

1991

Kenneth James Morrell v. State of Utah : Unknown

Utah Supreme Court

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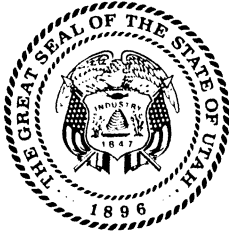
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Recommended Citation

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February 27, 1991

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: State of Utah v. Kenneth James Morrell, 910066

Dear Mr. Butler:

The respondent, State of Utah, hereby waives the right to file a brief in opposition to the petition for writ of certiorari in the above-referenced case pursuant to rule 50(d), Utah Rules of Appellate Procedure. This waiver does not constitute a stipulation that the petition should be granted, but rather, it is respondent's position that the petition should be denied based upon the legal analysis contained in the state's brief and the lower court's opinion, copies of which are attached to this letter. In the event that the Court deems an additional response by the State necessary to its determination, a brief in opposition will be provided.

Thank you for your consideration.

Very truly yours,

CHRISTINE F. SOLTIS
Assistant Attorney General
Criminal Appeals Division

CFS/jn

cc: Elizabeth Holbrook

Attachments

FILED

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Clerk, Supreme Court, Utah

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

IN THE UTAH COURT OF APPEALS

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The State of Utah,)	OPINION
)	(For Publication)
Plaintiff and Appellee,)	
)	Case No. 890031-CA
v.)	
)	
Kenneth James Morrell,)	F I L E D
)	(November 30, 1990)
Defendant and Appellant.)	

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

Attorneys: Debra K. Loy and Elizabeth Holbrook, Salt Lake
City, for Appellant
R. Paul Van Dam and Christine F. Soltis, Salt Lake
City, for Appellee

Before Judges Bench, Billings, and Orme.

ORME, Judge:

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

FACTS

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

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

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

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

At trial, defendant testified he saw Moor driving in defendant's neighborhood and recognized both Moor and his car. He stated that he had sold some marijuana to Moor at a party for which Moor still owed money to defendant. Defendant claimed that when Moor pulled over to ask street directions of defendant he asked Moor about the debt. Defendant testified that Moor did not respond, but pushed the pizza out the window at defendant. Defendant then got in the car and again asked Moor about the money owed for the marijuana. Moor did not have enough money to satisfy the debt and suggested that they go elsewhere to get more money. Eventually, defendant and Moor arrived at Ilov's home, where the defendant's account of the events largely corresponds with Moor's.

The trial court precluded defense counsel from cross-examining Moor concerning his drug and alcohol use, and any related possible effect on his ability to recall prior encounters with defendant which may have supported defendant's claim of a drug sales debt. The court also allowed testimony

by a police detective that the telephone used to place the pizza order incident to the robbery in this case, like others which had occurred, was not located at the address stated by the person placing the order.

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

EVIDENCE OF THE PRIOR ROBBERY

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

1. Defendant also raises a challenge under the Confrontation Clause, U.S. Const. amend. VI, asserting that he was denied the constitutional right of confrontation when the trial court limited cross-examination of Matthew Moor. However, defendant failed to make this specific objection, as required by Utah Rule of Evidence 103(a)(1), and therefore has waived his claim insofar as premised on confrontation grounds. See State v. Eldredge, 773 P.2d 29, 34 (Utah) (failure to object precludes review of evidentiary matters except in case of plain error), cert. denied, 110 S.Ct. 62 (1989).

2. The state argues, however, that the guilty plea should be treated as a conviction for purposes of Rule 609(a)(2), relying on State v. Delashmutt, 676 P.2d 383, 384 (Utah 1983)(per curiam). In our view, Delashmutt has questionable value as

Rule 609(a)(2) provides that evidence of conviction for any crime involving dishonesty or a false statement is admissible to attack the credibility of a witness. The focus of the rule concerns impeachment based on the probability that a particular witness may not be telling the truth as evidenced by prior acts of dishonesty on the part of that witness. Any act done with knowledge of its unlawfulness involves a measure of dishonesty as commonly defined. Nonetheless, Rule 609(a)(2) was drafted to restrict automatic admissibility to those crimes which are committed by means of deceit or fraud and thus bear directly on a witness's tendency to offer untruthful testimony. See State v. Morehouse, 748 P.2d 217, 222 (Utah Ct. App. 1988) (Jackson, J., dissenting) (citing legislative history of subsection 609(a)(2)).

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

(Footnote 2 continued)

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

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

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

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Utah R. Evid. 404(b).

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

Defendant directly challenged the element of intent. He claimed he was only trying to collect a debt through somewhat insistent, but not unlawful, means. Defendant was being tried for aggravated robbery, which is "the unlawful and intentional taking of personal property" from another, "against his will," by threat or use of "a dangerous weapon." Utah Code Ann. §§ 76-6-301(1), -302(1)(a) (1990). The only two controverted elements of the charge were the use of a weapon⁴ and defendant's intent. Therefore, it was critical for the state that it discredit defendant's claim of a coincidental encounter with Moor. Admission of prior bad acts is proper when it tends to prove a contested material element of the crime charged. State v. Featherson, 781 P.2d 424, 426 (Utah 1989); State v. Shaffer, 725 P.2d 1301, 1307 (Utah 1986). Evidence of the prior robbery was highly probative of defendant's intent in the present case.

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

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

In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as

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

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

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

Testimony concerning the prior robbery was the only evidence, other than defendant's and Moor's conflicting testimony, bearing on whether defendant's intent was to rob Moor or merely to secure payment of money defendant believed he was owed. The testimony, then, was clearly prejudicial to defendant. It was, however, extremely probative of defendant's intent during the incident with Moor. The two robberies for which defendant was charged occurred within months of each other. Each manifested an almost identical factual pattern. There was strong evidence of defendant's guilt in the prior robbery in view of competent eyewitness testimony from the victim in that case. The state had a great need to present this evidence to demonstrate intent; no effective alternative proof was available. Cf. Shickles, 760 P.2d at 296 (even where "other evidences of defendant's intent" are introduced, "the use of . . . other-crimes evidence" is "not necessarily" precluded). We cannot say that the trial court abused its discretion in weighing these factors and determining that the probative value substantially outweighed the prejudicial effect. It was therefore not incumbent upon the court to exclude the evidence under Rule 403. Because admission of the evidence was proper under Rule 404(b), and not barred by Rule 403, any error in admission of the guilty plea under Rule 609(a)(2) is harmless.

EVIDENCE OF PRE-MIRANDA SILENCE

During the cross-examination of one officer, the prosecution elicited testimony of defendant's silence when he was asked by another police officer what was happening. This question was asked immediately after the arrival of the officers, who took control of defendant from Ilov. No Miranda warning had been given, and defendant claims for this reason

that the court erred in allowing improper comment on his silence. The state asserts that the testimony was proper as demonstrating intent to rob Moor since defendant did not exculpate himself by stating that he was merely endeavoring to collect a debt.

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

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

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

Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983). Another factor which we find pertinent to our analysis was recognized by our Oregon counterpart in State v. Herrera, 49 Or. App. 1075, 621 P.2d 1209 (1980). That factor is (5) whether the defendant came to the place of interrogation freely and willingly. Id. at 1212.

