1999

State of Utah v. Jacob Ross Hale : Reply Brief

Utah Court of Appeals

Jan Graham; Attorney General; Marian Decker; Assistant Attorney General; Attorney for Appellee.
Catherine E. Lilly; Lisa J. Remal; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JACOB ROSS HALE,	:	Case No. 990939-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), and Aggravated Kidnaping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

CATHERINE E. LILLY (7746)
LISA J. REMAL (2722)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

JAN GRAHAM (1231)
ATTORNEY GENERAL
MARIAN DECKER (5688)
ASSISTANT ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JACOB ROSS HALE,	:	Case No. 990939-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), and Aggravated Kidnaping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

CATHERINE E. LILLY (7746)
LISA J. REMAL (2722)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

JAN GRAHAM (1231)
ATTORNEY GENERAL
MARIAN DECKER (5688)
ASSISTANT ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JACOB ROSS HALE,	:	Case No. 990939-CA Priority No. 2
Defendant/Appellant.	:	

ARGUMENT

ISSUE: THE BAILIFFS' STATEMENTS IN THE PRESENCE OF THE JURORS CONSTITUTES A CONSEQUENTIAL REMARK GIVING RISE TO AN UNREBUTTED PRESUMPTION OF PREJUDICE.

The State asserts that there was no consequential juror contact such that a presumption of prejudice arose in Appellant Jacob Hale's ("Hale") trial. See State's Brief ("S.B.") at 13-19. The State's position is without merit.

A. The Bailiffs' Remarks Constitute a "Contact."

The State asserts "this case does not involve a contact, let alone a conversation, between a juror and a trial participant." S.B. 14. "Accordingly, . . . the trial court reasonably determined that a mistrial was unwarranted." S.B. 15 (footnote omitted). The State's assertion oversimplifies the term "contact" as it is used in Utah case law.

As an initial matter, the remark "guilty, guilty, guilty" is a "contact" to the extent that it was uttered in the immediate presence of the jury and at least one juror overheard it and could testify to it when questioned by the trial judge. R.247[120,130]. As such, the remark was communicated to at least

one of the jurors, rendering it a contact. See Webster's New World College Dictionary (4th ed.) (defining "contact" as "the state or fact of being in touch, communication, or association (with)").

In addition, a comment need not be a verbal exchange or a conversation with a juror in order to be a "contact" under Utah case law. The Utah Supreme Court in State v. Pike, 712 P.2d 277, 280 (Utah 1985), and State v. Erickson, 749 P.2d 620, 621 (Utah 1987), does not limit its holdings to conversations alone. Rather, the Court specifically refers to "contacts," recognizing that any sort of communication, one-way or two-way, may prejudice a defendant if it is improper. Pike, 712 P.2d at 280; see also Erickson, 749 P.2d at 621 ("prejudice will be presumed from any *contact*") (emphasis added). Accordingly, the mere fact that the bailiffs were not conversing with the jury when the remark was made does not render it a non-contact. R.247[129-31]. "The 'scope and subject matter [of the contact], . . .' so long as more than mere pleasantries, . . . [is] irrelevant." Logan City v. Carlsen, 799 P.2d 224, 227 (Utah App. 1990) (Orme, J., concurring). .

Finally, a contact need not be with a "trial participant" to fall under Pike. See Carlsen, 799 P.2d at 226. This Court has already rejected such a proposition, stating, "the [Utah] Supreme Court made no such distinction and precluded any unauthorized

contact by witnesses, attorneys or *court personnel*." Id. at 226 (rejecting appellee's argument that "no prejudice occurred because the incident involved a bailiff rather than a witness for the state, as was the case in Erickson and Pike") (citing State v. Erickson, 749 P.2d 620, 621 (Utah 1987)) (emphasis added); see also State v. Day, 815 P.2d 1345, 1349 (Utah App. 1991) (declining to address propriety of contact by bailiff on preservation grounds). In so reasoning, this Court held that statements made by a bailiff, appropriately characterized as "court personnel," which touched upon the issue of sentencing were consequential and merited a mistrial. Carlsen, 799 P.2d at 226-27. By the same reasoning, the remark in this case, made by a bailiff who is "court personnel," implicates the Pike rule.

In light of the foregoing, the State's assertion that the remark did not amount to a contact is without merit.

