

2009

# The State of Utah v. Phong Nguyen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 PHONG NGUYEN, : Case No. 20090077-CA  
 :  
 Defendant/Appellant. : Appellant is incarcerated.

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**APPELLANT'S REPLY BRIEF**

Appeal from a conviction of two counts of aggravated sexual abuse of a child, first degree felonies under Utah Code Ann. § 76-5-404.1 (Supp. 2007); two counts of sodomy on a child, first degree felonies under Utah Code Ann. § 76-5-403.1 (Supp. 2007); and attempted rape of a child, a first degree felony under Utah Code Ann. §§ 76-4-102(c) (2003), 76-5-402.1 (Supp. 2007), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Robin W. Reese, presiding.

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**SUMMARY**

Mr. Nguyen was not required to marshal his challenge to the trial court's legal conclusion but even if marshaling was necessary, the requirement was met. Mr. Nguyen's argument that the trial court erred in failing to grant his motion for mistrial also did not require him to marshal the evidence as he was not challenging a finding of fact. A mistrial was warranted where the prosecutor's improper comments on Mr. Nguyen's decision not to testify were meant to bolster the sole material witness' credibility and focus the jury on Mr. Nguyen's silence as substantive evidence of his guilt. Where the issue of guilt or innocence lies solely with the testimony of the child witness, adherence to the rights and rules designed to sift truth from error is critical.

**POINT I. MR. NGUYEN CHALLENGES THE TRIAL COURT'S LEGAL CONCLUSION AND THEREFORE WAS NOT REQUIRED TO MARSHAL BUT EVEN IF MARSHALING WAS NECESSARY, THE REQUIREMENT WAS MET.**

Mr. Nguyen argued in his opening brief that the trial court failed to comply with the requirements of Utah Code Ann. §76-5-411, Utah Rule of Evidence 15.5 and 403

before admitting the videotaped interview into evidence at trial. See Aplt. Opening Brief 9-17. Whether the trial court correctly admitted the videotape under these provisions is a question of law. See State v. Snyder, 932 P.2d 120, 125 (Utah Ct. App. 1997); see also State v. Rodrigues, 2009 UT 62, ¶11, 218 P.3d 610 (“[T]he interpretation of a rule of procedure is a question of law that we review for correctness.”) (quotation and citation omitted); State v. Germonto, 2003 UT App 217, ¶6, 73 P.3d 978 (“Statutory interpretation is a matter of law, which [this Court] review[s] for correctness.”). The State is attempting to escape review of the merits by arguing that Mr. Nguyen was required to marshal the evidence or that he inadequately briefed. See Appellee Brief 13-26. The State’s argument is unsupported.

The issue before the Court is whether the trial court erred in admitting the videotape without making the required statutory determination that good cause existed, that the best interests of justice were served and that probative value of the tape outweighed any unfair prejudice. See Aplt. Opening Brief 9-17. The issue requires this Court to interpret Utah Code Ann. §76-5-411 and Utah Rule of Evidence 15.5 and determine whether the trial court failed to make those required findings. Mr. Nguyen’s argument in relations to the trial court’s findings is that those required to support good cause and best interests were not made as mandated by the statute and rule. Because Mr. Nguyen’s arguments only address the legal sufficiency of the findings under the applicable statute and rule, marshaling is not required. See Utah R. App. P. 24(a)(9) (“A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.”).

Even if the State were correct and Mr. Nguyen's argument did require him to marshal, that requirement was met where Mr. Nguyen "summarize[ed], or 'marshal[ed]'" the State's arguments for the videotapes admission. See Aplt Brief 13-16. Furthermore, "the marshaling requirement is not a limitation on the power of the appellate courts" and this Court has the discretion to reach the merits of issues where the duty to marshal the evidence is imposed but not met. See Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints, 2007 UT 42, ¶¶18-21, 164 P.3d 384 (noting the marshaling requirement is "not, itself, a rule of substantive law"). In addition, the State's assertion that the issue was inadequately briefed is without merit as Mr. Nguyen supported his argument with the appropriate statute, rules and applicable case law. See Aplt. Brief 9-17. Therefore, this Court should reach the merits of Mr. Nguyen's argument that the trial court improperly admitted the videotaped testimony into evidence.