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

Treating these factors in order, the following conclusions emerge. First, the site of interrogation was a public parking lot which, unlike interrogation at the police station, see id., does not suggest custody. Second, the investigation had not yet focused on defendant. When the officers arrived at the scene and observed defendant restrained by Ilov, they knew nothing more than that an altercation had been reported, and that a pizza driver was possibly missing in the same general vicinity. The officers had no reason to know or suspect that

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

While the fifth factor might be taken as "relatively 'neutral,'" *id.*, each of the other factors are not suggestive of custody. Taken together, the factors compel the conclusion that defendant was not subject to custodial interrogation and no *Miranda* warning was required.⁵ See also *State v. Kelly*, 718

5. In view of our disposition, we need not consider the state's alternative argument that, in any event, defendant's silence was admissible to impeach a defense offered for the first time at trial. See *Fletcher v. Weir*, 455 U.S. 603, 605-607 (1982). But see *People v. Jacobs*, 158 Cal. App. 3d 740, 750, 204 Cal. Rptr. 849, 856 (1984) (rejecting *Fletcher v. Weir* analysis under state constitutional provision nearly identical to federal counterpart); *State v. Davis*, 38 Wash. App. 600, 686 P.2d 1143, 1145-46 (1984) (rejecting *Fletcher v. Weir* analysis under state constitutional provision identical to federal counterpart); *Nelson v. State*, 691 P.2d 1056, 1059-60 (Alaska Ct. App. 1984) (rejecting *Fletcher v. Weir* analysis under state constitutional provision nearly identical to federal counterpart).

P.2d 385, 391 (Utah 1986) (brief questioning inside defendant's home not interrogation); Salt Lake City v. Carner 664 P.2d 1168, 1170 (Utah 1983) (police not required to give warning upon asking investigatory question).

HEARSAY & LIMITATION OF CROSS-EXAMINATION

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

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

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

Defendant also challenges a detective's testimony concerning the telephone locations from which pizza orders were made and the telephone numbers left with the order taker. The

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

detective testified that in both the robbery at issue and the prior robbery, the number left did not correspond to the pay telephone from which the call had been made, although in both instances the numbers were merely rearranged. Defendant claims this testimony was improper hearsay.

The state claims the business records and public records exceptions of Utah Rule of Evidence 803 allow admission of the officer's testimony. See Utah R. Evid. 803(6), (8). However, the police report, and not the business record of the pizza company, was the source to which the officer referred in his testimony. Police reports are not eligible for admission under either of these provisions of Rule 803 except in certain limited circumstances not applicable here. Utah R. Evid. 803(8)(B). See State v. Bertul, 664 P.2d 1181, 1184-86 (Utah 1983).

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

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

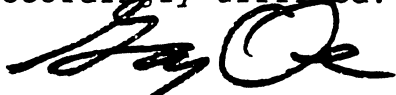
Concerning the telephone testimony, the facts of defendant's prior robbery were properly introduced through the testimony of the victim in that incident. Defendant also admitted his participation in that robbery. The precise methodology of telephone usage in both instances was therefore comparatively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

Viewing the other substantial evidence supporting defendant's conviction, we cannot say that defendant might not have been convicted without the officer's testimony concerning the telephone numbers or if the jury had learned more about the

exact reason Moor had incomplete recall of some parties he had attended.

CONCLUSION

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

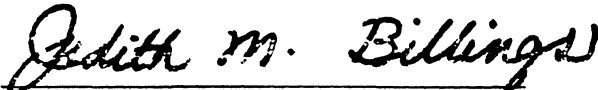


Gregory K. Orme, Judge

WE CONCUR:



Russell W. Bench, Judge



Judith M. Billings, Judge

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 890031-CA
v. :
KENNETH JAMES MORRELL, : Category No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A CONVICTION OF ROBBERY, A SECOND
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 76-6-301 (1978), IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE LEONARD H.
RUSSON, JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 890031-CA
v. :
KENNETH JAMES MORRELL, : Category No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of robbery, a second degree felony, in violation of Utah Code Ann. § 76-6-301 (1978). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

The issues presented in this appeal are:

1. Did either Officer Wayment's testimony concerning a telephone number listed in a police report or the limitation of cross-examination of Matthew Moor infringe on defendant's right to confrontation? Being a question of law, this Court must review it for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Western Fiberglass v. Kirton, McConkie & Bushnell, 129 Utah Adv. Rep. 28, 29 (Utah Ct. App. 1990).

2. If Officer Wayment's testimony or Matthew Moor's examination violated defendant's right of confrontation, did defendant preserve this issue for appeal? If the issue was not

waived, is any constitutional violation harmless beyond a reasonable doubt? This presents questions of law not determined by the court below. This Court must make original legal determinations regarding waiver and prejudice. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (relying on Chapman v. California, 386 U.S. 18, 24 (1967); State v. Verde, 770 P.2d 116, 122 (Utah 1989).

3. If Officer Wayment's testimony or Matthew Moor's examination did not violate defendant's right of confrontation, did the trial court abuse its discretion in ruling on these evidentiary matters? Evidentiary rulings are reviewed only for a clear abuse of discretion. State v. Gentry, 747 P.2d 1032, 1035 (Utah 1987); State v. Brown, 771 P.2d 1093, 1094 (Utah Ct. App. 1989).

3. Did the trial court abuse its discretion in allowing the State to present impeachment evidence of defendant's pre-Miranda warning failure to exculpate himself? As an evidentiary ruling, this issue is subject to the clear abuse of discretion standard stated above.

4. Did the trial court commit prejudicial error in admitting evidence of defendant's prior robbery under Utah R. Evid. 609(a)(2)? Where evidence is improperly admitted, this Court must review its admission for prejudicial effect; that is, absent the error, is there a reasonable likelihood of a more favorable result for defendant? State v. Verde, 770 P.2d at 121, n.10 (Utah 1989); State v. Knight, 734 P.2d 913, 920 (Utah 1987).

5. Did the trial court abuse its discretion in admitting as rebuttal evidence defendant's prior robbery for purposes of proving defendant's intent under Utah R. Evid. 403 and 404(b)? As an evidentiary ruling, this issue is subject to the clear abuse of discretion standard stated above.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The applicable statutes, constitutional provisions and rules for a determination of this case are in pertinent part:

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Utah R. Evid. 103(a):

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Utah R. Evid. 403:

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

Utah R. Evid. 404(b):

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Utah R. Evid. 609(a):

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Utah R. Evid. 801(d)(2):

(d) Statements which are not hearsay. A statement is not hearsay if:

. . .

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person

authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Utah R. Evid. 803:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . .

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

STATEMENT OF THE CASE

Defendant, Kenneth J. Morrell, was charged with aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1978) (R. 23-24, 30). On December 1, 1988, a jury trial commenced before the Honorable Leonard H. Russon, Judge, Third Judicial District Court, Salt Lake County, State of Utah (R. 27). On December 2, 1988, the jury returned a verdict of guilty of the lesser included offense of robbery, a second degree felony, in violation of Utah Code Ann. § 76-6-301 (1978) (R. 28, 118). On December 19, 1988, defendant was sentenced to the statutory indeterminate term of one to fifteen years at the Utah State Prison, to run concurrently with his previous sentence and with credit for time served awaiting trial (R. 122). Defendant filed a notice of appeal on January 18, 1989 (R. 123).

