

1993

Utah v. Larsen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

930286

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STATE OF UTAH, :
Plaintiff\Appellee : Case No. 930286-CA
v. :
C. DEAN LARSEN, : Priority No. 2
Defendant\Appellant :

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BRIEF OF APPELLANT

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Appeal from a judgment entered upon a jury verdict
convicting Defendant of one count of Theft; and appeal
from the denial of Defendant's Motion for New Trial, by
the Honorable Michael R. Murphy, Third District Court Judge

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FILED
Utah Court of Appeals

SEP 8 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff\Appellee	:	Case No. 930286-CA
v.	:	
C. DEAN LARSEN,	:	Priority No. 2
Defendant\Appellant	:	

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals from a jury verdict convicting him of the crime of Theft in the above-entitled matter in a trial held December 4 - 14, 1990. Defendant also appeals from the judgment entered on said jury verdict, as well as the denial of his Motion for New Trial in this case entered by the Honorable Michael R. Murphy, Third District Judge, on April 27, 1993.

This Court has jurisdiction to hear this appeal pursuant to U.C.A. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the trial judge erroneously fail to grant the Defendant's Motion to Reduce Judge Leonard H. Russon's Order Granting New Trial to Writing? The trial court's decision is reviewed under a legal correctness standard, with no deference given to the trial court's determination. State v. Ramirez, 817 P.2d 774 (Utah 1991).

2. Were certain instructions given to the jury by the trial judge erroneous? The issue is reviewed for legal correctness since failure to properly instruct the jury in a criminal case can constitute reversible error as a matter of law. State v. Jones, 823 P.2d 1059 (Utah 1991); State v. Roberts, 711 P.2d 235 (Utah 1985).

3. Did the trial court err by failing to give certain specific instructions requested by Defendant? The standard of review is the same as in Paragraph 2 above.

4. Did the trial court err by allowing the State to impeach the Defendant through the use of his prior convictions entered on eighteen counts of Securities Fraud? Whether a piece of evidence is admissible is a question of law and an appellate court always reviews questions of law under a legal correctness standard.

State v. Ramirez, 817 P.2d 774 (Utah 1991).

5. Did the trial court err by allowing State's witness John Baldwin to testify concerning an investigation of Granada, Inc. for unregistered securities violations? The same standard outlined in Paragraph 4 above applies to this issue.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes or rules pertinent to the resolution of the issues presented on appeal are contained in the body of this brief.

STATEMENT OF THE CASE

After Defendant was convicted of the crime of Theft in the above-entitled matter by a jury in a trial held December 4-14, 1990, the Honorable Leonard H. Russon, the trial judge in the matter, subsequently granted a Motion in Arrest of Judgment, set aside the jury verdict, and granted a Judgment of Acquittal in the case. It should be noted that Judge Russon also ruled he would have granted a new trial had he not granted the Judgment of Acquittal (R. 1619 p. 110).

Subsequently, Judge Russon was appointed to fill a position on the Utah Court of Appeals and the Honorable Michael R. Murphy was appointed to take his place in this matter.

On October 20, 1992, Defendant made a "Motion to Reduce Judge Leonard H. Russon's Order Granting New Trial to Writing." Defendant also filed a "Motion for New Trial on Theft Conviction" on February 12, 1993.

All of Defendant's post-judgment motions were denied on April 27, 1993 by the Honorable Michael R. Murphy.

STATEMENT OF FACTS

1. In 1979 a limited partnership called "Three Crowns, Ltd.", was formed for the purpose of acquiring an existing mobile home park in Las Vegas, Nevada. Three individuals, one of which was Defendant, originally created the partnership and served as general partners. These individuals sold limited partnership interests to several investors (R. 2056 pp. 106-108, 124-27). The Three Crowns Mobile Home Park was managed by an independent property manager until 1985 when a Utah corporation, Granada, Inc., assumed direct property management responsibility. Defendant was a part owner and president of Granada, Inc. The limited partners included Defendant, his brother, and later by substitution, Defendant's wife (R. 2056 pp. 106-108, 129-130, 193). The limited partners also included the four individuals named in the Amended Information charging Defendant with theft. Granada, Inc., became the acting general partner in approximately 1980 (R. 2056 pp. 127-130).

2. From 1979 through October of 1986, this partnership owned and operated the Three Crowns Mobile Home Park. Some net profits were earned by the park from 1980 through 1986 (R. 2056

pp. 131-132; R. 2058 pp. 65-67). From time to time, these funds were loaned by Granada, Inc., the managing general partner of the partnership, at interest through a Granada account pending repayment and distribution to the limited partners (R. 2056 pp. 132-137, 182). The purpose of these periodic loans was to provide additional income to the partnership and to increase the investment returned to the partners (R. 2056 p. 133; R. 2058 pp. 114-117). These funds were normally loaned through the Granada Interoffice account (GIOA) or to other related borrowers because such accounts provided a higher interest rate and a better return to the partners than other commercial lending sources (R. 2056 pp. 133, 168; R. 2058 pp. 114-117).

3. In late 1985, the executive management committee at Granada, Inc., approved the sale of the Three Crowns Mobile Home Park, along with other property either owned by Granada or other separate partnerships (R. 2056 pp. 139-141; R. 2058 pp. 93-94). The sale of Granada properties was normally handled by either Keith Sorenson, a Granada officer and director, or Defendant who were assisted by other executives. Normally the executive committee, as a body, did not participate directly in the sale of properties. These responsibilities were delegated (R. 2056 pp. 151-152; R. 2058 pp. 123-124).

4. After reviewing and negotiating several offers over a period of eight to ten months, the Three Crowns Mobile Home Park was finally sold in October, 1986 providing net sales proceeds of \$838,000.00 plus Granada's share of the sales commission (R. 2056

pp. 149, 167). Defendant and one of the Granada project executives, Kim Heaton, travelled together to Las Vegas and participated in the closing at the Nevada Title Company (R. 2056 pp. 38-40, 150-151; R. 2061 pp. 2-6). After the closing and return to Salt Lake City, the \$838,000.00 of net sales proceeds, plus Granada's commission (\$235,000.00) were deposited in the Three Crowns partnership account.

The majority of these funds (less certain operating expenses) was then loaned at interest through the Granada Inter-office Account (GIOA) pending the resolution of some serious gas line leaks in the mobile home park and the resolution of certain liability claims against the park (R. 2056 pp. 33-36, 44, 168-170). The GIOA account then placed these funds in other interest-bearing accounts or loaned the funds to other borrowers (R. 2056 pp. 178-179).

5. Defendant testified at trial that it was always his intent, and the intent of Granada, Inc., and others to assure repayment of these funds with interest from the partnerships and/or other Granada sources. The sales proceeds advanced from the Three Crowns Partnership through the GIOA were loaned and documented in the same manner as other Three Crowns monies which had been previously loaned to other projects and subsequently repaid (R. 2056 pp. 132-137).

6. Defendant testified that at the time the sales proceeds in question were loaned from the Three Crowns Partnership through the GIOA, he believed Granada, Inc. was financially able to

assure the repayments of the loans (R. 2056 pp. 180-181).

Indeed, Lamar Hatch, the comptroller of Granada, and all other executives of Granada who testified at the trial (Wayne Jensen, Steve Apple, and Dick Miller) all stated they believed in the financial stability of Granada until approximately January of 1987, three months after sale of Three Crowns Mobile Home Park (R. 2056 pp. 115-118; R. 2058 pp. 121-122).

7. At that time, a re-evaluation of the company's assets was performed at the direction of Defendant in order to determine the source and solution of the cash flow problems the company had been experiencing since mid-1986 (R. 2056 pp. 115-118; R. 2058 pp. 65-67). Defendant testified that he was shocked to learn in January, 1987 that Granada might not have sufficient assets to insure repayment of both the Three Crowns Partnership loans which had been made in October of 1986 (R. 2056 p. 118) and other loans.

8. Defendant and others testified that the option of Granada repaying the loan was further severely impaired a month later when the State of Utah forced Granada to file for Chapter 11 Reorganization in Bankruptcy (R. 2056 pp. 123, 196; R. 2061 pp. 17-25).

9. Notwithstanding these severe problems which were compounded by the State of Utah's actions, Defendant was able to pay in full two of the Three Crowns Limited partners (not related to Defendant), and arrange an exchange of a third partners' interest for another asset (R. 2056 pp. 193-196).

