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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

* *

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	Criminal No. 021501335 FS
vs.	)	Appellant Case No. 20031009-CA
ROBYN LYNN MILLER,	)	
Defendant/Appellant.	)	Argument Priority: (2)

* *

BRIEF OF APPELLANT MILLER

Appeal from the judgment, sentence, stay of execution of sentence, order of probation and commitment in the Fifth Judicial District Court, in and for Iron County, State of Utah, the Honorable J. Philip Eves, presiding.

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FILED
UTAH APPELLATE COURTS
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, Plaintiff/Appellee, vs. ROBYN LYNN MILLER, Defendant/Appellant.	):):):):):):	**BRIEF OF APPELLANT MILLER** Criminal Case No. 021501335 FS Appellant Case No. 20031009-CA Argument Priority: (2)

* *

JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter in that it is an appeal in a criminal case not involving a first degree or capital felony. Utah Code Annotated Section 78-2a-3(2)(e) (1953, as amended).

ISSUES PRESENTED FOR REVIEW

The issues presented for appeal in this case by Appellant are as follows:

ISSUE NO. 1: Whether or not there was sufficient evidence to convict the Appellant of the charges set forth in the amended information, under circumstances where the Appellant was entitled to the funds retrieved from her ex-husband?

ISSUE NO. 2: Whether or not the trial court properly instructed the jury as to the elements of each offense, by the use of definitions or other instructions at the time of the trial?

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ISSUE NO. 3: Whether or not the trial court erred in not including an appropriate instruction to deal with the entitlement to the proceeds acquired through manipulation of banking forms to gain access to funds in the account of Appellant's ex-husband?

ISSUE NO. 4: Whether or not Appellant received the effective assistance of counsel at trial?

STANDARD OF REVIEW

The standard of review for a claim of insufficiency of evidence is to view the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Cayer, 814 P.2d 604 (Utah App. 1991); see also State v. Booker, 709 P.2d 342, 345 (1985). A jury verdict will be reversed only if the evidence is "sufficiently inconclusive or inherently improbable" that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which she was convicted. Id. State v. Cayer, 814 P.2d at 612. The law does not conclusively presume that because a person signed the name of another a forgery has occurred. The act of signing another's name without permission does not constitute forgery unless it is done with the intent to defraud. State v. Winward, 909 P.2d 909, 912 (Utah App. 1995). Accordingly, to sustain a conviction of forgery there must be a sufficient connection between the act of forgery and the intent to

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defraud, see also Hendershott v. People, 653 P.2d 385, 390 (Colo. 1982). Moreover, even if a defendant possesses both an intent to defraud and commits the act of signing another's name without authority, a forgery conviction cannot be sustained unless the act was done in furtherance of the intention to defraud. Winward at 913.

Where the trial court fails to sufficiently instruct a jury on the concept of specific intent as it applies to the facts of a case involving forgery, the same constitutes reversible error, Id. A party who fails to object to or give an instruction may have that instruction assigned as error under the manifest injustice exception, Utah R. Crim. P. 19(e). However, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error, State v. Anderson, 929 P.2d 1107, 1109 (Utah 1996). Accordingly, a jury instruction may not be assigned as error even if such an instruction constitutes manifest justice "if counsel, either by statement or act, affirmatively represents to the trial court that he or she had no objection to the jury instruction." State v. Hamilton, 2003 UT 22, paragraph 54, P.3d 111. Where Defendant or his counsel invites error the verdict will not be overturned even if the jury instruction results in manifest injustice. See State of Utah v. Geukgeuzian, 204 Utah 16, paragraph 14.

Where representation falls below the standard objective of a reasonable

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professional, sufficiently to overcome the presumption that counsel rendered adequate assistance and exercised sound professional judgment and where the case demonstrates that counsel's errors were prejudicial, the representation is ineffective when there is a reasonable probability that but for such error the outcome in the proceedings would have been different. See Strictland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L.Ed. 2d 674 (1985).

STATUTORY PROVISIONS

The Appellant is aware of no statutory provision that is dispositive but believes the following apply:

Utah Code Annotated Section 78-2a-3(2)(e) (1953, as amended)
Rule 19(e), Utah Rules of Criminal Procedures
Utah Code Annotated, Section 76-6-501 (1953, as amended)
Utah Code Annotated, Section 76-6-506.2 (1953, as amended)
Utah Code Annotated, Section 76-6-404 (1953, as amended)

STATEMENT OF THE CASE

A. NATURE of the CASE: This is a criminal case where the Appellant was charged with three (3) counts of forgery, each a third degree felony, one count of unlawful use of a financial transaction card, a third degree felony and one count of theft of property, a third degree felony. The charge of theft of property was reduced by amended information to a class A misdemeanors before trial, see the record at page 66. On the 25th day of September, 2003, a one (1) day jury trial was held and

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the Appellant was convicted on all counts. The charges stem from circumstances where the Appellant was accused of forging her ex-husband's signature authorizing her and their fifteen (15) year old daughter to withdraw funds from his personal bank account at State Bank of Southern Utah beginning in February, 2002. The Appellant was the ex-wife of the victim, Andrew Miller, having divorced, however, pursuant to a modified decree he was required to pay child support for two (2) children and if he were unemployed or incarcerated, all funds from which he received Veteran's Administration (benefits) were to be sent directly to the Appellant as support. The funds acquired by Appellant from Andrew's account were benefit proceeds from the Veteran's Administration since he had no other sources of income while incarcerated. The State asserted that a forgery was committed when the Appellant submitted three (3) bank card applications utilizing the victim's checking account number at State Bank of Southern Utah and where photos from the ATM camera showed her use the card to obtain funds from his account.