STATEMENT OF THE FACTS

At approximately midnight on September 4, 1988, Ambassador Pizza received a telephone call to deliver pizza and a soft drink to 813 Genessee Street, Salt Lake City Utah. The call constituted the last delivery for the night (T. 14-15).¹

Matthew Moor, a nineteen year delivery man for Ambassador Pizza, drove to what he thought was Genessee Street near 800 West (T. 15). He observed defendant standing on the

¹ The two volumes of trial transcript (R. 137 and 138) have been paginated separately, as opposed to continuously. To avoid confusion and to be consistent with appellant's brief, volume R. 137, the trial transcript for December 1, 1988, will be referred to as (T. -), and volume R. 138, the trial transcript for December 2, 1988, as (T2. -). Additionally, volume R. 139 is a miscellaneous volume containing the hearings on defendant's motion in limine and his sentencing. These will be referred to respectively as (MT. -) and (ST. -).

corner and asked him if the street was in fact Genessee (T. 15). Defendant said "yes" and then asked Moor if he had seen a red Camero; Moor said "no" (T. 15-16). Moor proceeded to the delivery address, about two houses from the corner (T. 15, 16). No lights were on in the house and no one answered when Moor knocked on the door (T. 16). Moor returned to his car "and was getting ready to leave and [defendant] came and approached [Moor] with what [Moor] thought was the intention of buying a pizza from [him]" (T. 16). Defendant asked Moor what type of pizza it was, stating he did not want it if it had green peppers and onions (T. 16). Normally, Moor would not try to resell pizza but since it was the last delivery of the evening, he decided to sell the pizza to defendant rather than throw it away (T. 16-17). Throughout this conversation, Moor was sitting in his car with the window rolled down (T. 17). When Moor told defendant he could purchase the pizza for \$5.00, defendant replied, "Why don't you give me the pizza for free?" (T. 18). Defendant then grabbed Moor, holding what Moor thought was a knife to his neck, and told Moor that he was being robbed (T. 18). Even though Moor could not see the knife, he felt something sharp, "sharp enough that [he] wasn't going to struggle" (T. 20). Defendant told Moor to hand over the keys to the car and then defendant got into the passenger side of the vehicle (T. 20, 21). The pizza and drink were left on the street (T. 52).

Once in the car, defendant demanded money from Moor (T. 21). Moor gave defendant about \$26.00 from one of his pants pockets. Defendant then asked Moor where his "bank" was (T. 21).

A "bank" is a small, leather carrying case used by the drivers to carry money at night (T. 22). Moor had put his "bank", containing approximately \$800.00 dollars, in his pants because he was somewhat suspicious when there were no lights on at the delivery address (T. 37, 53-54). Moor told him that a co-worker had mistakenly taken his "bank" on the last delivery (T. 22).

Defendant told Moor to drive to a "very dark place," telling Moor that he was going to search the car for the "bank" (T. 22-23). Throughout the drive, defendant held the knife to Moor's side, threatening to kill him if he did not cooperate (T. 23-24). At the location, defendant searched the car (T. 24).

Moor suggested that they drive to a house around 1000 East and 400 South, claiming that his girlfriend lived there and that she would give Moor money (T. 25). Moor knew that no one would be at the address but thought, since it was only four blocks from Ambassador Pizza, he might be able to get help (T. 25).

When no one answered at the Fourth South house, defendant told Moor to drive towards the "Avenues" area and find a house without any lights on so that they could "eventually do what he had done to me, rob Domino's" (T. 26). Moor testified that he was continuing to cooperate with defendant because he was afraid (T. 24, 27-8). On the way, defendant had Moor stop at a drive-up pay telephone at 800 East 200 South and call Domino's Pizza. No one answered as Domino's was closed (T. 28).

Defendant told Moor that he was "sick of these games". Defendant said he did not believe Moor and that Moor "had one

last chance to get him the amount of money he wanted, and if that didn't work that he would use the knife" (T. 29). Moor responded that a co-worker might have some money. Moor drove to the co-worker's, Ivan's, house at 1985 South 200 East (T. 29-30). Defendant told Moor to back into the driveway, roll up the windows, lock the doors, and then honk and yell for Ivan (T. 30). Moor did so, hitting the fence as he backed into the driveway (T. 58).

Ivan Ilov, thirty-six years old, heard the honking and came out to the car (T. 69-71). It was about 2:00 a.m. and Ivan thought Moor was playing some kind of joke. But when Ivan looked into the car, he observed Moor's "sweat-out eyes" and "worried" look" and realized "something was wrong" (T. 71). Ivan tried to get a better look at defendant who was leaning against Moor (T. 71-72). Moor asked Ivan for some money, stating "I have a guy with a knife in my back, can you get as much money as you can." (T. 72, 77-78). Simultaneously, Moor grabbed defendant's hand and Ivan broke through the driver's window of the car (T. 32, 73). Ivan testified that he broke the window "because at the moment I was trying to open the door. I realized the door is locked and the guy [the defendant] got nervous and I got a feeling he was already penetrating with the knife, so I got really wild and I broke the window" (T. 73). A brief struggle occurred. Defendant jumped out of the car and Ivan and Moor began to chase him (T. 62, 73).

Moor caught up with defendant. Defendant hit him, breaking Moor's nose (T. 62, 74). Defendant continued to run and

Moor caught up again, tackling defendant near the Sconecutter Restaurant, 2100 South State (T. 62-63, 75). When Ivan caught up, defendant was still wrestling with Moor. Ivan helped subdue defendant (T. 34, 75). Moor waived down a passing taxicab, telling the driver to call the police (T. 35, 76). When Moor asked defendant where he had put the money, defendant pulled the money from his pockets and threw it on the ground. Moor picked it up (T. 76). Moor went into the Sconecutter to wash himself while waiting for the police (T. 82).

When the police arrived, Moor was still in the Sconecutter restaurant and Ivan was holding defendant (T2. 9). Officer Miller went to one side of defendant and took defendant's arm, holding it up behind his back. Officer Neeley stood by defendant's other side (T2. 13). After the victim was interviewed, defendant was placed under arrest (T2. 5). No weapon was ever recovered.

Defendant testified on his own behalf (T2. 20). He did not deny the encounter with Matthew Moor, the subsequent attempts to get more money or the altercation at Ivan Ilov's home (T2. 23-36). Instead, defendant claimed he had met Moor in July at a party and had given Moor \$45.00 worth of marijuana without receiving any payment (T2. 25-26, 47). Defendant stated that it was merely a coincidence that he was standing on the corner when Moor drove by to deliver the pizza (T2. 22). Defendant maintained that his sole reason for approaching Moor was to get the money owed him. Defendant denied any intent to rob the victim (T2. 39-40, 53, 58).

Matthew Moor denied ever meeting defendant and denied purchasing any marijuana from him (T. 35-36, 41-43).