The State further misinterprets Mr. Nguyen's argument regarding the prejudice he suffered as a result of having the videotape testimony admitted. The prejudice does not stem from Mr. Nguyen's choice not to cross-examine the child witness but from the needless cumulative presentation and bolstering of the witness' testimony. See Aplt. Brief 14-17; Utah R. Evid. 403. Under Utah Rule of Evidence 403, this video was needlessly cumulative of the child witness's testimony and there was no need to admit it given the witness's ability to testify on the stand completely and "articulate[ly]" regarding her allegations. The presentation of this video to the jury followed by the witness's testimony relating the allegations of abuse a second time was prejudicial and substantially outweighed any probative value it may have had. Utah R. Evid. 403.



**POINT II. MR. NGUYEN’S ARGUMENT THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A MISTRIAL AFTER THE PROSECUTOR’S COMMENTS VIOLATED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION DID NOT REQUIRE MARSHALING BUT PREJUDICED MR. NGUYEN REQUIRING REVERSAL.**

As noted above Utah Rule of Appellate Procedure 24(a) only requires a party to “marshal all record evidence” when that party is “challenging a fact finding.” See Utah R. App. P. 24(a)(9). Mr. Nguyen’s argument that the trial court erred in failing to grant a mistrial after the prosecutor’s indirect comments on his decision not to testify violated his Fifth Amendment right against self-incrimination resulting in prejudice does not fit under the State’s ubiquitous attempts to expand the marshaling requirement to avoid review of the issues on the merits. The prosecutor’s several implicit references on Mr. Nguyen’s failure to testify prejudiced him necessitating a new trial.

Contrary to the State’s assertions, the prosecutor in this case was not merely “argu[ing] the strength of the prosecution’s case,” but attempted to bolster the child witness’s credibility at the expense of Mr. Nguyen’s choice not to testify. The prosecutor’s comments were not aimed at “fairly responding to an argument of the defendant” or in response to claims by Mr. Nguyen that he was not “afforded” the opportunity “to explain his side of the case” like the defendant in United States v. Robinson, 485 U.S. 25, 32 (1988), the case cited by the State to support the prosecutor’s prejudicial comments. Instead, “the prosecutor on his own initiative ask[ed] the jury to draw an adverse inference from [Mr. Nguyen’s] silence” which case law clearly holds violates “the privilege against compulsory self-incrimination.” Robinson, 485 U.S. at 32

(noting the prosecutor is prohibited “from suggesting to the jury that it may treat the defendant’s silence as substantive evidence of guilt”).


Many cases involving allegations of child sexual abuse, like this one, hinge on the credibility of a child witness. Seldom can physical evidence be offered to refute the allegation of sexual abuse. State v. Saunders, 1999 UT 59, ¶12, 992 P.2d 951 (recognizing the evidentiary difficulties that confront a defendant in litigating these types of cases ). In such cases, it is critical that “the governing evidentiary and procedural rules designed to enable a trier of fact to sort out truth from falsehood . . . be applied with punctiliousness to avoid factual error and injustice.” Id. ¶14. Additionally, “[p]rosecutors have a duty to eschew all improper tactics.” Id. ¶31 (quotation and citation omitted). “It is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Id. (quotation and citation omitted).

In this case, the prosecutor “call[ed] the jurors’ attention to matters not proper for their consideration and [those] comments ha[d] a reasonable likelihood of prejudicing the jury by significantly influencing its verdict.” State v. Reed, 2000 UT 68, ¶18, 8 P.3d 1025. The prosecutor’s comments exceeded the limits of permissible comment in violation of the Fifth Amendment. The cumulative error of this violation together with the improper admission of the videotaped testimony of the sole material witness substantially prejudice Mr. Nguyen resulting in an unfair trial. State v. Havatone, 2008 UT App 133, ¶8, 183 P.3d 257.

**CONCLUSION**

For the reasons stated above and more fully set out in Appellant's opening brief, Mr. Nguyen respectfully requests this Court to reverse his convictions and remand for a new trial.

SUBMITTED this   1   day of June, 2010.

  
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**CERTIFICATE OF DELIVERY**

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this   1   day of June, 2010.

  
\_\_\_\_\_  
DEBRA M. NELSON

DELIVERED this \_\_\_\_\_ day of June, 2010.

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