10. Defendant advised Ned Gregerson, a limited partner, of the sale at the time it occurred, and also advised him that partnership funds would be distributed to the limited partners (R. 2056 pp. 164-167; R. 2061 p. 53). All parties, including Defendant, were probably overly optimistic as to how soon this distribution could occur (R. 2056 pp. 160-161, 167; R. 2061 pp. 53-55). However, the proceeds from the sale of the Three Crowns Mobile Home Park could not be distributed until the managing general partner was satisfied that all liability claims, or the potential for serious claims, from the leaking gas lines in the mobile home park had been resolved (R. 2056 pp. 155-161). This took longer than anticipated, and as a result no immediate distributions were made.

11. Defendant openly advised Ned Gregerson, Robert Nelson and Neal Mortensen of the sale or pending sale of the Three Crowns Mobile Home Park and of his intent to either make distribution or reinvestment of their net sales proceeds as soon as it was prudent and reasonable to take such action (R. 2056 pp. 164-167; R. 2057, pp. 36-37; R. 2061 pp. 53-55, 62, 74-78). Further, Defendant arranged with Neal Mortensen for the donation of part of his sales proceeds (R. 2057 pp. 37-40). It was Defendant's intent that these donations be completed.

12. But for the intervention of the State, Defendant believed all these distributions would have been completed as intended (R. 2056 pp. 120-122, 180-187, 196). It was not until January, 1987 that anyone at Granada, including Defendant, had

any understanding that the company might be in a negative equity position of some 3 to 5 million dollars (2056 pp. 114-118; R. 2058 pp. 69-72). Even then a workout plan was developed by the executive and workout committees which would have addressed this negative equity position and Granada's financial challenges (R. 2056 pp. 120-122; R. 2061 pp. 17-22). All the executives who knew and understood the business thought the workout plan would succeed. The worst scenario occurred when the State forced Granada into a Chapter 11 Bankruptcy (R. 2056 pp. 123, 196; R. 2061 pp. 22-25). As a result, the Three Crowns Partnership was forced to file a separate civil lawsuit against the Granada trustee in bankruptcy claiming that Three Crowns should receive a preferential payback (R. 2056 pp. 190-191).

13. Defendant requested that John Chamberlain, a limited partner who had knowledge of mobile home parks, provide Granada and Defendant with information and references on any potential buyers. During the summer of 1986, Mr. Chamberlain referred two potential buyers to Defendant, neither of which materialized (R. 2056 pp. 145-149). Mr. Chamberlain was advised when he contacted Defendant (after the closing in October, 1986), that the property had been sold (R. 2056 p. 147). However, his share of the sales proceeds were not disbursed to him in December, 1986 because of the potential liability claims from the hazardous gas lines (R. 2056 pp. 155-160). At Mr. Chamberlain's request, he subsequently received, through an exchange, an interest in another mobile home park which Defendant believed had a higher value than the inter-

est held by John Chamberlain in Three Crowns. Thus, through the exchange, Chamberlain received his full disbursement "in kind" from the Three Crown Partnership (R. 2056 pp. 193-195). The other partners named in the Information have not yet received their distribution although two other non-related partners have through the efforts of the Defendant received their distribution in full. All family related partners are still awaiting their distribution.

14. At the time of the sale it had not been determined whether the partnership would engage or invest in other ventures as allowed in Paragraph 2.2 of the Certificate Agreement of Limited Partnerships. Defendant testified that it was generally understood that some of the partners would reinvest part or all of the their proceeds from the sale of the Three Crowns Mobile Home Park in other Granada partnerships at such time as proceeds were distributed (Exhibit 1-P, R. 2056 p. 200).

15. It was Defendant's intent to provide distribution of sales proceeds to those partners who were not reinvesting their funds when the gas line problems with the mobile home park and liability claims had been resolved, and other closing costs paid; but such distributions would not take place until those contingencies were resolved (R. 2056 pp. 187-188, 207-208). A majority of the partnership interests were owned by the Defendant, his family, and their direct associates.

16. Defendant was convicted of the crime of Theft in the above-entitled matter by a jury in a trial held December 4 through December 14, 1990.

17. The Honorable Leonard H. Russon subsequently granted a Motion in Arrest of Judgment, set aside the jury verdict, and granted a judgment of acquittal in the case. Subsequently still, Judge Russon's decision was reversed by the Utah Court of Appeals and the matter remanded for reinstatement of the jury verdict and sentencing.

18. On January 25, 1993, the Honorable Michael R. Murphy entered an Order sentencing the Defendant to the indeterminate term of one to fifteen years in the Utah State Prison for the second degree felony offense of Theft. Judge Murphy granted Defendant a stay of the prison sentence and placed him on probation under the supervision of the Utah Department of Adult Probation and Parole for a period of thirty-six months. Among the conditions of probation required by the Court were that the Defendant serve six months in the Salt Lake County Jail, which he commenced serving May 10, 1993 after the denial by Judge Murphy of his Motion for Certificate of Probable Cause. Defendant was also ordered to pay restitution in an amount to be determined by the Adult Probation and Parole Department.

SUMMARY OF ARGUMENT

It is the position of Defendant that the Honorable Michael R. Murphy erred by not entering a written order reducing Judge Leonard H. Russon's oral order for a new trial to writing as

requested by Defendant. Defendant argues that Judge Murphy in effect overruled the trial judge, a co-equal in this situation, in not entering an order granting a new trial.

Defendant also argues that the trial judge should not have given certain instructions to the jury because said instructions were erroneous and mislead the jury. Among those instructions were the elements instruction of the case and an instruction stating that the formation of criminal intent in a theft case could occur at any time and did not have to occur at the time Defendant exercised unauthorized control over the property. Defendant argues that the intention to steal must have existed at the time of the taking and no subsequent felonious intent suffices to carry the State's burden of proving theft.

Furthermore, Defendant argues that the trial court erred by failing to give specific instructions requested by Defendant regarding the nature of the law as to limited partnerships in the State of Utah; the time of forming intent in a theft case; and a good faith instruction, all of which were requested by Defendant.

Defendant also argues that the trial court erred by allowing the State to impeach him through the use of his prior convictions entered on eighteen counts of Securities Fraud. Defendant argues that under the circumstances of this case, the Court had discretion to exclude the prior convictions despite the trial judge's rulings. Defendant also argues that the court should have excluded his prior convictions under the circumstances of this case because those convictions are presently on appeal. The Utah

Supreme Court granted a Writ of Certiorari to review Defendant's convictions on eighteen counts of Securities Fraud and that review is presently pending. Defendant also argues that his prior convictions for Securities Fraud do not necessarily involve dishonesty or false statement and therefore should not have been admitted by the trial court as impeachment of his testimony.

Defendant further argues that the trial judge erred by allowing the State's witness John Baldwin to testify concerning an investigation of Granada, Inc. for unregistered securities violations. The subject matter of the instant theft charge against the Defendant involved a limited partnership called Three Crowns, but the State's witness was allowed to testify about an investigation of a real estate entity called Granada, Inc. which investigation had little or no relationship to the Three Crowns Limited Partnership.

ARGUMENT

POINT I

THE HONORABLE MICHAEL R. MURPHY ERRONEOUSLY FAILED TO GRANT DEFENDANT'S "MOTION TO REDUCE JUDGE LEONARD H. RUSSON'S ORDER GRANTING NEW TRIAL TO WRITING"

Although Defendant was convicted by a jury of the crime of Theft in a trial held December 4 through December 14, 1990, the Honorable Leonard H. Russon, the trial judge, set aside the jury verdict, arrested judgment, and further granted a judgment of acquittal in the case. The State appealed and caused much delay in the situation as a result of its appeal. Although the Utah Court of Appeals reversed Judge Russon's decision and ordered the

jury verdict reinstated and the Defendant sentenced on the charge of Theft, another fact needs to be considered carefully by the Court of Appeals. The Honorable Leonard H. Russon ruled on the record that had he not set aside the jury verdict and arrested judgment and granted a judgment of acquittal in the case, he would have granted a new trial (R. 1609 p. 110, Add. 1).

As can be readily seen from page 110 of the transcript of Motions, Judge Russon ruled:

. . . But in addition to that, I do make the following finding that in addition to that, if my ruling had been otherwise, I would have granted a new trial because I don't think the instruction clearly outlined that intent as is necessary in the element instructions. I think you can do something with a purpose, but I am not sure that that constitutes intent as required by the statute and defined earlier in the statute of a specific intent to deprive
. . .

