

1986

# Utah v. Douglas Carter : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff-Respondent.	:	Case No. 860063
	:	
vs.	:	
	:	
DOUGLAS CARTER,	:	Priority 1
	:	
Defendant-Appellant.	:	

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SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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FILED

JUN 6 1988

Clerk, Supreme Court, Utah

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**SECOND SUPPLEMENTAL BRIEF OF RESPONDENT**

**INTRODUCTION**

The State submits this second supplemental brief in response to defendant's second supplemental brief submitted May 6, 1988.

**ARGUMENT**

**POINT I**

**REVIEW OF CAPITAL CASES FOR PLAIN ERROR.**

The State does not dispute that this Court has stated it will review capital cases for plain error even in the absence of an objection at trial. State v. Tillman, 750 P.2d 546, 551 (Utah 1987). The State does not agree, however, that there were any errors committed at trial that require reversal of defendant's conviction or death sentence.

**POINT II**

**DEFENDANT WAS NOT PREJUDICED BY THE COURT  
READING THE INFORMATION TO THE JURY.**

Defendant's claim that he was prejudiced by the language of the information is without merit. He asserts that the jury was led to believe that he was charged with more than

one crime because the information cited two statutes in the single first-degree murder charge. Yet he admits that the jury was properly instructed on the elements of first-degree murder under Utah Code Ann. § 76-5-202 (Supp. 1987). Because the jury was appropriately instructed on the elements of the crime and only one criminal act was alleged, proven and instructed upon, there was no error in the information citing to both statutes and defendant was not prejudiced by the court reading the information. It is unlikely that the jury thought defendant was charged with anything more than the single count of first degree murder upon which they were instructed.

In support of his claim defendant cites United States v. Marquardt, 786 F.2d 771 (7th Cir. 1986). Marquardt is inapposite here because it discusses multiplicitous charges or "charging the same defendant with the same offense in several different counts." Id. at 778. Here, defendant was charged with only one offense even though two statutes were cited and, therefore, there was no multiplicity involved.

### **POINT III**

#### **DEFENDANT ALLEGES NO ERROR FOR THIS COURT TO REVIEW ON THE PEREMPTORY CHALLENGES.**

Defendant claims that he is prejudiced by an inability to attack the peremptory jury challenges exercised by the State because there is no record of these challenges. The record does, however, contain a list of those potential jurors that were stricken by both parties from the jury panel (R. 101-102). Other than this list, there would normally be no other record of the peremptory challenges to review unless defendant objected to an



improper challenge by the State at the time they were exercised. Here, defendant does not intimate what he suspects might have been improper about the peremptories and his claim is meritless.

#### POINT IV

**DEFENDANT'S CONFESSION WAS PROPERLY ADMITTED AT TRIAL EVEN THOUGH THERE WERE NO AUDIO OR STENOGRAPHIC RECORDINGS OF DEFENDANT'S PRECISE WORDS WHERE DEFENDANT SIGNED THE STATEMENT ADOPTING IT AS HIS OWN AND WHERE THERE WAS NO EVIDENCE OF COERCION.**

Defendant argues that his confession should not have been admitted at trial under a rule that he urges this Court to adopt for capital cases. While it is apparent that the State would be unduly prejudiced by the application of such a rule to this case rather than prospectively only, this brief does not discuss the retroactivity issue because the State asserts that the rule is inappropriate in any case.

Defendant urges this Court to rule that confessions of first-degree murderers must be recorded verbatim by either a tape or stenographic recording. Not only is defendant's argument unsupported by any authority, but it is flawed in its claim that such a rule would do more to preserve a defendant's rights or protect against involuntary confessions.

First, there are some reasonable bases for a claim that recording statements will eliminate some opportunities for coercion, but there is no guarantee that a police officer who attempts to coerce a suspect into confessing a crime would turn on a tape recorder or invite in a stenographer during the coercive session. Thus, short of requiring officers to record their entire lives, there is nothing about taping or otherwise

recording a suspect's exact words that would guarantee elimination of coercive tactics prior to the recording session.

While the State agrees that it is good police practice to record the statements of suspects, it does not agree that the lack of a recording should be fatal to a finding of voluntariness or admissibility of the statement in any case. In Utah, confessions are presumed voluntary unless a defendant presents some evidence to rebut this presumption. State v. Hinton, 680 P.2d 749, 750 (Utah 1984). Defendant's proposed rule implies that the opposite should be true in capital cases; that confessions are presumed involuntary unless the State can prove otherwise. Defendant offers no good reason why this Court should reverse its position in this or any other case, or any convincing reason why his proposed rule should apply only in capital cases.

