

1999

Utah v. Misty Dawn Segura : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee. :
 :
 v. :
 :
 MISTY DAWN SEGURA, : Case No. 990914-CA
 : Priority No. 2
 Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Theft, a second degree felony, in violation of Utah Code Ann. §§ 76-6-404, 76-6-412 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable L. A. Dever, Judge, presiding.

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INTRODUCTION

Appellant/Defendant Misty Segura replies to the state's brief as follows.

Arguments not addressed in this reply brief were either adequately discussed in Appellant's opening brief or do not merit reply.

SUMMARY OF THE ARGUMENT

Error occurred in failing to instruct the jury that it must find beyond a reasonable doubt that Misty aided and abetted another in order to convict Misty. That error was obvious in light of existing case law. Under controlling Utah case law, this error requires reversal as a matter of law. Moreover, even if this Court were to require prejudice, the evidence regarding the missing element was controverted; the jury could have believed that Misty did not aid Chastity. A new trial is therefore required.

ARGUMENT

POINT 1. MANIFEST INJUSTICE OCCURRED IN THIS CASE WHERE THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT IT MUST FIND BEYOND A REASONABLE DOUBT THAT APPELLANT AIDED AND ABETTED ANOTHER IN ORDER TO CONVICT HER.

A. ERROR OCCURRED IN LIGHT OF *Laine* AND OTHER CASES.

The state claims that the trial judge's error in failing to include the aiding and abetting element in the elements instruction was not reversible error because the instructions as a whole informed the jury that it must find beyond a reasonable doubt that Misty "solicit[ed], request[ed], command[ed], encourage[d], or intentionally aid[ed]" Chastity in order to convict Misty. State's brief at 8-12. A review of the instructions relied on by the state and collected in its addendum demonstrates, however, that those instructions do not require the jury to find beyond a reasonable doubt that Misty aided and abetted Chastity, and instead, require only that the jury find that Misty "obtained or exercised unauthorized control over the property of another." R. 36; see Addendum to state's brief.

The state attempts to distance this case from State v. Laine, 618 P.2d 33 (Utah 1980) so as to avoid the holding in Laine that the failure to instruct the jury that it must find the essential elements beyond a reasonable doubt is reversible error. State's brief at 8-9. The state acknowledges that this case is similar to Laine in that an essential element was not included in the elements instruction. State's brief at 9. It argues, however, that

Instruction No. 3 provides an adequate substitute for including the aiding and abetting element in the elements instruction because Instruction No. 3 tells the jury that the "State has the burden of proving each of those essential allegations [in the Information] beyond a reasonable doubt." R. 28; see state's brief at 9.

Contrary to the state's argument, Instruction No. 3 does nothing to inform the jury that it must find beyond a reasonable doubt that Misty aided and abetted Chastity in order to convict Misty. The "essential allegations of the charge contained in the Information" are not delineated anywhere in the instructions other than in Instruction No. 11, the elements instruction. Since Instruction No. 11 does not include the aiding and abetting element, Instruction No. 3's direction that the jury must find all of the essential allegations beyond a reasonable doubt does nothing to inform the jury of this missing element.

Moreover, the Information itself, which was not part of the instructions, alleges that Misty Segura, as a party to the offense, "obtained or exercised unauthorized control over the motor vehicle of Alamo Rent-A-Car with the purpose to deprive the owner thereof." R. 2. The Information says nothing about "solicit[ing], request[ing], command[ing], encourag[ing], or intentionally aid[ing] another person to engage in conduct," and therefore Instruction No. 3's message that the state must prove all of the essential allegations in the Information tells the jury nothing in regard to the necessity of finding this element beyond a reasonable doubt in order to convict Misty. Because the instructions as a whole fail to inform the jury that aiding and abetting is an essential

allegation, the message in Instruction No. 3 that the jury must find all essential allegations beyond a reasonable doubt fails to save these instructions.