(R. 1609, p. 110; Add. 1).

Defendant filed in the lower court a "Motion to Reduce Judge Leonard H. Russon's Order Granting a New Trial to Writing" (R. 2210-2220; Add. 2). However, Judge Murphy (who was appointed to the case when Judge Russon was appointed to the Court of Appeals) subsequently denied the Motion and stated that the aforementioned statements of Judge Russon were merely "musings on the record" and did not constitute a ruling, despite what Judge Russon had held (R. 2844).

This issue becomes extremely relevant when one considers that the Defendant raised numerous substantive issues in his Motion for New Trial before the Honorable Michael R. Murphy, all

of which were not considered by Judge Murphy to be "substantial enough to result in reversal, an order for new trial, etc.". Yet this was not the opinion of Judge Russon.

It is Defendant Larsen's position that even though Judge Russon's ruling granting the motion for new trial was not reduced to writing, it still constitutes a valid order of the Third District Court and cannot be ignored. The comments of Judge Russon make clear that he was indeed making a "finding" and a "ruling". These were not simple musings on the record by Judge Russon, but clear determinations that he was issuing an order granting a new trial and urging the State to appeal such order for new trial simultaneously with their appeal of the issue of his arrest of judgment and judgment of acquittal. It is an undisputed fact that the State chose not to appeal Judge Russon's order granting a new trial.

The State also chose not to reduce Judge Russon's order granting a new trial to writing, presumably because it did not intend to accept his invitation to appeal the ruling. Defendant Larsen and his attorney were instructed to reduce the order arresting judgment and granting judgment of acquittal to writing, but Defendant was not instructed to reduce the order granting a new trial to writing. It is Defendant Larsen's position that the trial court should have simply reduced Judge Russon's oral ruling to writing and entered the order for a new trial, allowing the State to take its appeal if it chose to do so.

Rule 30 of the Utah Rules of Criminal Procedure entitled "Errors and Defects" states as follows:

- (a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.
- (b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

It is Defendant Larsen's position that the Court should impose the standards of Rule 30 and simply enter a written order, which was not entered previously due to oversight or omission, since this Court may correct such oversight or omission at any time.

In the Utah Supreme Court case of State v. Kelsey, 532 P.2d 1001 (1975), Justice Crockett, writing for a unanimous court (with two separate concurring opinions) dealt with a case in which the Honorable D. Frank Wilkins had heard a criminal case in a bench trial. Judge Wilkins placed an oral statement into the record regarding what he intended to do with regard to the judgment and verdict in the case, ". . . (h)owever, he resigned before written findings of fact and conclusions of law were made and placed in the file. . .". In reviewing Rule 63(a), U.R.C.P., the Court held that the term "other disability" involved a judge who resigned from the bench before he could complete his duties. The Court held:

Inasmuch as the stated findings and verdict of Judge Wilkins at the conclusion of the trial were sufficient to meet the requirements of Rule 52, U.R.C.P., there could be no question

about the authority or propriety of the successor judge to make and sign formal findings of fact and conclusions of law which were consistent with the findings and verdict of the judge who actually tried the case. (Emphasis supplied).

532 P.2d at 1006.

It is the position of Defendant that this case stands as precedent for the situation presently being reviewed by this Court. Since Judge Russon clearly made a "finding" and a "ruling" orally from the bench, the mere fact that he resigned and left the bench before entering a written order did not give Judge Murphy carte blanche authority to overrule Judge Russon's "ruling" and enter a different ruling. In fact, Defendant would argue that it is error under the Kelsey case for Judge Murphy to have done so.

Judge Murphy should have been bound by the "law of the case" doctrine pronounced in several Utah cases, both civil and criminal. As pointed out by the Utah Supreme Court in the case of State of Utah v. Lamper, 779 P.2d 1125 (1989), "(T)he general rule is that one judge may not redetermine a previous ruling made by another judge in the same case. E.g., Sittner v. Bighorn Tar Sands and Oil, Inc., 692 P.2d 735, 736 (Utah 1984); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 44-45 (Utah Ct.App. 1988) . . . ". 779 P.2d at 1129. Although the Court in Lamper found that if relevant circumstances had changed in the intervening period, the second judge may then re-examine the earlier ruling, the Court cited the example in that case of a change in the governing law. In the instant case, there have

been no relevant circumstances which have changed in the intervening period. In fact, Judge Murphy was at a significant disadvantage in attempting to decide a motion for new trial in this matter, since his Honor did not hear the trial involved in this case. This circumstance is extremely significant.

In State v. Saunders, 699 P.2d 738 (Utah 1985), the Utah Supreme Court considered the very circumstances of the instant case. In Saunders, the Utah Supreme Court reversed and remanded convictions for burglary, theft, possession of a firearm by a restricted person, and being an habitual criminal, where a judge presiding at trial granted a motion for severance of charges which had been denied during pretrial proceedings by a different judge. Writing for a unanimous Court, Chief Justice Hall held:

. . . (W)here the judge presiding at trial is different from the one who denied the pretrial motion, as was the case here, to grant the same motion at trial, absent a change in the facts relevant to ruling on the motion, would be to overrule a co-equal. This would be improper. (Sittner v. Bighorn Tar Sands and Oil, Inc., Utah, 692 P.2d 735 (1984)).

699 P.2d at 740.

While the circumstances are a little different in the sense that the lower court in the instant case was not dealing with a pretrial motion granted by a co-equal judge, the court was dealing with a post-trial motion granted by Judge Russon, ordering a new trial for Defendant Larsen as an alternative to the motion in arrest of judgment. The Honorable Judge Murphy should have been expressly prohibited by the "law of the case" doctrine from overruling Judge Russon's decision.

It is the position of Defendant Larsen that the Honorable Michael R. Murphy simply did not have the authority to overrule the order granting a new trial issued by his co-equal, the Honorable Leonard H. Russon. Furthermore, it is Defendant's position that Judge Russon was very clear and stated he was making a "finding" and "ruling," and was not simply having a discussion on the record with counsel. Therefore, it was prejudicial error for Judge Murphy to have overruled Judge Russon; and Judge Murphy's order denying Defendant Larsen a new trial should be reversed, and a new trial granted.

POINT II

CERTAIN INSTRUCTIONS GIVEN TO THE JURY WERE ERRONEOUS AND CONSTITUTED REVERSIBLE ERROR

The Utah Supreme Court in State v. Jones, 823 P.2d 1059 (Utah 1991), held that, "[A]n accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error as a matter of law." 823 P.2d at 1061 (citing State v. Roberts, 711 P.2d 235 (Utah 1985)).

A. Instruction No. 22 was erroneous.

It is Defendant's position that the Court erred in giving Instruction No. 22 which states as follows:

In order to convict the Defendant of the charged offense, you must find that he exercised unauthorized control over the property of another while acting with a specific intent or purpose to deprive the other person of his/her property, as defined in these instructions. It is not necessary that you find that the Defendant formed such specific intent or purpose to deprive at the time he first obtained control over the property of another, but such a purpose to deprive may be found at any period of

time in which the Defendant exercised unauthorized control over such property. (Emphasis added).

R. 1862.

Since Instruction No. 22 states that intent could be found at any time, Defendant maintains the jury was erroneously instructed.

The intention to steal must have existed at the time of the taking and no subsequent felonious intent suffices to carry the State's burden of proving theft, in the opinion of the Defendant. See State v. Shonka, 279 P.2d 711, 713 (Utah 1955) (citing People v. Miller, 11 P. 514 (Utah 1886); State v. Allen, 189 P. 84 (Utah 1920)). See also, State v. Noren, 704 P.2d 568 (Utah 1985).

Therefore, Instruction No. 22 is an erroneous statement of the law and the giving of that instruction constitutes reversible error as it relates to the issue of the Defendant's intent.

It should be reiterated here that the Honorable Leonard H. Russon, in reviewing Defendant's prior Motion in Arrest of Judgment or in the Alternative Motion for New Trial, noted that had he not granted the Motion in Arrest of Judgment, he would have granted a new trial in that he believed that the jury was not properly instructed as to the intent element of the offense before the Court in this case (See Point I, infra). Judge Russon stated, "[b]ut in addition to that, I do make the following finding that in addition to that, if my ruling had been otherwise, I would have granted a new trial because I don't think the instruction clearly outlined that intent as is necessary in the

element instructions. I think you can do something with a purpose but I am not sure that that constitutes intent as required by the statute and defined earlier in the statute of a specific intent to deprive" (R. 1619, p. 110; Add 1). The Utah Supreme Court in State v. Laine, 618 P.2d 33 (1980) held that failure to include the element of intent in the element instruction in a theft by deception case constituted reversible error, and this may have been the basis for Judge Russon's ruling granting the Defendant a new trial.