Defendant further asserts that he was prejudiced because his voice or his exact words were not heard by the jury. Defendant did, nevertheless, read the statement and sign it and, thus, adopted it as his own. See State v. Ellis, 374 P.2d 461, 467-68 (Or. 1962); Hommer v. State, 657 P.2d 172, 175 (Okla. Cr. App. 1983). As in Hommer there is no evidence of any significant errors, omissions or additions in the statement introduced at trial. In the absence of any of these things, and where the statement represented the substance of what defendant told Detective Pierpont, defendant was not prejudiced by the introduction of the statement he signed. See Deerman v. State, 466 So. 2d 1013, 1018 (Ala. Cr. App. 1984); State v. Morris, 163 P. 567, 571 (Or. 1917). "A statement which is reduced to writing

by one other than the accused is generally admissible where the accused reads it over and signs it." United States v. Johnson, 529 F.2d 581, 584 (8th Cir. 1976) cert. denied 96 S. Ct. 2233 (1976).

Finally, the best evidence rule would not require admission of the actual tape recording even if one existed in this case. See Deerman, 466 So. 2d at 1018; and see 23 C.J.S. Criminal Law, § 833(e) (1961). Defendant was not, therefore, prejudiced by the lack of a recording of his statement.

#### **POINT V**

##### **THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT.**

Defendant argues that the prosecutor committed prejudicial misconduct in closing argument by misstating facts, commenting on defendant's failure to testify and vouching for a witness. A review of the closing arguments reveals no misconduct and defendant's conviction and death sentence should be affirmed.

##### **A. Alleged Mistatement Of Facts.**

During closing arguments the prosecutor did refer to defendant's confession several times as being defendant's own words as defendant alleges. These references were not misstatements, however, because even if defendant did not actually place pen to paper, defendant read and signed the confession adopting it as his own. United States v. Johnson, 529 F.2d 581, 584 (8th Cir. 1976) cert. denied 96 S. Ct. 2233 (1976); State v. Ellis, 374 P.2d 461, 467-68 (Or. 1962); Hommer v. State, 657 P.12d 172, 175 (Okla. Cr. App. 1983). For this reason, the State was entitled to characterize the confession as defendant's

own words and there was no misstatement of facts, thus, no misconduct since the prosecutor had "a right to discuss fully ... the evidence and the inferences and deductions arising therefrom." State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988) quoting State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973) .

**B. Alleged Comments On Defendant's Failure To Testify.**

While the State agrees that a prosecutor may not comment on a defendant's failure to testify at trial, the remarks defendant complains of here were not such a comment. The passage quoted by defendant was a comment upon the lack of any evidence supporting defendant's claim that he was coerced to confess. Such evidence could have been elicited from other sources, such as the police officers who were present during the confession, and the remark does not necessarily imply that the evidence was lacking because defendant failed to testify. Defendant's claim on this point is tenuous at best.

The prosecutor may comment on the weaknesses of the defendant's case. State v. Kazda, 540 P.2d 949 (Utah 1975). The remark here did no more than that and was not the same as the remarks in State v. Eaton, 569 P.2d 1114, 1115 (Utah 1977) where the prosecutor stressed that there was no evidence from the defendant" who was one of the only two eyewitnesses to the crime and also asked "What does the defendant tell us?"

Even if the remark did imply that defendant should have testified, it was harmless in light of the evidence of defendant's guilt. Eaton, 569 P.2d at 1116. There is little

likelihood of a different result absent the remarks of the prosecutor. Id.

### **C. Alleged Vouching.**

Defendant claims that the prosecutor erred by stating his personal opinion that Lucia Tovar was a credible witness. The prosecutor did nothing here, however, that approached the type of vouching that has been held to be error. In United States v. Dennis, 786 F.2d 1029, 1046-47 (11th Cir. 1986), the court disapproved comments by a prosecutor that imply the government possesses some knowledge that the jury lacks supporting the witness' testimony or by making "explicit personal assurances of the witness' veracity." Id. at 1046. Neither of these two things happened here and the prosecutor's comments could fairly be construed to be comments upon the witness' demeanor in court which the jury was able to observe for itself. There was no attempt to supplant the jury's perceptions with those of the prosecutor's and no error.

