defendant was charged occurred within months of each other. Each manifested an almost identical factual pattern. There was strong evidence of defen-

to present this evidence to demonstrate intent; no effective alternative proof was available. *Cf. Shickles*, 760 P.2d at 296 (even where "other evidences of defendant's intent" are introduced, "the use of ... other-crimes evidence" is "not necessarily" precluded). We cannot say that the trial court abused its discretion in weighing these factors and determining that the probative value substantially outweighed the prejudicial effect. It was therefore not incumbent upon the court to exclude the evidence under Rule 403. Because admission of the evidence was proper under Rule 404(b), and not barred by Rule 403, any error in admission of the guilty plea under Rule 609(a)(2) is harmless.

EVIDENCE OF PRE-MIRANDA SILENCE

During the cross-examination of one officer, the prosecution elicited testimony of defendant's silence when he was asked by another police officer what was happening. This question was asked immediately after the arrival of the officers, who took control of defendant from Ilov. No *Miranda* warning had been given, and defendant claims for this reason that the court erred in allowing improper comment on his silence. The state asserts that the testimony was proper as demonstrating intent to rob Moor since defendant did not exculpate himself by stating that he was merely endeavoring to collect a debt.

In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Supreme Court held that the prosecution is barred from using statements stemming from *custodial interrogation* of a defendant unless the defendant had been informed of the right to remain silent, the right to counsel, the right to appointed counsel if indigent, and that any statement may be used against the defendant. Not all police inquiry is made in the context of custodial interrogation. On the contrary,

[t]he Utah Supreme Court has identified several key factors to consider in order to determine when a defendant

who has not been formally arrested is in custody. They are: (1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation.

Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983). Another factor which we find pertinent to our analysis was recognized by our Oregon counterpart in *State v.*

place of interrogation freely and willingly. *Id.* at 1212.

State v. Sampson, 143 Utah Adv. Rep. 12, 15 (Ct. App. 1990).

Treating these factors in order, the following conclusions emerge. First, the site of interrogation was a public parking lot which, unlike interrogation at the police station, *see id.*, does not suggest custody. Second, the investigation had not yet focused on defendant. When the officers arrived at the scene and observed defendant restrained by Ilov, they knew nothing more than that an altercation had been reported, and that a pizza driver was possibly missing in the same general vicinity. The officers had no reason to know or suspect that the two reports were connected. Nor did they know the reason for the altercation and which party to the altercation, if any, was the culprit. At the time of the question the officers did not know if a crime had been committed, nor had any investigation yet focused on defendant. Contemporaneously with the question, but some distance from where it was asked, Moor exited a nearby restaurant, where he had gone to attend to his broken nose, and spoke with another officer who determined that Moor was the victim of a robbery and defendant was the apparent perpetrator. Nothing more was asked of defendant from that time. To that point, defendant's encounter with the police constituted nothing more than a general investigation to determine whether a crime had even been committed. Third, while it is apparent that defendant had been momentarily restrained by police officers when the question was put to him, other objective indicia of arrest were lacking. Defendant was not handcuffed, placed in a police vehicle, or told he was under arrest. Fourth, the length of interrogation was exceptionally brief and the form of interrogation, on which "Utah courts have placed a great deal of emphasis," *id.*, was merely investigatory and in no sense accusatory. *See id.* The question asked of defendant was merely part of a preliminary attempt to ascertain exactly that which was asked--"What's going on?" Fifth, while defendant had not come to the place of questioning voluntarily, he had also not been taken there by police against his will--he was chased there by citizens trying to apprehend him.

While the fifth factor might be taken as "relatively neutral," *id.*, each of the other factors are not suggestive of custody. Taken together, the factors compel the conclusion that defendant was not subject to custodial interrogation and no *Miranda* warning was required.⁵ *See also State v. Kelly*, 718 P.2d 385, 391 (Utah 1986) (brief questioning inside

warning upon asking investigatory question).

HEARSAY & LIMITATION OF CROSS-EXAMINATION

Defendant claims that the court's limitation of cross-examination of Moor and the admission of certain hearsay testimony was erroneous.⁶ We review evidentiary rulings for a clear abuse of discretion. *State v. Brown*, 771 P.2d 1093, 1094 (Utah Ct. App. 1989).

