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James Christiansen Crabb v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES CHRISTIANSEN CRABB,

Appellant,

v.

STATE OF UTAH

Appellee.

REPLY BRIEF

Case No.: 20091046

The Appellant, through counsel, hereby, submits this reply brief to the State's Response.

All parties are listed in the caption.

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ARGUMENT

I.

THIS COURT CAN REVIEW ALL OF THE INSUFFICIENCY CLAIMS BECAUSE THEY ARE ALL PRESERVED, THE EVIDENCE IS SUFFICIENTLY MARSHALED, AND THE EVIDENCE IS STILL INSUFFICIENT

A. Justification for review was sufficiently argued.

The State argues that two of the three claims were either not preserved or there was no justification for review. The two claims allegedly not preserved were those arguing plain error that specific elements of the crime had not been met sufficiently by the direct and circumstantial evidence provided at trial.

The State is incorrect in its argument because, “To affirm the jury’s verdict, we must be sure the State has introduced evidence sufficient to support all elements of the charged crime.” State v. Gonzales, 2 P. 3d 954, 957 (Utah App. 2000). Internal quotations and alterations omitted. The two claims of plain error in the insufficiency of evidence are precisely the kinds of justification for review that this Court needs. State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993). These “plain error” justifications are the basis for exceptions to the preservation rule, which were mentioned in the original brief. State v. Pinder, 2005 UT 15, ¶ 45, 114 P.3d 551 and Br. Appellant at 6-7, 37-39, 42. Further, the appellate rules about inadequate briefing were not violated because the Defendant amply cited to the record where the evidence was or was not and indicated

where the result was made: in the jury's decision. E.g. Br. Appellant at 9-17. The State's arguments in sections IA (pages 8-9) of its brief are incorrect.

B. The evidence that was marshaled, together with the State's quotations, demonstrate that the standard of beyond a reasonable doubt was clearly not met.

The State argues that the Defendant failed to marshal the evidence properly. While it is true that the State mentioned evidence that the Defendant did not cite in his brief, the marshaling requirement does not mean that the Defendant must amass the evidence exactly how the State would. If so, the State would not have to respond. The adequately marshaled evidence is so in favor of the Defendant that the State's only recourse is to claim that the Defendant failed to marshal the evidence for them.

The marshaled evidence demonstrates that there were facts that would make a reasonable person *believe* a crime had been committed by the Defendant. The State has pointed them out well and many of them were in the Defendant's brief, as well. When those facts were more carefully analyzed at trial, however, they failed to establish that all the elements of the alleged crime had been met by the highest level of certainty that American courts require. Instead, the marshaled facts established that there was clearly enough room to reasonably doubt that the Defendant was guilty, as pointed out in the Defendant's brief. Br. Appellant at 19-23, 25-27, 30, 32-35, 39-40. There was not enough evidence to *know* beyond a reasonable doubt. Even in the light most favorable to

the verdict, the marshaled evidence was “sufficiently inconclusive...[for] reasonable minds,” such that the jurors “must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” State v. Buck, 2009 UT App 2, ¶9, 200 P.3d 674. The State’s arguments in IB (pages 10-11) of their brief are, therefore, incorrect.

C. The evidence was insufficient to support the jury’s finding Defendant guilty beyond a reasonable doubt.

The marshaled evidence did not demonstrate beyond a reasonable doubt that the Defendant possessed methamphetamine. Not only did it fail to show possession, but it also failed significantly to show that the Defendant ever had any prohibited “intent” towards the residue and paraphernalia discovered for the *mens rea* or for constructive possession. State v. Hansen, 732 P.2d 127, 131-32 (Utah 1987) (“To find that a defendant had constructive possession...it is necessary to prove that...the accused had...the intent to exercise dominion and control over the drug. Whether there is a sufficient nexus depends upon the facts and circumstances of each case.”). Accordingly, the marshaled evidence also failed to show even constructive possession because the Defendant was found initially unconscious with the contraband and neither showing signs nor producing evidence that the sleep was due to any legal or illegal drug. (R434:112,

166, 178, 286). The evidence was not there. Only speculative conclusions arising from the low level of certainty standard—belief—provided for the jury’s decision of guilt.

