

2008

State of Utah v. James Lawrence Hall : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Dee W. Smith; The Public Defender Association of Weber County; Counsel for Defendant/Appellant.

Karen A. Clucznik; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Christopher L. Shaw; Weber County Deputy District Attorney; Counsel for Plaintiff/Appellee.

Recommended Citation

Brief of Appellant, *Utah v. Hall*, No. 20080460 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/944

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 vs. :
 :
 JAMES LAWRENCE HALL, :
 : Appellate Court No. 20080460-CA
 Defendant/Appellant. :

BRIEF OF APPELLANT

THIS APPEAL IS FROM A CONVICTION AND SUBSEQUENT SENTENCING OF UNAUTHORIZED CONTROL OF A VEHICLE, A THIRD DEGREE FELONY, AND SENTENCING TO AN INDETERMINATE SENTENCE OF ZERO TO FIVE YEARS AT THE UTAH STATE PRISON, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE PAMELA G. HEFFERNAN PRESIDING.

THE APPELLANT IS CURRENTLY INCARCERATED AT THE UTAH STATE PRISON.

MARK L. SHURTLEFF
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

Telephone: (801) 366-0100

Attorney for Plaintiff/Appellee

DEE W. SMITH #8688
THE PUBLIC DEFENDER
ASSOCIATION OF WEBER
COUNTY
2550 Washington Boulevard, Ste 300
Ogden, Utah 84401

Telephone: (801) 399-4191

Attorney for Defendant/Appellant

FILED
UTAH APPELLATE COURTS
DEC 15 2008

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 vs. :
 :
 JAMES LAWRENCE HALL, :
 : Appellate Court No. 20080460-CA
 Defendant/Appellant. :

BRIEF OF APPELLANT

THIS APPEAL IS FROM A CONVICTION AND SUBSEQUENT SENTENCING OF UNAUTHORIZED CONTROL OF A VEHICLE, A THIRD DEGREE FELONY, AND SENTENCING TO AN INDETERMINATE SENTENCE OF ZERO TO FIVE YEARS AT THE UTAH STATE PRISON, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE PAMELA G. HEFFERNAN PRESIDING.

THE APPELLANT IS CURRENTLY INCARCERATED AT THE UTAH STATE PRISON.

MARK L. SHURTLEFF
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

Telephone: (801) 366-0100

Attorney for Plaintiff/Appellee

DEE W. SMITH #8688
THE PUBLIC DEFENDER
ASSOCIATION OF WEBER
COUNTY
2550 Washington Boulevard, Ste 300
Ogden, Utah 84401

Telephone: (801) 399-4191

Attorney for Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES AND STANDARD OF REVIEW 1

CONSTITUTIONAL OR STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE..... 4

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE DEFENDANT WAS DENIED A FAIR TRIAL
WHEN THE TRIAL COURT DENIED HIS MOTION
FOR A MISTRIAL..... 6

CONCLUSION..... 20

CERTIFICATE OF MAILING..... 21

ADDENDA:

Addendum A: Sentence, Judgment and Commitment

Addendum B: Prior Bad Act Evidence: Transcript R. 91/12-22, 53-55

Addendum C: Inadmissible Hearsay: Transcript R. 91/64

Addendum D: Court’s Rulings on the Motions for Mistrial: Transcript R. 91/21-22, 57-58, 69-70

Addendum E: Witness’s Xanax Use: Transcript R. 91/2-5, 28-34, 50-51, 91-92

TABLE OF AUTHORITIES

UTAH STATE CASES

<i>State v. Allen</i> , 2005 UT 11 ¶39.....	2
<i>State v. Colwell</i> , 994 P.2d 177, 186 (Utah 2000).....	19
<i>State v. Featherson</i> , 781 P.2d 424, 426 (Utah 1989).....	13
<i>State v. Havatone</i> , 2008 UT App 133	17, 18, 19
<i>State v. Johnson</i> , 748 P.2d 1069, 1075 (Utah 1987).....	12, 13
<i>State v. Knight</i> , 734 P.2d 913, 920 (Utah 1987).....	17
<i>State v. Saunders</i> , 992 P.2d 951, 959 (Utah 1999).....	12

STATUTES AND RULES

UTAH RULES OF EVIDENCE

Rule 404(b).....	3, 6, 13
------------------	----------

UTAH CODE ANNOTATED

41-1A-1314.....	2, 4
§76-6-404.....	3, 4
§76-6-412(a)(ii)	3, 4
78A-4-103(2)(3)	1, 3

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
vs. :
JAMES LAWRENCE HALL, : District Court Case No. 081900281
Defendant/Appellant. : Appellate Court No. 20080460-CA

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The Appellant is appealing from a Judgment, Sentence and Commitment in the Second District Court for Weber County, Utah, dated May 21, 2008. Jurisdiction for the Appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. §78A-4-103(2)(e).

ISSUE ON APPEAL AND STANDARD OF REVIEW

WAS THE DEFENDANT DENIED A FAIR TRIAL WHEN
THE TRIAL COURT DENIED HIS MOTION FOR A
MISTRIAL?

Standard of Review: This issue should be reviewed under a correction of error standard of review. “[O]nce a district court has exercised its discretion and

denied a motion for a mistrial, we will not reverse the court's decision unless it is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial." *State v. Allen*, 2005 UT 11 ¶39. This issue was preserved for appeal when Defendant moved for a mistrial on three separate occasions. (R. 91/19, 53, 64).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANNOTATED

41-1a-1314. Unauthorized control for extended time.

(1) Except as provided in Subsection (3), it is a class A misdemeanor for a person to exercise unauthorized control over a motor vehicle that is not his own, without the consent of the owner or lawful custodian, and with the intent to temporarily deprive the owner or lawful custodian of possession of the motor vehicle.

(2) The consent of the owner or legal custodian of a motor vehicle to its control by the actor is not in any case presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the motor vehicle by the same or a different person.

(3) Violation of this section is a third degree felony if:

(a) the person does not return the motor vehicle to the owner or lawful custodian within 24 hours after the exercise of unlawful control; or

(b) regardless of the mental state or conduct of the person committing the offense:

the motor vehicle is damaged in an amount of \$500 or more;

the motor vehicle is used to commit a felony; or

the motor vehicle is damaged in any amount to facilitate entry into it or its operation.

(4) It is not a defense to Subsection (3)(a) that someone other than the person, or an agent of the person, returned the motor vehicle within 24 hours.

(5) A violation of this section is a lesser included offense of theft under Section 76-6-404, when the theft is of an operable motor vehicle under Subsection 76-6-412(1)(a)(ii).

76-6-404. Theft -- Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

76-6-412. Theft -- Classification of offenses -- Action for treble damages.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

78A-4-103. Court of Appeals jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

UTAH RULES OF EVIDENCE

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of

trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

The Defendant was originally charged with theft of a vehicle, a second degree felony in violation of U.C.A. §76-6-404 and U.C.A. §76-6-412(a)(ii) (R.001-2). A jury trial was held on April 9 and 10, 2008. The jury convicted the Defendant of the lesser included offense of Unauthorized Control of a Vehicle, a third degree felony in violation of U.C.A. §41-1A-1314. The Defendant was ordered to serve an indeterminate sentence of zero to five years at the Utah State Prison. The sentence, judgment and commitment was signed on May 21, 2008. (R. 076-77). A timely notice of appeal was filed on May 23, 2008 (R. 079-80).

STATEMENT OF THE FACTS

On January 24, 2008, between 2:30 and 3:30 p.m. the Defendant asked a neighbor, Cindi Fields if he could borrow her car so he could go to the hospital to get a prescription. (R. 91/5-6) Cindi had allowed the Defendant to borrow her vehicle on at least four prior occasions. (R. 91/8) Cindi looked out her window as the Defendant was leaving, and he was carrying a black bag that looked like a camera bag. (R. 91/7).

The Defendant didn't return Cindi's car so she called the police at approximately 7:30 or 8:00 p.m. on that same day. (R. 91/13). The next day Cindi learned that her vehicle had been located in Pocatello, Idaho. (R. 91/26-27). Cindi testified that the Defendant didn't ask if he could take the vehicle to Idaho and didn't mention that he was going to Idaho. (R. 91/27). Inside the vehicle was Defendant's black bag which had personal items, including dirty clothes and hygiene items. (R. 91/97).

