

1993

Utah v. Taylor : Brief of Appellant

Utah Court of Appeals

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Jan Graham; attorney for appellee.

Janet Miller, Lisa J. Remal; Salt Lake Legal Defender Assoc.; attorneys for appellant.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, : 930784 CA
Plaintiff/Appellee, :
v. :
DALE PHILLIP TAYLOR, : Case No. 930784-CA
Defendant/Appellant. : Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

JANET MILLER
LISA J. REMAL
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111


Attorneys for Appellant

JAN GRAHAM
ATTORNEY GENERAL
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Appellee

FILED
Utah Court of Appeals

MAR 28 1994


Mary T. Noonan
Clerk of the Court

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JANET MILLER
LISA J. REMAL
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM
ATTORNEY GENERAL
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Appellee

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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Priority No. 2
Defendant/Appellant :

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this court pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992), whereby a defendant in a district court criminal action may take appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

I. Whether the trial court erred in taking under advisement Appellant's motion to dismiss the Theft by Deception charge rather than ruling on it promptly, before requiring Appellant to present his case.

Standard of Review: Appellate review of a trial court's determination of the law is for correctness. State v. Pena, 232, Utah Adv. Rep., 3, 4 (Utah 1994); State v. Deli, 861 P.2d 431, 433 (Utah 1993) see Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1383 (Utah 1993).

II. Whether the prosecutor's questioning of Appellant on cross examination was improper and requires reversal.

Standard of Review: This issue involves a mixed question of law and fact. "[A]ll applications of law to findings of fact that produce conclusions of law are reviewed under a nondeferential standard, i.e., for correctness." State v. Pena, 232 Utah Adv. Rep. 3, 4 (Utah 1994), State v. Ramirez, 817 P.2d 774, 781-82 (Utah 1991).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES AND RULES**

The pertinent parts of the following constitutional provisions, statutes, ordinances and rules are contained in Addendum A.

Constitutional Provisions

U.S. Const. Amends. V, XIV
Utah State Const. Art. 1 § 7

Statutes

Utah Code Ann. § 77-17-3 (1953 as amended)
Utah Code Ann. § 76-6-401(5) (1953 as amended)
Utah Code Ann. § 76-6-405 (1953 as amended)

Rules

Utah R.Crim.P. 17(o) (1993)
Utah R.Crim.P. 30(a) (1993)
Utah R. Evid. 103(d) (1993)
Utah R. Evid. 611(b) (1993)

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction of Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson presiding.

Appellant was found guilty by a jury on September 29, 1993 and was sentenced on October 29, 1993 to a term of zero to five years at the Utah State Prison. The prison term was suspended and Appellant was placed on probation.

The Notice of Appeal was filed November 26, 1993.

STATEMENT OF THE FACTS

On June 21, 1993, Appellant went into Fankhouser Jewelry which is owned and operated by Miriam Davis and her husband, (R. 274, 279, 324, 378). Appellant testified at trial that he brought two rings into the store seeking appraisals on both, (R. 378-79). He also testified that Mrs. Davis took both rings into the back of the store for up to ten minutes, (R. 379-80). Appellant testified further that when Mrs. Davis returned, she told him that one ring was worth about \$ 4,000.00, and she offered to buy it from him for \$ 2,500.00 in cash or \$ 3,000.00 in trade and cash, (R. 380, 382).

Mrs. Davis testified that Appellant came into the store and asked if she would be interested in buying a diamond ring that he had, (R. 280). She also testified that Appellant told her that the ring belonged to his wife, (R. 289).

After examining the ring, Mrs. Davis gave Appellant, in exchange for the ring, a \$ 750.00 watch, a \$ 975.00 man's ring and a check made out for \$ 1,275.00, (R. 284-86). She asked him not to cash the check until the next day, saying she was unsure if she had sufficient funds to cover the check, (R. 286-87). Appellant left the store and went to her bank where he cashed the check after learning that her account did have sufficient funds to cover the check, (R. 294, 384-85).

Approximately three hours after his first visit, Appellant returned to Fankhouser Jewelry because he was unable to properly set the watch he had been given, in part, for the ring, (R. 292,

325, 386). He was almost immediately confronted by Linda Davis, Mrs. Davis' daughter, who told him that they had discovered, after he had left the store earlier, that the stone in the ring he sold them was a cubic zirconium rather than a diamond, (R. 325, 387). She demanded that Appellant immediately return the check, watch and ring he'd been given in exchange for the ring, (R. 330, 387-88). Appellant did not do so, and he left the store and headed to his car in the parking lot, followed by Ms. Davis, (R. 326, 327, 329, 389-90).

When Appellant arrived at his car, Ms. Davis was right behind him, (R. 330, 394). As he opened the car door, she tried to stop him from doing so, but he was able to get into the car and start it by putting the keys in the ignition, (R. 330, 395). Ms. Davis reached in through the open driver's side door, grabbed the keys, and turned the car off, (Id.).

The testimony at trial of Appellant and Ms. Davis differed greatly regarding what happened next. Appellant testified that he started the car again and that Ms. Davis walked over to an area some distance away, (R. 397-98). He further stated that he backed up and drove out of the parking lot, never coming closer to Ms. Davis than approximately twenty feet, (R. 401). Ms. Davis testified that, after restarting the car, Appellant drove straight towards her, coming to within a foot or two of her; she said she had to jump out of the way to avoid being hit by the car, (R. 331).

Appellant was charged with two offenses--Theft by Deception

and Aggravated Assault, (R. 7-8). At the conclusion of the State's case in chief, Appellant moved the trial court to dismiss the case against Appellant, especially the Theft by Deception charge, for insufficiency of the evidence, (R. 370-72). The trial court denied the motion to dismiss with regard to the Aggravated Assault charge, and took the motion regarding the Theft by Deception charge under advisement, requiring the defense to present its case before ruling on that motion, (R. 374).

Appellant testified about the facts surrounding the incidents which gave rise to both charges, (R. 375, 432). After the defense rested, the jury retired to deliberate both counts charged against Appellant, (R. 135, 488). The jury subsequently returned to the Courtroom and advised the Court that they had reached a verdict on one of the counts, but could not agree on the other, (R. 135, 489). The jury returned to the jury room to continue deliberation, (R. 135, 492). After further deliberation, the jury returned, (R. 136, 493). The jury found Appellant guilty of Aggravated Assault, but were unable to reach a verdict on the Theft by Deception charge, (R. 136, 493, 495).

Defense counsel requested a ruling on Appellant's motion to dismiss the Theft by Deception charge which the trial court then denied, (R. 136, 496, 500-01) see Addendum B.

SUMMARY OF THE ARGUMENT

The Appellant was entitled to a prompt ruling on his motion to dismiss the Theft by Deception charge. Appellant did not waive his claim by failing to object immediately after the trial

judge took the motion under advisement. The trial court's failure to rule promptly on the motion constituted reversible error; the State did not establish a prima facie case of Theft by Deception which required the trial judge to dismiss the charge rather than requiring Defendant/Appellant to present evidence in his defense. Further, the trial court's error was prejudicial because it impacted the decision of the jury.

The prosecutor's questioning of the Appellant on cross-examination was improper and harmful. The failed to support his allegations in his cross-examination of Appellant with evidence, thereby calling improper matters to the juror's attention. The prosecutor's question asking Appellant to comment on the veracity of another witness' testimony was argumentative and sought information beyond Appellant's competence.

ARGUMENT

POINT I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN TAKING APPELLANT'S MOTION TO DISMISS THE THEFT BY DECEPTION CHARGE UNDER ADVISEMENT RATHER THAN RULING ON IT PROMPTLY.

A. The trial court should have ruled promptly on Appellant's motion to dismiss.

Appellant was entitled to a prompt ruling on his motion to dismiss the Theft by Deception charge. see State v. Emmett, 839 P.2d 781 (Utah 1992). In Emmett, the Supreme Court of Utah said:

[Utah Code Ann. §] 77-17-3 clearly entitles the defendant to an immediate ruling on the sufficiency of the prosecution's case at the close of its case. The trial judge should at that time "rule promptly upon such a motion so that the defendant may decide whether or not to proceed with the introduction of evidence in his defense." The purpose of the rule is to "avoid forcing a defendant into going forward with his own evidence when the State's case is insufficient."

839 P.2d at 783 (Utah 1992), (quoting State v. Smith, 675 P.2d 521, 524 (Utah 1983)) (quoting United States v. Brown, 456 F.2d 293, 294 (2d Cir.), *cert denied*, 407 U.S. 910, 92 S.Ct. 2436, 32 L.Ed.2d 684 (1972)).

The case at bar is analogous to State v. Emmett, 789 P.2d 781 (Utah 1992). In Emmett, following the State's presentation of its case in chief, Emmett moved to dismiss the charges of sexual abuse of a child and sodomy upon a child. The trial judge reserved ruling on the motion until he had an opportunity to review the record. After Emmett took the stand and denied the allegations, but prior to submitting the case to the jury, the trial judge dismissed the charge of sexual abuse of a child and submitted the charge of sodomy upon a child to the jury. Emmett was convicted. The Supreme Court of Utah found that Emmett was entitled to a prompt ruling on his motion. Further, "viewed in conjunction with the prosecutor's improper argument, the fact that the evidence in favor of guilt was not strong, and the fact that these errors impacted Emmett's credibility and character, which were at the heart of his defense," the Emmett court concluded that the trial judge's error in failing to promptly rule on the motion "was of sufficient magnitude as to warrant a new trial." 789 P.2d at 786 (Utah 1992). see State v. Palmer, 860 P.2d 339, 343 (Utah App. 1993).

In the instant case, the trial court ruled on Appellant's motion after the jury returned with its verdict. see Addendum B. This ruling cannot be considered prompt. As in Emmett, Appellant

did not waive his claim, and the error is reversible because the court forced the Appellant to present evidence in his defense even though the State failed to establish a prima facie case of the theft by deception charge against Appellant. Further, reversible error occurred here because the trial court's actions impacted the decision of the jury.

