

2001

## Utah v. Richard L. Holbert : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

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

Laura B. Dupaix, Assistant Attorney General; Attorney for Appellee.

Sharon S. Sipes; Public Defenders Association, Inc. of Weber County; Attorney for Appellant.

---

### Recommended Citation

Reply Brief, *Utah v. Holbert*, No. 20010147 (Utah Court of Appeals, 2001).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/3139](https://digitalcommons.law.byu.edu/byu_ca2/3139)

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

---

**IN THE UTAH COURT OF APPEALS**

---

STATE OF UTAH

VS.

RICHARD L. HOLBERT

Case No. 20010147--CA

Priority #2

---

APPELLANT'S REPLY BRIEF

**APPEAL**

**from the Second Judicial District Court for Weber County  
Honorable Michael D. Lyon**

Laura B. Dupaix  
Assistant Attorney General  
Heber M. Wells Building  
160 East 300 South  
Salt Lake City, Utah 84114-0854  
Attorney for Appellee

Sharon S. Sipes, UBN 6987  
Public Defenders Association,  
Inc. of Weber County  
Attorney for Appellant  
2564 Washington Boulevard  
Second Floor  
Ogden, Utah 84041

**Utah C.**

**AUG 23 2002**

**Paulette Stagg**

---

**IN THE UTAH COURT OF APPEALS**

---

STATE OF UTAH

vs.

RICHARD L. HOLBERT

Case No. 20010147-CA

Priority #2

---

APPELLANT'S REPLY BRIEF

**APPEAL**

**from the Second Judicial District Court for Weber County  
Honorable Michael D. Lyon**

Laura B. Dupaix  
Assistant Attorney General  
Heber M. Wells Building  
160 East 300 South  
Salt Lake City, Utah 84114-0854  
Attorney for Appellee

Sharon S. Sipes, UBN 6987  
Public Defenders Association,  
Inc. of Weber County  
Attorney for Appellant  
2564 Washington Boulevard  
Second Floor  
Ogden, Utah 84041

---

**IN THE UTAH COURT OF APPEALS**

---

STATE OF UTAH

vs.

RICHARD L. HOLBERT

Case No. 20010147-CA

Priority #2

---

APPELLANT'S REPLY BRIEF

**APPEAL**

**from the Second Judicial District Court for Weber County  
Honorable Michael D. Lyon**

Laura B. Dupaix  
Assistant Attorney General  
Heber M. Wells Building  
160 East 300 South  
Salt Lake City, Utah 84114-0854  
Attorney for Appellee

Sharon S. Sipes, UBN 6987  
Public Defenders Association,  
Inc. of Weber County  
Attorney for Appellant  
2564 Washington Boulevard  
Second Floor  
Ogden, Utah 84041

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . ii

ARGUMENT

THE DEFENDANT WAS CONVICTED OF THE  
CRIME CHARGED FOR BEING A PERSON OF  
CRIMINAL CHARACTER . . . . . 1

EVIDENCE OF THE MAY ASSAULT SHOULD  
HAVE BEEN EXCLUDED BECAUSE IT IS PREJUDICIAL  
AND CONFUSING TO THE JURY . . . . . 4

ONE PRIOR CONVICTION FOR SIMPLE ASSAULT  
DOES NOT CONSTITUTE A "PATTERN OF ABUSE". . . . . 6

NO ADDENDUM IS NECESSARY.

TABLE OF AUTHORITIES

<i>State v. DeCorso</i> , 1999 UT 59, 993 P.2d 837, <i>cert denied</i> 528 U.S. 1164 (2000) . . . . .	4
<i>State vs. Doporto</i> , 935 P.2d, 484, 488 (Utah 1997) . . . . .	3

## ARGUMENT

### **THE DEFENDANT WAS CONVICTED OF THE CRIME CHARGED FOR BEING A PERSON OF CRIMINAL CHARACTER.**

Testimony of the May 18 incident of domestic violence, of speculative assertions that the defendant attempted to burglarize the family home, that he engaged in domestic violence and assaultive behavior for which there was insufficient evidence for prosecution, and that he "kidnaped" his wife on a previous occasions, proved not that the defendant kidnaped his wife in the instant case, but that the defendant was a person of criminal character and he must have kidnaped his wife.

The State claims that the testimony of the May 18 assault was relevant to refute allegations that Ms. Palmer had fabricated the story, that Ms. Palmer was "so afraid that she and her children stayed with her parents" only "visiting the family home at certain" times. Br. Aple. at 21. The fact that Ms. Palmer chose different times to be at the home supports Mr. Holbert's claim that his wife invited him to the home because Mr. Holbert had no way to know, absent information from Ms. Palmer, when the family would be there. That possibility was naturally lost on the

jury given all the inadmissible evidence it heard, including evidence of an attempted break-in at the family home for which the defendant was presumed to be the perpetrator despite a lack of evidence connecting him with the alleged attempted break-in; allegations of domestic violence and protective order violations not prosecuted for lack of evidence; references that the defendant had held the defendant "hostage" before; and testimony that the defendant had a prior conviction for assault.

The jury's only picture of the defendant was what appeared to be his hostility and controlling behavior, an illusion painted by the prosecutor through his use of claims of prior bad acts which were not prosecuted for lack of evidence, the victims characterization of a prior "kidnaping" incident, and evidence of the defendant's prior misdemeanor assault conviction. The admission of that evidence set the stage for the jury to do just what Dean Wigmore described in his treatise on the admissibility of specific bad acts testimony, to give "excessive weight to the vicious record of crime" and allowed it to bear "too strongly on the present charge...irrespective of the accused's guilt of the present charge." See, *State vs.*



*Doporto*, 935 P.2d, 484, 488 (Utah 1997) (citation omitted).