Defendant was interviewed by law enforcement and he told them that he did not steal the vehicle. He told the detectives that Cindi knew he was going to Pocatello and that he went there to buy Xanax for Cindi. (R. 91/79).

SUMMARY OF ARGUMENTS

There were three specific errors that were objected to during the Defendant's trial that caused him to be denied a fair trial. The State's primary witness and victim repeatedly told the jury that the Defendant had warrants for his arrest. She did this even though she was admonished by the prosecutor and trial judge to not do it. This prior bad act evidence was inadmissible and extremely prejudicial to the Defendant.

Then when Defendant was interviewed by the detective who investigates vehicle thefts, she was accompanied by an officer who was in the "fraud"

division. The only logical conclusion the jury could reach was that the Defendant had been involved in fraudulent activity.

After the jury heard about Defendant's prior bad act evidence, the jury heard unverified hearsay evidence that the Defendant was headed to Missoula Montana. When all of the errors are considered together, the cumulative effect of the errors should undermine this Court's confidence that the Defendant received a fair trial. For these reasons, the Defendant respectfully requests this Court to reverse his conviction and remand the matter back to the trial court for a new trial.

ARGUMENT

I. THE DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT DENIED HIS MOTION FOR A MISTRIAL.

Rule 404(b) of the Utah Rules of Evidence states; "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." In the case at bar, the jury repeatedly heard about the fact that Defendant had a warrant for his arrest.

Although the State didn't intentionally admit the improper evidence, the State's witnesses intentionally did. The Defendant's right to a fair trial was severely damaged by the improper evidence the jury heard. It appears that the witness/victim in the case, Cindi Fields, intentionally discussed the

Defendant's warrant even though she knew it was improper. Earlier in her testimony she was instructed that she couldn't discuss hearsay and she understood that she was not to do that. The following colloquy took place.

A. (Ms. Fields) I started to get concerned around 4:30 that he wasn't back with the car. My neighbor actually was the one that was more concerned. She called and said, "Where is your car?"

MR. GRAVIS (defense counsel): I'm going to object as to what the neighbor said, Your Honor, it's hearsay.

THE COURT: Sustained.

MR. SHAW (prosecutor): Yeah. Don't tell us what she said.

THE WITNESS: Sorry. Okay, I'm sorry.

Q. You can say she called, but don't—

A. She called. She just called and questioned and wanted to know where my car was and—

Q. Okay. But you can't say that either, okay?

A. I can't say that either, okay.

(R. 91/12). Later on in her examination it became clear that she understood these instructions. The prosecutor questioned Cindi about her making a report to the Ogden Police Department and whether she spoke with an officer. The prosecutor asked the following question with a further instruction to not say what the officer told her.

Q. Okay. Again, without telling us what the officer may have said to you, what did you tell the officer relative to reporting a stolen vehicle?

(R. 91/14). As this discussion continued the prosecutor asked;

Q. As a result of the initial contact with the Ogden City police officers, later that night, after having contact with the Ogden City Police officer, did you do anything else to try to find your car?

A. Well, I can't tell you what the officer told me so that's—

(R. 91/15). This shows very clearly that Cindi understood that she wasn't to discuss what she had been told by others, including police officers. However, just a short time later, Cindi was asked;

Q. Do you understand the question? What I'm getting at is what did you do the following morning to try to locate your car?

A. We did call – Well, the officer told me there was a warrant out.

(R. 91/15-16). This answer was totally nonresponsive to the question and was in opposition to what she had been instructed to not do. Furthermore, she had just indicated that she understood she couldn't tell the jury what the police had told her.

Defense counsel objected to the statement. The Court sustained the objection, and the prosecutor and the judge instructed her to just answer the question. Her immediate response was,

A. Okay. The following day I called the warrant department to find out if there really was a warrant out on Hillbilly or James.

Q. Okay.

A. I found out that, yes, there was.

(R. 91/16). After defense counsel objected and the court sustained the objection, Cindi continued to press the information concerning the warrant.

The following colloquy took place.

Q. When you made the phone call to the police department, after that phone call, did you then call again the Ogden Police Department or did you stay on the line and talk to someone else?

A. It's – I don't know how to answer this without it being not-

Q. Look, just tell us what you did, not what other people may have said, okay? Just tell us what you did, Did you make a call, for instance, to ask the Ogden City Police Department to do anything to help you find your car?

A. Yes.

Q. Okay. And what did you ask them to do?

A. Actually, once I found out that there was a warrant—

MR. GRAVIS: Your honor, I'm going to object.

THE COURT: Sustained.

THE WITNESS: All right.

THE COURT: Just tell him what you did the next day.

THE WITNESS: Well, the next day I called to see if there was a warrant and from there I called Ogden, Melissa – Officer Melcher.

Q. (BY Mr. SHAW) Okay.

A. And told her that there was a warrant out for him.

MR. GRAVIS: Your Honor, move to strike that. That's non-responsive, that's—

THE COURT: Sustained. It will be stricken.

Q. (BY MR. SHAW) Just tell us what you did with respect to – did you ask her for instance to do something about helping find your car?

A. At the time that I found out that there was a warrant –

MR. GRAVIS: Your Honor, I'm going to object, Your Honor.

MR. SHAW: Let—

THE COURT: I'm going to instruct just not to refer to this other issue. It's not, it's not-

THE WITNESS: (Inaudible)-

THE COURT: Just a minute, just – it's not relevant, okay? What you need to do is just answer Mr. Shaw's question. He's asking, what did you do to locate the car? Is that the question?

MR. SHAW: The question was, what did you ask Melissa Melcher to do in helping you locate the –

THE WITNESS: I actually called Melissa and told her that I was told that there was a warrant out-

MR. GRAVIS: Your Honor-

THE WITNESS: And that he had been arrested in Idaho.

(R. 91/16-18) Following this statement, Mr. Gravis asked to approach the bench. Following a discussion at the bench, the jury was removed from the court room. The Defendant's attorney moved for a mistrial based on the fact that the warrant had been repeated over and over and he believed that it had prejudiced the jury

The trial court denied the Defendant's motion for a mistrial. In doing so, the Court made the following ruling:

I understand the basis of your motion. I think it's borderline in terms of the effect that it's had. However, I think they heard it once. If there was damage to be done, it was by hearing it for the first time. . . I don't think that in and of itself is going to, you know, that that information in and of itself, if that's all they have to go on, you know, then that's one thing. But there presumably will be other evidence coming in aside from any kind of warrant. I'm going to instruct them that it's – that that testimony regarding any kind of warrant is not – first of all, it's not substantiated. It's not evidence and it's not relevant to this case and they're to disregard anything that she said about that.

(R. 91/21-22) When the jury came back into the court room the trial judge gave the following instruction.

[T]here was some statement made about some kind of warrant and that's – I'm going to instruct you at this time that that – that any issue regarding that has not been proven, has not been substantiated, it's not evidence, it's not relevant. And it's just to be totally disregarded by you. Is everybody able to follow that instruction? Okay, great.

(R. 91/25-26) By the time the trial judge finished with the instruction the jury had heard seven references to the Defendant's warrant. Even though the jury was instructed to disregard that information, it was impossible at that point with so many references, objections, instructions to avoid it, and a removal from the court room over it.

In *State v. Saunders*, 992 P.2d 951 (Utah 1999) the Utah Supreme Court stated:

Anchoring the principle that prior crime evidence is not admissible to show criminal propensity is the more fundamental principle that a prosecutor may never argue or suggest to the finder of fact, either directly or indirectly, that a defendant should be convicted because of his criminal character or that he was guilty of the crime charged because he acted in accord with a criminal propensity shown by such evidence this is true regardless of whether that evidence was properly or erroneously admitted. *Id.* at 959.

In the case at bar the prosecutor didn't intentionally elicit the information that Defendant had a warrant for his arrest. However, the information came from the State's primary witness who repeatedly mentioned the warrant. The effect on the Defendant's fundamental right to a fair trial was infringed upon regardless if it was an intentional act on the part of the prosecutor.

In *State v. Johnson*, 748 P.2d 1069 (Utah 1987), the Utah Supreme Court stated that "this Court has repeatedly held that evidence of other crimes may

not be admitted to prove that the defendant has a bad character or a disposition to commit the crime charged. “ *Id.* at 1075. The Supreme Court also stated that “[t]o give meaning to the policy embodied in Rule 404(b), evidence of other crimes must be reasonably necessary and highly probative of a material issue.”

