

1961

State of Utah v. Cecil A. Dickson : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

K. Samuel King; Attorney for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *State v. Dickson*, No. 9343 (Utah Supreme Court, 1961).
https://digitalcommons.law.byu.edu/uofu_sc1/3801

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
SUPREME COURT OF THE STATE OF UTAH

| | | |
|----------------------------------|-----|-----------------|
| State of Utah, |) | |
| |) | |
| Plaintiff and Respondent, |) | |
| |) | |
| |) | |
| |) | |
| vs. |) - | Case No. |
| |) | 9343 |
| |) | |
| |) | |
| Cecil A. Dickson, |) | |
| |) | |
| Defendant and Appellant, |) | |

BRIEF OF APPELLANT

K. SAMUEL KING,

**Attorney for Cecil A. Dickson,
Defendant and Appellant.**

**401 Executive Building.
Salt Lake City, Utah.**

TABLE OF CONTENTS

| | Page |
|---|------|
| STATEMENT OF FACTS. | 2 |
| STATEMENT OF POINTS | 10 |
| POINT I. THE ADMISSION IN EVIDENCE, OVER OBJECTION, OF THE DETAILS OF THE OFFENCES FOR WHICH THE DEFENDANT WAS CONVICTED IN 1951 IN CALIFORNIA, AND OF THE DETAILS OF THE "INCIDENT" IN TEXAS, FOR WHICH THE DEFENDANT WAS CHARGED AS AN ACCESSORY TO AN ATTEMPTED ROBBERY, WAS REVERSIBLE ERROR BECAUSE THIS EVIDENCE DID NOT RELEVANTLY TEND TO PROVE THE ELEMENTS OF THE OFFENSE CHARGED, AND WAS PREJUDI- CIAL ON ITS FACE. | 10 |
| POINT II. PREJUDICIAL ERROR WAS COMMITTED BY THE COURT IN REFUSING THE DEFENDANT'S REQUESTED INSTRUCTION THAT ALL WITNESSES, INCLUDING THOSE WHO TESTIFIED FOR THE DEFENDANT BY DEPOSITIONS TAKEN ON COMMIS- SION IN TEXAS, WERE SUBJECT TO THE PENALTIES OF PERJURY, WHEN THE PROSECUTION HAD CHARGED THAT THE DEFENSE WITNESSES WERE LYING, AND BY INFERENCE THAT THEY WERE AFRAID TO COME TO UTAH TO TESTIFY. . . | 16 |
| CONCLUSION | 21 |

| | |
|--|----------------|
| Glasser v. H.S., 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 | 21 |
| Gypsy Oil Co. v. Ginn et al, 241 P. 794 (Okla.) | 21 |
| Jensen v. Utah R.R. Co., 72 Utah 366, 270 P. 349 | 21 |
| Larson v. Webb, 58 S. W. 2d 967 (Tenn.) | 21 |
| Mason v. State, 66 So. 2d 557, (Ala.) | 16 |
| People v. Wilson, 245 P. 781 (Calif.) | 16 |
| State v. Buxton, 22 S.W. 2d 635 | 16 |
| State v. Gregorious, 81 Utah 23, 16 P 2d 893 | 12, 14, 16 |
| State v. Harries, 118 Utah 260, 221 P 2d 605 | 14, 16 |
| State v. Hilberg, 22 Utah 27, 61 P 215 | 11, 14, 16 |
| State v. Johnson, 76 Utah 84, 287 P 909 | 11 |
| State v. Lyman, 10 Utah 2d 58, 348 P 2d 340 | 14 |
| State v. Martin, 49 Utah 346, 164 P 500 | 12, 13 |
| State v. McHenry, 7 Utah 2d 289, 323 P 2d 710 | 11, 12, 13 |
| State v. Nemier, 106 Utah 307, 148 P 2d 327 | 11, 16 |
| State v. Russum, 107 Utah 94, 152 P 2d 88, | 11 |
| State v. Scott, 119 Utah 9, 175 P 2d 1016 | 11, 14, 15, 16 |
| State v. Stewart, 110 Utah 203, 171 P 2d 383. | 11 |
| State v. Torgerson, 4 Utah 2d 52, 286 P 2d 800 | 11, 13, 14, 16 |
| State v. Williams, 36 Utah 273, 103 P 250 | 11, 12, 14, 16 |
| State v. Winget, 6 Utah 2d 243, 310 P 2d 739 | 11, 13, 14, 16 |
| Steven v. State, 159 N.E. 834 (Ohio) | 16 |

STATUTES CITED

| | Page |
|--|------|
| U.R.C. P., Rule 26 (d) | 19 |
| U.C.A. 76-45-1, 6, 7, 13 (1) | 19 |
| U.C.A. 77-47 (1953) | 17 |
| U.C.A. 77-47-9 (1), (1953) | 19 |

