

1992

# Utah v. Flores : Brief of Appellant

Utah Court of Appeals

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UTAH APPEALS

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DOCKET NO. 920538

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	)	
Plaintiff and Appellee,	)	APPELLANT'S AMENDED BRIEF
	)	
vs.	)	
	)	Case No. 920538
RAYMOND FLORES	)	
Defendant and Appellant	)	Priority No.2

Brief of Appellant

RAYMOND FLORES

APPEAL FROM THE SECOND JUDICIAL  
DISTRICT COURT, DAVIS COUNTY  
THE HONORABLE RODNEY S. PAGE PRESIDING

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**FILED**

AUG 16 1993

COURT OF APPEALS

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State v. Slowe ..... 728 P.2d 110 (Ut. 1986)

## STATEMENT OF ISSUES

1. Was there sufficient evidence to support a conviction of theft?
2. Did the Court error in allowing evidence of Defendant's prior convictions?

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	)
Plaintiff/Appellee	)
vs.	)
RAYMOND FLORES	)
Defendant/Appellant.	)

---

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal, drafted pursuant to State v. Clayton, 638 P.2d 168 (Ut. 1986)., is from a judgment and conviction of theft, a felony of the second degree, in violation of Utah Code Annotated 76-6-604.

This Court has jurisdiction to hear the appeal under Utah Code Ann. 72-2a-3(f).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was there sufficient evidence to support a conviction of theft?
2. Did the Court error in allowing evidence of Defendant's prior convictions?

PROVISIONS, RULES AND STATUTES

All relevant statutory or rule provisions pertinent to the resolution of the issues presented on appeal are appended to this brief.

#### STATEMENT OF THE CASE

Defendant Raymond Flores along with co-defendants David Joseph Martinez, Carl Phillip Rader, and Aaron Daniel Green were charged by information with committing the crimes of Burglary, a felony of the third degree, in violation of Utah Code Annotated 76-6-202; Theft, a felony of the second degree, in violation of 76-6-604 and with regards to a February 6, 1992 break-in of a Centerville, Utah Radio Shack store.

Green and Martinez plead to reduced charges. At a May, 1992 trial, Rader, was acquitted by a jury on all charges. At a July 16, 1992 jury trial, the jury acquitted Mr. Flores of the burglary charge but found the defendant guilty of the theft charge. The State intended to have the Defendant sentenced as a habitual criminal. However, the State, after the conviction of Mr. Flores on the theft charge, did not proceed on the habitual criminal matter (T. 231-233). Mr. Flores was immediately sentenced after the trial by Judge Rodney S. Page to serve one to fifteen years in the Utah State Prison with the recommendation that he be given credit for time served. Raymond Flores appeals that theft conviction.

#### STATEMENT OF FACTS

The defendant's fiancée, Kim Joy Hoskins, gave birth to Raymond's son, on February 3, 1992 (T. 165). Mr. Flores was at the West Valley Hospital prior to and during his son's birth (T.166). Flores spent most of February 4th and the night of February 4th and

the early morning hours of the 5th at the hospital (T. 165, 166). He had a restless night's sleep while at the hospital (T. 167-168).

On February 5, 1992 Defendant returned to Ogden, Utah where, at approximately 4:00 p.m., he met with friends and his sister at his sister's house to celebrate the birth of Raymond's son (T. 168, 171). During the celebration at his sister's house, the defendant consumed over nineteen beers and two or three shots of whiskey (T.173, 176).

