1984

State of Utah v. Jeffrey Mcintyre Roberts : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OE UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19398
JEFFREY McINTYRE ROBERTS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT AND CONVICTION RENDERED BY THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE, PRESIDING.

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Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Whether there was sufficient evidence to support defendant's conviction for theft by deception.

2. Whether the trial court's refusal to give defendant's requested instruction concerning pecuniary loss was error.

3. Whether the trial court erred in refusing to give defendant's requested instruction on "puffing."

STATEMENT OF THE CASE

Defendant, Jeffrey McIntyre Roberts, was charged by information with theft by deception, a second degree felony, under Utah Code Ann. §§ 76-6-405 and 412 (1978) (R. 2). After a jury trial on May 4 and 6, 1983, defendant was found guilty of the charged offense. On May 27, 1983, defendant was sentenced to a term of 1 to 15 years in the

Utah State Prison and ordered to make restitution (R. 99-100). On June 6, 1983, Judge Bullock granted defendant's application for a certificate of probable cause and set bail at $10,000 (R. 108-109).

STATEMENT OF FACTS

At trial, many of the facts were in dispute. The facts which support the verdict are as follows.

In 1978, the State's primary witness, David Rail, sold a life insurance policy to Miriam Marlowe (R. 176). Ms. Marlowe's husband died in a swimming accident in July of 1981. In March of 1982, Mr. Rail began processing an insurance claim on that accident for the named beneficiary, Ms. Marlowe, who, under the provisions of the policy, was entitled to approximately $50,000 (R. 177). Mr. Rail contacted Ms. Marlowe, a resident of California, and informed her that she would receive $50,000, but that only $38,000 would be paid initially because California law required one-fourth of the proceeds to be retained pending final settlement of the estate (R. 181).

During the time Mr. Rail was processing the claim, he mentioned the $50,000 sum to be paid to Ms. Marlowe to John Walton, a friend who had an office in the same building (R. 179). Defendant learned of the money that Mr. Rail was to pay Ms. Marlowe while present during a discussion of the matter between Rail and Walton (R. 179). Several days later, defendant approached Mr. Rail and asked him if he might be interested in convincing Ms. Marlow to invest the

insurance proceeds (R. 179). Defendant told Rail that he had a friend who worked for the State Department and had access to gold in Brazil. The gold could be purchased in Brazil for $100 an ounce and sold in the United States for approximately $300 an ounce (R. 180).

Mr. Rail then flew to California and personally delivered the check for $38,000 to Miriam Marlowe (R. 187). At that time, Mr. Rail explained to Ms. Marlowe that she could invest the insurance proceeds and double her money (R. 183). He related to her defendant's story about a South American gold connection who could buy gold for $100 an ounce and sell it in the United States for $300 an ounce. She would double her money, and Mr. Rail and defendant would divide the remainder as payment for their services (R. 183).

Ms. Marlowe agreed to invest some of her money, but only if she could get some security or guarantee (T. 185). Mr. Rail discussed the wisdom of the investment with an attorney, who advised him not to invest the money unless some security were obtained (R. 296).

After Mr. Rail contacted defendant and discussed securing the investment, defendant offered a building lot located in Sherwood Hills in Utah County as security. He represented to Mr. Rail that the lot was free and clear (R. 185). Based on these representations, Mr. Rail agreed to go through with the investment for his client, Ms. Marlowe.

However, a title search performed at Mr. Rail's request before the deal was closed revealed that the property was not free and clear as defendant had represented (R. 189). There was a $6,200 tax lien present and the property was in default in the amount of $16,000 (R. 189, 216, 270, 281). When Mr. Rail confronted defendant with this information, defendant assured him that he would clear the title by the following Tuesday (R. 191). Based upon this assurance, Mr. Rail decided to invest Ms. Marlowe's money.

Mr. Rail contacted a title company and asked a person there to draft documents for a transaction involving land used as security for a cash investment. On April 15, 1982, Mr. Rail and defendant met at the title company. However, defendant refused to sign a trust deed for the property he had offered as security, insisting that the title company prepare a warranty deed instead. He told Mr. Rail that a warranty deed was better security than a trust deed (R. 285). Although the use of a warranty deed under these circumstances was somewhat unusual (R. 286), the deal was closed.