Even if the comments can be construed as vouching for the witness' credibility, they were harmless in this case. They were isolated as defendant admits, See People v. Smith, 685 P.2d 786, 790 (Colo. App. 1984), and it is unlikely that the jury based its verdict, in whole or in part, on the comments. The comments were not prejudicial because it was not "clear and unmistakable that counsel [was] not arguing an inference from the evidence, ..." State v. Sargent, 698 P.2d 598, 601 (Wash. App. 1985) quoting State v. Papadopoulos, 34 Wash. App. 397, 400, 662 P.2d 59, rev. denied, 100 Wash. 2d 1003 (1983).

## **POINT VI**

### **THE TRIAL COURT PROPERLY ALLOWED THE STATE'S INVESTIGATOR TO REMAIN IN THE COURTROOM DURING TRIAL.**

Defendant contends that he was prejudiced by the court allowing the State's investigator to remain in the courtroom during the trial after he requested exclusion of the witnesses. He acknowledges that the ruling was proper under Utah R. Evid. 615 (2) and that the purpose of the exclusionary rule; to prevent witnesses from gaining information from other witnesses' testimony; was not offended. He argues, however, that the jury could have gathered from the witness' presence at counsel table that the State believed in the witness' credibility. This argument lacks substance and establishes no reversible error.

A similar argument was summarily rejected by the Eighth Circuit Court of Appeals in United States v. Williams, 604 F.2d 1102, 1115 (8th Cir. 1979). This Court should also disregard this argument without lingering long. Any time the State presents a witness whose testimony supports the State's theory of the crime, there is an implication that the State believes the witness is credible. This occurs regardless of whether the witness is seated at the prosecutor's table or excluded from the courtroom. There was no unfair prejudice to defendant where the prosecutor did not comment on the witness' credibility or attempt to substitute his judgment for that of the jury's.

## **POINT VII**

### **DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.**

Defendant claims that he received ineffective assistance of counsel because counsel was unprepared for trial and because of the lack of mitigating evidence presented at penalty phase. Defendant's claims, while they may establish deficient performance, do not establish demonstrable prejudice as required by State v. Archuleta, 747 P.2d 1019, 1023-25 (Utah 1987).

The decision of trial counsel on what mitigating evidence to present may be explained by trial strategy. Counsel may have felt that the alienists' testimony would have been more damaging than their reports since the prosecutor would have been able to cross examine them and stress more damaging evidence than was contained in the written reports.

Defendant further speculates that his attorney could have offered evidence from defendant's mother, brother, ex-wife, and young son or from unnamed friends, former employers or "others having significant association with defendant." Br. of App. at 36. Such speculation does not establish demonstrable prejudice. See Archuleta.

## **POINT VIII**

### **THERE WAS NO ERROR, CUMULATIVE OR OTHERWISE, WARRANTING REVERSAL OF DEFENDANT'S CONVICTION OR DEATH SENTENCE.**

Defendant requests that this Court reverse his conviction on the basis of either individually prejudicial or cumulative error. Based upon the foregoing discussion of

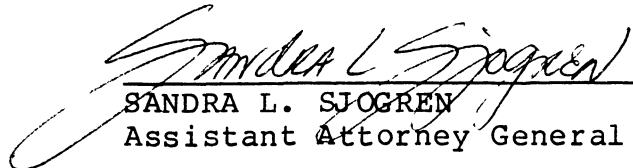
defendant's allegations of error, reversal of his conviction is not warranted on the basis of any individual error or on a theory of cumulative error. Because the trial court, at most, committed harmless error, defendant's conviction should be affirmed. See Hawkes v. State, 644 P.2d 111, 113 (Okla. Cr. 1982); State v. McKenzie, 608 P.2d 428, 448 (Mont. 1980), cert. denied, 449 U.S. 1050; United States v. Bohr, 581 F.2d 1294, 1304 (8th Cir. 1978), cert. denied, 439 U.S. 958.

#### CONCLUSION

Based upon the foregoing, the State requests this Court to affirm defendant's conviction and death sentence.

DATED this 6 day of June, 1988.

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Attorney General

  
SANDRA L. SJOGREN  
Assistant Attorney General

#### DELIVERY MAILING CERTIFICATE

I hereby certify that on the 7 day of June, 1988, I caused to be <sup>delivered</sup> ~~mailed, postage prepaid~~, four (4) true and exact copies of the above and foregoing Brief of Respondent to Thomas Means, 290 North Fourth East, Provo, Utah 84603.

