

2010

Utah v. Michelle Ann Cox : Brief of Appellee

Utah Court of Appeals

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Case No. 20100947-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,

vs.

Michelle Ann Cox,
Defendant/ Appellant.

Brief of Appellee

Appeal from convictions for forgery and theft by deception, in the
Third Judicial District Court of Utah, Salt Lake County, the Honorable
Robert Faust presiding.

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Utah Code Ann. § 76-6-402 (West 2004) (presumptions and defenses)
 Utah Code Ann. § 76-6-405 (West 2004) (theft by deception)
 Utah Code Ann. § 76-6-412 (West 2004) (classification of theft offenses)
 Utah Code Ann. § 76-6-412 (West Supp. 2011) (classification of theft
 offenses)
 Utah Code Ann. § 76-6-501 (West Supp. 2009) (forgery)

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Case No. 20100947-CA

IN THE
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State of Utah,
Plaintiff/ Appellee,

vs.

Michelle Ann Cox,
Defendant/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (West Supp. 2009), and theft by deception, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-405 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUES

The trial court instructed the jurors on all the elements of theft by deception and forgery. The court instructed that they could find Defendant guilty of the offenses only if they were convinced that “each and every element had been proven beyond a reasonable doubt.” R89,92.

The court also instructed that “[i]t is a defense to theft by deception that the Defendant . . . acted under an honest belief that she had a right to obtain or exercise control over the property.” F94. That instruction further stated: “Evidence of this

defense must be presented by the defense, and if presented[,] the State retains its burden of proof beyond a reasonable doubt on all elements of the offense charged.”

Id.

Defendant now raises an unpreserved claim that the last sentence of the “honest belief” instruction “unconstitutionally shifted the burden of proof” on both the theft-by-deception and forgery charges.

1a. Should this Court review this claim for plain error or manifest injustice, where Defendant invited the error below?

Standard of Review. A party who invites error is precluded from subsequently obtaining appellate review for plain error or manifest injustice. *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742.

1b. Has Defendant shown that counsel was ineffective for not objecting to the “honest belief” instruction where the instruction expressly stated that the State retained the burden of proof?

Standard of Review. “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *State v. Ott*, 2010 UT 1, ¶ 16, 247 P.3d 344 (quoting *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162).

2. Should this Court remand for Defendant to receive the benefit of the lesser penalty afforded by an amended statute that took effect after her conviction but before her sentencing?

Standard of Review. Whether a defendant is “entitled to a lesser sentence when the legislature reduces the penalty for the crime charged after conviction but before sentencing” is a question of law. *State v. Yates*, 918 P.2d 136, 138 (Utah App. 1996). But, as explained below, the State concedes this point.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutes are included in *Addendum A*:

Utah Code Ann. § 76-6-402 (West 2004) (presumptions and defenses);
Utah Code Ann. § 76-6-405 (West 2004) (theft by deception);
Utah Code Ann. § 76-6-412 (West 2004) (classification of theft offenses);
Utah Code Ann. § 76-6-412 (West Supp. 2011) (classification of theft offenses);
Utah Code Ann. § 76-6-501 (West Supp. 2009) (forgery).

STATEMENT OF THE CASE

A. Summary of the facts.

The offense. On September 10, 2009, Kathy Aller parked her 1996 Chevrolet Cavalier at the University of Utah Medical Center, where she worked as an administrative assistant. R152:138-39. She left her bag inside and locked the car with the windows open a few inches; she planned just to drop off some papers and make a short visit to a friend. R152:139.

When she returned just after 6:00 p.m., her bag was gone. R152:139-40, 148. She called University Campus Police to report the missing bag. Because her bag contained blank checks and credit and debit cards, she went to her credit union

early the next morning to report the theft. R152:147. She was too late. A check had been cashed against her account at 10:08 a.m. R152:185.

The \$360 check was made out to Defendant Michelle Cox. *See* State's Exhibit B. Surveillance video showed Defendant cashing the check. *See* R152:163-64; *see also* State's Exhibit F. The teller requested and Defendant showed her identification. R152:162. Defendant endorsed the check. State's Exhibit B; R156:305. Defendant later admitted to writing in her name as the payee and to filling in the written amount of the check, i.e., the amount in words. R156:305. She also later admitted to driving to the bank with Zach Garcia, who allegedly stole the bag and the checks, and Katrina (or Catrina) Dominguez, Defendant's friend and Garcia's girlfriend. R156:303, 357. Defendant also admitted calling the bank before traveling there to make sure that the check would clear. R156:302.

The investigation – Defendant's account. After receiving a packet from the credit union's fraud investigators and a copy of the check, Salt Lake City Police Detective Brenden Kirkwood contacted Defendant. R156:246. During the investigation he spoke by telephone with Defendant on several different occasions. R156:248-68. Defendant admitted cashing the check, but gave several different stories about how she came to possess it. R156:250; *see also* R156:248-68.

Defendant first told Detective Kirkwood that she had received the check as payment for a service she had provided. R156:250. She claimed to be a manicurist

who had done manicures for a party of twelve people. *Id.* When asked who could verify this, Defendant replied that her supervisor, Sue Sandoval, could. *Id.* But when Kirkwood called Sandoval, she could not verify Defendant's story. R156:251. Moreover, Sandoval advised Kirkwood that Defendant was not licensed to perform manicures. R156:252.

So Kirkwood called Defendant back. *Id.* This time Defendant asserted that she had done the manicures for her friend Katrina Dominguez, but had done them in her own home rather than at the salon. *Id.* When Kirkwood told Defendant he was going to call Dominguez, Defendant gave a third story. R156:253. She still claimed that she got the check from Dominguez, but said "it was to cover gas that [Dominguez] had pumped at a station for an unknown female." R156:253. Defendant claimed that Dominguez "put the gas on her debit card, received the check in exchange for the gas of this unknown individual," and then gave the check to Defendant to cash for her. R156:253. When Kirkwood called Dominguez, she said she received the check as a payment from an unknown female for pumping gas for her. R156:253-54.

Defendant's last account to Kirkwood was that Dominguez's mother gave Dominguez the check, but that Dominguez could not cash it because she had "account issues." R156:254. Defendant believed that Dominguez had signed the check. R156:256. Defendant claimed that Dominguez offered Defendant money to

cash the check. R156:267. Defendant said that she received \$60 for cashing the check. *Id.*

The investigation—Katrina Dominguez’s account. Dominguez did not testify. *See* R152, 156. Detective Kirkwood testified to her account. *See* R156:267-76. As stated, Dominguez initially told Detective Kirkwood that she had received the check for purchasing gas for an unknown female. R156:269. Kirkwood obtained Dominguez’s debit card transactions record, which showed no gas purchase for the date claimed. *Id.* When Kirkwood confronted Dominguez with this discrepancy, she admitted that she had lied and there had been no gas pumping. R156:269-70. Dominguez now said that she found the checkbook outside Defendant’s apartment, believed that it belonged to a friend of Defendant, and returned the checkbook to Defendant. R156:270. She claimed that Defendant cashed one of the checks from the checkbook and then gave her \$60 for finding it. R156:271. Dominguez later admitted lying about this. R156:276. She then told Detective Kirkwood that her boyfriend Zach Garcia burglarized a vehicle and stole the checks; she and Defendant devised the gas-pumping story; Defendant cashed the check; and she and Defendant split the proceeds so that each received \$150. *Id.*

Defendant’s trial testimony. At trial, Defendant admitted cashing the check, but claimed that she did not know that it was stolen. R156:295. She testified that her friend Dominguez came to her saying that she had a check from her mother that

she needed to cash. R156:301. Defendant claimed that Dominguez said that she could not cash it herself because she had problems with her account. *Id.* Defendant agreed to cash the check, which had already been signed with the \$360 numeric amount already written in. R156:301, 305. Defendant said she printed her name on the payee line and filled in the written amount of the check. R156:305. She called the bank to make sure that the account had sufficient funds to cover the check. R156:302. Defendant, Dominguez, and Garcia then drove to the bank, where Defendant presented and endorsed the check at the teller station. R156:305. She said that Dominguez gave her \$60 for cashing the check. R156:306.