On the same day as the closing, defendant informed Mr. Rail that there had been a change of plan concerning delivery of Ms. Marlowe's money. Originally, both Mr. Rail and defendant were to fly to Brazil and give the money to the State Department official there (R. 195). However, defendant now said that the State Department official's

wife, who lived in Salt Lake City, was going to fly to Brazil. Defendant suggested that he would deliver the money to her and thus save the expense of flying to Brazil (R. 196, 198). Based upon these representations, Mr. Rail gave defendant a check made payable to JARCO in the amount of $24,861 ($25,000 less the cost of the title search). Defendant explained that JARCO was the name of the corporation set up by the people in Brazil to handle income from their gold transactions (R. 197-198). Mr. Rail parted company with defendant that day with the understanding that defendant would deliver Ms. Marlowe's money to the wife of the Brazilian gold connection (R. 198).

In July of 1982, Mr. Rail discovered that the property defendant conveyed as security was in default and subject to a sheriff's sale (R. 201). In an effort to preserve his client's equity interest in the security, Mr. Rail personally borrowed $16,000 and purchased the property after it had been sold at the sheriff's sale (R. 236). After repeated efforts to recover Ms. Marlowe's money from defendant had failed, Mr. Rail contacted the Utah County Attorney's Office.

The County Attorney's investigation revealed that on April 16, 1982, defendant opened an account at the Midvale Branch of Tracy-Collins Bank in the name of Jeffrey McIntyre Roberts, d/b/a JARCO, and deposited Ms. Marlowe's money in this account (R. 298, 291). On April 17,

defendant withdrew $12,000 cash from the account (R. 304). Defendant testified that expenditures made with money from this account were "pretty much" personal expenditures and that no attempt was made to invest the money in Brazilian gold (R. 369).

By the date of trial, Ms. Marlowe had not received any of the $25,000 she had given defendant. She held title to the "security" property only after her agent incurred a debt of $16,000 to secure the title. The tax liens remained.

SUMMARY OF ARGUMENT

The evidence was suffficient to support defendant's conviction for theft by deception in that the State proved both the statutory elements of theft by deception and the additional element of pecuniary loss required for the crime by State v. Johnson, 663 P.2d 48 (Utah 1983). However, this Court should abandon the pecuniary loss requirement announced in Johnson and adopt the majority rule.

The trial court did not err in refusing to give defendant's requested jury instruction concerning pecuniary loss to the victim. That instruction is not required under the majority, and better, rule.

Finally, the trial court did not err in refusing to give defendant's requested instruction concerning

"puffing". The evidence simply did not support the giving of that instruction. Alternatively, if there was error in this regard, it was harmless error.

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR THEFT BY DECEPTION.

Defendant argues that the evidence introduced at trial was insufficient to establish that he commited theft by deception. As support for this argument, he cites State v. Johnson, 663 P.2d 48 (Utah 1983). Based upon language contained in that opinion, defendant contends that although he was guilty of wrongful conduct in taking Ms. Marlowe's money and not investing it in the gold scheme, the State failed to prove that the victim lost something of value (i.e., suffered a pecuniary loss) and thus his conviction for theft by deception cannot stand. He points to evidence which he contends demonstrates that Ms. Marlowe received a piece of property with an equity value of approximately $25,000 by operation of the security arrangement insisted upon by Ms. Marlowe before she invested her $25,000 cash. Thus, he concludes, "[s]he received exactly what the parties intended for her to receive should [defendant] fail to obtain the gold." Appellant's Brief at p. 11.

In Johnson, this Court reversed a theft by deception conviction because the State "failed to prove beyond a reasonable doubt an essential element of the criminal offense of theft by deception, namely, that [the victim] failed to get what it bargained for or that it sustained a pecuniary loss." 663 P.2d at 51 (emphasis added). There, the Court applied the current theft by deception statute, Utah Code Ann. § 76-6-405(1) (1978), which states:

> A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

The Court said that one of the essential elements necessary to sustain a conviction under that statute is the following:

> [A]n actual fraud must have to be perpe trated in the sense that something of value was obtained and the victim lost something of value . . . .

