2009

State of Utah v. Verbery Adams : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
VERBERY ADAMS,	:	Case No. ~~20090994-CA~~ 20090793-CA
Defendant/Appellant.	:	Appellant is incarcerated.

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for one count of Attempted Murder With Injury, a first degree felony, in violation of Utah Code Ann. § 76-5-203(2)(a) (2008), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable William Barrett, presiding.

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INTRODUCTION

The prior bad act evidence introduced in this case was inadmissible because the State failed to comply with the terms of its Rule 404(b) notice to the defense. Specifically, in contradiction of its stated intention to introduce the evidence only "in the event that the defendant testifies," the State introduced the evidence during its case-in-chief. Now, the State claims that the admission of the evidence during its case-in-chief was not in error because the trial court's pretrial ruling on admissibility placed no condition on when the evidence could be admitted. But the State fails to cite to any rule or case law that requires that a condition that it voluntarily sets forth in regard to prior bad act evidence be included in a pretrial ruling on admissibility.

POINT. THE INTRODUCTION OF THE PRIOR BAD ACT EVIDENCE IN CONTRADICTION OF THE STATE'S RULE 404(b) NOTICE CONSTITUTES PLAIN ERROR REGARDLESS OF WHETHER THE CONDITION PRECEDENT WAS INCLUDED IN THE PRETRIAL RULING ON ADMISSIBILITY

The State notified the defense of its intent to introduce Rule 404(b) evidence conditionally upon Adams testifying. Specifically, the prosecution notified Adams of its intent to introduce his fourteen year-old murder conviction only in the event that he testified at trial and put his intent at issue. Adams did not testify. In contradiction of its stated intention, the prosecution introduced the 404(b) evidence during its case-in-chief, effectively rendering the Rule 404(b) notice to the defense inoperable.

The State now claims that Adams cannot demonstrate error in the admission of the evidence because the trial court's pretrial ruling on admissibility placed no condition on when the evidence could be admitted. Appellee's Br. at 27-28. But the State fails to cite to any rule or case law supporting this assertion.

It is well-established that "[t]he policy behind the Rule 404(b) notice requirement is 'to reduce surprise and promote early resolution on the issue of admissibility.'" *United States v. Carrasco*, 381 F.3d 1237, 1241 (11th Cir. 2004) (quoting Fed. R. Evid. 404(b), advisory committee note, 1991 amendment.) If the same series of events had taken place below with the only difference being that the condition precedent was included in the pretrial ruling, Adams would be no less unfairly surprised at the introduction of the prior conviction during the State's case-in-chief. Thus, the contention that a condition precedent, voluntarily set forth by the State in its Rule 404(b) notice, must be included in the pretrial ruling obscures the real issue, the *unfair surprise* in the State's notice to the

defense of its intention to introduce Adams' prior conviction only in the event that he testifies. Had the condition precedent been explicitly included in the pretrial ruling, the defense would be no less surprised at the premature admission of the evidence.

The State further contends that defense counsel's silence as to the condition precedent during pretrial discussion of the Rule 404(b) evidence "waived any claim that [Adams'] testimony was a condition precedent to the admission of his prior conviction." Appellee's Br. at 29. But defense counsel's silence as to the condition voluntarily set forth in the State's Rule 404(b) notice during pretrial argument was not a waiver of that condition, but rather represented a reliance on the prosecution's stated intent to introduce the evidence only in the event that Adams testified. When the government voluntarily conditions the introduction of certain evidence on the testimony of a defendant, defense counsel should be entitled to rely on such condition in preparation for trial. Parties should be entitled to rely on the language of an opposing counsel's pretrial agreement and trust that its author will abide by its stated intentions. This is especially so when the notice is mandated by the rule.

Moreover, if it had been properly complied with, the particular conditional term at issue in this case, would have been favorable to the defense. Therefore, defense counsel would have no reason to argue against the condition in pretrial discussions on admissibility. Because the State's condition was favorable to the defense in that the Adams' prior conviction would only come in if he testified, defense counsel had no motive to take issue with the condition as set forth in the State's notice during pretrial arguments. And, as previously mentioned, defense counsel relied on the language of the

State's Rule 404(b) notice and trusted that the State would abide by its stated intention to introduce the prior conviction only in the event that Adams testified. Therefore, defense counsel's silence as to the condition precedent during pretrial argument did not constitute a waiver of that condition.

The State also takes issue with defense counsel's failure to claim unfair surprise when the State introduced Adams' prior conviction during its case-in-chief. Appellee's Br. at 30-31. But, after an initial objection to the introduction of the prior conviction evidence, defense counsel was precluded from further objection by the trial court. Below, during direct examination, when prosecution witness David Greco mentioned Adams' prior conviction, the dialogue proceeded as follows:

> DEFENSE COUNSEL: Judge, I object to this. I think that the State has other methods of introducing this[1]. This is hearsay. I don't know – I don't know if there is an exception to it. I don't think
>
> PROSECUTOR: It's a statement against interest. Your Honor, at this point, the State offers State's Exhibit No. 5, which is a certificate of Cook County Illinois, People of the State of Illinois vs. Verbery Adams. It's a certified statement of conviction/disposition, Case No. 94CR2665101 where the defendant was convicted murder/intent to kill/injury.

[1] The State asserts that defense counsel's statement, "[t]he State has other methods of introducing this", suggests that defense counsel anticipated that the prior conviction would be introduced during the State's case-in-chief. Appellee's Br. at 31. The State fails to recognize, however, that another method of introducing Adams' prior conviction could be during the State's cross examination of Adams during the presentation of the defense's case.

COURT: Okay. I'm going to overrule your objection. I've already told her that I will allow Exhibit 5. So it will be received.

R. 85:208-09. But the statement at issue did not qualify as a "statement against interest" exception to the hearsay rule because the statement was not hearsay. Had it been properly admissible under Rule 404(b), the statement would have been admissible non-hearsay as an admission by a party-opponent pursuant to Rule 801(d)(2)(A).

By failing to rule on the merits of the particular objection and telling defense counsel, "I already told her that I will allow Exhibit 5. So it will be received," the trial court foreclosed any opportunity for defense counsel to raise additional objections. The trial court clearly indicated that its ruling was final and additional objections would not be considered.

Given that defense counsel was precluded from objecting further, Adams' claim of unfair surprise is not waived. Minimal standards of fairness dictate that Adams should not be prejudiced for defense counsel's failure to object where he had no opportunity to object, especially where the State voluntarily set forth the condition precedent in the notice and then proceeded to violate that condition.

CONCLUSION

Based on the foregoing, Defendant/Appellant Verbery Adams respectfully requests that this Court reverse the conviction and remand this case for a new trial.

RESPECTFULLY SUBMITTED this 17 day of December, 2010.

SHERRY VALDEZ
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Attorney for Appellant

CERTIFICATE OF DELIVERY

I, SHERRY VALDEZ, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and caused to be mailed 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 17 day of December, 2010.

SHERRY VALDEZ

DELIVERED/MAILED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 17 day of December, 2010.