

1997

Utah v. Diane Marie Nelson : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| DIANE MARIE NELSON, | : | Case No. 970163-CA |
| Defendant/Appellant. | : | Priority No. 2 |

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DOCKET NO. 970163-CA

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-301 (Supp. 1996) and Utah Code Ann. § 76-6-302 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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INTRODUCTION

Nelson claimed in Point I of her Opening Brief that the trial court failed to determine the reliability of the eyewitness identification and make appropriate findings of fact prior to trial as required by Article I, section 7 of the Utah Constitution and State v Ramirez, 817 P.2d 774 (Utah 1991). Prior to trial, defense counsel filed a motion to suppress the identification on the grounds that the showup was prejudicially suggestive and the identification unreliable. At the hearing on the motion to suppress defense counsel indicated that he believed the State intended to submit the preliminary hearing transcript. R. 161-62. Defense counsel stated that he too would be relying on portions of the transcript as well. R. 161-62. Defense counsel also made a proffer as to the testimony of Dr. Dodd, an expert in eye witness identifications. R. 168-69. Though the State filed a motion and memorandum in opposition to Nelson's motion to suppress, the State never submitted the transcript of

the preliminary hearing into evidence.¹ The State's failure to submit any evidence at the hearing is explained by the fact that the trial court indicated at the outset its belief that the issue of reliability was essentially one for the jury.² R. 162-63. The trial court made it quite clear to defense counsel that he need not waste his time putting Dr. Dodd on the stand because the court had already ruled on the matter. R. 167-68. The State now claims that Nelson waived the issue. See State's Opening Brief, pg. 11-12.

Lastly, though the State concedes on page 21 of its Opening Brief that challenges to the sufficiency of the evidence do not require preservation, Nelson invited error and/or waived the issue.

ARGUMENT

I. DEFENDANT DID NOT WAIVE HER RIGHT TO REQUIRE THE TRIAL COURT TO MAKE A THRESHOLD DETERMINATION OF THE RELIABILITY OF THE EYE WITNESS IDENTIFICATION PURSUANT TO ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION.

Contrary to the State's suggestion, Nelson did request an evidentiary hearing pursuant to Ramirez. R. 17. At that point, the burden was on the State to demonstrate the reliability of the

¹. The burden is on the prosecution to demonstrate the admissibility of the eyewitness identification. Ramirez, 817 P.2d at 778.

². On page twelve of its Brief, the State argues that because the trial court did review the facts recited in the prosecutor's memorandum in opposition to Nelson's motion to suppress, the requirements of Ramirez were met. The prosecutor's memorandum is not, however, a substitute for an evidentiary hearing as the "facts" recited in a memorandum are not evidence.

identification. The State never had to meet its burden because the trial court ruled that the issue was one for the jury without hearing any evidence. Once the trial court had ruled, Nelson was not required to again request a Ramirez hearing to preserve the claim.

The State's reliance on State v. Olsen, 860 P.2d 332 (Utah 1993) to support its claim that Nelson must ask for a pretrial hearing to suppress the identification twice to preserve her claim is misguided. In Olsen, the defendant failed all together to object to the reliability of the eye witness identification. Id. at 335. Unlike, Olsen, in this case Nelson did file the appropriate motion, and that motion was denied. R. 17. It is unclear just what the State expects defense counsel to do to preserve the claim in addition to filing the appropriate motion.

The State also erroneously relies on State v. Lopez, 886 P.2d 1105 (Utah 1994) to support its claim that Nelson waived her request for a pretrial determination of the reliability of the identification. Like Olsen, the defendant in Lopez never asked the trial court to consider the admissibility of the identification under the Utah Constitution. Consequently, the claim was deemed waived. Id. at 1113. Olsen is therefore distinguishable from this case because Nelson did request a hearing and ruling on the reliability of the identification under Article I, section 7 of the Utah Constitution prior to trial.

II. NELSON DID NOT INVITE ERROR OR WAIVE ANY
CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE.

The State concedes that challenges to the sufficiency of the evidence do not require preservation. See State's Opening Brief, pg. 21. However, the State asserts that counsel argued a contrary position to his claim on appeal that the State failed to establish that Nelson intended for the accomplice to use a knife in the commission of the offense. Id. This assertion is not supported by the record. Defense counsel argued at the close of the State's case that the charge against Nelson should be dismissed because the State did not establish that she encouraged the accomplice to use a weapon. R. 374-75. The trial court denied the motion on the grounds that the law does not require that the defendant know that the accomplice will use a dangerous weapon. R. 377-78.

The State apparently believes that despite the trial court's ruling, counsel must request a jury instruction contrary to the trial judge's interpretation of the law to avoid inviting error. Given the trial court's rejection of defense counsel's argument, it was appropriate to agree not to argue the point before the jury.

Lastly, the State's assertion that defense counsel never asked the trial court to consider the argument that Nelson had to intend the use of a knife and somehow misled the court on that issue is incorrect. At the close of the State's case defense counsel argued:

You know, and it sort of leads me to the next argument I wanted to make before the jury comes in, and that would be an argument, obviously, that the state has not shown a prima facie case.

If they don't believe that she committed an aggravated robbery, i.e. that she didn't have the knife, that she didn't encourage the use of the knife, or intend to use the knife, then this, as an alternative to that, then this simply ought to go to the jury as a robbery.


R. 374-75. The invited error doctrine has two principal purposes. First, the trial court should be given an opportunity to address a claim of error. "Second, it discourages parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal." State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993).

In this case, defense counsel raised the issue of what constitutes the necessary mens rea and argued it at trial. The trial court considered the argument and rejected defendant's interpretation of the law. The trial court was not misled, and counsel did not "hide" the issue for a surprise attack on appeal.

CONCLUSION

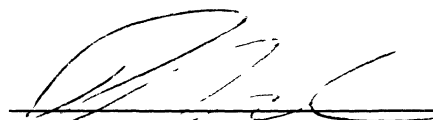
Based on the foregoing and as set forth in her initial Opening Brief, Nelson respectfully requests that this Court vacate the conviction and judgment entered in the trial court and remand the case to the trial court either for a new trial, or with orders to dismiss for insufficient evidence.

SUBMITTED this 50 day of October, 1997.


REBECCA C. HYDE
Attorney for Defendant/
Appellant

CERTIFICATE OF DELIVERY

I, REBECCA C. HYDE, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 30 day of October, 1997.


REBECCA C. HYDE

DELIVERED this _____ day of October, 1997.