Around 8:30 p.m. Anthony Robles, Flores' friend, drove Radar and Flores to Lou Monico's a bar in Roy, Utah where they continued drinking and celebrating the birth of Raymond's son (T. 184). During the celebration, Anthony Robles drove home leaving Carl Radar and Raymond Flores at the bar (T. 178). At the bar, Flores and Radar met two prior acquaintances, David Martinez and Aaron Green (T. 177). Green and Martinez offered to drive Radar and Flores home (T. 177, 178). After leaving the bar, Flores recalls sitting in the back seat of Martinez's car, curled in his car and listening to music (T. 179). The next thing Flores remembers is someone shining a flashlight in his face telling him to get out of the car (T. 180). Flores was pulled out of the car by a police officer and then layed face down on the cold pavement (T. 189, 181, 182). Flores further recalls talking to a police officer at the station to whom he gave general information regarding his name and where he lived (T. 188, 196). Police officers noted that Flores had an odor of alcohol on him, that his eyes were bloodshot and

that he was intoxicated (T. 196, 197). Police recovered from Martinez vehicle camcorders, a T.V. and a V.C.R. later identified as items taken from the Centerville, Utah Radio Shack store (T. 78, 79).

Evidence presented at trial indicated that Green and Martinez illegally entered the closed Radio Shack store by breaking the store's front glass door (T. 98). Evidence indicated that Flores and Radar never entered the store (T. 98). David Martinez indicated that Raymond Flores and Carl Radar had nothing to do with the theft (T.73).

#### SUMMARY OF THE ARGUMENT

##### ARGUMENT

##### POINT I

#### THE EVIDENCE WAS INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION

Defendant has asked counsel to make the following argument.

This Court "views the evidence and the reasonable inferences drawn therefrom in the light most favorable to the verdict." State v. Lemons, 204 Utah Adv. Rep. 15, 17 (Utah App. December 14, 1992) (quoting State v. Perdue, 813 P.2d 1201, 1207 (Utah App. 1991)). Reversal is appropriate "only when the evidence so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime of which he was convicted. State v. Bank, 839 P. 2d 880, 884 (Utah App. 1992).

The record contains insufficient evidence upon which a reasonable jury could convict Raymond Flores of theft.

David Green, a co-defendant in this case, admitted to a police officer, shortly after he was apprehended to the burglary of the Centerville, Utah Radio Shack Store and the theft of various electronic devices (T. 73). As noted in the cross-examination of Officer Child:

Q: And do you recall what statement Mr. Martinez said to you?

A: Yes, Mr. David Martinez, quote, "This is my responsibility. They had nothing to do with it."

Q: "This is all my responsibility and" ---

A: "They had nothing to do with it."

Q: And this was a spontaneous utterance of Mr. Martinez?

A: Yes.

(T. 73).

In addition to Officer Child's testimony regarding Martinez' acceptance of responsibility, Officer Worsley testified that based upon the examination of physical evidence, he did not believe that Raymond Flores nor Carl Radar entered into that building to retrieve merchandise (T.98).

Beginning at approximately February 5, 1993 at 4:00 until around 12:00, Flores, in celebrating his son's birth, consumed over nineteen beers and two or three shots of whiskey (T. 171, 173, 168, 164, 176, 175). Prior to the commencement of his celebration, Flores had little sleep due to the February 3, 1992 birth of his

son (T. 165-168). Some police officers noted shortly after Flores' arrest, that Flores had an odor of alcohol on him, that his eyes were bloodshot and that he was intoxicated (T. 196, 197).

Defendant's lack of sleep, heavy consumption of alcohol, Officer Child's testimony, and other evidence support Defendant's claim that he was asleep/passed out in the rear of the vehicle at the time Green and Martinez broke into the store and stole the electronic equipment. Flores was not aware of the burglary nor the placement of the items in Martinez' car because he was asleep/passed out.

It is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime of theft.

Despite the above argument, application of the facts to the above referenced standard of review clearly show that there was sufficient evidence to support the jurors' verdict. (see Dunn v. Cook, 791 P.2d 873 (Ut. 1990)). The jury obviously did not believe Mr. Green's testimony that Mr. Flores did not have anything to do with the theft. There is evidence to support findings that Mr. Flores was drinking, but not intoxicated, and the jury could have reasonably inferred that Flores would have to have known about the theft and participated in the theft because the items that were stolen were large and were found by the police next to Mr. Flores shortly after the theft occurred.