The marshaled evidence showed no difference between the Defendant, who was found apparently sleeping (R434:112, 166, 178, 286), and an “incidental bystander” (Rivas v. United States, 783 A.2d 125, 130 (D.C. 2001)) because multiple people were in and out of the garage area when the Defendant was not there (R434:259-260, 266, 270-1, 276, 284), who could have easily disposed of the paraphernalia in the *unlocked* (R434:184, 263, 271) trailer or *office* (R434:149-150, 199, 205, 257, 261, 275, 281, 283) where the general public would not see it, and where the Defendant would not find it quickly since he “didn’t go out there very often.” R434:281. It is difficult to have a present intent to exercise control over anything while unconscious, yet, that is what the State unreasonably claims is showed by the evidence.

Significantly, no “sufficient” direct “nexus” can be shown by the “facts or circumstances.” See State v. Hansen, 732 P.2d 127, 131-32 (Utah 1987). There was not even a single fingerprint of the Defendant’s on the glass of the paraphernalia; there was, however, one from another individual (R434: 147-148). Significantly, there was no urine sample evidence showing consumption of the illegal drug discovered. R434: 151-152, 164, 178, 241-243, 246-253, 302. The strongest piece of evidence is that one of the contraband items was within “arm’s reach” (R434:109-10) of the Defendant, but that

evidence does not amount to much when the contraband is not within a *conscious* arm's reach. And simply being near the contraband while conscious is not even enough:

The mere occupancy of a portion of the premises where the drug is found cannot, without more, support a finding of its knowing and intentional possession by the accused. There must be some additional nexus between the accused and the contraband to show that the accused had the power and intent to exercise dominion and control over it.

State v. Hansen, 732 P. 2d 127, 132 (Utah 1987) citing State v. Fox, 709 P.2d 316, 319 (Utah 1985); State v. Anderton, 668 P.2d 1258, 1263 (Utah 1983) (Durham, J., concurring opinion with two justices concurring); State v. Carlson, 635 P.2d at 74. Accord People v. Theobald, 231 Cal. App.2d 351, 41 Cal. Rptr. 758 (1964); Petty v. People, 167 Colo. 240, 447 P.2d 217 (1968); Glispey v. Sheriff, Carson City, 89 Nev. 221, 510 P.2d 623 (1973); State v. Herrera, 90 N.M. 306, 563 P.2d 100 (N.M.Ct.App.), cert. denied, Herrera v. State, 90 N.M. 636, 567 P.2d 485 (1977); Champeau v. State, 678 P.2d 1192 (Okla. Crim. App. 1984); Brown v. State, 481 P.2d 475 (Okla.Crim. App. 1971); State v. Hystad, 36 Wash. App. 42, 671 P.2d 793 (1983); State v. Davis, 16 Wash. App. 657, 558 P.2d 263, 264 (1977).

The “nexus” that the State claims exists is clearly not “sufficient” (Id.) because it is far too attenuated to eliminate all reasonable doubts of guilt and prove culpability because it is only based on temporal proximity to the contraband in his open trailer and nothing more.

The State makes the same logical fallacy as the jury members. It states, “the evidence showed that the light bulbs had been altered...into a pipe...[and] could not be used for their normal purposes,” that the bulbs had “burned residue” that turned out to be “methamphetamine,” and that based solely on this that the Defendant must have done it