B. COURSE of PROCEEDINGS: Charges were brought against the Appellant in December, 2002, see the record at page 4. The Appellant made her first appearance and was appointed counsel on the 19th day of December, 2002. On or about the 15th day of January, 2003, the Appellant waived her preliminary hearing and was bound over for arraignment where she plead not guilty and the matter was

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set for trial. In April, 2003, counsel stipulated to a motion to continue jury trial and status conference and after further continuance in June, the matter was reset for trial in September, 2003. The day before trial, an amended information was filed, reducing Count V, theft of property, to a class A misdemeanor, see the record at page 66.

On or about the 25th day of September, 2003, a jury trial was held and the Appellant was convicted. The matter was continued to the 17th day of November, 2003, for sentencing. On or about the 2nd day of December, 2003, the court entered its judgment, sentence, stay of execution of sentence, order of probation and commitment which granted Appellant the privilege of probation, ordered that she pay a restitution of eight hundred fifty-nine dollars and six cents ($859.06) and serve a six (6) month jail term with work release. Also, she was to reimburse Iron County two hundred dollars ($200.00) for the public defender services and pay a fine of one thousand two hundred fifty dollars ($1,250.00) plus a twenty-five dollar ($25.00) court security fee, a true and correct photocopy of the trial court's judgement, sentence, stay of execution of sentence , order of probation and commitment is attached as Exhibit A in the Appellant's addendum and incorporated herein by this reference.

Notice of appeal was filed on the 8th day of December, 2003, and on the 9th day of January, 2004, J. Bryan Jackson was substituted as public defender

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appointee for purposes of appeal.

C. DISPOSITION of the TRIAL COURT: Upon hearing the evidence, the jury returned a verdict of guilty on all counts against the Appellant and the matter was set for sentencing pending the preparation of a presentence investigation report. On or about the 2nd day of December, 2003, the trial court entered its judgment, sentence, stay of execution of sentence, and order of probation and commitment, see the record at page 147. A notice of appeal was filed on or about the 8th day of December, 2003, see the record at page 149.

The Appellant was sentenced per statute with execution of sentence stayed. She was placed on supervised probation for thirty-six (36) months, which included incarceration of six (6) months in jail with work release. She was ordered to pay restitution in the amount of eight hundred fifty-nine dollars and six cents ($859.06) and an additional fine and reimbursement fee in the total amount of one thousand four hundred seventy-five dollars ($1,475.00).

D. STATEMENT of FACTS: In August, 2001, there was entered an amended order modifying decree of divorce between the Appellant and victim which had been filed in the Fifth Judicial District Court, civil number 914900110. It required the Respondent (the victim) to pay child support of five hundred ninety dollars ($590.00) per month and if he were unemployed or incarcerated, all funds which the victim

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received from the Veteran's Administration were to be sent directly to the Petitioner (the Appellant) for child support. See Trial Exhibit D-13, at the record at page 129, a true and correct photocopy thereof being marked as Appellant's Exhibit B and the same is attached hereto as part of the addendum and incorporated herein by this reference. While the victim, Mr. Miller, was incarcerated, there was filed bank card applications at State Bank of Southern Utah by Appellant and their daughter, Sydney Miller, utilizing his account number, see State's Exhibits 2, 3, 4 and 5, at the record at page 129. The victim denied authorizing this action. In November, 2001, there was filed with the United States Post Office a change of address so that the victim's mail went directly to the Appellant. See Trial Exhibit P-1 at the record at page 129. By the change of address and with the approval of the application, the Appellant received a debit card and the access PIN number which allowed her to withdraw monies from the victim's account at any ATM machine. While the victim acknowledged not paying child support during incarceration and that his V.A. benefits had been on direct deposit with State Bank, he changed his testimony to suggest that these funds were changed to a Zion's Account. He was not clear as to now or when the benefits from the Veteran's Administration were deposited into his account. He was elusive as to when the change occurred. He was elusive in giving information about his income. The inquiry on cross examination was as follows:

