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West Valley City v. Richard Norris : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,
Plaintiff/Appellee,

vs

RICHARD NORRIS,
Defendant/Appellant

Case No.: 990028-CA

Priority Number 2

BRIEF OF APPELLEE

Appeal From the Decision of the Third District Court, Judge Anthony B Quinn

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over appeals from the Third District Court pursuant to Section 78-2a-3(2)(e), of the Utah Code Annotated 1953, as amended.

STATEMENT OF THE CASE

A. Nature of the Case

This case is an appeal from the conviction of Defendant, Richard Norris, on one count of Child Abuse, a Class B Misdemeanor.

B. Course of Proceedings

On December 18, 1997 the City filed an Information charging Defendant with Child Abuse, based on events that occurred on November 15, 1997. A criminal bench trial was conducted before the Trial Judge, Anthony B. Quinn, on June 29, 1998. Defendant was found guilty. On September 14, 1998 Defendant was sentenced. Defendant then filed motions for a new trial and to dismiss. Both were denied by the Trial Court. This Appeal

was filed on January 6, 1999, following disposition of Defendant's post-trial motions.

C. Disposition in the Trial Court

Defendant was found guilty of one count of child abuse, a class B misdemeanor. The Trial Court also denied Defendant's motions to dismiss and for a new trial.

D. Statement of Facts

On November 15, 1997 Shannon and Angie Norris, daughters of Defendant Richard Norris, arrived at his home to retrieve some personal belongings. Defendant was divorced from Jane Norris, mother of Shannon and Angie. While in Defendant's home, Angie and Defendant had an altercation in which Defendant grabbed Angie's arm and threw her against a wall. The impact caused Angie to hit her head against the wall, causing a lingering headache. Defendant also grabbed Angie with such force that her arm was bruised where he had grabbed her.

Angie, Shannon, and Jane Norris reported the incident to the West Valley City Police on November 17, 1997. The officer took Angie's statement, but did not investigate further. The report indicated that Angie stated that she had no visible marks on her arm, but that she had bruises on the day of the incident.

The City issued an Information charging Defendant with Child Abuse on December 18, 1997. At a bench trial, the City offered the testimonies of Angie, Shannon, and Jane Norris, while the defense offered testimony from Donna Evans and Tamie Andreson. After considering the testimony and other evidence, the Trial Court found that Defendant was guilty.

SUMMARY OF THE ARGUMENT

I. The Trial Court Did Not Abuse its Discretion by Denying Defendant's Motion to Continue.

Defendant did not prove that a continuance was necessary to procure the testimony of the absent witness. Defendant did not show that the desired testimony was material, that the witness was available within a reasonable time, and that Defendant had exercised due diligence to procure the witness. Thus, under *State v. Creviston*, 646 P.2d 750 (Utah 1982), the Trial Court did not abuse its discretion.

Furthermore, denying the motion to continue did not constitute a constitutional violation. Defendant never requested a court order or certificate to compel the absent witness, so his right to compulsory process was never denied.

II The Clear Weight of the Evidence Supports the Trial Court's Verdict and its Reading of the Law.

The Trial Court relied on the undisputed eyewitness testimony of Angie and Shannon Norris. Defendant attempted to undermine the credibility of Jane Norris, and tried to overemphasize alleged inconsistencies in the police report. However, the Trial Court ruled that the testimony of the two sisters was undisputed, and the police report strengthened rather than undermined their testimony. The other witnesses provided little relevant information, and their veracity or potential biases were not an important issue.

In addition, the Trial Court correctly applied the Utah Child Abuse Statute, Section 76-5-109 of the Utah Code. That statute defines physical injury as an injury or condition that

impairs the physical condition of a child, including a bruise or contusion. The Trial Court ruled that bruising and lingering red marks constituted a physical injury within the meaning of the statute, an application that is consistent with law.

III Defendant's Trial Counsel Provided Effective and Vigorous Representation.