Defendant denied telling Detective Kirkwood that she received a check for doing the pedicure party. R156:308. She testified that she had only tried to explain to the detective that Dominguez had asked her about “possibly doing a pedicure party for about 12 people.” *Id.*

B. Summary of the proceedings.

The State charged Defendant with forgery and theft by deception. R1-3. A jury found her guilty on both counts. R97. The trial court sentenced Defendant on the forgery conviction to an indeterminate prison term of up to five years, suspended execution of the prison term in favor of a 365-day jail term, and suspended all but thirty days of that term. R107. The court sentenced her on the theft-by-deception conviction to a 365-day jail term and suspended all 365 days. *Id.*

Defendant timely appealed. R124.

SUMMARY OF ARGUMENT

Jury Instruction No. 33 stated that it was a defense to theft by deception that Defendant acted in the "honest belief" that she had a right to obtain the property she took. The last sentence of the instruction stated that evidence of this defense must be presented by the defense, and that if presented, the State retained its burden of proving beyond a reasonable doubt all elements of the offense charged. Defendant claims for the first time on appeal that this sentence improperly shifted the burden of disproving both theft by deception and forgery to her. She also claims that she was entitled to be sentenced to a reduced punishment for her theft-by-deception conviction under an amended statute that became effective after her conviction but before sentencing.

1a. Defendant is not entitled to review of her jury instruction claim for plain error or manifest injustice. Defendant invited any error when trial counsel affirmatively represented to the court that the instruction was correct or, at the very least, failed to object to the instruction when the trial court specifically asked about it. Thus, she can succeed on this claim only if she proves ineffective assistance of counsel for not objecting to the instruction.

1b. Defendant has not proven that trial counsel performed deficiently for not objecting to the instruction, because it was a correct statement of the law. First, by

its express terms, the instruction did not shift the burden of proving deception; rather, it made clear that the burden of proof always remained on the State. Second, the instruction could not have shifted the burden of proof as to the forgery count, because, by its express terms, the instruction applied only to the theft-by-deception count. Defendant has not proven prejudice for essentially the same reasons.

2. The State concedes that counsel should have alerted the trial court that after Defendant's conviction but before sentencing, an amended statute took effect that reduced the penalty for her theft-by-deception offense from a class A misdemeanor to a class B misdemeanor. Defendant was entitled to be sentenced to the lesser penalty. This Court should therefore remand for entry of the theft-by-deception conviction and sentence as that of a class B misdemeanor.

ARGUMENT

I.

DEFENDANT CANNOT PREVAIL ON HER UNPRESERVED CLAIM THAT THE "HONEST BELIEF" JURY INSTRUCTION SHIFTED THE BURDEN OF PROOF TO HER

The trial court instructed the jury that it was a defense to theft by deception if the defendant "acted in the honest belief that she had the right to obtain . . . the property." R94. The instruction concluded with this sentence: "Evidence of this defense must be presented by the defense, and if presented[,] the State retains its burden of proof beyond a reasonable doubt on all elements of the offense charged." *Id.* Defendant claims for the first time on appeal that the last sentence of the instruction improperly shifted to her the burden of proving not only theft by deception, but also the forgery. *See* Br. Appellant at 23-24. Because she did not preserve this claim below, she argues that the trial court plainly erred in giving the instruction as written or, alternatively that her counsel was ineffective for not objecting to the instruction. Br. Appellant at 23-26.

Because Defendant invited any error, she is not entitled to plain error review. And while she is entitled to review of her ineffective-assistance-of-counsel claim, she has not met the heavy burden of proving both that counsel performed deficiently and that counsel's failure to object prejudiced her.

A. Because defendant approved the jury instructions below, the invited error doctrine precludes plain error review.

Defendant first claims that it was “plain error to instruct the jury that the defendant had the burden of presenting evidence that she had an honest belief that she was authorized to cash the check.” Br. Appellant at 23 (*italics and underlining omitted*). Defendant correctly notes that the “plain error standard of review is also intended to avoid manifest injustice” and that the terms “plain error” and “manifest injustice” have been described as being essentially synonymous. *Id.* (citing *State v. Alinas*, 2007 UT 83, ¶ 10, 171 P.3d 1046) (*internal quotation marks omitted*). But Defendant is not entitled to plain error or manifest injustice review because she affirmatively approved the jury instructions below.

Proceedings below. Before taking evidence on the second and last day of trial, the trial court discussed the jury instructions with the parties. Defense counsel objected to one instruction—unrelated to the issue here—and the prosecutor withdrew it. R156:221-23. The court then asked defense counsel, “Okay, so then for the record, to make it absolutely clear, neither the State nor the defense has any jury instructions objections in this case; correct, [counsel]?” R156:223. Defense counsel apparently responded affirmatively and non-verbally, because the transcript does not indicate any response from her. *See id.* When the court then asked about the parties’ preferences concerning the order of the instructions, both parties agreed to have the court determine the order of the instructions. *See* R156:223-24. The court

also asked the parties if they would like an instruction about Defendant's right to testify or not testify. R156:224. The prosecutor said that he did, and defense counsel questioned Defendant on the record to show that Defendant knew that she did not have to testify, but that she wanted to take the stand. R156:224-25.

Minutes later, the prosecutor asked that all objections to questions and testimony be discussed outside the jury's presence. R156:234. The prosecutor then stated, "[O]ther than that, I have no objections to the instructions the Court is intending to give and no objections to the Court's not giving mine." R156:235. Before bringing in the jury, the court asked defense counsel, "[D]id you have anything else you wanted to add?" *Id.* The record indicates that defense counsel gave "[n]o verbal response." *Id.*

Relevant law. Under the invited error doctrine, "a party on appeal cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Alfatlawi*, 2006 UT App 511, ¶ 26, 153 P.3d 804 (quotations and citation omitted). A party invites error when she makes "[a]ffirmative representations that [she] has no objection to the proceedings . . . because such representations reassure the trial court and encourage it to proceed without further consideration of the issues." *State v. Winfield*, 2006 UT 4, ¶ 16, 128 P.3d 1171. In the context of jury instructions, a defendant invites error when she "affirmatively approve[s] of the jury instructions at trial." *Alfatlawi*, 2006 UT App

511, ¶ 26 (alteration in original). Thus, where counsel “confirm[s] on the record that the defense had no objection to the instructions given by the trial court,” or even “fail[s] to object to an instruction when specifically queried by the court,” the invited error doctrine applies. *Geukgeuzian*, 2004 UT 16, ¶ 10. A party who invites error is precluded from subsequently obtaining appellate review for plain error or manifest injustice. *Geukgeuzian*, 2004 UT 16, ¶ 9; *Alfatlawi*, 2006 UT App 511, ¶ 26.

Defendant invited any error in the instructions here. As explained, when asked, counsel effectively confirmed on the record that she had no objections to the jury instructions. *See* R156:223. At the very least, she failed to object to the instructions when specifically queried by the court. *See id.* In so doing, Defendant invited any error, and she is not entitled to review of her claim for plain error or manifest injustice. *See State v. Anderson*, 929 P.2d 1107, 1108-09 (Utah 1996); *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993); *State v. Medina*, 738 P.2d 1021, 1023 (Utah 1987).