In rebuttal, Paul Christensen testified that in June 1988, he was robbed by defendant (T2. 75). In that robbery, a telephone order for pizza and a soft drink had been placed to Free Wheeler Pizza late on a Saturday night (T2. 75, 83). Mr. Christensen drove to the address given. When he got there, the house was dark and no one answered. Defendant appeared from the side of the house. Mr. Christensen thought defendant had ordered the pizza (T2. 75). Defendant asked Mr. Christensen what the pizza cost and started digging in his pockets as if to get money. Suddenly, defendant knocked the pizza and drink out of Christensen's hand and pulled out a gun (T2. 76). Defendant told Christensen to lie on the ground and to give him all his money and checks. Christensen turned over approximately \$200.00. Defendant asked where the rest of the money was and if Christensen had any money in his car. Christensen said "no". Defendant told Christensen to walk down the street. Christensen did and when he turned around, defendant was gone (T2. 76-77).

Defendant did not deny his culpability for the robbery of Christensen in June. In fact, defendant had pled guilty to that crime (T2. 55, 86-87). Defendant maintained that he had committed the Christensen robbery because of a drug habit, a habit which he claimed he was undergoing treatment for one or two months prior to the Moor altercation (T2. 56, 60-62, 86-87).

The jury was instructed on the crime charged, aggravated robbery, and its lesser included offense, robbery (R.

101-103, Court's Instructions to Jury). The jury returned a verdict of guilty to the lesser included offense of robbery (R. 118). On appeal, defendant has not raised any issue concerning the appropriateness of the jury instructions or the sufficiency of the evidence for conviction.

SUMMARY OF ARGUMENT

The trial court did not violate defendant's right to confrontation in allowing testimony concerning a telephone number listed in a police report or in limiting cross-examination of the victim-witness. Further, defendant failed to preserve any confrontation issue for purposes of appeal by only objecting on general evidentiary grounds. Even if defendant did not waive this issue and a violation of his right to confrontation did occur, any error is harmless beyond a reasonable doubt based on the totality of the evidence at trial.

The trial court properly allowed the State to present impeachment evidence of defendant's silence prior to any Miranda warnings. The issue is not one of defendant's right to a Miranda warning but of the right of the State to use probative evidence disputing defendant's claim of innocence at trial.

The trial court erred in automatically admitting into evidence, pursuant to Utah R. Evid. 609(a)(2), defendant's previous conviction of robbery as a crime of dishonesty. The error is harmless, however, because the court subsequently and properly admitted evidence of the same crime under Utah R. Evid. 404(b) to establish defendant's intent. Further, even if the evidence had not been admitted, based on the totality of the

record, there is no reasonable likelihood of a more favorable result for defendant.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO CONFRONTATION IN PROPERLY EXERCISING ITS DISCRETION IN RULING ON EVIDENTIARY MATTERS.

Defendant asserts that the trial court violated defendant's right to confrontation in two ways: 1) in allowing an officer to testify to a telephone number contained in a police report, and 2) in sustaining objections to certain questions posed during cross-examination of the victim (Br. of App. at 12-15). In raising this argument, defendant concedes that under State v. Brooks, 638 P.2d 537 (Utah 1981), the state and federal constitutional provisions on confrontation should be construed similarly, and does not argue for any separate state constitutional interpretation (Br. of App. at 11 n.2). As such, the State will limit its discussion to federal constitutional analysis. State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988); State v. Earl, 716 P.2d 803, 805-06 (Utah 1986).

As noted by defendant, the sixth amendment right to confrontation primarily involves the right of cross-examination, which encompasses both the admission of out-of-court statements and limitations on the scope of cross-examination. Kentucky v. Stincer, 482 U.S. 730, 736-737 (1987), cert. denied, 485 U.S. 65 (1988). Functionally, the confrontation clause is interpreted so as to promote reliability in evidence considered by the fact-finder in a criminal trial. Id. at 737.

Similarly, the rules of evidence governing hearsay have as their core a concern for providing a defendant the right to be confronted by the witnesses against him. California v. Green, 399 U.S. 149, 155 (1970). But,

[w]hile it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and treat the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

Id. at 155-156. Accord State v. Hackford, 737 P.2d 200, 204-205 (Utah 1987) (citations and footnote omitted). The fallacy of defendant's argument is in failing to recognize this distinction and by equating, what at best are, improper evidentiary rulings with prejudicial constitutional deprivations (Br. of App. at 14-15).

A. The Admission of Information from a Police Report.

Defendant argues that the trial court violated defendant's right to confrontation by allowing Officer Wade Wayment to testify during the State's rebuttal as to a telephone number listed in a police report. A brief discussion of the evidentiary context of Officer Wayment's testimony is necessary before turning to a discussion of its admissibility.

Throughout the trial, defendant had presented the defense that despite having physically done all the acts testified to by the victim, defendant lacked any intent to rob the victim and was merely collecting a debt. The defense was discussed in evidentiary hearings (MT. 9-12), alluded to in defendant's opening statement (T. 9-11), developed during cross-examination of the victim (T. 41-43), and fully presented by defendant during his direct testimony (T2. 22-41). After extensive pre-admission evidentiary hearings, the State was allowed on rebuttal to present evidence of a prior robbery, similar in nature, to which defendant had pled guilty (T2. 68-79).² After the details of the previous robbery had been testified to by the victim in that case, Paul Christensen, Officer Wade Wayment testified.

The officer stated that, in the case before the court, the telephone number given Ambassador Pizza in ordering the pizza was not connected to 813 Genessee Street as represented by the person placing the order, but was to a pay telephone at Smith's Food Store, 828 South 900 West, a block away (T2. 81-82). This information was admitted without objection.

Officer Wayment then testified that he had reviewed the police report in the prior Christensen robbery (T2. 82). Officer Wayment was asked if he had obtained a telephone number given to Free Wheeler Pizza in that case (T2. 82-83). Defendant objected for "lack of foundation, hearsay" (T2. 83). The court ordered

² The admissibility of this evidence under Utah R. Evid. 404(b) to prove defendant's intent during the encounter will be discussed separately under Point IV.

the prosecutor to "lay a foundation where he is getting that information from" (T2. 83). The officer testified that he got the information from the police report, which was prepared and kept in the ordinary course of police business. Defendant renewed the objection on the same grounds; the objection was overruled (T2. 83). Officer Wayment then testified that based on the police report, the telephone number of 466-0438 was given when the order was placed to Free Wheeler Pizza. The officer testified that he searched for the location of such a telephone, but the number could not be connected to any location (T2. 83). Because the officer knew that the address given in ordering the pizza was in the area of 1300 South and 900 East, he transposed the telephone number to 466-0348 and connected it to a pay telephone at a 7-11 store, a few blocks from the location of the Christensen robbery (T2. 84).

On surrebuttal, defendant testified that he did in fact commit the Christensen robbery as testified to by Paul Christensen, including having made the telephone call ordering the pizza from a pay telephone (T2. 86-89).

Defendant now argues that in allowing Officer Wayment to testify from the police report as to the telephone number used by defendant in setting up the Christensen robbery, defendant's right to confrontation was violated. In the context of the evidence, the argument is specious.

First and foremost, defendant never denied his involvement in the Christensen robbery; nor did he ever contest the evidence presented by Paul Christensen as to how the robbery

occurred. Rather, throughout the pretrial hearing, the issue was the evidence's admissibility under Utah R. Evid. 404(b), not the accuracy or reliability of the facts (MT. 13). This was also defendant's position at trial (T. 93-101; T2. 70-73, 86-89). Therefore, there was no reliability issue involved, only one of relevance and possible prejudice.