AUTHORITIES CITED

| | |
|--|----|
| 14 Am. Jur., Cr. Law, Sec. 312, p. 292 | 12 |
| 16 Am. Jur., Depositions, Sec. 112, p. 746-747 | 19 |
| 20 Am. Jur., Evidence, Sec. 314, p. 296 | 14 |
| American Law Institute, Model Code of Evidence, Sec. 311 | 11 |
| 42 A.L.R. 2d, Sec. 3, p. 857; Sec. 15, p. 887 | 11 |
| 42 A.L.R. 2d, Sec. 5, p. 861 | 13 |
| 42 A.L.R. 2d, Sec. 6, p. 869 | 14 |
| 5 (A) C.J.S., Appeal & Error, Sec. 1774, p. 1264 | 20 |
| 5 (B) C.J.S., Appeal & Error, Sec. 1904, p. 393-394 | 21 |
| 26 (A) C.J.S., Depositions, Sec. 96, p. 449 | 19 |
| J.I.F.U. Sec. 3.3 | 19 |
| McCormick on Evidence, 4th Ed., p. 328 (3) | 14 |

STATEMENT OF FACTS

Defendant and "John Doe", were jointly charged by a complaint dated June 17, 1959, with the commission of the felonies of robbery and grand larceny, at the Canyon Rim Market, Salt Lake City, Utah, on March 10, 1959 (R. 3).

No complaint nor information has ever issued against "John Doe."

The defendant was tried in the Salt Lake County District Court, Judge A. H. Elliott presiding, on April 7-8, 1960, on both counts. The charge of grand larceny was dismissed by the court at the conclusion of the evidence. The jury was unable to reach a verdict on the charge of robbery, hanging 6 for acquittal and 2 for guilty, and was discharged.

On May 17-18, 1960, the defendant was retried on the charge of robbery in the same court, with Judge Elliott again presiding. The jury found him guilty. He was sentenced to the Utah State Prison by Judge Elliott, and is now in custody there.

At the outset of the statement of the facts, the defendant concedes that the state presented a strong case, but contends that there was also competent evidence adequate to justify his acquittal on the facts.

Donald Reese Ludlow, called as a witness by the state, testified that on March 10, 1959, he was held up and robbed by two men at closing time - 9:00 p.m., while he was managing the Canyon Rim Market, 2055 East 8300 South, Salt Lake City, Utah. At the trial he identified the defendant as being one of the two robbers. He identified (R. 74) as the other robber a picture (Ex. 3), which was identified by the defendant as a picture of Lester Ray Dickson (R. 212, 213), brother of the defendant.

Mr. Ludlow testified that both robbers carried pistols (R. 73, 74, 77), that they forced the three employees in the store at the time to lie down in a back room of the store (R. 78, 79), while he was forced to take money from the safe and give it to the robbers, and then go to the front of the store under guard of "John Doe" and get the money from the cash registers (R. 84, 85), while the defendant remained on guard over

the other employees. At this time he saw only one car parked in front of the store. It was a green 1948 Studebaker. He did not see it again after the robbery (R. 85). Both robbers held handkerchiefs over their faces as they would if they were blowing their noses (R. 76). During the robbery, Mr. Ludlow was as close as 4 feet from the defendant (R. 83). He had the defendant in sight for one to two minutes (R. 101), and never saw the defendant's whole face (R. 101).

During the police investigation after the robbery Mr. Ludlow was shown a picture of the defendant which he described as "similar" to the robber he later identified as the defendant (R. 102, 103, Ex. 1.). On June 16, 1959, Mr. Ludlow was taken to Mark's Lounge, in Salt Lake County, by deputy sheriffs Hayward and Andrews. There he identified a man on the bandstand as "possibly" being the defendant (R. 103-107). He was then advised that this was not the man, and that the defendant would be by in a minute. The defendant came by and Mr. Ludlow recognized him (R. 93, 94, 109), as the man who had robbed him. Mr. Ludlow again identified the defendant in a police lineup on June 16, 1959.

Dale Willden was called as a witness by the state. He testified that he had been butcher in the Canyon Rim Market on the night in question and was one of the victims of the robbery. His statement of the robbery agreed with that of Mr. Ludlow. He identified the defendant as one of the robbers (R. 121), and the picture of Lester Ray Dickson as being a picture of the other robber (R. 123). He said that he recognized the picture of the defendant as definitely being that of one of the robbers when, shortly after the robbery, it was shown to him by the police (R. 125-126), (Ex. 1). No complaint issued until June 16, 1959, three months later, although the defendant was known to be in Texas during the intervening period (R. 142).

Mr. Willden admitted that he might have given a description of the robbers to the press which was widely different from the actual appearance of the defendant (R. 132, 133).

He identified the defendant at the lineup, but under circumstances where he might

have formed an opinion as to who the accused was before the lineup was held (R. 118-119, 130-132).

Salt Lake County deputy sheriff N. D. Hayward testified for the state. He identified Exhibit 2, as being a picture of Lester Raymond Dickson, brother of the defendant (R. 135), and said that Lester Dickson was in prison in Huntsville, Texas, for attempted armed robbery, committed on April 5, 1959 (R. 135, 136).