B. The Trial Court should have dismissed the Theft by Deception charge because the State failed to establish a prima facie case.

When a motion to dismiss a charge for insufficiency of the evidence is made, "the trial court should dismiss the charge if the State did not establish a prima facie case against the defendant by producing 'believable evidence of all of the elements of the crime charged.'" Emmett, 839 P.2d at 784 (quoting State v. Smith, 675 P.2d 521, 534 (Utah 1983)). Here the State failed to present believable evidence regarding the element of intent to support a charge of theft by deception. "A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive." Utah Code Ann. § 76-6-405 (1953 as amended). 'Deception' is defined in section 76-6-401(5); the applicable sections are as follows:

'Deception' occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

"The deception must occur at the time of the transaction."

State v. Noren, 704 P.2d 568, 570 (Utah 1985), citing State v. Droddy, 702 P.2d 111, (Utah 1985), citing State v. Lakey, 659 P.2d 1061 (Utah 1983).

In the instant case, the State failed to establish a prima facie case of theft by deception and the trial judge should have promptly dismissed this charge for insufficiency of the evidence. The State presented insufficient evidence at trial to demonstrate that Appellant created, confirmed, or failed to correct a false impression of fact as to the genuineness of the ring.

At trial, Mrs. Davis testified on direct examination that when Appellant came into her store, he asked her if she would be interested in buying a diamond ring that he had (R. 280). Upon further direct questioning, and in response to the following question, "Who made the representation that it was a diamond? Did you assume it was a diamond, or did he say it was a diamond?", Mrs. Davis testified that Appellant said "it was a diamond ring that he had got from his wife," (R. 288).

Mrs. Davis also testified that she has worked in the jewelry business for forty years (R. 274), and for twenty of those years she has been buying and selling diamonds (R. 277). Mrs. Davis

testified that she deals with diamonds on a daily basis, either buying, selling, or appraising them (R. 297), and that she has had training in the area of identifying gems and has attended various jewelry seminars (R. 278, 297).

Mrs. Davis testified that Appellant brought in "a ring that is fourteen karat yellow gold band about six millimeters wide, had a finish on it, not bright and shiny, and had a karat size stone on it." (R. 280). Mrs. Davis stated that she looked at the stone, and measured it with a plastic gauge to determine the sized of the stone, according to millimeter size (R. 282). In looking at the stone, Mrs. Davis said its color was very good, "indicating that it was a better stone." (R. 283). After examining the stone thus far, Mrs. Davis testified that she "thought it was a diamond." (R. 284).

On cross examination, Mrs. Davis testified that she examined the stone by looking at it with her naked eye, measuring it with both a plastic gauge with circles on it and a millimeter gauge, and by looking at it with an instrument called a ten power loop (R. 300-02). Mrs. Davis testified that she then made an offer to Appellant to purchase his ring which he accepted and then left the store (R. 284-87).

Mrs. Davis testified that after Appellant left the store, she tested the stone twice with her diamond testing machine, and both times the machine indicated that the stone was not a genuine diamond (R. 287-88). The State brought the diamond tester to trial for demonstrative purposes, and Mrs. Davis used her own

diamond to demonstrate to the jury what the machine does when a genuine diamond is touched to it, (R. 289-92); see Addendum C. The ring Davis purchased from Appellant was received into evidence, (R. 36, 281). Interestingly, while the State had at its disposal a machine that would show that the stone in this ring was a zircon rather than a diamond, the State did not have Davis test this stone on the machine at trial (R. 289-92); see Addendum C.

Both Mrs. Davis, and her daughter, Linda Davis, testified that Appellant came back into the store about three hours later the same day because the watch they had given him in part exchange for the ring needed an adjustment (R. 292, 325). At this time, Linda Davis told Appellant that the ring they had purchased from him was not a diamond (R. 325).

The State called Officer Roberts to the stand who testified that she was dispatched to the Fankhouser Jewelry store for "an assault investigation" (R. 364). This officer's testimony concerned the aggravated assault allegations only; she made no mention of the theft by deception allegations, nor did the State question her regarding those allegations, (R. 364-70).

The evidence presented by the State does not demonstrate that Appellant had the required intent under the Theft by Deception statute at the time of the transaction. In fact, the evidence is to the contrary. There was no showing that Appellant believed the stone was a zircon and attempted to pass it off as a diamond. Both parties, relying on Mrs. Davis' experience with

diamonds and examination of this particular stone, believed at the time of the transaction that the stone was genuine. Mrs. Davis' testimony that the entire transaction--from the time Appellant entered the store until the time that he left--took twenty to twenty-five minutes (R. 306) demonstrates that in no way did Appellant prevent Mrs. Davis from acquiring information likely to affect her judgment in the transaction. Had Appellant intended to deceive the Davises by selling them a zircon rather than a diamond, he surely would not have returned to the scene of his alleged crime three hours later seeking an adjustment on his watch.

C. The Trial Court's error in taking under advisement Appellant's motion to dismiss the Theft by Deception charge impacted the decision of the jury.

The trial court's error is reversible because it impacted the jury's decision. The test used in determining when an error warrants reversal is whether, upon a review of the record as a whole, there is a reasonable likelihood that absent the error a different result would have occurred. Emmett, 839 P.2d at 784; see e.g., State v. Verde, 770 P.2d 116, 120 (Utah 1989); State v. Hackford, 737 P.2d 200, 204 & n. 1 (Utah 1987); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987); Utah R.Crim.P. 30(a). "[T]his determination is best made by viewing this error in conjunction with other errors that occurred during the trial, specifically, instances of prosecutorial misconduct." Emmett, 839 P.2d at 785; see Point II., *infra* at p. 17.

Because the trial judge reserved ruling on Appellant's

motion to dismiss, Appellant was forced to introduce evidence in his defense and was subjected to cross-examination concerning the allegations of theft by deception. The State spent the majority of its cross-examination questioning Appellant with respect to the theft by deception charge; of the twenty-eight pages of transcript containing the State's cross-examination of Appellant, twenty-three pages focused solely on the theft by deception allegations, (R. 402-20, 426-31); see Addendum D.

The State's cross-examination impacted Appellant's credibility and character which were central to his defense. But for the trial court's error in taking Appellant's motion to dismiss under advisement, Appellant would not have been subject to cross-examination on that charge, and his credibility and character would not have suffered great impact. As it was, there was a reasonable likelihood that absent the error, a different result would have occurred.

Appellant's testimony on cross-examination conflicted with the testimony of Mrs. Davis and Linda Davis in several respects. Given the conflict between the testimony of the Appellant and the Davises, if the jury found the Davises to be credible, it is more likely they would believe that Appellant was not testifying truthfully. Further, if the jury believed that Appellant was testifying untruthfully as to the charge of Theft by Deception, it could have easily believed as well that Appellant was not testifying truthfully to the Aggravated Assault charge.

Mrs. Davis testified several times on direct that Appellant

had told her that the ring belonged to his wife, (R. 288, 289). The State questioned Appellant relentlessly on cross-examination regarding the origin of the ring, (R. 403-07); see Addendum D. In response to the State's questioning, Appellant repeatedly denied telling Mrs. Davis that the ring belonged to his wife, (Id.). Appellant had previously testified on direct that he had found the ring in a washing machine a couple days before he took it to Fankhouser Jewelry, (R. 375). The State had not brought this fact out in its case in chief, and it seized upon it on cross examination to show the jury that Appellant lied to Mrs. Davis when he told her it belonged to his wife, (R. 402-07); see Addendum D. Further, in closing argument, the prosecutor used this fact to destroy Appellant's credibility, stating:

And in this case, we have a con. He misrepresented to start with that it was his own property. If you believe his version of the facts that he never said it was his wife's, or his ex-wife's, then manifested that it was his own property by saying give money for this, giving the impression that he has a right to the proceeds of that, that's not his property. That's a misrepresentation that he brought up. The State didn't bring it up at all.
(R. 462)

Mrs. Davis also testified several times on direct that Appellant represented to her that the ring he had with him contained a diamond, (R. 280, 284, 288). Again, the State's cross-examination of Appellant belabored him regarding this issue, and Appellant testified that he based his belief that the stone was a diamond on Mrs. Davis' offer and exchange of expensive merchandise for the ring, (R. 414-17); see Addendum D. Despite Appellant's testimony that he did not know the ring contained a zircon, the

prosecutor argued the following in his closing argument:

What are the odds of two imitation rings being presented at the same time, and Defendant not knowing that either one on them was phony? That's one of the things you have to consider. What were the remaining misrepresentations? The ultimate one is creating the impression the ring was a diamond when he did not believe this to be true.
(R. 463)

On direct, Mrs. Davis testified that Appellant told her specifically that he wanted to sell the ring (R. 280, 284). On cross, Appellant testified that he went to the store because he sought appraisals on two rings, and he wanted to find out whether the ring contained a genuine diamond (R. 407, 412, 414).

Mrs. Davis testified on direct that when she gave Appellant a check for \$ 1,275.00 as partial payment for the ring, she asked him not to cash it until the next day because she did not think she had enough money in her account to cover the check (R. 287). She also stated that Appellant agreed to these terms (Id.), but that Appellant cashed the check the same day she gave it to him (R. 293). On cross-examination, the State used this issue to shatter Appellant's character by making Appellant look like a bad person for cashing the check one day too soon (R. 419). The testimony was as follows:

Q. Do you remember the instructions from Mrs. Davis telling you that there would not be money in the account until tomorrow; is that correct?

A. She said that she had to make a deposit later that afternoon, or the next morning.

Q. And she asked you to wait; is that correct?

A. Yes.

Q. But you didn't wait, did you?

A. No, I didn't.

Q. Why didn't you?

A. I wanted to see if the check was good.

Q. Once you found out the check was good, and there was money in the account, why didn't you wait?

A. If it would have been post-dated, I would have.

Q. Did you think it might inconvenience her to have her checks bouncing because you took the check out before she said that you could?