On direct examination, Moor testified he had never seen defendant at a party. On cross-examination Moor conceded that he had attended parties of which he thereafter did not have complete recollection. Defense counsel asked if Moor's memory deficiency might be related to drug or alcohol use and whether it was possible that Moor had met defendant at such a party and did not recall the encounter because of the influence of alcohol or drugs. The court sustained the prosecution's objections to both questions.

Defendant had the right to impeach Moor's credibility by attacking his memory. Utah R. Evid. 607. Even though this right is limited by the witness's right to be free from harassment and humiliation, *State v. Chesnut*, 621 P.2d 1228, 1233 (Utah 1980), defendant must be allowed to elicit testimony concerning a witness's ability to recall the event about which the witness is testifying. Moor's possible alcohol and drug use and any impact on his memory were relevant to the credibility of his testimony refuting defendant's claimed defense of debt collection growing out of prior dealings with Moor. Consequently, it was error for the court to prevent testimony which probed Moor's possible inability to remember the party at which defendant claimed to have met him and to have sold him drugs for which Moor was to pay defendant later.

Defendant also challenges a detective's testimony concerning the telephone locations from which pizza orders were made and the telephone numbers left with the order taker. The detective testified that in both the robbery at issue and the prior robbery, the number left did not correspond to the pay telephone from which the call had been made, although in both instances the numbers were merely rearranged. Defendant claims this testimony was improper hearsay.

The state claims the business records and public records exceptions of Utah Rule of Evidence 803 allow admission of the officer's testimony. *See Utah R. Evid. 803(6), (8)*. However, the police report, and not the business record of the pizza company, was the source to which the officer referred in his testimony. Police reports are not eligible for admission under either of these provisions of Rule 803 except in certain limited circumsta-

1184-86 (Utah 1983).

We need not determine, however, whether the court's errors in limiting cross-examination of Moor and permitting the detective's hearsay testimony rise to the level of a clear abuse of discretion. Any error in either instance was harmless and would not entitle defendant to reversal. See *State v. Tillman*, 750 P.2d 546, 555 (Utah 1987).

Concerning the limitations on cross-examination, defendant was allowed to present his defense of debt collection stemming from an alleged marijuana sale to Moor. The jury learned that defendant claimed Moor used illegal drugs and had heard Moor admit that he had been to parties of which he later had no memory. While defendant should have been allowed to pursue questioning of Moor's memory ability, defendant established the important point that Moor's memory of parties was imperfect, a matter the jury was free to consider in deciding Moor's credibility. The exact reason for this deficiency was much less important.

Concerning the telephone testimony, the facts of defendant's prior robbery were properly introduced through the testimony of the victim in that incident. Defendant also admitted his participation in that robbery. The precise methodology of telephone usage in both instances was therefore comparatively inconsequential to the outcome.

Viewing the other substantial evidence supporting defendant's conviction, we cannot say that defendant might not have been convicted without the officer's testimony concerning the telephone numbers or if the jury had learned more about the exact reason Moor had incomplete recall of some parties he had attended.

CONCLUSION

While the trial court erred in admitting evidence of the prior robbery under Rule 609, the same evidence was properly admitted under Rule 404(b). Defendant was not subjected to custodial interrogation, and therefore was not entitled to a *Miranda* warning. Finally, any error in admission of the officer's hearsay testimony concerning the phone numbers and the limitation on cross-examination concerning Moor's prior drug or alcohol use was harmless. Defendant's conviction is accordingly affirmed.

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench, Judge

Judith M. Billings, Judge

1. Defendant also raises a challenge under the Confrontation Clause, U.S. Const. amend. VI, asserting that he was denied the constitutional right

to confront his accusers. See *State v. Eldredge*, 773 P.2d 29, 34 (Utah) (failure to object precludes review of evidentiary matters except in case of plain error), cert. denied, 110 S.Ct. 62 (1989).