B. The State failed to prove Defendant Larsen exercised unauthorized control over the property of the four individuals named in Instruction No. 23

It is the position of Defendant Larsen that there was insufficient evidence to show that he exercised unauthorized control over the property of the four individuals named in the Information and Jury Instruction No. 23 (the elements instruction, R. 1863). Instruction No. 23 provided:

Before you can convict the defendant of the crime of THEFT, as alleged in the Information, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime: (1) That the defendant exercised unauthorized control; (2) over the property of John Chamberlain, Ned Gregerson, Robert Nelson or Neal Mortensen; (3) with a purpose to deprive them thereof; (4) on or about October 10, 1986; (5) in Salt Lake County, State of Utah; (6) and, that the value of said property exceeded \$1,000.00.

If you believe that the evidence establishes each and all of the foregoing elements beyond a reasonable doubt, it is your duty to find the defendant guilty of THEFT.

On the other hand, if the evidence has failed to establish one or more of the foregoing

elements beyond a reasonable doubt, it is your duty to find the defendant not guilty of THEFT. (Emphasis added).

Limited partnership law is very clear that at the time the theft in the instant case is alleged to have occurred, none of the four individuals named in Instruction No. 23 (i.e., John Chamberlain, Ned Gregerson, Robert Nelson or Neal Mortensen) owned any of the partnership property. In fact, U.C.A. § 48-2a-606 of Utah's Limited Partnership Act provides:

At the time a partner becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

While this specific statute did not become effective until 1990, Defendant maintains that the entire scheme of the Limited Partnership Act prior to (as well as after) its amendment has been to provide that a limited partner, at the time he becomes entitled to receive a distribution, has all the remedies available to a creditor of the limited partnership with respect to the distribution. The specific enactment of U.C.A. § 48-2a-606 effective in 1990 merely codified and clarified that philosophy, which has permeated the entire Utah Limited Partnership Act from its inception; and is patterned after the Uniform Limited Partnership Act.

In addition, U.C.A. § 48-2-22, in effect at the time of the alleged theft in this case, provided that a creditor of a limited partner may charge only the interest of the indebted limited partner with payment of any unsatisfied claim. The statute

specifically states, "The interest may be redeemed with the separate property of any General Partner, but may not be redeemed with partnership property." This statute establishes clearly that a limited partner has no right to, nor interest in, specific partnership property until an actual distribution occurs.

One of the grounds for the Motion to Dismiss made by the Defendant at the end of the State's case, and later the Motion for Directed Verdict made by the Defendant at the end of all the evidence and prior to submission to the jury, was that the State had failed to present prima facie evidence, or any kind of evidence, that the Defendant "[o]btain(ed) or exercise(d) unauthorized control over the property of John Chamberlain, Ned Gregerson, Robert Nelson, Neal Mortensen, and others with a purpose to deprive them thereof . . ." as alleged in the Amended Information.

Furthermore, Defendant requested certain jury instructions at trial as set forth in Point III infra which were denied but which would have clarified the status of partnership property and the limited partner's relationship to the partnership property. These instructions were essential statements of the law and would have demonstrated that the evidence was insufficient to support a verdict of guilty.

It is very clear that if the alleged limited partner victims in the instant case had a grievance with the manner in which the Defendant handled the funds from the sale of the Mobile Home Park in Las Vegas, they had the same right that any creditor of the

limited partnership would have under Utah law to bring a civil action against the General Partner.

In Wall Inv. Co. v. Garden Gate Distributing, 593 P.2d 542 (Utah 1979) the Utah Supreme Court held: "Limited partnerships were unknown to the common law and are, like corporations, creatures of statute . . . Moreover there is a specific legislative recognition that a limited partnership as an entity distinct from its partners, can bring suit." 593 P.2d at 544.

Partnership law uniformly holds that limited partners do not have any ownership interest in assets or property of the partnership. Maxco, Inc. v. Volpe, 274 S.E.2d 561 (Ga. 1981); Wroblewski v. Brucker, 550 F.Supp. 742 (W.D.Okla. 1982); Bossier v. Lovell, 410 So.2d 821 (La. 1982); Central Allied Profit Sharing Trust v. Bailey, 759 P.2d 849 (Colo. 1988); Cramer v. McDonald, 396 N.E.2d 504 (Ill. 1979). The Utah Limited Partnership Act is to be construed to effectuate its general purpose and make Utah's law uniform with other states. U.C.A. § 48-2a-1001.

The Amended Information filed in this case alleged that the Defendant "[o]btain(ed) or exercise(d) unauthorized control over the property of John Chamberlain, Ned Gregerson, Robert Nelson, Neal Mortensen, and others with a purpose to deprive them thereof. . . ." (R. 1729). However, the property that they were allegedly deprived of, a portion of the \$838,000.00 proceeds from the sale of the Mobile Home Park, was property of the partnership itself, and not the property of the individual partners. Therefore, the State's evidence at trial failed to prove the allega-

tion in the Amended Information, i.e., that the property of individuals was "stolen" from those individuals.

This argument becomes particularly significant when it is noted that in Paragraph 2.2 of the Certificate and Agreement of Limited Partnership for Three Crowns, Ltd., the partnership was given the authority to "engage in or possess any interest in other ventures which may or may not have similar business purposes as those set forth. . .". (R. 1689, Exhibit A attached thereto p. 2). Further, Paragraphs 8.1 and 8.2 clearly indicated that distribution of any partnership assets or proceeds was "subject to maintaining the partnership in a sound financial and cash position. . ." and "such distributions of cash or other property would be made to the limited partners only when the General Partner, in his absolute discretion, determines such is not needed in the operation (of the partnership), but any distribution will be made only if, in the absolute judgment and discretion of the General Partner, it will not in any way jeopardize or limit the business of the partnership." (Emphasis added) (R. 1689, Exhibit A p. 2).

Furthermore, the Partnership Agreement provides in Section 15.1 that "the General Partner shall be solely responsible for the management of the partnership business with all rights and powers generally conferred by law or necessary, advisable or consistent in connection therewith." (R. 1689, Exhibit A p. 6).

In addition to the foregoing, the Partnership Agreement in Section 15.2, Subsection P provides that among the rights and

powers to be held exclusively by the General Partner would be the power to "sell all or substantially all of the assets of the limited partnership without the consent of the limited partners." (R. 1689, Exhibit A p. 8). The General Partner, upon termination and dissolution of the partnership, is given the power under Paragraph 21.1, Subsection C to terminate and dissolve the partnership upon "(S)ale of all properties acquired by the partnership if the General Partner in its sole discretion determines there is not a compelling reason to continue the partnership." (R. 1689, Exhibit A p. 13). Also, Section 23.1 provides for a power of attorney granted by the limited partner to the General Partner concurrently with the execution of the Partnership Agreement to "take any further action which said attorney shall consider necessary or convenient in connection with any of the foregoing hereby giving said attorney full power and authority to do and perform each and every act and thing whatsoever requisite and necessary to be done in and about the foregoing as fully as said limited partner might or could do if personally present, and hereby ratifying and confirming all that said attorney shall lawfully do or cause to be done by virtue hereof." (R. 1689, Exhibit A p. 14).

The Defendant introduced at trial the Subscription Agreement of each of the named individuals in the Amended Information, and each of them did in fact provide through those Subscription Agreements the power of attorney referred to in Section 23.3 of the Partnership Agreement (R. 1689, Exhibit A p. 15).

It should therefore be readily seen by the Court, that pursuant to Utah law, a limited partner simply stands in the shoes of a normal creditor with regard to any distributions he feels he is entitled to receive at any time. Given the discretionary powers granted to the General Partner as outlined above, and the fact that no limited partner had an ownership interest in the proceeds of the sale of the Mobile Home Park in Las Vegas, the State utterly and completely failed to prove that Defendant Larsen obtained or exercised unauthorized control over the property of John Chamberlain, Ned Gregerson, Robert Nelson, Neal Mortensen, and others with a purpose to deprive them thereof.

POINT III

THE TRIAL COURT ERRED BY FAILING TO GIVE SPECIFIC INSTRUCTIONS REQUESTED BY THE DEFENDANT.