B. Because the “honest belief” jury instruction did not shift the burden of proof to Defendant, Defendant has not shown that trial counsel was ineffective for not objecting to it.

Defendant alternatively claims that “[d]efense counsel was ineffective for failing to object to an instruction which deprived [her] client of a fundamental constitutional protection,” i.e., an instruction that “shift[ed] the burden of proof to the defendant.” Br. Appellant at 24, 26 (italics and underlining omitted).

Defendant claims that the final sentence of this instruction unconstitutionally shifted to her the burden of proving not only the deception element of theft deception, but also the fraud element of forgery. Br. Appellant at 10-26. Defendant asserts that because the last sentence required her “to present evidence that she had an honest belief that her representations were true or that she had an honest claim of right to the property she obtained,” it “unconstitutionally shifted the burden of proof to [her] to disprove required elements of the charged offense[s].” *Id.* at 7.¹ Defendant thus argues that her counsel was ineffective for not objecting to the instruction. *Id.* at 24-26. Defendant has not met her heavy burden to show both deficient performance and prejudice.

¹ Defendant claims only that the jury instruction unconstitutionally shifted the burden of proof on the deception element of theft by deception and the fraud element of forgery. *See* Br. Appellant at 15-21. She does not claim that the instruction shifted the burden on any other element of either offense. *See id.*

Jury instructions. The jury was repeatedly instructed that the defendant was presumed innocent and the State had the burden to prove all of the elements of each offense beyond a reasonable doubt:

"The defendant is presumed innocent of the charge." (Instruction 5, R77);

"The prosecution has the burden of proof. . . . The defendant is not required to prove innocence—you must start by assuming it. According to our law, the defendant is presumed innocent unless proven guilty beyond a reasonable doubt." (Instruction 15, R81);

"Before you can give up your assumption [that] the defendant is innocent, you must be convinced that the defendant's guilt has been proven beyond a reasonable doubt." (Instruction 16, R81);

"Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of both—to convince you of the defendant's guilt beyond a reasonable doubt." (Instruction 29, R87);

"The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state." (Instruction 30, R88);

"You cannot convict [Defendant] of [forgery] unless you find beyond a reasonable doubt, based on the evidence each of the following elements [listing elements of forgery]. . . . [I]f you are not convinced that one or more of these elements has been proven beyond a reasonable doubt then you must find the defendant NOT GUILTY." (Instruction 31, R89-90).

"You cannot convict [Defendant] of [theft by deception] unless you find beyond a reasonable doubt, based on the evidence each of the following elements [listing elements of theft by deception]. . . . [I]f you are not convinced that one or more of these elements has been proven beyond a reasonable doubt then you must find the defendant NOT GUILTY." (Instruction 32, R92-93).

Jury Instruction No. 31 set forth the elements of forgery. It instructed that the jurors could not convict Defendant of forgery unless they found beyond a

reasonable doubt that Defendant, “acting with a purpose to defraud anyone, or with knowledge that she was facilitating a fraud to be perpetuated by anyone,” “altered any writing of another without his authority or uttered the altered writing” or “made, completed, . . . or uttered any writing” so that it “purported to be the act of another” or “to be an act on behalf of another party with the authority of that party.” R89-91 (instruction set forth in its entirety in *Addendum B*).

Jury Instruction No. 32 set forth the elements of theft by deception. It instructed the jurors that they could not convict Defendant of theft by deception unless they found beyond a reasonable doubt that Defendant had obtained or exercised control over the property of another by deception and with a purpose to deprive. R92-93. This instruction explained that “deception” occurs when a person intentionally “[c]reates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect . . . the judgment of another in the transaction.” *Id.* (instruction set forth in its entirety in *Addendum B*).

Jury Instruction No. 33, the challenged instruction, set forth the “honest belief” defense to theft by deception. It explained that Defendant had a defense to theft by deception if she acted “under an honest claim of right to the property,” “in the honest belief that she had the right to obtain the property,” or “honestly believing that the owner, if present, would have consented” to her obtaining the

property. R94. The instruction concluded with this sentence: “Evidence of this defense must be presented by the defense, and if presented the State retains its burden of proof beyond a reasonable doubt on all elements of the offense charged.” *Id.* (emphasis added).

Relevant law – burden of proof and jury instructions. The State bears the burden to “prove beyond a reasonable doubt every fact necessary to constitute the crime with which [a defendant] is charged.” *Patterson v. New York*, 432 U.S. 197, 206 (1977), quoting *In re Winship*, 397 U.S. 358 (1970) (internal quotation marks omitted); see also *State v. Poole*, 2010 UT 25, ¶ 22, 232 P.3d 519.

An appellate court reviews “a challenged jury instruction in context with all other jury instructions provided to the jury.” *State v. Marchet*, 2009 UT App 262, ¶ 23, 219 P.3d 75 (citation and internal quotation marks omitted). Where “the jury instructions as a whole fairly instruct the jury on the applicable law, reversible error does not arise merely because one jury instruction, standing alone, is not as accurate as it might have been.” *Id.* (citation and internal quotation marks omitted).

Relevant law – ineffective assistance. A defendant “raising an ineffective assistance of counsel claim carries a ‘heavy burden.’” *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002). To prevail on an ineffective assistance claim, the burden is on Defendant to show: “(1) that counsel’s performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant

would have obtained a more favorable outcome at trial.” *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Failure to satisfy either prong will result in our concluding that counsel’s behavior was not ineffective.” *State v. Diaz*, 2002 UT App 288, ¶ 38, 55 P.3d 1131.

To establish ineffective assistance of counsel, Defendant must first show that trial counsel’s performance was deficient—that is, that counsel’s performance did not meet an objective standard of reasonableness—by identifying specific acts or omissions she alleges did not result from reasonable professional judgment. *Strickland*, 466 U.S. at 687-88, 690. When reviewing such a claim, courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (citation omitted). This presumption “derives from our common experience that attorneys, as a whole, usually represent their clients in a professional, competent, and reasonable manner.” *Bullock*, 297 F.3d at 1046. The standard is appropriately deferential, recognizing the “variety of circumstances faced by defense counsel” and “the range of legitimate decisions regarding how to best represent a criminal defendant.” *State v. Tyler*, 850 P.2d 1250, 1254 (Utah 1993). Moreover, “[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with

the client, with opposing counsel, and with the judge.” *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011).

Accordingly, “tactical decisions such as ‘what witnesses to call, what objections to make, and, by and large, what defenses to interpose, are generally left to the professional judgment of counsel.’” *Adams v. State*, 2005 UT 62, ¶ 25, 123 P.3d 400 (quoting *State v. Wood*, 648 P.2d 71, 91 (Utah 1982)). *State v. Snyder*, 860 P.2d 351, 354 (Utah App. 1993).

Ultimately, Defendant bears the burden of “show[ing] that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 787 (quotations and citation omitted). As part of that burden, the defendant must show that there is no conceivable legitimate tactical basis for trial counsel’s actions. If there is such a basis, counsel has not performed deficiently. See *Clark*, 2004 UT 25, ¶ 7; *State v. Holbert*, 2002 UT App 426, ¶ 58, 61 P.3d 291.