as opposed to anyone else. Br. Appellee at 17. No evidence established, however, that the *Defendant* had any particular skills in altering bulbs into pipes. No evidence showed that *he* had ever done it before. No evidence showed that *he* had ever consumed methamphetamine. No evidence showed that *he* even knew how to burn methamphetamine into residue on the bulbs. No evidence showed that *he* even owned the same brand of light bulbs. No evidence showed that *he* even had the tools that could alter the bulbs. The marshaled evidence did not even tell us when the person who altered the bulbs may have done it. R434: 236-237. Absolutely no uniquely identifying evidence was presented that showed the Defendant did any of these things, and yet, the State says, “From *this* evidence [about the alteration of the bulbs], the jury could reasonably have inferred that Defendant possessed the light bulbs with the intent that they be used to introduce drugs into the human body.” Br. Appellee at 17. That evidence alone does not reasonably tell us anything about *who* did it except that a human being did it (not necessarily a male or female), who could do it, who knew how to do it, and who did not accidentally do it. Beyond that, no identifying evidence whatsoever created any sufficient nexus or link between the Defendant and this kind of handiwork.

The State’s arguments in IC (pages 12-29) of their brief are, therefore, incorrect.

II.

THE TRIAL COURT DID ERR WHEN REJECTING THE PROPOSED JURY INSTRUCTION REQUIRING THE JURY TO ELIMINATE ALL REASONABLE ALTERNATIVE HYPOTHESES OF GUILT

Under the circumstances of this case, where the proof was so heavily dependent on circumstantial evidence and where the State failed to show any direct nexus between the Defendant and the incriminating evidence by way of fingerprints, DNA, consumption, impaired behavior, history or modus operandi of making methamphetamine paraphernalia, or habitually using any methamphetamine, it was appropriate and necessary to inform the jury that the State was required to preclude every reasonable hypotheses of innocence that provided reasonable doubt about the Defendant's guilt. Otherwise, the trial court condones a jury verdict that still entertains reasonable doubt.

The Defendant does not argue that the jury cannot weigh the evidence and draw reasonable inferences. He merely and emphatically argues that the State failed to instruct the jury sufficiently under the set of facts presented to them because that evidence failed to prove without doubt who was the one or ones who altered the bulbs and consumed the illicit drugs. The State merely tried to prove guilt by association in a general sense—that the Defendant was associated with his open business location that contained used paraphernalia at the time he was asleep inside it. Taken in the broad sense, “Conviction thus cannot be had on the basis of...guilt by association.” State v. Murphy, 674 P. 2d

1220, 1224 (Utah 1983). The mere guilt by association evidence presented at trial, which lacked no specifically identifying features linking it to the Defendant, without the stronger jury instruction in this instance, facilitated the prejudicial effects that guilt by association can bring. The broad use of “guilt by association” is not merely guilt by association with incriminating evidence, it is guilt by association with the unknown criminal who made the altered bulbs, left his fingerprint on one of them, and then put them out of view of the general public in the unlocked trailer. Association by sleeping in the same place where such a person deposited them engenders substantially unfair prejudice requiring the jury instructions about eliminating all reasonable alternative hypothesis of guilt. The State’s arguments in section II (pages 29-33) of their brief are, therefore, incorrect. The verdict should be set aside and appropriate orders entered.

III.

THE DEFENDANT DID NOT INVITE ANY ERROR IN REGARDS TO THE LOST URINE SAMPLE

There is no single standard for determining whether the prosecution's withholding of exculpatory evidence violates due process. A different standard applies in each of three separate circumstances. The urine sample that was withheld in this case had the real possibility of being mitigating or exculpatory evidence. The State failed to even test the 30 cubic centimeters (cc's) of urine that it had in its possession. R126, R434:152. The only apparent reason the State did not test the 30 cc's was because the *Defendant* could

not do DNA testing of it *on his own*. R78-79. He requested it, but it was not enough. There was nothing stopping the State, however, from testing their 30 cc's sample.