663 P.2d at 50 (citations omitted). It then noted its past elaboration on that element:

> The actual fraud and prejudice required, however, is determined according to the situation of the victim immediately after he parts with his property. If he gets what was pretended and what he bargained for there is no fraud or prejudice.

Id. (emphasis in original) (citations omitted).

In reviewing the information filed by the State and the instructions given to the jury at trial (see Instructions #3 and #5, R. 69, 71, attached as Appendix A),

it is apparent that the State sought to establish theft by deception based upon the "deception" defined in Utah Code Ann. § 76-6-401(5)(e) (1978), which reads:

> (5) "Deception" occurs when a person intentionally:
>
> . . .
>
> (e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Under that definition the evidence was sufficient to support defendant's conviction, in that it showed that defendant obtained or exercised control over Ms. Marlowe's money with the purpose to deprive her thereof by representing that he would invest the money in a gold scheme and would clear title on the land used to secure the transaction--promised performance which the jury could have reasonably inferred from the evidence defendant did not intend to perform or knew would not be performed. Clearly, defendant's representations that he would do those two things affected Ms. Marlowe's judgment concerning her investment. In fact, they were a fundamental part of the transaction. Thus, by the terms of the relevant statutes, defendant's conduct constituted theft by deception.

The question, therefore, is whether the evidence was sufficient to support a finding that Ms. Marlowe

suffered a pecuniary loss. Although the Johnson opinion mixes the concepts of "loss of something of value," "failure to get what one bargained for," and "pecuniary loss" in a somewhat confusing manner, it appears the Court held that in addition to the applicable statutory elements of theft by deception, the State must prove that the victim did not receive what was bargained for and that a pecuniary loss was sustained. Johnson, 663 P.2d at 51 (see, particularly, C.J. Hall, concurring and dissenting).

There is little doubt that Ms. Marlowe did not receive what she bargained for--i.e., an opportunity to double her money in the gold scheme and an unencumbered piece of property as security for her investment. Looking at "the situation of the victim immediately after she part[ed] with [her] property," Johnson, 663 P.2d at 50 (quoting State v. Casperson, 71 Utah 68, 75, 262 P. 294, 296 (1927)), it is clear that Ms. Marlowe was defrauded. Defendant obtained her money (something of value), and she lost not only her money but also the opportunity to double it--losses that clearly constitute pecuniary losses (or loss of something of value).

Nevertheless, defendant argues that Ms. Marlowe did not suffer a pecuniary loss, as required by Johnson, because she received land with an equity value of "somewhere in the neighborhood of $25,000" when defendant failed to invest her money in gold. Appellant's Brief at p. 10.

Although it is not clear from the record that Ms. Marlowe sought to secure her investment in anticipation of the possibility that defendant would not invest her money in the gold scheme as he said he would, even if it were assumed that that was the arrangement, Ms. Marlowe suffered a pecuniary loss as a result of the transaction. She gave her money to defendant with the understanding that it would be secured by unencumbered land whose value appears to have been in excess of $25,000 (R. 224-225) (see Appellant's Brief at p. 10). Defendant's argument that the property's market value of $38,000 to $50,000 minus $16,000 in encumbrances left Ms. Marlowe whole and with no pecuniary loss (i.e., "[s]he received exactly what the parties intended for her to receive should defendant fail to obtain the gold" Appellant's Brief at p. 11) is without merit.[1]

First, Ms. Marlowe did not receive the unencumbered land she bargained for as security. Second, she suffered a pecuniary loss amounting to the difference between the value of the land in an unencumbered condition, as promised, and the value of the encumbered land she received at the time she parted with her money. Cf. Utah Code Ann. § 76-6-401(5)(d) (1978). The critical inquiry is not whether

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[1] Even if the premise of defendant's argument were accepted, if one were to subtract $16,000 from $38,000 (the low estimate of market value) the remainder would be $22,000--a figure $3,000 less than the $25,000 Ms. Marlowe invested. It is beyond dispute that the $3,000 difference would constitute a pecuniary loss.

the land may have been worth the $25,000 Ms. Marlowe invested, but whether she received what she bargained for and if she did not, whether a pecuniary loss was suffered as a result.