Further, defendant never raised the confrontation issue below. Instead, both objections were worded as being for "lack of foundation, hearsay" (T2. 83). An objection on grounds of hearsay does not necessarily include within it an objection on confrontational grounds; for, the constitutional provision does not require that hearsay never be introduced. Just the opposite is true. Numerous hearsay exceptions exist which do not fall within the scope of the confrontation clause. Dutton v. Evans, 400 U.S. 74, 80-82 (1970) (quoting Pointer v. Texas, 380 U.S. 400, 407 (1965)). Accord State v. Hackford, 737 P.2d at 204-205. As such, this Court should only consider defendant's objection as being a general hearsay objection, defendant having waived any confrontation argument. State v. Eldredge, 773 P.2d 29, 34-35 (Utah), cert. denied, 110 S.Ct. 62 (1989); Utah R. Evid. 103(a). Being an evidentiary matter, the ruling is reviewed only for a clear abuse of discretion. State v. Gentry, 747 P.2d 1032, 1035 (Utah 1987); State v. Brown, 771 P.2d 1093, 1094 (Utah Ct. App. 1989).

Applying the hearsay rules, defendant argues that a police report does not qualify for admission under the public records exception of Utah R. Evid. 803(8) and cites in support

State v. Bertul, 664 P.2d 1181 (Utah 1983) (Br. of App. at 13). However, Bertul does not completely preclude the consideration of information in a police report. Instead, the Utah Supreme Court concluded that the police report itself is not ordinarily admissible as a business record, Utah R. Evid. 803(6), or as a public document, Utah R. Evid. 803(8), "except when offered to prove simple routine matters which are based on first-hand knowledge of the maker of the report and do not involve conclusions, and when the 'circumstances of their preparation indicate their trustworthiness'." Id. at 1185-86. Here, the only information derived from the police report was the telephone number given to Free Wheeler Pizza by defendant in placing the order which set up the Christensen robbery. The telephone number was not recorded by Free Wheeler Pizza in anticipation of litigation, but was taken in the normal course of their business in receiving the pizza order. Id. at 1184. Merely because the police then included it in a police report does not transform it into non-routine information. Since the police report itself was not introduced into evidence, the issue is not the admissibility of the report, but the admissibility of specific information in the report. That information, a telephone number given and recorded in the normal course of business, clearly falls within the hearsay exceptions of Utah R. Evid. 803.³

³ It is also arguable, under the unique circumstances of this case, that the statement is not hearsay at all, being an admission of defendant. Utah R. Crim. P. 801(d)(2). By the time the officer testified, defendant had already admitted his guilt of the Christensen robbery, Mr. Christensen had testified to the details, and none of the facts surrounding the robbery were challenged by defendant as inaccurate (T2. 55, 73-75; MT. 13).

B. The Scope of Cross-Examination of the Victim.

Defendant also raises a confrontation issue in relation to, what defendant characterizes as, the unwarranted limitation of cross-examination of the victim, Matthew Moor (Br. of App. at 14-15). Specifically, defendant argues that his confrontation right was violated when the trial court sustained objections to defendant's questions of Moor as to his drug and alcohol use during the summer months of 1988 (T. 43). However, defendant has not adequately preserved the issue for appeal. Rather, defendant posed questions of the victim, and when objections were sustained, defendant abandoned the line of questioning without further argument or factual proffer (T. 42-44). As such, defendant has waived his claim on a constitutional ground. Any limitations should be reviewed only on general evidentiary grounds for abuse of discretion. State v. Eldredge, 773 P.2d at 34-35; Utah R. Evid. 103(a). The appropriateness of the questions and adequacy of the objections must be evaluated in light of Moor's testimony.

Matthew Moor, as the first State's witness, had completed his direct testimony describing the robbery. Moor had stated that the only reason he had given money to defendant was because of defendant's threatening demands (T. 21, 24-25, 31). Moor testified that he had never met defendant prior to the night of the robbery and did not recognize him from anywhere else (T. 35-36). On cross-examination, Moor denied that defendant ever

³ Cont. Further, defendant in surrebuttal admitted placing the call (T2. 86-89).

represented that he knew Moor or that Moor owed him money (T. 41-42). Moor denied knowing anyone named Scott Perry, an individual defendant later claimed introduced Moor to defendant at a party in July 1988 (T. 42-42; T2. 25, 48). The following then ensued:

Q: (By Ms. Loy) Have you ever been to a party on the east side of Salt Lake in the area of Trolley Square where you might have met Mr. Morrell and don't remember specifically?

A: (By Matthew Moor) Well, there have been parties that I have been to where I don't remember anything. So, I don't know. I don't remember ever having seen Mr. Morrell, ever.

Q: When you say sometimes you don't remember anything after being to a party, would that be because of alcohol and drug use?

MR. REED: Objection, Your Honor. I don't see where we are going with this.

. . .

THE COURT: Objection sustained.

Q. (By Ms. Loy) Mr. Moor, have you ever obtained marijuana from Ken Morrell?

MR. REED: Objection, Your Honor. He has already said he doesn't know Mr. Morrell.

THE COURT: Sustained.

Q. (By Ms. Loy) Mr. Moor, is it possible that you have met Mr. Morrell at a party and you do not know remember him, meeting him at a party because of some reason?

MR. REED: Your honor, this has been asked and answered.

MS. LOY: This is in a different form.

THE COURT: Overruled. I will let her pursue this more.

. . .
Q: (BY Ms. Loy) Mr. Moor, is it possible that you met Mr. Morrell at a party at some

time in your past and do not remember because you have for some reason not remembered what occurred at a past party?

THE COURT: Wait a minute. Both of you approach the bench.

(Off the record discussion between Court and counsel.)

Q. (BY Ms. Loy) Mr. Moor, you indicated you took some money out of your pocket and handed it to Mr. Morrell; is that right?

(T. 43-44).

In the context of this case, the trial court did not prevent defendant from proper inquiry into any bias or motive of the victim appropriate to the jurors' consideration of the witness's reliability. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). Defendant's theory of the case was that he knew Moor, recognized him the night of the robbery and approached him to collect a debt. The circumstances surrounding the debt were irrelevant; the issue was defendant's intent in approaching Moor. Moor repeatedly denied knowing defendant but admitted that he did not always remember everything from the parties he attended (T. 44). Once Moor denied ever knowing defendant but admitted that he could have met him at a party and not remembered, the predicate for defendant's theory of the case was laid. Further questioning would not have elicited any other information supportive of defendant's claim that he knew Moor in light of Moor's continued statements that he did not remember ever meeting defendant and did not recognize him as someone he knew on the night of the robbery. Additionally, Moor had already refuted defendant's claim that he told Moor that he was merely collecting

a debt. Whether or not Moor was ever under the influence of drugs or alcohol at some previous undefined time, was not relevant to Moor's recitation of the incident on the night in question. The trial judge properly and reasonably restricted questioning that was repetitious and only marginally relevant to Moor's present credibility or reliability. Delaware v. Van Arsdall, 475 U.S. at 679. Accord State v. Hackford, 737 P.2d at 203 (right of cross-examination is limited by Utah R. Evid. 403; there is no right to "harass, annoy or humiliate the witness"); State v. Chesnut, 621 P.2d 1228, 1233 (Utah 1980).