Moreover, the message in Instruction No. 7 that a person "who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes the offense" does not tell the jury that it must find beyond a reasonable doubt that Misty solicited, requested or otherwise aided and abetted in order to convict her. Given that Instruction No. 7 did not tell the jury that aiding and abetting was an element, and that it must find that element beyond a reasonable doubt in order to convict Misty, the instructions failed the mandate of Laine that unless the judge instructs the jury as to "what each element is and that each must be proved beyond a reasonable doubt...", reversible error occurs. Laine, 618 P.2d at 35.

This case is remarkably similar to Laine. Both cases involve charges arising from the theft of a motor vehicle. See Laine, 618 P.2d at 34. In Laine, the elements instruction omitted the intent element. Id. at 35. A separate instruction informed the jury of "the intent required for commission of the crime, but [did] not inform the members of the jury that before returning a verdict of guilty, they must find beyond a reasonable doubt that defendant had [that intent]." Id.

In the present case, the elements instruction failed to include the actus reus element—aiding and abetting. Although Instruction No. 7 vaguely referred to that actus reus, like the instructions in Laine, the present instructions failed to inform the jury that it

must find that element beyond a reasonable doubt.

The state misreads Laine when it claims that the decision in that case turned on the absence of an instruction similar to Instruction No. 3 telling the jury it must find all of the essential allegations beyond a reasonable doubt. State's brief at 9. Indeed, the decision in Laine actually was based on a review of the instructions which, while articulating all of the elements, failed to clarify that intent to permanently deprive was an element which must be found beyond a reasonable doubt. Laine, 618 P.2d at 35. The same problem exists in this case where nothing in the instructions informed the jury that aiding and abetting was an element it must find beyond a reasonable doubt. The decision in Laine therefore mandates that the conviction in this case be reversed.

In this case, the jury was given free rein without any guidance as to what it must find regarding Misty's actions in order to convict her. Indeed, since the jury was never told that aiding and abetting was an element it must find beyond a reasonable doubt, it was likewise never informed that aiding and abetting had a specific definition and did not include "[m]ere presence or even prior knowledge... ." State v. Labrum, 959 P.2d 120, 123 (Utah App. 1998). Instruction No. 7 merely gave the jury "arid, dense statutory language that the trial judge [did] not relate concretely to the issues in [the] case." State v. Standiford, 769 P.2d 254, 266 (Utah 1988). Reversible error occurred in this case where the jury was not instructed that it must find beyond a reasonable doubt the most important element that was at issue in this case.

In addition, in the absence of an instruction requiring the jury to find aiding and abetting beyond a reasonable doubt, the inclusion of Instruction No. 8, telling the jury that it need not concern itself with the status of Chastity, further compounded the error. Not only was the jury allowed to convict Misty without ever finding beyond a reasonable doubt that she "solicit[ed], request[ed], command[ed], encourag[ed], or intentionally aid[ed] another, it was also allowed to convict her without finding beyond a reasonable doubt that anyone committed the theft.

While evidence certainly existed in this case to pursue a theft charge against Chastity, an issue as to whether she held the intent to permanently deprive, or whether Misty aided and abetted her in permanently depriving existed. Based on the testimony, Chastity's request to take the car may well have been interpreted as a request to take it for a short period of time. The jury needed an accurate instruction as to what it needed to find regarding Misty's role, which necessarily included a focus on Chastity.

B. THE ERROR WAS OBVIOUS.

The Utah Supreme Court and this Court have never required that an error in failing to instruct a jury on all of the elements must be obvious in order to reverse a case for manifest injustice when such an error occurs. See discussion on page 21 of Appellant's opening brief. Even if such an error must be obvious, however, the error in this case meets that requirement. Indeed, the state's claim that the trial judge's error in failing to instruct the jury on the actus reus, aiding and abetting was not obvious is specious. See

state's brief at 12-13.

Laine, which is almost directly on point, was decided long before this case and clearly instructs that reversible error occurs when the judge fails to instruct the jury as to all of the elements it must find beyond a reasonable doubt. See discussion supra at 2, 4. The missing element in Laine was articulated in a separate instruction, but the Court still found reversible error because the instructions did not inform the jury that it must find that element beyond a reasonable doubt. Therefore, the trial judge in this case could not have reasonably believed that a similar error in these instructions was acceptable under Laine. The state's claim that the error was not obvious because of the teaching in Laine that the instructions are viewed as a whole fails to consider the entirety of that decision, and the fact that Laine requires reversal in the present circumstances. See state's brief at 12-13.