A. I did not force this woman to write a check.

The prosecutor used this issue in closing argument to malign Appellant's character, saying:

They told him not to cash the check until the next day. Now, I'm not sure what his reasoning was, or what people go through that reasoning of checking to see if somebody's reputable by going and trying to make them have all their checks bounce by getting your check in first. How that leads you to believe whether or not somebody is reputable or not when they say wait for the following day, I don't understand [sic] how this would.
(R. 464)

Appellant's character and credibility would not have suffered so severely had he not been subject to cross-examination on the theft by deception charge. If the jury believed Appellant was testifying untruthfully as to the theft by deception charge, they could have easily believed Appellant testified untruthfully as to both charges. Further, had only the aggravated assault

charge been submitted to the jury for deliberation, the jury may not have convicted Appellant of any crime at all.

Review of this issue is appropriate because defense counsel properly preserved the issue for appeal. Defense counsel moved to dismiss both counts against Appellant at the close of the State's case in chief. The motions to dismiss preserved the issue for appeal. see Emmett. In Emmett, the court addressed this precise issue, stating:

We have never required criminal defendants who have properly presented a claim to take exception to a trial court's erroneous ruling in order to preserve the issue for appeal. Rather, our case law establishes that the doctrine of waiver has application if defendants fail to raise claims at the appropriate time at the trial level, so the trial judge has a opportunity to rule on the issue, or if they do not create an adequate record for a appellate court to review their claims.

789 P.2d at 783-84, (Utah 1992).

POINT II. THE PROSECUTOR MADE IMPROPER AND HARMFUL STATEMENTS IN HIS CROSS EXAMINATION OF APPELLANT.

The test used for determining whether a prosecutor's statements are improper and constitute error is whether the remarks "called to the jurors attention matters which they would not be justified in considering in reaching a verdict." Emmett, 839 P.2d at 785; quoting State v. Johnson, 663 P.2d 750, 754 (Utah 1982). Reversal is proper where statements are determined to be harmful. 839 P.2d at 785; (citations omitted). An error is harmful if it undermines the reviewing court's confidence in the verdict, or, stated alternatively, there is a reasonable likelihood of a more favorable outcome without the error. see

State v. Palmer, 860 P.2d 339, 342 (Utah App. 1993).

Prosecutorial misconduct violates the defendant's right to due process of law guaranteed by amendments V and XIV of the United States Constitution and Article 1, Section 7 of the Utah State Constitution. Further, it is the State's burden to show that the prosecutorial misconduct is harmless beyond a reasonable doubt.

see State v. Tarafa, 720 P.2d 1368, 1373 and n. 21 (Utah 1986).

A. The prosecutor did not support his allegations contained in his cross-examination of Appellant with evidence.

In Appellant's case, the prosecutor failed to support prejudicial questions with appropriate evidence. During cross-examination, the following exchange took place:

Q. But you did intend to stay in the valley, and continue working; is that correct?

A. Yes.

Q. But despite that, you immediately left for Washington after you had had this confrontation in the parking lot; is that correct?

A. No.

Q. You didn't immediately go back to Washington and pawn the ring and the watch in Seattle, Washington? Is that what you're saying here today under oath?

A. I didn't go back immediately.

Q. Well, how long did it take you to go back to Washington and pawn that watch and ring?

A. I was there approximately a month.

Q. A month. And if the pawn records indicated that you had

pawned that earlier in Seattle, they would be mistaken?

A. I can't hear you.

Q. If the pawn records from Seattle indicated you had pawned it earlier than that, they would be mistaken; is that correct?

A. I believe not. I did pawn the ring, yes, and the watch.

(R. 410-11); see Addendum D.

The prosecutor did not introduce the pawn records into evidence. This series of questions, followed by the State's failure to present any evidence supporting the allegations contained in the questions, brought improper information to the juror's attention.

The Supreme Court of Utah noted in State v. Emmett that this type of questioning generally constitutes error. see Emmett, 839 P.2d 781, 786-87 (Utah 1992). In Emmett, the prosecutor repeatedly questioned the defendant whether he had rehearsed his testimony with his attorney, asking at one point, "He didn't tell you to face the jury and *tell you exactly what to say?*" Id. at 786. (emphasis in original). The defendant denied the allegation, and the prosecutor presented no evidence to show that defense counsel had manufactured defendant's testimony. The court noted: "Generally, it is error to ask an accused a question that implies the existence of a prejudicial fact unless the prosecution can prove the existence of the fact. Otherwise, the only limit on such a line of questioning would be the prosecutor's imagination." Id. at 786-87; see also United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984) (requiring

prosecutor who asks accused prejudicial fact to prove the fact); State v. Peterson, 722 P.2d 768, 769-70 (Utah 1986) (per curiam) (holding questioning about prior convictions after witness's denial improper without extrinsic proof of the convictions).

This issue came before this court in State v. Palmer, 860 P.2d 339 (Utah 1993). In Palmer, defendant was charged with aggravated assault of a child. The prosecutor asked defendant several times if he had made incriminating statements to the victim's stepfather and then did not introduce evidence demonstrating that assertion. The court concluded that these questions which implied inculpatory facts and were unsupported by evidence were error. 860 P.2d at 343. The court reserved analysis on the harmfulness of the error in order to consider it in conjunction with all of the other errors in the case. Id.

The prosecutor's unsupported questions in the present case were also error, and were harmful because they affected the Appellant's character which was central to his defense. Further, the unsupported questions demonstrated that Appellant has a propensity to lie, thereby affecting his credibility, which, like Appellant's character, was central to his defense of both charges.

B. The prosecutor's questions exceeded the scope of cross-examination.

In addition to being unsupported by any evidence, the prosecutor's questions regarding the pawning of the ring and watch which are set out above and in Addendum D exceeded the scope of direct examination. Utah R. Evid. 611(b) provides:

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

At no time on direct examination did defense counsel question Appellant as to what he did with the watch and ring given to him by Mrs. Davis in part exchange for the ring, nor did Appellant offer any information on this issue, (R. 375-402). Because Appellant was not questioned on direct examination to what he did with the watch and the ring, and because he volunteered no testimony to that matter on direct, the prosecutor's questions allowed the jurors to unjustifiably focus on the fact that Appellant pawned the ring and the watch. This error was harmful because it affected Appellant's credibility and character which, as discussed earlier, were at the heart of his defense. This could have reasonably affected the decision of the jury as to the decision to convict Appellant on the aggravated assault charge.

C. The prosecutor asked Appellant to comment on the veracity of another witness.

In the instant case, the prosecutor asked Appellant whether he disagreed with the testimony of Mrs. Davis on the issue of the origin of the ring. The questioning was as follows:

Q. So it's your testimony now that you never told anybody on that occasion that the way you came into possession of this ring was that it came from your wife, your ex-wife, is that correct? That's what I'm hearing you say now.

A I never said it came from my wife.

Q. Did you ever say it came from your ex-wife?

A. No.

Q. You heard the testimony, and you disagree with that testimony; is that correct?

A. Yes.

(R. 405, emphasis added); see Addendum D.

In asking Appellant to assess the credibility of Mrs. Davis, the prosecutor drew to the juror's attention improper information. The Supreme Court of Utah said in Emmett that "[s]everal courts have noted that it is improper to ask a criminal defendant to comment on the veracity of another witness." 839 P.2d at 787; see United States v. Narcisco, 446 F. Supp. 252, 321 (E.D. Mich. 1977); Commonwealth v. Long, 462 N.E.2d 330, 331-32, review denied, 465 N.E.2d 262 (1984), People v. Ellis, 462 N.Y.S.2d 212, 213-214 (1983). The Emmett court explained that such a question is improper "because it is argumentative and seeks information beyond the witness's competence." 839 P.2d at 787; see Narcisco, 446 F.Supp at 321; Long, 462 N.E.2d at 331-32, Ellis, 462 N.Y.S.2d at 213-14. The court said further that "[t]he prejudicial effect of such a question lies in the fact that it suggests to the jury that a witness is committing perjury even though there are other explanations for the inconsistency. In addition, it puts the defendant in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury." 839 P.2d at 787; (citations omitted).

In Emmett, the prosecutor asked the defendant if he was

claiming that his son was lying. The court found the question improper but that it was unnecessary to address how the question affected the trial since the court had previously decided to reverse for other errors. The court concluded that "we feel again compelled to note that prosecutors have a duty to eschew all improper tactics." 839 P.2d at 787; citing State v. Tillman, 750 P.2d 546, 557 (Utah 1987).

The issue was also before this court in State v. Palmer, 860 P.2d 339 (Utah App. 1993). In Palmer, this court relied on Emmett to find that the prosecution's questions to the defendant asking him to comment on the veracity of other witnesses amounted to obvious error. 860 P.2d at 344. In cross-examination, the prosecutor asked defendant to comment on the conflict between his testimony and that of two other witnesses. Relying on Emmett, the court found the questions to be argumentative and prejudicial because such questions suggest to the jury that the witness is committing perjury even though other explanations may exist for the inconsistencies. Id. The court reserved analysis on the harmfulness of the error in order to consider it in conjunction with all of the other errors in the case. Id.

This type of questioning in the instant case was error for the same reasons as the courts enunciated in both Emmett and Palmer. The questions brought improper matters to the juror's attention. Further, considered in conjunction with the other errors of the prosecution, this error was harmful because absent it, the jury could have reasonably returned with a more favorable

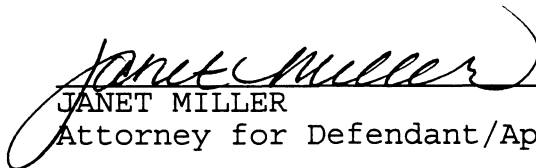
result for Appellant.

