1992

# State of Utah v. Alfred Lee O'Neil : Brief of Appellee

Utah Court of Appeals


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DOCKET NO. 920439

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Appellee, : Case No. 920439-CA

v.

ALFRED LEE O'NEIL, : Priority No. 2

Defendant-Appellant.

# BRIEF OF APPELLEE

APPEAL BY DEFENDANT OF CONVICTION ON THREE COUNTS OF UNLAWFUL DISTRIBUTION OF A CONTROLLED SUBSTANCE, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a) (SUPP. 1992), A FIRST DEGREE FELONY, IN THE SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR GRAND COUNTY, UTAH, THE HONORABLE BOYD BUNNELL, PRESIDING.

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# BRIEF OF APPELLEE

## JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Alfred Lee O'Neil appeals his conviction on three counts of unlawful distribution of a controlled substance, first degree felonies in violation of Utah Code Ann. § 58-37-8(1)(a) and -(1)(b) (Supp. 1992). This Court has jurisdiction by virtue of Utah Code Ann. § 78-2-2(4) (Supp. 1992), whereby an appeal from a first degree felony conviction may be transferred to this Court by the Utah Supreme Court. The Supreme Court transferred this case by order dated July 9, 1992.

## ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. **Did the Trial Court Properly Admit Evidence of Defendant's "Other Bad Acts," Under Rules 404, 403, and 609, Utah Rules of Evidence?** Admissibility of evidence under Rule 404 appears to present a question of law, reviewed without deference to the trial court. See State v. Taylor, 818 P.2d 561, 568-71 (Utah App. 1991). Rules 403 and 609 both require the trial court to weigh probative value against the prejudicial effect of evidence; thus the State agrees with defendant that appellate

review of this process entails a deferential, "abuse of discretion" standard. See State v. Hamilton, 827 P.2d 232, 239 (Utah 1992) (Rule 403); State v. Morrell, 803 P.2d 292, 295-96 (Utah App. 1990). Cf. State v. Ramirez, 817 P.2d 774, 781-82 n.3 (Utah 1991) ("Whether a piece of evidence is admissible is a question of law, and we always review questions of law under a correctness standard").

**2. Where the Evidence of Defendant's Prior Conviction was Excluded at his First Trial, which Ended in a Mistrial, Did the Trial Court, with a Different Judge Presiding, Properly Admit that Evidence at Defendant's Second Trial?** This issue essentially addresses the authority of one district judge to set aside the "law of the case" decided by another. As set forth more fully in the body of this brief, this should be considered a matter of trial court discretion, and be afforded deference on appeal. See, e.g., Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984) ("law of the case" doctrine is subject to several exceptions).

**3. Did the Trial Court Correctly Deny Defendant's Motion, at His Second Trial, to Recuse the Trial Judge and Replace Him with the Judge who had Presided over the First Trial?** The denial of a recusal motion is reversed on appeal only upon a showing of actual bias, or if the trial court abused its discretion. State v. Neeley, 748 P.2d 1091, 1094 (Utah), cert. denied, 108 S. Ct. 2876 (1988); State v. Ontiveros, 189 Utah Adv. Rep. 9, 11 (Utah App. June 22, 1992).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 404(b), Utah Rules of Evidence, provides:

> **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.

Rule 403, Utah Rules of Evidence, provides:

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

Rule 609(a), Utah Rules of Evidence, provides in pertinent part:

> **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 . . ..

The text of other constitutional provisions, statutes, or rules pertinent to this appeal will appear in the body of this brief.

## STATEMENT OF THE CASE

Defendant was first tried jointly with his wife, Peggy O'Neil, on three counts of unlawful distribution of a controlled substance (R. 98). The counts were based upon three December 1990 methamphetamine sales directly consummated by Peggy O'Neil; defendant was charged as an accomplice, see Utah Code Ann. § 76-2-202 (1990) (R. 5-8). Peggy O'Neil was found guilty; however, the jury deadlocked as to defendant, resulting in a mistrial ruling on the charges against him (R. 103-04).

A new trial was set for defendant alone (R. 139). The State moved in limine to admit evidence of defendant's and Peggy O'Neil's prior, 1987 convictions on similar charges, along with evidence that defendant had been incarcerated at the Utah State Prison on such charges from 1987 through 1990. This evidence had been excluded, on defendant's motion, at the original joint trial (R. 99, 121). The judge in the new trial, not the same judge who had presided over the joint trial, granted the State's motion to admit the evidence (R. 159-60). This pretrial success prompted the State to press forward with the new trial (R. 105).