Moreover, the state claims that the error was not obvious because State v. Chaney, 1999 UT 309, 989 P.2d 1091, was decided after the trial in this case. Appellant did not rely on Chaney in support of her claim that the error was obvious. Instead, she relied on State v. Pacheco, 492 P.2d 1347 (Utah 1972), aff'd on reh'g, State v. Pacheco, 495 P. 2d 808 (Utah 1972); State v. Pacheco, 495 P.2d 808 (Utah 1972); State v. Scott, 732 P. 2d 117 (Utah 1987); State v. Lopes, 1999 UT 24, 980 P.2d 191; Laine, 959 P.2d 120 ; and other cases decided prior to the trial in this case. See e.g. Appellant's opening brief at 22. While these cases indicate that the jury must be instructed that it must find beyond a

reasonable doubt the element of aiding and abetting, the state for the most part ignores these cases when it argues that the error was not obvious. Contrary to the state's claim, the error in failing to instruct the jury that it must find beyond a reasonable doubt that Misty aided and abetted in order to convict her was obvious.

C. THE ERROR REQUIRES REVERSAL.

This Court and the Utah Supreme Court have "consistently held that '[f]ailure to give an elements instruction for a crime satisfies the manifest injustice standard under Rule 19(c) and constitutes reversible error as a matter of law.'" American Fork v. Carr, 970 P.2d 717, 720 (Utah App. 1998) (quoting State v. Gibson, 908 P.2d 352, 354 (Utah App. 1995) and citing State v. Souza, 846 P.2d 1313, 1320 (Utah App. 1993)); see also State v. Jones, 823 P.2d 1059, 1061 (Utah 1991) (citing inter alia Laine, 618 P.2d at 35); State v. Roberts, 711 P. 2d 235, 239 (Utah 1985); State v. Harmon, 712 P.2d 291, 292 (Utah 1986) (per curiam); State v. Reedy, 681 P.2d 1251, 1252 (Utah 1984). Precedent from the Utah Supreme Court as well as this Court which has held that reversible error occurs as a matter of law under our rules of criminal procedure, if not our state due process clause, therefore requires this Court to reverse Misty's conviction as a matter of law where the trial judge failed to instruct the jury that it must find the element of aiding and abetting beyond a reasonable doubt.

Indeed, in assessing whether the error requires reversal, Laine again provides guidance. In Laine, the defendant negotiated the purchase of a new car. Laine, 618 P.2d

at 35. After signing the contract, the defendant told the dealership he needed the new car to drive to his bank which was nearby and that he would get the money and return with it. Laine, 618 P.2d at 35. He did not return and the dealership reported the car stolen. Id. Eight days after negotiating the contract, the defendant was arrested with the car in Minnesota. Id. Although the evidence in support of the intent to permanently deprive element was strong, the Court held that the failure to instruct the jury on that element required reversal. This case likewise requires reversal where the trial judge did not instruct the jury that it must find an essential element beyond a reasonable doubt in order to convict Misty.

Since our courts have already decided this issue on state grounds in a way that departs from the recent federal due process decision in Neder v. United States, 527 U.S. 1 (1999), the state decisions control and this Court is required to reverse Misty's conviction. Contrary to the state's suggestion, Misty is not required "to articulate any reason for departing from the federal harmless-error analysis" (state's brief at 15) because controlling Utah case law has already departed from the federal analysis and applies in this case.

The state suggests that despite the long line of cases from the Utah Supreme Court as well as this Court which have "consistently held that '[f]ailure to give an elements instruction' requires reversal as a matter of law" (American Fork v. Carr, 970 P.2d at 720), Utah law requires a harmless error review when the jury is not instructed on an

element. In support of this argument, the state relies on State v. Stevenson, 884 P.2d 1287, 1292 (Utah App. 1994) and State v. Kohl, 2000 UT 35 ¶¶27-31, 392 Utah Adv. Rep. 3. Neither of these cases present a compelling basis for overruling the rule adopted by the Utah Supreme Court, consistently followed by both appellate courts and recently reaffirmed by this Court.