A review of the Trial Transcript shows that Defendant's Trial Counsel was effective and vigorous in his representation. Defendant adds nothing new to the argument that was already rejected by the Trial Court. There is nothing in the acts cited by Defendant that fall below an objective standard of reasonable professional judgment, and Defendant cannot show how he was prejudiced by the allegedly deficient performance.

IV Since Defendant Never Requested a Jury Trial, There Was No Need to Have a Record Advising Defendant of His Right to a Jury

Because this was a misdemeanor prosecution, Defendant had to request a jury trial. UTAH R. CRIM. P. 17. No request was made. Therefore, the Trial Court was under no obligation to create a record advising Defendant of his right to a jury trial, and of Defendant specifically waiving that right.

V the Delay in Sentencing Did Not Prejudice Defendant

Defendant was sentenced within a reasonable time, and any delays outside of the 45-day limit of URCP Rule 22 did not prejudice him. *State v. Tyree*, 2000 UT App 350.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT’S MOTION TO CONTINUE.

A. *The Defendant Failed to Prove that the Testimony Sought was Material, that it Could be made Available Within a Reasonable Time, or that Due Diligence had been Exercised to Procure the Testimony.*

The trial court did not abuse its discretion by denying Defendant’s motion to continue, because Defendant failed to prove that a continuance was necessary to procure the desired testimony. A decision on a motion to continue is within a trial court’s discretion, and should be reviewed under an abuse of discretion standard. The Utah Supreme Court gave the following guidance on evaluating a motion to continue sought to procure the testimony of an absent witness:

When a defendant in a criminal action moves for continuance in order to procure the testimony of an absent witness, such a defendant must show that the testimony sought is material and admissible, that the witness could actually be produced, that the witness could be produced within a reasonable time, and that due diligence has been exercised before the request for a continuance.

State v. Creviston, 646 P.2d 750, 752 (Utah 1982); *see also State v. Oliver*, 820 P.2d 474 (Utah Ct. App. 1991). The Defendant did not meet his burden of showing that the four factors listed in *Creviston* had been met.

First, the Defendant failed to introduce any proof that the testimony of Officer Ovalle would be material to the case. “Testimony is material . . . if there is a reasonable probability that its presence would affect the outcome of the trial.” *State v. Schreuder*, 712 P.2d 264, 274-75 (Utah 1985). The Transcript of the June 29, 1998 trial shows that Defendant’s

counsel merely speculated as to what Officer Ovalle's testimony would be:

The only additional thing *we hope* Mr [Ovalle] could give us was testimony as to the nature of witnesses when they spoke. He's the only person who has spoken to these witnesses or had a chance other than [sic] themselves within their own family. He's the only person who ever spoke to them, had a chance to look at the, look for injuries, that kind of thing, *maybe question* their veracity a little bit . . .

(Transcript at p. 2, ln. 22- p. 3, ln. 3; emphasis added). This statement shows that Defendant had no idea what Officer Ovalle's testimony would be. ("We hope" he will testify about the witnesses, and "maybe question" their veracity). This is the only justification Defendant presented for the continuance. There were no affidavits or other recorded statements of what the testimony would include. There was no proof that the testimony would reasonably affect the outcome of the trial. He did not meet his burden of showing that the testimony was material.

If Officer Ovalle had testified, he could not offer any facts that are not recorded or otherwise available from more reliable sources. He did not investigate the crime scene, but only served in a clerical role by taking statements from the witnesses. Those statements were recorded and introduced as evidence. (*See* Transcript. at p.65, ln. 19). Officer Ovalle could not testify as to whether those statements were truthful, only that he had accurately recorded them. The other witnesses were available, and could testify as to the facts. Again, there was no proof that the testimony would reasonably affect the outcome of the trial.

Second, a motion for continuance should not be granted merely because the unavailable testimony might impeach another witness. "It is not an abuse of discretion to

deny a motion for continuance when the testimony sought is only for impeachment purposes.” *Creviston*, 646 P.2d at 753. As has been pointed out, Defendant did not know what the officer’s testimony would be, and only expressed a hope that the testimony might “question [the witness’] veracity a little bit.” (Transcript at p. 3, ln. 3). Since there was no evidence indicating what the proposed testimony would be, and since the proposed value would be for impeachment purposes, the evidence cannot be said to be material, and the trial court did not abuse its discretion by denying the motion for continuance.