A. Instructions Re: Limited Partnerships.

It is the position of Defendant Larsen that his right to due process of law and a fair trial in the instant matter was denied under both the Utah and United States Constitutions when the Court failed to give the jury certain specific instructions. The Defendant requested jury instructions at trial as follows:

1. "At the time a limited partner becomes entitled to receive a distribution from the limited partnership, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution."

2. "Where two persons create a relationship of debtor and creditor, a failure of one of the parties to pay over money in

satisfaction of the debt does not constitute the crime of theft."

3. "A limited partner has no interest in the specific assets of the partnership by virtue of his status as a limited partner; rather he simply owns a percentage interest in the legal entity which is the limited partnership." (R. 1860).

Even though the Defendant submitted these three instructions as "Defendant's Proposed Additional Jury Instructions" on December 11, 1990, they were, for unknown reasons, excluded from the record of this case (See Affidavit of Larry R. Keller, Add. 3).

The Court refused to give the first two but did give the third to the jury, and the Defendant took appropriate exception thereto. The Court's failure to give these instructions denied the Defendant his theory of the defense and constituted reversible error per se.

As authority for the proposition that these instructions should have been provided to the jury, the Defendant cited U.C.A. § 48-2a-606 quoted verbatim for the first instruction mentioned above. Defendant cited the case of State v. Siers, 248 N.W.2d 1 (Neb. 1976) as authority for allowing the Defendant's second requested instruction. As to the third requested instruction, the Defendant cited State v. Birch, 675 P.2d 246 (C.A. Wash. 1984) and Evans v. Galardi, 546 P.2d 313 (Cal.S.Ct. 1976). The Defendant further cited U.C.A. §§ 48-2-22, 48-2-23, 48-2a-606, and 48-2a-703 as examples of Utah's partnership law which stood for the proposition outlined in Defendant's proposed third instruction mentioned above.

The failure of the Court to give all three of these jury instructions which accurately reflect Utah law regarding limited partnerships, meant that the jury had an incomplete understanding of what would have been necessary for the State to prove beyond a reasonable doubt in order for the Jury to find the Defendant guilty. The Defendant therefore was denied his right to a fair trial and he should be granted a new trial with the aforementioned instructions proposed by the Defendant given to the jury at that new trial.

B. Instruction Re: Time of Forming Intent.

Defendant Larsen requested that the Court provide the following instruction to the jury:

In order to convict the Defendant of the crime of Theft, it is necessary for you to find that the intent to steal existed at the time of the taking of the property, and no subsequent felonious intent will suffice.

Therefore, if you find that at the time the Defendant C. Dean Larsen is alleged to have obtained or exercised unauthorized control over the property of John Chamberlain, Ned Gregerson, Robert Nelson and Neal Mortensen, he did not have the intent to steal their property, no subsequent felonious intent will suffice and you must conclude that the State has failed to prove beyond a reasonable doubt the element of intent to commit the crime of Theft.

R. 1838.

The Court refused to give this instruction, and the Defendant took an exception.

The intent to steal in a theft case must have existed at the time of the taking and no subsequent felonious intent suffices to

carry the State's burden of proving Theft. People v. Miller, 4 Utah 410, 11 P. 514 (1886); State v. Allen, 56 Utah 37, 189 P. 84 (1920); see State v. Noren, 704 P.2d 568 (Utah 1985).

Defendant Larsen maintains that the failure of the Court to give this specific instruction meant that the jury did not have full information regarding the elements of the crime in this particular case. In State v. Jones, 823 P.2d 1059 (Utah 1991), the Utah Supreme Court held:

. . . The jury must be instructed with respect to all the legal elements that it must find to convict of the crime charged, and the absence of such an instruction is reversible error as a matter of law. State v. Lane, 618 P.2d at 35. In State v. Roberts, 711 P.2d 235 (Utah 1985), we stated, "The general rule is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." Id. at 239 (Utah 1985) (citing Lane, 618 P.2d at 35). See also State v. Harmon, 712 P.2d 291, 292 (Utah 1986) per curiam; State v. Reedy, 681 P.2d 1251, 1252 (Utah 1984). Thus, the failure to give this instruction can never be harmless error.

823 P.2d at 1061.

It is the position of Defendant Larsen that the Court's failure to accurately inform the jury that the intent to steal must have existed at the time of the taking of the property, and no subsequent felonious intent would suffice, means that the jury was not properly instructed as to the elements of this offense, and a reversible error of law occurred. The Court should grant a new trial in this case for this reason alone.

C. Good Faith Instruction.

The Defendant proposed the following instruction:

Good faith, as commonly used, means a belief or state of mind denoting honesty of purpose or freedom from intention to commit theft.

If the evidence in this case leaves you with a reasonable doubt whether the Defendant obtained or exercised control over the property of another in good faith, then you should find the Defendant not guilty of Theft.

R. 1842.

The Court's failure to give this instruction denied the Defendant his right to due process of law under both the Utah and the United States Constitutions.

If there is sufficient evidence to support a proposed jury instruction on any issue, the trial court has a duty to adequately instruct the jury if defendants so request. State v. Smith, 706 P.2d 1052 (Utah 1985). The trial was replete with information from numerous witnesses, including Defendant Larsen himself that the actions taken by the Defendant in dealing with the proceeds of the sale of the Three Crowns Mobile Home Park in Las Vegas, Nevada, were all undertaken in "good faith." The Defendant testified that he believed at all times that he had the authority to deal with the proceeds in the manner in which he did and that he at all times acted in good faith. Because the evidence was clear on this point, the Court should have given the good faith instruction requested by the Defendant, and its failure to do so constitutes an error of law which should result in a new trial.

POINT IV

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO IMPEACH THE DEFENDANT THROUGH THE USE OF HIS PRIOR CONVICTIONS ENTERED ON 18 COUNTS OF SECURITIES FRAUD.

- A. Under the circumstances of this case, the Court did have discretion to exclude the Defendant's prior convictions.

Prior to the trial of this matter, the Defendant made a Motion to Exclude Evidence of Prior Convictions dated November 21, 1990 (R. 1650, 1651). Defendant Larsen had been convicted of 18 counts of Securities Fraud on August 6, 1990. The trial in the instant case began on December 4, 1990. The Honorable Leonard H. Russon denied Defendant's motion and ruled that the State could ask the Defendant about his prior felony convictions if he testified in the trial, and he would be required to answer truthfully. Judge Russon also ruled that Defendant would be allowed to make the statement that his convictions were on appeal (R. 2056 p. 92).

As a matter of strategy, Defendant Larsen and his attorney recorded on the record their position that Defendant Larsen's attorney would ask Defendant Larsen about his convictions when he took the stand to testify in the case on direct examination. Defendant Larsen thus preserved his record with regard to the Motion to Exclude Evidence of Prior Convictions, since it was stated clearly for the record that defense counsel would not have asked Mr. Larsen about his convictions had the Court not denied his Motion to exclude the convictions. The State clarified on the record that it did intend to ask Mr. Larsen about his convictions, and defense counsel further clarified the fact that the

testimony of the Defendant was essential to his defense in the case (R. 2056 p. 92).

The Defendant was originally bound over by the Third Circuit Court on a single Information alleging 42 counts. The Defendant, on April 24, 1990, filed with this Court a Motion to Sever the 42 counts of the Information into five separate trials. On May 8, 1990, the Honorable Judge Russon granted the Defendant's Motion to Sever, "[f]or the reasons set forth in Defendant's Memorandum of Points and Authorities and oral argument. . .".

Despite the State's efforts to rejoin the remaining counts once the first trial involving 18 counts of Securities Fraud had occurred, Judge Russon once again ruled that the counts would remain severed as he initially had ordered on May 8, 1990.

What the Defendant did in making the Motion to Sever and resisting the State's subsequent motion to rejoin the counts, was to exercise his constitutional right under both the Utah and the United States Constitutions to due process of law. Specifically, the Defendant argued that he could not have a fair trial if all these counts had been joined together. Among the reasons argued by the Defendant (which the Court adopted as a basis for granting the Motion to Sever) was that the joining of all these unrelated charges into a single Information was an attempt on the part of the State to show the "bad character" of the Defendant. Defendant argued that such efforts would violate Rule 404 of the Utah Rules of Evidence.

When Judge Russon found in favor of the State by not excluding the prior convictions, the Court penalized the Defendant for having exercised his constitutional right to due process of law and a fair trial by requesting the severance of the counts originally contained in the Information.