He, with deputy sheriff Ferris Andrus and Donald Reese Ludlow, saw the defendant at Mark's Lounge on June 18, 1959. He followed the defendant from Mark's Lounge, lost him, and found him again on June 17, 1959, and arrested him (R.137, 138).

Over defense objection (R. 138), he described the circumstances of the arrest - that it was 1:00 a.m., that the defendant was in a green 1952 Mercury automobile, that the defendant was parked with the lights off sitting in the car, and that there was a gun in the glove compartment (R. 137-139).

On cross-examination, deputy Hayward admitted that the car was registered to a man named Lobato, and that the gun was not known to belong to the defendant (R. 138).

He testified that he got Exhibit 1, the "glamour" picture of the defendant from a local radio station. During his testimony it was admitted that the defendant was a singer who had made records, that he left his pictures at radio stations and at places where his records were sold in this area (R. 139-142).

Deputy Hayward testified that Dale W. Hilden had positively identified the picture of the defendant about 3 months before the arrest of the defendant, and that he knew that the defendant was in Texas, but admitted that no warrant issued (R. 140-141).

He was unable to connect the green 1948 Studebaker probably used in the robbery, the clothes worn by the robbers, or the money taken in the robbery, to the defendant (R. 142).

The state then rested its case.

The defense called John L. Hodge, a disk jockey for radio station KXAN, and Glen Sorenson, proprietor of the Lariat Club tavern, as witnesses. They testified that during early 1956, the defendant was in Salt Lake City, that the defendant made public appearances singing at the Lariat Club and being interviewed and having his records played on the radio (R. 143-148). Mr. Sorenson also said that he spoke to deputy Hayward after the defendant had sung at the Lariat Club and told him that the defendant had said that he was returning to Texas (R. 147, 148).

Depositions of five defense witnesses were then read into the record. It was stipulated by the district attorney that they were taken in Fort Worth, Texas, on May 12, 1960, and that the witnesses were separately sworn and gave separate answers (R. 149). The district attorney also asked that it be stipulated that 12 other persons "refused to testify" in answer to the depositions. It was finally stipulated that the other 12 persons did not testify (R. 149, 150). Dan Dix, the court clerk, read the answers of the deponents, defense counsel read the questions for the defense, and the district attorney read the questions for the state (R. 146, 150).

Rose Valle, mother of the defendant (R. 150-155), Henry Eugene Dickson, brother of the defendant (R. 155-156), Betty Jane Dickson, sister-in-law of the defendant (R. 156-163), and Gladys Dickson Jensen, sister of the defendant (R. 163-165), all gave answers by the interrogatories that they saw the defendant in Fort Worth, Texas, between 6:30 a.m. and 8:00 a.m., March 11, 1956, when he arrived there in his pink 1957 Oldsmobile in company with his wife Lou Burks Dickson in reply to defense questions. In reply to state questions they testified that they knew that they were under oath and subject to perjury charges if they gave false answers, and that none of them had been convicted of felonies. They said that they were able to place the date for their own separate reasons, that they had a family conference in June, 1956, when they were informed of the arrest of the defendant and the date of the offense charged, and at that time refreshed their recollections and agreed on the date. Rose Valle testified that she would not come to Salt Lake City to testify if called because of her doctors

orders. The others said that they would come if called.

Loa Parks Dickson also testified by the same depositions (R. 168-170). She was the ex-wife of the defendant. On March 9, 1958, at 9:30 p.m., she left Salt Lake City with the defendant in his pink 1957 Oldsmobile, and arrived in Fort Worth with him at 6:00 a.m. to 6:30 a.m. March 11, 1958. During that time he did not return to Salt Lake City, and was with her in Colorado City, Texas, when the robbery occurred. The state submitted no questions to her.

The court denied the defense motion to allow the depositions into evidence (R. 169, 170).

Edna Dickson Moore, sister of the defendant, testified that she was in Fort Worth, Texas, on March 11, 1958, and saw the defendant around 6:30 a.m. that day (R. 170-174). She appeared in person, her present residence being in Salt Lake City. She said that it takes at least 25 hours driving time to go from Salt Lake City to Fort Worth. She said that the defendant did not appear to be spending more than he was earning during the period between March and June of 1958. She also said that the defendant supported the whole seven member family by himself by working at the Garfield Smelter from the time that he was 14 until he was 16 (R. 173).

On cross examination the district attorney said to her "You lied the last time you were on the stand didn't you?" She denied lying (R. 175). He asked her twice if she wasn't found in contempt of court for lying by failing to positively identify Exhibit 2 as a picture of her brother Lester (R. 174-177), and put in the county jail for lying (R. 177). Over defense objection that the district attorney was deliberately mistating the action of the court at the prior trial, the court required the witness to answer the question (R. 177). The District attorney then asked her if she was present at the prior trial when her mother, Rose Valle, testified. She said yes. He then stopped himself from further questions on the ground that he felt he was getting into an improper line of cross-examination (R. 177-178). The reference to the testimony of the mother

followed directly on the heels of the questions concerning whether or not the witness.

Mrs. Moore had lied.

