

2010

# Utah v. Michelle Ann Cox : Brief of Appellant

Utah Court of Appeals

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THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. :  
MICHELLE ANN COX, : Case No. 20100947-CA  
Defendant/Appellant. : Appellant is not incarcerated.

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**BRIEF OF APPELLANT**

Appeal from a conviction of Forgery, a third degree felony, in violation of Utah Code Ann. §76-6-501 (2008), and Theft by Deception, a Class A misdemeanor, in violation of Utah Code Ann. §76-6-405 (2008), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judge Robert Faust presiding.

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**JURISDICTIONAL STATEMENT**

This is an appeal from a conviction of Forgery, a third degree felony, in violation of Utah Code Ann. §76-6-501 (2008), and Theft by Deception, a Class A misdemeanor, in violation of Utah Code Ann. §76-6-405 (2008), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judge Robert Faust presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. §78A-4-103(2)(e) (Supp. 2010). The judgment is attached hereto as "Addendum A."

**STATEMENT OF ISSUES, STANDARDS OF REVIEW, PRESERVATION**

Issue I: Whether the burden of proof was shifted to the defendant in violation of her constitutional Due Process rights when the jury was instructed that the defendant was required to present evidence that she had an honest belief that she was lawfully entitled to cash the check and receive the proceeds therefrom.

Standard of Review: “Determining the propriety of the instructions submitted to the jury presents a question of law, which we review for correctness.” State v. Reyes, 2004 UT App. 8, ¶15, 84 P.3d 841 (citation omitted).

Preservation: This issue was not preserved. This Court will review unpreserved claims for plain error, see, State v. Patrick, 2009 UT App 226, ¶12, 217 P.3d 1150, for ineffective assistance of counsel, see, e.g., State v. Nelson-Waggoner, 2004 UT 29, ¶30, 94 P.3d 186, and to avoid manifest injustice. See, State v. Turner, 736 P.2d 1043 (Utah App. 1987) (citing Utah R. Crim. Pro. 19(c)).

Issue II: Did the trial court err by failing to sentence Appellant on Count II of the Information pursuant to the reduced penalty in effect at the time of her sentencing but, instead, sentenced Appellant to the greater penalty which was in effect for this crime at the time the Information was filed?

Standard of Review: This issue presents a question of law which is reviewed for correctness. State v. Patience, 944 P.2d 381 (Utah App. 1997).

Preservation: This issue was not raised in the district court. However, this Court will review unpreserved claims for plain error, see, State v. Patrick, 2009 UT App 226, ¶12, 217 P.3d 1150, for ineffective assistance of counsel, see, e.g., State v. Nelson-Waggoner, 2004 UT 29, ¶30, 94 P.3d 186. Additionally, this Court can review this illegal sentence under Rule 22(e) of the Utah Rules of Criminal Procedure. State v. Brooks, 908 P.2d 856, 859-60 (Utah 1995).



## **RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS**

The text of following relevant provisions is set forth in full at Addendum B:

United States Constitution, Amend. XIV; Utah Constitutions, Art. I, Sec. 7; Utah Code Ann. §76-6-401(2008); Utah Code Ann. §76-6-402 (2008); Utah Code Ann. §76-6-405 (2008); Utah Code Ann. §76-6-412 (2008); Utah Code Ann. §76-6-412 (Supp. 2010); Utah Code Ann. §76-6-501 (2008).

## **STATEMENT OF THE CASE**

On February 12, 2010, the State of Utah filed an Information against Michelle Cox (hereinafter “Cox”) which included one count of Forgery, in violation of Utah Code Ann. §76-6-501 (2008) and one count of Theft by Deception, in violation of Utah Code Ann §76-6-405 (2008). R. 1-2. On March 30, 2010, a preliminary hearing was held and the magistrate bound Cox over for trial on all charges. R. 151.

A trial was held in this matter on August 3-4, 2010. R. 152, 156. At the conclusion of the trial, the jury returned verdicts of guilty on both counts. R. 156:377. On November 8, 2010, Cox was sentenced to a term of 0-5 years in prison on count I of the Information, and a term of 365 days in jail on count II of the Information. R. 107-08. These terms were suspended, and Cox was ordered to serve 30 days jail as a condition of probation. R. 107-08.

Cox filed a notice of appeal on November 16, 2010. R. 124-25. Therefore, this appeal is timely. See, Utah R. App. Pro. 4(a) (2010).

### STATEMENT OF RELEVANT FACTS

On September 10, 2009, a vehicle belonging to Kathy Aller (hereinafter "Aller") was broken into while it was parked in a parking lot. R. 152:139. Items were taken from the car including checks from Aller's checking account. R. 152:140. Aller had not given anyone permission to take any of her property out of the car. R. 152:140.

The checking account in question was a joint account, shared by Aller and her father, Don Butler (hereinafter "Butler"). R. 152:141. Aller had not met Cox prior to the trial, nor had Aller authorized Cox or anyone else other than Butler to write checks on or withdraw funds from her account. R. 152:140. Butler also testified that he had not authorized anyone else to write checks or make charges on their account. R. 152:171. He also was not acquainted with Cox and had "[n]ever seen her before." R. 152:171.

Aller reported the vehicle burglary to the police. R. 152:144-45. The next day, September 11, 2009, Aller also reported to her credit union that the checks had been taken. R. 152:144, 147. Aller filled out a fraud report with the credit union, which was signed by both her and Butler. R. 152:149.

On September 11, 2009, an individual presented a check on Aller's account at a Mountain America Credit Union branch in Salt Lake County. R. 152:160-62. The check was written out to "Michelle Cox" as the payee, in the amount of \$360. R. 152:189-90. The back of the check was endorsed with the name of "Michelle Cox." R. 152:188. The check was cashed, and the person presenting the check received \$360 in proceeds from the check. R. 152:164. Aller testified that she had not signed the check, nor had she authorized anyone else to sign the check. R. 152:145-47, 152.

When contacted by police, Cox confirmed that she had cashed the check in question. R. 156:249. Cox also testified at trial that she cashed the check in question. R. 156:295. Although the evidence relating to how Cox came to possess the check is somewhat conflicting, Cox maintained that she did not know the check was stolen when she cashed it. R. 156:295.

Salt Lake City Police Detective Brenden Kirkwood (hereinafter "Kirkwood") interviewed Cox as part of his investigation relating to the stolen check. R. 156:249. Kirkwood testified that Cox initially claimed to have received the check as payment for services she had provided as a manicurist. R. 156:250. Kirkwood testified that he was not able to confirm this information with the salon where Cox was employed. R. 156:251.

Kirkwood testified that when he informed Cox that he was not able to confirm Cox's claim with her supervisor, Cox stated that the services had not been provided at the salon. R. 156:251. Kirkwood testified that Cox stated that the services had been provided at her house, for a group of 12 people, and that she had been paid by a friend, Katarina Dominguez (hereinafter "Dominguez"). R. 156:251-52.

Kirkwood testified that Cox initially claimed that Dominguez had told her that she had received the check in exchange for purchasing gas for an unknown female at a gas station. R. 156:253. Kirkwood further testified that Cox later claimed that Dominguez had told her that the check belonged to Dominguez' mother, and offered to give Cox a portion of the proceeds from the check if she would cash it for her. R. 156:254. Kirkwood testified that Cox stated that she had filled out the amount and wrote her name on the "pay to the order of" line. R. 156:255. Kirkwood testified that Cox believed that Dominguez had signed the check. R. 156:256-57.



Cox testified at trial. While Cox admitted to receiving the check from Dominguez and cashing the check, her testimony differed from the testimony given by Kirkwood in a number of respects.

Cox testified at trial that she had received the check from Dominguez, and that Dominguez told her the check belonged to her mother. R. 156:301-02. Cox testified that Dominguez told her that her mother had not had time to cash the check, and that Dominguez was not able to cash the check due to problems with her own account. R. 156:301.

Cox testified that when Ms. Dominguez gave her the check, Dominguez showed her an ID which she claimed was her mother's ID. R. 156:302. Cox acknowledged that the name on the check did not match Dominguez' last name, but pointed out that Dominguez had been married and had taken her husband's last name. R. 156:315.

When Cox received the check, the numeric amount was filled in for \$360, and it had been signed and dated. R. 156:301-02. However, the written amount and the payee line were blank. R. 156:301.

Dominguez drove Cox to the nearest Mountain America branch to cash the check. R. 156:303-04. On the way to the credit union, Dominguez asked Cox to fill in her name on the "pay to the order of" line and to fill in the written amount. R. 156:305. Ms. Cox complied with that request. R. 156:305.

Upon arriving at the credit union, Dominguez parked the car and Cox went inside to cash the check. R. 156:304. At the teller station, Cox endorsed the back of the check and provided identification. R. 156:305-06.

After cashing the check, Cox returned to Dominguez' car and gave all the cash to Dominguez. R. 156:306. Dominguez thanked Cox and gave her \$60 back. R. 156:306.