Even when the presumption of competency is overcome and deficient performance is established, the ineffectiveness analysis does not end. A defendant alleging ineffectiveness must also establish prejudice, that is, “a reasonable probability . . . that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Templin*, 805 P.2d 182, 187 (Utah 1990) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a one that

undermines confidence in the outcome. *Id.* "In making this determination, an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *Id.* "And as with the first prong of the *Strickland* standard, there is a 'strong presumption' that the outcome of the particular proceeding is reliable." *Benvenuto v. State*, 2007 UT 53, ¶ 23, 165 P.3d 1195 (quoting *Strickland*, 466 U.S. at 699).

1. Defendant has not shown that counsel performed deficiently for not objecting to the final sentence of the "honest belief" instruction, because it did not shift the burden of proving the deception element of theft by deception.

Defendant has not shown that counsel performed deficiently. Counsel had a legitimate reason for not objecting to the jury instruction because, when read both by itself and in context with all other instructions, the instruction made clear that the State, and only the State, had the burden of proof with respect to all the elements of theft by deception. By its express terms, the last sentence in the instruction did not shift to Defendant the burden of proving any element of theft by deception. First, the instruction stated that an "honest belief" that Defendant had a right to obtain the property constituted "a defense to the charge of theft by deception." R94 (emphasis added). Defendant does not challenge the correctness of this statement. The instruction then correctly advised the jury that Defendant had the responsibility or burden of production to raise this defense by presenting some evidence that could

support it. *See id.* Defendant does not contest this allocation of the *burden of production*. Nor could she. Defendants typically have the burden of presenting some evidence of a defense. *See* Utah Code Ann. § 76-2-308 (West 2004) (stating that compulsion, entrapment, ignorance or mistake of fact, and voluntary intoxication may be affirmative defenses) & § 76-1-504 (West 2004) (stating that evidence of an affirmative defense “shall be presented by the defendant”); *see also State v. Knoll*, 712 P.2d 211, 215 (Utah 1985) (“As a practical matter, a defendant may have to assume the burden of producing some evidence of self-defense if there is no evidence in prosecution’s case that would provide some kind of evidentiary foundation for claim of self-defense.”). This is because evidence of many defenses, like evidence of a defendant’s “honest belief,” is most often uniquely in the position of a defendant, who knows what he or she thought or did at the time of the offense. A defendant therefore bears the burden of producing some evidence of the defense. Indeed, in this case, Defendant met her burden of production to present evidence of this defense when she put on evidence that she believed she had a right to cash the check. *See* R156:295-313.²

² Defendant’s only challenge to the “honest belief” instruction is that it shifts the burden of proof on the elements of the offense. Defendant does not argue that she cannot legally be required to put on some evidence of a defense or that she

(Footnote continues on following page.)

Defendant nevertheless claims that the instruction shifted the *burden of proof* on the deception element. But the instruction did not state that an “honest belief” was a necessary or required defense or that Defendant’s failure to produce evidence of the defense shifted the burden of proof from the State. *See id.* Moreover, the instruction expressly told the jurors that if Defendant presented evidence that she had an “honest belief” in her right to cash the check, as Defendant did, the State still “retain[ed] its burden of proof beyond a reasonable doubt on *all elements* of the offenses charged.” R94. “All elements” necessarily included the element of deception. *See* R92-93 (elements instruction on theft by deception).

Thus, the instruction accurately instructed the jury on the law as set forth in *In re Winship*, 397 U.S. 358 (1970), and *Patterson v. New York*, 432 U.S. 197 (1977): it set forth the State’s burden to prove all elements of the offenses beyond a reasonable doubt. In addition, other instructions—Nos. 5, 15, 16, 29, 30, 31, and 32, which included the elements instructions—reiterated the State’s burden to prove all the elements beyond a reasonable doubt. *See* R77, 81, 87, 88, 89-90, 92-93. The elements

cannot legally be allocated the burden of production. She does not claim that the instruction was an affirmative defense, nor does she argue that there should have been a specific instruction requiring the State to disprove an affirmative defense. She argues only that the instruction shifted to her the burden of proving the elements of the offenses. The State therefore addresses only that matter.

instructions, in fact, expressly stated that if the jurors were not convinced beyond a reasonable doubt of the proof of even one element of an offense, they must find the Defendant not guilty. *See* R89-90, 92. Thus, the instructions as a whole also accurately conveyed the State's burden. *See State v. Taylor*, 2005 UT 40, ¶ 24, 116 P.3d 360 ("We have clearly indicated that jury instructions must be viewed as a whole rather than in isolated segments.") (citation and internal quotation marks omitted).

Thus, trial counsel had legitimate, strategic reasons for not objecting to the final sentence of Jury Instruction No. 13. First, the instruction was favorable to Defendant. It reiterated the State's burden to prove beyond a reasonable doubt all of the elements of the defense. Second, there is nothing in the law that precludes requiring a defendant to bear the burden of production—to put on some evidence of a defense—particularly where that evidence of that defense is uniquely in her possession. The instruction was correct and clear about the State's burden of proof. Counsel could reasonably have determined that objecting would be contrary to Defendant's interests. At the least, he could reasonably have concluded that objecting would have been futile. Counsel is not required to make futile motions or objections. *State v. Whittle*, 1999 UT 96, ¶ 34, 989 P.2d 52 (quotations and citations omitted).

2. Defendant has not shown that counsel performed deficiently for not objecting to the final sentence of the “honest belief” instruction, because it did not shift the burden of proving the fraud element of forgery.

As stated, Defendant also asserts that the “honest belief” jury instruction shifted the burden of proof on the fraud element of forgery and that counsel therefore performed deficiently for not objecting to it. Br. Appellant at 21. Defendant cannot prevail on this claim because the instruction, by its express terms, did not address forgery, let alone imply that Defendant bore the burden of disproving the fraud element of forgery. The first sentence of the instruction expressly states that a defendant’s acting in the honest belief that she had a right to obtain property “is a defense to the charge of theft by deception.” R94. The phrase in the final sentence of the instruction – that “this defense must be presented by the defense” – goes only to a defense to theft by deception. It does not address or bear on the forgery charge. Moreover, for the reasons given above, the instruction did not shift the burden of proof on any element of the offense. Thus, trial counsel was not deficient for not objecting to the instruction on the basis that it shifted the burden of proof on forgery.

3. Defendant has not shown that counsel’s not objecting to the final sentence of the “honest belief” instruction prejudiced her.

For essentially the reasons state above, Defendant also has not proved that counsel’s not objecting to the instruction prejudiced her. First, as stated, the

instruction was correct and clear and did not shift the burden of proof on the deception element of theft by deception, the fraud element of forgery, or any other element of the offenses. Rather, the instructions clearly provided that the State had the burden to prove every element of the offenses. Thus, she had shown no reasonable probability of a more favorable result, had defense counsel objected to the instruction.

Moreover, the “honest belief” instruction was favorable to Defendant. It emphasized to the jury that the prosecution was required to prove all the elements of the offense. That may have been particularly important in this case, where Defendant’s only defense was that she claimed to have held an honest belief that the account owner signed the check and that she was entitled to cash it.³

³ In addition, the State presented overwhelming evidence of Defendant’s guilt. The teller and the surveillance tape established that Defendant cashed the check. See R152:162-64; see also State’s Exhibit F. Detective Kirkwood testified to Defendant’s giving four inconsistent stories of how she came to have the check. R156:250-67. Her explanations for the inconsistent stories were illogical. See R156:295-308. Because the evidence of guilt was overwhelming, counsel’s not objecting to the jury instruction could not have affected the outcome of the proceeding. Thus, even if counsel should have objected to the instruction, Defendant has not shown prejudice. See *State v. Arnold*, 2011 UT App 255, ¶ 6, 688 Utah Adv. Rep. 49 (holding that Defendants had not demonstrated prejudice based on counsel’s alleged deficient performance because evidence of their guilt was overwhelming).