Finally, Defendant also failed to prove that Officer Ovalle could be produced within a reasonable time, or that due diligence had been exercised to procure the witness. There was no evidence presented that Defendant had contacted the officer, and only speculation that he might be available “by the end of July.” (Transcript at p. 1, ln. 19). This also demonstrates that Defendant had not exercised due diligence to locate Officer Ovalle. Nobody seemed to know where he was, even though his whereabouts could be ascertained quite easily through the military. There was no evidence that the Defendant had attempted to contact Ovalle, and there was no subpoena issued for him.¹ Because the Defendant failed to prove that Ovalle would be available within a reasonable time, and also failed to exercise due diligence in locating him, the trial court did not abuse its discretion by denying the motion to continue.

¹ Defendant argues that due diligence was exercised by “requesting assistance from the prosecutor’s office.” (Appellant’s Brief at 21). This is hardly the kind of due diligence required.

B. The Trial Court did not Violate Defendant's Constitutional Rights.

The Defendant's constitutional rights were not violated because the trial court denied his motion for continuance. Defendant argues that denying his motion to continue violated his right to compulsory process of witnesses in his favor, guaranteed by the sixth and fourteenth amendments to the federal constitution, and Article I, Section 12 of the Utah Constitution. Defendant, however, made no attempt to compel attendance by Officer Ovalle, so it cannot be said that his rights were violated. There is no evidence that the trial court denied Defendant's request for a certificate compelling Officer Ovalle to attend the trial. Since there no attempt to avail himself of his right to compulsory service, Defendant was not denied that right.²

Defendant's argument that he suffered a constitutional violation simply reiterates his assertion that Officer Ovalle's testimony was material to the case. However, it has been shown that Ovalle's testimony was of potential value only for the purposes of impeaching the witnesses, and even that was very speculative. Officer Ovalle could provide no new information about the events in question, and the potential for impeachment was minimal at best. Even if the testimony were found to be material, there is still the absence of any attempt

² The Defendant states that Article I, § 12 of the Utah Constitution was also violated, and requests that the Court analyze his claim under that provision. However, the Defendant presents no argument or justification that the state constitution ought to be read differently from the federal. There is no evidence presented that either the state or federal constitutions have been violated at all. Since there is no particular argument supporting a different interpretation of the Utah Constitution, there is no basis for such an analysis as requested by Defendant. *See e.g., Schreuder*, 712 P.2d at 275.

to compel Ovalle to testify. Defendant never attempted to use the court's power to compel witnesses, and so there was no violation.

Furthermore, it should be noted that this issue was never argued before the trial court, nor is it adequately briefed. Appellate courts will only consider arguments that are adequately briefed.

It is well established that a reviewing court will not address arguments that are not adequately briefed. . . . In deciding whether an argument has been adequately briefed, we look to the standard set forth in rule 24(a)(9) of the Utah Rules of Appellate Procedure. This rule states that the argument in the appellant's brief "shall contain the contentions and reasons of the appellant with respect to the issues presented ...with citations to the authorities, statutes and parts of the record relied on." Implicitly, rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority. We have previously stated that this court is not a depository in which the appealing party may dump the burden of argument and research.

State v. Thomas, 961 P.2d 299, 304 (Utah 1998) (citations omitted); *see also State in re E.R.*, 2001 UT App 66, ¶ 8. Defendant presented no argument as to why the Utah Constitution should be read differently from the federal, and has included no argument other than a suggestion that this Court analyze the issue itself, even though the brief "wholly lack[s] legal analysis and authority to support his argument." *State v. Washington*, 772 P.2d 960, 996 (Utah 1989). Thus, there is no merit in Defendant's allegation of a constitutional violation.