B. The Bailiffs' Remarks Are Consequential And Give Rise To A Presumption of Prejudice.

The State erroneously asserts that the "guilty, guilty, guilty" remark was not consequential. S.B.16-17; R.247[130]. A remark is consequential, giving rise to a rebuttable presumption of prejudice, when it goes beyond a mere incidental, unintended, and brief contact. See Pike, 712 P.2d at 280; Erickson, 749 P.2d at 621. A remark rises to the level of consequential if it is something other than a mere "civility," Erickson, 749 P.2d at 621, such as "'Hello' or 'Good morning.'" State v. Jonas, 793

P.2d 902, 909 (Utah App. 1990); see also Carlsen, 799 P.2d at 227 ("any contact [gives rise to rebuttable presumption of prejudice if] 'more than a brief incidental contact where only remarks of civility are exchanged'") (citing Erickson, 749 P.2d at 621) (Orme, J., concurring).

In light of the foregoing, and for the reasons set forth in Hale's opening brief ("A.B."), the "guilty, guilty, guilty" remark was anything but a mere civility. See A.B. 17-21; R.247[130]. Indeed, the comment touched on a sensitive issue going to the crux of the trial - the guilt-or-innocence question. Id. at 17; see also Carlsen, 799 P.2d at 226 (mistrial required where bailiff's comment to jury, although not related to specific case, "touched on the extremely sensitive issue of sentencing").

For this reason, the State's reliance upon Jonas, 793 P.2d at 908, is misplaced. See S.B. 16-17. The statement at issue in Jonas was an explanation made by a bailiff to the jury about the absence of another juror. 793 P.2d at 908.[1] This Court held it was "an incidental contact raising no presumption of prejudice" because "no 'conversation' took place, in the normal sense of an 'oral exchange of sentiments, observations, opinions [or] ideas.'" Id. at 908-09. Moreover, the content of the remark had only a "tenuous connection to the subject of the trial." Id. at

---

[1] The bailiff involved in Jonas stated, "'I went in and I told them that Mr. Davis wouldn't be in because his sister was the lady that was shot out in West Valley.'" 793 P.2d at 908.

909. Hence, the comment did not affect "the jury's judgment regarding their verdict" nor did it lend and "any appearance of impropriety" to the trial. Id. at 909-10. The phrase "guilty, guilty, guilty," R.247[130], by contrast, communicates a strong and central idea in the criminal setting and, therefore, bears a direct relationship to the subject of Hale's trial.

A more instructive case is Carlsen, wherein this Court held that remarks from a bailiff, although not directly touching on the specific case, gave rise to an unrebutted presumption of prejudice. See 799 P.2d at 226. The bailiff's remark concerned the "difference between circuit and district court jurisdiction, and the sentences for misdemeanors and felonies." Id. In holding that a mistrial was merited, the Court stated,

> We find it particularly troublesome that the unauthorized conversation between the bailiff and the jury concerned the sensitive subject of sentencing. The juror's minds should be free of extraneous thought as to possible sentences because such thought would tend to interfere with their concentration on defendant's guilt or innocence.

Id. at 227.

For the same reasons set forth in Carlsen, the remark at issue here is consequential in that it touches upon the sensitive issue of guilt. Id. The juror's thought processes should have been focused on the facts of the case without the infecting overlay of the "guilty, guilty, guilty" remark ringing in their minds. Id.; R.247[130]. To the extent that the jury was

infected with this bias toward guilt, Hale's right to a fair trial by an impartial jury was compromised. Accordingly, the trial court erred in failing to grant a mistrial.[2]

CONCLUSION

In light of the foregoing, and for the reasons set forth in Hale's opening brief, Hale respectfully requests this Court to reverse the lower court's denial of his suppression motion and his motion for a new trial, and remand for further proceedings.

SUBMITTED this 1st day of September, 2000.

Catherine E. Lilly

CATHERINE E. LILLY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 1st day of September, 2000.

---

[2] Hale submits on his opening brief in response to the State's argument that any presumption of prejudice was adequately rebutted, see A.B. 17-21, as well as its argument concerning the trial court's erroneous denial of his motion to suppress unreliable and tainted identification testimony. See A.B. Point II.

Catherine E. Lilly

CATHERINE E. LILLY