But, even if it could be said that the instruction shifted the burden of proof on the theft-by-deception count, it did not shift and could not have shifted the burden of proof on the forgery count because the instruction was expressly limited to theft by deception. Therefore, even assuming *arguendo* that trial counsel was deficient for not objecting to the "honest belief" instruction and that Defendant suffered prejudice with respect to her theft-by-deception conviction, Defendant has not shown prejudice with respect to her conviction on the forgery count.

II.

THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO GIVE DEFENDANT THE BENEFIT OF A LESSER PENALTY AFFORDED BY AN AMENDED THEFT STATUTE THAT TOOK EFFECT BEFORE SENTENCING

Based on her taking possession of \$360 after passing a forged check, Defendant was convicted of theft by deception. *See* R107. Under Utah law, the value of property taken determines the level of theft offenses, including theft by deception. *See* Utah Code Ann. § 76-6-412(c) (West 2004). At the time of the offense, theft of property valued at \$300 or more, but less than \$1000, was classified as a class A misdemeanor. *Id.* Effective November 1, 2010, theft of property valued at less than \$500 was classified as a class B misdemeanor. *See* Utah Code Ann. § 76-6-412 (West Supp. 2011). Defendant was sentenced seven days later on November 8, 2010. *See* R107.

Under Utah law, a defendant is "entitled to a lesser sentence when the legislature reduces the penalty for the crime charged after conviction but before sentencing." *See Yates*, 918 P.2d at 139; *see also Belt v. Turner*, 479 P.2d 791, 792-93 (Utah 1971); *State v. Patience*, 944 P.2d 381, 385 (Utah App. 1997).

For the first time on appeal, Defendant claims that she was entitled to be sentenced to the reduced penalty. Br. Appellant at 3-32. Because of the well-settled rule cited above, the State does not contest Defendant's claim that trial counsel was ineffective for not asking that she be convicted and sentenced to a class B misdemeanor on the theft-by-deception charge.


This Court should remand for the trial court to enter Defendant's theft-by-deception conviction as a class B misdemeanor and resentence her to the reduced penalty.

CONCLUSION

For the foregoing reasons, the Court should remand for the trial court to enter Defendant's conviction for theft by deception as a class B misdemeanor and to give her the benefit of the reduced penalty that was in effect at the time of sentencing. The court should affirm Defendant's convictions and sentences in all other respects.

Respectfully submitted January 12, 2012.

MARK L. SHURTLEFF
Utah Attorney General



JEANNE B. INOUE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on January 12, 2012, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Stephen W. Howard
Crippen & Cline, LC
10 West 100 South, Suite 425
Salt Lake City, UT 84101

A digital copy of the brief was also included: ☒ Yes ☐ No

Melina Fryer

Addenda

Addendum A

Title/Chapter/Section: [Go To](#)[Search Code by Key Word](#)[<< Previous Section \(76-6-401\)](#)[Next Section \(76-6-402.5\) >>](#)[Utah](#)[Code](#)[Title 76](#) Utah Criminal Code[Chapter](#)
[6](#) Offenses Against Property[Section](#)
[402](#) Presumptions and defenses.**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.

Amended by Chapter 32, 1974 General Session

Download Code Section [Zipped](#) WordPerfect [76_06_040200.ZIP](#) 2,030 Bytes

[<< Previous Section \(76-6-401\)](#)[Next Section \(76-6-402.5\) >>](#)[Questions/Comments](#) | [Utah State Home Page](#) | [Terms of Use/Privacy Policy](#) | [ADA Notice](#)

Title/Chapter/Section:

Go To

[Search Code by Key Word](#)[<< Previous Section \(76-6-404.7\)](#)[Next Section \(76-6-406\) >>](#)[Utah](#)[Code](#)[Title 76](#) Utah Criminal Code[Chapter](#)
[6](#) Offenses Against Property[Section](#)
[405](#) Theft by deception.**76-6-405. Theft by deception.**

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

Enacted by Chapter 196, 1973 General Session

Download Code Section [Zipped](#) WordPerfect [76_06_040500.ZIP](#) 1,774 Bytes[<< Previous Section \(76-6-404.7\)](#)[Next Section \(76-6-406\) >>](#)[Questions/Comments](#) | [Utah State Home Page](#) | [Terms of Use/Privacy Policy](#) | [ADA Notice](#)

(d) "Renter" means any person or organization obtaining the use of a motor vehicle from a rental company under the terms of a rental agreement.

(2) A renter is guilty of theft of a rental vehicle if, without notice to and permission of the rental company, the renter knowingly fails without good cause to return the vehicle within 72 hours after the time established for the return in the rental agreement.

(3) If the motor vehicle is not rented on a periodic tenancy basis, the rental company shall include the following information, legibly written, as part of the terms of the rental agreement:

(a) the date and time the motor vehicle is required to be returned; and

(b) the maximum penalties under state law if the motor vehicle is not returned within 72 hours from the date and time stated in compliance with Subsection (3)(a).

Laws 2001, c. 112, § 1, eff. April 30, 2001.

Library References

Automobiles § 339.

Westlaw Key Number Search: 48Ak339.

C.J.S. Motor Vehicles §§ 1511 to 1523.

§ 76-6-411. Repealed by Laws 1974, c. 32, § 41

§ 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.

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OFFENSES AGAINST PROPERTY

§ 76-6-412

Note 1

(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.

Laws 1973, c. 196, § 76-6-412; Laws 1974, c. 32, § 18; Laws 1975, c. 48, § 1; Laws 1977, c. 89, § 1; Laws 1989, c. 78, § 1; Laws 1995, c. 291, § 14, eff. May 1, 1995; Laws 1996, c. 139, § 1, eff. April 29, 1996; Laws 1997, c. 119, § 1, eff. May 5, 1997; Laws 1997, c. 289, § 8, eff. May 5, 1997.

Cross References

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.
Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.
Fines upon conviction of misdemeanor or felony, see § 76-3-301.
Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.
Indigent Defense Act, see § 77-32-101 et seq.
Motor vehicles, unauthorized control for extended time, see § 41-1a-1314.
Penalties for felonies, see § 76-3-203.
Rights of Crime Victims Act, see § 77-38-1 et seq.
Right to trial by jury, see Const. Art. 1, § 10.
Theft of baggage or cargo, buses, see § 76-10-1508.
Theft of baggage or cargo, see § 76-10-1508.

Library References

Larceny 23, 46, 65, 87. C.J.S. Larceny §§ 60(1) to 65, 115, 129(1), 159.
Westlaw Key Number Searches: 234k23; 234k46; 234k65; 234k87.

Research References

ALR Library

2002 A.L.R.5th 19, What is "Property of Another" Within Statute Proscribing Larceny, Theft, or Embezzlement of Property of Another.

Treatises and Practice Aids

Punitive Damages State-by-State Guide § 8.54, Utah.
3 Substantive Criminal Law § 19.4, Larceny-Personal Property of Another.

3 Substantive Criminal Law § 19.8, Theft Crimes: Consolidation.
Wharton's Criminal Law § 405, Property of Value.
Wharton's Criminal Law § 432, Property of Value.
Wharton's Criminal Law § 450, Property of Value.
Wharton's Criminal Law § 464, Taking Property by Stealth.
Wharton's Criminal Law § 465, Taking Property by Surprise.