Id.

Furthermore, in *State v. Featherson*, 781 P.2d 424 (Utah 1989), the Utah Supreme Court held that for prior bad acts to be admissible at trial, there had to be “a special relevance to a controverted issue and is introduced for a purpose other than to show the predisposition to criminality.” *Id.* at 426.

In the case at bar, there was no reason for the witness to introduce the prior bad evidence other than to prejudice the jury against the Defendant. There was no “special relevance” to a controverted issue. The witness obviously wanted the jury to hear that, even though she was instructed several times, by the judge, the prosecutor and defense counsel to not do it. Her answers concerning the warrant were non-responsive to questions and came on the heels of being admonished not to discuss that information.

After the jury heard the numerous references to the Defendant’s warrant Detective Reaves testified. Detective Reaves was not the detective assigned to the vehicle theft case. Detective Melcher who also testified was assigned to investigate this case. Nonetheless, Detective Reaves testified that he was

currently in the “fraud division.” (R. 91/53). Detective Reaves testified that he was with Detective Melcher when she interviewed the Defendant. His only contribution was that he asked a couple of questions during the interview. Detective Melcher was present and could have testified to anything the Defendant said during the interview; and, in fact, she did testify to some of the same information that Detective Reaves testified to concerning the Defendant’s statement.

Defendant’s counsel made a renewed motion for mistrial based on Detective Reaves being assigned to the fraud division. Counsel made the following motion;

At this time I’m renewing my motion to mistrial. My position is that repeated testimony of one witness about warrants. Now Detective Reaves, when they get into the fact that he’s in the fraud division, with the talk about warrants is clearly, even further exacerbates the problem with the testimony about the warrants because now you combine that with the fact that he’s a fraud investigator, not an auto theft, if they’d just mentioned major crime that would have been fine, but when they brought fraud in I think that clearly implies to the jury that Mr. Hall is involved in some sort of fraudulent activity outside of this because Detective Melcher will testify that she’s involved in the *investigation of auto thefts, that’s her assignment and I think it prejudices the jury.*

(R. 91/54-55). The Court denied this second request for a mistrial.

In addition to the inadmissible character evidence, another of the State’s witnesses introduced improper hearsay evidence. During the trial, Detective

Melissa Melcher of the Ogden Police Department testified that during her investigation, "I learned that he [Defendant] may be heading towards Missoula. I notified Missoula police to look for the vehicle and Mr. Hall and put out an attempt to locate the vehicle and Mr. Hall. After I made contact there I learned that Mr. Hall and the vehicle were in Pocatello, Idaho." (R. 91/64) Defense counsel objected and then renewed his motion for a mistrial. Defense counsel made the following argument.

This testimony of this witness I think has further grounds for mistrial. The testimony that she had information he was headed towards Missoula, Montana, is based upon a hearsay statement from somebody in Montana saying that he had talked to my client. That witness is not here. Mr. Shaw knows it, knew I was going to object to that because it was hearsay on hearsay even to get my client's statement in. And now we get it – now the jury's thrown – gets that thrown out here. Of course, they're not going to get any explanation why she had information he was going to Missoula, but that's offered for the proof the matter asserted because he's in Pocatello which is on the way to Missoula.

(R. 91/64-65). The trial court denied this motion for a mistrial. In ruling so, the Court stated;

I think this is really close, but I'm going to deny it. But we're getting cumulatively; this is becoming very problematic I think at this point. You know, and I do, you know, that really does enter into it as a cumulative thing. Regardless of anything, I don't think you've done anything, Mr. Shaw, that would have created the situation. But it's been cumulative by voluntary information coming out that would not be otherwise admissible and, you know, we're really kind of getting it, skirting, I think, the edge of this.

I think, but this is the problem I've got with it and I, you know, I think it requires a lot of supposition. A lot of these things require a lot of supposition to each what you're headed for, Mr. Gravis, in terms of what you think the jury may conclude. It requires a lot of other assumptions that they have to make, but cumulatively, this could end up being a problem if we get anymore of this stuff coming in.

(R. 91/69-70).

The information that Defendant was going to Montana was in no way verified, and the Defendant didn't have the opportunity to confront the person who made the statement that Defendant was on his way to Montana. Furthermore, when Detective Melcher interviewed the Defendant, she specifically asked him if he was going to Montana and he told her no. (R. 91/73).

The evidence concerning Defendant's warrant and arrest in Idaho and the hearsay statement that Defendant may have been headed to Missoula were not harmless. There is a strong possibility that but for the inadmissible evidence the jury heard there would have been a different result. This was a case that hinged on whether the jury believed that Defendant had permission to take the vehicle to Pocatello to get Xanax. It was uncontroverted that Cindi had allowed the Defendant to borrow her vehicle in the past as well as on this occasion. The jury rejected the State's position that Defendant intended to

permanently deprive the victim of her property. They still found him guilty of keeping the vehicle for an extended period of time.

The jury obviously rejected the Defendant's statement that he had permission to go to Pocatello to get Xanax for Cindi. However, there was evidence that both Cindi and Tammy Hurst were regular Xanax users who at times would loan each other pills when one of their prescriptions ran out early. There were also inconsistencies between statements these two had made concerning their Xanax use. (*See*, R. 91/2-5, 28-34, 50-51, 91-92).

Had the jury not learned about Defendant's warrant and the hearsay evidence concerning Montana, it is very likely that they would have had reasonable doubt in this case. But for the evidence that was seared into the jury's collective memory concerning the Defendant's warrant there is a strong probability that there would have been a more favorable result. "For an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." *State v. Knight*, 734 P.2d 913, 920 (Utah 1987).

In *State v. Havatone*, 2008 UT App 133, this Court reversed a case where the facts were similar to the facts in the case. In *Havatone*, the defendant was arrested by an officer who was working in search of drug related activity. He realized that the defendant had a warrant for forgery and arrested

her in her motel room and supervised her while she changed from a nightshirt into street clothes. The officer handcuffed her with her arms behind her back, performed a pat-down search and placed her in his patrol car.

When the officer arrived at the jail he assisted the defendant out of the patrol car and then lifted the back seat cushion where he found methamphetamine lying on the floorboard under the middle portion of the seat cushion. The officer testified that it was his custom to check under the seat each time he arrested and transported a person, and he had checked it that night prior to arresting the defendant and hadn't found anything. When the officer questioned the defendant about the methamphetamine she stated, "I did a forgery; but I don't do drugs, you can test me." *Id.* ¶ 2.

Prior to trial, the parties agreed that the officer could testify that the defendant was arrested pursuant to a warrant, but that the forgery wouldn't be mentioned. On the morning of trial, the State wanted to bring in the defendant's statement about committing a forgery. The trial court ruled that the information that the arrest warrant was for forgery could be given to the jury as well as the defendant's statement that she had committed a forgery. *Id.* ¶ 3.

The defendant testified, and during cross-examination the prosecutor explored elements of the forgery emphasizing that forgery involves a person's

dishonesty. During closing argument, the prosecutor referenced the forgery charge arguing that the defendant had a conviction for lying, dishonesty, forgery, passing bad checks and that the officer was more credible because of the defendant's prior lying. *Id.* at ¶ 4.

This Court reversed the trial court under the cumulative error doctrine. “Under the cumulative error doctrine, we will reverse only if the cumulative effect of the several errors undermines our confidence . . . that a fair trial was had.” *State v. Colwell*, 994 P.2d 177, 186 (Utah 2000). In *Havatone*, this Court found that while any of the errors considered individually may or may not have been prejudicial “when taking them together, we cannot say that a fair trial was had, especially considering that the State’s case against Havatone was not particularly strong.” *State v. Havatone*, at ¶ 8.

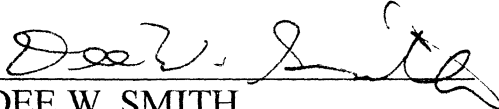
The trial judge acknowledged that there cumulative errors were problematic in this case when she acknowledged that “I think this is really close but I’m going to deny it. But we’re getting cumulatively; this is becoming very problematic I think at this point. . . . But it’s been cumulative by voluntary information coming out that would not be otherwise admissible and, you know, we’re really kind of getting it, skirting, I think, the edge of this.” (R. 91/69).

When all of the errors are considered together, it undermines any confidence that the Defendant received a fair trial. For these reasons, the Defendant respectfully requests that this Court reverse his conviction and remand the matter to the trial court for a new trial.