Review of these issues is proper because they were plain error. "Plain error is error that is both harmful and obvious." State v. Emmett, 839 P.2d at 785; see State v. Bullock, 791 P.2d 155, 158 (Utah 1989) (no obvious error because admission of evidence part of trial strategy); State v. Whittle, 780 P.2d 819, 821 (Utah 1989) (applying plain error analysis to claims of prosecutor misconduct); see Utah R. Evid. 103(d). In Emmett, the Supreme Court of Utah said it reviews allegation of plain error despite a timely objection "in order to avoid manifest injustice and because, if the error is obvious, the trial court has the opportunity to address the error regardless of the fact that it was never brought to the court's attention." 839 P.2d at 785, (citations omitted).

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand this case for a new trial.


SUBMITTED this 28 day of March, 1994.


JANET MILLER
Attorney for Defendant/Appellant

LISA J. REMAL
Attorney for Defendant/Appellant

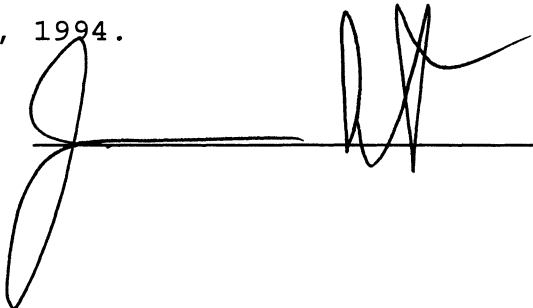
CERTIFICATE OF DELIVERY

I, JANET MILLER, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 28 day of March, 1994.


JANET MILLER

DELIVERED by

this 28 day of March, 1994.



ADDENDUM A

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.

A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

Key Numbers. — Constitutional Law — 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

Compiler's Notes. — Laws 1983, Senate

Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.

Regulation of right to bear arms.

Prospective application.

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.

C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

A.L.R. — Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Key Numbers. — Constitutional Law — 82; Weapons — 1, 3, 6 et seq.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

AMENDMENT V**[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI**[Rights of accused.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII**[Trial by jury in civil cases.]**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII**[Bail — Punishment.]**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV**Section**

1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]

Section

4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

COLLATERAL REFERENCES

Am. Jur. 2d. — 67 Am. Jur. 2d Robbery § 3. affecting criminal responsibility, 68 A.L.R.4th
C.J.S. — 77 C.J.S. Robbery § 28. 507.
A.L.R. — Fact that gun was unloaded as af- **Key Numbers.** — Robbery ⇐ 11.

PART 4

THEFT

76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impedi-

ment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(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.

History: C. 1953, 76-6-401, enacted by L. 1973, ch. 196, § 76-6-401.

NOTES TO DECISIONS

ANALYSIS

Deception.
Purpose to deprive.
Cited.

Deception.

Subsection (a) in the definition of "deception" only applies to impressions of fact that are false at some present time; unfulfilled promises of future performance do not suffice as false representations under that subsection. *State v. Lakey*, 659 P.2d 1061 (Utah 1983).

Under Subsection (b) in the definition of "deception," the previously created or confirmed impression of fact must be false when the property is obtained in order to constitute "deception." *State v. Lakey*, 659 P.2d 1061 (Utah 1983).

Under Subsection (e) in the definition of "deception," a promise of future performance can constitute deception when the promising party does not intend to perform or knows the promise will not be performed; a person knows that a promise will not be performed when he is aware that the promise is reasonably certain not to be performed. *State v. Lakey*, 659 P.2d 1061 (Utah 1983).

Purpose to deprive.

Evidence was sufficient to establish defendant's intent to deprive owner of his automobile where defendant drove the automobile in excess of 100 miles per hour when fleeing from police; told police when stopped that he owned the automobile; damaged the automobile by misuse; and drove the car from Utah to California without ever stating he would return the automobile to Utah. *State v. Daniels*, 584 P.2d 880 (Utah 1978).

The defendant's "purpose to deprive" was inferred from the following facts: in 1984, defendant began borrowing small amounts of money from the victim to buy pet food; the victim's generosity prompted defendant to make subsequent requests for larger sums to pay for everything from automobile repairs to medical bills; with each request, defendant inevitably promised to repay the victim soon or by a specific date; and between 1984 and 1986, defendant borrowed over \$70,000 and repaid only about \$1,500. *State v. Fowler*, 745 P.2d 472 (Utah Ct. App. 1987).

Cited in *Stevens v. Sanpete County*, 640 F. Supp. 376 (D. Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — Utah's New Penal Code: theft, 1973 Utah L. Rev. 718.

Am. Jur. 2d. — 50 Am. Jur. 2d Larceny § 1.

C.J.S. — 52A C.J.S. Larceny § 1(1).

A.L.R. — Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Cat as subject of larceny, 55 A.L.R.4th 1080.

What is "trade secret" so as to render actionable under state law its use or disclosure by former employee, 59 A.L.R.4th 641.

Key Numbers. — Larceny ⇐ 1.

76-6-405. Theft by deception.

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

(2) Theft by deception does not occur, however, 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.

History: C. 1953, 76-6-405, enacted by L. 1973, ch. 196, § 76-6-405.

NOTES TO DECISIONS**ANALYSIS****Constitutionality.**

Distribution of imitation controlled substance.

Elements of offense.

—Pecuniary loss.

Evidence.

Forgery distinguished.

Intent.

Jury instructions.

"Purpose to deprive."

Venue of offense.

Cited.

Constitutionality.

This section is not unconstitutionally vague or ambiguous; fact that auto salesman who knew that turning back an odometer was a crime assertedly relied upon the fact that former § 41-6-177 made such crime only a misdemeanor did not preclude conviction of the salesman of theft by deception on basis of his having turned back the odometer. *State v. Forshee*, 588 P.2d 181 (Utah 1978).

Distribution of imitation controlled substance.

Where defendant distributed an imitation controlled substance in violation of § 58-37b-4, pursuant to § 58-37-19, which is applicable to offenses under Chapter 58-37b, defendant should have been charged with a violation of § 58-37b-4, which specifically proscribed defendant's conduct, rather than with theft by deception. *State v. Hill*, 688 P.2d 450 (Utah 1984).

Elements of offense.

For cases discussing elements of former offense of obtaining money by false pretense, see *State v. Howd*, 55 Utah 527, 188 P. 628 (1920); *State v. Casperson*, 71 Utah 68, 262 P. 294 (1927); *State v. Jensen*, 74 Utah 527, 280 P. 1046 (1929); *State v. Morris*, 85 Utah 210, 38 P.2d 1097 (1934); *State v. Timmerman*, 88 Utah 481, 55 P.2d 1320 (1936); *Ballaine v. District Court ex rel. Box Elder County*, 107 Utah

247, 153 P.2d 265 (1944); *State v. Vatsis*, 10 Utah 2d 244, 351 P.2d 96 (1960); *State v. Nuttall*, 16 Utah 2d 171, 397 P.2d 797 (1964).

Reliance by the victim is an element of the crime of theft by deception; even though the alleged victim is deceived, if he does not rely on the deception in parting with his property, there has been no theft by deception. *State v. Jones*, 657 P.2d 1263 (Utah 1982).

—Pecuniary loss.

Evidence of pecuniary loss can be used to prove the elements of the crime of theft by deception, although pecuniary loss is not an essential element in itself. *State v. Roberts*, 711 P.2d 235 (Utah 1985).

Evidence.

Evidence that defendant had signed name of alleged buyer of automobile to conditional sales contract which was purchased by finance company, and that automobile was subsequently sold to third person who paid cash sustained conviction for obtaining money by false pretenses. *State v. Vatsis*, 10 Utah 2d 244, 351 P.2d 96 (1960).

Evidence was not sufficient to support beyond a reasonable doubt finding that buyer was reasonably certain that his promise to make a deposit into his checking account would not be performed, and was therefore insufficient to support his conviction for theft by deception when his personal check for payment of the goods was returned for insufficient funds, where at time buyer gave seller the check he informed seller of the insufficient funds in the account; he requested seller not to cash the check that day; he informed seller that he had assurances from investors of imminent cash investments which he would deposit to cover the check; the seller accepted the check on such terms; and the check was returned for insufficient funds because the buyer did not receive the expected cash to make the deposit. *State v. Lakey*, 659 P.2d 1061 (Utah 1983).

Evidence held to be sufficient to establish the amount of funds embezzled by a theater manager. See *State v. Patterson*, 700 P.2d 1104 (Utah 1985).

In a prosecution for theft by deception, there was sufficient evidence that the defendant, who sold a mobile home under a lease-back arrangement, then secured two loans using the same mobile home as collateral, without disclosing that title was encumbered, intended to deceive at the time of the transactions. *State v. Noren*, 704 P.2d 568 (Utah 1985).

Forgery distinguished.

Court properly ordered release of defendant who had pleaded guilty to crime of obtaining money or property by false pretenses, when information charged him with crime of forgery; former crime was not "necessarily included" in crime of forgery, although both crimes included elements of fraud; forgery had to do with alteration or falsification of written instruments or documents, or use of unauthorized signatures, while false pretenses statute applied to wide range of activities related to property which might have in some instances involved forgery, but usually did not. *Williams v. Turner*, 421 F.2d 168 (10th Cir. 1970).

Intent.

In a prosecution for theft by deception, the intent of the defendant at the time of taking the victim's money is determinative, and the fact that the defendant later enters an agreement with the victim, appearing to negate any criminal intent, is immaterial. *State v. Drodgy*, 702 P.2d 111 (Utah 1985).

Jury instructions.

Instructions referred to the intent required for commission of the offense but that did not inform the jury that before returning a verdict

of guilty they must find beyond a reasonable doubt that defendant had the conscious objective to withhold the property permanently was fatally defective. *State v. Laine*, 618 P.2d 33 (Utah 1980).