Based upon the foregoing discussion, the evidence, viewed in a light most favorable to the jury's verdict and taking those facts which can reasonably be inferred from it, was sufficient to support defendant's conviction. See State v. McCardell, 652 P.2d 942, 945 (Utah 1982). The evidence simply was not so lacking and insubstantial that a reasonable person could not possibly have determined beyond a reasonable doubt that defendant was guilty of theft by deception. Id. The State proved both the statutory elements of theft by deception and the additional element of pecuniary loss required for that crime by State v. Johnson.

Although the requirements of the statute and the additional requirement of Johnson were satisfied in this case, the Court should reexamine its conclusion in Johnson that the showing of a pecuniary loss to the victim is an essential element of theft by deception. That conclusion does not appear to be consistent with the terms of the theft by deception statute or with the better view adopted by a majority of courts.

In Utah, the crime of theft by deception is similar to that defined in a predecessor statute to § 76-6-405 termed "false pretenses." Johnson, 663 P.2d at 50. The statutes of the various states that recognize the crime, although not uniform, have enough in common to

suggest the following definition:

> The crime of false pretenses is knowingly and designedly obtaining the property of another by means of untrue representations of fact with intent to defraud.

PERKINS AND BOYCE, CRIMINAL LAW 364 (3d ed. 1982).

Neither § 76-6-405 nor the related definitional section, § 76-6-401, contains any requirement that the victim suffer a pecuniary loss before a conviction for theft by deception may be had. The Johnson Court grafted that requirement onto the statute. However, such a requirement is not in accordance with what appears to be the majority position in this country. That position and the reasons underlying it are set forth in State v. Mills, 96 Ariz. 377, 396 P.2d 5 (1964):

> Although there is authority for the the proposition that an actual financial loss is necessary to constitute the crime of theft by false pretenses, see Daniel v. State, 63 Ga. App. 12, 10 S.E.2d 80 (1940); McGee v. State, 97 Ga. 199, 22 S.E. 589 (1895), we think the better rule is that there is no requirement that the victim suffer a pecuniary loss so long as he has parted with his property. Nelson v. United States, 97 U.S. App. D.C. 6, 227 F.2d 21, 53 A.L.R.2d 1206, (D.C.Cir. 1955), cert. denied 351 U.S. 910, 76 S.Ct. 700, 100 L.Ed. 1445 (1956); People v. Talbott, 65 Cal. App. 2d 654, 151 P.2d 317 (1944); United States v. Rowe, 56 F.2d 747 (2d Cir. 1932). The defendants focus on the wrong part of the transaction. They direct attention to what the victim obtains. The gist of the offense, however, is conerned with what the defrauder obtains. Once the victim has parted with his property in reliance on a false representation, it is immaterial whether whatever he got in return is equal in exchange value to that with which

he parted. Judge Learned Hand put it as follows:

> "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed." United States v. Rowe, supra at 749.

96 Ariz. at 381, 396 P.2d at 8. Numerous jurisdictions adhere to this position. See, e.g., United States v. Alston, 609 F.2d 531, 534-535 (D.C. Cir. 1979), cert. denied, 445 U.S. 918, 100 S.Ct. 1281, 63 L.Ed. 2d 603; Nelson v. United States, 227 F.2d 21 (D.C. Cir. 1955); State v. Kennedy, 314 N.W.2d 884, 887 n.1 (Wis. App. 1981); Quidley v. Commonwealth, 221 Va. 963, 966, 275 S.E.2d 622, 625 (1981); Clemons v. United States, 400 A.2d 1048, 1050 n.2 (D.C. App. 1977); Paulk v. State, 355 So.2d 304, 305 (Fla. App. 1977); People v. Talbott, 65 Cal. App. 2d 654, 659, 151 P.2d 317, 320 (1944), cert. denied, 324 U.S. 845, 65 S.Ct. 677, 89 L.Ed. 1406; State v. Sargent, 97 P.2d 692, 693 (Wash. 1940). See also PERKINS AND BOYCE, CRIMINAL LAW 383 (3d ed. 1982); TORCIA, WHARTON'S CRIMINAL LAW § 422, at 499 (14th ed. 1980).