To conclude, the Trial Court did not abuse its discretion by denying Defendant's motion to continue. There was no justification presented that the testimony sought from the absent witness would materially affect the outcome of the trial. Furthermore, Defendant did

not request that the Trial Court compel the attendance of that witness, so there was no constitutional violation of his right to compulsory process.

II THE CLEAR WEIGHT OF THE EVIDENCE SUPPORTS THE TRIAL COURT'S VERDICT AND ITS READING OF THE LAW.

The clear weight of the evidence supports the Trial Court's verdict that the Defendant was guilty of child abuse; and its interpretation of the child abuse statute was correct. Because the matter on appeal is from a criminal bench trial, not a jury trial, the Court's analysis is governed by *State v. Gurr*, 904 P.2d 238 (Ut. Ct. App. 1995):

When reviewing sufficiency-of-evidence challenges from criminal bench trials, we must sustain the trial court's judgment unless it is 'against the clear weight of the evidence. . . . "[W]e will review the record to see if the clear weight of the evidence, not including demeanor and credibility, is contrary to the verdict."

Gurr, 904 P.2d at 241 (*quoting State v. Goodman*, 763 P.2d 786, 787 (Utah 1987); other citations omitted). The record shows that the clear weight of the evidence supports the Trial Court's verdict.

A. *The Clear Weight of the Evidence Supports the Verdict*

The City introduced testimony from three credible witnesses which established the fact that the victim, Angie Norris, was injured by the Defendant, her father. Both Angie and her sister testified that Defendant grabbed Angie and threw her against a bedroom wall, causing her head to impact against the wall. Defendant grabbed his daughter with such force that it bruised her arm. The existence of the bruise was established by the testimony of the

victim, Angie; her sister, Shannon Norris; and their mother, Jane Norris. Defendant offered very little testimony to dispute the existence of these injuries.

The defense offered the testimony of Donna Evans, who was working in the Defendant's home when the child abuse occurred. She confirmed that Angie and Shannon were present at the time, but did not witness any of the events that led to the abuse. She stated that she heard "muffled voices" upstairs, and that she did not believe those voices were arguing. She also stated that Angie was wearing a winter coat of some kind. However, her attention was focused on the work she was doing, and not on the events. Furthermore, she could not remember details such as the nature of the work she was performing, and even the exact day she was there, although she claimed to remember such trivia as the type of coat worn by a person she saw for only a moment. Ms. Evans was also a long-time employee of Defendant, which definitely raises the issue of bias.

The defense then called Tamie Andreson, a former roommate of Jane Norris. Ms. Andreson's testimony amounted to nothing more than a vicious attack on Jane Norris's credibility, and did not include any information relevant to whether the child abuse occurred. Ms. Andreson testified that she had seen Jane Norris tell Angie and Shannon to lie about being abused by Defendant. However, it was never established when these statements were made, and if there was any connection to the child abuse in question, although it was implied that the statements were made shortly before the trial. Ms. Andreson's credibility was also questioned with allegations of drug abuse. The trial judge elected to disregard this testimony

as inadmissible under Rule 608 of the Utah Rules of Evidence.

The police report, dated 17 November 1997, was introduced without objection. There was some dispute as to the date the child abuse occurred, but the facts in the report corroborate the testimony of Angie and Shannon Norris, and serves as an accurate record made shortly after the events occurred. In the report Angie indicated that she had no visible marks at that time, but stated that Defendant's attack had caused bruising. The report not only corroborates Angie's and Shannon's testimony, it also supports their credibility because it is a statement made shortly after the events occurred.

The Trial Judge acknowledged that the case was close, but felt that the eyewitness testimony of the two sisters was credible. The judge recognized that there were not the best of feelings between Defendant and his ex-wife, Jane Norris, but felt that her testimony supported a guilty verdict. As to the testimony of Donna Evans, the Trial Judge felt it was less reliable, and did not undermine the eyewitness testimonies.