Defense counsel finally got the court to state that the witness had been found in contempt for "delay" of the proceeding, but the court went further than stating the prior action of the court in regard to the witness, Mrs. Moore, and stated that it "held some witnesses" in contempt for the delay in court because of the difference of the testimony in the afternoon and the next day." (R. 182, 183).

The district attorney also said, when asked by the court, at the conclusion of all of the evidence, as to whether he had further evidence, "Well, I do anticipate putting some evidence on about these--the testimony at the previous trial of Mrs. Rose Valle, Henry Eugene Dickson, Betty Jane Dickson and Gladys Dickson Jensen, only as to the picture," (R. 245). He had just finished a detailed examination of Mrs. Moore as to whether she had given contradictory testimony at the prior trial in regard to the Exhibit 2, picture of Lester Ray Dickson (R. 238-242).

The noon recess was then taken. After reconvening the district attorney did reopen, but did not touch on the "picture" (R. 245, 246).

The defendant testified (R. 185-221, 245, 246). He denied being guilty of the crime for which he was charged and claimed that at the time of the robbery he was in Colorado City, Texas. He had been in Salt Lake City for 9 days up to March 9, 1939, for a singing engagement at the Lariat Club and to publicize his records. He made no effort to conceal his whereabouts after leaving Salt Lake City. While here he had stayed at the Boulevard Motel with his wife Lou Burke Dickson. He left Salt Lake City in his 1937 pink Oldsmobile with Lou and drove straight through to Fort Worth. His brother Lester Ray Dickson was in Salt Lake City while he was here, but remained in Salt Lake City when he left on March 9, 1939.

In September, 1938, he returned to the Boulevard Motel and picked up the receipts from the motel for his stay there in March. He said that he was "playing detective" when he did this. He did not present the receipts at the trial. He said

that there were three receipts and that the room was paid for up to 10:00 a.m.,

Wednesday, March 11, 1959, but that the last receipt was issued on March 9, 1959.

He did not try to get a refund for the day paid for, but not used (R. 199-200, 206-209).

On cross examination he said that he had been convicted of the felony of robbery in California. The district attorney sought to get the details of the crimes for "modus operandi", defense counsel objected and was overruled (R. 211, 212). The district attorney then developed from the defendant that the conviction was on two counts for two different robberies, asked if they weren't both robberies of food stores and was answered that the robberies were of liquor stores (R. 212). The conviction was in May, 1951 (R. 245).

The district attorney then asked in separate questions if the defendant had not been with his brother Lester Ray Dickson, in Fort Worth, Texas, on May 5, 1959, and received a physical injury on that date. Defense objected continuously to the line of questioning, and finally objected to any further questions on the point and moved a mistrial (R. 213, 214). The witness was instructed to answer and then related in response to further cross examination that at 6:30 a.m., May 5, 1959, his brother Lester Ray Dickson, asked him to take him to an address in Fort Worth, where the brother went to a telephone booth and when a car stopped in front of a store about 100 yards away, the brother went up to the man who got out of the car, scuffled with the man, and that the man shot the brother. The defendant ran to the scene from his own car, and was shot twice by the man, who was the proprietor of the store. The defendant took his brother home, called an ambulance, and he and his brother were then arrested. The defendant denied that he had had a gun at the time of the incident. He didn't know if his brother was armed or not. The brother entered a plea of guilty to a charge of attempted robbery. The defendant said that he was charged as an accessory to the crime for carrying his brother away. This was not rebutted (R. 214-219).

Robert Clark, cousin of the defendant, testified and said that he saw the

defendant on March 9, 1959. He had the defendant and his wife, Lou Burke Dickson, out to dinner because they were leaving to return to Texas. The defendant was driving a pink, 1957 Oldsmobile. He last saw the defendant and his wife at about 7:30 p.m. (R. 221, 222).

He also testified that there were too many members of the defendant's family in this area for him to count, and that many of them had a family resemblance (R. 222).

Mr. and Mrs. Samuel T. Thomas were called as rebuttal witnesses by the state.

They were proprietors of the Boulevard Motel where the defendant had stayed in March, 1959. They testified that they had no personal recollection of the dates that the defendant and his wife stayed there (R. 227, 236), but that their records indicated that he had stayed there until March 10, 1959, because they had missing receipts for March 2 to March 9, March 9 and March 10, 1959, and believed that these were the receipts that the defendant took from them in September, 1959 (R. 231, 236). They believed that the receipts were issued on the days that they were dated, but could not say on what receipt number the March 9 receipts stopped and the March 10 receipts started (R. 233-235).

The subject trial and the trial of the defendant on April 7 - 8, 1960 were alike in all important aspects except that (1) details of the crime for which the defendant had been convicted in California in 1951, and details of the incident in Fort Worth, Texas, on May 5, 1959, were admitted into evidence at the second trial and not at the first trial, (2) the defendant's alibi witnesses testified in person at the first trial and by deposition at the second trial, except for the ex-wife of the defendant, who did not testify at all at the first trial, and (3) the jury was not told, erroneously, by the district attorney at the second trial that the alibi witnesses had been placed in the County jail for lying.