C. Even If Any Error Was Committed, the Error Is Harmless.

The State submits that a harmless-error analysis is inapplicable in this case as no error was committed. The constitutional issues were not preserved for appeal; instead, defendant only objected on evidentiary grounds. As such, the court's rulings amounted to nothing more than evidentiary rulings, which should be upheld absent a clear abuse of discretion. State v. Gentry, 747 P.2d 1035 (Utah 1987); State v. Brown, 771 P.2d at 1094. Here, the court properly exercised its discretion in ruling on both issues.

But assuming arguendo that the trial court's rulings violated defendant's right to confrontation and that defendant has not waived the issue, the standard of review is one of harmless-error analysis as delineated under Chapman v. California, 386 U.S. 18, 24 (1967). Delaware v. Van Arsdall, 475 U.S. at 681. Accord State v. Tillman, 750 P.2d 546, 555 (Utah 1987). That is:

[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. . . . The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. . . .

Delaware v. Van Arsdall 475 U.S. at 681 (citations omitted).

Assuming that the trial court improperly admitted into evidence the telephone number contained in the police report or unduly limited some questions on cross-examination, the effect of the rulings could not have reasonably affected the outcome of the case. Defendant's involvement in the Christensen robbery and the facts concerning that robbery were not in issue. Defendant admitted to these matters. Thus, whether the pizza employee who had taken the telephone number or the officer testified, is wholly irrelevant to the outcome of this case. Similarly, whether or not Matthew Moor was ever under the influence of drugs or alcohol is irrelevant to defendant's claim that he had previously met Moor. Moor testified that he had not met defendant but admitted that he did not remember everything from parties attended. Follow-up questions concerning whether or not Moor bought drugs from defendant were duplicative and repetitious; Moor had already testified several times, both on direct and cross, that he did not recognize defendant or believe that he and defendant had ever met. The scope of cross-examination did not restrict defendant in developing the theory of his case.

POINT II

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO
PRESENT AS IMPEACHMENT EVIDENCE DEFENDANT'S
PRE-MIRANDA FAILURE TO EXCULPATE HIMSELF.

At the conclusion of the State's case-in-chief,
defendant presented Officer Susan Neeley as its first witness.
On direct examination, Officer Neeley testified that when
defendant was arrested and searched no evidence was seized from
defendant's person (T2. 3). Additionally, Officer Neeley
testified that she interviewed Matthew Moor and Ivan Ilov in
connection with the case but was not aware of what happened to
the money in question (T2. 4). On cross-examination, the
prosecutor asked:

At anytime prior to Mr. Morrell's arrest, did
[he] make any statements to you?

(T2. 5). Defendant objected on grounds of "improper comment"

(T2. 5). A hearing continued outside the presence of the jury.

Defendant restated the objection:

[M]y objection was stated, I believe, that
the question asked for an improper comment
upon my client's silence at the time he was
in custody, although the answer of the
officer was that he was not yet arrested.
Her previous testimony indicated that he was
restrained by a civilian. They arrived and
then patted him down. It appears without
further foundation that it was a comment upon
his silence upon arrest, and that is why I am
objecting.

(T2. 6). The State proffered that defendant's failure to
exculpate himself was relevant to show his intent at the time of
the incident in light of his trial claim that he was merely
collecting a debt from the victim (T2. 6-7). The court requested
further information as to the sequence of events.

Out of the presence of the jury, Officer Neeley testified that she was dispatched to approximately 1900 South State Street, in response to a call that a fight was occurring (T2. 8). While traveling to the location, she received a second dispatch that a pizza driver was missing at the same location (T2. 8). Arriving, Officer Neeley observed defendant being held by Ivan Ilov (T2. 8-9). Immediately, Officer Neeley went to one side of defendant while Officer Miller held defendant with his arm behind his back (T2. 9). Officer Miller asked defendant "What was going on?" (T2. 9). Defendant did not respond. No further questions were asked of defendant (T2. 9).. Officer Neeley testified that even though defendant was not free to leave, he was not a suspect or under arrest. Instead, defendant was being detained because:

[W]e [the police] didn't know what was going on. When someone is being held like that, we have to find out all of the facts.

(T2. 11). Officer Neeley stated that the detention continued for investigative purposes until it could be determined from conversation with the victim that a crime had occurred (T2. 11-12). At that point, defendant was placed under arrest by a third officer, Officer Allred (T2. 5, 11). Based on this testimony, the court overruled the objection, allowing testimony up to the time of arrest (T2. 12). The jury was reconvened.

With the jury present, Officer Neeley testified that she was in defendant's presence for approximately 10-15 minutes (T2. 12). During that time, defendant made no statements to her. Officer Miller asked defendant what was going on. Defendant did

not respond (T2. 13).⁴

Defendant subsequently testified that he never heard the police ask him any question (T2. 51).

On appeal, defendant claims that the introduction of this evidence was constitutionally improper in that "Appellant was in custody when Officer Miller asked him what was going on, and was entitled to a Miranda warning" (Br. of App. at 18). However, the issue is not whether or not defendant was entitled to a Miranda warning, but whether defendant's pre-Miranda silence could be used to rebut defendant's trial claim that he was not involved in any criminal conduct on the night in question. Before turning to this issue, the State will respond to the Miranda argument posed by defendant.

There is no question that:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Miranda v. Arizona, 384 U.S. 436, 444 (1966) (footnote omitted).

Custody was further explained by the United States Supreme Court in California v. Beheler, 463 U.S. 1121 (1983), where the Court stated:

Although the circumstances of each case must certainly influence a determination of

⁴ This represents the entire scope of questioning by the State as to defendant's silence. (See T2. 12-13.)

whether a suspect is "in custody" for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. . . .

Id. at 1125 (citations omitted). Utah appears to have adopted a similar functional arrest test. State v. Kelly, 718 P.2d 385, 391 (Utah 1986); Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983). Without analyzing the issue, it may be assumed arguendo that defendant was being detained by the police and was not free to leave (T2. 10-12).

More necessary to this case, is a determination of whether the officer's question, "What is going on here?", constituted interrogation. As the Utah Supreme Court has recognized:

[F]or the purpose of determining whether a crime has been committed, investigation and interview are critical; under such circumstances, the warning is not required.

Salt Lake City v. Carner, 664 P.2d at 1170. For,

[i]t would be wholly impractical and the law does not require an officer who is investigating suspicious circumstances to give the "Miranda" warning to everyone of whom he asks a question.

Id. at 1170 (quoting State v. Carlsen, 25 Utah 2d 305, 480 P.2d 736, 737 (1971)). To constitute interrogation for Miranda purposes, the police must subject a suspect to "express questioning or its functional equivalent . . . not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to

elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). Accord United States v. Gay, 774 F.2d 368, 379 (10th Cir. 1985) (comment of police in searching container that it contained "cocaine, too" did not constitute comment which the police "should have known [was] reasonably likely to elicit an incriminating response").