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Q. Did you receive any benefits from the Veteran's Administration?
A. Yes, I do.
Q. That's a source of income, isn't it?
A. Yes, it is.
Q. And where do those funds go?
A. Those funds go to my bank account at State Bank.
Q . Okay. Have they always been on deposit in the State Bank account?
A. No, they have not.
Q. When did that change?
A. That changed this year or last. It was this year in fact.
Q. Okay.
A. I believe in April or May.
Q. Okay. So, do you have a source of income?
A. That's correct.
Q. And did you have a source of income during the time you were incarcerated.
A. That's correct.
Q. And those funds did go into the State Bank account at that time.
A. No. They went into a different Bank at that time.
Q. Well, what bank was that, Sir?
A. That was Zion's bank.
Q. Okay, so what is the source of funds that were located in the State Bank account?
A. Air force retired bank.
Q. So you had retirement funds in addition to V. A. benefits, further income during your period of incarceration.
A. That's correct. That's correct.
Q. And those - - the source of those funds were on deposit in State Bank; in that correct?
A. That's true. I - -
Q. And during all that period of incarceration, sir, you had no other source of income?
A. No. ...
Q. Alright. During the time period when you were incarcerated, Mr. Miller, did you pay child support?
A. No, of course not.
Q. And are you current paying child support today?

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A. Obviously not.

See trial transcript at pages 72-74. However, his daughter, Sydney Miller indicated that the action taken by Appellant was authorized by the victim. On direct examination she stated as follows:

> Q. Okay. During that conversation, did you talk about money?
> A. Yes, we did.
> Q. Why were you talking about money?
> A. Because he was in jail and that's the only time we can get - - or, when he's in jail, we get the V.A. money. And he doesn't have a job, obviously, when he's in jail, so we were there to discuss that and get that worked out.
> Q. Do you understand what the V.A. money is being used for?
> A. Child support.
> Q. Okay. And on this particular occasion, you were having a conversation with him related to child support?
> A. Yes.
> Q. What did he say?
> A. He - - we took the - - the divorce decree in there. And it said that, because he's in jail, we get the V.A. money. And he said, "Okay, fine." Then you could go and get all the paper work and get it all filled out and it will be easier for us to do it rather than for him to do it because of all the - - the - - it'd just a long time and everything else to do it - - for him to, like, do it through the mail and jail and stuff like that.
> Q. And so he told you to go ahead and fill the applications.
> A. Uh - Huh (affirmative).
> Q. He told you to go ahead and sign them.
> A. Uh - Huh (affirmative).
> Q. And he told you to do that because it was hard for him to do that by mail in jail.
> A. Yes.
> See trial transcript at pages 152 and 153.

Tristyn Miller, the victim's other daughter corroborated the conversation that

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occurred at the jail house but she was unclear on the details, see trial transcript at pages 171 and 172. She also suggested that her father tried to manipulate her in changing her testimony, see the trial transcript at pages 169 and 170. However, a visitor log record which was introduced as Exhibit P-26, see the record at page 129, showed no visits by the Appellant, Sydney Miller or Tristyn Miller. Moreover, the victim, Andrew Miller, denied on rebuttal having visited with the Appellant, Sydney and/or Tristyn Miller, see the trial transcript at page 196.

A standard set of jury instructions was read to the jury which included instruction No. 13 offering definitions for various legal terms. This included the term "purpose or intent to defraud" which was defined as simply a purpose to use a false writing as if it were genuine in order to gain some advantage. See the record at page 103. Instruction No. 10, the elements instruction for the offense of forgery as charged in counts I, II and III of the information, made it an element of the offense that the Defendant (Appellant) acted with a purpose to defraud anyone, or with knowledge that he was facilitating a fraud to be perpetuated by anyone see the record at page 106 (emphasis added). Counsel for the defense did not take exception to the jury instructions or proposed verdict form, see the trial transcript at page 193. However, there is nothing in the trial transcript or record suggesting that this was anything other than an oversight. Notwithstanding, it would have been more

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consistent with State v. Winward, 909 P.2d 909 (Utah App. 1995), had additional qualifications been made regarding the charges of forgery and theft of property.

The jury returned its guilty verdict after deliberating for approximately one (1) hour, see the trial transcript at page 228.

SUMMARY OF ARGUMENTS

A.

There was insufficient evidence to convict the appellant of the charges of forgery and theft of property, no matter what inferences one might draw from the evidence to support the jury verdict, because Appellant was entitled to the monies she received as had been previously decreed and to which she had full entitlement without further authorization as child support. Her questionable use of deceptive means to acquire that which she was entitled to does not amount to fraud since the victim had no legal right to retain the monies in his account and therefore the unauthorized signature was not forgery as found in State v. Winward, 909 P.2d 909 (Utah App. 1995). A forgery conviction cannot be sustained unless the act was done in the furtherance of the intention to defraud the victim and not just anyone.

For the same reason, Appellant's entitlement to funds sequestered by the victim, depriving Appellant from having access to property which by previous court decree belonged to her. She had not exercised unauthorized control over property

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of another. She merely acquired that property to which she had full right and entitlement.

B.