In Stevenson, this Court held that the failure to instruct the jury on the element of non-marriage in a rape case did not require reversal. Stevenson, 884 P.2d at 1291. Because the non-marriage element was never at issue at trial and "all testimony at trial clearly and indisputably established that defendant and [the victim] were not married," this Court held that manifest injustice did not occur in failing to instruct the jury on that element. Id. Stevenson presented a unique circumstance where not only was the evidence that the defendant and victim were not married clear and indisputable, but the non-marriage element had been deleted from the statute and no longer was included as an element of the crime when this Court reviewed Stevenson's conviction. Id. Given these unique circumstances, this Court upheld the conviction.

Following Stevenson, in Carr, this Court reiterated the rule that failure to give an accurate elements instruction requires reversal as a matter of law. Carr, 970 P.2d at 720. In Carr, the trial judge failed to instruct the jury that one of the elements of lewdness was the intent to derive sexual gratification. Id. Because the instruction did not include this

element, this Court reversed the conviction as a matter of law without conducting a review for prejudice. Id.

Since the Utah Supreme Court has repeatedly held that failure to accurately instruct on the elements of a crime is manifest error requiring reversal as a matter of law and this Court has reiterated that position after issuing the decision in Stevenson, Stevenson has no controlling authority and does not provide a basis for departing from Utah Supreme Court holdings. Moreover, even if Stevenson controlled, it would not apply in this case where the evidence regarding the missing element was not clear and indisputable, and instead, was controverted. See Appellant's opening brief at 24-9.

The state also suggests that State v. Kohl, 2000 UT 35, ¶¶27-31, 392 Utah Adv. Rep. 3 supports its argument that this Court should conduct a harmless error review rather than follow Supreme Court precedent that mandates reversal as a matter of law. Kohl, however, does not involve a review for manifest injustice in instructing a jury. Instead, Kohl analyzes whether an error occurred in imposing the gang enhancement, and if so, whether that error requires reversal. Because the Court was not reviewing for manifest injustice in Kohl, the Laine line of cases requiring reversal as a matter of law when the jury is not instructed on an element were not considered by the Court. In fact, Kohl does not mention or acknowledge those cases. Because Kohl did not consider whether manifest injustice occurred in instructing the jury, it cannot be read as overruling the Laine line of cases.

Moreover, Kohl involves unique facts where the jury had already found the element at issue, and is decided on the basis of those unique facts. Kohl, 2000 UT 25, ¶29. In Kohl, the jury had necessarily found the missing element of in concert activity with two or more persons when it convicted three co-defendants of committing an aggravated burglary. Id. The Court indicated that "[t]he trial court could have properly instructed the jury that in the event all three defendants were found guilty of the charged aggravated burglary, the jury must also find that each defendant acted 'in concert with two or more persons' in the commission of the burglary." Kohl, 2000 UT 25, ¶29 (emphasis and quotations in original). Because the jury found all three co-defendants guilty, they had necessarily also found that the trio acted in concert, thereby allowing for imposition of the gang enhancement without retrying the case. In other words, reversal was not required because the jury had actually made the necessary finding and the court could therefore impose the gang enhancement as a matter of law. Given the unique circumstances in Kohl and the Court's failure to address Laine and other controlling case law, Kohl does not overrule the Laine line of cases. In addition, in the present case, the unique circumstances of Kohl are not present. Since the jury was not instructed that aiding and abetting is an element of the crime, let alone given a definition of aiding and abetting, the jury has not found that Appellant aided and abetted Chastity.

In addition, even if the Neder harmless beyond a reasonable doubt analysis applied, a new trial is required in this case. Neder indicates that when the error involves

the failure to instruct the jury that it must find an element beyond a reasonable doubt, that error is harmless beyond a reasonable doubt if the evidence on that issue is uncontroverted. Neder, 527 U.S. at 18. This requirement exists in this context because if the evidence on the missing element were controverted, the reviewing court would have to act as "a second jury to determine whether the defendant is guilty." Id. at 19. The United States Supreme Court rejected the notion of a reviewing court acting in this capacity and was therefore willing to uphold a conviction when the jury was not instructed on an element only if the evidence was uncontroverted. Id. at 18.