2. The state argues, however, that the guilty plea should be treated as a conviction for purposes of Rule 609(a)(2), relying on *State v. Delashmutt*, 676 P.2d 383, 384 (Utah 1983) (per curiam). In our view, *Delashmutt* has questionable value as precedent. Significant case law concerning the nature of guilty pleas has developed since *Delashmutt* which gives doubt to its continued vitality. See, e.g., *State v. Gallegos*, 738 P.2d 1040 (Utah 1987); *State v. Kay*, 717 P.2d 1294, 1303-5 (Utah 1986). Defendant had merely entered his plea on the other charge, and had neither been adjudged guilty nor sentenced by the court. In view of the liberality with which motions to withdraw guilty pleas are to be granted prior to sentence, see, e.g., *Gallegos*, 738 P.2d at 1042 ("presentence motion to withdraw a guilty plea should, in general, be liberally granted"), we see real difficulty, for Rule 609(a)(2) purposes, in equating a mere guilty plea, prior to sentencing, with an actual conviction. As explained hereafter, however, we need not definitively decide this issue since any error in admission of the guilty plea under Rule 609 was harmless in view of the admissibility of other evidence of the crime under Rule 404(b).

3. Convictions not admissible under Rule 609(a)(2) may yet be admissible under subsection (a)(1), which provides for admission of prior convictions where the court determines that the probative value outweighs the prejudicial effect. The court must inquire into the probative value of the facts supporting the conviction and balance them against potential prejudice. *State v. Banner*, 717 P.2d 1325, 1334 (Utah 1986). In *Banner*, the Supreme Court listed five factors to be considered. *Id.* The trial court in this case did not consider the *Banner* factors and we therefore do not decide whether the guilty plea could have been admitted under Rule 609(a)(1). Nor did the state argue that defendant's particular brand of robbery--characterized by false statements concerning his telephone number, his whereabouts, and his desire to obtain and pay for pizza--had sufficient bearing on his propensity to tell the truth to distinguish his crime from garden-variety theft so as to permit the evidence to come in under either Rule 609(a)(2) or 609(a)(1).

4. Defendant was convicted of simple robbery under Utah Code Ann. §76-6-301 (1990), manifesting that the jury did not find he used or threatened the use of a dangerous weapon. The jury apparently concluded that the object defendant pressed against Moor was only a plastic nametag.

5. In view of our disposition, we need not consider the state's alternative argument that, in any event, defendant's silence was admissible to impeach a defense offered for the first time at trial. See *Fletcher v. Weir*, 455 U.S. 603, 605-607 (1982). But see *People v. Jacobs*, 158 Cal. App. 3d 740, 750, 204 Cal. Rptr. 849, 856 (1984) (rejecting *Fletcher v. Weir* analysis under state constitutional provision nearly identical to federal counterpart); *State v. Davis*, 38 Wash. App. 600, 686 P.2d 1143, 1145-46 (1984) (rejecting *Fletcher v. Weir* analysis under state constitutional provision identical to federal counterpart); *Nelson v. State*, 691 P.2d 1056, 1059-

the court's decisions in these respects can be sustained under the Utah Rules of Evidence, his right to confrontation was nonetheless denied. See note 1, *supra*.

Cite as
149 Utah Adv. Rep. 31

IN THE
UTAH COURT OF APPEALS

W. & G. COMPANY, a Utah general partnership; **Darol Krantz**, an individual, dba **Broadway Music**; **J. Ross Trapp**, Trustee of the **Ross Trapp Trust** and Trustee of the **June Trapp Trust**; **National Department Store**, a Utah corporation; **Robert C. Nelson**, dba **The Magazine Shop**; and **Downtown Athletic Club**, a Utah corporation,

Plaintiffs and Appellee,

v.

REDEVELOPMENT AGENCY OF SALT LAKE CITY, Salt Lake City Corporation, **Ted L. Wilson**, in his official capacity as a member and chief operating officer of the Board of Directors of the Redevelopment Agency of Salt Lake City; **Ronald J. Whitehead**, **Grant Mabey**, **Sidney R. Fonnesbeck**, **Earl S. Hardwick**, **Ione M. Davis** and **Edward Parker**, in their official capacities as members of the Board of Directors of the Redevelopment Agency of Salt Lake City, and **Michael Chitwood**, in his official capacity as the Executive Director of the Redevelopment Agency of Salt Lake City,

Defendants and Appellants.