Defense counsel urges that there were errors committed in regard to these three matters which were prejudicial and probably resulted in the present conviction.

STATEMENT OF POINTS

POINT I.

THE ADMISSION IN EVIDENCE, OVER OBJECTION, OF THE DETAILS OF THE OFFENCES FOR WHICH THE DEFENDANT WAS CONVICTED IN 1951 IN CALIFORNIA, AND OF THE DETAILS OF THE "INCIDENT" IN TEXAS, FOR WHICH THE DEFENDANT WAS CHARGED AS AN ACCESSORY TO AN ATTEMPTED ROBBERY, WAS REVERSIBLE ERROR BECAUSE THIS EVIDENCE DID NOT RELEVANTLY TEND TO PROVE THE ELEMENTS OF THE OFFENSE CHARGED, AND WAS PREJUDICIAL ON ITS FACE.

The California evidence was that the defendant robbed two liquor stores there (R. 212), for which he was convicted in May, 1951 (R. 245).

The Texas evidence was that the defendant went in his car to a grocery store in Fort Worth, Texas, with his brother Lester Ray Dickson on May 5, 1959, at 6:30 a.m. (R. 214, 215). The defendant remained at a telephone booth, near his car, about 100 feet from the grocery (R. 217, 219). Lester accosted the store owner as the owner was outside the front door of the store about to open the door. Lester and the store owner scuffled, and the store owner shot Lester twice, not fatally (R. 217). The defendant ran up, the store owner shot him twice. The defendant picked up Lester, took him to his car and drove him home (R. 217-218). Lester plead and was found guilty of attempted robbery, and the defendant was charged as an accessory to the robbery (R. 217-218). He has not been tried.

The rule in Utah that all evidence with probative value is admissible unless there is a sound reason for its exclusion, applies also to evidence of other crimes or wrong doing. It is modeled on Sec. 311 of the American Law Institute Model Code of Evidence. *State v. Winget* 6 Utah 2d 243, 310 P 2d 739, 740. *State v. Scott* 119 Utah 9 175 P 2d 1016. Admission of such evidence, over objection, constitutes prima-facie reversible error requiring a new trial, unless in fact the evidence relevantly tends to prove a disputed element of the crime charged. *State v. Mc Henry*, 7 Utah 2d 289, 323 P 2d 710, 711. *State v. Winget*, *Supra*, *State v. Torgerson* 4 Utah 2d 52, 286 P 2d 890. *State v Stewart* 110 Utah 203, 171 P 2d 363, 366. *State v. Ruesum* 107 Utah 94, 153 P 2d 88, 90. *State v. Nemler* 106 Utah 307, 148 P 2d 327, 331. *State v. Johnson* 76 Utah 84, 287 P 909, 911. *State v. Williams* 36 Utah 273, 103 P 250. *State v. Hilberg* 22 Utah 27, 61 P 215, 42 ALR 2d 267, Sec. 3, 667, Sec. 15.

The error requires reversal even though other evidence in the case is adequate to sustain a conviction. *State v. Johnson*, *supra*.

The reasons most often advanced for this extremely strict rule of exclusion are that it obviously tends to make the jury think of the accused as a "bad man", infer criminality to him and convict him because he deserves conviction, regardless of the merits of the case at the bar, deprives him in fact of the presumption of innocence, requires the defense to defend against more than the charge of which it has been informed, and confuses the issues and the jury. These reasons are well summarized in *State v. Williams*, *supra*, and *State v. Johnson*, *supra*, in which case the matter is well summed up as to the prejudicial effect of this type of evidence because its "very nature has a tendency and was calculated to do harm, and on the record we cannot say it did no harm or did not influence the verdict of the jury." 267 P 909, 912.

Objections made to the subject evidence by defense counsel were not exemplary

in form, but were adequate to dispute the admissibility of the evidence. They were uniformly overruled.

In regard to the California conviction, objection was made that the inquiry could go only to the number of convictions. The district attorney said the purpose was to show modus operandi and was allowed to proceed. No further objections were made (R. 211 - 212). The objection here can stand only as a general objection. No error was committed unless the evidence was inadmissible for any purpose.

In regard to the Texas incident of May 5, 1959, (R. 213 - 220), objections were strongly made to the evidence as being incompetent, irrelevant, immaterial, and prejudicial. They were argued in detail in a conference at the bench which was not reported. When the court indicated it would allow the evidence, defense counsel moved a mistrial if the line of inquiry were pursued, and entered a standing objection to all further questions on the subject (R. 213, 214). The district attorney offered no theory of admissibility for the record, but the evidence immediately followed the California evidence and the clear inference was that it was offered also as showing modus operandi, and was so stated by the district attorney in a conference at the bench (R. 213). Being properly objected to as irrelevant and prejudicial, the evidence was improperly received if not adequate on the theory offered. However, as the ground of admission was not stated in the record, for safeties sake, all possible grounds of admissibility are considered for the Texas as well as the California incident.

The defendant now seeks to show that the subject evidence was not admissible for any purpose and accordingly prejudicial error was committed by its admission.