The new trial resulted in guilty verdicts on all three distribution counts (R. 291-93). By virtue of defendant's prior conviction, these verdicts amounted to first degree felonies under Utah Code Ann. § 58-37-8(1)(a) and -(1)(b) (Supp. 1992).

## STATEMENT OF FACTS

The evidence supporting defendant's guilt is fairly straightforward. A confidential informant, P.H., made three

controlled methamphetamine buys from Peggy O'Neil inside Woody's Bar in Moab, during early December 1990 (T. 2/27/92 at 67, 71-72, 101; 75-78; 81-85; 185-86). Twice, defendant was actually inside Woody's, watching P.H. "very closely" as the sales were completed (id. at 78, 83). P.H. was convinced that defendant actually saw the exchange of drugs for money during one of the buys (id. at 124-25, 127). Defendant was also positively identified driving Peggy O'Neil to or from Woody's in his brown Thunderbird at the time of two of the sales (id. at 71, 148-49, 153). The Thunderbird was in the vicinity on all three occasions (id., and id. at 181, observing male driver and female passenger).

P.H. admitted that a month or so after the controlled buys, he began buying methamphetamine for his own personal use (T. 2/27/92 at 102). He made one such purchase on credit from Peggy O'Neil; shortly thereafter, P.H. testified, defendant attempted to collect that debt for his wife, telling P.H. to pay for the methamphetamine as soon as possible (id. at 103-05).

As permitted upon its pretrial motion in limine, the State introduced evidence of defendant's 1987 conviction and incarceration for drug distribution (T. 2/28/92 at 252-55). Peggy O'Neil's concurrent 1987 conviction, and the fact that she had been charged jointly with defendant in that case, was also revealed (id.; State's Exh. H, at Attachment A to Record on Appeal). This showed defendant's awareness of, and involvement in, his wife's past criminal activity, supporting the State's argument that defendant had intentionally aided her in the

December 1990 methamphetamine sales (T. 2/28/92 at 280-81). The jury was also urged that defendant's presence in Woody's bar during two of those sales, and his effort to collect the drug debt from P.H., belied his testimony that he had been an unwitting bystander to Peggy O'Neil's crimes (id. at 282-84).

The jury returned unanimous guilty verdicts (T. 2/28/92 at 310-11). Defendant was sentenced to three concurrent, five-to-life terms at the Utah State Prison (R. 309).

## SUMMARY OF ARGUMENT

Evidence of defendant's prior conviction was properly admitted under Rule 404(b), Utah Rules of Evidence. This Court, the Utah Supreme Court, and the clear weight of authority all hold that such evidence is admissible where, as here, it is used to show intent, knowledge, or absence of mistake with respect to the charges at hand. The trial court also properly found that under Rule 403, the probative value of the evidence was not "substantially outweighed" by opposing concerns. And although defendant's past conviction was not primarily admitted to impeach his credibility, it did fall within the time guidelines to make such use permissible, and again, it was sufficiently probative to outweigh concerns about unfair prejudice.

The judge at defendant's second trial was not bound by the first trial judge's order ruling defendant's prior conviction inadmissible. Defendant relies too heavily on his "law of the case" argument; that doctrine has legitimate exceptions, and is not compelling here. Because this was defendant's second trial,

the inadmissibility ruling at the first trial was not binding; further, different considerations at the two trials justified the different evidentiary rulings. Reconsideration of evidentiary rulings, as happened here, should always be permissible, for it allows trial courts to correct their own errors.

It appears that defendant's "judge substitution" complaint is merely his evidentiary ruling complaint in a different guise. He did not properly pursue his request to change judges in his second trial, for he did not follow the procedures set forth in Rule 29, Utah Rules of Criminal Procedure, for judge recusal. He makes no showing that the presiding district court judge exceeded his authority to assign cases as deemed fit in light of judge workloads.

## ARGUMENT

### POINT ONE

### EVIDENCE OF DEFENDANT'S AND HIS WIFE'S PRIOR CONVICTIONS AND OTHER BAD ACTS WAS PROPERLY ADMITTED AT DEFENDANT'S SECOND TRIAL.