Since the circumstances of this case, much like those of State v. Winward, 909 P.2d 909 (Utah App. 1995), required an instruction more in keeping with the facts than what the general language of Utah Code Annotated, Section 76-6-501 (1953, as amended) might have otherwise required. The jury was not properly instructed when the language made reference a purpose to defraud anyone, and where testimony at trial would have lead a jury to reasonably believe that the victim was the bank and not Mr. Miller. However, defense counsel did not object or take exception to the trial court's instruction and therefore may have invited error after the Utah Supreme Court's ruling in State v. Geukgeuzean, 2004 UT 16. Notwithstanding, Appellant maintains that the practical application effectively eliminates the manifest injustice exception of Rule 19(e), Utah Rules of Criminal Procedure, when applied to circumstances where there is a clear indication that the error in failing to instruct was one of inadvertence by both parties and the trial court. Appellant asserts that in cases of such inadvertence the manifest injustice exception should still apply

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C.

Where this case was one that required consideration of Appellant's entitlement to the proceeds of the victim's account, the trial court erred in not including an instruction or definition addressing her right or in clarifying the reason for the evidence so as to not confuse the jury. Appellant believes that the appropriate remedy is remand for new trial.

D.

Defense counsel's failure to take exception to the trial court's jury instruction and in not submitting an instruction qualifying the standard instructions for forgery and theft to account for the circumstances of the instant case together with his failure to object to the testimony of bank officials regarding reimbursement or by failing to request a clarifying instruction excluding the jury's consideration of the bank as a victim fails the Strickland test, being prejudicial and falling below the objective standard of a reasonable professional. However, it is speculative to assume that the jury would render a different verdict had they been properly instructed. Notwithstanding, since the remedy would be for new trial and not a reversal, there should be less of a need to speculate on the outcome.

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ARGUMENT

A.

AFTER MARSHALING THE EVIDENCE, THE APPELLANT ASSERTS THAT THE SAME IS INSUFFICIENT TO CONVICT ON COUNTS I, II AND III, FORGERY, A THIRD DEGREE FELONY AND THEFT, A CLASS A MISDEMEANOR, WHERE SHE WAS ENTITLED TO THE FUNDS SHE RECEIVED FROM HER EX-HUSBAND.

Where the issue appeals deals with sufficiency of evidence, in determining whether a jury verdict should be set aside based on insufficient evidence this Court has previously ruled in State v. Salas, 820 P. 2d 1386 (Utah App. 1991) as follows:

> The evidence and the reasonable inferences which might be drawn therefrom must be viewed in the light most favorable to the jury verdict. A jury conviction is reversed for insufficient evidence 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 on which he [she] was convicted.

See also State v. Johnson, 774 P.2d 1141-47 (Utah 1989). This Court has also held in State v. Vessey, 967 P.2d 960, 966 (Utah App. 1998), that one challenging the verdict must marshal the evidence and then demonstrate that it is insufficient when viewed in the light most favorable to the jury verdict. The most obvious inference is that the jury simply believed the victim, Andrew Miller, and chose not to believe the testimony of the Appellant, or their daughters, Sydney Miller and Tristyn Miller. The question must be asked, however, whether it is reasonable to infer under the

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circumstances of this case that one can steal or take unauthorized possession of that which she by law is entitled. One clear fact that went undisputed and uncontroverted at trial was Appellant's entitlement to the victim's V. A. benefits when he was incarcerated. There is no question that Mr. Miller was incarcerated at the time the monies were withdrawn from his account. While Mr. Miller's testimony was confusing as to whether the V.A. benefits were actually deposited in his State Bank account or a Zion account, he offered no corroborating evidence to disaffirm or question the established fact that the V.A. benefits were on direct deposit with State Bank. The victim acknowledged that he had not paid child support and that he did owe child support while he was incarcerated. The victim was untruthful as to his sources of income when questioned at trial. In short, there was substantial evidence suggesting that he was evading his obligation and elusive in testifying truthfully. However, notwithstanding the factual issue as to whether the victim authorized the Appellant to file an application, signing his name to it for purposes of accessing his account for child support, the more essential question is one of her entitlement to those funds. She needed no further authorization to receive the V.A. benefit money since the previous modified court order had already granted her full authority and entitlement. This is not a case where one exercises control over property of another but a case where she used questionable means to get access to her own property.

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Hence, the Appellant contends that she had every right to possession and control of her property even by the use of questionable means including the filing of an application in behalf of her ex-husband to access the funds.

The situation in this case is not unlike that which was found in State v. Winward, 909 P.2d 909 (Utah App. 1995) wherein the Utah Court of Appeals determined that even the unethical conduct of an attorney was insufficient to support a charge of forgery unless there was found to be a sufficient connection between the act of forgery and the intent to defraud. In that case, this Court stated that the law does not conclusively presume that because a person signed the name of another a forgery has occurred. "The act of signing another's name without permission does not constitute forgery unless it was done with the intent to defraud." Id at 912. This Court went on to state that even if a defendant possessed both an intent to defraud and commits the act of signing another's name without authority, a forgery conviction cannot be sustained unless the act was done in the furtherance of that intention. Stated another way, a defendant who has signed another's name without permission, while possessing an intent to defraud that is completely unrelated to the unauthorized endorsement has not committed forgery. Id at 913.