Defendant offered no direct evidence disputing the facts established by the eyewitnesses. Instead, the defense chipped away at the credibility of Jane Norris, and argued that the police report was unreliable. The Trial Judge stated that the report still corroborated the details of the sister's testimony, and there was no reason to conclude that it undermined those testimonies.

To conclude, the Trial Judge correctly found that Defendant was guilty. The clear weight of the evidence supports this verdict. There were two eyewitnesses who testified, and

their testimony was corroborated by a written report. The defense could only attempt to undermine the witnesses' veracity, but the Trial Judge decided to believe the eyewitnesses, whose credibility was not sufficiently attacked. The other witnesses provided only peripheral information which contributed little to resolving the question of Defendant's guilt or innocence.

B. The Trial Judge Correctly Interpreted the State's Child Abuse Statute.

The Trial Judge correctly interpreted Section 76-5-109 of the Utah Code, ruling that the bruises and discoloration on Angie's arm constituted "physical injury" within the meaning of the statute. The relevant portion of § 76-5-109 states:

"Physical injury" means injury to or condition of a child which impairs the physical condition of the child, including:
(i) a bruise or other contusion of the skin . . .

Utah Code Ann. § 76-5-109(c) (1997 version).³ The Trial Judge held that persistent discoloration came within the definition of "physical injury." The testimony established that Angie Norris suffered bruising and lingering red marks on her arm, as a result of the altercation with the Defendant. This clearly falls under the definition quoted above. In addition, Angie reported an injury to her head, resulting in a headache which lingered for two days. This also must fall within the definition of "physical injury."⁴

³ Section 76-5-109 was amended in 1998, 1999, and 2000, but none of those amendments changed the language from the 1997 version, which was in effect when the events in question occurred.

⁴ Note that the definition of "physical injury" does not attempt to include an exhaustive list of injuries, but lists examples of injuries that would fall under statute.

In short, there was nothing wrong with the Trial Judge's interpretation of the statute, and the clear weight of the evidence supported the guilty verdict.

III. DEFENDANT'S TRIAL COUNSEL PROVIDED EFFECTIVE AND VIGOROUS REPRESENTATION.

The Trial Judge correctly ruled that Defendant's Trial Counsel provided effective and vigorous representation, and that the Trial Counsel's performance did not fall below any reasonable standard.

To establish ineffective assistance of counsel, Defendant "must show that his counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment and that counsel's deficient performance prejudiced him". . . . To prevail, Defendant "must identify specific acts or omissions that fell outside the wide range of professional assistance and illustrate that, absent those acts or omissions, there is a reasonable probability of a more favorable result."

State v. Simmons, 2000 UT App 190, ¶ 4, 5 P.3d 1228, 1230 (*quoting State v. Maestas*, 1999 UT 32, ¶ 20; 984 P.2d 376, 379; other citations omitted). To support his claim for ineffective assistance, Defendant simply refers the Court to his "Memorandum Supporting Motion for New Trial" filed before the Trial Court. (*See* Appellant's Brief, Exhibit "D"; *hereafter* "Memorandum"). The Defendant makes no other argument to support his contention.

The specific acts identified by the Defendant to support his argument of ineffective assistance are as follows:

- 1 The appointed counsel waived the Defendant's right to a jury trial;
- 2 The appointed counsel did not attempt to subpoena Officer Ovalle to testify;
- 3 The appointed counsel did not challenge the constitutionality of the statute;

4 The appointed counsel did not challenge the information.

These acts will be addressed below.⁵ The Trial Court considered the Defendant's claims, and held that his trial counsel effectively represented him.

1. Waiving the Defendant's Right to a Jury Trial was not Ineffective Assistance

The Trial Court found that there was no evidence presented that the Defendant wanted a jury trial. The only notice served upon the Defendant indicated that matter was on a bench trial track. The court also noted that it was "not objectively unreasonable for trial counsel to have not pursued a jury trial." (*See Findings of Fact, Conclusions of Law, and Order, West Valley City v. Norris*, Case # 971005450; *see also* Appellant's Brief Exhibit "C".) Defendant simply presents the exact same arguments he made to the Trial Court. Since there is no new evidence, and no new argument, the Court should agree with the Trial Court and find that not pursuing a jury trial was not objectively unreasonable.