Here, the testimony established that the police had received two dispatches, one that a fight was occurring, another that a pizza driver was missing (T2. 8). Arriving on the scene, they observed one citizen holding another (T2. 9). As Officer Neeley testified, the police did not know at that point what, if any, crime had been committed (T2. 11-12). Because the one witness had hold of defendant, the police took over, continuing the hold but asking the general investigatory question of "What is going on here?" (T2. 9-10). When they did not receive a response from defendant, they apparently sought other information by interviewing Moor (T2. 11). Upon receiving the statement of the victim, defendant was arrested (T2. 11). Under the facts of this case, the police did nothing more than pose a single investigatory question to defendant to determine the facts surrounding the dispatch call. Of course, the police were suspicious that something criminal had occurred, but at the time of the question, they did not know what or by whom (T2. 11-12). The question posed was "justified and the answer may well have disclosed some perfectly lawful activity." State v. Carlsen, 480 P.2d at 737. Accord State v. Kelly, 718 P.2d at 391. Therefore, no Miranda warning was required.

But, as previously stated, the significant issue in this case is not the Miranda issue, for no statements of defendant were admitted into evidence. Rather, the issue is whether the introduction of defendant's silence constituted a violation of defendant's constitutional right against self-incrimination. Though not specifically raised by defendant, the State addresses the issue pursuant to its duty to promote justice. State v. Bartley, 784 P.2d 1231, 1237 (Utah Ct. App. 1989).

Clearly, the State may not comment on or use in its case-in-chief a defendant's silence in response to Miranda warnings. Doyle v. Ohio, 426 U.S. 610, 619 (1976). But, a different rule is applicable where no Miranda warning has been given. In the latter case, a defendant's silence is admissible to impeach a defense offered for the first time at trial. Fletcher v. Weir, 455 U.S. 603, 605-607 (1982). The reason for the distinction is explicit in the Miranda warning itself. Once a defendant is informed that he constitutionally need not respond to police questioning, his subsequent silence is "not sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof." Id. at 605 (quoting United States v. Hale, 422 U.S. 171, 180 (1975)). On the other hand, where no Miranda warning has been given,

"[c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. . . . Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that

impeachment by reference to such silence is probative."

Fletcher v. Weir, 455 U.S. at 606 (quoting Jenkins v. Anderson, 447 U.S. 231, 239 (1980)). Thus,

[i]n the absence of the sort of affirmative assurances embodied in the Miranda warnings, [the United States Supreme Court does] not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

Fletcher v. Weir, 455 U.S. 607. Utah courts have implicitly recognized this same distinction. Compare State v. Wiswell, 639 P.2d 146, 147 (Utah 1981) (prosecutorial misconduct warranted reversal where prosecutor elicited testimony of the defendant's post-Miranda silence), with State v. Sorrels, 642 P.2d 373, 375 (Utah 1982) (no error in admitting into evidence defendant's post-arrest silence to refute defendant's claims that he never had an opportunity to give an explanation of his activities to the police). Accord United States v. Harrold, 796 F.2d 1275, 1279-1280 (10th Cir. 1986), cert. denied, 479 U.S. 1037 (1987) (proper to allow evidence of defendant's pre-Miranda silence); People v. O'Sullivan, 217 Cal.App.3d 237, 265 Cal. Rptr. 784, 787-788 (1990) (no error in allowing into evidence defendant's post-arrest but pre-Miranda silence to refute claims of defense).

Here, the record establishes that even prior to defendant actually testifying, it was clear his defense was that he was merely collecting a debt from Moor when the altercation

occurred (MT. 12-13; T. 41-43, 93-94, 98). In this context, during the defense case and just prior to defendant testifying, the State elicited, in cross-examining Officer Neeley, that defendant never informed the police that he was collecting a debt. The evidence was directly probative of defendant's claim of innocence; for if defendant was merely collecting a legitimate debt, why would he have refused to give this explanation to the police in response to their neutral question of "What is going on here?". Under the circumstances, the prosecutor properly elicited impeaching evidence of defendant's failure to offer this explanation at the time of his arrest. The silence was not government induced and was probative in judging the validity of the exculpatory defense presented at trial.

As no constitutional violation was involved, the admission of the evidence should be viewed as any other evidentiary matter; that is, was it reliable and probative of an issue at trial? As such, it is reviewable only for abuse of discretion. State v. Gentry, 747 P.2d at 1035; State v. Brown, 771 P.2d at 1094. Here, the trial court properly allowed its admission.

POINT III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE DEFENDANT'S PREVIOUS CONVICTION UNDER UTAH R. OF EVID. 609(a)(2) AS A CRIME OF DISHONESTY; BUT, UNDER THE FACTS OF THIS CASE, THE ERROR IS HARMLESS.

Defendant argues that the trial court erred in admitting into evidence his prior conviction for robbery under Utah R. Evid. 609(a)(2) as a crime of dishonesty. Additionally,

defendant contends that a plea of guilty is not a conviction for purposes of the rule (Br. of App. at 22-27). Because the State concedes that the trial court erred in concluding that robbery was automatically admissible under Utah R. Evid. 609(a)(2) as a crime of dishonesty, the State merely notes that defendant's argument that a guilty plea alone cannot constitute a conviction for purposes of the rule is without merit. State v. Delashmutt, 676 P.2d 383, 384 (Utah 1983).

When this matter was raised pretrial, the trial court did not have the benefit of State v. Bruce, 779 P.2d 646, 653-656 (Utah 1989), in which the Utah Supreme Court concluded that theft crimes are not necessarily crimes of dishonesty and therefore not automatically admissible under Rule 609(a)(2). Instead, the trial court based its ruling on State v. Cintron, 680 P.2d 33 (Utah 1984), concluding:

Right now, I am following Cintron because I think that is the law of the State and I think that is the correct law of the State. I hope they never change that, but this may be the case that you want to try to convince them of that. I will hold that robbery is a crime of dishonesty.

MT. at 5). Because of its conclusion that the conviction was automatically admissible, the court declined to apply the balancing test of Utah R. Evid. 609(a)(1) as delineated in State v. Banner, 717 P.2d 1325, 1332-1334 (Utah 1986) (MT. 5).

Clearly, under the now applicable rulings of the Utah appellate courts, the automatic admission of the robbery conviction to

impeach defendant's credibility was error.⁵ State v. Lanier, 778 P.2d 9, 10-11 (Utah 1989); State v. Wight, 765 P.2d 12, 17-18 (Utah App. 1988).

However, the State submits that under the facts of this case, the error is harmless. As will be discussed in the next point, evidence of defendant's robbery conviction was properly admitted on other grounds, that is, under Utah R. Evid. 404(b), as evidence probative of defendant's intent (T2. 70-73). Thus, even if the conviction had not been admitted for impeachment under Rule 609(a)(2), there is no reasonable likelihood of a more favorable result for defendant. State v. Bruce, 779 P.2d at 656 (citing State v. Gentry, 747 P.2d at 1038, and State v. Banner, 717 P.2d at 1335). Since the State presented sufficient evidence and eyewitness testimony to prove defendant's guilt of the Moor robbery, any erroneous admission of the prior conviction for impeachment purposes should be viewed as harmless.⁶ State v. Johnson, 784 P.2d 1135, 1140 (Utah 1989); State v. Bruce, 779 P.2d at 657. Accord State v. Brown, 771 P.2d at 1095; State v. Wight, 765 P.2d at 19-20. Compare State v. Lanier, 778 P.2d at 11.