That case involved an unauthorized endorsement not unlike the facts and circumstances of the instant case. In that case, this Court stated that the trial court

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had erred in allowing the State to present evidence suggesting that the defendant had committed wrongful acts against other victims. In the instant case, the only person who could have been defrauded is Andrew Miller. However, Andrew Miller, given the language in the modified decree of divorce had no right to withhold funds from the Appellant because such were to paid as child support when he was incarcerated. Notwithstanding any inference that might be drawn on what the jury did under the circumstances of this case, there is no basis for sustaining the forgery conviction because the only possible victim, Andrew Miller, was not defrauded in any way by her taking money that belonged to her which he had no right to withhold from her. If there is no fraud, there can be no forgery.

Similarly, the same holds for the unauthorized exercise of property in the theft charge. Where the charge requires that unauthorized control be made of property of another, the charge cannot be sustained when the property that she exercised control over is her own.

Certainly, what the Appellant did in this case was no different than what the attorney did in State v. Winward, except that under the circumstances her action was not governed by the rules of professional conduct and therefore not unethical. In light of this legal component which was clearly overlooked or not adequately explained to the jury through instruction, there is no reasonable inference that can

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be drawn that to support the charges in this case.

B.

THE TRIAL COURT DID NOT PROPERLY INSTRUCT THE JURY AS TO THE CHARGES IN THIS CASE OR BY WAY OF DEFINITION OR FURTHER INSTRUCTION GIVEN THE CIRCUMSTANCES.

The Appellant points out that the instructions that were given at trial were consistent with Utah Code Annotated, Section 76-6-501 (1953, as amended) which states that a person is guilty of forgery if, with purpose to defraud anyone, [she] makes any writings so that the writing or the making purports to be the act of another (emphasis added). However, the Appellant also notes that there was no exception made by her attorney at trial. There is nothing further in the trial transcript elaborating on what discussion may have taken place off the record. However, State v. Winward, 909 P.2d 909 (Utah App. 1995) suggests that more limitation be given as part of the instruction. In that case, this Court had a problem with defining "purpose to defraud" as simply a purpose to use a false writing as if it were genuine in order to gain some advantage" by stating that it failed to explain adequately the distinction between the general and specific intent requirements or relate those requirements to the facts of the case. Id at 914. See also State v. Potter, 627 P.2d 75 (Utah 1981). The same problem exists in the instant case. Evidence was introduced in the instant case regarding the bank's reimbursement of the monies

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paid from the victim's account. The introduction of such evidence suggests, without clearly identifying the victim in this case, that the bank could have been the victim. Consequently, it is reasonable to conclude that the jury may have believed that the bank was the victim. However, the only connection that can be made through the endorsement is to Mr. Miller since the act in this case is the signing of his signature to the application form. The separate act causing the bank to reimburse Mr. Miller's account came as a result of his action not that of the Appellant. The introduction of such evidence without proper instruction, created the same type of confusion and similar circumstances to that of the Windward case. In short, the Appellant asserts that given the circumstances, the nature of evidence introduced, and the form of instruction given the jury was not properly instructed. Having said that, the Appellant notes that the situation may be one where here the trial attorney invited error. In State v. Geukgeuzean, 2004 UT. 16, the Utah Supreme Court reviewed a matter where the trial court had failed to include an appropriate mens rea instruction and this Court rejected the State's contention that the defendant invited error by omitting the challenged element in his own proposed instructions. Notwithstanding, the Supreme Court reversed stating that as in State v. Hamilton, 2003 UT 22, 70 P.3d 111 (Utah 2003), where defense counsel confirmed on the record that it had no objection to the instructions given by the trial court, the invited error doctrine applied.

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In that case, it recognized and acknowledged the defendant's failure to include a separate mens rea element in his proposed instruction was most likely inadvertent and not a deliberate attempt to mislead the trial court. Nevertheless, the Supreme believed that like other cases discussed therein, the proposed jury instructions effectively led the trial court into adopting an erroneous jury instruction that he then challenged on appeal, see paragraph 12.

Unlike State v.Geukgeuzean, however, there is nothing in the trial transcript and there is nothing on the record indicating what defense counsel's proposed instructions were. There are proposed instructions made a part of the record by the State. However, there appear to be no proposed jury instructions submitted by defense counsel that are part of the record. All that defense counsel did in this case is to not object to the instructions given as indicated in the trial transcript at page 193. Whether that was enough to invoke the invited error doctrine, is a matter that this Court can decide for itself. The Appellant maintains that the purpose behind the invited error doctrine was to discourage parties from intentionally misleading the trial court and that something more than to assert to the court's instruction should be required. In the instant case, defense counsel chose not to take exception to the instructions given. Appellant suggests that there are other reasons for not taking exception which are not intended to invite the trial court to commit error in its

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instruction. While the Appellant agrees that a jury instruction may not be assigned as error if counsel, either by statement or act, affirmatively demonstrates his position on the matter and does not object to the instruction, accord State v. Hamilton, 2003 UT 22, at ¶ 54, 70 P.3d 111, the Appellant maintains that error assigned to the manifest injustice exception should still be maintained under circumstances that clearly show inadvertence by all parties including the trial court. Appellant's explanation as to why the more detailed instruction was not given in this case was that it seems clearly to have been overlooked by all parties including the trial court in this case. Moreover, unlike the other cases on this point, neither the record nor the trial transcript offer any further insight.