Notes of Decisions

Theft of animals 2

1. Equal protection

Statute governing theft of livestock does not constitute denial of equal protection on theory that there is absence in statute of any reference to value of animal stolen in arriving at felonious nature of offense charged, as distinction made by Legislature between general theft and theft of certain animals is one which has historically been recognized as furthering legitimate pur-

Accomplices 7
Admissibility of evidence 10
Attorney fees 15
Determination of value 3
Elements of offense 8
Equal protection 1
Instructions 12
Lesser included offense 4
Presumptions and burden of proof 9
Questions for jury 11
Review 16

[<< Previous Section \(76-6-410.5\)](#)

[Next Section \(76-6-412.5\) >>](#)

[Utah](#)

[Code](#)

[Title 76](#) Utah Criminal Code

[Chapter](#)
[6](#) Offenses Against Property

[Section](#)
[412](#) Theft -- Classification of offenses -- Action for treble damages.

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

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

(a) as a second degree felony 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 third degree felony if:

(i) the value of the property or services is or exceeds \$1,500 but is less than \$5,000;

(ii) the actor has been twice before convicted of any of the offenses listed in this Subsection (1)(b)(ii), if each prior offense was committed within 10 years of the date of the current conviction or the date of the offense upon which the current conviction is based:

(A) theft, any robbery, or any burglary with intent to commit theft;

(B) any offense under Title 76, Chapter 6, Part 5, Fraud; or

(C) any attempt to commit any offense under Subsection (1)(b)(ii)(A) or (B).

(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 \$500 but is less than \$1,500; or

(d) as a class B misdemeanor if the value of the property stolen is less than \$500.

(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 attorney fees.

Amended by Chapter 193, 2010 General Session

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[<< Previous Section \(76-6-410.5\)](#)

[Next Section \(76-6-412.5\) >>](#)

U.C.A. 1953 § 76-6-501

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 6. Offenses Against Property

Part 5. Fraud

§ 76-6-501. Forgery—Elements of offense—"Writing" defined

(1) As used in this section, "writing" includes printing, electronic storage or transmission, or any other method of recording valuable information including forms such as:

- (a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification;
- (b) a security, revenue stamp, or any other instrument or writing issued by a government or any agency; or
- (c) a check, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

(2) A person is guilty of **forgery** if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

- (a) alters any writing of another without his authority or utters the altered writing; or
- (b) makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication, or utterance:
 - (i) purports to be the act of another, whether the person is existent or nonexistent;
 - (ii) purports to be an act on behalf of another party with the authority of that other party; or
 - (iii) purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when an original did not exist.

(3) It is not a defense to a charge of **forgery** under Subsection (2)(b)(ii) if an actor signs his own name to the writing if the actor does not have authority to make, complete, execute, authenticate, issue, transfer, publish, or utter the writing on behalf of the party for whom the actor purports to act.

(4) **Forgery** is a third degree felony.

CREDIT(S)

Laws 1973, c. 196, § 76-6-501; Laws 1974, c. 32, § 19; Laws 1975, c. 52, § 1; Laws 1995, c. 291, § 15, eff. May 1, 1995; Laws 1996, c. 205, § 27, eff. April 29, 1996; Laws 2007, c. 141, § 1, eff. April 30, 2007.

HISTORICAL AND STATUTORY NOTES

Laws 2007, c. 141, inserted subsec. (1); redesignated former subsec. (1) as subsec. (2); in subsec. (2)(a) substituted "the" for "any such", added designators (2)(b)(i) to (iii), inserted subsec. (2)(b)(ii), and made punctuation changes; deleted former subsec. (2) which provided:

"(2) As used in this section, 'writing' includes printing, electronic storage or transmission, or any other method of recording valuable information including forms such as:

"(a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege,

Addendum B

FILED DISTRICT COURT
Third Judicial District

AUG - 4 2010

SALT LAKE COUNTY

By _____ Deputy Clerk

In The Third Judicial District Court Of Salt Lake County
State of Utah

THE STATE OF UTAH,
Plaintiff,

vs.


MICHELLE ANN COX,
Defendant,


JURY INSTRUCTIONS

Case No. 101901166

THE JURY IS HEREBY CHARGED WITH THE LAW THAT APPLIES TO THIS CASE
IN THE FOLLOWING INSTRUCTIONS, NUMBERED (1) THROUGH (34), INCLUSIVE.

DATED THIS 4th DAY OF AUGUST, 2010.


ROBERT P. FAUST
DISTRICT COURT JUDGE



JURY INSTRUCTIONS

1. GENERAL INSTRUCTION

There are certain laws and rules which apply to this case. I'll explain them to you from time to time during the trial. Please pay careful attention. Each of you has been given a copy of these instructions. This copy is yours to keep. As I read these instructions to you, please follow along on your copy. Keep in mind the following points:

Many Instructions. There will be many instructions. All are equally important. Don't pick out one and ignore the rest. Think about each instruction in the context of all the others.

Obey Instructions. You must obey the instructions. You are not allowed to reach decisions that go against the law.

Gender – Singular/Plural. In these instructions, the masculine gender such as "he" or "him" includes the feminine "she" or "her" and the singular such as "defendant" includes the plural "defendants" when appropriate.

Note Taking. You may take notes during the trial, but don't over do it, and don't let it distract you from following the evidence. The lawyers will review important evidence in their closing arguments and help you focus on that which is most relevant to your decision. I also caution that notes are not evidence. Use them only to aid personal memory or concentration.

Keep an Open Mind. Don't form an opinion about the ultimate issues in this case until you have listened to all the evidence and the lawyers' summaries, along with the instructions on the law. Keep an open mind until then.

2. WHAT RULES APPLY TO RECESSES

From time to time I will call for a recess. It may be for a few minutes, a lunch break, overnight or longer. During recesses, do not talk about this case with anyone; not family, friends or even each other. The Clerk may ask you to wear a badge identifying yourself as a juror so that people will not try to discuss the case with you. Don't mingle with the lawyers, the parties, the witnesses or anyone else connected with the case. You may say "hello", or exchange similar greetings or civilities with these persons, but don't engage in conversations. Don't accept from or give to any of these

persons any favors, however slight, such as rides or food. Finally, don't read about this case in the newspaper or listen to any reports on television or radio. These restraints are necessary for a fair trial.

3. THE GENERAL ROLE OF THE JUDGE, THE JURY AND THE LAWYERS

The judge, the jury and the lawyers are all officers of the Court and play important roles in the trial.

Judge. It is my role as judge to decide all legal issues, supervise the trial and instruct the jury on the LAW that it must apply.

Jury. It is your role as the jury to follow that law and decide the factual issues. Factual issues generally relate to WHO, WHAT, WHEN, WHERE, HOW or similar things concerning which evidence will be presented.

Lawyers. It is the role of the lawyers to present evidence, generally by calling and questioning witnesses and presenting exhibits. Each lawyer will also try to persuade you to accept his version of the facts and to decide the case in favor of his client.

Keep in mind that neither the lawyers nor I actually decide the case, because that is your role. Don't be influenced by what you think our personal opinions are; rather, you decide the case based upon the law explained in these instructions and the evidence presented in court.

4. OUTLINE OF THE TRIAL

The trial will generally proceed as follows:

Opening Statements. The lawyers will outline what the case is about and indicate what they think the evidence will show.

Presentation of Evidence. The plaintiff will offer its evidence first followed by the defendant. Each side may also offer rebuttal evidence after hearing the witnesses and seeing the exhibits offered by the other side.

Instructions on the Law. After each side has presented its evidence, I will supplement these written instructions and review them with you.

Closing Arguments. The lawyers will then summarize and argue the case. They will share with you their respective views of the evidence, how it relates to the law and how they think you should decide the case.

Jury Deliberation. The final step is for you to retire to the jury room and deliberate until you reach a verdict.