Where defendant was charged with theft by deception, instruction to jury stating that they "may" employ a presumption that "the law presumes that a person intends the reasonable and ordinary consequences of his own act" violated defendant's constitutional right to due process of law because under the instruction given, the burden of persuasion on the element of intent, in the jury's mind, may have been shifted to the defendant. *State v. Walton*, 646 P.2d 689 (Utah 1982).

"Purpose to deprive."

The defendant's "purpose to deprive" was inferred from the following facts: in 1984, the defendant began borrowing small amounts of money from the victim to buy pet food; the victim's generosity prompted defendant to make subsequent requests for larger sums to pay for everything from automobile repairs to medical bills; with each request, defendant inevitably promised to repay the victim soon or by a specific date; and between 1984 and 1986, defendant borrowed over \$70,000 and repaid only about \$1,500. *State v. Fowler*, 745 P.2d 472 (Utah Ct. App. 1987).

Venue of offense.

District court had jurisdiction of offense of obtaining money by false pretense where both misrepresentation and delivery of goods were accomplished in Utah. *State v. Cobb*, 13 Utah 2d 376, 374 P.2d 844 (1962).

Cited in *State v. Ortiz*, 782 P.2d 959 (Ct. App. 1989).

COLLATERAL REFERENCES

Utah Law Review. — Criminal and Civil Liability for Bad Checks in Utah, 1970 Utah L. Rev. 122.

Am. Jur. 2d. — 32 Am. Jur. 2d False Pretenses § 1.

C.J.S. — 35 C.J.S. False Pretenses § 5.

A.L.R. — Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like, 6 A.L.R.3d 241.

Criminal liability of corporation for extor-

tion, false pretenses, or similar offenses, 49 A.L.R.3d 820.

Criminal liability in connection with application for, or receipt of, public relief or welfare payments, 80 A.L.R.3d 1280.

Key Numbers. — False Pretenses ⇐ 2.

Rule 30. Errors and defects.

(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.

Cross-References. — Arraignment, necessity of objection to preserve error, U.R.Cr.P. 10.

Indictments and informations, harmless errors, U.R.Cr.P. 4.

NOTES TO DECISIONS

ANALYSIS

Admission of photographic evidence.

Clerical mistakes.

—Defendant's right of allocution.

Harmless error.

Minor defect.

Substantial right affected.

—State's burden of persuasion.

Variances.

Cited.

Admission of photographic evidence.

Even though admission of photographs of manslaughter victim served only to create emotional impact on jury, their admission was not reversible error; they were not so gruesome or offensive that their absence would have resulted in a more favorable outcome for defendant. *State v. Wells*, 603 P.2d 810 (Utah 1979).

Clerical mistakes.

—Defendant's right of allocution.

The defendant's due process right of allocution was satisfied at a sentencing hearing held in his presence, where he was addressed by the judge and elected to speak, and an amended judgment subsequently entered by the trial court, at which the defendant was not present nor represented by counsel, reflected only a correction of a clerical mistake in his sentence. *State v. Lorrain*, 761 P.2d 1388 (Utah 1988).

Harmless error.

In prosecution for having carnal knowledge of female under age of 18 years, although it was error to allow prosecutrix to testify to acts of sexual intercourse after one relied on for conviction, such error was not prejudicial to defendant so as to require reversal. *State v. Mattivi*, 39 Utah 334, 117 P. 31 (1911).

Where defendant in murder prosecution contested every step taken by state during progress of trial and was afforded every opportunity to defend charge, and his counsel insisted upon every right to which the law entitled him, mere fact that defendant's plea of not guilty was received on legal holiday did not constitute prejudicial error. *State v. Estes*, 52 Utah 572, 176 P. 271 (1918).

In a prosecution of a state fish and game warden for appropriating state money to his own use, an instruction in which the court read the entire statute on misuse of public money was erroneous, but since it did not prejudice rights of defendant, such error was disregarded. *State v. Siddoway*, 61 Utah 189, 211 P. 968 (1922).

The admission of testimony at trial in violation of defendant's constitutional confrontation

rights was harmless beyond a reasonable doubt where such testimony was merely cumulative. *State v. Chapman*, 655 P.2d 1119 (Utah 1982).

Trial court's instruction that flight from scene of crime of aggravated burglary amounted to implied admission of guilt was erroneous, but was not prejudicial, since there was other evidence sufficient to sustain a conviction. *State v. Bales*, 675 P.2d 573 (Utah 1983).

The prosecutor's impermissible comment on the defendant's exercise of his constitutional right not to take the stand did not require reversal where the other evidence of guilt was convincing, defense counsel's prompt objections prevented the prosecutor from making any real point of the failure to testify, and the judge's quick and decisive admonition to the jury and prosecutor further obviated any harm that might have resulted from the comments. *State v. Tucker*, 709 P.2d 313 (Utah 1985).

Erroneous inclusion of intent to defraud an insurer in the information as comprising an element of aggravated arson was harmless error, where a correct instruction on the subject was later given to the jury immediately before their deliberations, to which no objection was taken. *State v. Bergwerff*, 777 P.2d 510 (Utah Ct. App. 1989).

Admission of defendant's prior offenses was harmless error as there was no reasonable likelihood of a more favorable result without the admission of the prior bad acts evidence. *State v. Featherson*, 781 P.2d 424 (Utah 1989).

Minor defect.

Conviction for fornication would not be reversed because information charged defendant with having committed offense with one "Verda," whereas her name was Beatea, where identity of woman was sufficiently established. *State v. Chipman*, 40 Utah 549, 123 P. 89 (1912).

Substantial right affected.

Court could not reverse judgment unless some substantial right of defendant had been invaded. *State v. Estes*, 52 Utah 572, 176 P. 271 (1918).

The verdict of a jury will not be upset on appeal merely because some error or irregularity may have occurred, but will be overturned only if the error or irregularity is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result. *State v. Hutchinson*, 655 P.2d 635 (Utah 1982); *State v. Rimmasch*, 775 P.2d 388 (Utah 1989); *State v. Mitchell*, 779 P.2d 1116 (Utah 1989).

material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at specified time.

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received in evidence, except depositions; and each juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person.

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Cross-References. — Capital felony, penalty, execution of penalty, §§ 76-3-206, 76-3-207, 77-19-1 et seq.

Fees, payment by state in criminal cases, § 21-6-5.

Husband and wife as witness for or against each other, Utah Const., Art. I, Sec. 12; §§ 77-1-6, 78-24-8.

Jurors and jury, § 78-46-1 et seq.

Report of testimony of witness taken at preliminary examination as admissible, Rule 7.

Right to jury trial, Utah Const., Art. I, Sec. 10, § 77-1-6.

When judgment rendered, Rule 22.

When verdict rendered, Rule 21

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ARTICLE I. GENERAL PROVISIONS.

Rule 101. Scope.

These rules govern proceedings in the courts of this State, to the extent and with the exceptions stated in Rule 1101.

Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on evidence.

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104. Preliminary questions.

(a) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) **Testimony by accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) **Weight and credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.
(Amended effective October 1, 1992.)

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
(Amended effective October 1, 1992.)

ARTICLE II. JUDICIAL NOTICE.

Rule 201. Judicial notice of adjudicative facts.

(a) **Scope of rule.** This rule governs only judicial notice of adjudicative facts

and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

ARTICLE III. PRESUMPTIONS.

Rule 301. Presumptions in general in civil actions and proceedings.

(a) **Effect.** In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

(b) **Inconsistent presumptions.** If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

Rule 302. Applicability of federal law in civil actions and proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

ARTICLE IV. RELEVANCY AND ITS LIMITS.

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or

717 (1922) (referred to in Committee Note);
State v. Green, 578 P.2d 512 (Utah 1978);
State v. Hubbard, 601 P.2d 929 (Utah 1979);
State v. Tarafa, 720 P.2d 1368 (Utah 1986);

State v. Morehouse, 748 P.2d 217 (Utah Ct. App. 1988); *State v. Johnson*, 784 P.2d 1135 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1987 Utah L. Rev. 137.

Green v. Bock Laundry — Federal Rule 609(a)(1) in Civil Cases: The Supreme Court Takes an Imbalanced Approach, 1990 Utah L. Rev. 613.

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 569 et seq.

C.J.S. — 98 C.J.S. Witnesses § 507.

A.L.R. — Permissibility of impeaching cred-

ibility of witness by showing former conviction as affected by pendency of appeal from conviction or motion for new trial, 16 A.L.R.3d 726.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment, 67 A.L.R.3d 761.

Right to impeach credibility of accused by showing prior conviction as affected by remoteness in time of prior offense, 67 A.L.R.3d 824.

Key Numbers. — Witnesses ⇐ 345.

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

(Amended effective October 1, 1992.)

Advisory Committee Note. — This rule is the federal rule, verbatim, and is in accord with Rule 20 [Rule 30], Utah Rules of Evidence (1971).

Cross-References. — Religious belief not

basis of incompetency as a witness, Utah Const., Art. I, Sec. 4.

Amendment Notes. — The 1992 amendment, effective October 1, 1992, revised this rule to make the language gender-neutral.

Rule 611. Mode and order of interrogation and presentation.

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. (Amended effective October 1, 1992.)

Advisory Committee Note. — This rule is the federal rule, verbatim, and restates the inherent power of the court to control the judicial process. Cf. *Vanderpool v. Hargis*, 23 Utah 2d 210, 461 P.2d 56 (1969). There was no comparable provision to Subsection (b) in Utah Rules of Evidence (1971), but it is comparable to current Utah case law and practice. *Degnan, Non-*

Rules Evidence Law: Cross-Examination, 6 Utah L. Rev. 323 (1959). Subsection (c) is comparable to current Utah practice. Cf. Rule 43(b), Utah Rules of Civil Procedure.

Amendment Notes. — The 1992 amendment, effective October 1, 1992, revised this rule to make the language gender-neutral.

NOTES TO DECISIONS

ANALYSIS

Cross-examination.

Exclusion of witnesses.

Leading questions.