C.

THE TRIAL ALSO ERRED IN NOT INCLUDING ANY INSTRUCTION OR DEFINITION ADDRESSING APPELLANT'S RIGHT OR ENTITLEMENT TO THE PROCEEDS OBTAINED.

Without readdressing the issues set forth in the previous section, the Appellant further notes that under the circumstances of this case, it seems that it would have been appropriate that a more definitive instruction be given concerning Appellant's entitlement or right to proceeds in the victim's account. The Appellant believes that failure to so instruct was similar to what this Court took exception to in State v. Winward, by failing to relate the requirements to the facts of this particular case.

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Without limiting or qualifying the evidence, the same concerns would apply in the instant case as this Court found to have likely confused the jury in the Winward case, in that the jury is allowed to make inappropriate or unfair assumptions or inferences as to who the victim is or what the nature of the injury might encompass. At the same time, Appellant can see that like in the Winward case if it is determined that she was convicted unfairly, she is entitled to a new trial and not an acquittal. Therefore, the appropriate remedy would be to remand for such proceedings as would be appropriate under the circumstances.

D.

WHERE DEFENSE COUNSEL FAILED TO PROPOSE A MORE DETAILED INSTRUCTION QUALIFYING FORGERY AND THEFT AND THEN FAILED TO TAKE EXCEPTION TO THE INSTRUCTIONS GIVEN BY THE COURT, APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE AT TRIAL.

Appellant believes that the failure to include more definitive instruction was an oversight by all parties. However, even as an oversight or considering the possibility that defense counsel did not objection for reasons calculated toward the defense, the question arises as to whether Appellant received effective assistance of counsel at trial. The standard is that which has been set forth in Strictland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L .Ed. 2d 674 (1984), by the United States Supreme Court. The two prong Strickland test is first to show that the representation fell below the objective standard of a reasonable professional sufficiently to

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overcome the presumption that counsel rendered adequate assistance and exercised reasonable professional judgment and second, there must a showing that counsel's errors were prejudicial. Appellant can establish that she was convicted, any further showing of prejudice is somewhat speculative in assuming that the jury would render a different verdict had they been properly instructed. Likewise, if it was defense counsel's strategy to not focus on the jury instruction but rather to limit evidence that might come in which might be confusing, there comes to mind the question as to why counsel did not object to the testimony of bank officials reimbursing the victim of monies withdrawn from the victim's account. Counsel's failure to object or otherwise qualify the testimony through instruction seems to call into question whether effective assistance was rendered consistent with reasonable professional judgment. Since the relief sought is requesting a new trial as opposed to reversal, the Appellant contends that there is less of a need to speculate on the outcome of the proceedings, as to whether it is reasonablely probable that the verdict be different. A new jury would have the benefit of proper instruction consistent with this Court's mandate on remand, accord Butterfield v. Cook, 817 P.2d 333, 336 (Utah App. 1991).

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CONCLUSION

On the grounds and for the reasons set forth above, the Appellant requests that the matter be remanded for new trial with such instruction as the deems appropriate together with such and further relief as to this Court appears equitable and proper.

DATED this 9th day of June, 2006.

J. BRYAN JACKSON,
Attorney for Appellant Miller

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CERTIFICATE OF MAILING

I hereby certify that on the 21st day of June, 20 09, I did mailed a true and correct photocopy of the BRIEF OF APPELLANT MILLER, by way of U.S. mail, postage fully prepaid, thereon, to the following:

SCOTT GARRETT
IRON COUNTY ATTORNEY
97 North Main Street, Suite 1
Post Office Box 428
Cedar City, Utah 84721-0428

MARK L. SHURTLEFF
ATTORNEY GENERAL
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114

COURT OF APPEALS
450 South State Street, Suite 500
Post Office Box 140230
Salt Lake City, UT 84114-0230

ROBYN LYNN MILLER
P.O. Box 254
Cedar City, UT 84721-0254

Laura Lee
LAURA LEE,

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ADDENDUM

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Exhibit A

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TROY A. LITTLE (#9061)
Chief Deputy Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 586-6694
Telecopier: (435) 586-2737

FILED
DEC - 1 2003
5th DISTRICT COURT
IRON COUNTY
Deputy Clerk

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROBYN LYNN MILLER, 11/18/64 Defendant.	**JUDGMENT, SENTENCE, STAY OF EXECUTION OF SENTENCE, ORDER OF PROBATION, and COMMITMENT** Criminal No. 021501335 Judge J. Philip Eves