## **SUMMARY OF THE ARGUMENT**

ISSUE I: The charges of forgery and theft by deception both arose from allegations that Cox had cashed a forged check at a credit union, and received proceeds from the check totaling \$360. As a necessary element of the charge of theft by deception, the State was required to prove that Cox used deception in order to obtain or exercise control over the property of another. As a necessary element of the charge of forgery, the State was required to prove that Cox acted with a purpose to defraud or knowledge that she was facilitating a fraud.

In order to cash the check, Cox made representations, explicit or implied, that she was lawfully authorized to cash the check and receive the proceeds therefrom. The fraud element of forgery and the deception element of theft by deception both require proof that Cox did not honestly believe the representations she made when cashing the forged check. However, the jury was instructed that Cox was required 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. This instruction unconstitutionally shifted the burden of proof to the defendant to disprove required elements of the charged offenses.

Constitutional due process protections clearly establish that the State must bear the burden of proving each element of a charged offense beyond a reasonable doubt. Case law also clearly establishes that a jury instruction that shifts the burden of proof to the defendant to disprove an element of the offense violates the defendant's due process rights under the United States and Utah constitutions. This error can therefore be

reviewed by this Court under a plain error analysis or under an ineffective assistance of counsel analysis because defense counsel failed to object to the State's jury instruction.

ISSUE II: The trial judge imposed a sentence on Count II of the Information which was greater than that allowed by law. The jury convicted Cox of Theft by Deception, for unlawfully obtaining \$360 from a credit union by cashing a forged check. At the time of the offense, theft by deception of property valued at \$360 constituted a class A misdemeanor. But at the time of Cox's sentencing, the legislature had amended the law to make theft by deception a class B misdemeanor if the value of the property taken was less than \$500.

Pursuant to long-established case law, Cox was entitled to the benefit of the lower penalty in effect at the time of her sentencing. The imposition of an incorrect sentence was plain error since it was obvious under the existing law and statutes. The incorrect sentence also prejudiced Cox as it imposed a greater penalty than that allowed by the legislature.

Long-standing Utah case law clearly establishes that when the legislature amends a criminal statute to lower the level of the offense, a defendant is entitled to be sentenced at the lower level in effect at the time of sentencing. This illegal sentence can therefore be reviewed by this Court on appeal under a plain error analysis, under Rule 22(e) of the Utah Rules of Criminal Procedure, or under an ineffective assistance of counsel analysis because her attorney failed to argue that the amended law required sentencing as a class B misdemeanor.

## ARGUMENT

### **I. THE JURY INSTRUCTION REQUIRING THE DEFENDANT TO PRESENT EVIDENCE THAT SHE HAD AN HONEST BELIEF THAT THE CHECK WAS LEGITIMATE UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT.**

Cox was charged in an Information filed on February 12, 2010 with the crimes of Forgery in violation of Utah Code Ann. §76-6-501 (2008) and Theft by Deception in violation of Utah Code Ann. §76-6-405 (2008). R. 1-2. At trial a trial held on August 3-4, 2010, the jury found Cox guilty of said offense. R. 152; 156:377.

Both of these charges contain elements that, in the context of the present case, required the State to prove beyond a reasonable doubt that Cox had used false or misleading information or misrepresentations for the purpose of cashing a check and obtaining the proceeds therefrom. See, Utah Code Ann. §76-6-501; Utah Code Ann. §76-6-405. Jury Instruction 33 unconstitutionally shifted the burden of proof from the State, and instead required Cox to present evidence that she had an honest belief that she was legally entitled to cash that check.

#### **A. THE STATE BEARS THE BURDEN OF PROVING EACH AND EVERY ELEMENT OF A CRIMINAL OFFENSE; REQUIRING THE DEFENDANT TO DISPROVE AN ELEMENT OF THE OFFENSE VIOLATES BOTH FEDERAL AND STATE CONSTITUTIONAL DUE PROCESS PROTECTIONS.**

There are few if any principles as fundamental to the American system of criminal justice and the constitutional requirements of Due Process as those of the presumption of innocence and the requirement that the prosecution must bear the burden of proving each element of a crime beyond a reasonable doubt. See, In re Winship, 397 U.S. 358, 90 S.Ct.

1068, 25 L.Ed.2d 268 (1970); State v. Walton, 646 P.2d 689 (Utah 1982). The United States Supreme Court has referred to the presumption of innocence as “that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” Winship, 397 U.S. at 363 (quoting Coffin v. United States, 156 U.S. 432 (1895)).

The presumption of innocence is given “concrete substance” by the requirement that each element of a criminal offense be proven beyond a reasonable doubt. Winship, 397 U.S. at 363. “It is elementary that in criminal cases the State has the burden of proving every essential element of the crime beyond a reasonable doubt.” State v. Hendricks, 258 P.2d 452, 453 (Utah 1953).

A defendant’s Due Process rights under both the United States and Utah constitutions are violated if the burden of disproving an essential element of a crime is shifted to the defendant. State v. Tebbs, 786 P.2d 775, 777-78 (Utah App. 1980) (citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); State v. Starks, 627 P.2d 88, 92 (Utah 1981); State v. Sorenson, 758 P.2d 466, 468-69 (Utah Ct.App. 1988)). “[T]he prosecution must prove guilt beyond a reasonable doubt; the defendant need not prove innocence.” State v. Kihlstrom, 1999 UT App 289, ¶10 n.5, 988 P.2d 949.

(1) Requiring the defendant to present evidence of an honest belief or honest claim of right is equivalent to requiring the defendant to disprove the element of deception in a charge of theft by deception.

In the present case, Jury Instruction No. 33 instructed the jury that the Cox was required to present evidence that she “(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.” R. 94. Although apparently based on Utah Code Ann. §76-6-402(3) (2008), this instruction unconstitutionally shifted the burden of proof to the defendant.

The Court of Appeals has previously enumerated “three separate components” of the deception element in a charge of theft by deception: “(1) that defendant’s act satisfied the statutory definition of deception, (2) that the deception occurred contemporaneously with the transaction in question, and (3) that the victim relied upon the deception, at least to some degree, in parting with the property.” State v. LeFevre, 825 P.2d 681, 685 (Utah App. 1992), cert. denied, 843 P.2d 1042 (Utah 1992). It is this first component of deception, an act that “satisfied the statutory definition of deception,” that is the subject of incorrect and confusing jury instructions which had the effect of shifting the burden of proof to the defendant in the present case.

The jury was instructed, in conformity with Utah Code Ann. §76-6-401(5) (2008), as follows:

“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 . . .*; or (b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct . . . and *that the actor does not now believe to be true.*

R. 92 (emphasis added). This instruction further stated that an act of deception is a necessary element of the crime of theft by deception, and that the jury must be convinced beyond a

reasonable doubt of each element of the crime before they could reach a verdict of guilty. R. 92.

The jury was also instructed generally that the “prosecution has the burden of proof.” R. 81.

However, the jury was also instructed as follows:

[I]t 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.”

R. 94. This instruction further stated that evidence of this kind of honest belief “must be presented by the defendant.” R. 94. This instruction unconstitutionally shifted the burden to the defendant to disprove an element of the offense of theft by deception.

A reasonably diligent search of Utah case law reveals two opinions that touch on the “honest belief” or “honest claim of right” defense in the context of a charge of theft by deception: State v. Vigil, 922 P.2d 15 (Utah App. 1996) and State v. Noren, 704 P.2d 568 (Utah 1985). Neither of these cases supports the position that the honest claim of right defense instruction was properly given in the present case.

In Vigil, the defendant argued on appeal that it was ineffective assistance for counsel to fail to request and plain error for the trial judge to fail to include an honest belief jury instruction in a charge of theft by deception. Vigil, 922 P.2d at 28. The Court of Appeals disagreed, holding that since the defense case was not based on an honest

belief defense, it was not error to fail to request or include an honest belief instruction.

Id. at 29.

The defendant in Vigil, along with his wife, had communicated with three separate attorneys in regard to the possibility of placing their expected child up for adoption by three separate prospective adoptive couples. Vigil, 922 P.2d at 18-22. Payments to the Vigils had been made by each of the prospective adoptive couples, to cover living expenses and other costs associated with the pregnancy. Id. The Vigils ultimately did not give the child up for adoption after it was born, and did not return any of the money they had received. Id.

Defense counsel at trial had asserted that any “misunderstandings occurred as a result of conduct of the attorneys” and that the defendant did not personally “obtain or exercise control over the money.” Id. at 29. Thus, the Court of Appeals stated that “because defendant’s defense at trial was not based on the [honest belief] defense, we conclude no error existed which could have been plain to the trial court.” Id. (citing State v. Bishop, 753 P.2d 439, 489 (Utah 1988) (“where instruction was inconsistent with defendant’s theory of the case, no error in refusing instruction”).