Proof of Identity. Identity was an issue in the case. This ground of admissibility is used when the facts are such that the other wrong doing physically tends to place the defendant at the site of the charged crime, *State v. Williams, supra*, or to explain why a witness can identify him. *State v. McHenry* 7 Utah 2d 289, 323 P 2d 710, *State v. Martin* 49 Utah 346, 164 P 500, 14 Am. Jur. Criminal Law, Sec. 312, P. 292,

The evidence must be limited to the applicable aspect of the other wrong doing. State v. Torgerson 4 Utah 2d 52, 266 P 2d 800, 801 (concurring opinion). State v. Gregorius, supra, State v. Martin, supra. In the instant case, no evidence shedding light on a common identity was introduced in regard to the California incident, and in the Texas incident all details, without discrimination, were inquired into.

Even a striking similarity between the facts of the crime charged and of the other wrong doing is not by itself an adequate ground for admission of the evidence of the other wrong doing State v. McHenry 7 Utah 2d 289, 323 P 2d 710, 711, State v. Winget 6 Utah 2d 243, 310 P 2d 739, 740, State v. Gregorius, supra.

The Texas and California evidence failed to have any relevant relation to the defendant's familiarity with the state witnesses, subject store, or furnish any link in a chain of events leading him to the place of the robbery. Accordingly it was not admissible on this purpose.

Intent. Evidence of other wrong doing tending to prove intent is admissible only where the defendant denies a capacity for a criminal intent or where the act charged is logically susceptible of a non-criminal intent and is not to be used when the intent is apparent from the act nor a subset of dispute. State v. McHenry 7 Utah 2d 289, 323 P 2d 710, 711, 42 ALR 2d, Sec. 4, P 868.

Under the circumstances, with the criminal intent being obvious from the act, and defense having raised no special issue in dispute, details of the other wrong doing was not admissible on this ground.

Other Common Grounds of Admission. Aside from the grounds of "Plan" and "Scheme of Operation", the most commonly used grounds of admission of evidence of other wrong doing are to prove motive, res gestae, refute alibi, show propensity for particular sexual offense, or to establish motive. These are well reviewed in 42 ALR 2d 554, and McCormick on Evidence, 4th Ed., Sec. 157, P 296 - 333. It is submitted that these grounds are inapplicable on their face. Particular Utah

cases are *State v. Torgerson, supra*, on *res gestae*; *State v. Williams, supra*, and *State v. Winget, supra*, on propensity; and *State v. Lyman* 10 Utah 2d 58, 348 P 2d 340, 342 on intent and motive.

Plan or Scheme of Operation. This is the only ground on which the state can make a serious argument of admissibility and is the ground used at the trial for the California robberies and apparently used for the Texas incident.

To be admissible the evidence must show "that the other offense formed a link in the chain of events leading to the charged offense," *State v. Williams*, 36 Utah 273, 103 P 250, 252, *State v. Hilberg, supra*, *State v. Lyman, supra*, or to show a system "so unusual and distinctive as to be like a signature," *McCormick on Evidence*, 4th Ed. P. 328 (3), *State v. Scott*, 119 Utah 9, 175 P 2d 1016, 1023, *State v. Harries*, 118 Utah 260, 221 P 2d 605, 617.

It is not enough that the crimes be strikingly similar, there must be some "logical connection between the two on which it can be said the proof of one tends to establish the other." *State v. Williams*, 36 Utah 273, 103 P 250, 252, *State v. Winget, supra*, *State v. Torgerson, supra*, *State v. Harries, supra*, *State v. Gregorious, supra*, 42 ALR 2d, Sec. 6, P 869, 20 Am. Jur. Evidence, Sec. 314, P 296.

Examining the facts here, we find that the California evidence showed only the similar facts of a robbery of a store. Assistance of a partner, conduct and timing of the actual robbery, unique pattern, and all other comparable details of comparison of the California incident were not shown. The evidence showed only that, having robbed one store, the defendant was likely to rob another. This is the precise effect that the rules of exclusion seek so stringently to avoid, and by itself was prejudicial error sufficient to require a retrial of the defendant.

In regard to Texas, the facts are closer, particularly in that the defendant's brother, Lester Ray Dickson, was linked to the defendant as in Utah. It should be noted that the brother has never been charged with the Utah offense. Although witnesses

at the trial identified his picture as being that of one of the robbers, he was given no opportunity to examine them, nor to prove a defense. The case lacks the factor relied on to some degree in *State v. Scott*, supra, where evidence of prior wrong doing with these same parties was admissible largely to rebut the testimony of the defendant that he had had no prior acquaintance with his partners in crime. There was no issue in the subject case denying that the defendant knew his own brother.

The defendant was charged in Texas as an accessory - he took his brother from the scene of the crime. This means that in the jurisdiction where the facts were fully known he was not charged as having been a participant in the actual crime there. Accordingly, proof of a partnership in crime with his brother as being a trade-mark of the defendant, fails in proof because the brother was not charged as a partner in the Utah offense, and the defendant was not charged as being a partner in the Texas offense and was to the contrary specifically charged with an offense other than being a partner.