The Defendant, ROBYN LYNN MILLER, having been found of guilty by a jury trial of the offense(s) of three (3) counts of Forgery, each a Third-Degree Felony; Unlawful Use of a Financial Transaction Card, a Third-Degree Felony; and Theft of Property, a Class A Misdemeanor, on September 25, 2003, and the above-entitled matter having been called on for sentencing November 17, 2003, in Parowan, Utah, and the above-named Defendant, ROBYN LYNN MILLER, having appeared before the Court in person together with her attorney of record, Dale Sessions, and the State of Utah having appeared by and through Deputy Iron County Attorney Troy A. Little, and the Court having reviewed the sentencing recommendation and having further reviewed the file in detail and thereafter having heard statements from the Defendant, her attorney, and the Deputy Iron County Attorney, and the Court being fully advised

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in the premises now makes and enters the following Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, ROBYN LYNN MILLER has been convicted upon her plea of guilty to the offense of three (3) counts of Forgery, each a Third-Degree Felony; Unlawful Use of a Financial Transaction Card, a Third-Degree Felony; and Theft of Property, a Class A Misdemeanor, a, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, ROBYN LYNN MILLER, and pursuant to her conviction of three (3) counts of Forgery, each a Third-Degree Felony, is hereby sentenced to a term of zero to five (0-5) years in the Utah State Prison for each count..

IT IS FURTHER ORDERED that the Defendant, ROBYN LYNN MILLER, pay a fine in the sum and amount of five thousand dollars ($5,000), plus an eighty-five percent (85%) surcharge for each count, for her conviction of the offense(s).

IT IS HEREBY ORDERED that the Defendant, ROBYN LYNN MILLER, and pursuant to her conviction of Unlawful Use of a Financial Transaction Card, a Third-Degree Felony, is hereby sentenced to a term of zero to five (0-5) years in the Utah State Prison.

IT IS FURTHER ORDERED that the Defendant, ROBYN LYNN MILLER, pay a fine in the sum and amount of five thousand dollars ($5,000), plus an eighty-five percent (85%) surcharge for, for her conviction of the offense(s).

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IT IS HEREBY ORDERED that the Defendant, ROBYN LYNN MILLER, and pursuant to her conviction of Theft of Property, a Class A Misdemeanor, is hereby sentenced to a term of one (1) year in the Iron County Jail.

IT IS FURTHER ORDERED that the Defendant, ROBYN LYNN MILLER, pay a fine in the sum and amount of two thousand five hundred dollars ($2,500), plus an eighty-five percent (85%) surcharge for, for her conviction of the offense(s).

STAY OF EXECUTION OF SENTENCE

IT IS HEREBY ORDERED that the execution of the terms of imprisonment imposed and the fines imposed in this case are hereby stayed, pending the Defendant's strict adherence to and compliance with the following terms and conditions of probation.

ORDER OF PROBATION

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, ROBYN LYNN MILLER is hereby placed on supervised probation for a period of thirty-six (36) months, to strictly comply with the following terms, provisions, and conditions:

1. The Defendant shall forthwith make and execute a formal agreement provided by the Utah Department of Adult Probation and Parole, and during the period of probation set forth herein, shall strictly conform with all the terms, provisions, and conditions, and the same are hereby made a part of this Order by means of incorporation.

2. That the Defendant shall report as ordered and required by the Court and the department of Adult Probation and Parole during the period of this probation.

3. That the Defendant shall commit no law violations.

4. That the Defendant shall obtain a mental health evaluation and enter, complete, and pay for any recommended treatment as a result of that evaluation.

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5. That the Defendant shall pay restitution in the amount of eight hundred and fifty-nine dollars and six cents. ($859.06). However, the execution of said restitution is stayed for a period of six (6) months.

6. That the Defendant shall serve six (6) months in the Iron County Jail. The Defendant may have work release. Defendant is ordered to report to jail on December 10, 2003, by 10 a.m.

7. That the Defendant shall reimburse Iron County two hundred dollars ($200) for the services of the Public Defender.

8. That the Defendant shall pay a fine in the amount of one thousand two hundred and fifty dollars ($1,250), plus a twenty-five dollar ($25) Court Security Fee.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, ROBYN LYNN MILLER, and deliver her to the Iron County Jail in Cedar City, Utah, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment.

DATED this 2nd day of ~~November~~ December, 2003.

BY THE COURT:

J. Philip Eves

J. Philip Eves
District Court Judge

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CERTIFICATE

STATE OF UTAH)
:ss.
COUNTY OF IRON)

I, CAROLYN BULLOCH, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true and exact copy of the original Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment in the case entitled State of Utah vs. ROBYN LYNN MILLER, Criminal No. 021501335, now on file and of record in my office.

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this 2 day of ~~November~~ Dec, 2003.