Cross-examination.

Trial court did not abuse its discretion in

control of cross-examination by defense counsel. See *Vanderpool v. Hargis*, 23 Utah 2d 210, 461 P.2d 56 (1969).

The latitude that may be allowed in cross-examination is largely within the discretion of the trial court, to be exercised and governed by the facts and circumstances of each particular

ADDENDUM B

1 you want to step back and hand them to the baliffs at the
2 front door, feel free to do so. If you do mail them in,
3 write your name at the bottom, and indicate you were a
4 juror so I know who they came from. And then I can see
5 they are administratively dismissed. If there's nothing
6 else I'm going to dismiss the jury at this time.

7 MS. REMAL: Nothing else.

8 THE COURT: Thank you all very much, ladies
9 and gentlemen. Please have a nice day.

10 MR. MORGAN: Your Honor, before we proceed
11 with your ruling, perhaps I may be able to save that
12 judicial time. One moment.

13 THE COURT: I suppose the reason I took this
14 under advisement as to count one was my concern at the
15 time that -- I thought the jury would let me off the
16 hook, and they didn't. I think my concern went perhaps
17 more to weight than actually being able to determine as a
18 matter of law that reasonable minds could not differ on
19 the sufficiency of the evidence in this case. And while
20 I still have concerns about the strength of the State's
21 case primarily on the basis of intent as far as Mr.
22 Taylor's concerned, I in all honesty do not feel that I
23 would be acting appropriately if I said that as a matter
24 of law, reasonable minds could not differ with regard to
25 the question of intent. I believe it's possible that

1 reasonable minds can differ, and I think it's a question
2 of proof in my own view of the evidence in particularly
3 the state of mind of Mr. Taylor when he first went in
4 Fankhauser Jewelry, and I suppose that's basis upon the
5 after events, but those are traditionally matters for a
6 trier of fact, and not a matter for the Court to rule on
7 as a matter of law. So while I then and still do have
8 some serious concerns about the strength of the State's
9 case, I'm not willing to say as a matter of law that it
10 must fail. Therefore, the motion is denied. All right.
11 Having granted a mistrial in this matter, what I am going
12 to do is this: Is there any reason I ought not to
13 proceed to sentence on the third degree felony?

14 MR. MORGAN: No reason known to the State.

15 MR. REMAL: None that I know, Your Honor.

16 THE COURT: Let's set the matter down for
17 sentencing. October 29th, Evelyn?

18 THE CLERK: Yes.

19 THE COURT: Mr. Taylor, you have a right to
20 be sentenced not earlier than two, no more than thirty
21 days from today's date. Ms. Remal, would it be
22 appropriate to get a pre-sentence report?

23 MR. REMAL: I believe it would be.

24 THE COURT: I'll set the matter for the 29th
25 of October at nine o'clock for sentencing. I'll refer

ADDENDUM C

1 work, and he needed money.

2 Q. So he indicated he was familiar with that

3 particular --

4 A. Yes. He said it belonged to his wife.

5 Q. Did he say anything else about the origin of

6 that diamond?

7 A. No.

8 Q. Now, you indicated that you tested it with a

9 diamond tester. You've been kind enough to bring that

10 diamond tester today?

11 A. Yes.

12 Q. Would you take it out of your little bag

13 there?

14 A. Yes.

15 MR. MORGAN: May we show that to the jury? I

16 don't think we want to enter it into evidence. Use it

17 for demonstrative purposes.

18 THE COURT: Defendant have any objection?

19 MS. REMAL: I don't have any objection, as

20 long as Mr. Taylor and I can move so we can see the

21 demonstration.

22 THE WITNESS: It's blinking now, and once it

23 stops and says ready, then it's ready to be used.

24 MR. MORGAN: Mind if we show it to counsel

25 and the jury?

1 THE WITNESS: No, that's fine
2 THE COURT: Mr. Taylor, just stand right back
3 there by your counsel.
4 MR. MORGAN: I'd just like to show it to the
5 jury.
6 THE COURT: Pass it around, let them take a
7 look at it.
8 Q. (By Mr. Morgan) You indicated that the
9 light is blinking right now. What does that mean?
10 A. That it's getting ready. It's heating up.
11 Q. We just heard a beep. What does that mean?
12 A. Did you touch your diamond?.
13 Q. I don't have a diamond.
14 A. Oh, the beep meant that it was ready. Isn't
15 it just -- not blinking any more?
16 Q. And the red light will stay on when it's
17 ready to test?
18 A. Yes. Until you touch something with it.
19 Q. Based upon your training and experience,
20 you've indicated that you do have a diamond on your hand;
21 is that correct?
22 A. Yes. Uh huh (affirmative).
23 Q. What size of diamond is that?
24 A. 2.11 karats.
25 Q. That's a big one?

1 A. Uh huh (affirmative).

2 Q. Would you test for the jury to show them what
3 it sounds like? Now, I'll give you your diamond back.

4 THE COURT: Mr. Taylor, stand back over here
5 behind your attorney, please.

6 Q. (By Mr. Morgan) Now, we just heard a beep?

7 A. The green light comes on and says diamond.

8 Q. What does that mean?

9 A. That it is a diamond.

10 Q. Now, we're going to have to allow it to
11 recharge again, and that will turn red again, and you'll
12 hear a little beep, and you're now going to test the item
13 that was represented as a diamond by the defendant; is
14 that correct?

15 A. Yes.

16 Q. State's Exhibit 1?

17 A. I can touch mine again.

18 Q. Now you're touching your's again?

19 A. Uh huh (affirmative).

20 Q. And it's beeping and turning green?

21 A. Uh huh (affirmative).

22 Q. It did not beep or turn green on the
23 defendant's; is that right?

24 A. No.

25 Q. This is the kind of test you conducted?

1 A. Yes.

2 Q. You checked it twice?

3 A. Yes.

4 Q. You realize now it was not a diamond. And

5 based upon its color, and its size, you concluded it was

6 a cubic zirconium?

7 A. Yes.

8 Q. The defendant returned later that day?

9 A. Yes. He came back about 1:30.

10 Q. And who was present at that time?

11 A. My daughter Linda, myself, and my husband,

12 Gary.

13 Q. And did the defendant approach you again at

14 that time?

15 A. Yes. He came in, and said that the hands on

16 the watch were not lined up. In other words, at twelve

17 o'clock, both hands should be on top of each other, the

18 hour hand was off so that -- he didn't say how far off,

19 but I know what he meant. Instead of being twelve

20 o'clock, maybe the hour hand was on 1, between 1 and 12,

21 to indicate that the hands weren't lined up.

22 Q. And at that time, did you confront him with

23 your discovery that it was a cubic zirconium?

24 A. Yes. My daughter, Linda, told --

25 Q. Did you confront him?

ADDENDUM D

1 zirconium or a real diamond?

2 A. No, I did not.

3 Q. Did you at any time on June 21st, 1993 try to
4 hit Linda Davis with your car?

5 A. No.

6 MS. REMAL: I don't have anything further
7 questions, Your Honor.

8 THE COURT: Mr. Morgan?

9 CROSS EXAMINATION

10 By Mr. Morgan:

11 Q. You testified that you found this in a dryer
12 two days before the incident; is that correct?

13 A. It was not in a dryer; it was in a washing
14 machine.

15 Q. You found it two days prior; is that correct?

16 A. No. It was on Sunday morning.

17 Q. You found it?

18 A. Yes.

19 Q. Before you are took it into the jewelry
20 store?

21 A. I found it Sunday morning after I took my
22 wash out of the machine.

23 Q. Do you understand what I'm asking you? Did
24 you find it two days before?

25 A. No.

1 Q. Did you find it before you went into the
2 jewelry store? Yes or no?

3 A. Yes.

4 Q. It was not your property; is that correct?

5 A. No, it wasn't.

6 Q. This is somebody else's property, no matter
7 what it is, when you walked into the jewelry store; isn't
8 that correct?

9 A. Yes.

10 Q. All right. When you went in there, you sold
11 it as if it were your own; is that correct?

12 A. I wanted to find out if it was real first.

13 Q. I understand. My question, however, was when
14 you made the transaction, you sold it, and represented to
15 them that this was your own; isn't that correct? No
16 matter what it was?

17 A. Yes.

18 Q. So you misrepresented by your own testimony
19 where you got this ring and who owned it?

20 A. Can you define that a little bit for me?

21 Q. Yes. To misrepresent means to lie. You lied
22 to them about whether or not you owned this ring or not,
23 didn't you?

24 A. I made no statement to them. I brought it in
25 to have it appraised.

1 Q. It was a lie when you sold this ring to them
2 as your own, wasn't it?

3 A. I don't think it was quite a lie.

4 Q. What do you think it quite was?

5 A. I think what I should have done was do some
6 more research.

7 Q. When you walked in there, and you
8 misrepresented that it was your own property, you told
9 them that it belonged to your wife, or your ex-wife;
10 isn't that true?

11 A. I never said I had a wife.

12 Q. You didn't?

13 A. No, I didn't.

14 Q. You are divorced, aren't you?

15 A. Say what?

16 Q. You're divorced, aren't you?

17 A. Yes.

18 Q. And you were divorced on June 21st, 1993,
19 weren't you?

20 A. Yes.

21 Q. So you did have an ex-wife?

22 A. Yes.

23 Q. And so it's very reasonable to assume that
24 you did tell them that this belonged to your ex-wife; is
25 that correct.