The State should not have been able to have it both ways, particularly in this case which required such a strained application of the theft statute to an otherwise established business procedure. If the State would have had its way originally, there would have only been a single trial with 42 counts involved. Therefore, there would be no prior conviction situation such as exists presently for the Defendant to confront. However, having lost its efforts to combine all of those charges into a single trial, the State then argued that the trial court had absolutely no discretion about allowing the use of the 18 convictions obtained in the first trial to be used to impeach the Defendant on cross-examination in the upcoming trial.

It is to be reiterated that the Theft trial came pursuant to the exact same case number as the 18 convictions for Securities Fraud. Essentially the two trials (as well as the remaining three) were all part of the same case. Therefore, Defendant adamantly maintains that the trial court clearly had the discretion to exclude the prior Securities Fraud convictions because they were all part of the same case which was tried before the jury on December 4, 1990. Had the prior convictions in question occurred under some previous case number at some earlier time,

then the issue could be different. However, the fact that this second trial occurred pursuant to the same case number and is all part of the same case as the first trial should have prevented the Court from thinking that its discretion was so limited.

B. The Court should have excluded the Defendant's prior convictions under the circumstances of this case because the prior convictions are presently on appeal.

The Defendant appealed his judgment and sentence issued by the Court on August 6, 1990 to the Utah Court of Appeals, and said convictions were affirmed. However, the Utah Supreme Court has granted certiorari on the Securities Fraud convictions, and all parties are awaiting a final decision by the Utah Supreme Court on the allegations of lack of a fair trial argued by the Defendant with regard to those convictions (oral argument is scheduled September 9, 1993). Defendant argued to the lower court that it would have been judicially uneconomical, as well as a violation of his rights under the Utah and United States Constitutions if the Court were to allow the jury in the Theft trial to learn of the evidence of the Defendant's prior convictions, and then those prior convictions were later reversed on appeal.

Under such circumstances, the fact that the Court allowed the Defendant to be impeached by the State's presentation of evidence relating to his prior Securities Fraud convictions would necessitate a reversal of the conviction in the Theft case. It cannot possibly be considered fair and just for the Defendant to have been impeached by 18 prior felony convictions which are

later reversed on appeal. This fact alone would constitute reversible prejudicial error.

While the Defendant does admit that Rule 609(e) of the Utah Rules of Evidence provides that the pendency of an appeal does not render evidence of a conviction inadmissible, Defendant submits that under the circumstances of this individual case, which had been bifurcated into five trials under the same case number, the pendency of an appeal should render the evidence of the convictions inadmissible. Rule 609(e) was not intended to apply to such a situation.

C. Defendant's prior convictions for Securities Fraud do not necessarily involve dishonesty or false statement.

The Utah Court of Appeals, in State v. Wight, 765 P.2d 12 (Utah App. 1988), found that all crimes do not necessarily involve dishonesty or false statement under Rule 609(a)(2) of the Utah Rules of Evidence. In Wight, the Defendant had a prior conviction for aggravated robbery and the Utah Court of Appeals found that, "The crime of robbery is not necessarily one of dishonesty or false statement" and the evidence of the prior robbery conviction is not automatically admissible under 609(a)(2).

In the subsequent case of State v. Brown, 771 P.2d 1093 (Utah App. 1989), the Utah Court of Appeals held that the trial court should make some inquiry into the facts of the prior crimes to determine if dishonesty or false statement was involved, and that the crime of Theft does not necessarily involve dishonesty or false statement.

The Information alleging the 18 counts of Securities Fraud in the first trial in this case claimed that Defendant Larsen "[w]illfully made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." (Emphasis added). Since the jury in that case was given two options on each count to find the Defendant guilty, it is possible that the jury did not find there were untrue statements of material facts, but rather felt that the Defendant had omitted informing the individuals named about material facts. The Court also declined to give a specific intent instruction in that case as requested by the Defendant. Therefore, as in the Wight case and the Brown case where the Utah Court of Appeals found that the crimes of aggravated robbery and theft were not necessarily crimes of dishonesty or false statement, the crimes for which Defendant Larsen was convicted also did not necessarily involve dishonesty or false statement. Defendant Larsen submits that the Court is not bound by the mandatory requirements of U.R.E. Rule 609(a)(2) as alleged by the State, even if the Court rejected the arguments made in the first two sections of this point.

If the inquiry goes to U.R.E. Rule 609(a)(1), as provided in the Utah Supreme Court case of State v. Banner, 717 P.2d 1325 (Utah 1986), the Court must become involved in balancing the probative value of the evidence against the prejudicial effect to the Defendant. In making such a balancing test, the Court is

required to consider the following: (1) the nature of the crime, as bearing on the character for veracity of the witness; (2) the recentness or remoteness of the prior conviction. . .; (3) the similarity of the prior crime to the charged crime, insofar 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 a prosecution tried without decisive non-testimonial evidence . . .; and (5) the importance of the accused's testimony, as perhaps warranting exclusion of convictions.

Under the Banner test, the Court can see that it may have been determined that the nature of the 18 counts of Securities Fraud were such that they didn't necessarily have a bearing on the veracity of the Defendant; and even though the convictions were recent, the similarity of the prior crimes to the charged crime of Theft may lead the jury to punish the accused as a bad person, rather than decide the case on the evidence presented. Furthermore, there was no decisive, non-testimonial evidence with regard to the crime of Theft in the trial held on December 4, 1990. Rather, the State relied on a convoluted series of transactions in an effort to convince the jury that the Defendant exercised unauthorized control over the property of the named alleged victims with a purpose to deprive them of that property.

Looking at the last point of the balancing test, the accused's testimony was extremely important in light of the fact that the evidence was all circumstantial and was primarily the

result of a convoluted tracing of transactions by the State's witnesses. The intent with which the Defendant acted was essential to the case.

If all of these items are balanced, and the Court takes into consideration that the theft trial was only one more trial under the same case number with an Information which originally alleged 42 counts by the State's choice, the Court can readily see that the probative value of the admissibility of these convictions far outweighed the prejudicial effect, in that the Defendant's right to a fair trial was denied.

Because we are still dealing with the same case, Defendant believes that the Court should have been compelled to the conclusion that the prior 18 Securities Fraud convictions should not have been admitted, and the mandatory provisions of U.R.E. Rule 609(a)(2) did not apply under these circumstances. However, even if the Court determined that the mandatory provisions were applicable in this situation, the crimes with which the Defendant was previously convicted, Securities Fraud, do not automatically involve dishonesty or false statement and the Court should be allowed to proceed to the balancing test allowed under U.R.E. Rule 609(a)(1) and the reasoning of the Court in Banner. Under such a balancing test, the Court must conclude that the prior convictions should have been excluded.

The Utah Supreme Court in State v. Banner, supra, stated that "Utah's Rule 609 is the Federal rule verbatim," and advised that "Federal case law should be consulted for advice interpret-

ing the rule." Because subsection (2) of Rule 609 is purely mechanical in its operation, the range of offenses encompassed by the phrase "dishonesty or false statement" is a crucial issue. Federal rule 609 is a hybrid product of various legislative approaches resulting from the confusion of prior law. Although some form of dishonesty or false statement may be thought to adhere in nearly all crimes, the legislative history indicates that a narrow construction of the phrase was understood by those who voted this rule into law. See 31 Rutgers L.Rev. 908, 923 n.104. Further, the nature of automatic admission of prior convictions itself, which recognizes no special or extenuating circumstances such as we find in subsection (1) of the rule, speaks to the need for a narrow construction of the term "dishonesty or false statement." U.S. v. Hayes, 553 F.2d 824, 827 (2nd Cir. 1977), cert denied 434 U.S. 867 (1977).

Congress did not provide final guidance as to which crimes involve "dishonesty or false statement." Rule 609(a)(2) is an anachronism in the Federal (and therefore State) Rules of Evidence. With few exceptions evidence is admitted pursuant to rules 401, 402 and 403 of the Utah Rules of Evidence focusing on legal relevancy under the control of the trial court's discretion. In Rule 609(a)(2) by legislative fiat, the relevancy determination by the trial court is decided and the trial court apparently has no discretion in the matter.