2. Trial Counsel Attempted to Continue the Trial to Procure Testimony

The Trial Counsel's performance did not fall below an objective standard of reasonable performance by failing to take more steps to secure Officer Ovalle's testimony. As has been discussed before, Defendant believes that Officer Ovalle might have provided useful testimony. However, there was nothing showing that the officer's testimony would

⁵ Defendant's counsel for the trial was Dean Ellis. The counsel for the post-trial motions and the beginning of the appeal was M. Karlynn Hinman, who was hired and paid by the Defendant. After Ms. Hinman withdrew, the Trial Court appointed the present counsel, despite the fact that the City presented evidence that the Defendant had sufficient assets to pay for representation.

provide any facts not already known. The Trial Counsel attempted to continue the trial in order to secure Officer Ovalle's testimony. The Trial Counsel repeated his request after the City had presented its case. The Defendant claims (without proof) that his Trial Counsel refused to take additional steps because of the cost involved. However, given the limited value of the testimony, it is not objectively unreasonable for the Trial Counsel to choose not to pursue the officer's attendance more than he already had.

Furthermore, the Defendant has not established a reasonable probability that the result would have been more favorable if the Trial Counsel had taken more steps to secure the officer's testimony. The officer was not an eyewitness, and did not investigate the matter. He only recorded Angie Norris's statement. According to the Defendant, the officer could have testified that Angie stated that she had no bruises or marks when she made her statement. (*See* Memorandum at 5). However, that information is in the written report which was submitted into evidence. Thus, even if the officer had testified, he could offer no new information. There is thus no reasonable probability that if the Trial Counsel had taken more steps to secure the officer's testimony the result would have been more favorable for the Defendant.

3. The Trial Counsel was not Ineffective Because he did not Challenge the Constitutionality of the Statute.

The Trial Court properly held that the Trial Counsel's refusal to challenge the constitutionality of the Child Abuse statute was reasonable. The Defendant provided no evidence that he requested his Trial Counsel to raise a constitutional challenge, and also

provided little evidence that the statute was unconstitutionally vague. Since the issue was not adequately raised and argued before the Trial Court, and since there is no additional argument on the constitutionality issue, this Court should uphold the Trial Court's decision that the Trial Counsel's representation was not ineffective. Furthermore, the decision to pursue a constitutional challenge was within the Trial Counsel's discretion, and a decision not to proceed with such a challenge does not render his performance ineffective.

4. There is no Evidence or Argument that the Information was Defective.

Finally, the Defendant has provided no argument or evidence to support his contention that the Information filed in the case was defective. The challenge to the information simply implies that it is overbroad and vague, presumably because it directly quotes the language of the Child Abuse statute in the Utah Code. The Trial Court did not address the Defendant's argument, and this Court has been given nothing more than what was filed before the Trial Court. This issue was not adequately argued or developed before the Trial Court, and this Court should not indulge the Defendant now. Since there is no evidence or even argument linking the Information to the Trial Counsel's performance, there is no reason to decide that the Trial Council was ineffective.

To conclude, there is no merit in the Defendant's argument that the Trial Counsel was ineffective. The specific acts cited by the Defendant are merely unsupported allegations. The Defendant has not met his burden of proof that those specific acts fell below an objective standard of reasonable performance, and that absent those acts, there is a reasonable

probability that the result would have been more favorable. In addition, the Trial Court observed that the Trial Counsel was “extraordinary” in his representation, a conclusion that is supported by the Trial Transcript. The Trial Counsel vigorously and effectively represented the Defendant, and his performance was not ineffective.