1 MS. REMAL: I object to the form of the
2 question. I think he can ask what he did or didn't say.
3 MR. MORGAN: I withdraw the question.
4 THE COURT: Very well.
5 Q. (By Mr. Morgan) So it's your testimony now
6 that you never told anybody on that occasion that the way
7 you came into possession of this ring was that it came
8 from your wife, your ex-wife; is that correct? That's
9 what I'm hearing you say you now.
10 A. I never said it came from my wife.
11 Q. Did you ever say it came from your ex-wife?
12 A. No.
13 Q. You heard the testimony, and you disagree
14 with that testimony; is that correct?
15 A. Yes.
16 Q. Nobody ever asked you where you got the ring?
17 A. Yes, she did.
18 Q. And how did you respond when you were asked?
19 A. I didn't respond.
20 THE COURT: He said he didn't respond.
21 Q. You didn't respond. They didn't ask you --
22 when you didn't respond to them asking you where you got
23 the ring, did that surprise you?
24 A. Ms. Davis was making the assumption that it
25 was my ex-wife's.

1 Q. Why would she make that assumption?
2 A. Possibly because it's a woman's ring.
3 Q. Were you wearing a wedding ring?
4 A. No.
5 Q. Are you wearing a wedding ring today?
6 A. No.
7 Q. So why would one assume that it came from
8 someone to whom you've been married?
9 A. I don't know.
10 Q. That would not be a reasonable assumption in
11 your opinion, would it?
12 A. Could you -- I can't hear very well. I'm
13 sorry. Could you come up closer?
14 Q. You indicated -- this is as close as I want
15 to get. If you can't hear me, I'll repeat the question.
16 You indicated that you believed that Mrs. Davis, Miriam
17 Davis assumed this came from your ex-wife; is that
18 correct?
19 Or your wife?
20 A. That's what she said, yes.
21 Q. When did she say that?
22 A. After I asked her if she'd appraise it.
23 Q. So she said this came from your ex-wife, and
24 again, did you respond to that statement?
25 A. I didn't really say anything, no.

1 Q. Didn't it surprise you that she never
2 questioned your failing to tell her where the ring came
3 from?

4 MR. REMAL: Your Honor, I object. I don't
5 think it's relevant whether it surprised him or not what
6 Ms. Davis was thinking.

7 THE COURT: Overruled.

8 Q. (By Mr. Morgan) Did it surprise you that
9 she did not question your failure to tell her where this
10 ring came from?

11 A. To be honest with you, she was more eager to
12 find out if the ring was real or not.

13 Q. And you were willing to let her just take the
14 ring no matter what; is that correct?

15 A. No.

16 Q. Were you eager to sell this ring?

17 A. I wanted to find out its true value, yes.

18 Q. Were you eager to sell the ring?

19 A. Not necessarily, no.

20 Q. Were you employed on June 21st, 1993 in the
21 State of Utah?

22 A. Yes.

23 Q. What were you doing for a living?

24 A. Working.

25 Q. Where were you working?

1 A. Subcontractor.

2 Q. For whom were you subcontracting?

3 A. His name is Cal. I was working up in Park
4 City at the time.

5 Q. What's Cal's last name?

6 A. To be honest with you, I'd have to get the
7 phonebook and get it out for you. I worked for him for
8 one week.

9 Q. And during that one week period, how much did
10 you earn?

11 A. About \$150.00.

12 Q. With that \$150.00 over the one week period,
13 did you have any money in your pocket when you walked in
14 there?

15 A. Yes.

16 Q. How much money did you have in your pocket?

17 A. I had several hundred dollars. Can we back
18 up a little bit?

19 Q. Sure. You're about to tell me where you got
20 the several hundred dollars from.

21 A. I was working for Intermountain Temporary. I
22 had been working for them for over a year.

23 Q. Those are for people who don't have continued
24 employment; is that correct?

25 A. I don't work for them any more, no.

1 Q. Maybe I didn't make that clear. You didn't
2 have a regular job, did you?

3 A. I was working through a temporary service,
4 yes.

5 Q. And that is not a regular job, is it?

6 A. It's work.

7 Q. Needed money, didn't you?

8 A. No.

9 Q. You were eager to sell this ring because you
10 needed money?

11 A. Can we back up a little bit?

12 THE COURT: No. Is that a question, or a
13 statement?

14 MR. MORGAN: It was a question, Your Honor. I
15 think it's best just to move on.

16 Q. (By Mr. Morgan) Now, when was the last
17 time you got paid?

18 A. Friday.

19 Q. Did you expect to go to work the following
20 Monday?

21 A. I also worked during the weekends detailing
22 semi trucks.

23 Q. I see. For whom did you work detailing semi
24 trucks?

25 A. Just independent owners.

1 Q. And you would have to look in the phone book
2 to find their names as well?

3 A. No, I'd go to the truckstops.

4 Q. And did you expect to work that week?

5 A. It was -- yes.

6 Q. And you expected to continue working in
7 construction as a subcontractor up in Park City as well;
8 is that correct?

9 A. I worked up there with this person for one
10 week. That was the term of the job. Yes.

11 Q. So that job was over?

12 A. Yes.

13 Q. But you did intend to stay in the valley, and
14 continue working; is that correct?

15 A. Yes.

16 Q. But despite that, you immediately left for
17 Washington after you had had this confrontation in the
18 parking lot; is that correct?

19 A. No.

20 Q. You didn't immediately go back to Washington
21 and pawn the ring and the watch in Seattle, Washington?
22 Is that what you're saying here today under oath?

23 A. I didn't go back immediately.

24 Q. Well, how long did it take you to go back to
25 Washington and pawn that watch and ring?

1 A. I was there approximately a month.

2 Q. A month. And if the pawn records indicated

3 that you had pawned that earlier in Seattle, they would

4 be mistaken?

5 A. I can't hear you.

6 Q. If the pawn records from Seattle indicated

7 you had pawned it earlier than that, they would be

8 mistaken; is that correct?

9 A. I believe not. I did pawn the ring, yes, and

10 the watch.

11 Q. You had another ring with you at the time

12 that you went into the jewelry store?

13 A. Yes.

14 Q. Where did you get this ring?

15 A. It was given to me by my mother.

16 Q. It was given to you by the --

17 A. Mother.

18 Q. The mother of whom?

19 A. Me.

20 Q. Your mother?

21 A. Yes.

22 Q. And that ring is where today?

23 A. It's back in Washington.

24 Q. Where in Washington?

25 A. It should be in my car if it's still there.

1 Q. You never pawned that ring?

2 A. No.

3 Q. You have never tried to sell that ring?

4 A. No.

5 Q. But you had that appraised?

6 A. Yes.

7 Q. If you weren't going to sell it, why did you
8 have that ring appraised?

9 A. It had some sentimental value to me. I
10 wanted to know. My mother -- she gave my brother a ring
11 too, which is worth, I don't know, probably right around
12 \$3,000. She's probably not going to be around much
13 longer.

14 Q. The stones that were in that ring, it's your
15 testimony that Mrs. Davis told you that they were
16 zircons?

17 A. (Witness nods affirmatively).

18 THE COURT: You need to answer audibly. You
19 need to say yes or no, sir.

20 Q. (By Mr. Morgan) Was that a yes?

21 A. I --

22 Q. Did Mrs. Davis tell you that the stones in
23 the ring that you've identified as coming from your
24 mother, that they were zircons? Is that your testimony?

25 A. Yes.

1 Q. That's what you told them?

2 A. Yes.

3 Q. And she looked at those under a glass to

4 determine whether or not they were zircons?

5 A. Yes.

6 Q. And you indicated that your brother has a

7 similar ring that you believe is worth \$3,000; is that

8 correct?

9 A. Yes.

10 Q. Now, you had never heard of zircons until

11 after this incident?

12 A. I've seen them on TV before, yes.

13 Q. Now, when you were told that the stones in

14 the smaller ring were zircons, then what did you

15 understand the value of that ring to be?

16 A. She told me it was worth, I don't know, maybe

17 fifty -- \$60.00.

18 Q. And that would be considerably less than the

19 value of a similar ring belonging to your brother would

20 be; is that correct?

21 A. The ring my brother has that my mother gave

22 to him has two rubies in it, and I think four diamonds.

23 Q. And so you did understand the difference of

24 the value between a Zircon and a diamond at that time,

25 didn't you?

1 A. I didn't know if it was real or not.

2 Q. And you didn't know this ring was real or not

3 at that time; isn't that correct?

4 A. Yes.

5 Q. You did know, or you didn't know?

6 A. I didn't know.

7 Q. And you went in there because you did not

8 know the ring was real or not, and that's why you wanted

9 it appraised, isn't that what you testified to?

10 A. I wanted to find out if it was real or not,

11 yes.

12 Q. So you did not know at the time that the ring

13 was real or not when you asked to have it appraised is

14 your version?

15 A. No.

16 Q. Therefore, if you represented that it was a

17 diamond, that would not be the truth?

18 A. I thought if somebody was going to give that

19 much merchandise, that it must have been real.

20 Q. Under your version, it is Mrs. Davis who

21 suggested that it was a diamond, and not you; is that

22 correct?

23 A. I said -- as far as I knew, it was.

24 Q. You never represented that it was a diamond

25 when you initially made the trade? That is that your

1 testimony?

2 A. As far as I knew, it was.

3 Q. Do you know what the word represent means?

4 A. Yes.

5 Q. Did you ever represent at the time the
6 transaction was made that this was a diamond?

7 A. Yes.

8 Q. So you did tell them that it was a diamond
9 even though you did not know?

10 A. After I went through the transaction with
11 her, yes. As far as I knew, I believed it was.

12 Q. So when you came back later that day, and you
13 kept insisting it was a diamond, what had changed your
14 mind?

15 A. When you -- could you speak towards me? I'm
16 having a real hard time hearing.

17 Q. I'll speak louder. When you returned to the
18 store later that day, and you insisted that it was a
19 diamond, what had changed your mind?

20 A. I don't quite understand you.

21 Q. Let's break it down into pieces. Did you
22 return later that day to get the hands on the watch
23 fixed, or to get the watch fixed?

24 A. Yes.

25 Q. When you returned, did they tell you that it

1 was a cubic zirconium?

2 A. Yes.

3 Q. Did you nonetheless insist that it was a

4 diamond?