CONCLUSION

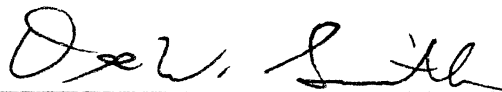
The Defendant was prejudiced by the admission of prior bad act evidence. The jury heard over and over that he had a warrant and was wanted by the Ogden Police. Then when he was interviewed by the detective who investigates vehicle thefts, she was accompanied by an officer who was in the “fraud” division. The only logical conclusion the jury could reach was that the Defendant had been involved in fraudulent activity. Furthermore, the jury heard unverified hearsay evidence that the Defendant was headed to Missoula Montana. When all of the errors are considered together, the cumulative effect of the errors should undermine this Court’s confidence that the Defendant received a fair trial. For these reasons, the Defendant respectfully requests this Court to reverse his conviction and remand the matter back to the trial court for a new trial.

DATED this 12th day of December 2008.


DEE W. SMITH
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Ryan Tenney, Assistant Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 12th day of December 2008.



DEE W. SMITH
Attorney at Law

ADDENDUM A

FILED

MAY 22 2008

SECOND
DISTRICT COURT

SECOND DISTRICT COURT - OGDEN
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,
Plaintiff,

: MINUTES
: APP SENTENCING
: SENTENCE, JUDGMENT, COMMITMENT
:

MAY 22 2008

vs.

: Case No: 081900281 FS

JAMES LAWRENCE HALL,
Defendant

: Judge: PAMELA G. HEFFERNAN
: Date: May 20, 2008

PRESENT

Clerk: roxanneb

Prosecutor: TREE, TERAL L

Defendant

Defendant's Attorney(s): MARTIN GRAVIS, PDA

Agency: Adult Probation and Parole

DEFENDANT INFORMATION

Date of birth: May 31, 1967

Video

Tape Number: 3C 052008 Tape Count: 349-351

CHARGES

1. UNAUTHORIZED CONTROL OF VEHICLE EXT TIME (amended) - 3rd Degree
Felony

- Disposition: 04/10/08 Guilty

HEARING

This is the time set for sentencing. Defendant is present in custody from the Weber County Jail. Defendant is represented by Martin Gravis. The Court hears from counsel and proceeds with sentencing.

Sentence, Judgment, Commitment



CD24317997

pages: 2

081900281 HALL, JAMES LAWRENCE

Case No: 081900281
Date: May 20, 2008

SENTENCE PRISON

Based on the defendant's conviction of UNAUTHORIZED CONTROL OF VEHICLE EXT TIME a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

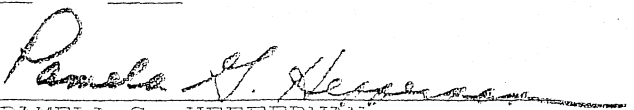
COMMITMENT is to begin immediately.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE RECOMMENDATION NOTE

The Court orders defendant to pay restitution in the amount of \$195 on behalf of the victim, Cindi Field. The Court recommends defendant receive credit for time served while at the Weber County Jail.

Dated this _____ day of MAY 21 2008, 20____.


PAMELA G. HEFFERNAN
District Court Judge

ADDENDUM B

1 A I started to get concerned around 4:30 that he
2 wasn't back with the car. My neighbor actually was the one
3 that was more concerned. She called and said, "Where is your
4 car?"

5 MR. GRAVIS: I'm going to object as to what the
6 neighbor said, Your Honor, it's hearsay.

7 THE COURT: Sustained.

8 MR. SHAW: Yeah. Don't tell us what she said.

9 THE WITNESS: Sorry. Okay, I'm sorry.

10 Q (BY MR. SHAW) You can say she called, but don't-

11 A She called. She just called and questioned and
12 wanted to know where my car was and-

13 Q Okay. But you can't say that either, okay?

14 A I can't say that either, okay.

15 Q Just let me stop you and ask you a specific
16 question. What time did the neighbor call, roughly?

17 A It was after four.

18 Q And who was the neighbor that called?

19 A Tammy.

20 Q Tammy Hurst?

21 A (Nods affirmatively).

22 Q Okay. What did you do at that point and time?

23 A Well, I told her where the car was and who had the
24 car and at that, I don't know, can I tell you this or not,
25 but at that time she-

1 Q Don't tell us what she said.

2 A Okay.

3 Q You can't tell us what she said, okay?

4 A Okay.

5 Q All right.

6 A I waited longer. It wasn't until almost, what,
7 7:30, 8:00 before I finally called the police because I knew
8 the car was gone. It wasn't coming back because he has
9 always brought it back within a timely frame.

10 Q On this occasion, on the 24th of January, had the
11 car been gone longer or shorter than in past occasions.

12 A Oh, longer.

13 Q Okay. And did you do anything else to try to locate
14 it - prior to calling the police, I mean?

15 A I did get his girlfriend's number and I called and
16 spoke with her to see if she knew or had heard from him
17 because, you know, he had told me this story about how she
18 was going to pay for his prescriptions and she informed me-

19 MR. GRAVIS: Your Honor, I'm going to object.

20 THE WITNESS: Got an object there, sorry.

21 MR. SHAW: You can't tell us what she said, okay?

22 THE WITNESS: Okay.

23 Q (BY MR. SHAW) But you made an attempt to call his
24 girlfriend.

25 A I made an attempt, the girlfriend.

1 Q Did you successfully contact her?

2 A I did.

3 Q Okay. And after contacting her were you more
4 concerned about your missing vehicle-

5 A Yes.

6 Q - or less concerned about your vehicle?

7 A More concerned.

8 Q Okay. Then what did you do?

9 A I called the police.

10 Q Okay. And did an Ogden City police officer then
11 later arrive at-

12 A Yes-

13 Q Your home to take a report?

14 A Yes, he did.

15 Q Okay. Again, without telling us what the officer
16 may have said to you, what did you tell the officer relative
17 to reporting a stolen vehicle?

18 A That I had given the man the keys to take my car. I
19 had been given the impression that the car would be gone
20 maybe two hours tops by the time he ran to the hospital to
21 get his prescriptions filled, give the girlfriend the laundry
22 to do and then he would be back, so.

23 Q Okay. And as a result did you sign any formal
24 statement at that point in time?

25 A I did.

1 Q As a result of the initial contact with the Ogden
2 City police officers, later that night, after having contact
3 with the Ogden City police officer, did you do anything else
4 to try to find your car?

5 A Well, I can't tell you what the officer told me so
6 that's-

7 Q Here's the thing, let me-

8 A I - I don't know how to do this without-

9 Q You're okay. Let me just ask a question and then
10 we can help you through it. At the end of the evening when
11 the Ogden City police officer arrived, were you given some
12 instructions as to how to proceed?

13 A I-

14 Q That's a yes or a no question.

15 A Yes.

16 Q Okay. And did those instructions come from the
17 Ogden City police officer?

18 A Yes.

19 Q Okay. And the following morning what did you do
20 after receiving those instructions from the Ogden City police
21 officer?

22 A Umm...

23 Q Do you understand the question? What I'm getting
24 at is what did you do the following morning to try to locate
25 your car?

1 A We did call - well, the officer told me there was a
2 warrant out.

3 MR. GRAVIS: Your Honor, we'd object as to what the-

4 THE COURT: Sustained. I think what-

5 MR. SHAW: You can't say that.

6 THE WITNESS: I can't-

7 MR. SHAW: Don't - just tell us what you did.

8 THE COURT: Right.

9 THE WITNESS: But okay.

10 THE COURT: Okay, hold on just a minute. It - I
11 know that you're having a little bit of a problem. Just
12 listen closely to the question and-

13 THE WITNESS: (Inaudible).

14 THE COURT: And then just answer what he's asking.

15 THE WITNESS: Okay. The following day I called the
16 warrant department to find out if there really was a warrant
17 out on Hillbilly or James.

18 Q (BY MR. SHAW) Okay.

19 A I found out that, yes, there was.

20 MR. GRAVIS: I'm going to object, Your Honor.

21 THE COURT: Sustained.

22 MR. SHAW: Let me just ask the question.

23 THE COURT: Stricken.

24 MR. SHAW: That's fine.

25 Q (BY MR. SHAW) When you made the phone call to the

1 police department, after that phone call, did you then call
2 again the Ogden Police Department or did you stay on the line
3 and talk to someone else?