This Court's decision in Stevenson supports the notion that if the failure to instruct a jury on an element of a crime is reviewed for prejudice, the conviction can be upheld only if the evidence on that element is uncontroverted. Stevenson, which represents the only departure in Utah case law from the standard reversal as a matter of law when the jury is not instructed on an element, upheld the conviction only because the evidence on the non-marriage element was *clear and undisputed*. Unless evidence on a missing element is *uncontroverted* or *clear and undisputed*, the appellate court would act as a second jury in reviewing the evidence, and the Appellant's right to a fair jury trial on the disputed element would be undermined. Hence, even if the failure to instruct on an element is reviewed for prejudice, a conviction can be upheld only if the evidence on that element is clear and undisputed or, in other words, uncontroverted.

As set forth in Appellant's opening brief at 25-29, the evidence as to whether Misty aided or abetted was disputed or controverted in this case, and the state mischaracterizes the evidence when it argues that the "evidence of defendant's accomplice liability was essentially uncontroverted at trial." State's brief at 16. In fact, the state later recognizes that the evidence on this issue was controverted when it indicates that Misty claimed that all she did was fail to tell on Chastity. State's brief at 17. Misty very clearly testified that Chastity took the Montero on her own, and that Chastity's friend opened the door of the Eclipse and told Misty to get out. R. 97:101. Misty's testimony also indicates that she was scared by Chastity and her friends, so she got out. R. 97:101-02. Moreover, Misty testified that she did not encourage Chastity or intentionally try to help her take the vehicles. R. 97:102. Since getting out of a car when ordered to do so by someone who scares you fails to amount to aiding and abetting, the testimony was controverted regarding the question of whether Misty's actions amounted to aiding and abetting as a matter of law. Since the jury was never informed that it must find that Misty "solicit[ed], request[ed], command[ed], encourage[d], or intentionally aid[ed] another" or what that terminology meant as a matter of law, the jury did not necessarily find under these facts that Misty's actions amounted to aiding and abetting.

The state attempts to confuse the issue by arguing that Chastity's role as a principal actor was uncontroverted. State's brief at 15. The focus in this case, however, is on Misty and whether she was an accomplice; even if the evidence of Chastity's role as

a principal was uncontroverted, the evidence regarding the extent of Misty's involvement was controverted and, therefore, the failure to instruct on this element was not harmless beyond a reasonable doubt.

POINT II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MISTY.

The state's claim that Appellant failed to marshal the evidence is incorrect. State's brief at 18. The marshaled evidence is listed on pages 29-30 of Appellant's opening brief and labeled as the marshaled evidence in support of the conviction. Appellant recognized that marshaled evidence in support of her argument (Appellant's opening brief at 30-32), but argued that even when that marshaled evidence was considered, the evidence was not sufficient to convict Misty.

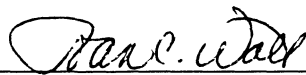
There are two parts to Appellant's insufficient evidence claim. The state ignores the first part of the claim. The first part of the claim is that the jury was instructed that the element it must find beyond a reasonable doubt was that Misty "obtained or exercised unauthorized control over the property of another." R. 36. There was absolutely no evidence suggesting that Misty directly obtained the vehicle, and since that was the only element submitted to the jury, the conviction must be overturned.

The state does not argue that there was any evidence to support the actus reus element on which the jury was instructed. See state's brief at 18-20. Accordingly, the conviction must be overturned for insufficient evidence.

CONCLUSION

Defendant/Appellant Misty Segura respectfully requests that this Court reverse her conviction and remand her case for a new trial based on the trial court's failure to accurately instruct the jury on the elements. Alternatively, Appellant requests that this Court reverse her conviction and dismiss the case based on insufficient evidence.

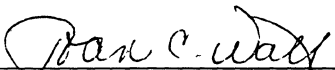
SUBMITTED this 14th day of July, 2000.



JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be 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 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 14~~th~~ day of July, 2000.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of July, 2000.
