

1992

## Utah v. Flores : Brief of Appellant

Utah Court of Appeals

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### Recommended Citation

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

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

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Brief of Appellant

RAYMOND FLORES

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

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APR 3 1994  
COURT OF APPEALS

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## STATEMENT OF ISSUES

1. Did the trial court error in admitting evidence of Defendant's prior convictions without conducting a balancing test?
2. Did the trial counsel fail to object to the admissibility of the prior conviction evidence at trial?

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 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). This brief is in response to the Court's October 18, 1993 order.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court error in admitting evidence of Defendant's prior convictions without conducting a balancing test?
2. Did the trial counsel fail to object to the admissibility of the prior conviction evidence at trial?

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 COURT ERRORED IN ALLOWING EVIDENCE OF DEFENDANT'S PRIOR CONVICTIONS

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).

The Utah Supreme Court, in the case of State v. Bruce, 779 P. 2d 646, 653 (Ut. 1989) stated that: "If the crime involved dishonesty or false impeachment, the conviction may be used to impeach whether it was classified as a misdemeanor or felony. The mandatory language of the rule leaves a trial court with no discretion to exclude the evidence... Thus, convictions for crime not involving dishonesty or false statement cannot be used for impeachment purposes in Utah unless they are felony convictions and the trial court has applied the proper balancing tests under the rule."

In State v. Banner, the Court set forth various factors which should be used when weighing the probative value against the prejudicial effect of admitting prior felony theft convictions. In Banner, 717 P. 2d 1325, the Court stated that the factors to be

used are (1) the nature of the crime as bearing on the character for the voracity of the witness (2) the recentness or remoteness of the prior conviction (3) the similarity of the prior crime to the charged crime, in so much as a close resemblance may lead the jury to punish the accused as a bad person (4) the importance of credibility issues in determining the truth in prosecution tried without decisive non-testimonial evidence (5) the importance of the accused testimony as perhaps warranting the exclusion of convictions probative of the accused character for voracity.

In State v. Wight, the Court found that where the trial court did not apply the proper criteria as outlined in Banner, then the trial court erred in filing the prior conviction inadmissible. However, in Wight, the Court concluded that the error was harmless and therefore, did not overturn the decision reached in the trial court.

As noted by the supplements, the Stipulated Motion to Supplement the Trial Record and the Order Supplementing Trial Record, it is clear that an objection by Defendant was made at a side bar conference out of the range of the jury, objecting to the admission of Defendant's prior felony by deception and grand theft by obtaining property by false pretenses previous convictions.

The crimes of Deception, Theft by Deception, and Grand Theft by attaining property by false pretenses are similar to the crimes charged and that the Court, by allowing the State to introduce evidence of these crimes to impeach the Defendant, probably led

the jury to punish the accused as a bad person.

Defendant Raymond Flores' testimony was an intricate part of the Defendant's defense. The jury could have determined the credibility of the Defendant by comparing the Defendant's testimony with testimony presented by police officers and other witnesses. It was not necessary for the State to use evidence of Mr. Flores' prior convictions in order for the jury to determine Mr. Flores' credibility as a witness. The Court erred by allowing the introduction of Defendant's prior convictions and the introduction of the prior convictions led the jury to convict the Defendant in the instant case.

#### CONCLUSION

THEREFORE, the Defendant respectfully requests that Defendant's conviction be set aside and that the Defendant be granted a new trial.

SIGNED and DATED this \_\_\_\_ day of March, 1994.

---

MICHAEL D. MURPHY

**CERTIFICATE OF MAILING**

I, hereby certify that I mailed a true and correct copy of the foregoing Amended Brief, postage prepaid, to:

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Raymond Flores, 13611  
Aspen 131  
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Gunnison, UT 84634

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

\_\_\_\_\_  
Secretary