Due to the unfair aspects of this mechanical operation of the rule, several courts have attempted to solve the problem by

narrowly interpreting the words of the statute under Rule 609(a)(2). In U.S. v. Millings, 535 F.2d 121, the U.S. Court of Appeals for the District of Columbia stated that the crime defined by Rule 609, subsection (2) must contain "an intent to deceive or defraud." Thus, by limiting the crimes included under the dishonesty section (subsection (2)), most prior crime decisions will be decided under Rule 609(a)(1) in accordance with the general intent of Congress and the method advocated by the body of the Rules of Evidence. Moreover, the standard which requires a crime to include an element of intent to deceive or defraud would possess the advantage of ease of application. Courts are more familiar with crimes of this nature and the conference report's initial list serves as a reference. At the same time such a test will force a court to look beyond the label of the offense to an investigation of whether it involved an intent to deceive. Virgin Islands v. Toto, 529 F.2d 278, 281 (3rd Cir. 1976); see also, 71 NW.U.L.Rev. 655, 657: *Rule 609(a)(2) Dishonesty and False Statement* (1976).

The Federal Court of Appeals in Millings recognized that the disparate legislative histories of the two provisions of Rule 609 require a much narrower construction of the language contained in subsection (2). Thus it held that the possession of heroin and the possession of an unlicensed pistol did not fall within the ambit of subsection (2) because neither offense involved an intent to deceive or fraud. Further, the Court decided that since this in effect was a "close case" and involved a "test of

credibility", the improper admission of prior convictions could not be merely harmless error. 535 F.2d at 123-124.

The most salient contribution of Millings is its recognition that dishonesty or false statement defines a narrow sub-set of crimes directly related to testimonial veracity. 31 Rutgers L.Rev. 908, 928 n.130. See also, State v. Morehouse, 748 P.2d 217, 222 n.2 (Utah App. 1988).

If such a careful and narrow construction is not applied to Rule 609(a)(2), offenses properly admitted only through discretionary balancing of subsection (1) would be admitted automatically under subsection (2), contrary to the original Congressional intent at the time Rule 609 was promulgated by Congress. Otherwise defendants would be denied the protection inherent in any judicial balancing process, as well as specific protection, namely the presumption of inadmissibility and the resulting proponent's burden of rebuttal, which is deliberately built into Rule 609(a)(1). The prosecution on the other hand, would reap the advantage of automatic admission without having the obstacles of Rule 609(a)(1). By stripping away the shield of rule 609(a)(1), the trial court's decision in the instant case defeats the legislative intent to protect defendants from the impact of unfair prejudice and the general principle of encouraging defendants to testify when they so choose. The lower court's decision in the instant case also frustrates the legislative intent to accommodate the divergent attitudes of the U.S. House and Senate with an intricate compromise allowing automatic admission of the

narrow range of offenses under 609(a)(2) while providing a strong built-in protection of defendants under Rule 609(a)(1).

These considerations are particularly valid in the instant case. Defendant's convictions of Securities Fraud under Utah law were not convictions of crimes involving intentional dishonesty or false statement. Defendant's convictions were actually a form of "strict liability." One of the primary issues currently on appeal before the Utah Supreme Court on the Securities Fraud convictions is the issue of the Defendant's intent. At the Securities Fraud trial, Defendant Larsen vigorously argued that an element of a securities law violation included the element of intent. The State argued that intent was not an element of securities fraud violations and the trial judge so ruled. The Defendant was thus denied a jury instruction on the element of intent. As a result, the jury did not consider the element of intentional dishonesty or false statement in its deliberations and ultimate finding that the Defendant was guilty of the crimes of Securities Fraud.

Defendant Larsen argues that this is exactly the type of situation Congress intended should be balanced under the specific protection of Rule 609(a)(1) rather than being automatically admitted under Rule 609(a)(2). See U.S. v. Lipscombe, 702 F.2d 1049, 1057 (1983). Surely the exclusion of evidence of prior convictions will generally result in less confusion of the issues and fairer trials for defendants. See 1987 Utah Law Review: Recent Developments at 189.

Where the State has a strong case, the automatic admission of prior convictions under Rule 609(a)(2) might presumably have less impact on a jury's deliberations. However, in the instant case where the State's position is so uncertain, the trial court's erroneous ruling under Rule 609(a)(2) cannot fairly be said not to have influenced the judgment of the jury and therefore, the error in this case was not harmless. See Kotteakos v. United States, 328 U.S., 750, 765 (1946); Virgin Islands v. Toto, 529 F.2d 278, 283. In the instant case, evidence of the Defendant's prior convictions of 18 counts of Securities fraud may very well have tipped the scales against him. See U.S. v. Slade, 627 F.2d 293, 308 (1980).

POINT V

THE COURT ERRED BY ALLOWING STATE'S WITNESS JOHN BALDWIN TO TESTIFY CONCERNING AN INVESTIGATION OF GRANADA, INC. FOR UNREGISTERED SECURITIES VIOLATIONS.

At the trial of the instant matter, the State was allowed to call witness John Cheney Baldwin. Mr. Baldwin testified that five years previous to his current employment he had been the director of the Utah Securities Division. He testified that three years prior to that he was an assistant Utah Attorney General and had been in private practice earlier. Over defense counsel's objection, Mr. Baldwin was asked if he was aware of an investigation of Granada Inc. by the Utah Securities Division subsequent to 1985.

The trial judge overruled defense counsel's objection and Mr. Baldwin was specifically asked the following:

Q: (By Mr. Griffin) Mr. Baldwin, do you recall that one of the issues that you were looking at or the division was looking at was the sale of unregistered securities?

A: Yes, that is correct.

Q: Do you recall how that was related to Granada? Can you explain that a little?

A: Well, there was, to my recollection, several entities which I would recall are satellites around Granada. That Granada was an operation in which money was going. There were other entities in which money was coming and going, and that collectively we will refer to that group as Granada because that essentially was the mother ship. We were again concerned that certain of these sales of promissory notes, securities, other types of instruments constituted unregistered securities which have not been registered and that was the basis of the discussions that we had with Granada.

Q: Can you recall the magnitude of the amount of money that was invested in these unregistered securities?

Mr. Keller: Objection. . . (Overruled)

. . .

A: It was millions of dollars. My recollection is, as well as that, in order to reconcile the negotiations and to provide an offering statement to our satisfaction to keep the operation ongoing, that collectively was fifteen million dollars.

R. 2057 pp. 111, 112.

As if these discussions regarding unregistered securities violations were not enough, the prosecutor took the opportunity to ask Mr. Baldwin about other matters under investigation by the Utah Securities Division which did not relate to the Three Crowns

Limited Partnership or the theft alleged in the instant case (R. 2057 pp. 111, 112).

Defendant submits that the Court's decision to overrule his counsel's objections to the aforementioned questions regarding an investigation of Granada, Inc. not related to the Three Crowns Limited partnership constituted clear and prejudicial error. There can be no doubt that the purpose for the introduction of such evidence was to attempt to assassinate the Defendant's character. Rule 404 of the Utah Rules of Evidence provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith" Although there are exceptions to this general rule, Defendant submits that the alleged evidence of the Utah Securities Division's investigation was introduced for the sole purpose of attempting to prove that Defendant had been engaged in other bad acts during the period of time that the Three Crowns Limited matters were active. In such a unique and uncertain case as the instant matter, those "charged" statements from such an authoritative figure may have been devastating to the Defendant in the jury's deliberations.

Rule 403 of the Utah Rules of Evidence allows the court to exclude even evidence found relevant, on the grounds that its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Since the investigation of Granada Inc. as a whole did not involve an investigation of the Three Crowns Limited Part-

nership, the prejudice created in the jury's mind by allowing the witness to discuss an official investigation of other entities involved with Defendant Larsen created unfair prejudice and was a violation of the Defendant's right to due process of law under both the Utah and the United States Constitutions.

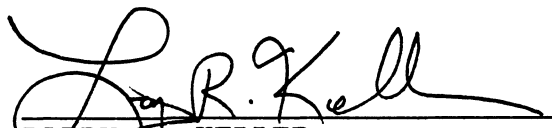
Defendant maintains that the trial court's admission of the foregoing evidence over his objection constituted prejudicial error under Rules 403 and 404 of the Utah Rules of Evidence. Defendant was significantly and unfairly prejudiced by the admission of this evidence and believes that he should be granted a new trial on this ground alone.

CONCLUSION

Defendant Larsen believes that any one of the issues he has raised constitutes unfair prejudicial error which prevented him from having a fair trial, in violation of his rights under both the Utah and United States Constitutions. However, when each of these issues is considered in the context of the others, it is very clear that overall, Defendant Larsen was denied a fair trial.