It is conceded that it is proper to show proof of a wrong doing on which there has been no trial, as is true of the defendant on the Texas charge, but to admit such evidence on the theory that it is a trade-mark of the criminals when the other wrong is a different type of offense is no more than to say "We think you and your brother stole apples here. To prove it we offer proof that you once committed assault together somewhere else. This proves you are partners in crime and identifies your scheme of operation."

The evidence does not show a link, as a chain of embezzlements from one fund. As to whether it shows a trade-mark, or pattern, the evidence fails to show anything more than that two brothers might have been involved in two wrongful acts separate in time, place and nature and dissimilar in *modus operandi* in that in the subject case the offense was at night, the criminals both went into the store and actively participated and concealed their identity. The Texas incident occurred in daylight outside a store.

and only one person, the brother, was active, and the defendant denied, and there was no proof to the contrary that he was armed, whereas in the Utah offense both robbers carried guns.

The "scheme of operation" and "method of operation" differ under analysis in that a scheme is ordinarily analyzed as requiring a conspiracy or plan to commit a number of similar criminal acts, *State v. Harries, supra*, *State v. Scott, supra*, *State v. Nemier, supra*, *Mason v. State, Alabama, 1953, 86 So. 2d, 557*, *People v. Wilson (1926) 76 Cal. App. 688, 245 P 781*, *Stevens v. State (1927) 26 Ohio App. 53, 159 NE 634*. "Plan" refers to the unique system of operation, far more than even a strong similarity between the various offenses. *State v. Williams, supra*, *State v. Winget, supra*, *State v. Hilberg, supra*, *State v. Torgerson, supra*, *State v. Gregorious, supra*, *State v. Buxton (1929) 324 Mo. 78, 22 SW 2d 635*.

At the conclusion of the trial, while defense counsel was taking his exceptions, and before the jury brought in its verdict, defense counsel moved for a mistrial "on the ground that the testimony in regard to the Texas incident on April 5 was on its face prejudicial to the defendant and because the testimony is unrebutted that he was an accessory rather than the principal, does not tend to connect him with the modus operandi; therefore, this evidence missed its point, and this is the only point under which it is admissible." (R. 249, 250).

POINT II.

PREJUDICIAL ERROR WAS COMMITTED BY THE COURT IN REFUSING THE DEFENDANT'S REQUESTED INSTRUCTION THAT ALL WITNESSES, INCLUDING THOSE WHO TESTIFIED FOR THE DEFENDANT BY DEPOSITIONS TAKEN ON COMMISSION IN TEXAS, WERE SUBJECT TO THE PENALTIES OF PERJURY, WHEN THE PROSECUTION HAD CHARGED THAT THE DEFENSE WITNESSES WERE LYING, AND BY INFERENCE, THAT THEY WERE AFRAID TO COME TO UTAH TO TESTIFY.

The Statement of Facts in this brief, pages 5 to 7, details the testimony of six alibi witnesses. One, Edna Moore, testified in person. The other five, who were mother, brother, ex-wife, sister and sister-in-law of the defendant, testified by interrogatories pursuant to Title 77, Chapter 47, U.C.A., 1953. Defendants requested Instruction No. 1 "Responsibility of witness for false testimony. You are instructed that a witness who knowingly gives false testimony may be prosecuted for the felony of perjury. This applies to witnesses for the state and for the defense, and applies whether the testimony of the witness is given in open court or by deposition and interrogatory," (R. 53) was refused.

The court instructions concerning witnesses are Numbers 7, 8 and 9 (R. 44-45).

Instruction No. 7, "Where there is a conflict in the evidence, you should reconcile such conflict as far as you reasonably can; but where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are. There are no definite rules governing how you shall determine the weight or convincing force of any evidence, nor how you shall determine what the facts in this case are; but you should carefully and conscientiously consider and compare all of the testimony and all of the facts and circumstances which have a bearing on any issue and determine therefrom what the facts are. You are not bound to believe all that the witnesses have testified to, nor any witness or class of witnesses, unless their testimony is reasonable and convincing in view of all of the facts and circumstances in evidence. You may believe one witness as against many, or many as against a few, in accordance with honest convictions. The testimony of a witness known to have made false statements on one matter is naturally less convincing on other matters. So if you believe a witness has wilfully testified falsely as to any material fact in this case, you may disregard the whole of the testimony of such witness, or you may give it such weight as you think its entitled to."

Instruction No. 8, "You should not ignore or disregard the testimony of any witness, whether for the state or for the defendant, or whether or not such witness is a party to the action or is interested in the result thereof, simply because of such

facts but you may take all the facts into consideration in determining the credibility of any witness. The testimony of each witness should be considered fairly and impartially and given such weight effect as you think it is entitled to, measured by reason and common sense and the standards given you in these instructions for determining the weight and credibility of witnesses generally."