No. 890285-CA

FILED: November 30, 1990

Third District, Salt Lake County
Honorable Raymond S. Uno

ATTORNEYS:

Harold A. Hintze, Provo, for Appellants
Robert S. Campbell, Jr. and **Barney Gesas**,
Salt Lake City, for Appellee

Before Judges Garff, Jackson, and Orme.

OPINION

GARFF, Judge:

Appellant, the Redevelopment Agency of Salt Lake City (RDA), seeks reversal of the district court's order granting partial summary judgment in favor of appellee Robert C. Nelson dba The Magazine Shop,¹ and denying RDA's motion for partial summary judgment.

In 1969, the Utah Legislature adopted the

Utah Neighborhood Development Act, which creates and empowers municipal redevelopment agencies such as the RDA to acquire and redevelop property determined to be "blighted." See *Redevelopment Agency of Salt Lake City v. Tanner*, 740 P.2d 1296, 1297 (Utah 1987). Pursuant to this act, Salt Lake City's Board of Commissioners (Commission) and, subsequently, its City Council, were designated to act as the city's redevelopment agency. *Id.* defendants Nelson, W & G Company, Broadway Music, J. Ross Trapp, National Department Store, and Downtown Athletic Club (Landowners), at the times relevant to these events at issue in this case, were property owners having separate interests in properties on Block 57 in Salt Lake City.

On February 4, 1971, the RDA adopted the Central Business District (CBD) West Neighborhood Development Program, which included two and one-half blocks of the downtown Salt Lake City business district. In May 1975, the RDA passed a resolution to consider the adoption of an ordinance amending the redevelopment plan to include an additional eleven blocks of the downtown business district, including Block 57. In this resolution, the RDA designated this area as a redevelopment survey area, and decided that it required further study to determine whether one or more redevelopment projects within its boundaries were feasible. It directed the RDA staff to select one or more project areas comprising "all or part of the above described redevelopment survey area," and to formulate a preliminary redevelopment plan.

To this end, the public hearings were held on the adoption of this ordinance on July 31 and August 4, 1975 before the RDA, and on September 3, 1975 before the Commission. Although the RDA notified every property owner in the affected area by mail prior to the hearings, no Landowners attended these hearings.

During the hearings, the RDA's executive director, Michael Chitwood, assured those present that all owners of property designated for redevelopment by the RDA would be provided notice and hearing, along with detailed architectural information about the renovation of their properties, and that property acquisition would not occur without their approval and consent.

On September 10, 1975, the Commission passed an ordinance adopting the CBD West Neighborhood Development Plan and mailed a copy of the ordinance to every property owner in the affected area, including Landowners.

On May 14, 1982, the RDA again notified all affected property owners, including Landowners, of another set of public hearings to be held for the purpose of amending and updating the CBD West Neighborhood Development

do not consider his related claim that even if the court's decisions in these respects can be sustained under the Utah Rules of Evidence, his right to reinstatement was nonetheless denied. See note 1,

Cite as
149 Utah Adv. Rep. 31

IN THE UTAH COURT OF APPEALS

W & G COMPANY, a Utah general partnership; Darol Krantz, an individual, dba Broadway Music; J. Ross Trapp, Trustee of the Ross Trapp Trust and Trustee of the June Trapp Trust; National Department Store, a Utah corporation; Robert C. Nelson, dba The Magazine Shop; and Downtown Athletic Club, a Utah corporation,

Plaintiffs and Appellee,

v.

REDEVELOPMENT AGENCY OF SALT LAKE CITY, Salt Lake City Corporation, et al.; L. Wilson, in his official capacity as a member and chief operating officer of the Board of Directors of the Redevelopment Agency of Salt Lake City; Ronald J. Whitehead, Grant Mabey, Sidney R. Jonesbeck, Earl S. Hardwick, Ione M. Davis and Edward Parker, in their official capacities as members of the Board of Directors of the Redevelopment Agency of Salt Lake City, and Michael Chitwood, in his official capacity as Executive Director of the Redevelopment Agency of Salt Lake City,

Defendants and Appellants.