In Noren, the defendant argued on appeal that the trial judge committed error by refusing to include a requested jury instruction on the defense of an honest claim of right to a charge of theft by deception. Noren, 704 P.2d at 571. The Supreme Court affirmed the lower court, holding that the requested instruction had not been supported by the evidence. Id. at 571.



The charges against the defendant in Noren included two counts of theft by deception. Id. at 569. The first count was based on an allegation that Noren had convinced an individual to take out a loan to be secured by a motor home and to deliver the proceeds of the loan to Noren, without telling that individual that the motor home was already encumbered by a previous loan as well as a lease-back agreement with another party. Id. at 569. The second count was based on an allegation that Noren had sold the motor home to a second individual under a lease-back program, receiving over \$22,000 from that individual, without informing that individual of the other encumbrances already on the motor home. Id. at 569.

Noren contended on appeal that he had acted under an honest claim of right when he obtained the funds. Id. at 571. However, in affirming the trial court's refusal to give the instruction, the Utah Supreme Court stated that there was "no evidence before the trial court to support that defense" and that "without some evidence at trial to justify a requested instruction, the court is correct in refusing." Id. at 571 (citing State v. Hafen, 593 P.2d 538 (1979)).

Both Noren and Vigil clearly establish that when the evidence does not support an honest belief defense, it is not error to refuse to give an honest belief instruction. Noren, 704 P.2d 571; Vigil, 922 P.2d at 29. Although it is possible that a person could use false representations to obtain control over property to which the person had an honest claim of right, the evidence at trial in the present case did not present such a set of facts. The issue



in the present case is whether it was error to include an instruction on an honest claim of right defense that shifted the burden of proof to the defendant.

A necessary element of the charge of theft by deception is that Cox obtained property “by deception” when she cashed the check. Utah Code Ann. §76-6-405. The prosecution was required to prove that when Cox impliedly represented that she was authorized to cash the check and legally entitled to receive the funds therefrom, she intended to “[c]reate[] or confirm[] by words or by conduct an impression of law or fact that is false *and that the actor does not believe to be true.*” Utah Code Ann. §76-6-401(5) (emphasis added). Jury Instruction 32 informed the jury, in accordance with Utah Code Ann. §76-6-401(5), that an act of deception requires proof that the defendant created or failed to correct a false impression of law or fact, and requires proof that the defendant did not believe the impression of law or fact to be true.

In the present case, the relevant impression created by Cox was that she was authorized to cash the check in question and receive the funds therefrom. Thus, under the Due Process clauses of the United States Constitution, Amend. XIV, and Utah Constitution, Art. I, Sec. 7, the State had the burden of proving that Cox did not believe that she was authorized to cash the check and receive the funds therefrom. See, State v. Tebbs, 786 P.2d 775, 777-78 (Utah App. 1980) (citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); Starks, 627 P.2d at 92; Sorenson, 758 P.2d at 468-69); see also, Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct. 2319, 2329-30, 53 L.Ed.2d 281 (1977).

On the contrary, an honest claim of right defense requires proof that the defendant acted with “an *honest* claim of right to the property ” or with an “*honest belief* that he had the right to obtain or exercise control over the property.” Utah Code Ann. §76-6-402(3) (emphasis added). Jury Instruction 33 instructed the jury that evidence that Cox acted with such an honest belief “must be presented by the defense.” R. 94.

In the context of the present case, an honest belief or honest claim of right defense as set forth in Jury Instruction 33 required Cox to produce evidence that she honestly believed she was authorized to cash the check. R. 94 (“evidence of this defense must be presented by the defense”). This requirement that Cox present evidence that she had an honest belief that she was legally entitled to cash the check is in direct conflict with the constitutional requirement that the State bear the burden of proving that she did not believe she was lawfully entitled to cash the check. Tebbs, 786 P.2d at 777-78 (citations omitted).

Because the issue involved in the honest belief defense is precisely the same issue involved in the element of deception, requiring Cox to present evidence of her honest belief is precisely the same as requiring Cox to disprove the element of deception. See, State v. Martinez, 2000 UT App 320, ¶10, 14 P.3d 114. An instruction that “shifts to the defendant the burden of disproving an essential element, namely that of a culpable mental state . . . violate[s] the Due Process clauses of the United States and Utah constitutions.” Tebbs, 786 P.2d at 777-78 (citations omitted).

Although addressing a different kind of criminal offense, the Court of Appeal’s opinion in the case of Martinez, 2000 UT App 320 is instructive in the present case.

Martinez addressed the application of strict liability in the context of a charge of unlawful sexual activity with a minor. Id. The court's holding demonstrates that when an element of an offense and an affirmative defense are the same, a requirement that a party prove an element is the same as requiring that party to disprove the affirmative defense. Id. at ¶10.

Martinez contended on appeal that the State still bore the burden of proving a culpable mens rea (that the defendant knew or was aware of the risk that his partner was under the age of 16) even though Utah Code Ann. §76-2-304.5(2) stated that it was not a defense to a charge of unlawful sexual activity with a minor that the defendant mistakenly believed that the victim was 16 years of age or older. Martinez, 2000 UT App 320, ¶¶8-9. In making this argument, Martinez attempted to make a distinction between a defense relating to mistake of age and the mens rea element as it related to the age of the victim. Id.

Contrary to Martinez' position, the Court of Appeals reasoned as follows:

[I]t is clear that the burden of proving the mens rea for unlawful sexual activity with a minor *is precisely the same* as the burden of disproving the affirmative defense of mistake of age. That is, proof that Defendant knew or was aware of the risk that his partner was under sixteen (Defendant's proposed mens rea requirement) is no more or less than proof that Defendant did not mistakenly believe his partner was sixteen or was unaware of the risk that his partner was under sixteen. Thus, to require the State to prove a mens rea is to require the State to disprove mistake of fact. . . .

2000 UT App 320, ¶10 (emphasis added).

Applying the reasoning of Martinez to the present case, it is clear that the burden of proving the mens rea for theft by deception for cashing a forged check is precisely the



same as the burden of disproving the defense of having an honest belief that she was authorized to cash the check. See, Martinez, 2000 UT App 320, ¶10. Proof that Cox did not believe the false impression she created when she represented that she was authorized to cash the check is no more or less than proof that she did not have an honest belief that she was entitled to the proceeds of that check. See, Utah Code Ann. §76-6-402(3); Utah Code Ann. §76-6-405; Martinez, 2000 UT App 320, ¶10.

Instructing the jury that Cox had the burden of presenting evidence that she had an honest belief that she was entitled to cash the check is precisely the same as placing the burden on Cox to disprove the mens rea element of deception. See, Martinez, 2000 UT App 320, ¶10. Shifting to the defendant the burden of disproving the mens rea element of the offense is a clear violation of the Due Process clauses of both the United States and Utah constitutions. See, Tebbs, 786 P.2d at 777-78 (citations omitted).

(2) The elements of an honest belief, deception, and fraudulent intent are sufficiently similar that the instruction on an honest belief created a substantial likelihood that the jury would be confused or misled.

“The trial court has a duty to instruct the jury on the law applicable to the facts of the case.” State v. Potter, 627 P.2d 75, 78 (Utah 1981). “The purpose of giving instructions to the jurors is to assist them in understanding issues which they have to decide in the case.” State v. James, 819 P.2d 781, 798 (Utah 1991) (citations omitted). If the instructions given are not sufficiently clear such that “they could have misled or confused the jury, they have failed to fulfill this duty and thus denied the defendant a fair trial. . . .” Potter, 627 P.2d at 78.



The charge of forgery requires, among other elements, that the State prove that the defendant acted “with purpose to defraud” or “with knowledge that the person is facilitating a fraud to be perpetrated.” Utah Code Ann. §76-6-501(2). The terms “defraud” and “fraud” are not specifically defined under Utah Code Ann. §76-6-501, nor were they defined in the instructions given to the jury in the present case. However, the concepts of fraud and the intent to defraud are sufficiently similar to the elements of theft by deception that the instruction on an honest claim of right defense created a risk of confusing the jury.

The Supreme Court addressed the definition of “fraud” in the context of a criminal charge of filing a false insurance claim in the case of State v. Kitchen, 564 P.2d 760 (Utah 1977). The court utilized a dictionary definition of “fraud” which defined the term as including “an intentional misrepresentation for the purpose of inducing another in reliance upon it to part with some valuable thing.” Id. at 763 (citing Webster’s New International Dictionary of The English Language, Unabridged, 1961).

The Utah Court of Appeals addressed the concept of “fraudulent intent” in the context of a criminal charge of identity fraud in the case of State v. Chukes, 2003 UT App 155, 71 P.3d 624. Noting that the identity fraud statute itself did not define “fraudulent intent,” the court adopted the Black’s Law Dictionary definition which states that fraudulent intent “exists where one, either with a view of benefitting oneself or misleading another into a course of action, makes a representation which one knows to be false or

which one does not believe to be true.” Id. at ¶14 (quoting Black’s Law Dictionary 662 (6<sup>th</sup> ed. 1990)).

The Court of Appeals also discussed the definition of fraud in the context of an arbitration award in the case of Fleming v. Simper, 2007 UT App 102, 158 P.3d 1110. Noting that Utah courts had not defined “fraud” as applied to arbitration awards, the court adopted the reasoning of other courts that had held that obtaining an arbitration award by means of perjured testimony constituted “fraud.” Id. at ¶6 (citing Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9<sup>th</sup> Cir. 1982); Newark Stereotypers’ Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 598 (3d Cir. 1968)).

Each of the definitions of fraud or fraudulent intent used in Kitchen, Chukes, and Fleming contain two common elements: (1) the use of some kind of false or misleading information or misrepresentation, (2) for the purpose of obtaining some benefit or something of value. Kitchen, 564 P.2d at 763; Chukes, 2003 UT App 155, ¶14; Fleming, 2007 UT App 102, ¶6. Similarly, the elements of a charge of theft by deception include the use of false or misleading impression of fact or law for the purpose of obtaining or exercising control over the property of another. Utah Code Ann. §76-6-401(5); Utah Code Ann. §76-6-405(1).

The elements of deception and fraud are sufficiently similar that the Utah Supreme Court has even referred to the element of “deception” under Utah Code Ann. §76-6-401(5) as an “element of fraudulent misrepresentation.” Sorenson, 617 P.2d at 335. The Supreme Court in Sorenson further elaborated, stating, “A conviction of theft by deception

requires a determination by the jury that the defendant intentionally made a fraudulent misrepresentation.” Id., at 337 (citing State v. Howd, 55 Utah 527, 188 P. 628 (1920)).

In interpreting jury instructions, an appellate court must not consider only the intended meaning of the instruction; rather, the court must consider how the jury may have interpreted the instruction. Sandstrom v. Montana, 442 U.S. 510, 517-19, 99 S.Ct. 2450, 61 L.Ed.2d. 39 (1979). Jury instructions that are not sufficiently clear, even if technically correct, can constitute error. Potter, 627 P.2d at 78. If a reasonable jury could have interpreted the instruction as shifting the burden of proof to the defendant, then the instruction violates due process protections under the Fourteenth Amendment. Sandstrom, 442 U.S. at 524.

In the present case, the jury was clearly instructed that Cox bore the burden of presenting evidence that she had an honest belief that she was lawfully entitled to cash the check and receive the proceeds therefrom. R. 94. This is the functional equivalent of requiring Cox to disprove the element of deception. See, Martinez, 2000 UT App 320 at ¶10.

Given the similarities between the concepts of deception and fraud, see, Sorenson, 617 P.2d at 335-37, there is a likelihood that a reasonable jury could have interpreted the instruction as requiring Cox to disprove the element of fraud as well. Since a reasonable jury could have interpreted the instructions as shifting the burden of proof to the defendant on the forgery charge also, Cox’s Due Process rights were violated. See, Sandstrom, 442 U.S. at 524.



(3) An erroneous instruction which unconstitutionally shifts the burden of proof to the defendant cannot be cured by another conflicting instruction that may correctly state the presumption of innocence and burden of proof.

A guilty verdict requires the prosecution to present proof beyond a reasonable doubt on each element of an offense. See, Winship, 397 U.S. at 363; Walton, 646 P.2d 689. Other jury instructions provided general instruction on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. R. 81. However, a correct statement of the presumption of innocence in one instruction does not cure another instruction which relieves the prosecution of the burden of proof. See, Hendricks, 258 P.2d at 453.

"Although [jury] instructions are to be considered as a whole, where they are in irreconcilable conflict, they could but confuse or mislead the jury" and reversal is required. Hendricks, 258 P.2d at 453; see also, Walton, 646 P.2d at 692 (holding that one instruction that correctly stated the State's burden of proving the defendant's guilty beyond a reasonable doubt did not cure an instruction that erroneously instructed the jury that proof of basic facts creates a presumption of ultimate facts). Thus, even though other instructions may have correctly stated the presumption of innocence and burden of proof, the erroneous instruction requires reversal. See, Hendricks, 258 P.2d at 453.



B. INSTRUCTING THE JURY IN A WAY THAT SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT CONSTITUTED PLAIN ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL.

Although defense counsel did not object to the jury instructions at issue in this appeal, the instructions may still be reviewed on grounds of plain error and ineffective assistance of counsel.

(1) 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.

An instruction which has not been objected to at trial may still be reviewed on appeal to avoid “manifest injustice.” Utah R. Crim. Pro. 19. “The plain error standard of review is also intended to avoid manifest injustice.” State v. Munguia, 2011 UT 5, ¶12, \_\_ P.3d \_\_ (citation omitted). “Plain error” and “manifest injustice” have been described as being essentially synonymous, see, State v. Alinas, 2007 UT 83, ¶10, 171 P.3d 1046, and both unpreserved claims of jury instruction error and claims of plain error are reviewed under the same standard. State v. Sellers, 2011 UT App 38, ¶8, 238 P.3d 70 (citing State v. Verde, 770 P.2d 116, 122 (Utah 1989)).

“To demonstrate plain error, a defendant must establish that [1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” Munguia, 2011 UT 5 at ¶13 (citation omitted).

As set forth supra at 9-22, it was error to give the jury an instruction which shifted to the defendant the burden of disproving an element of the charged offenses. This error

should have been obvious to the court. The presumption of innocence and the requirement that the prosecution prove each and every element of a charged offense beyond a reasonable doubt are elementary requirements of the constitutional Due Process protections. Winship, 397 U.S. at 363; Hendricks, 258 P.2d at 453. Given the elementary and fundamental nature of the presumption of innocence and the requirement of proof beyond a reasonable doubt, the error of shifting to the defendant the burden of disproving an element of the crime should have been obvious to the trial court.

The Utah Court of Appeals addressed a jury instruction that inappropriately shifted the burden of proof to the defendant in violation of his Fourteenth Amendment Due Process rights in the case of State v. Turner, 736 P.2d 1043 (Utah App. 1987). In Turner, trial counsel had not objected to the instruction at issue on appeal. Id. at 1046. Nevertheless, due to the nature of the error and circumstances of the case, the court was “compelled to correct the constitutional error and the consequences imposed on [the defendant], despite his lack of objection at trial.” Id.; see also, Walton, 646 P.2d at 692 (holding that a jury instruction that relieved the prosecution of its burden of proof constituted reversible error).

(2) Defense counsel was ineffective for failing to object to an instruction which deprived his client of a fundamental constitutional protection.

To succeed in a claim of ineffective assistance of counsel, the defendant must meet a two part test established by the United States Supreme Court. “[A] defendant must first “show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” State v. Tennyson, 850 P.2d 461,

465 (Utah App. 1993) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Accord, State v. Templin, 805 P.2d 182, 186 (Utah 1990). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Tennyson, 850 P.2d at 465 (quoting Strickland, 466 U.S. at 686).

“To satisfy the first part of the Strickland two-prong test, a defendant ‘must show that counsel’s representation fell below an objective standard of reasonableness.’” Tennyson, 850 P.2d at 465 (quoting Strickland, 466 U.S. at 688). In evaluating counsel’s performance, appellate courts will not engage in second-guessing “trial counsel’s legitimate strategic choices, however flawed those choice might appear in retrospect.” Tennyson, 850 P.2d at 465 (citing Strickland, 466 U.S. at 689).

Trial counsel for a criminal defendant bears a responsibility to ensure that the jury is correctly instructed on issues relating to burden of proof. See, State v. Sellers, 2011 UT App 38, ¶17, 248 P.3d 70. In light of the fundamental importance requirement that the prosecution prove each element beyond a reasonable doubt, see, Winship, 397 U.S. at 363, trial counsel’s failure to request a jury instruction that correctly set forth the applicable burden of proof “cannot be attributed to any reasonable trial strategy.” Sellers, 2011 UT App 38, ¶17.

To satisfy the second prong of the Strickland test, “prejudice,” a defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial. . . .”



Tennyson, 850 P.2d at 465. Necessary to a fair criminal trial is the presumption of innocence and the requirement of proof beyond a reasonable doubt. Winship, 397 U.S. at 363. A trial in which a defendant was denied the presumption of innocence and in which the prosecutor was not required to prove each element beyond a reasonable doubt would therefore be unfair. See, Id.

The jury instructions in the present case had the effect of relieving the prosecution of the burden of proof, and instead required the defendant to present evidence to disprove a critical element of the charged offenses. See, R. 94. This violation of Due Process protections resulted in a trial that was fundamentally unfair. See, Winship, 397 U.S. at 363.

To demonstrate prejudice under Strickland, it is not necessary to show that the jury *actually* misunderstood or misapplied the jury instructions. State v. Sellers, 2011 UT App 38, ¶19, 248 P.3d 70. Rather, the mere risk that the jury may have understood the instructions as shifting the burden of proof to the defendant is sufficient to satisfy the prejudice prong under Strickland, and to require that the convictions be reversed and the matter remanded for new trial. See, Sellers, 2011 UT App 38, ¶19.

**II. BECAUSE THE LEGISLATURE HAD REDUCED THE LEVEL OF THE CHARGE OF THEFT BY DECEPTION PRIOR TO SENTENCING, COX WAS ENTITLED TO BE SENTENCED AT THAT LOWER LEVEL.**

Cox was charged in Count II of the Information with the crime of theft by deception in violation of Utah Code Ann. §76-6-405. R. 1-2. Under relevant portions of



Utah Code Ann. §76-6-412, the level of offense for a charge of theft by deception is determined by the value of the property taken.

The law in effect at the time that charges arose stated that a charge of theft is punishable as a class A misdemeanor if the value of the property in question is or exceeds \$300, but is less than \$1000. Utah Code Ann. §76-6-412(1)(d) (2008). However, the amended statute in effect at the time Cox was sentenced stated that a charge of theft is punishable “as a class B misdemeanor if the value of the property stolen is less than \$500.” Utah Code Ann. §76-6-412(1)(d) (Supp. 2010).

It was alleged by the State that Cox obtained cash in the amount of \$360 by cashing a forged check. R. 1-3. Evidence presented at trial was consistent with this alleged amount. R. 152:164.

Under the earlier Utah Code Ann. §76-6-412(1)(d) (2008) the offense would have been a class A misdemeanor. However, prior to the time of sentencing, the legislature amended the law to provide that theft by deception of property valued at less than \$500 constitutes a class B misdemeanor. Utah Code Ann. §76-6-412(1)(d) (Supp. 2010). Cox was entitled to be sentenced on count II as a class B misdemeanor. State v. Patience, 944 P.2d 381, 385 (Utah App. 1997) (citations omitted).

A. THE LEVEL OF AN OFFENSE IS DETERMINED BY THE LAW IN EFFECT AT THE TIME OF SENTENCING.

Utah appellate courts have “consistently held that ‘[d]efendants are entitled to the benefit of the lesser penalty afforded by an amended statute made effective prior to their sentencing.’” Patience, 944 P.2d at 385 (quoting State v. Yates, 918 P.2d 136, 138 (Utah

App. 1996)) (citations omitted); Smith v. Cook, 803 P.2d 788, 792 (Utah 1990); Harris v. Smith, 541 P.2d 343, 344 (Utah 1975) (“the law in force at the time of sentencing govern[s]).

This rule was initially adopted by the Utah Supreme Court in Belt v. Turner, 479 P.2d 471 (Utah 1971). Relying on People v. Oliver, 134 N.E.2d 197 (N.Y. 1956), the Belt court stated:

A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.

Belt, 479 P.2d at 793 (1971) (citation omitted).

The rationale for the rule was further set forth by the Supreme Court in State v. Tapp, 490 P.2d 334 (Utah 1971). The court stated:

[I]t is the prerogative of the legislature, expressing the will of the people, to fix the penalties for crimes and the courts should give effect to the enactment and the effective date thereof as so declared. . . . [T]o insist on the prior existing harsher penalty is a refusal to accept and keep abreast of the process which has been continuing over the years of ameliorating and modifying the treatment of antisocial behavior by changing the emphasis from vengeance and punishment to treatment and rehabilitation. In the same tenor are the time-honored rules of the criminal law generally favorable to one accused of a crime: that in case of doubt or uncertainty as to the degree of crime, he is entitled to the lesser; and correlated thereto: that as to an alternative between a severe or a lenient punishment, he is entitled to the latter.

Tapp, 490 P.2d at 336.

The Belt rule applies regardless of whether the defendant caused the delays that resulted in sentencing taking place after the effective date of the amended statute.

Patience, 944 P.2d at 385 (citations omitted). This point is illustrated by the case of State v. Yates, 918 P.2d 136 (Utah App. 1996).

In Yates, the defendant pled guilty to theft involving property valued between \$100 and \$250. At the time of his plea, the offense was classified as a class A misdemeanor. Id. at 137 (citing Utah Code Ann. §76-6-412(1)(c) (1995)). Yates was released from jail pending sentencing, but missed his appointment for a presentence investigation interview and failed to appear for his sentencing hearing. Yates, 918 P.2d at 137. Yates appeared at a subsequent hearing, which was continued in an effort to obtain a presentence report. Id. Yates again missed his presentence investigation interview appointment, and again failed to appear for a second sentencing hearing. Id. Before Yates was arrested, the legislature amended the theft statute under which Yates had been charged, making theft of property valued at under \$300 a class B misdemeanor. Id. at 137-38 (citing Utah Code Ann. §76-6-412 (Supp. 1995)).

When Yates was finally arrested and sentenced, he argued that he should receive the benefit of the amended statute. Yates, 918 P.2d at 138. The trial court refused, and imposed sentence as a class A misdemeanor, “noting that it was Yates’ own failures to appear that had delayed sentencing beyond the effective date of the amended statute. Id. The Court of Appeals in Yates reversed the trial court, holding that Yates was entitled to be sentenced on a class B misdemeanor. Id. at 140.



The Court of appeals stated in Yates that “[d]ilatory as well as diligent defendants are entitled to the benefit of the legislature’s amended punishments and lesser sentences.” Yates, 918 P.2d at 139-40. Thus, even when “the defendant’s presentence misconduct resulted in the defendant’s sentencing being delayed beyond the effective date of the amendments,” the defendant is still entitled to the benefit of the lesser sentence. Patience, 944 P.2d at 385 (citing Yates, 918 P.2d at 139-40).

In the present case, the record indicates that Cox missed an appointment for her presentence investigation interview and requested a continuance of the sentencing to a date beyond the effective date of the amended theft statute. See, R. at 102, 103, 105. Nevertheless, under existing caselaw, she is still entitled to the benefit of the lesser penalty in effect at the time of her sentencing. Yates, 918 P.2d at 139-40.

**B. FAILURE TO SENTENCE THEFT BY DECEPTION AS A CLASS B MISDEMEANOR CONSTITUTED AN ILLEGAL SENTENCE, PLAIN ERROR, AND INEFFECTIVE ASSISTANCE OF COUNSEL.**

Although defense counsel did not object to the imposition of the illegal sentence on count II, this error may be reviewed on the following grounds: (1) plain error; (2) the court’s ability to correct an illegal sentence; and (3) ineffective assistance of counsel.

**(1) Sentencing theft by deception as a class A misdemeanor was plain error.**

“To demonstrate plain error, a defendant must establish that [1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” Munguia, 2011 UT 5 at ¶13 (citation omitted).



As set forth supra at 26-30, the trial court committed error by sentencing Cox on count II as a class A misdemeanor when theft by deception of property valued at \$360 was a class B misdemeanor at the time of sentencing. See, Patience, 944 P.2d at 385381 (Utah App. 1997). This error should have been obvious to the trial court since the statutory penalty had been amended by the legislature and the principle that defendants should be given the benefit of the amended lesser penalty had been clearly established in Utah case law for nearly forty years. See, Belt 479 P.2d at 792-93; Yates, 918 P.2d at 138; Patience, 944 P.2d at 385.

As this Court stated in Yates:

*Utah law on this question is clear and the instant case does not present an exception to the well-established rule: Defendants are entitled to lesser criminal punishments mandated by statutes that become effective before the court imposes sentence.*

Yates, 918 P.2d at 139 (emphasis added).

The error was prejudicial in that Cox received a harsher penalty for the higher level offense. Imposing a sentence harsher than that allowed by law is prejudicial and requires reversal. Id. at 139-40.

(2) *The sentence imposed by the trial court for theft by deception is an illegal sentence that can be reviewed under Utah R. Crim. Pro. 22(e).*

This court may additionally review this illegal sentence pursuant to Utah R. Crim. Pro. 22(e). See, State v. Brooks, 908 P.2d 856, 859-60 (Utah 1995). Because Cox is attacking the sentence itself, this Court may review this issue for the first time on appeal. Utah R. Crim. Pro. 22(e); Brooks, 908 P.2d at 859-60.

(3) Trial counsel was ineffective by failing to ask the court to sentence theft by deception as a class B misdemeanor.

This Court can also review this issue for ineffective assistance of counsel at sentencing. When claiming ineffective assistance of counsel, a defendant must satisfy a two part test established by the United States Supreme Court. “[A] defendant must first “show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” Tennyson, 850 P.2d at 465 (quoting Strickland, 466 U.S. at 687. Accord, Templin, 805 P.2d at 186.


The first prong of the Strickland test, deficient performance, is satisfied where defense counsel failed to argue that Cox should have been sentenced on count II as a class B misdemeanor. Utah case law on the principle that a defendant should receive the benefit of the amended lesser penalty is clear and well established. See, Belt 479 P.2d at 792-93; Yates, 918 P.2d at 138; Patience, 944 P.2d at 385. No argument exists that would justify defense counsel failing to argue that Cox should have received the lesser penalty of a class B misdemeanor. When no sound strategy supports defense counsel’s performance, the first prong of the Strickland test is met. State v. Humphries, 818 P.2d 1027, 1029 (Utah 1991).

The second prong of the Strickland test requires proof of prejudice to the defendant. Tennyson, 850 P.2d at 465 (citing Strickland, 466 U.S. at 687). This second prong is satisfied because the sentence Cox received for count II was harsher than that allowed by law. Thus, the case should be remanded to the trial court for resentencing. Patience, 944 P.2d at 392

### CONCLUSION

For the first issue, Cox respectfully requests that the convictions for all counts be reversed and that the case be remanded for a new trial. In the alternative, for the second issue, Cox respectfully requests that her sentence for theft by deception be vacated and the case be remanded for sentencing in accordance with Utah Code Ann. §76-6-412 (Supp. 2010).

SUBMITTED this 19<sup>th</sup> day of July, 2011.



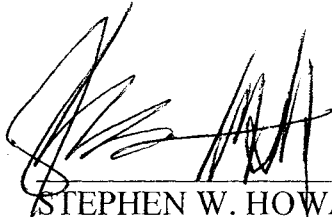
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STEPHEN W. HOWARD  
Attorney for Defendant/Appellant



CERTIFICATE OF DELIVERY

I, STEPHEN W. HOWARD, hereby certify that I have caused to be delivered the eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140320, Salt Lake City, Utah 84114-0230, and two copies to the Attorney General's Office, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854, this 19<sup>th</sup> day of July, 2011.



STEPHEN W. HOWARD  
Attorney for Defendant/Appellant

Delivered to the Utah Court of Appeals and the Attorney General as indicated above this 19<sup>th</sup> day of July, 2011.



Tab A

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 101901166 FS
MICHELLE ANN COX,	:	Judge: ROBERT FAUST
Defendant.	:	Date: November 8, 2010

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PRESENT

Clerk: saraj  
Prosecutor: ROSS III, CLIFFORD C  
Defendant  
Defendant's Attorney(s): LILLY, CATHERINE E

FAXED TO ADC

DEFENDANT INFORMATION

Date of birth: March 16, 1975  
Audio  
Tape Number: N41g Tape Count: 10:20

CHARGES

1. FORGERY - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 08/04/2010 Guilty
2. THEFT BY DECEPTION - Class A Misdemeanor  
Plea: Not Guilty - Disposition: 08/04/2010 Guilty

SENTENCE PRISON

Based on the defendant's conviction of FORGERY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison. The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of FORGERY a 3rd Degree Felony, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 335 day(s).  
Based on the defendant's conviction of THEFT BY DECEPTION a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

SENTENCE JAIL SERVICE NOTE

Defendant is to report for commitment on 11/12/2010 at 8:30am to the Court.



Case No: 101901166 Date: Nov 08, 2010

SENTENCE FINE

Charge # 1            Fine: \$400.00  
                         Suspended: \$0.00  
                         Surcharge: \$201.62  
                         Due: \$400.00

Charge # 2  
                         Total Fine: \$400.00  
                         Total Suspended: \$0  
                         Total Surcharge: \$201.62  
Total Principal Due: \$400.00  
                         Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.  
Defendant to serve 30 day(s) jail.  
Defendant is to report by November 12, 2010 by 8:30 a.m..

Defendant is to pay a fine of 400.00 which includes the surcharge.  
Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation & Parole.  
Obtain a mental health evaluation and successfully complete any  
recommended treatment.  
Restitution to remain open for 60 days, paid jointly and severally.  
Enter and complete any program or treatment as directed by AP&P.

Date: 11/8/10

Robert P. Faust  
ROBERT FAUST  
District Court Judge



Tab B

der could be found from proof of facts from which it reasonably could have been believed that such was intent of defendant, because additional facts may be inferred from those shown directly by evidence. *State v. Kazda*, 15 Utah 2d 313, 392 P.2d 486 (1964).

#### Recent possession of stolen property.

Statute making unexplained recent possession of stolen property prima facie evidence of larceny applied to offense of robbery when larceny and robbery were committed in same transaction. *State v. Donovan*, 77 Utah 343, 294 P. 1108 (1931).

#### Recovery of property by force.

Defendant, even if he took money from another by force or fear, was not guilty of robbery (with revolver), regardless of whatever other offense he might have committed in taking of money, if money actually belonged to him, and its possession by person from whom it was taken was wrongful since, in such case, animus furandi element of robbery was lacking. *People v. Hughes*, 11 Utah 100, 39 P. 492 (1895).

#### Sentence.

##### —Use of a firearm.

The legislature's 1975 amendment of the aggravated robbery statute to specify use of a firearm, coupled with the subsequent enactment of the general sentence enhancement provisions, created no ambiguity over what penalty the legislature intended for robbery committed with a firearm. The legislature was merely increasing the degree of a robbery committed with the enumerated instruments of

violence. *State v. Webb*, 790 P.2d 65 (Utah Ct. App. 1990).

#### Threatening to use weapon.

Threatening to use a dangerous weapon during the commission of a robbery, regardless of whether one actually possesses such a weapon, is sufficient for a charge of aggravated robbery under this section. *State v. Adams*, 830 P.2d 310 (Utah Ct. App. 1992).

Defendant's threats to get a gun and "shoot to kill" were sufficient to elevate his offense to aggravated robbery even though defendant did not possess a gun at the time. *State v. Reyos*, 2004 UT App 151, 499 Utah Adv. Rep. 19, 91 P.3d 861.

Defendant's gesture of pointing his hand inside his coat pocket constituted a representation of a dangerous weapon. *State v. Ireland*, 2005 UT App 209, 525 Utah Adv. Rep. 28, 113 P.3d 1028.

#### Unloaded firearm.

Aggravated robbery may be committed with an unloaded firearm. *State v. Turner*, 572 P.2d 387 (Utah 1977).

Cited in *State v. Ortiz*, 712 P.2d 218 (Utah 1985); *State v. DeJesus*, 712 P.2d 246 (Utah 1985); *State v. Gutierrez*, 714 P.2d 295 (Utah 1986); *State v. Bishop*, 717 P.2d 261 (Utah 1986); *State v. Iacono*, 725 P.2d 1375 (Utah 1986); *State v. Griffiths*, 752 P.2d 879 (Utah 1988); *State v. Whittle*, 780 P.2d 819 (1989); *State v. Russell*, 791 P.2d 188 (Utah 1990); *State v. Severance*, 828 P.2d 1066 (Utah Ct. App. 1992); *State v. Lee*, 831 P.2d 114 (Utah Ct. App. 1992); *State v. Martinez*, 925 P.2d 176 (Utah Ct. App. 1996); *State v. Bryant*, 965 P.2d 539 (Utah Ct. App. 1998).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d Robbery § 3.  
**C.J.S.** — 77 C.J.S. Robbery § 32 et seq.

**A.L.R.** — Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 124 A.L.R.5th 657.

Robbery: Identification of victim as person named in indictment or information, 4 A.L.R.6th 577.

## PART 4 THEFT

### 76-6-401. Definitions.

For the purposes of this part:

- (1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights



concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "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 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; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

History: C. 1953, 76-6-401, enacted by L.  
1973, ch. 196, § 76-6-401.

## NOTES TO DECISIONS

## ANALYSIS

Deception.  
Purpose to deprive.  
Cited.

**Deception.**

Subsection (a) in the definition of "deception" only applies to impressions of fact that are false at some present time; unfulfilled promises of future performance do not suffice as false representations under that subsection. *State v. Lakey*, 659 P.2d 1061 (Utah 1983).

Under Subsection (b) in the definition of "deception," the previously created or confirmed impression of fact must be false when the property is obtained in order to constitute "deception." *State v. Lakey*, 659 P.2d 1061 (Utah 1983).

Under Subsection (e) in the definition of "deception," a promise of future performance can constitute deception when the promising party does not intend to perform or knows the promise will not be performed; a person knows that a promise will not be performed when he is aware that the promise is reasonably certain not to be performed. *State v. Lakey*, 659 P.2d 1061 (Utah 1983).

Defendant's false representations to a bank employee about his account and line of credit at other banks were sufficient to support finding of deception. *State v. LeFevre*, 825 P.2d 681 (Utah Ct. App.), cert. denied, 843 P.2d 1042 (Utah 1992).

There is no conflict between § 76-7-203, which prohibits the payment of money to induce the birth parents or legal guardian to place a child for adoption, and § 76-6-405, which prohibits obtaining control over someone else's property by deception; consequently, when unsuspecting potential adoptive parents, relying on the false representation made by the birth parents that they intended to place the

child for adoption, paid their medical expenses, maternity expenses, and living expenses, the trial court did not err in concluding that theft by deception could occur in an adoption setting. *State v. Vigil*, 922 P.2d 15 (Utah Ct. App. 1996).

Sufficient evidence existed to convict defendant of theft by deception where he placed a price tag from a lower priced item on the item that he wanted to "buy" in order to deceive the cashier. (Unpublished decision.) *State v. Clegg*, 2006 UT App 44.

**Purpose to deprive.**

Evidence was sufficient to establish defendant's intent to deprive owner of his automobile where defendant drove the automobile in excess of 100 miles per hour when fleeing from police; told police when stopped that he owned the automobile; damaged the automobile by misuse; and drove the car from Utah to California without ever stating he would return the automobile to Utah. *State v. Daniels*, 584 P.2d 880 (Utah 1978).

The defendant's "purpose to deprive" was inferred from the following facts: in 1984, defendant began borrowing small amounts of money from the victim to buy pet food; the victim's generosity prompted defendant to make subsequent requests for larger sums to pay for everything from automobile repairs to medical bills; with each request, defendant inevitably promised to repay the victim soon or by a specific date; and between 1984 and 1986, defendant borrowed over \$70,000 and repaid only about \$1,500. *State v. Fowler*, 745 P.2d 472 (Utah Ct. App. 1987).

Cited in *Stevens v. Sanpete County*, 640 F. Supp. 376 (D. Utah 1986); *State v. Taylor*, 884 P.2d 1293 (Utah Ct. App. 1994); *State v. Bloomfield*, 2003 UT App 3, 464 Utah Adv. Rep. 26, 63 P.3d 110; *State v. Chukes*, 2003 UT App 155, 474 Utah Adv. Rep. 18, 71 P.3d 624.

## COLLATERAL REFERENCES

**Utah Law Review.** — Utah's New Penal Code: Theft, 1973 Utah L. Rev. 718.

**Am. Jur. 2d.** — 50 Am. Jur. 2d Larceny § 1 et seq.

**C.J.S.** — 52B C.J.S. Larceny § 1.

**A.L.R.** — Criminal liability for theft of, inter-

ference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Cat as subject of larceny, 55 A.L.R.4th 1080.

What is "trade secret" so as to render actionable under state law its use or disclosure by former employee, 59 A.L.R.4th 641.

**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.

**History:** C. 1953, 76-6-402, enacted by L. 1973, ch. 196, § 76-6-402; 1974, ch. 32, § 16.

#### NOTES TO DECISIONS

##### ANALYSIS

Constitutionality.

Applicability to other offenses.

Effect of presumption.

Evidence.

Explanation of possession.

Instructions.

—Good faith.

—Other offenses.

—Verbatim use of Subsection (1).

Possession as corroborating evidence.

Possession defined.

Prima facie evidence.

Questions of law and fact.

Uncorroborated explanation of possession.

Cited.

##### Constitutionality.

Prima facie evidence provision was not invalid as encroachment by legislature upon prerogatives of judiciary. *State v. Potello*, 40 Utah 56, 119 P. 1023 (1911).

A jury instruction based on Subsection (1) did not infringe on the defendants' constitutional right to remain silent, since nothing in the instruction required testimony by the defendants, because an explanation of possession could have been made by the testimony of other witnesses or by other evidence. *State v. Chambers*, 709 P.2d 321 (Utah 1985).

Use of the inference raised by possession of recently stolen property does not offend the federal constitution. *State v. Graves*, 717 P.2d 717 (Utah 1986).

Subsection (1) does not force a defendant to take the stand in violation of his Fifth Amendment right not to take the stand to testify. *State v. Smith*, 726 P.2d 1232 (Utah 1986).

Because the use of instructions allowing the inference of guilty knowledge upon unexplained possession does not offend the federal

constitution and has been approved by the Utah Supreme Court for use in possession of stolen vehicle cases, such instructions used did not improperly expand Utah's statutory presumption under this section, nor did they impermissibly shift the burden of proof concerning the mens rea requirement of the crime from the state to defendant found guilty of possession of a stolen vehicle. Although language allowing the inference that the defendant also stole the vehicle should have been omitted, such error was harmless as defendant was only charged with possession of a stolen vehicle. *State v. Carlson*, 934 P.2d 657 (Utah Ct. App. 1997).

##### Applicability to other offenses.

Recent possession of stolen property, when not satisfactorily explained, was also prima facie evidence of guilt of burglary or robbery, at least when larceny, burglary and robbery had been committed in same transaction. *State v. Donovan*, 77 Utah 343, 294 P. 1108 (1931).

The presumption that a person in possession of recently stolen property stole the property when no satisfactory explanation of the possession is made applies to burglary cases. *State v. Sessions*, 583 P.2d 44 (Utah 1978).

##### Effect of presumption.

Provision that unexplained possession of recently stolen property was prima facie evidence of guilt in prosecution for larceny did not relieve state of burden of convicting defendant upon all the evidence by proof beyond a reasonable doubt. *State v. Barretta*, 47 Utah 479, 155 P. 343 (1916); *State v. Merritt*, 67 Utah 325, 247 P. 497 (1926).

Possession of articles recently stolen, when coupled with circumstances of hiding or concealing them, or of disposing or attempting to dispose of them, or of making false or unrea-



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

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

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

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

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

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

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

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

(4) Wrongful appropriation is a lesser included offense of the offense of theft under Section 76-6-404.

**History:** C. 1953, 76-6-404.5, enacted by L. 1998, ch. 138, § 1; 1999, ch. 21, § 100; 2001, ch. 48, § 2.

**NOTES TO DECISIONS****Applicability.**

Because of its specificity as to motor vehicles, in cases of wrongful appropriation of a motor

vehicle, § 41-1a-1314 clearly takes precedence over this section. *State v. Webster*, 2001 UT App 238, 32 P.3d 976.

**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.

**History:** C. 1953, 76-6-405, enacted by L. 1973, ch. 196, § 76-6-405.

**NOTES TO DECISIONS****ANALYSIS**

Constitutionality.  
Adoption agreement.  
Attempted theft.

Distribution of imitation controlled substance.  
Elements of offense.  
—Reliance.  
—Series of misrepresentations.

(c) "Rental company" means any person or organization in the business of providing motor vehicles to the public.

(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).

**History:** C. 1953, 76-6-410.5, enacted by L. 2001, ch. 112, § 1.

### **76-6-411. Repealed.**

**Repeals.** — Section 76-6-411, as enacted by L. 1973, ch. 196, § 76-6-411, relating to theft by failure to make required payment or disposition of property subject to legal obligation, was repealed by Laws 1974, ch. 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.

(2) Any person who violates Subsection 76-6-408(1) or Section 76-6-413, or commits theft of property described in Subsection 76-6-412(1)(b)(iii), is civilly



liable for three times the amount of actual damages, if any sustained by the plaintiff, and for costs of suit and reasonable attorneys' fees.

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

1997, ch. 119, § 1; 1997, ch. 289, § 8.

**Cross-References.** — Bus Passenger Safety Act, theft of baggage or cargo, § 76-10-1508.

## NOTES TO DECISIONS

## ANALYSIS

Constitutionality.

Construction.

Determining degree of crime.

Elements of offense.

Enhancement for prior offense.

Evidence.

— Prior convictions.

Instructions.

Lesser included offenses.

Livestock.

Single offense based on separate takings.

Valuation of stolen property.

— At time of theft.

— Testimony of owner.

Cited.

**Constitutionality.**

This section, by making theft of certain livestock a third degree felony, irrespective of the value of the livestock, does not deny equal protection of the laws and does not violate the constitutional prohibition against private or special laws. *State v. Clark*, 632 P.2d 841 (Utah 1981).

**Construction.**

This section does not outline the elements of the crime of theft; it simply categorizes theft for sentencing purposes into various degrees of felonies and misdemeanors. Thus defendant was improperly charged under § 76-6-404 and this section with two separate counts of second degree theft for stealing both a firearm and property worth over \$1000 in a single burglary; the crime was instead one theft offense under § 76-6-404 punishable as a second degree felony under this section. *State v. Casias*, 772 P.2d 975 (Utah Ct. App. 1989).

No claim for treble damages based on § 76-6-408(2)(d) and this section against businesses that regularly deal in large bulk orders of raw industrial material. See *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282 (Utah 1993).

Because the elements of felony theft in Subsection (1)(a)(iv) are distinct from those of misdemeanor theft in Subsection (1)(d), and the misdemeanor theft provision does not proscribe the same conduct as the felony provision, defendant was properly charged with, and sentenced under, the felony theft statute. *State v.*

*Green*, 2000 UT App 33, 995 P.2d 1250.

**Determining degree of crime.**

In theft by deception, degree of the crime is determined by the value of the property obtained by defendant as a result of the deception without reducing that amount by any value received by the victim. *State v. Forshee*, 588 P.2d 181 (Utah 1978).

Defendant's second degree felony conviction, based on a check written for exactly \$1,000, was plain error, since he could only have been convicted of a third degree felony on the basis of the \$1,000 check. *State v. Burnett*, 712 P.2d 260 (Utah 1985).

**Elements of offense.**

While both statutory prohibitions criminalize theft of property, the misdemeanor theft provision does not require that the property be stolen from the person of another and is limited to less than \$ 300 in value, whereas the felony theft provision has no value limitation and requires that the theft be from the person, with the associated increase in the possibility of physical harm. *State v. Green*, 2000 UT App 33, 995 P.2d 1250.

**Enhancement for prior offense.**

The phrase "any burglary" in Subsection (1)(b)(ii) means any of the various burglary offenses in the criminal code, including burglary of a vehicle. *State v. Hall*, 2008 UT App 148, 184 P.3d 636.

**Evidence.**

State's use of color photographs of the stolen property for evidence rather than producing the actual tangible stolen property did not deny defendant due process of law. *State v. Ballenberger*, 652 P.2d 927 (Utah 1982).

**— Prior convictions.**

A judgment of prior conviction must be written, clear and definite, and signed by the court (or the clerk in a jury case) in order to serve as the basis for enhancing a penalty under this section. *State v. Anderson*, 797 P.2d 1114 (Utah Ct. App. 1990).

**Instructions.**

It was reversible error to omit to instruct as to amount of debt owing by defendant on auto,



(b) the person charged has received the direct benefit of the reduction of the cost of the utility or cable television service.

(4) A person who violates this section is guilty of the offense of theft of utility or cable television service.

(a) In the case of theft of utility services, if the value of the gas, electricity, water, or sewer service:

- (i) is less than \$500, the offense is a class B misdemeanor;
- (ii) is or exceeds \$500 but is not more than \$1,500, the offense is a class A misdemeanor;
- (iii) is or exceeds \$1,500 but is not more than \$5,000, the offense is a third degree felony; and
- (iv) is or exceeds \$5,000 or if the offender has previously been convicted of a violation of this section, the offense is a second degree felony.

(b) In the case of theft of cable television services, the penalties are prescribed in Section 76-6-412.

(5) A person who violates this section shall make restitution to the utility or cable television company for the value of the gas, electricity, water, sewer, or cable television service consumed in violation of this section plus all reasonable expenses and costs incurred on account of the violation of this section. Reasonable expenses and costs include expenses and costs for investigation, disconnection, reconnection, service calls, employee time, and equipment use.

(6) Criminal prosecution under this section does not affect the right of a utility or cable television company to bring a civil action for redress for damages suffered as a result of the commission of any of the acts prohibited by this section.

(7) This section does not abridge or alter any other right, action, or remedy otherwise available to a utility or cable television company.

**History:** C. 1953, § 76-6-409.3, enacted by L. 1987, ch. 38, § 3; 1989, ch. 30, § 2; 1990, ch. 130, § 1; 1995, ch. 291, § 12; 2010, ch. 193, § 10.

**Amendment Notes.** — The 2010 amend-

ment, effective November 1, 2010, substituted "\$500" for "\$300" in (4)(a)(i) and (4)(a)(ii) and substituted "\$1,500" for "\$1,000" in (4)(a)(ii) and (4)(a)(iii).

## **76-6-412. Theft — Classification of offenses — Action for treble damages [Effective November 1, 2010].**

(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

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(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.

**History:** C. 1953, 76-6-412, enacted by L. 1973, ch. 196, § 76-6-412; 1974, ch. 32, § 18; 1975, ch. 48, § 1; 1977, ch. 89, § 1; 1989, ch. 78, § 1; 1995, ch. 291, § 14; 1996, ch. 139, § 1; 1997, ch. 119, § 1; 1997, ch. 289, § 8; 2010, ch. 193, § 11.

**Amendment Notes.** — The 2010 amendment, effective November 1, 2010, substituted "\$1,500" for "\$1,000" in (1)(b)(i) and (1)(c);

added "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" in the introductory language of (1)(b)(ii); added (1)(b)(ii)(B) and (C); substituted "\$500" for "\$300" in (1)(c) and (1)(d); and made related and stylistic changes.

### **76-6-412.5. Property damage caused in the course of committing a theft.**

If a defendant who commits or attempts to commit theft as defined in Section 76-6-404 of regulated metal as defined in Section 76-10-901 and in the course of committing or attempting to commit the theft causes damage to any person's real or personal property other than the regulated metal, the defendant is liable for restitution for all costs incurred due to the damage to the person's property.

**History:** C. 1953, 76-6-412.5, enacted by L. 2009, ch. 325, § 2.

**Effective Dates.** — Laws 2009, ch. 325, § 6 makes the act effective on March 25, 2009.

## **PART 5**

## **FRAUD**

### **76-6-505. Issuing a bad check or draft — Presumption [Effective November 1, 2010].**

(1) (a) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check or draft.

(b) For purposes of this Subsection (1), a person who issues a check or draft for which payment is refused by the drawee is presumed to know the check or draft would not be paid if he had no account with the drawee at the time of issue.



1033 (Utah Ct. App. 1992); State v. Davis, 965 P.2d 88 (Utah 1999); State v. Rogers, 2005 UT P.2d 525 (Utah Ct. App. 1998), cert. denied, 982 App 379, 122 P.3d 661.

## COLLATERAL REFERENCES

**A.L.R.** — Consideration of sales tax in determining value of stolen property or amount of theft, 63 A.L.R.5th 417.

**76-6-413. Release of fur-bearing animals — Penalty — Finding.**

(1) In any case not amounting to a felony of the second degree, any person who intentionally and without permission of the owner releases any fur-bearing animal raised for commercial purposes is guilty of a felony of the third degree.

(2) The Legislature finds that the release of fur-bearing animals raised for commercial purposes subjects the animals to unnecessary suffering through deprivation of food and shelter and compromises their genetic integrity, thereby permanently depriving the owner of substantial value.

**History:** C. 1953, 76-6-413, enacted by L. 1997, ch. 119, § 2.

**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.

**History:** C. 1953, 76-6-501, enacted by L. 1973, ch. 196, § 76-6-501; 1974, ch. 32, § 19; 1975, ch. 52, § 1; 1995, ch. 291, § 15; 1996, ch. 205, § 27; 2007, ch. 141, § 1.

**Amendment Notes.** — The 2007 amend-

ment, effective April 30, 2007, redesignated former Subsection (2) as Subsection (1), added Subsections (2)(b)(ii) and (3), and made related and stylistic changes.

## NOTES TO DECISIONS

### ANALYSIS

Attempt.  
 Authority to use forged signature.  
 Computer crimes distinguished.  
 Defenses.  
 — Insanity.  
 — Postdated check.  
 Elements of offense.  
 — Making and passing.  
 — Passing.  
 — Signature.  
 Evidence.  
 — Handwriting.  
 — Insufficient.  
 — Other crimes.  
 — Sufficient.  
 False pretenses distinguished.  
 Fictitious name.  
 Identity theft distinguished.  
 Indictment or information.  
 — Variance.  
 Intent.  
 Lesser included offense.  
 "Make" or "utter."  
 Prescription.  
 Sentencing.  
 Signature.  
 — In general.  
 — Authority to sign another's name.  
 Standard of proof.  
 Theft consolidation rule.  
 Uttering.  
 Verdict.  
 Cited.

### Attempt.

Where information charging offense of forgery contained one count for forgery and another for uttering, attempt to utter could be shown, for it was immaterial that attempt to utter was unsuccessful; it was fact of uttering or attempting to utter that was of evidentiary value. State

v. Green, 89 Utah 437, 57 P.2d 750 (1936).

The crime of attempted forgery involves the same culpability and dishonesty as does the crime of forgery itself. State v. Ross, 782 P.2d 529 (Utah Ct. App. 1989).

### Authority to use forged signature.

Where defendant forged his accomplice's name on checks which accomplice owned but had reported stolen, then cashed the checks and split the proceeds with the accomplice, defendant committed forgery as defined under Subsection (1)(b), notwithstanding that the accomplice authorized defendant to sign his name. State v. Collins, 597 P.2d 1317 (Utah 1979).

### Computer crimes distinguished.

The elements of the computer crimes statute, § 76-6-703, are distinct from those of this section, insurance fraud, § 76-6-521, and communications fraud, § 76-10-1801, and, thus, it was within the prosecutor's discretion to charge and the trial court's authority to sentence defendant for computer crimes, rather than the crimes carrying lesser penalties. State v. Kent, 945 P.2d 145 (Utah Ct. App. 1997).

### Defenses.

#### — Insanity.

Insanity, if sufficiently established, would constitute defense to a charge of forgery. State v. Brown, 36 Utah 46, 102 P. 641, 24 L.R.A. (n.s.) 545 (1909).

#### — Postdated check.

In prosecution for forgery, fact that forged check was postdated did not help defendant, who had attempted to pass it. State v. Green, 89 Utah 437, 57 P.2d 750 (1936).

### Elements of offense.

#### — Making and passing.

Crime of forgery could consist of making of

Tab C

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.