4 A It's - I don't know how to answer this without it
5 being not-

6 Q Look, just tell us what you did, not what other
7 people may have said, okay? Just tell us what you did. Did
8 you make a call, for instance, to ask the Ogden City Police
9 Department to do anything to help you find your car?

10 A Yes.

11 Q Okay. And what did you ask them to do?

12 A Actually, once I found out that there was a
13 warrant-

14 MR. GRAVIS: Your Honor, I'm going to object.

15 THE COURT: Sustained.

16 THE WITNESS: All right.

17 THE COURT: Just tell him what you did the next day.

18 THE WITNESS: Well, the next day I called to see if
19 there was a warrant and from there I called Ogden, Melissa -
20 Officer Melcher.

21 Q (BY MR. SHAW) Okay.

22 A And told her that there was a warrant out for him.

23 MR. GRAVIS: Your Honor, move to strike that.

24 That's non-responsive, that's-

25 THE COURT: Sustained. It will be stricken.

1 Q (BY MR. SHAW) Just tell us what you did with
2 respect to - did you ask her for instance to do something
3 about helping find your car?

4 A At the time that I found out that there was a
5 warrant-

6 MR. GRAVIS: Your Honor, I'm going to object, Your
7 Honor.

8 MR. SHAW: Let-

9 THE COURT: I'm going to instruct just not to refer
10 to this other issues. It's not, it's not-

11 THE WITNESS: (Inaudible)-

12 THE COURT: Just a minute, just - it's not relevant,
13 okay? What you need to do is just answer Mr. Shaw's
14 question. He's asking, what did you do to locate the car?

15 Is that the question?

16 MR. SHAW: The question was, what did you ask
17 Melissa Melcher to do in helping you locate the-

18 THE WITNESS: I actually called Melissa and told her
19 that I was told that there was a warrant out-

20 MR. GRAVIS: Your Honor-

21 THE WITNESS: And that he had been arrested in
22 Idaho.

23 MR. GRAVIS: Your Honor, may we approach, Your
24 Honor?

25 THE COURT: Yeah.

1 MR. SHAW: Yeah.

2 THE COURT: Let's do this - I'm going to ask the
3 bailiff to take the jury to the jury room just to, while we
4 discuss a legal issue and we'll be back with you in just a
5 minute and bring you back out. Don't discuss the case until
6 we've proceeded further.

7 Who is he?

8 UNKNOWN: (Inaudible).

9 THE COURT: Okay. Yeah, why don't you do it.

10 UNKNOWN: (Inaudible) record?

11 THE COURT: Yeah, we'll stay on the record, that's
12 fine.

13 (Whereupon the jury left the courtroom)

14 THE COURT: Go ahead. Mr. Gravis, what is it that
15 you want to do?

16 MR. GRAVIS: Your Honor, at this time I move for a
17 mistrial. This has been repeated and repeated. I've had to
18 make objection after objection. I think it's prejudiced the
19 jury, the constant repetition of this stuff about a warrant.

20 THE COURT: Well, they've heard it.

21 MR. GRAVIS: (Inaudible).

22 THE COURT: I mean, I don't know if repetition is
23 going to make any difference. They've heard it. The
24 question is, in my mind, whether having said anything about a
25 warrant is in and of itself a basis for a mistrial and-

1 MR. SHAW: I think it could be the subject of a jury
2 instruction if the Court chooses to disregard, you can
3 instruct them to disregard (inaudible).

4 THE COURT: I guess my main question at this point
5 is that now we're discussing it and now I'll decide this, but
6 I'm just wondering, can you avoid referring to the issue of
7 the warrant in answering your questions, because if you can't
8 then I'm probably going to dismiss this jury.

9 MR. SHAW: We don't want you to talk about the
10 warrant, so.

11 THE WITNESS: Okay.

12 THE COURT: Yeah. If the - warrant, the warrant is
13 not relevant to this case. It may be important to you but
14 it's not important to the case.

15 THE WITNESS: Okay.

16 THE COURT: What matters is, what Mr. Shaw is trying
17 to get at from what I understand is that you've called the
18 police, your car, in your opinion is missing, and then you
19 took certain actions to try to get it back.

20 MR. SHAW: Right.

21 THE COURT: And all he wants to know about it is
22 what you did to get it back - not what you were thinking, not
23 what somebody told you, not anything to do with any warrant
24 or anything else. That may come in a different way, through
25 somebody else's testimony. He just wants to know what you

1 did to get your car back.

2 Is that right?

3 MR. SHAW: That's right. I'm just trying to get to
4 the fact that you called Melissa and reported it.

5 THE COURT: Okay. And I'm going to instruct you not
6 to refer to any warrant. I don't want you to even talk about
7 a warrant, okay?

8 THE WITNESS: Okay.

9 THE COURT: And the best you can - and I'm sorry to
10 have to put you through this, I really am.

11 THE WITNESS: (Inaudible).

12 THE COURT: Believe me, I really am sorry.

13 THE WITNESS: (Inaudible).

14 THE COURT: But it's important that you don't bring
15 in this other information-

16 THE WITNESS: Okay-

17 THE COURT: - because it may influence the jury in
18 some way, okay.

19 Now let me just, let me rule on this, okay.

20 MR. SHAW: Sure.

21 THE COURT: I understand the basis of your motion. I
22 think it's borderline in terms of the effect that it's had.
23 However, I think they heard it once. If there was damage to
24 be done, it was by hearing it for the first time. I don't
25 think-

1 MR. GRAVIS: (Inaudible)--

2 THE COURT: I don't think that in and of itself is
3 going to, you know, that that information in and of itself,
4 if that's all they have to go on, you know, then that's one
5 thing. But there presumably will be other evidence coming in
6 aside from any kind of warrant. I'm going to instruct them
7 that it's - that that testimony regarding any kind of warrant
8 is not - first of all, it's not substantiated. It's not
9 evidence and it's not relevant to this case and they're to
10 disregard anything that she said about that.

11 MR. SHAW: Only (inaudible) you have a warrant
12 issue, right?

13 UNKNOWN: Actually, no, I didn't, it was-

14 MR. SHAW: Okay. It was the (inaudible).

15 UNKNOWN: It was a different.

16 MR. SHAW: Okay. You just need to say that he was
17 arrested and leave it at that.

18 THE COURT: Okay. And if you want to make a further-

19 MR. GRAVIS: (Inaudible) make a record.

20 THE COURT: Okay.

21 MR. GRAVIS: When the warrant first came out is,
22 that was not the answer I was expecting her to say.

23 THE COURT: I understand.

24 MR. GRAVIS: And I chose not to initially object,
25 not to draw attention to it but that (inaudible) keep

1 crimes unit in Ogden City?

2 A A little over nine years.

3 Q Okay. And what is your duty assignment? When you
4 say major crimes, what does that mean?

5 A I've done a variety of jobs between misdemeanor
6 crimes to burglaries to crimes against person and currently
7 I'm in the fraud division.

8 Q Okay.

9 MR. GRAVIS: Your Honor, may we approach?

10 THE COURT: Yes.

11 (Whereupon a sidebar was held - inaudible)

12 THE COURT: Okay. Something's come up that probably
13 we need to discuss and get a little bit more detail on the
14 record outside the presence of the jury. I'm going to ask
15 that the bailiff take you to the jury room. It shouldn't be
16 too long. I'll bring you back out when we're ready for you.

17 (Whereupon the jury left the courtroom)

18 THE COURT: Go ahead, Mr. Gravis.

19 MR. GRAVIS: Yes, Your Honor. At this time I'm
20 renewing my motion to mistrial. My position is that repeated
21 testimony of one witness about warrants. Now Detective
22 Reaves, when they get into the fact that he's in the fraud
23 division, with the talk about warrants is clearly, even
24 further exacerbates the problem with the testimony about the
25 warrants because now you combine that with the fact that he's

1 a fraud investigator, not an auto theft, if they'd just
2 mentioned major crime that would have been fine, but when
3 they brought fraud in I think that clearly implies to the
4 jury that Mr. Hall is involved in some sort of fraudulent
5 activity outside of this because Detective Melcher will
6 testify that she's involved in the investigation of auto
7 thefts, that's her assignment and I think it prejudices the
8 jury.