Instruction No. 9. "In judging the weight and credibility of any witness, you should keep in mind the bias, if any is shown, of such witness, his interest, if any, in the result of the trial, and any probable motive or lack thereof to testify as he does. You may consider his appearance on the witness stand, the reasonableness or lack thereof of his statements, his apparent frankness and candor, or the want of it, his opportunity to know, his ability to understand, his capacity to remember, together with all of the facts and circumstances which have a bearing on the accuracy of his statements. You should also consider any contradictory evidence and whether or not he contradicted himself, and from all the facts and circumstances given in evidence, determine what weight and credibility you should give to the testimony of any witness."

Defense counsel made the following exception to the refusal of his Instruction No. 1. "I take exception then to the court's refusal to grant my Instruction No. 1 that the jury be instructed that witnesses giving testimony by interrogatory are subject to the penalties of perjury as are witnesses appearing in court. The ground of the exception is without such instruction, the jury has only the comment by the district attorney in the interrogatories that they are subject to the pains and penalty of perjury. The jury does not have the weight of the court or the law on that position and accordingly may give less weight to the testimony of these witnesses than they are properly entitled to; that it is especially important in this type of a form of testimony because the testimony already suffers the lack of weight because the people are not physically present and is entitled under those circumstances to all the support that the court can fairly and reasonably give to it; and that this is not

cured by me being allowed to comment to this effect to the jury because I stand in a position of counsel for a party rather than as an impartial party to the proceedings." (R. 249).

None of the instructions given touch on the relative weight of testimony given in person as opposed to testimony given by deposition. None touch on the personal liability to Utah law of a witness who resides in, and gives written testimony from, another state. The defendant's requested instruction No. 1 was proper in form and as a statement of the law, 76-45-1, 6, 7, 13 (1), U.C.A. 1953, 77-47-9 (1), U.C.A. 1953, J.I.F.U. 3.3, R 26 (d), U.R.C.P., 16 Am.Jur. Depositions Sec. 112, p. 746-747, 26 (A) C.J.S. Depositions Sec. 96, p. 449.

The instruction was necessary for the following reasons:

- (A) Out of state witnesses who testify by deposition are entitled to have the same weight given to their testimony as to the testimony of witnesses who appear personally and an instruction to this effect is proper.
Citations above.
- (B) The alibi witnesses were under suspicion of perjury because having testified in person, and obviously being the "some witnesses (who) were held in contempt" at the first trial of the defendant (R. 182, 183), they didn't come back to Utah, but testified by deposition from Texas. From this the jury could infer a fear of personal appearance on their part. The inference would be erroneous because the depositions were in fact fully subject to penalties for perjury regardless of where they testified.
- (C) The district attorney accused the deposition witnesses of lying and perjury at the first trial by tying them in to his examination of Edna Moore on this point (R. 173-178, 238-243). He accused her of being willing to lie for the defendant. She denied this (R. 174). When she denied it, to impeach her, the district attorney accused her twice of being put in the

that small error can be decisive, *Glasser v. U.S.*, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, and the error concerned a material factor or issue to the losing party, *Jensen v. Utah R. R. Co.*, 72 Utah 366, 270 P. 349, 361-362, *Larson v. Webb, Mo.*, 58 S.W. 2d 967, *Gypsy Oil Co. v. Ginn et al, Okla.*, 241 P. 794, 5 (B) C.J.S. Appeal & Error, Sec. 1904, p. 393-394.

CONCLUSION

Appellant submits that the trial below contained error prejudicial against him and requests that the case be reversed and the cause remanded to the trial court for a new trial.

Respectfully submitted,

K. SAMUEL KING,
405 Executive Building,
Salt Lake City, Utah,

Attorney for Appellant.

County Jail at the time trial was being in that she refused to identify a picture of her brother Lester Ray. He charged her with later recounting her testimony during that trial and identifying the picture, after she was advised by defense counsel that she would be charged with perjury if she failed to do so. He then immediately followed with questions as to whether she heard the testimony of her mother, Rose Valle, a deposition witness at the prior trial. He then elaborately dropped the subject (R. 177-178). This in context linked the testimony of Rose Valle to Edna's. What it lacked specifically on this point was inadvertently filled in by the court's comment that it held "some witnesses in contempt" (R. 182, 183). To complete the identification of the absent witnesses testimony with Edna's in regard to the alleged perjury at the first trial, the district attorney after re-examining her (R. 233-243), in detail as to her apparent testimony, finished off by saying that he would put in further evidence regarding the deposition witnesses testimony in regard to their identification of Lester's picture at the first trial. He didn't follow up with any testimony on this point. It was not necessary. The point was made.

Under these circumstances, the defense instruction was drafted not merely to state that all witnesses testimony starts with the same weight, but that all witnesses are equally subject to penalties for perjury. A mere statement in the instruction that the testimony of all witnesses is to be given equal weight, or that all witnesses are under oath did not appear adequate to meet the inference that the witnesses were afraid to return to Utah because of past perjury.

Failure to give a proper instruction, timely requested, is error and presumed prejudicial when it cannot be said that no prejudice occurred, 5 (A) C.J.S. Appeal & Error, Sec. 1774, p. 1264.

A presumption of prejudice is strengthened when the case is so close