⁵ Defendant also claims that the trial court erred in allowing proof under Rule 609 through the testimony of Paul Christensen (Br. of App. at 29). This assertion is incorrect. The robbery conviction for purposes of Rule 609 was introduced in the cross-examination of defendant (T2. 55). Subsequently, for purposes of Utah R. of Evid. 404, to establish defendant's intent, Paul Christensen testified to the details of the prior robbery. While the State concedes error under Rule 609, there was no error under Rule 404. This distinction will be thoroughly discussed under Point IV of this brief.

⁶ Defendant has not argued on appeal that the evidence was insufficient to convict defendant of robbery.

POINT IV

EVIDENCE OF DEFENDANT'S PRIOR CRIME WAS PROPERLY ADMITTED AS REBUTTAL EVIDENCE UNDER UTAH R. EVID. 404(b) TO PROVE HIS INTENT IN COMMITTING THE PRESENT CRIME.

Defendant argues that aside from the admission of defendant's prior robbery conviction for purposes of impeachment, the trial court additionally erred in admitting, pursuant to Utah R. Evid. 404(b), evidence of the prior crime to establish defendant's intent in committing the present crime (Br. of App. at 29).

A trial court's rulings on evidentiary matters must be upheld unless it is "manifest that the trial court so abused its discretion that there is a likelihood that injustice resulted," State v. Gentry, 747 P.2d at 1035. Accord, State v. Brown, 771 P.2d at 1094; State v. Banner, 717 P.2d at 1335. An evidentiary ruling as to the admission of evidence, under Utah R. Evid. 403, will likewise only be reversed for abuse of discretion where the admission of the evidence constituted harmful error. State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989); State v. Larson, 775 P.2d 415, 419 (Utah 1989). But, erroneous admission of evidence will be deemed harmless where there is "convincing, properly admitted evidence of all essential elements of the case," State v. Bruce, 779 P.2d at 656.

Utah R. Evid. 404(b) is a rule of inclusion. Evidence of prior acts is admissible if relevant to prove an element of the crime, unless under Utah R. Evid. 403, the evidence's probative value is "substantially outweighed" by its prejudicial effect (T. 148). State v. Wareham, 772 P.2d 960, 963 (Utah 1989);

State v. Jamison, 767 P.2d 134, 137 (Utah Ct. App. 1989); Boyce, Utah Rules of Evidence, 85 Utah L. Rev. 63, 84 (1985). But, the State recognizes, that within the general rule, the Utah appellate courts have scrutinized Rule 404 admissions for their potential prejudicial effect. State v. Rocco, 130 Utah Adv. Rep. 16, 17 (Utah 1990) (harmless error to admit prior and subsequent bad acts that were not probative of any issue; no error to admit prior bad acts "reflective of the absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity"); State v. Gotschall, 782 P.2d 459, 462-463 (Utah 1989) (no error to admit evidence of other crime to show defendant's state of mind and dispute defendant's claim of self-defense); State v. Florez, 777 P.2d 452, 456-57 (Utah 1989) (evidence of other crime admissible to prove element of crime; but, error to admit in guilt phase); State v. Featherson, 781 P.2d 424, 427-428 (Utah 1989) (harmless error to admit evidence of other crimes only minimally probative of intent); State v. Johnson, 784 P.2d 1135, 1141-1142 (Utah 1989) (harmless error to admit theft crime under Utah R. Evid. 609(2); no error to admit evidence of other crimes under Utah R. Evid 404(b) to show defendant's intent); State v. Jamison, 767 P.2d at 137 (evidence of other crimes admissible to show opportunity and knowledge of technique used); State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988) (evidence of other crimes admissible to establish defendant's intent).

Before turning to the merits of defendant's claim, it is important to recognize what defendant is not claiming. Defendant is not asserting that the evidence of the prior crime

was in any way unreliable or contested. Defendant had pled guilty to the offense and was awaiting sentencing (MT. 2). Defendant, neither pretrial, during trial nor on appeal, has ever contested the accuracy of Paul Christensen's recitation of the facts surrounding defendant's prior robbery. Nor has defendant asserted that the evidence's probative value was outweighed by its prejudicial effect. Instead, defendant argues that the evidence entirely lacked any probative value (Br. of App. at 32). Defendant improperly asserts that "Appellant's intent was not the issue in conflict. Rather, it was Appellant's physical actions that were contested" (Br. of App. at 29). As such, defendant claims that the evidence was not admitted to prove intent, but to prove criminal propensity (Br. of App. at 29-30). Defendant's argument is factually and legally incorrect.

Defendant presented testimony that did not dispute the physical acts of approaching the victim, Matthew Moor, seeking money from Moor, remaining with Moor when he did not receive sufficient money, going to Ivan Ilov's to get more money, the altercation at Ilov's and the ensuing chase and altercation on State Street (T2. 22-36). Instead, defendant contested Moor's statements as they related to his intent; that is, was defendant merely requesting the repayment of a debt or was he robbing Moor? While there was evidence corroborating Moor's description of what occurred, the issue to be resolved by the jury came down to a pure question of intent, no other elements were in dispute.⁷

⁷ The only fact testified to by the victim which was disputed by defendant, other than his intent in demanding money of Moor, was the use of a weapon. Moor testified that defendant had a knife or fascimile; defendant denied it (T. 19-20; T2. 38). The jury

Defendant attempted to preclude the admission of this evidence in a motion in limine (R. 87-88). The issue was argued to the trial court pretrial, at the close of the State's case, and after defendant testified (MT. 5-29; T. 93-101; T.2 70-73). In each case, the State argued not that the evidence was admissible as a signature crime, i.e., modus operandi to prove identity, but as evidence of defendant's intent, plan, preparation. The State argued that in light of the defense claim that defendant coincidentally ran into the victim and asked him for money legitimately owed defendant, the evidence of a similar crime, committed within months of this crime, was probative of defendant's claim of lack of intent (MT. 8, 18-20; T. 96; T2. 72-73). The court properly reserved any final ruling on the issue until after defendant testified. The trial court had a full factual basis as to the prior robbery and its probative value in regards to proof of defendant's intent in the instant case (T2. 68-73). In considering the admission, the court applied the proper legal standard. State v. Shickles, 760 P.2d at 295-296. Based on the totality of the evidence, the court concluded that the probative value of the evidence to prove defendant's intent was not substantially outweighed by any prejudicial effect. The court's conclusion is consistent with Utah law; as such, this Court should defer to the trial court's ruling. State v. Gotschall, 782 P.2d at 462-463); State v. Johnson, 784 P.2d at 1141-1142; State v. Shickles, 760 P.2d at 296; State v. Jamison, 767 P.2d at 137.

CONCLUSION

For the foregoing reasons, defendant's judgment and conviction should be affirmed.

RESPECTFULLY submitted this 22 day of May, 1990.

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CERTIFICATE OF DELIVERY

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were hand-delivered to Elizabeth Holbrook, Attorney for Appellant, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 2 day of May, 1990.