5. THE CHARGE(S) and THE PRESUMPTION OF INNOCENCE

The defendant in this case has been accused of committing a crime. The accusation is in a written document called an INFORMATION, which will be read or summarized for you following this instruction. As you listen, keep in mind that the defendant has answered the charge by saying "not guilty." The defendant is presumed to be innocent of the charge.

COUNT 1

FORGERY, (2646) § 76-6-501, Utah Code Ann., as follows: That on or about September 11, 2009, at 735 South State Street, in Salt Lake County, State of Utah, the defendant did, with purpose to defraud anyone, or with knowledge that he was facilitating a fraud to be perpetrated by anyone:

(a) alter any writing of another without his authority or utters the altered writing; or
(b) make, complete, execute, authenticate, issue, transfer, publish, or utter any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance:

- (i) purported to be the act of another, whether the person was existent or nonexistent;
- (ii) purported to be an act on behalf of another party with the authority of that other party; or
- (iii) purported to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

COUNT 2

THEFT BY DECEPTION, (333) § 76-6-405, Utah Code Ann., as follows: That on or about September 11, 2009, at 735 South State Street, in Salt Lake County, State of Utah, the defendant obtained or exercised unauthorized control over the property of another by deception, with the purpose to deprive the owner thereof, and that the value of said property was or exceeded \$300, but was less than \$1,000.

6. WHAT IS THE JURY'S ROLE IN THIS CASE?

You must decide whether the charge against the defendant has been proven beyond a reasonable doubt. Your decision is called a VERDICT. Your verdict must be based only on the evidence produced here in court. It must be based on facts, not on speculation. Don't guess about any fact. However, you may draw reasonable inferences or arrive at reasonable conclusions from the evidence presented.

7. WHAT IS EVIDENCE?

Evidence is anything that tends to prove or disprove the existence of a disputed fact. It can be testimony, or documents, or objects, or photographs, or stipulations, or certain qualified opinions, or any combination of these things. Some times the lawyers may agree that certain facts exist. You should accept any agreed or stipulated facts as having been proved. In limited instances, I may take "judicial notice" of a well-known fact. If this happens, I will explain how you should treat it.

8. OPINION TESTIMONY

Under certain circumstances, witnesses are allowed to express an opinion. A person who by education, study or experience has become an expert in any art, science or profession, may give his opinion and the reason for it. A layman (or, a non-expert) is also allowed to express an opinion if it is based on personal observations and it is helpful to understanding his testimony or the case. You are not bound to believe anyone's opinion. Consider it as you would any other evidence, and give it the weight you think it deserves.

9. WHAT IS NOT TO BE CONSIDERED OR USED AS EVIDENCE?

I've explained to you what evidence is. Now I'll tell you about some things which do not qualify as evidence or which, for some other good reason, you should not consider in reaching your verdict.

Accusation. The fact that formal charges have been filed accusing the defendant of committing a crime is not evidence of guilt.

Punishment. You may be aware of the gravity of the offense charged and the range of potential penalties, but you should not consider what actual punishment the defendant may receive if found guilty. That is for the judge to decide based upon the applicable law.

Right to Remain Silent. If the defendant chooses not to testify in this case, don't consider that as evidence of guilt. The Constitution provides that an accused person has the right not to testify and you should not draw any negative inferences based upon the reliance on this right.

Lawyer Statements. What the lawyers say is not evidence. Their purpose is to give you a preview of expected evidence and to help you understand the evidence from their viewpoint.

Personal Investigation. Evidence is not what you can find out on your own. You should not make any investigation about the facts in this case. Do not make personal inspections, observations or experiments. Do not view premises, things or articles not produced in court. Don't let anyone else do anything like this for you. Don't look for information in law books, dictionaries or public or private records which are not produced in court.

Out of Court Information. Do not consider anything you may have heard or read about this case in the media or by word of mouth or other out-of-court communication. You must rely solely on the evidence that is produced and received in court.

10. THE JUDGE DECIDES WHAT EVIDENCE IS ADMISSIBLE

Sometimes a question will be raised about whether certain evidence is proper for the jury to consider. This type of question is called an OBJECTION. I rule on objections. If an objection is SUSTAINED the evidence is kept out and you should not consider it. If an objection is OVERRULED the evidence comes in and you may consider it. If evidence is STRICKEN you should ignore it.

11. HOW TO MAKE DECISIONS ABOUT THE EVIDENCE

Once evidence is admitted, you must decide three things about it: Whether it should be believed, how important it is, and what you can infer or conclude from it.

Use your common sense as a reasonable person in making these decisions. Review all the evidence. Don't imagine things which have no evidence to back them up. Consider the evidence fairly without any bias or sympathy toward either side.

12. DECIDING WHETHER TO BELIEVE A WITNESS

As each witness testifies, you must decide how accurate that testimony is. It may help you to ask yourself questions such as these:

Personal Interest. Does the witness have a personal interest in how the trial comes out?

Other Bias. Does the witness have some other bias or motive to testify a certain way?

Demeanor: What impression is made by the witness's appearance and conduct while answering questions?

Consistency. Did the witness make conflicting statements or contradict other evidence?

Knowledge and Memory. Did the witness have a good opportunity to know the facts and the ability to remember them?

Reasonableness. Is the testimony reasonable in light of human experience?

You're not required to believe all that a witness says. You are entitled to believe one witness as against many or many as against one, in accordance with your honest convictions.

13. WHAT IF A WITNESS PURPOSELY GIVES FALSE TESTIMONY?

If you believe a witness has purposely given false testimony about anything relevant to the case, you may disregard not only the false testimony but the remaining testimony from that witness unless it is corroborated by other evidence; in which event you should give it what weight you think it deserves.

14. QUESTIONS BY JURORS DURING THE TRIAL

A jury member may direct questions to the judge or to a witness by writing the question on a piece of paper and handing it to the bailiff who will hand it to me. I will share the same with the lawyers who have the right to express an opinion as to whether it is proper. If the

question is not one that is allowed under the rules of evidence or is otherwise improper, I will tell you. Otherwise, the question will generally be allowed.

I remind you that the lawyers are trained in asking questions that will produce the evidence necessary to decide this case. However, if you feel there is something important that has been missed or that needs clarification, you may ask a question by complying with the procedure outlined in this instruction.

15. WHO IS RESPONSIBLE TO CONVINCE THE JURY?

The prosecution has the burden of proof. It is the one making the accusations in this case. The defendant is not required to prove innocence - you must start by assuming it. According to our law, the defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt. This is a humane provision of the law intended to guard against the danger of an innocent person being unjustly punished.

16. HOW CONVINCED MUST THE JURY BE BEFORE DECIDING THE DEFENDANT IS GUILTY?

Before you can give up your assumption the defendant is innocent, you must be convinced that the defendant's guilt has been proven beyond a reasonable doubt. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind and convinces the understanding of reasonable persons who are bound to act conscientiously upon it.

17. WHAT IS A REASONABLE DOUBT?

A reasonable doubt is one based upon reason and common sense rather than speculation, supposition, emotion or sympathy. It is the kind of doubt that would make a reasonable person hesitate to act. It must be real and not merely imaginary. It is such as would be retained by reasonable men and women after a full and impartial consideration of all the evidence, and must arise from the evidence or lack of evidence in the case.

18. HOW TO EVALUATE DOUBT

If after such full and impartial consideration some possible doubt exists, you must determine whether such doubt is reasonable in light of all the evidence. Ask yourselves if the doubt is consistent with reason and common sense. The law does not require that the evidence dispel all possible or conceivable doubt, but rather that it dispel all reasonable doubt. That is what is meant by the phrase "proof beyond a reasonable doubt".