5 A. I believed it was, yes.

6 Q. Did you tell them that it was a diamond?

7 A. I may have, yes.

8 Q. Don't you remember?

9 A. I may have, yes.

10 Q. Do you remember telling them that it was a

11 diamond at that time?

12 A. After she -- I was still going on the basics

13 what I learned before.

14 Q. I understand. Did you tell them that it was

15 a diamond?

16 A. I don't -- explain to me. Can you break it

17 down?

18 Q. Yes. Did you tell Mrs. Davis that it was a

19 diamond?

20 A. I may have, yes.

21 Q. When you say you may have, does that mean you

22 don't remember?

23 A. I may have, yes. Yeah.

24 Q. Do you remember telling them it was a

25 diamond?

1 A. Yes.

2 Q. Thank you. So you did tell them it was a
3 diamond? When you walked in, you didn't think it was a
4 diamond, or you didn't know?

5 A. I didn't know if it was or not.

6 Q. What changed between the time that you let
7 them tell you it was a diamond, and when you went in and
8 told them it was a diamond?

9 A. Can you break this down for me?

10 Q. Did anything change between the time that you
11 left and when you came back that caused you to believe
12 that it was a diamond?

13 A. As far as I knew, I felt it was.

14 Q. You had your Washington ID with you when you
15 came to Utah?

16 A. Yes.

17 Q. But you weren't in Utah for very long; is
18 that correct?

19 A. Yes. I have been.

20 Q. Did you get a Utah driver's license?

21 A. No.

22 Q. Showing you what's been marked as State's
23 Exhibit 9, does that appear to be the record of your
24 driver's license in Washington?

25 A. Yes.

1 Q. That's the information that you have on your
2 driver's license card; is that correct?
3 A. Yes.
4 Q. Is that your picture as it appeared on June
5 21st, 1993?
6 A. Yes.
7 Q. That is your signature?
8 A. Yes.
9 Q. That is your identification number as well;
10 is that correct?
11 A. Yes.
12 Q. Now, did you have any other identification
13 with you at that time?
14 A. Yes.
15 Q. What other identification did you have?
16 A. Several bank cards, social security card,
17 veteran's card, and a check cashing card.
18 Q. All of those forms of identification are in
19 the name of Dale Taylor; is that correct?
20 A. Yes.
21 Q. When she offered to give you a check in
22 exchange for this ring, she asked you your name?
23 A. Yes.
24 Q. And you gave her the name Dale Taylor?
25 A. Yes, I did.

1 Q. If you had given her any other name, could
2 you have cashed that check?

3 A. No.

4 Q. Do you remember the instructions from Mrs.
5 Davis telling you that there would not be money in the
6 account until tomorrow; is that correct?

7 A. She said that she had to make a deposit later
8 that afternoon, or the next morning.

9 Q. And she asked you to wait; is that correct?

10 A. Yes.

11 Q. But you didn't wait, did you?

12 A. No, I didn't.

13 Q. Why didn't you wait?

14 A. I wanted to see if the check was good.

15 Q. Once you found out the check was good, and
16 there was money in the account, why didn't you wait?

17 A. If it would have been post-dated, I would
18 have.

19 Q. Did you think it might inconvenience her to
20 have her checks bouncing because you took the check out
21 before she said that you could?

22 A. I did not force this woman to write a check.

23 Q. Now, you forced her to give you a ring, and
24 you forced her to give you a watch in return for your
25 representation that this is a diamond, when you knew that

1 it was a Zircon; isn't that correct.

2 MR. REMAL: Your Honor, I object to the form

3 of the question. There's no evidence of forcing her.

4 THE COURT: Sustained.

5 Q. (By Mr. Morgan) You caused her to do those

6 things?

7 A. I did not force this woman to do anything.

8 Q. You didn't use physical force?

9 A. No.

10 Q. You used deception, didn't you?

11 A. No.

12 Q. You didn't ask for a receipt, did you?

13 A. I figured I should have been given one, yes.

14 Q. Did you ask for one?

15 A. No.

16 Q. Why not?

17 A. I don't know. I figured this was just

18 business practice.

19 Q. It's good business practice to not ask for a

20 receipt?

21 A. She was the one that was giving me the

22 materials. It was her responsibility to give me the

23 receipt.

24 Q. And you did not ask for one?

25 A. I didn't even think of it at the time.

1 Q. She must have gotten those injuries from
2 something else other than that; wouldn't you agree?

3 A. To be honest with you, I didn't see any
4 injuries on this woman at that time.

5 Q. So those injuries must have come from
6 something other than the confrontation with you?

7 A. I don't know.

8 Q. Did those injuries come from the
9 confrontation with you or not?

10 MR. REMAL: Your Honor, I think he's asking
11 for --

12 THE COURT: Sustained. He said, I don't
13 know.

14 THE WITNESS: To be honest with you, I
15 didn't see any injuries on her at that time.

16 Q. (By Mr. Morgan) You indicated that you
17 believed that Mrs. Davis had switched the stones on you.
18 Do you recall that when you testified on direct?

19 A. Yes.

20 Q. What led you to believe that she had switched
21 the stones on you?

22 A. It just didn't make sense to me that somebody
23 would give this type of merchandise, and then come back
24 three hours later, and say it was not real without
25 testing it fully.

1 Q. So it's her fault she didn't test it?

2 A. If all this would have been tested and done
3 the proper way, none of this would have actually ever
4 happened.

5 Q. You've never returned the diamond ring?

6 A. I would have taken it to the police, yes.

7 Q. You never returned the watch?

8 A. No.

9 Q. You never returned the \$1,275.00; is that
10 correct?

11 A. No.

12 Q. And you believe you're entitled to that?

13 A. It seems like there's a big misunderstanding
14 in the whole deal.

15 Q. There was a misunderstanding at the point
16 where you returned, and they said, let's talk about this,
17 wasn't there, sir?

18 A. I didn't know what to think at the time.

19 Q. So you did not understand -- in your mind,
20 they did not understand, and that's pretty much a
21 misunderstanding; is it not?

22 A. Yes.

23 Q. Now, when you left, why didn't you just wait
24 for the police, or call the police yourself?

25 A. I don't know.

1 Q. Didn't you testify that you believed they had
2 switched the ring?

3 A. Yes.

4 Q. If somebody had switched a \$3,000 diamond
5 ring, don't you think that's a fraud?

6 A. Yes.

7 Q. That's a crime, because somebody deceived
8 you, if that had taken place; isn't that correct?

9 A. Yes.

10 Q. If somebody had taken a ring, and said that
11 it was a diamond to cheat you out of the -- if somebody
12 had taken the ring, and said it was a zirconium to cheat
13 you out of your rightful money for the diamond, that
14 would be a deception, and that would be a crime; is that
15 correct?

16 A. Yes.

17 Q. But the other way around, you don't think
18 it's a crime when you take a ring that is not yours, that
19 you represent is a diamond, that you don't know whether
20 or not it's a diamond or not, and you give that to
21 someone, and they give you money for it, and even after
22 you find out for sure that it's a cubic zirconium, that
23 in your mind is not a crime, because Mrs. Davis should
24 have checked it? Is that your belief?

25 A. I believe that things should have been a lot

1 more thouroughly gone through.

2 Q. Do you think the police could have helped in
3 this situation?

4 A. In pertaining --

5 Q. By the police coming down, and just
6 straightening things out, maybe taking the ring, taking
7 the report, seeing if it had been switched, maybe
8 checking to see if there was a loose one karat diamond in
9 the back room?

10 A. I don't know if they did or didn't.

11 Q. You could have called -- you could have done
12 something about it, but you didn't. You fled, didn't
13 you?

14 A. I did leave, yes.

15 Q. You were in a hurry when you left?

16 A. Not necessarily, no.

17 Q. Used physical force so you could leave. You
18 didn't want to stay there, did you?

19 A. I didn't want to stay there, yes.

20 Q. And you immediately left for Washington?

21 A. No, I didn't.

22 Q. Did you go to the police?

23 A. Huh?

24 Q. Once you had cooled down, did you go to the
25 police?

1 THE COURT: Mr. Morgan, you've asked this
2 about three times.

3 MR. MORGAN: I'm done. Let me check my
4 notes. One last thing, Your Honor. I promise I'll be
5 done.

6 Q. (By Mr. Morgan) You asked them to fix your
7 watch when you returned the second time; is that correct?

8 A. Yes.

9 Q. And you indicated that nobody responded to
10 your request; is that correct?

11 A. I don't remember.

12 Q. You didn't -- if you did testify that they
13 didn't really respond, then you're not sure about that?
14 They may have responded; might not have?

15 A. I don't think anything was said right at the
16 moment, no.

17 Q. All right. So they responded, they may have
18 responded, may not have responded?

19 A. They said they wanted the ring and the check
20 and the money, yes.

21 Q. You have a pretty good memory when it comes
22 down to things that support your version. What's causing
23 the problems with your memory that support their version?

24 MR. REMAL: Your Honor, I'd object.

25 THE COURT: Objection sustained.

1 MR. MORGAN: No further questions.

2 THE COURT: Redirect?

3 REDIRECT EXAMINATION

4 By Ms. Remal:

5 Q. Dale, let's just try to review some of this.
6 When you went to the store the first time to the jewelry
7 store with the ring that's now Exhibit No. 1, did you
8 know what the stone was that was in that ring?

9 A. No.

10 Q. And was there anything that happened during
11 that first time you were at the store that made you
12 believe it was a diamond?

13 A. The way they were looking at it through their
14 optics, and I was going on their expertise.

15 Q. And when you left the store that first time
16 with the check for \$1,275 I think it is, and the watch,
17 and the other ring, which you had received in trade for
18 the ring you brought in, did you at that moment believe
19 that the ring you'd brought in had a diamond, and not a
20 zirconium in that ring?

21 A. Yes.

22 Q. And when you returned two or three hours
23 later with the problem with the watch, did you still
24 believe that that was a diamond based on what had
25 happened the first time you were there?