The fact remains that evidence of May 18 incident, in addition to the evidence of the prior break-in attempt at the family home, allegations of two prior domestic violence and protective order violations not prosecuted for lack of evidence, and the introduction of the defendant's prior misdemeanor conviction, was unfairly prejudicial, inflammatory, and it distorted the deliberative process. The process was distorted because the jury had no choice but to convict for kidnaping this man because it had before it speculative assertions that he had attempted to burglarize the family home, and although no charges were filed, assertions that he had kidnaped his ex-wife before and had engaged in numerous acts of domestic violence and assaultive behavior before, finally, that he was convicted for assaulting Ms. Palmer before. Mr. Holbert was convicted of kidnaping as a result of his presumed bad character and his prior bad acts.

If the improper evidence had not been considered by the jury, there is a reasonable likelihood that it would have returned a different verdict, therefore, the admission of the evidence was not harmless.

**EVIDENCE OF THE MAY ASSAULT DOES NOT  
MEET REQUIREMENTS FOR ADMISSIBILITY  
UNDER RULE 403.**

The State claims testimony that the defendant had previously assaulted his wife was relevant to establish his motive and intent, and to show a specific pattern of behavior toward her. In deciding whether evidence of other crimes is admissible, the trial court must determine (1) whether the evidence is being offered for a proper, noncharacter purpose under 404(b), (2) whether such evidence meets the requirement of rule 402, and (3) whether the evidence meets the requirements of rule 403. *State v. Decorso*, 1999 UT 59, 993 P.2d 837, *cert denied* 528 U.S. 1164 (2000).

Assume for the sake of discussion that the challenged evidence was offered for a proper, noncharacter purpose, and, as the State contends, it is admissible to prove motive to commit the offense charged. Its admissibility must still fail because it does not meet the third part of the analysis for admissibility. Under Rule 403, other crimes evidence does not meet rule 403's requirements if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

*Decorso*, 1999 UT 57 ¶25.

In deciding whether the danger of unfair prejudice substantially outweighs the probative value of evidence, the court must consider

the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of the alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

*Id.* at ¶29.

Ms. Palmer testified that Mr. Holbert held her "hostage" for "an hour and a half", however, Mr. Holbert was never charged with kidnaping in that incident. The court also permitted testimony of two prior investigations into allegations of protective order violations and domestic violence which did not produce sufficient evidence to pursue prosecution. Likewise, testimony was admitted that law enforcement investigated an attempted burglary at the couple's residence and that they considered the defendant to be a suspect in that incident. Neither the prior allegations of protective order violations and domestic violence, and the attempted burglary at the marital home produced sufficient evidence to warrant prosecution. If several investigations by

law enforcement cannot produce sufficient evidence to pursue prosecution, the evidence as to the commission of the crimes must be considered weak and as a result, should not be permitted at trial.

Finally, the challenged evidence obviously has a high degree of probability for rousing the jury to overmastering hostility. The jury heard evidence that the defendant assaulted Ms. Palmer on numerous occasions, that he held her "hostage", and that he did so in the presence of his children. Those acts do rouse overmastering hostility. Domestic violence is so reviled in our society that violation of a protective order can be a felony offense.

The danger of unfair prejudice substantially outweighs the probative value of evidence because the evidence of the commission of the other crimes was so weak that they could not be prosecuted, there was no need for the evidence, and the evidence likely roused the jury to overmastering hostility. Therefore, the evidence was not admissible under rule 403 and does not meet the admissibility test under 404(b).

**ONE PRIOR CONVICTION FOR SIMPLE ASSAULT  
DOES NOT CONSTITUTE A "PATTERN OF ABUSE"**

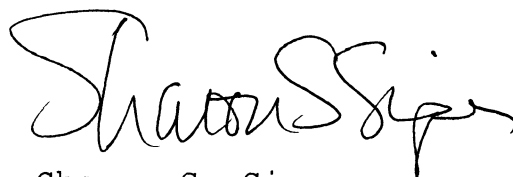
The State contends prior bad acts are admissible to show a "pattern of abuse" between the defendant and his wife. However, as argued above, the evidence of prior protective order violations and domestic violence, and an attempted burglary at the couple's home, was insufficient to warrant prosecution. It goes without saying, therefore, that it is insufficient to constitute proof that a "pattern of abuse" existed between the defendant and his wife.

**CONCLUSION**

For the reasons set forth herein and in the Appellant's Brief, the Defendant seeks reversal of his conviction for Aggravated Kidnaping and asks the court to remand for a new trial because he was deprived of his constitutionally protected right of a fair trial and his right to effective assistance of counsel.

DATED this 23 day of Aug, 2002.

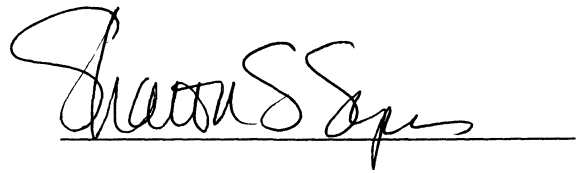
WEBER PUBLIC DEFENDER'S  
ASSOCIATION

A handwritten signature in black ink, appearing to read "Sharon Sipes", written in a cursive style.

Sharon S. Sipes

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of Aug,  
2002 I mailed postage prepaid first-class mail, two copies  
of the Appellant's Reply Brief to Jeanne B. Inouye, Assistant  
Attorney General, 160 East 300 South, 6<sup>th</sup> Floor, PO Box  
140854, Salt Lake City, Utah, 84114-0854.

A handwritten signature in black ink, appearing to read "Jason S. Spivey", is written over a horizontal line.

NO ADDENDUM IS NECESSARY