9 MR. SHAW: My response would be, I don't think you
10 can assume from one assignment designation that they don't
11 often overlap. I think that's a mischaracterization. Plus, I
12 don't think it, the fact that he says that means anything
13 with respect to the defendant's guilt or innocence. It's a
14 legitimate question. I think the jury's entitled to know his
15 nature, the nature of his experience, the nature of his
16 investigations and that sort of thing. That's the only
17 question I intended to ask anyway.

18 THE COURT: What was Detective Reaves's involvement
19 with this case again because I don't really know.

20 MR. SHAW: Well, primarily, this is where we're
21 going with it.

22 THE COURT: Okay.

23 MR. SHAW: He Mirandized the defendant. In the
24 course of the other investigation there - and he participated
25 in this interview. This interview encompasses both this

1 case-

2 THE COURT: Okay.

3 MR. SHAW: And the other case. What I intended to
4 do was simply now go to the fact that he was present in the
5 interview, he Mirandized the defendant, restate the Miranda
6 in front of the jury and then there were a couple of specific
7 areas that he talked to Detective Reaves about in this
8 investigation.

9 THE COURT: And you're going to focus on - certainly
10 not going to bring up any other-

11 MR. SHAW: No.

12 THE COURT: Yeah.

13 MR. SHAW: In fact, I don't even want you to say
14 that you were involved in another investigation, okay? Just
15 keep it that you were there and present and Mirandized him
16 and focus on the auto theft issue. Don't bring in anything
17 to do with the other investigation.

18 MR. GRAVIS: Well, Your Honor, I wouldn't have any
19 problem with that except for the testimony of the victim,
20 keep talking about, she kept talking about warrants time and
21 time again. I'm saying that this makes, even though either
22 one may not be individually grounds enough for mistrial, when
23 you combine the two, you clearly prejudice - potential
24 prejudice in the jury.

25 THE COURT: Yeah. I disagree. I really do. I think,

ADDENDUM C

1 Q Okay. Ultimately, when you interviewed Cindi Hall
2 and had been made aware that the vehicle was missing and, at
3 least in so far as she was concerned should have been
4 returned, what did you do to try to track that vehicle?

5 A You mean Cindi Fields?

6 Q Cindi Fields, yeah, I'm sorry.

7 A I started trying to find the location of James and
8 the vehicle. Through the course of the investigation I
9 learned that he may be heading towards Missoula. I notified
10 Missoula police to look for the vehicle and put out an
11 attempt to locate the vehicle and Mr. Hall. After I made
12 contact there I learned that Mr. Hall and the vehicle were in
13 Pocatello, Idaho.

14 MR. GRAVIS: Your Honor, I'm going to object. May
15 we approach the bench again?

16 (Whereupon a sidebar was held)

17 THE COURT: Okay. I'm going to have to excuse you
18 again, I apologize. I did warn you this was going to happen
19 periodically and just, we'll bring you back out in just a few
20 minutes.

21 (Whereupon the jury left the courtroom)

22 THE COURT: Go ahead.

23 MR. GRAVIS: Yes, Your Honor. This testimony of
24 this witness I think has further grounds for mistrial. The
25 testimony that she had information he was headed towards

ADDENDUM D

1 did to get your car back.

2 Is that right?

3 MR. SHAW: That's right. I'm just trying to get to
4 the fact that you called Melissa and reported it.

5 THE COURT: Okay. And I'm going to instruct you not
6 to refer to any warrant. I don't want you to even talk about
7 a warrant, okay?

8 THE WITNESS: Okay.

9 THE COURT: And the best you can - and I'm sorry to
10 have to put you through this, I really am.

11 THE WITNESS: (Inaudible).

12 THE COURT: Believe me, I really am sorry.

13 THE WITNESS: (Inaudible).

14 THE COURT: But it's important that you don't bring
15 in this other information-

16 THE WITNESS: Okay-

17 THE COURT: - because it may influence the jury in
18 some way, okay.

19 Now let me just, let me rule on this, okay.

20 MR. SHAW: Sure.

21 THE COURT: I understand the basis of your motion. I
22 think it's borderline in terms of the effect that it's had.
23 However, I think they heard it once. If there was damage to
24 be done, it was by hearing it for the first time. I don't
25 think-

1 MR. GRAVIS: (Inaudible)--

2 THE COURT: I don't think that in and of itself is
3 going to, you know, that that information in and of itself,
4 if that's all they have to go on, you know, then that's one
5 thing. But there presumably will be other evidence coming in
6 aside from any kind of warrant. I'm going to instruct them
7 that it's - that that testimony regarding any kind of warrant
8 is not - first of all, it's not substantiated. It's not
9 evidence and it's not relevant to this case and they're to
10 disregard anything that she said about that.

11 MR. SHAW: Only (inaudible) you have a warrant
12 issue, right?

13 UNKNOWN: Actually, no, I didn't, it was-

14 MR. SHAW: Okay. It was the (inaudible).

15 UNKNOWN: It was a different.

16 MR. SHAW: Okay. You just need to say that he was
17 arrested and leave it at that.

18 THE COURT: Okay. And if you want to make a further-

19 MR. GRAVIS: (Inaudible) make a record.

20 THE COURT: Okay.

21 MR. GRAVIS: When the warrant first came out is,
22 that was not the answer I was expecting her to say.

23 THE COURT: I understand.

24 MR. GRAVIS: And I chose not to initially object,
25 not to draw attention to it but that (inaudible) keep

1 warrants, it's clearly, the clear implication is, is this
2 warrant had something to do with fraud, not the auto theft.

3 THE COURT: Well, I think, you know, I think that
4 probably seems really obvious to you but I'm not so sure it's
5 going to be really that obvious to the jury.

6 But secondly, we're not talking about a fraud
7 investigation. We're talking about Detective Reaves's
8 assignment. And I think he's entitled to give him some
9 credibility that within the department, to administer the
10 Miranda warning. Otherwise, the jury may have said, "well,
11 who is this guy?" He, you know, he walks in and we don't
12 even know who he is. He may be an officer, but you know, he,
13 you know, they - they, I just don't, I think they need to
14 have some kind of context. If that, if you're having to put a
15 foundation in for Miranda warning, I think they're entitled
16 to know who he is and what he, you know, what he does with
17 the police.

18 MR. GRAVIS: I'm not sure you need a foundation for
19 Miranda warning, other than he's a police officer who's been
20 doing it for 25 years and he's a detective in investigation
21 of major crimes, not that he's specifically a fraud
22 investigator.

23 THE COURT: I'm going to deny your motion. I just
24 don't - as I said, I don't think it rises to that level in
25 this. I don't even think - I don't even see really a

1 prejudice here in any way. And I don't think a curative
2 instruction is appropriate either because I think then - then
3 it suggests to them that there's some reason for it. I just
4 don't - all it was was the context of his official duties.
5 It didn't even connect him with the defendant in terms of a
6 fraud investigation. He's just there as I understand it.

7 MR. SHAW: And-

8 THE COURT: Now it may have been a connection with
9 that but there's no, there's no insinuation that he was
10 somehow doing something other than being, having been here
11 incidentally on this case.

12 MR. SHAW: And so that the record is clear,
13 Detective Reaves, I don't want to hear anything about any
14 other investigation. I'm going to move directly to Miranda,
15 okay? And you were present during the interview and then
16 what you learned in the interview about this auto theft.

17 THE COURT: Okay. Just so it's clear, just like I
18 did last time. If we do get into this, the other issue about
19 some other kind of case or other charge that's pending or
20 other investigation, I think coupled with all the other
21 stuff, if it gets that specific, it may rise to the level of
22 mistrial. But I just don't think we're at that point, so, if
23 everybody's very careful, I think we can avoid that problem.

24 You can bring the jury back in.

25 (Whereupon the jury entered the courtroom)

1 MR. GRAVIS: No. Mr. Hall went to a shelter. They
2 run his name and found out he had warrant. They called the
3 police in Pocatello. He got arrested. He told the police
4 where it was, it was parked in a Midas shop.

5 THE COURT: Okay.

6 MR. GRAVIS: He denies it's run out of gas whether
7 that's an issue or not. As soon as they asked him he told
8 them where it was at.