The rule expressed in Mills represents the better view because it properly focuses attention on the defendant's fraudulent conduct--conduct which the law of false pretenses and theft by deception is designed to

punish. Whether the victim actually suffers a pecuniary loss should be immaterial. People v. Talbott, 65 Cal. App. 2d at 659, 151 P.2d at 320. The inquiry is limited to determining whether the defendant fraudulently obtained the victim's property with the intent to deprive him thereof. In other words, was the victim deprived of what he bargained for and did the defendant obtain or exercise control over the victim's property by means of deception, State v. Jones, 657 P.2d 1263, 1267 (Utah 1982), with the intent to withhold the property permanently. State v. Laine, 618 P.2d 33, 35 (Utah 1980). Significantly, not requiring that a pecuniary loss be shown appears to be more consistent than is State v. Johnson with State v. Casperson, 71 Utah 68, 262 P. 294 (1927), which was cited with approval in Johnson and where this Court said:

> That a pretense false in fact and an actual fraud resulting in prejudice are essential elements of the crime in question, and must be proved to establish guilt, are general principles of law which we recognize and approve. The actual fraud and prejudice required, however, is determined according to the situation of the victim immediately after he parts with his property. If he gets what was pretended and what he bargained for, there is no fraud or prejudice. But if he then stands without the right or thing it was pretended he would then have, he has been defrauded and prejudiced by reason of the false pretense, and the offense is complete, notwithstanding thereafter he may regain his property, or the person obtaining it or another compensates him, or he thereafter obtains full redress in some manner not contemplated when he parted with his property

71 Utah at 75, 262 P. at 296 (emphasis added).

Therefore, this Court should abandon the pecuniary loss requirement announced in Johnson and bring Utah law in line with the majority, and better, view. The result in Johnson would not be different under the majority rule, the "victim" there having received everything it bargained for. Johnson, 663 P.2d at 50-51. Moreover, dropping the pecuniary loss requirement prevents a defendant from arguing that although he obtained property of another by deceptive means with the intent to withhold that property permanently, he is not guilty of theft by deception because the victim suffered no pecuniary loss -- i.e., what the victim received was equal in value to that with which he parted. This argument should not prevail -- see State v. Mills, 396 P.2d at 8; People v. Pugh, 137 Cal. App. 2d 226, 233-234, 289 P.2d 826, 829-830 (1955) -- but apparently would under the standard set forth in Johnson. Cf. State v. Forshee, 588 P.2d 181, 184 (Utah 1978) (holding that "the degree of [theft] must be measured by the value of the property obtained by the defendant as a result of the deception, rather than the value of any property received by the victim" (footnote omitted)). The requirement that the victim lose something of value, Johnson, 663 P.2d at 50, is satisfied when he does not receive what he bargained for. Certainly, there is some inherent value, although not necessarily quantifiable financial value, in being able to rely on the representations made by another and actually

receiving what one bargained for before parting with one's property. See United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932); PERKINS AND BOYCE, CRIMINAL LAW 382.

POINT II

IF THIS COURT DOES NOT ABANDON THE PECUNIARY LOSS REQUIREMENT ANNOUNCED IN STATE v. JOHNSON, THE TRIAL COURT'S FAILURE TO GIVE DEFENDANT'S REQUESTED INSTRUCTION ON PECUNIARY LOSS WAS REVERSIBLE ERROR; HOWEVER, IF THAT REQUIREMENT IS ABANDONED, SUCH AN INSTRUCTION WAS NOT NECESSARY. THE TRIAL COURT PROPERLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSTRUCTION ON "PUFFING;" ALTERNATIVELY, ANY ERROR IN THAT REGARD WAS HARMLESS.