Defendant first complains that evidence of prior convictions, and evidence that he demanded payment of informant P.H.'s drug debt after the charged offenses took place, was improperly admitted against him. These complaints fail.

#### A. Proper Admission of Prior Convictions.

Admissibility of defendant's and his wife's prior convictions was competently addressed in both parties' memoranda to the trial court (R. 106-37). The State spelled out that it wished to use the prior convictions, as permitted by Rule 404(b),

Utah Rules of Evidence, for the purpose of showing defendant's knowledge of his wife's drug dealing and, in turn, knowledge that his wife went to Woody's bar intending to sell illicit drugs (R. 110). The State also argued that the prior convictions showed a common scheme to the December 1990 offenses, that is, that defendant and his wife acted together (R. 112-13).[1]

These were proper bases for admission of the evidence. Such "other crimes" evidence is admissible for purposes not related to the accused's character, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Utah R. Evid. 404(b). This portion of Rule 404 is an "inclusionary" rule, that admits "all evidence of other crimes relevant to an issue at trial except that evidence that proves only criminal disposition." State v. Taylor, 818 P.2d 561, 568 (Utah App. 1991) (emphasis added), following State v. Jamison, 767 P.2d 134, 137 (Utah App. 1989), and State v. Tanner, 675 P.2d 539 (Utah 1983).

In Tanner, the Utah Supreme Court traced the development of Rule 404(b) (then Rule 55), and noted that the rule's construction as one of inclusion dates back to 1947. 675 P.2d at 546 (citing State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947)). In Taylor, this Court noted the overwhelming approval of "other crimes" evidence both generally and, as here, in drug prosecutions, 818 P.2d at 569-570 (citing authorities). Here,

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[1]The State also believed that the prior offense had taken place at Woody's bar (R. 113); however, at trial, defendant denied this (T. 2/28/92 at 253).

the evidence was relevant to defendant's knowledge and intent as an accomplice to drug dealing; it did not show "only" criminal disposition. Thus the trial court, relying on Taylor (R. 138), correctly admitted it under Rule 404.

This Court held in Taylor that Rule 404 alone may not compel admission of "other crimes" evidence, and that the "probative versus prejudicial" weighing of Rule 403, Utah Rules of Evidence should also be done, 818 P.2d at 571. Defendant, however, misconstrues Rule 403, arguing that it compels exclusion of relevant evidence upon a mere "likelihood that it will be unfairly prejudicial" (Br. of Appellant at 5). In Taylor, this Court held that to be excluded under Rule 403, the probative value of the challenged, relevant evidence must be substantially outweighed by the danger of unfair prejudice to the accused, 818 P.2d at 571 (quoting the rule, emphasis partly in original).

Here the trial court ruled that evidence of the past convictions was not substantially outweighed by the risk of unfair prejudice (R. 156). As a matter of trial court discretion, this ruling should be honored on appeal. See State v. Hamilton, 827 P.2d 232, 239-40 (Utah 1992). The ruling is not "beyond the limits of reasonability," id. Therefore, this Court should affirm it even if it might have ruled differently, had it been presiding over the actual trial.[2]

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[2]It is worth noting that under Rule 403, the trial court rejected other evidence proffered by the State. That evidence was defendant's possession of valuable "collectibles" and electronic equipment in his home, even though he did not seem to have much income. The trial court ruled that this information tended to

Further, in Taylor, this Court noted that Rule 403 weighing may consider the State's need for the challenged evidence, 818 P.2d at 571. Here such need was demonstrated by the inability of the first trial jury to reach a verdict on defendant. His guilt turned on accomplice liability, and thus, in turn, upon whether he intentionally aided his wife in the illegal transactions, see Utah Code Ann. § 76-2-202 (1990). The first jury evidently deadlocked on this question, even though it presumably heard about defendant's close proximity during the methamphetamine sales in Woody's bar. This shows that evidence of defendant's and his wife's other similar activities was needed and admissible under Rule 403.

While not seriously pursued on appeal, defendant also argued in the trial court that his prior, 1987 convictions were irrelevant to the alleged 1990 drug transactions (R. 126). However, defendant was incarcerated for the 1987 offenses until shortly before the December 1990 drug sales (T. 2/28/92 at 254-55). Thus, but for his incarceration, it seems that defendant's involvement in illegal drug sales was effectively continuous, such that the similar 1987 offense was relevant to the question of his involvement in the 1990 offense.