Two of the three standards can apply in this case in regards to the withheld urine sample. "The second circumstance is where the defense makes a pretrial request for specific evidence which would tend to exculpate the defendant or reduce the penalty." Codianna v. Morris, 660 P. 2d 1101 (Utah 1983). In the second circumstance, the courts have said, "[I]t is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge." Id. quoting United States v. Agurs, 427 U.S. 97, 106, 96 S.Ct. 2392, 2398 (1976). The failure to make any response whatever would be "a violation of due process." Id. at 1106, quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963). In this case, the Defendant, through counsel, requested the urine sample (R78-79), but instead of submitting the problem to the trial judge, the State did nothing. Accordingly, the State violated the Defendant's due process rights.

In the third instance, the Defendant claims denial of due process from the State failing to volunteer the exculpatory evidence:

[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the

verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 1106, quoting 427 U.S. at 112-13, 96 S.Ct. at 2401-2402.

A prosecutor violates due process under this third circumstance if he fails to reveal voluntarily evidence which, viewed in the context of the entire record, creates a reasonable doubt about Defendant's guilt. Here, the verdict is already of questionable validity because of the lack of uniquely identifying pieces of evidence creating a nexus between the Defendant and the paraphernalia. As such, the urine sample would have clearly been sufficient to create reasonable doubt if it tested negative for methamphetamine.

If the urine sample tested positive for methamphetamine, then the State would have a direct, uniquely identifying piece of evidence clearly linking the Defendant to the paraphernalia and residue found in his trailer office. The nexus would have been established. The case would have been open and shut in favor of the State. If it did not, then it would be extraordinarily useful to the Defendant as mitigating or exculpatory evidence of guilt.

Whether it was for or against the Defendant, the evidence the State had was incalculably valuable. Yet it did nothing with it. It did not voluntarily offer it. The lack of analysis on such an important piece of evidence smacks of impropriety on the level of Constitutional due process violations. The Defendant's supposed consent at trial to

stipulate to its loss (B. Appellee at 36) was tainted by the plain error impropriety of waiving his right to potentially exculpatory evidence. The Defendant *himself* should have been the one who consented to the stipulated waiver (State v. McCumber, 622 P.2d 353, 356 (Utah 1980) (fundamental constitutional right to due process may be waived knowingly and voluntarily only)); however, the trial court accepted his attorney's stipulation to waive such an important Constitutional right when the Defendant had never been informed of the gravity of the right that was being waived for him.

The Defendant James Crabb, therefore, did not invite any error. The trial court invited the error by not asking *him* if he was "voluntarily and intelligently" waiving his due process rights to potentially exculpatory evidence.

Had Mr. Crabb been given the chance, and had he not waived his right, then the trial court would have had to either order it tested or tell the jury to presume it had already tested negative for methamphetamine. The outcome of the case would very likely have been more favorable to the Defendant. These meet the requirements of the plain error doctrine and avoid the realization of the invited error doctrine. State v. Dunn, 850 P. 2d 1201, 1208-1209 (Utah 1993). The State's arguments in section III (pages 34-44) of their brief are incorrect. On the basis of plain error, therefore, this Court can set aside the conviction and make appropriate orders.

CONCLUSION

This Court can review all of the claims of the Defendant/Appellant because there are proper justifications for those claims not preserved at trial and the evidence has been sufficiently marshaled. The marshaled evidence demonstrates that it was insufficient to meet the elements of the crimes charged by a standard of proof beyond reasonable doubt for each element. The strongest piece of evidence tying the Defendant/Appellant to the paraphernalia was his proximity to it. Courts have clearly stated that more is required to establish with proof beyond a reasonable doubt that the Defendant/Appellant intended to use the contraband. With such a lack of evidence, the trial court should have instructed the jury to eliminate all reasonable alternative hypothesis of guilt. The Defendant/Appellant did not invite any error in the withholding of the urine sample because he never waived his right to the potentially exculpatory evidence. The trial court committed plain error in allowing the Defendant/Appellant's attorney to waive his right to that evidence, violating the Defendant's due process rights.

Dated this 27th day of June 2011.



Taylor C. Hartley

PROOF OF SERVICE

I certify that I mailed, postage prepaid, or otherwise delivered a true and correct copy of the foregoing document to the following this 27th day of June 2011.

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