CAROLYN BULLOCH
CAROLYN BULLOCH
District Court Clerk

(S E A L)

By: _____
Deputy District Court Clerk

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Exhibit B

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FILED

AUG 23 2001

5th DISTRICT COURT
IRON COUNTY
DEPUTY CLERK

THE PARK FIRM, P.C.
JAMES M. PARK (5408)
141 North Main, Suite 200
P.O. Box 765
Cedar City, UT 84720
Telephone: (435) 586-6532

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

ROBYN L. MILLER,	)	
	)	**AMENDED**
Petitioner,	)	**ORDER MODIFYING**
	)	**DECREE OF DIVORCE**
vs.	)	
	)	
ANDREW L. MILLER,	)	Civil No. 914900110
	)	Judge J. Philip Eves
Respondent.	)	

The above-referenced matter came on regularly for Pretrial, pursuant to notice, on Monday, November 6, 2000 before the Honorable J. Philip Eves, District Judge. Respondent was present and represented by Floyd W Holm. Petitioner was also present and represented by James M. Park, ***THE PARK FIRM, P.C.***. The parties entered into a Stipulation in open court and on the record. Based upon the Stipulation of the parties and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Decree of Divorce in the above-referenced matter be, and the same is, modified as follows:

1. Respondent shall pay to Petitioner as and for child support the sum of $590.00 per month, effective November 1, 1998, which child support shall continue until each child reaches

DEFENDANT'S EXHIBIT NO. D-13 FOR IDENTIFICATION

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the age of 18 or graduates from high school with her regular graduating class, whichever shall first occur. Such child support shall be subject to modification when each child reaches majority and in accordance with then existing Utah Child Support Guidelines. Should the Respondent be unemployed or incarcerated, all funds which Respondent receives from the VA should be sent directly to Petition for child support.

2. Both parties shall be required to keep and maintain health, dental and optical insurance for the benefit of the minor children when such is available at reasonable cost. All other expenses, past and present, including Sylvan Learning Center, shall be split equally between the parties. The total cost through August 1, 2001 for the Sylvan Learning Center, Southwest Center, and Orthodontic expenses is $11,360.00 and/or the Respondent's share totals $5,680.00.

3. To obtain appropriate health insurance, Respondent shall supply Petitioner with a completed application for insurance coverage through the Veterans Administration and Respondent shall have seven (7) days to get said insurance activated.

4. Respondent shall be entitled to take credit for ½ of any health insurance premiums he must pay for the exclusive benefit of the parties minor children and the same may be credited against his child support obligation.

5. Respondent shall be entitled to visitation of the minor children of the parties subject to the following terms and conditions:

(A) Respondent shall immediately enroll in a parenting course through an appropriate provider;

(B) Pending completion of the parenting course, Respondent shall be entitled

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to visitation of the minor children every other Saturday from noon until 6:00 p.m. Commencing Saturday, November 11, 2000;

(C) Petitioner shall do everything possible to encourage visits by the minor children with Respondent but, because of the age of the children, they shall have the ultimate decision as to whether visits shall occur;

(D) Upon completion of the parenting course, visitation shall be expanded upon the agreement of the parties. If the parties are unable to agree upon such expanded visitation, then either party may request a hearing before the court to further set a visitation schedule.

6. Neither party shall make or cause any other person to make derogatory statements about the other in the presence of the children.

7. As long as the parties minor child Tristan is attending the Sylvan Learning Center, both parties shall share equally any and all travel expenses related to transporting the parties minor child to St. George to attend said Learning Center.

8. Except as modified herein above, the Decree of Divorce previously entered by the Court shall remain in full force and effect.

DATED this 30th day of August, 2001.

J. Philip Eves

J. PHILIP EVES

STATE OF UTAH)
COUNTY OF IRON) ss

I, the undersigned Clerk of the FIFTH DISTRICT COURT, certify that this document is a true copy of the original document on file in the clerk's office.

(WITNESS) my hand and seal of the court on this date: 9-25-03

Victor Palmer

Clerk of Court of Deputy Clerk

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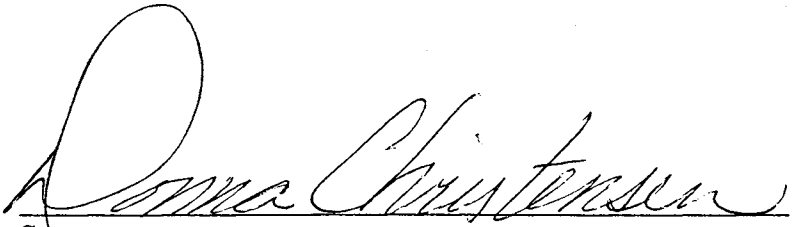
MAILING CERTIFICATE

I do hereby certify that on the 15 day of August, 2001, a true and correct **unsigned** copy of the foregoing was mailed, first class, postage prepaid to:

Mr. Floyd W Holm
Attorney At Law
392 East 6400 South
Salt Lake City, UT 84107



Secretary

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CERTIFICATE OF MAILING

I hereby certify that on the _____ day of _____, 20____, I did mailed a true and correct photocopy of the BRIEF OF APPELLANT MILLER, by way of U.S. mail, postage fully prepaid, thereon, to the following:

SCOTT GARRETT
IRON COUNTY ATTORNEY
97 North Main Street, Suite 1
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Salt Lake City, Utah 84114

COURT OF APPEALS
450 South State Street, Suite 500
Post Office Box 140230
Salt Lake City, UT 84114-0230

ROBYN LYNN MILLER
P.O. Box 254
Cedar City, UT 84721-0254

_____
LAURA LEE,
Legal Secretary

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