Defendant also complains that the prior convictions were inadmissible under Rule 609, Utah Rules of Evidence. That rule allows admission of past convictions, subject to certain restrictions, to impeach a witness's credibility. The State

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confuse the case with collateral issues (T. 2/27/92 at 96-97).

cited the rule as an alternative basis for admitting the prior convictions, but the trial court relied solely on Rules 404 and 403 in admitting them (R. 115, 157).

This Court should hold that admissibility of the prior convictions was controlled by Rules 404 and 403, without reaching the Rule 609 impeachment question. Indeed, in State v. Morrell, 803 P.2d 292 (Utah App. 1990), this was done: even though the defendant's past conviction was improperly admitted under Rule 609(a)(2), it was held properly admitted under Rules 404 and 403, 803 P.2d at 295-96. Further, here, as in Morrell, id. at 295, defendant's prior convictions constituted necessary substantive evidence of defendant's criminal intent, and were not merely evidence of a propensity to lie. Accordingly, Rules 404 and 403 are more specifically applicable, and control this issue. See State v. Moore, 802 P.2d 732, 737-38 (Utah App. 1990), and cases cited therein (where more than one provision might apply, the more specific provision governs the dispute).

Even considering the merits of defendant's Rule 609 argument, it should be rejected. First, defendant's prior conviction fit the seriousness and recency requirements of Rule 609(a)(1) and (b). Next, defendant testified at trial, and professed unawareness that his wife was selling drugs during the December 1990 trips to Woody's bar (T. 2/28/90 at 245-46). Further, defendant attacked the State's key witness, the informant P.H., with his own history of drug abuse and his alleged failure to pay rent on his living quarters, arguing that

P.H.'s testimony was not credible (T. 2/27/92 at 107-110; T. 2/28/92 at 291-92).

Construing Rule 608, Utah Rules of Evidence, dealing with the impeachment use of other bad acts not resulting in convictions, this Court squarely held that a criminal defendant cannot attack the character of prosecution witnesses and simultaneously expect that he or she will be immune from such attacks. This, the Court observed, "would be a mockery of our justice system . . .." State v. Reed, 820 P.2d 479, 482 (Utah App. 1991).

The foregoing principle in Reed, relying on Utah Supreme Court and this Court's precedent, properly applies to Rule 609 admission of prior convictions for impeachment purposes. Rule 609(a)(1) contains a "probative versus prejudicial effect" weighing requirement that appears more defendant-favorable than that of Rule 403. However, this requirement should be construed to allow a weighing in favor of admissibility, when a defendant assails the State's witnesses as untruthful. Reed suggests this is a matter of fairness, and it is legitimately so. Defendant here attacked the credibility of the State's key witness. It is reasonable to hold that he thereby opened the door to his own impeachment, to the effect that his disclaimer of participation in his wife's drug sales was itself incredible.

**B. Proper Admission of Later Bad Act.**

Defendant also complains of error in the admission, through the testimony of P.H., of evidence that some time after

the December 1990 methamphetamine sales in question, defendant "dunned" P.H. for payment of a later-accrued drug debt. This evidence, too, was admissible under Rule 404(b).

It does not matter that the "dunning" incident occurred after the December 1990 drug transactions for which defendant was tried. In United States v. Bibo-Rodriguez, 922 F.2d 1398 (9th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 2861 (1991), the United States Court of Appeals for the Ninth Circuit observed that federal Rule 404(b), identical to the Utah provision, deals with "other crimes, wrongs, or acts" (emphasis added), without regard to whether such acts occurred prior to or after the acts constituting the charges in issue, 922 F.2d at 1400.[3] Thus Bibo-Rodriguez's admissions to drug transportation, engaged in after the incident for which he was at trial, were held properly admissible against him, id. at 1401-02.

A virtually identical situation is presented here. Defendant denied involvement in his wife's drug dealing, portraying himself as an "innocent dupe," as did Bibo-Rodriguez, 922 F.2d at 1400 (T. 2/28/90 at 245-46). His attempt to collect a drug debt for his wife squarely contradicts this, showing his complicity in her criminal conduct. Again, because it was relevant to defendant's liability as an accomplice, this episode was properly revealed at his trial.

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[3]Interpretations of federal rules are persuasive authority for construing identical Utah rules. State v. Banner, 717 P.2d 1325, 1333-34 (Utah 1986).