9 MR. SHAW: And he never made it anywhere near
10 Montana.

11 MR. GRAVIS: I submit Pocatello is - maybe not be
12 halfway to Missoula, it's halfway to Montana.

13 MR. SHAW: Well, I'll disagree with that
14 (inaudible).

15 THE COURT: I think this is really close, but I'm
16 going to deny it. But we're getting cumulatively, this is
17 becoming very problematic I think at this point. You know,
18 and I do, you know, that really does enter into it as a
19 cumulative thing. Regardless of anything, I don't think
20 you've done anything, Mr. Shaw, that would have created the
21 situation. But it's been cumulative by voluntary information
22 coming out that would not be otherwise admissible and, you
23 know, we're really kind of getting it, skirting, I think, the
24 edge of this.

25 I think, but this is the problem I've got with it

1 and I, you know, I think it requires a lot of supposition. A
2 lot of these things require a lot of supposition to reach
3 what your headed for, Mr. Gravis, in terms of what you think
4 the jury may conclude. It requires a lot of other
5 assumptions that they have to make, but cumulatively, this
6 could end up being a problem if we get anymore of this stuff
7 coming in.

8 MR. SHAW: You know, one of the problems too is we
9 recognize there's a warrant and that shouldn't have come in
10 and we talked to Cindi about not mentioning that-

11 THE COURT: Right.

12 MR. SHAW: But that's how he was arrested, you know,
13 so we're dancing around that issue right from the get-go.
14 And it is kind of difficult to-

15 THE COURT: And I'm not being critical of you
16 either. I understand you were asked, you know, what, why did
17 you do what you did next and all that-

18 MR. SHAW: (Inaudible)-

19 THE COURT: And you said I understood it was
20 (inaudible), but the problem is with that extra specific, it
21 possibly could go to one of the elements in the case whether
22 he intended to keep it longer than 24 hours and that's where,
23 you know, because if he's going to Idaho, I guess it could be
24 argued that he could turn around and make it back in time. If
25 he's going to Montana, I don't think so. But the fact of the

ADDENDUM E

1 you.

2 DIRECT EXAMINATION

3 BY MR. SHAW:

4 Q Cindi, would you state your full name, please?

5 A Okay. My name is Cindi, but the first name is
6 spelled, C-I-N-D-I. My middle name is Lu, it's spelled L-U,
7 and the last name is Field, F-I-E-L-D.

8 Q Okay. And Cindi, how old are you?

9 A I'm 50.

10 Q Okay. And where do you live?

11 A 577-26th Street.

12 Q Is that an apartment complex?

13 A No, I - it's a two-bedroom home.

14 Q Two-bedroom home, okay. And whose your neighbor?

15 A I rent and there's rental property on each side of
16 me, so, I just got new neighbors to the west. I have no idea
17 who they are. And then there are just two out of the five
18 apartments right now that are rented and the one is rented to
19 Tammy, Tamara Hurst.

20 Q Okay.

21 A And then there's another man who's name is Matt but
22 I don't know his last name.

23 Q So Tamara Hurst is your next door neighbor living
24 in an apartment complex?

25 A Uh-huh (affirmative).

1 Q Okay. How long have you known Tamara?

2 A She's been there about two and a half years.

3 Q Okay. Cindi, I want to talk just a little bit about
4 before we get into any further evidence about the incident
5 itself, I want to talk just a little bit about your anxiety
6 problem.

7 A Okay.

8 Q Can you explain very briefly the reason that you
9 suffer from anxiety or what it is exactly that you suffer
10 from?

11 A I have acute panic attacks, but it's also
12 associated with fibromyalgia which I have and that's when the
13 panic attacks seem to have gotten worse. I had them before
14 but they, for some reason fibromyalgia intensifies the panic
15 attacks.

16 Q And fibromyalgia is a pain disorder?

17 A It is.

18 Q And sometimes referred to myofascial type pain?
19 Muscular pain, that sort of?

20 A It - well, yeah. It actually affects, it's worse
21 than arthritis. It affects joints, bones, ligaments, tendons,
22 the fluid sacs over the elbows, knees, so.

23 Q Okay. And do you take any medication for either
24 your fibromyalgia or for your anxiety issue?

25 A I do take Xanax to help with the panic attacks and

1 I take Celebrex for fibromyalgia and then Ibuprofen, 800
2 milligrams.

3 Q Okay. And are those medications prescribed by a
4 particular doctor?

5 A They are prescribed by Peter Clemmons who is my
6 physician.

7 Q He's your physician, okay. Looking back to January
8 24th of this year, did you have in your possession a valid
9 prescription of Xanax?

10 A Yes, I did.

11 Q Do you know specifically how many or roughly how
12 many pills you had in your possession of the Xanax on January
13 24, 2008?

14 A I'm sure I had at least 30, maybe 40 at the most.

15 Q Okay.

16 A I do get 120 of them, so.

17 Q And how long does that prescription last you
18 ordinarily?

19 A It has to last me 30 days.

20 Q Okay.

21 A Because it is covered under Medicaid and so
22 Medicaid holds you to exactly 30 days.

23 Q Okay. And so having 30 or 40 in your possession you
24 would have had a dosage sufficient for how many more days?

25 A I'm supposed to take four a day and some days I

1 don't take four a day. It just depends on how panicky I feel
2 at the time.

3 Q Okay.

4 A So some months I still have some left over before I
5 refill them and some months I am completely out before it's
6 time to refill them.

7 Q Okay. But on January 24th you still had 30 to 40
8 Xanax pills in your possession?

9 A Uh-huh (affirmative).

10 Q Okay. Did there come a time on January 24th where
11 the defendant asked you to borrow your car?

12 A Yes, he did.

13 Q Can you tell us about that?

14 A He told me that he had been to a hospital because
15 he had fallen down the stairs. He was staying with my
16 neighbor, Tammy, through the winter and the stairs were
17 really icy and he had fallen down and he had had to go to the
18 hospital for a test and then he said that he had
19 prescriptions that were written that he needed to have
20 filled. And so he asked me if he could borrow my car to meet
21 his girlfriend who was going to pay to fill the prescription
22 for Xanax that he had and then a narcotic of some sort for
23 pain.

24 Q Okay. And what time of day did the defendant ask
25 you about borrowing the car; do you recall?

1 hospital or to Pocatello or anywhere else to try to find you
2 some Xanax?

3 A No.

4 MR. SHAW: That's all.

5 CROSS EXAMINATION

6 BY MR. GRAVIS:

7 Q Okay. You say you get 120 Xanax pills at a time,
8 correct?

9 A For a 30-day period, yes.

10 Q And when do you get that prescription filled?

11 A On the 8th of each month.

12 Q Okay. And you're supposed to take four a day?

13 A Yes.

14 Q And some days - you say sometimes you don't take
15 four?

16 A And some days I can function and not be panicky so
17 I may take one or two or some days I may not take any at all.

18 Q Do some days you take more than four?

19 A No.

20 Q Well, you said some days you - some months you run
21 out and some days you have, some months you (inaudible).

22 A Well, it just depends on how stressful life has
23 been or how bad I hurt and.

24 Q Well, if you get 120 a month and you get, take four
25 a day, how could you run out if you don't sometimes take more

1 than four a day?

2 A Okay. Like today, I have taken already four just to
3 handle this-

4 Q Okay.

5 A So.

6 Q So you, so some days you do take more than four?

7 A Yes.

8 Q How many did you take on January 24th?

9 A I believe two.

10 Q But you can't remember?

11 A (No inaudible response).

12 Q Okay. What effect does it have on you if you take
13 more than four a day?

14 A It just makes me calmer and makes me able to handle
15 stress better and it also makes it so that I don't hurt as
16 bad and.

17 Q Okay. Does it affect your ability to think clearly?

18 A Xanax does not, no.

19 Q And what other drugs do you take again?

20 A I do have chronic migraine so I do take Maxalt. I
21 take Fiorinal with codeine and plain Fiorinal for the
22 migraines, but those are only for the migraines.

23 Q Okay.

24 A I also take the Celebrex and Ibuprofen 800
25 milligrams, and I have asthma so I take a drug called

1 Feodore.

2 Q Okay. So you got-

3 A And I also take prenatal vitamins and I do B12
4 shots two times a week for the chronic fatigue syndrome which
5 I have.

6 Q Okay. So you got 120 Xanax on the 8th of January,
7 correct?

8 A Yes, it could have been the 8th or the 9th. It
9 depends on-

10 Q Okay.

11 A How the months fall and how Medicaid sticks to
12 their rules.

13 Q And so you're not allowed to refill a prescription
14 shorter than 30 days, correct?

15 A Shorter than 30 days.

16 Q Okay. And during the month of January how many
17 pills were you taking - average, taking a day?

18 A On a day-to-day basis, I don't, and just to be
19 honest, it depends on how I wake up, how badly I hurt and how
20 stressful I feel and I wish I could tell you I take exactly
21 four or I take exactly one or two. Some days I can do just
22 fine and not take any, so.