It is respectfully requested that this Court reverse his conviction for theft and order a new trial in this matter.

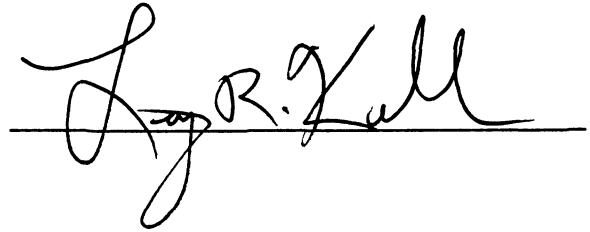
DATED this 7th day of Sept., 1993.


LARRY R. KELLER,
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the Appellant's Brief to be hand delivered, this 8th day of September 1993, to:

CHRISTINE F. SOLTIS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

A handwritten signature in cursive script, appearing to read "L. R. Zall", is written over a horizontal line.

ADDENDUM 1

1 constitute theft in this particular case. So I therefore
2 grant the Motion in Arrest of Judgment.

3 The State has a right to appeal this by statute
4 and I fully expect they will appeal it. But in addition
5 to that, I do make the following finding that in addition
6 to that, if my ruling had been otherwise, I would have
7 granted a new trial because I don't think the instruction
8 clearly outlined that intent as is necessary in the
9 element instructions. I think you can do something with
10 a purpose but I am not sure that that constitutes intent
11 as required by the statute and defined earlier in the
12 statute of a specific intent to deprive. And I may be
13 wrong in that, but that would be the second prong and I
14 only mention that because if this does go on appeal, Mr.
15 Parrish, you should be able to appeal that as well.

16 MR. PARRISH: Thank you, Your Honor.

17 THE COURT: So that if it is reversed, when it
18 comes back that will catch everyone's eye so that same
19 instruction won't be used over again. And then you try
20 it again, and then you end up going back to the Court of
21 Appeals again. That is a waste of resources and
22 everyone's time. So that is the reason I am ruling in
23 that regard. Okay, anything further?

24 MR. KELLER: Your Honor, there is one
25 additional procedural element under Rule 23. Will the

LARRY R. KELLER, #1785
 LARRY R. KELLER & ASSOCIATES
 Attorney for Defendant
 257ower, Suite 340
 257 East 200 South - 10
 Salt Lake City, Utah 84111
 Telephone: (801) 532-7282

IN THE THIRD JUDICIAL DISTRICT COURT
 SALT LAKE COUNTY, STATE OF UTAH


-----ooOoo-----

STATE OF UTAH,	:	
Plaintiff,	:	MOTION TO REDUCE JUDGE
	:	LEONARD H. RUSSON'S ORDER
v.	:	GRANTING A NEW TRIAL TO
	:	WRITING
C. DEAN LARSEN,	:	
Defendant.	:	Case No. 891900927FS

-----ooOoo-----

COMES NOW Defendant C. Dean Larsen, by and through his attorney, Larry R. Keller, Esq., and moves this Court for an Order reducing to writing Judge Russon's oral finding and order of February 19, 1991, in the above-entitled Theft matter. Said order granted a new trial on the Theft charge involving the Three Crowns partnership.

DATED this 20th day of OCTOBER, 1992.


 LARRY R. KELLER,
 Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be hand delivered this 20th day of October 1992, to:

Michael D. Wims
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Uem depda

LARRY R. KELLER, #1785
KELLER & LUNDGREN, L.C.
Attorney for Defendant
257 Tower, Suite 340
257 East 200 South - 10
Salt Lake City, Utah 84111
Telephone: (801) 532-7282

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

STATE OF UTAH,	:	
	:	AFFIDAVIT OF
Plaintiff\Appellee,	:	LARRY R. KELLER
v.	:	
C. DEAN LARSEN,	:	Case No. 930286-CA
Defendant\Appellant.	:	

-----oo0oo-----

STATE OF UTAH)	
)	ss.
COUNTY OF SALT LAKE)	

LARRY R. KELLER, being first duly sworn upon oath, deposes and states as follows:

1. I was the defense attorney for C. Dean Larsen and we tried his case between December 4 and 14, 1990, on the charge of Theft, which is the subject of the instant appeal.

2. On or about December 11, 1990, I filed "Defendant's Proposed Additional Jury Instructions" which are attached hereto as Exhibit 1 with Judge Russon and the Third District Court.

3. The proposed jury instructions were in addition to other

jury instructions I had previously submitted to the court.

4. The reader will note that the proposed additional jury instructions are duplicated, with one copy bearing citations and the second copy not bearing citations as required by Judge Russon during that trial.

5. It is to be noted that Judge Russon gave to the jury the third proposed additional jury instruction but refused to give the first two additional instructions.

6. I specifically recall having delivered a copy of these proposed instructions to Mark Griffin and Robert Parrish, the prosecutors in the case, on or about December 11, 1990, and well in advance of the time the matter was submitted to the jury on December 14, 1990.

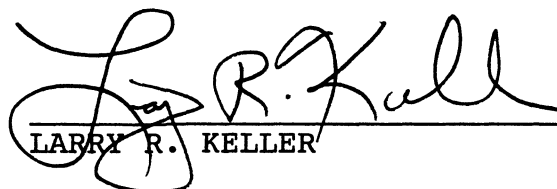
7. The reader will note that the third proposed additional jury instruction does not appear anywhere else in Defendant's proposed jury instructions, and is clear evidence that it was one of the three that were submitted to the court as stated in this Affidavit.

8. I am uncertain as to why these proposed additional jury instructions were not included in the record certified from the District Court to the Utah Court of Appeals, but believe it was a simple error on the court's part.

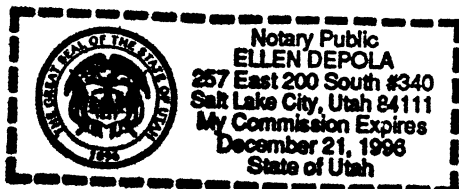
9. The discussion surrounding these jury instructions was

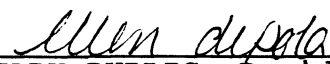
held in Judge Russon's chambers without the court reporter present, and this is the reason no reference to these proposed additional jury instructions appears in the record.

DATED this 7th day of Sept., 1993.


LARRY R. KELLER

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 7th
day of September, 1993 by Larry R. Keller.




NOTARY PUBLIC, Residing at
Salt Lake County, Utah

(Stamp)

LARRY R. KELLER, #1785
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257 Towers, Suite 340
257 East 200 South - 10
Salt Lake City, UT 84111
Telephone: (801) 532-7282

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

-----oo0oo-----

STATE OF UTAH,	:	
	:	DEFENDANT'S PROPOSED
Plaintiff,	:	ADDITIONAL JURY INSTRUCTIONS
v.	:	
C. DEAN LARSEN,	:	
	:	Case No. 891900927
Defendant.	:	Judge Leonard H. Russon

-----oo0oo-----

Comes now Defendant, C. Dean Larsen, and proposes the
following additional requested jury instructions.

DATED this 11th day of December, 1990.

151
LARRY R. KELLER
Attorney for Defendant C. Dean Larsen

CERTIFICATE OF DELIVERY

I hereby certify that I caused a true and correct copy of the foregoing to be hand delivered on this 11th day of December, 1990, to:

Mark Griffin
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

15/_____

INSTRUCTION NO. _____

At the time a limited partner becomes entitled to receive a distribution from a limited partnership, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

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At the time a limited partner becomes entitled to receive a distribution from a limited partnership, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

INSTRUCTION NO. _____

Where two persons create a relationship of debtor and creditor, a failure of one of the parties to pay over money in satisfaction of the debt does not constitute the crime of theft.

State v. Siers, 248 N.W.2d 1 (Nebr. 1976)

INSTRUCTION NO. _____

Where two persons create a relationship of debtor and creditor, a failure of one of the parties to pay over money in satisfaction of the debt does not constitute the crime of theft.

INSTRUCTION NO. _____

A limited partner has no interest in the specific assets of the partnership by virtue of his status as a limited partner; rather he simply owns a percentage interest in the legal entity which is the limited partnership.

State v. Birch, 675 P.2d 246

Evans v. Galardi, 546 P.2d 313

U.C.A. § 48-2-22

U.C.A. § 48-2-23

U.C.A. § 48-2a-606

U.C.A. § 48-2a-703

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