POINT II

THE COURT ERRORED IN ALLOWING EVIDENCE  
OF DEFENDANT'S PRIOR CONVICTIONS

Defendant has asked counsel to make the following argument.

Utah Rule of Evidence 609 states as follows:

Rule 609 Impeachment of Evidence of Conviction of Crime:

- (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 examinations, 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.
- (B) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or if the release of the witness from the confinement imposed for that conviction, whichever is a later date -----.

A trial court is given considerable discretion in deciding whether or not evidence submitted is relevant. Bambrough v. Bethers, 552 P. 2d 1286 (Ut. 1976). While relevant evidence is generally admissible, a trial court has broad discretion to determine whether proffered evidence is relevant, and the appellate court will find error in a relevancy ruling only if the trial court has abused its discretion. State v. Harrison, 805 P.2d 769 (Ut. App. 1991). Balancing the probative value of evidence against any prejudicial effect it may have on the jury necessarily rests within the sound discretion of the trial court; and the determination it makes thereon should not be disturbed on appeal unless there was a

clear abuse of its discretion. State v. Gibson, 565 P. 2d 783 (Ut. 1977).

Defendant's counsel objected to any introduction of Defendant's prior criminal record, but was overruled on his objection by the trial court. (T. 183, lines 5,6).

The presentation of Defendant's prior criminal convictions unfairly prejudiced the Defendant and the probative value, if any, of the Defendant's prior record was clearly outweighed by the prejudicial value.

Flores' prior conviction of theft by deception is similar to Defendant's current charge of theft, that admission of the prior conviction was extremely prejudiced because the close resemblance of the prior offense and the instant offense lead the jury, in the instant case, to punish the accused as a bad person. see State v. Banner, 717 P. 2d 1325 (Ut. 1986), State v. Gontry, 747 P. 2d 1032 (Ut. 1987).

The introduction of the prior conviction tended to induce the jury to render a verdict outside the relevant substantive evidence bearing on the material elements of the crime. see State v. Slowe, 728 P. 2d 110 (Ut. 1986).

The introduction of this material prejudiced the jury to render a verdict not supported by the evidence.

Making an objective demonstration as required by Dunn v. Cook, 791 P. 2d 873 (Ut. 1990), the introduction of Defendant's prior felony conviction was likely prejudicial. However, there was no abuse of discretion. The Court has broad discretion to determine

relevance and balancing the relevant, probative value of the evidence against the prejudicial value. The Court concluded that the prior conviction was admissible for attacking the credibility of Mr. Flores. There is no evidence to suggest that the resemblance of the prior offense and the instant offense lead the jury to punish Flores as a bad person nor is there evidence to suggest that the introduction of the prior conviction tended to induce the jury to render a verdict outside the relevant substantive evidence bearing on the material elements of the crime.

CONCLUSION

Although the Defendant has requested counsel to argue the above issues, it is clear to counsel that the Defendant's arguments are wholly frivolous and without merit.

RESPECTFULLY submitted this \_\_\_\_ day of August, 1993.

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MICHAEL D. MURPHY

**CERTIFICATE OF HAND DELIVERY**

I, Michael D. Murphy, hereby certify that I hand delivered four true and correct copies of the foregoing Amended Brief to Defendant-Appellant at the:

Criminal Appeals Division  
Utah Attorney General  
236 State Capitol

this \_\_\_\_\_ day of August, 1993.

\_\_\_\_\_  
Michael D. Murphy

**CERTIFICATE OF SERVICE**

I certify that I have thoroughly reviewed the file and have read the transcripts and that I have raised the points/issues requested by the defendant in this brief, and that on the \_\_\_\_\_ day of August, 1993, I mailed, postage prepaid, a true and correct copy of the above brief to:

Inmate Raymond Flores  
Utah State Prison  
P.O. Box 898  
Gunnison, Utah 84634

\_\_\_\_\_  
Michael D. Murphy