23 Q Now you're saying on the 24th of January which was
24 about - little less than two and a half weeks later, you had
25 30 to 40 Xanax left, correct?

1 A Probably, or maybe more. I don't - I don't sit and
2 count them everyday to make sure how many I have.

3 Q Do you recall telling Detective Melcher that you
4 got 150 Xanax at a time?

5 A I get 120 at a time.

6 Q Do you recall Detective Melcher you get 150?

7 A No, I don't.

8 Q Do you recall telling Detective Melcher that you
9 still had a hundred left?

10 A No, I don't remember telling her I had a hundred
11 left.

12 Q Do you recall telling Detective Melcher that you
13 gave 20 of your Xanax to Tammy Hurst?

14 A Yes, I did.

15 Q And why did you give Xanax to Tammy Hurst?

16 A Because my prescription was filled before hers and
17 she has panic attacks and so, I know I shouldn't do that but
18 she, I gave her 20 and when hers was going to be filled, she
19 was going to just give me back the 20.

20 Q Okay. And you know what - why she ran out?

21 A Her boyfriend beat her up and while she was at the
22 hospital getting stitches he went back to her apartment and
23 took all of her medications.

24 Q Okay. And where was James at during this time? Was
25 he staying with her?

1 A He was.

2 Q Okay. Were the police called?

3 A Um-

4 MR. SHAW: Objection, relevance, Your Honor.

5 MR. GRAVIS: Well, we'll withdraw.

6 THE COURT: Sustained.

7 Q (BY MR. GRAVIS) So you gave her 20 - about 20 of
8 your pills, could it have been more?

9 A Did I give her more?

10 Q Yeah.

11 A No.

12 Q Now you're saying that she gets her prescription
13 filled sooner than you then she can pay them back?

14 A No. Hers is usually filled later than mine.

15 Q So her is usually filled later than yours. So you
16 gave away 20 of your pills because she was out?

17 A (Nods in the affirmative).

18 Q And you had 30 or-

19 A I had just filled mine so I had the 120.

20 Q Well, you're saying today you had 30 or 40 left?

21 A Possibly, yes.

22 Q Is that before or after you gave her 20?

23 A That was after I gave her 20.

24 Q So you had - so you had somewhere between seven and
25 a half and ten days worth of Xanax left, correct?

1 A Yes.

2 Q And that was supposed to last you until February
3 8th or 9th, correct?

4 A Right.

5 Q So you didn't have enough in case you needed four a
6 day; is that what you're saying?

7 A I, well, I had enough, yes.

8 Q Well, you had between eight - seven and a half and
9 ten days left. How many days is it from January 24th to
10 February 8th or 9th?

11 A I don't know without sitting here and counting it
12 out. I - it's not my-

13 Q If I was to say it was 15, 16 days, would that be
14 right?

15 A Possibly, yes.

16 Q So you'd need 60 to 64 pills just, if you took the
17 right amount, correct?

18 A If I - yes.

19 Q So you were facing the potential of running out of
20 Xanax before you could get it refilled, correct?

21 A No, I didn't feel that way, no.

22 Q You didn't feel that way?

23 A No.

24 Q Okay. And you're sure about what time James
25 borrowed your car?

1 A Yes.

2 Q And what time was that again?

3 A It was around 3:30.

4 Q Around - or how do you know?

5 A Dr. Phil was on TV.

6 Q Okay.

7 A I was watching Dr. Phil when he knocked on my door.

8 Q And you're saying that you did not ask him or he

9 did not say he could go to Pocatello and get you some more

10 Xanax so you wouldn't run out?

11 A No.

12 Q How would James know that you didn't have enough

13 Xanax?

14 A He told me that he had a prescription that he

15 picked up for Xanax and pain pills because he was in pain

16 from the fall down the stairs. He told me that because Tammy

17 owed me 20 and her boyfriend had stolen hers, that he was

18 willing to pay me back the 20. I said - I didn't care either

19 way. I was fine with what I had. I was just going to let it

20 go. It was just one of those, another learning experience

21 that I had lent somebody 20 Xanax's and somebody stole them

22 and so it, he was the one that offered to fill his own

23 prescription and pay back the 20.

24 Q Okay.

25 I have nothing further.

1 about 45 minutes longer and I know how - I know Cindi well
2 and I know that she doesn't like people to drive her car.

3 Q Okay.

4 A Or whatever.

5 Q Okay. Now sometime during this period of time, your
6 boyfriend assaulted you, correct?

7 A Yes.

8 Q And then when you got back from the hospital you
9 noticed your Xanax pills missing, correct?

10 A Yes.

11 Q How many pills did Cindi-

12 A They were later retrieved.

13 Q Okay. But how many pills did Cindi give you?

14 A I think it was 20.

15 Q Twenty?

16 A She actually never did give them to me.

17 Q She never gave them to you?

18 A No, we talked about it.

19 Q Okay. So you're saying that she-

20 A It - why would it be her responsibility to pay me
21 back something my boyfriend stole from me?

22 Q Okay. So you're saying she never gave you any?

23 A The - she had given me 20 but they were stolen by
24 the - and I get the same prescription and so they were in my
25 bottle. Yes, I know that's illegal, but one, either one goes

1 back and forth and.

2 Q So she had given you 20 before they were stolen; is
3 that what you're saying?

4 A No. Oh, yeah, 20 before and (inaudible) had stolen
5 them, but I got my prescription reimbursed.

6 Q Okay. Now Mr. Hall slipped on your stairs too; is
7 that correct?

8 A Yes, he had.

9 Q And he hurt his neck?

10 A Well, I wasn't there. I didn't see it happen, but
11 I know that the rain gutters on that house are really old and
12 treacherous and we get a 50-foot icicle hanging down there
13 and they're really icy, and we've gone through three property
14 managers and two owners in the three years that I've lived
15 there. They're slowly but surely trying to fix it up.

16 Q Okay. Did he - do you know whether or not he hurt
17 his neck or did he tell you whether he hurt his neck?

18 A Well, he claimed a lot of things and prior to that
19 he supposedly had neck injuries and whatever. At this point
20 I don't know what to believe.

21 Q Okay. Did he tell you that he had an operation
22 scheduled in February?

23 A No.

24 Q And you're sure he never told you about that?

25 A He told me a lot of things.

1 take a look at that?

2 A Which - where at?

3 Q Page 7.

4 A Page 7. "Asked James why he would take all his
5 personal property with him to run an errand?"

6 Q Yeah.

7 A "If his intentions of returning and James, he had
8 taken all his personal property, said he still had a lot
9 stuff at Tamara's."

10 Q Yes. James said the only thing he took was his
11 dirty laundry, correct?

12 A Yes.

13 Q Didn't say he took any hygiene items?

14 A I probably got that from something else.

15 Q But he never said he took his hygiene items,
16 correct?

17 A No.

18 Q Now he said he took his dirty laundry and his black
19 bag, correct?

20 A Yes.

21 Q Now after you talked to James you went back and
22 talked to Cindi, right?

23 A Yes.

24 Q And at that point in time she admitted that she had
25 given some of her Xanax to Tamara, correct?

1 A Yes.

2 Q And she said that she had 100, got a 150 Xanax at a
3 time and she still had 100 left, correct?

4 A Well, when I spoke with her it was briefly on the
5 porch returning her car key to her. I might have
6 misunderstood the exact contents of that conversation. I
7 thought she said she had a prescription for 150, maybe it was
8 120. I'm not sure. I wrote this several hours later, and
9 then she had mentioned that she gave 20 Xanax to Tamara
10 Hurst.

11 Q Okay.

12 A I went there and specifically asked her if she
13 asked James, I was just clarifying James' story, if she asked
14 him to go to Pocatello to get her some Xanax.

15 Q But in your report you wrote down that she said she
16 got a prescription for 150 Xanax and still had about 100
17 left?

18 A Yes. I wrote that in my report.

19 Q And she said she had plenty and didn't have any
20 reason for James to go to Pocatello to get more, correct?

21 A Correct.

22 Q And she admitted that she gave some of her drugs
23 away, 20 of them, right?

24 A Correct.

25 Q To Tamara?