Defendant's defense theory centered on his purported unawareness of his wife's criminal activity, even in his very presence. That defense theory legitimately allowed the State to introduce evidence of other acts tending to refute it. State v. Brown, 577 P.2d 135, 136 (Utah 1978) ("The very nature of defendant's theory of the case points out that his contention of error is without merit"); State v. Kerekes, 622 P.2d 1161, 1165 (Utah 1980) (other acts need not themselves be criminal). The trial court did not err in so ruling.

## POINT TWO

### THE "OTHER BAD ACTS" EVIDENCE WAS PROPERLY ADMITTED AT DEFENDANT'S SECOND TRIAL, EVEN THOUGH IT HAD BEEN BARRED AT THE FIRST TRIAL.

Defendant next argues that the "other bad acts" evidence should have been inadmissible under the "law of the case" doctrine, because the judge who presided over the first, joint trial refused to admit them. That is, the judge at his second trial lacked power to "overrule" the first judge's decision. This argument fails.

### A. Inapplicability of "Law of the Case" Doctrine.

First of all, defendant relies too much on the "law of the case" doctrine. The term most commonly applies to legal issues in a given case that have been decided on appeal; those issues generally will not be redecided if the case, after remand, is again appealed. Further, the doctrine is a rule of general policy, not on the compelling level of res judicata or stare decisis. 5 Am. Jur. 2d Appeal and Error § 744 (1962). Accord

Conder v. A.L. Williams & Assocs., 739 P.2d 634 (Utah App. 1987) (refusing to revisit prior Utah Supreme Court ruling in same case on "law of the case" ground, but citing authority, id. at 636, that doctrine is not "an inexorable command").

Even where "law of the case" describes the rule that one judge will not overrule the decision of another, co-equal judge in the same case, see State v. Lamper, 779 P.2d 1125, 1129 (Utah 1989), the rule is one of general guidance only.[4] It is subject to a variety of exceptions, falling under the general rubric of a change in "relevant circumstances" following the earlier judge's ruling. Lamper, 779 P.2d at 1129. In fact, the "law of the case" doctrine generally insulates an earlier judge's ruling from reconsideration by a second judge only if no such change in circumstances occurs. See, e.g., Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735 (Utah 1984) (second judge was presented with no new evidence to justify changing first judge's decision); State v. Bero, 645 P.2d 44 (Utah 1982) (second judge's order reversed because, independent of "law of the case," it was legally erroneous); State v. Morgan, 527 P.2d 225 (Utah 1974) (second judge's order reversed because first judge's order, then pending on appeal, was held to be legally correct).

Indeed, in Lamper, the Utah Supreme Court held that it was error for a second district court judge, citing "law of the

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[4]Indeed, the doctrine has been described as an advisory rule in the federal courts. E.g., 20 A.L.R. Fed. 13, 17-20 (1974) ("the general rule is more properly expressed in such terms as that a judge should not overrule or reconsider the previous decision or order of another judge" (emphasis in original)).

case," to not reconsider a prior judge's evidentiary ruling in the same case, 779 P.2d at 1129. The law had changed since the prior ruling, trumping the "law of the case," id. Further, this Court has noted that the "law of the case" doctrine, applied in the unyielding manner advocated by defendant, would improperly prevent trial courts from correcting their own errors. State v. Willard, 801 P.2d 189, 190 n.1 (Utah App. 1990). Accord Griffin v. Dana Point Condominium Ass'n, 768 F. Supp. 1299, 1303 (N.D. Ill. 1991) ("The law of the case does not demand obsequiousness right or wrong" (quoting authorities)).

In sum, the "law of the case" doctrine does not bar reconsideration of legal rulings during the pendency of a case; indeed, the sound exercise of discretion sometimes requires such reconsideration. Just as the same judge may properly reconsider his or her earlier rulings, a subsequent judge in the same case should also be allowed to do so.

B. Changed Circumstances Justifying New Ruling.

Here changed circumstances supported the second trial judge in admitting the "other bad acts" evidence against defendant. One such circumstance was the fact that defendant, previously given a mistrial, was facing an entirely new trial. In a very real sense, then, the earlier ruling barring this evidence was not even a part of the case in defendant's second trial: that ruling was binding only upon the joint trial, which had been concluded. Further, prejudice to defendant's wife, no longer a co-defendant, was not a concern at the second trial.

The State made this point when it sought to introduce the other bad acts at the second trial (R. 131-32).

A second changed circumstance, also shown by the State, was the lack of full briefing of the "other bad acts" question before the first, joint trial. Defendant's motion to bar that evidence was only presented on the first day of that trial; the State was unable to fully research the issue (R. 69-73, 129-30). In fact, defendant's motion was untimely under Rule 12(b)(2), Utah Rules of Criminal Procedure (motions on admissibility of evidence must be made at least five days before trial): he received a "gift" when the judge even considered it. Further, as set forth in Point One, it can be argued that the first judge erroneously barred the evidence. It was therefore certainly proper, upon the State's timely motion, and full briefing by both parties, to admit the "other bad acts" evidence at defendant's second trial.

No rational legal principle entitled defendant to preserve, to his benefit, a questionable legal ruling made at his first trial. The "law of the case" doctrine does not compel such a result, and the "other bad acts" evidence against defendant was properly admitted at his second trial.

## POINT THREE

### DEFENDANT'S MOTION TO DISQUALIFY THE JUDGE AT HIS SECOND TRIAL WAS PROPERLY DENIED.

Defendant finally complains that the judge who presided at his second trial should have been disqualified, and that the

first trial judge should have presided over the second trial as well.[5] This complaint fails.

First, defendant's disqualification motion was procedurally inadequate. He did not allege that the second trial judge was biased, much less file an affidavit to that effect, as required under Rule 29(c), Utah Rules of Criminal Procedure. He raised no "colorable claim" that the second judge should have been recused for bias, see State v. Neeley, 748 P.2d 1091, 1094 (Utah), cert. denied, 487 U.S. 1220, 108 S. Ct. 2876 (1988). Accordingly, that judge did not abuse his discretion in refusing to disqualify himself. See State v. Ontiveros, 189 Utah Adv. Rep. 9, 11 (Utah App. June 22, 1992) (judge recusal motions reviewed for abuse of discretion). Defendant's disqualification motion was no more than an attempted intrusion upon the authority of the district court's presiding judge to assign cases as he or she sees fit. See Rule 3-104 (3)(E)(ii), Utah Code of Judicial Administration. It was properly rejected by the trial court.

Defendant's analogy to substitution of counsel, while creative, is wide of the mark. Counsel, of course, acts as an advocate, seeking at every turn to achieve a favorable trial outcome for the client. The judge's duty is to preside impartially over the matter, serving the truthfinding process, not necessarily to the benefit of either party. In short,

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[5]The first trial judge was Judge Halliday, then a circuit court judge temporarily assigned to the district court because of Judge Bunnell's unavailability. Judge Halliday was appointed permanently to the district bench after the first trial, but Judge Bunnell presided over the second trial (R. 175-77).

defendant's interest in retaining the same advocate for his defense is far stronger than that in retaining a particular, neutral judge. Rules governing changes in the former do not govern the latter.

Further, even if defendant could retroactively apply Rule 29A, Utah Rules of Criminal Procedure, to this case, it would not aid him. By its terms, the rule requires that "notice of change" of the trial judge be served on the court, not on the parties. Indeed, such notice is filed only when "all parties joined in the action . . . by unanimous agreement" decide to change judges. No such agreement occurred here.

Finally, defendant was put on notice of the new judge assignment some three months before his second trial (R. 105). He did not protest that assignment until long after that judge granted the State's motion to admit the "other bad acts" evidence barred at the original trial (R. 159-60, 171-72). Defendant's belated disqualification motion thus looks suspiciously like an attempt to set aside an unfavorable evidentiary ruling, by replacing the judge who made it. If this is correct, defendant was "forum shopping," an enterprise the "law of the case" doctrine is designed to discourage. See 20 A.L.R. Federal 13, 17-20 (1974) (discussing policy bases for "law of the case" rule). Accordingly, his judge disqualification motion was properly denied in the trial court, and that denial should be affirmed on appeal.

## CONCLUSION

As set forth above, the trial jury found defendant guilty of criminal conduct, upon properly admitted evidence, before an impartial judge. Accordingly, his convictions should be affirmed.

RESPECTFULLY SUBMITTED this 15 day of October, 1992.

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## CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to WILLIAM L. SCHULTZ, attorney for appellant, 59 East Center Street, Moab, Utah 84532, this 15 day of October, 1992.