Defendant contends that the trial court committed reversible error when it refused to give his Requested Instruction No. 2, which read:

> The crime of theft by deception is not established in the absence of evidence showing, or tending to show, that the claimed victim has sustained a pecuniary or property loss by reason of the transaction relied upon.

(R. 56). Defendant took exception to this refusal (R. 463). No similar instruction was given (R. 66-82).

As noted by defendant, State v. Laine, 618 P.2d 33 (Utah 1980), makes clear that failure to instruct on a basic element of the crime charged generally constitutes reversible error. If this Court follows its conclusion in State v. Johnson, 663 P.2d 48, 51 (Utah 1983), that pecuniary loss on the part of the victim is an essential element of the crime of theft by deception, in light of Laine the State cannot seriously argue that reversal is not required in this case for failure to give defendant's

Requested Instruction No. 2.

However, if the Court abandons the pecuniary loss rule announced in Johnson and adopts the majority rule, which as suggested above is the better course, the trial court's refusal to give defendant's requested instruction was not error because proving pecuniary loss to the victim is not an essential element of theft by deception. For the reasons stated above, this Court should adopt the majority rule and hold that the trial court did not err in refusing to give defendant's Requested Instruction No. 2

Finally, defendant argues that the trial court erred in refusing to give his Requested Instruciton No. 6, which read:

> Theft by deception does not occur, and you must return a verdict of not guilty, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.
>
> "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

(R. 60). Defendant took exception to this refusal (R. 464), and no similar instruction was given (R. 66-82). Although this requested instruction is a verbatim recitation of § 76-6-405(2), it does not appear to be relevant to the facts as presented at trial, by either party. There was no evidence that defendant was guilty only of "puffing." His theory of the case throughout trial was that the transaction between him and Ms. Marlowe was a sale of property where each party received value for value (R. 436). Therefore,

his Requested Instruction No. 6 was irrelevant and unnecessary. Cf. State v. Baker, 671 P.2d 152, 160 (Utah 1983); State v. Shabata, 678 P.2d 785, 790 (Utah 1984) -- cases which stand for the proposition that the defendant's theory of defense may preclude the giving of an instruction he requests.

Alternatively, if this Court determines that the trial court erred in not giving defendant's Requested Instruction No. 6, the error was harmless, in that even without the error there was not "a reasonable likelihood of a more favorable result for the defendant." State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984), quoting State v. Hutchison, 655 P.2d 635, 637 (Utah 1982). See also Rule 30(a), Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-30(a) (1982)).

CONCLUSION

Based upon the foregoing, defendant's conviction should be affirmed.

RESPECTFULLY submitted this 30th day of January, 1985.

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CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Brief were mailed, postage prepaid, to Earl Xaiz and Bradley P. Rich, Attorneys for Appellant, 72 East 400 South, Suite 355, Salt Lake City, Utah 84111, this 30th day of January, 1985.

Dave B. Thompson

APPENDIX A

INSTRUCTION NO 3

The essential elements of the crime charged in the information are as follows:

1. That the defendant obtained or exercised control over the property of Miriam Marlowe.

2. That the obtaining of or the control over said property, if any, was by deception.

3. That the value of said property exceeded $1,000.00.

4. That at the time of such control, if any, the defendant had a purpose to deprive the owner of such property.

5. That ~~such~~ control, if any, occurred on or about the 15th day of April, 1982, at Utah County, State of Utah.

If the state has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the above essential elements of the crime charged, you must acquit the defendant. But if the State has proved to your satisfaction beyond a reasonable doubt all of the essential elements of the offense as above set forth. the defendant is guilty of the offense charged in the information.

INSTRUCTION NO. 5

As used in these instructions, the following words or phrases are defined as follows:

(1) "Property" means anything of value including money.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession, whether to the obtainer or another.

(3) "Purpose to deprive" means to have the conscious object to withhold property permanently.

(4) Deception occurs when a person intentionally: ...

"promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that the failure to perform the promise in issue without other evidence of intent (not to perform) or knowledge (that it will not be performed) is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed."