

1986

West Valley City v. Kenneth H. Risløw : Brief of Appellant

Utah Supreme Court

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.A10 IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. 860332

WEST VALLEY CITY, :
Plaintiff/Respondent, :
v. :
KENNETH H. RISIOW, : Case No. 860332
Defendant/Appellant. : Priority No. 2

THIS IS AN APPEAL FROM THE DISTRICT COURT'S
AFFIRMANCE OF A CONVICTION FOR THE OFFENSE
OF LEWDNESS, A CLASS B MISDEMEANOR, IN
VIOLATION OF §13-9-702 OF THE WEST VALLEY
REVISED ORDINANCES, IN THE FIFTH CIRCUIT
COURT, WEST VALLEY CIRCUIT, SALT LAKE
COUNTY, THE HONORABLE TYRONE P. MEDLEY,
JUDGE PRESIDING.

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Clerk, Supreme Court, Utah

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Plaintiff/Respondent, : BRIEF OF APPELLANT
v.
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Defendants/Appellant. :

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the district court's affirmance of a conviction for the offense of Lewdness, a class B misdemeanor, in violation of §13-9-702 of the West Valley Revised Ordinances, in the Fifth Circuit Court, West Valley Circuit, Salt Lake County, the Honorable Tyrone E. Medley, Judge presiding.

DISPOSITION IN LOWER COURT

Appellant was charged by Information with the offense of Lewdness, a class B misdemeanor, in violation of §13-9-702 of the West Valley Revised Ordinances. The case was tried before a four member jury on December 18th, 1985. On that same date, appellant was convicted, as charged, by the jury. On January 30, 1986, appellant was sentenced by the circuit court. On February 7th, 1986, appellant filed a notice of appeal to the District Court. After both sides submitted oral and written argument to Judge Judith M. Billings, of the third judicial district court, said court affirmed the circuit court judgment in a memorandum decision dated April 28th, 1986. After hearing

further argument, the district court, on May 29th, 1986, issued a second memorandum decision affirming the April 28th, 1986, opinion. On June 6th, 1986, appellant filed a notice of appeal with this court.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order from this court reversing the judgment and conviction rendered against him, and remanding this case to the fifth circuit court for a new trial.

ISSUES PRESENTED FOR APPEAL

The issue presented by this appeal is whether appellant was denied his constitutional right to effective assistance of counsel where trial counsel made no attempt to object to the prosecutor's clearly unreasonable and objectionable argument.

STATEMENT OF THE FACTS

At trial, the City's first witness was Katherine Loveless, who testified that on May 4, 1985, she was employed as a secretary at ZCMI, which is located in the Valley Fair Mall. (Transcript, pages 35-36) She stated that she first noticed appellant in the early afternoon on that day as he was walking up the stairs near her desk. (Tr. 36)

At that time, Loveless noticed that appellant had on a T-shirt, jogging shorts, and a large utility belt around his waist. (Tr. 36) Also, she noticed that his shorts were "hiked up on one side", thus exposing a substantial part of his penis and testicles. (Tr. 36) After he walked past her desk,

appellant then stood in a credit line for a few minutes. (Tr. 37) Then, according to Loveless, he walked over to the toy department, but later came back to her area and picked up a bus schedule. (Tr. 37)

Loveless indicated that, after appellant came back the second time, she went to get a store security guard. (Tr. 40) However, by the time she returned, he had gone into the restroom. (Tr. 40) She indicated that when appellant emerged from the restroom, the shorts seemed to be pulled up even higher than before. (Tr. 41) The security guard then contacted a West Valley City police officer, who was in the store investigating a shoplifting incident. (Tr. 42)

Finally, Loveless testified that a number of people in the store observed appellant (Tr. 42), but that no one made an attempt to tell him that he had a problem. (Tr. 43)

The City also called, among others, Scott Longson, who was employed as the store security guard on May 4th. (Tr. 66) He indicated that it appeared to him the belt had caused the pants to be "kind of hiked up". (Tr. 67) However, Longson indicated that he did not mention this problem to appellant. (Tr. 70)

After the City rested, appellant then took the stand in his own behalf. (Tr. 84) He testified that he had gone to ZCMI that day to pay a bill. (Tr. 86) Appellant further testified he was not aware of the fact that he was "hanging out", when he was approached by the police officer. (Tr. 91)

After appellant testified, his trial counsel called three character witnesses who attested to his reputation for truthfulness and veracity, as well as his good character. Testimony was also introduced through opinion evidence relating to truthfulness and good character. (Tr. 98-117)

In response to appellant's character witnesses, the prosecutor called his ex-wife, Pamela Richards, to attest to his lack of veracity and truthfulness, as well as his bad character. (Tr. 119) However, in addition to eliciting testimony from her with regard to reputation and character, he also asked her several questions, over defense counsel's objections, regarding specific instances of bad conduct and/or other bad acts. (Tr. 120)

Specifically, he asked her if appellant had ever "fibbed" to her (Tr. 120)¹, if he had failed to pay his income taxes (Tr. 121-122), if he had fraudulently registered a motor vehicle (Tr. 122); and was able to elicit a statement from her that people they had known were afraid of appellant. (Tr. 123) It should be noted that the prosecutor did not, at any point, confront appellant or his character witnesses with any of these extrinsic facts on cross-examination.

Finally, in closing argument, the city prosecutor

1. At this point, trial counsel voiced his objection to any reference to specific instances of conduct as provided by Sections 404 and 405 of the Utah Rules of Evidence. The objection was overruled by the Court.

made the following statement, which was not objected to by trial counsel:

Counsel finally says that he's [appellant] guilty of being a slop (sic), not lewdness. I'm sorry. It's more than that. It's much more than that. Do you want people walking into the stores where you shop, dressed in that fashion, dangling their genitalia and you're going to find them not guilty? See, that presumption of innocence just went out the window. It's now time for you to decide this case. If you want these people walking around in your stores where you shop, then you're going to find him not guilty. If you want to put a stop to it, you're going to find him guilty. You raised your hand, an obligation, you swore that you would well and truly try this case. I'm asking you now to do what you agreed to do. (Tr. 173)

SUMMARY OF ARGUMENT

The issue here concerns trial counsel's failure to object to the prosecutor's closing argument, which, appellant submits, was clearly improper. More important was the fact that trial counsel failed to object to this inflammatory statement. This is especially true where the prosecutor had already been able to introduce other instances of "bad character" on appellant's part.

Based on these factors, appellant believes that his trial counsel was ineffective. Thus, appellant was denied his constitutional right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Utah State Constitution.

ARGUMENT

In State v. Andreason, 718 P.2d 400 (1986), this court reversed a conviction for third degree felony theft because of the prosecutor's improper closing argument. In Andreason, the prosecutor had argued:

Now, if these two gentlemen were our only concern, we could probably let them go but they're not. Ladies and gentlemen, we have a concern for all of society, we have concerns if this goes on and that this is not an isolated incident. This type of conduct is pervasive and when we're --

Mr. Mower: I object. I think the prosecutor is trying to paint the picture that there are others who are not charged and who are not before the Court.

The Court: Objection's overruled. This is argument, Counsel.

Mr. Brown: Perhaps the Defense would have you believe that nobody else is doing it but they are and everytime we have a jury trial, people are watching. People are watching to see how we administer justice and so, before you determine that there is some reasonable doubt -- and I'm not sure what it is -- but before you determine that, you need to consider that we're not -- we've heard a lot about these two Defendants but they are not the only ones here and they are not the only ones we need to be concerned about. We've got to be concerned about the law.

Now, we give the Defendants a lot of rights to insure that we never convict an innocent man but while we're insuring that, we need to be concerned about how many who aren't innocent are turned loose and how it affects them and us but also how it affects others, others who are going to base their decisions on conduct and what they know about how our system works.

So it is a weighty decision but you need to consider everyone who is involved here.

The court began it's analysis by stating that a two-part test was to be employed in reviewing alleged prejudicial remarks made by a prosecutor during closing argument. The first part of the test considers whether the remarks called the attention of jurors to matters they would not be justified in considering in determining their verdict. Id. at 402. The second part of the test considers, given a violation of part one, whether the appellant demonstrated, under the facts of each particular case, that the jurors were probably influenced by the improper remarks in reaching their verdict. Id. at 402-03.

The court then held that part one of the test had been met. It stated that:

The jury's attention was clearly called to matters outside the evidence of the case, e.g., that defendant's alleged conduct was "pervasive", that others were involved in similar conduct, and that the jury needed to be concerned about those "who aren't innocent but are turned loose". Id. at 402.

As to the second part, the court ruled that because of circumstantial and sufficiently conflicting evidence in the case, the jury was probably influenced by the comments. Id. at 403. Thus, the case was reversed and remanded to new trial.

Appellant submits that application of the Andreason analysis in the instant case would require a reversal if that issue itself could have been brought before this court on appeal. Clearly, the statements here were as offensive as those in Andreason, in that it called the jury's attention to

others apparently committing the same acts as appellant had done. Further, it appealed to the jury to convict appellant so as to prevent "these people [from] walking around in your stores where you shop".

As to the second part of the test, the evidence in the instant case was also circumstantial and sufficiently in conflict. The testimony indicated that although appellant was exposed, no one communicated that fact to him in order to ascertain his intent and/or lack of knowledge. Also, appellant himself testified that he was not aware he was exposed at the time. Appellant submits that because of the marginal nature of criminal intent and/or knowledge, there existed a reasonable likelihood that in the absence of the improper argument, there might have been a different result. See, State v. Andreason, supra at 403; State v. Tucker, Utah, 709 P.2d 313, 316 (1985); State v. Wiswell, Utah, 639 P.2d 146 (1981).

Because this case involves an appeal from a conviction which originated in circuit court, appeal to this court on the basis of improper prosecutorial comment is not proper because this court has not traditionally treated this issue as one involving a constitutional question. However, appellant believes that the constitutional issue here involves his trial counsel's failure to object to conduct which probably could have or should have resulted in a mistrial in the instant case. Therefore, this brief will focus on those cases that deal with allegations of ineffective assistance of counsel. Appellant

urges this court, in its analysis to consider the prosecutor's statements, in conjunction with other "bad acts" evidence improperly introduced at trial, as contributors to the prejudicial effect that failure to object under the particular circumstances of this case may have had.

In Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 25 L.Ed.2d 763 (1984) the United States Supreme Court announced that the following test would be applicable with regard to claims of ineffective assistance of counsel:

[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

This court has recently established its own three-prong test to be applied in determining whether a conviction should be set aside or reversed based on ineffective assistance of counsel:

1) The burden of establishing inadequate representation is on the defendant "and proof of such must be a demonstrable reality and not a speculative matter". State v. McNichol, Utah, 554 P.2d 203, 204 (1976).

2) A lawyers "legitimate exercise of judgment in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel". McNichol, supra at 205.

3) It must appear that any deficiency in the performance of counsel was prejudicial. In this context, prejudice means that without counsel's error there was a "reasonable likelihood that there would have been a different result."

Appellant submits that both the federal and state tests are similar in practical effect. In addition, appellant submits that his counsel was ineffective under either standard. Because the state standard is both more substantial and more specific than the federal standard, analysis will be made pursuant thereto.

Under the first prong of the Codianna test, appellant submits that he has met his burden of proof in showing that the error here is demonstrable and not speculative. Here, the trial transcript, on its face, clearly points out the objectionable facts, in addition to his counsel's failure to object thereto.

Pursuant to the second prong, it is equally clear that defense counsel's failure to object did not involve legitimate exercise of judgment in the choice of trial strategy. Certainly, the failure to object to this type of argument at a point in the trial when defense counsel has completed his case, cannot possibly be construed to be a strategic-type decision.

The district court, in its analysis of these two prongs, held that because trial counsel had already objected so many times at trial, he may have reasonably determined that further objection would cause the jury to react adversely. With all due respect to the district court, appellant submits that there comes a point where trial strategy must give way to a clear responsibility to object to something which is so clearly "out-of-bounds". In the instant case, this is so. The danger

here is not in possibly alienating the jury. Rather, it is the suggestion to the jurors that they may consider prejudicial matters outside the scope of the evidence that is so critical. In not objecting, defense counsel permitted the jury to deal with inflammatory social and/or moral issues which would be damaging to any defendant. Failure to object to such statements simply goes beyond mere trial strategy analysis.

As to the third prong, the likelihood of a different result without the statements is certainly reasonable. Again, in its memorandum decision, the district court stated that the likelihood of prejudice to appellant was weak "in view of the substantial competent evidence in the record supporting the appellant's conviction". (Memorandum decision, page 15)

Appellant submits that the significant conflict in the evidence, combined with the circumstantial nature of the city's case, seriously undermines the district court's assertion that the evidence was substantial. Appellant believes the evidence was close enough that any improper conduct during closing argument could have been enough to impact on the jury's decision.

In State v. Buel, Utah, 700 P.2d 701 (1985), the appellant had been convicted of aggravated assault and possession of a dangerous weapon by a restricted person. Among other issues raised, appellant argued that his trial counsel had been ineffective because he failed to object to the admission of a document which was used to prove that he had been convicted of a prior felony in Washington. In holding that appellant had

failed to satisfy Codianna, the court stated that counsel's failure to object to the chain of custody was not improper and would have been futile anyway. The court then quoted an earlier case, stating that "effective representation does not require counsel to object when doing so would be futile". Id. at 703, quoting State v. Malmrose, Utah, 649 P.2d 56, 59 (1982).

Appellant submits that the instant case can be distinguished from Buel. In Buel, it was clear that the objection would have had no effect since it would not have been meritorious. On the other hand, an objection in the instant case would have, at the very least, resulted in a curative instruction from the court. Further, it could have resulted in a mistrial based on Andreason, supra. Certainly, the objection would not have been futile or without merit.

In State v. White, Utah, 671 P.2d 191 (1983), trial counsel failed to subpoena a witness who she believed would assert his Fifth Amendment privilege. This witness had initially confessed to the crime which her client was charged with. In holding that appellant had failed to prove his counsel had been ineffective, this court stated:

...the appellant does not establish that there is any reasonable likelihood that the jury would have reached a different result if [the witness] had been subpoenaed and testified. We have no way of knowing what [his] testimony would have been. He might have asserted a Fifth Amendment privilege or he might have testified and denied ever confessing ... Id. at 194-195.

Appellant agrees with the court's reasoning in White. There, the questioned tactics were such that one could only

speculate as to why trial counsel chose not to utilize an obviously questionable confession. In the instant case, however, none of the speculation that existed in White is present. Rather, the questioned lack of action by trial counsel relates to a statement actually made by the prosecutor in the jury's presence. Further, this statement was made after the evidence introduced at trial had already included negative character evidence which the district court even believed was erroneously admitted. (District Court memorandum decision, page 7) This case simply presents that rare situation where, under its unique facts, the probability of prejudice arising from a statement as was made was likely. Counsel's failure to object at that particular time cannot be attributed to mere strategy. It was ineffective under any standard and appellant is therefore entitled to a new trial.

Finally, this court, in State v. Frame, Utah, 723 P.2d 401 (1986) has defined "reasonable probability" "as that sufficient to undermine confidence in the reliability of the verdict". at 405, quoting State v. Lairby, Utah, 699 P.2d 1187 at 1204-06 (1984). This prong, appellant submits is the crux of this case. Because it appears clear that trial counsel should have, under the facts of this case, objected to the improper remarks, the question then concerns the "reasonable probability" that the statements and the lack of objection were sufficient to undermine confidence in the reliability of the verdict.

Again, the prosecutor was able to improperly introduce evidence that appellant had lied to his ex-wife, failed to pay income taxes, fraudulently registered a motor vehicle and was violent. Although these improprieties are not before this court on appeal, one must look at these facts in conjunction with the statement to see that confidence in the verdicts reliability must necessarily be greatly undermined. The danger of the jury looking at appellant as a bad person in light of the character evidence and the prosecutor's plea to the jury to make a moral judgment rather than one based only on the facts of this case was obvious. This danger was not speculative, like in White, it was real. Therefore, appellant is entitled to a new trial.

CONCLUSION

Based on the above argument, which demonstrates that trial counsel was ineffective, appellant's conviction should be vacated and reversed with an order to the circuit court for a new trial.

Dated this ____ day of November, 1986.

RONALD J. YENGICH

EARL XAIZ

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was mailed/delivered to the Spence Robinson, Assistant West Valley City Prosecutor, 2470 South Redwood Road, West Valley City, Utah, 84119, on this ____ day of October, 1986.