19. INSTRUCTIONS ON THE LAW THAT APPLIES TO THIS CASE

The clerk has attached to your copy of these instructions some additional pages which contain instructions relating to the particular laws or rules that apply in this case. These additional instructions begin with instruction number twenty-eight (28). We will read those after completing our review of the following instructions which relate essentially to the procedure that you should follow.

20. WHAT TO TAKE WITH YOU INTO THE JURY ROOM

You may take the following things with you when you go into the jury room to discuss this case:

- a. all exhibits admitted in evidence;
- b. your notes (if any);
- c. your copy of these instructions; and
- d. the verdict form or forms.

21. WHAT TO DO IN THE JURY ROOM

The first thing you should do in the jury room is choose a person to be in charge. This person is called the "Foreperson" or the "Chair." The Chair's duties are:

- a. To keep order and allow everyone a chance to speak;
- b. to represent the jury in any communications you make; and
- c. to sign your verdict and bring it back in court.

In deciding what the verdict should be, all jurors are equal. The Chair has no more power than any other juror.

22. CONSIDER EACH OTHER'S OPINION, THEN REACH YOUR OWN DECISION BASED UPON HONEST DELIBERATION

It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of opinion or to announce a determination to stand for a certain verdict. When that is done at the outset, a person's sense of pride may block appropriate consideration of the case. Use your common memory, your common understanding and your common sense. Talk about the case with each other as you ponder and deliberate.

Your verdict must be your own. Don't make a decision just to agree with everyone else. However, you should respect and consider the opinions of the other jurors. If you are persuaded that a decision you initially made was wrong, don't hesitate to change your mind. Help each other arrive at the truth. Also, don't resort to chance or some form of decision-making other than honest deliberation.

23. WHAT TO DO IF YOU HAVE QUESTIONS DURING DELIBERATION

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence.

24. FOCUS ON THIS CASE ALONE

Your duty is to decide this case and this case alone. You should not use this case as a forum for correcting perceived wrongs in other cases, or as a means of expressing individual or collective views about anything other than the guilt or innocence of this defendant. Your verdict should reflect the facts as found by you applied to the law as explained in these instructions and should not be distorted by any outside factors or objectives.

The final test of the quality of your service will be the verdict you return. You will contribute to efficient judicial administration if you focus exclusively on this case and return a just and proper verdict.

25. REACHING A VERDICT

This being a criminal case, your verdict must be unanimous; all jurors must agree. When you are all in agreement, then you have reached a verdict and your work is finished.

26. HOW TO REPORT YOUR VERDICT

When you have reached a verdict, the Chair should date and sign the verdict form which corresponds to your decision. Then notify the bailiff that you are ready to return to court.

27. WHAT HAPPENS AFTER THE VERDICT HAS BEEN REPORTED

After you have given your verdict to the judge, he or the clerk may ask each of you about it to make sure you agree with it. Then you will be excused from the jury box and you may leave at any time. You may remain in the courtroom, if you wish, to watch the rest of the proceedings, which should be quite brief.

After you are excused, you may talk about the case with anyone. Likewise, you are not required to talk about it. If anyone attempts to talk to you about the case when you don't want to do that, please tell the Court Clerk.

INSTRUCTION NO. 28

Punishment is not relevant to whether the defendant is guilty or not guilty. In making your decision do not consider what punishment could result from a verdict of guilty. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

INSTRUCTION NO. 29

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of both—to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

INSTRUCTION NO. 30

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state. Ordinarily, there is no way that a defendant's mental state can be proved directly, because no one can tell what another person is thinking. A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

INSTRUCTION NO. 31

The defendant MICHELLE ANN COX, is charged in Count I with FORGERY in violation of Utah Code Annotated 76-6-501, as amended, ^{RP} You cannot convict defendant of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant MICHELLE ANN COX:
2. in Salt Lake County, State of Utah;
3. acting with a purpose to defraud anyone, or with knowledge that she was facilitating a fraud to be perpetrated by anyone;
4. (a) altered any writing of another without his authority or uttered the altered writing; or
(b) made, completed, executed, authenticated, issued, transferred, published, or uttered any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication, or utterance : (i) purported to be the act of another, whether the person is existent or nonexistent; or (ii) purported to be an act on behalf of another party with the authority of that other party; or (iii) purported to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original ^{exists}

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that one or more of

these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

In reaching your decision, the following shall apply.

A person engages in conduct knowingly or with knowledge with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly or with knowledge with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

To commit forgery, one must possess the specific intent to defraud anyone; that is, the state need not prove exactly who the defendant intended to defraud, provided the state can prove that the defendant acted with the requisite intent to defraud.

“Writing” includes printing, electronic storage or transmission, or any other method of recording valuable information including such forms as: (a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbol of value, right, privilege, or identification; or (b) a check, or any other instrument or writing representing an interest in or claim against property or a pecuniary interest in or claim against a person or enterprise.

“Completing” a signed check includes the act of inserting a name on the blank payee line of the signed check, or inserting the amount to be paid on the signed.

“Uttering” a writing includes passing the writing to another. The act of presenting a check for payment or the act of cashing a check are acts which constitute “uttering” a check.

It is not a defense to a charge of forgery under Subsection (2)(b)(ii) if an actor signs his or her own name to the writing if the actor does not have authority to make, complete, execute, authenticate, issue, transfer, publish, or utter the writing on behalf of the party for whom the actor purports to act.

INSTRUCTION NO. 32

The defendant, MICHELLE ANN COX, is charged in Count II with THEFT BY DECEPTION, in violation of Utah Code Annotated 76-6-405, as amended. You cannot convict her of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant MICHELLE ANN COX,
2. in Salt Lake County, State of Utah;
3. obtained or exercised control over the property of another ;
4. by deception and with a purpose to deprive the other thereof; and
5. the value of said property was or exceeded \$300.00 but was less than \$1,000.00

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

In reaching your decision, the following shall apply.

“Property” means anything of value. “Property” includes but is not limited to tangible and intangible personal property, and written instruments or other writings representing or embodying rights concerning personal property or otherwise containing anything of value to the owner.

A person engages in conduct knowingly or with knowledge with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly or with knowledge with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

“Deception” occurs when a person intentionally:

- (a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or
- (b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true.

“Purpose to deprive” means to have the conscious object to :

- (a) Withhold property permanently, or
- (b) Dispose of the property under circumstances that make it unlikely that the owner will recover it.

INSTRUCTION NO. 33

It is a defense to the charge of theft by deception that the Defendant:

- (a) acted under an honest claim of right to the property or service involved; or
- (b) acted in the honest belief that she had the right to obtain or exercise control over the property or service involved; or
- (c) obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

Evidence of this defense must be presented by the defense, and if presented the State retains its burden of proof beyond a reasonable doubt on all elements of the offense charged.

THIRD DISTRICT COURT, STATE OF UTAH
Salt Lake County, Salt Lake Department

STATE OF UTAH,
Plaintiff,
vs.
MICHELLE ANN COX,
Defendant.

VERDICT
Case No. 101901166

We, the jurors in the above case find the defendant, MICHELLE ANN COX, as follows:

Count 1: FORGERY

☐ Not Guilty
☐ Guilty

Count 2: THEFT BY DECEPTION

☐ Not Guilty
☐ Guilty

Dated this ____ day of August, 2010
____ Foreperson

Filed _____, 2010

By _____
Deputy Clerk

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INSTRUCTION NO. 35

76-2-103. Definitions.

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.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts

— knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his —
conduct is reasonably certain to cause the result.