No. 890285-CA

LED: November 30, 1990

Third District, Salt Lake County
Honorable Raymond S. Uno

ATTORNEYS:

Harold A. Hintze, Provo, for Appellants
Robert S. Campbell, Jr. and Barney Gesas, Salt Lake City, for Appellee

Before Judges Garff, Jackson, and Orme.

OPINION

GARFF, Judge:

Appellant, the Redevelopment Agency of Salt Lake City (RDA), seeks reversal of the district court's order granting partial summary judgment in favor of appellee Robert C. Nelson dba The Magazine Shop,¹ and denying RDA's motion for partial summary judgment.

In 1969, the Utah Legislature adopted the

act seq., which creates and empowers redevelopment agencies such as the RDA to acquire and redevelop property determined to be "blighted." See *Redevelopment Agency of Salt Lake City v. Tanner*, 740 P.2d 1296, 1297 (Utah 1987). Pursuant to this act, Salt Lake City's Board of Commissioners (Commission) and, subsequently, its City Council, were designated to act as the city's redevelopment agency. *Id.* defendants Nelson, W & G Company, Broadway Music, J. Ross Trapp, National Department Store, and Downtown Athletic Club (Landowners), at the times relevant to these events at issue in this case, were property owners having separate interests in properties on Block 57 in Salt Lake City.

On February 4, 1971, the RDA adopted the Central Business District (CBD) West Neighborhood Development Program, which included two and one-half blocks of the downtown Salt Lake City business district. In May 1975, the RDA passed a resolution to consider the adoption of an ordinance amending the redevelopment plan to include an additional eleven blocks of the downtown business district, including Block 57. In this resolution, the RDA designated this area as a redevelopment survey area, and decided that it required further study to determine whether one or more redevelopment projects within its boundaries were feasible. It directed the RDA staff to select one or more project areas comprising "all or part of the above described redevelopment survey area," and to formulate a preliminary redevelopment plan.

To this end, the public hearings were held on the adoption of this ordinance on July 31 and August 4, 1975 before the RDA, and on September 3, 1975 before the Commission. Although the RDA notified every property owner in the affected area by mail prior to the hearings, no Landowners attended these hearings.

During the hearings, the RDA's executive director, Michael Chitwood, assured those present that all owners of property designated for redevelopment by the RDA would be provided notice and hearing, along with detailed architectural information about the renovation of their properties, and that property acquisition would not occur without their approval and consent.

On September 10, 1975, the Commission passed an ordinance adopting the CBD West Neighborhood Development Plan and mailed a copy of the ordinance to every property owner in the affected area, including Landowners.

On May 14, 1982, the RDA again notified all affected property owners, including Landowners, of another set of public hearings to be held for the purpose of amending and updating the CBD West Neighborhood Develop-

JAN 15 1991

Mary Hooper

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----00000-----

)
)
)
)
)
)
)
)
)

ORDER DENYING PETITION
FOR REHEARING

Case No. 890031-CA


Before Judges Orme, Bench, and Billings.

THIS MATTER having come before the Court upon Appellant's Petition for Rehearing, filed January 9, 1991,

IT IS HEREBY ORDERED that the Appellant's Petition for Rehearing is denied.

Dated this 15th day of January, 1991.

FOR THE COURT:


Mary T. Noonan
Clerk of the Court

CERTIFICATE OF MAILING

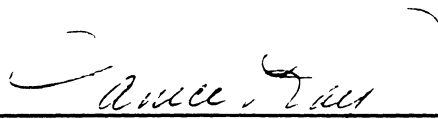
I hereby certify that on the 15th day of January, 1991, a true and correct copy of the foregoing ORDER DENYING REHEARING was hand-delivered or deposited in the United States mail.

Debra K. Loy
Elizabeth Holbrook
Salt Lake Legal Defender Association
Attorneys at Law
424 East 500 South, Suite 300
Salt Lake City, UT 84111

R. Paul Van Dam
State Attorney General
Christine F. Soltis
Assistant Attorney General
B U I L D I N G M A I L

DATED this 15th day of January, 1991.

By


Deputy Clerk