IV SINCE DEFENDANT NEVER REQUESTED A JURY TRIAL,
THERE WAS NO NEED TO HAVE A RECORD ADVISING
DEFENDANT OF HIS RIGHT TO A JURY

Defendant never requested a jury trial, so there was no need for the Trial Court to create a record of Defendant knowingly waiving his rights. Misdemeanors are not tried before a jury, unless the defendant requests a jury at least ten days before trial. “All other cases [*i.e.*, misdemeanors] shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise.” UTAH R. CRIM. P. 17(d). There is no record that Defendant made a written demand for a jury trial. As was discussed in Section III, there is also no evidence that Defendant even wanted a jury trial until after the verdict was in. Since there was no written demand for a jury trial, the Trial Court was under no obligation to create a record of Defendant knowingly waiving his right to a jury trial.

V THE DELAY IN SENTENCING DID NOT PREJUDICE THE
DEFENDANT.

The Trial Court’s decision to delay sentencing did not violate the Defendant’s right to a speedy trial, because the Defendant was not prejudiced by the delay. This Court has recently held that “[T]he amount of time a defendant waits to be sentenced should be

reasonable, so there is no abuse of the [sentencing] court's powers, and that due consideration should be given to any time he may have served because of the delay." *State v. Tyree*, 2000 UT App 350, ¶ 12; 17 P.3d 587, 590 (citations omitted). Furthermore, "[r]ule 22(a) [of the Utah Rules of Criminal Procedure] like its predecessor statutes, is to be read as directory, not jurisdictional." *Id.*, 2000 UT App 350, ¶ 15. In other words, a defendant should be sentenced within a reasonable time after conviction, but the 45-day limit of Rule 22 is a directive, not a jurisdictional requirement.

The Defendant was convicted on June 29, 1998. Sentencing was originally set for July 30, but was moved to September 14, 1998, because of conflicts in the Trial Judge's schedule. The Defendant was sentenced 31 days after the 45-day period outlined by Rule 22. Although the Defendant did assert his right to a speedy trial and sentencing, he failed to offer any supporting evidence that a delay would prejudice him. "The mere mention of an issue without introducing supporting evidence or relevant legal authority does not preserve [an] issue for appeal." *Id.* 2000 UT App 350, ¶ 11. Thus, the Defendant has no grounds to argue that he is prejudiced now.

In addition, the Defendant was sentenced within a reasonable time. The sentencing was scheduled approximately one month after the 45-day period expired. The record does not show why the delay was necessary other than "conflicts" in the Trial Judge's schedule. However, there is also no evidence that Defendant received a greater or lesser sentence because of the delay, or that the Trial Judge obtained any information that affected his

sentencing decision because of the delay. In short, the Defendant was sentenced within a reasonable time after he was convicted, and any delay that resulted did not prejudice him.⁶

CONCLUSION

To conclude, Defendant has presented no reason to overturn the decision of the Trial Court. The Trial Court did not abuse its discretion when it denied Defendant's motion to continue, because there was no proof that the testimony sought would have any impact on the trial. The clear weight of the evidence supports a guilty verdict, and the Trial Court correctly applied the Utah Child Abuse Statute.

Furthermore, Defendant's Trial Counsel was extraordinary in his representation, and did nothing that fell below an objectively reasonable standard of care. Since Defendant had not requested a jury trial for his misdemeanor prosecution, there was no need to create a record of Defendant being advised of his right to a jury trial, and then waiving that right. Finally, Defendant was sentenced within a reasonable time, and even though sentencing was outside of the 45-day limit of URCP 22, the delay did not prejudice Defendant.

For these reasons, West Valley City respectfully requests that the decision of the Trial Court be upheld.

RESPECTFULLY SUBMITTED this 26th day of April, 2001.


ELLIOT R. LAWRENCE
Assistant City Attorney

⁶ Although it does not bear on the issue of delay in sentencing, it should be noted that Defendant has delayed prosecution of this appeal for nearly three years!

CERTIFICATE OF MAILING

THIS CERTIFIES that two (2) copies of the foregoing Brief of Appellee were delivered to the following:

Steven D. Miller
3600 South Market St.
West Valley City, Utah 84119

by depositing them in the Larsen and Rammell mail box.

DATED this 26th day of April, 2001.


