

2000

## Utah v. Pedro Arballo : Brief of Appellee

Utah Court of Appeals

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### Recommended Citation

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 2000292-CA
v.	:	
PEDRO ARBALLO,	:	Priority No. 2
Defendant/Appellant.	:	

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BRIEF OF APPELLEE

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APPEAL FROM THREE CONVICTIONS FOR AGGRAVATED ROBBERY,  
FIRST DEGREE FELONIES, IN THE SECOND JUDICIAL DISTRICT  
COURT, WEBER COUNTY, UTAH, THE HONORABLE STANTON M.  
TAYLOR PRESIDING

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**FILED**  
Utah Court of Appeals

SEP 25 2000

Paulette Stagg  
Clerk of the Court

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals his first degree felony convictions for aggravated robbery. Utah Code Ann. § 78-2-2(3)(i) and (4) (1996) and § 78-2a-3(j) (1996) give this Court jurisdiction.

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW<sup>1</sup>

1. Did defendant affirmatively waive his appellate challenge to a voir dire comment the trial judge made?

An affirmative waiver bars appellate review unless defendant establishes that counsel performed ineffectively for waiving the claim. *See, e.g., State v. Bullock*, 791 P.2d 155, 158-59 (Utah 1989), *cert. denied*, 497 U.S. 1024 (1990); *State v. Morgan*, 813 P.2d 1207, 1211 (Utah App. 1991).

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<sup>1</sup>In violation of Utah R. App. P. 24(a)(5), defendant failed to include a record citation to where he preserved his appellate claim or to argue a basis for appellate review of his unpreserved claim.

2. Alternatively, has defendant established plain error in the voir dire statement that he challenges for the first time on appeal?

Defendant did not preserve the appellate claim; therefore, the Court may only review the claim for plain error. See, e.g., *State v. Parker*, 2000 UT 51 ¶ 6, 4 P.3d 778.

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 76-6-302 (1999) is attached as addendum A.

#### STATEMENT OF THE CASE

The State charged defendant with three counts of aggravated robbery, first degree felonies, in violation of Utah Code Ann. § 76-6-302 (1999) (R. 1-6).

A jury convicted defendant as charged (R. 46-48). The trial court sentenced defendant to the statutory prison terms of five years to life on all three counts and imposed statutory firearm enhancements (R. 108-110). The Court ordered concurrent sentences on the robberies and concurrent sentences on the enhancements, but ordered that the enhancement sentences would be consecutive to the robbery sentences (*id.*).

Defendant timely filed his notice of appeal to the Utah Supreme Court (R. 114). The supreme court transferred the case to this Court (R. 130).

#### STATEMENT OF FACTS

On appeal, petitioner argues only that a comment the trial

judge made during voir dire so tainted the panel that this Court must reverse. Consequently, the facts underlying the criminal charges have no relevance to defendant's single appellate claim.

Early in the jury voir dire, prospective juror Jackson informed the trial court that he had served on a jury in Phoenix twelve years earlier (R. 142 at 12). Mr. Jackson reported that the Phoenix jury could not reach unanimity, with the vote splitting eleven to one in favor of conviction (id. at 13).

The following exchange then occurred:

The Court: I see. [The hold-out juror] must have been Archie Bunker's wife, Edith.

Mr. Gravis [defense counsel]: Not necessarily.

The Court: Not necessarily. That - well, that's a good point, Mr. Gravis

(id.). Defense counsel did not object to the statement.

At the end of voir dire, Mr. Gravis asked the prospective jurors about the "Edith Bunker" comment:

Mr. Gravis: Now, there was - during the prior voir dire there was talk about a hung jury. In a jury case - trial it requires - a criminal case requires a unanimous jury verdict to enter a conviction. Would any of you feel compelled not to feel like an Edith Bunker if you disagree with everybody else and want to go home and whatever they want to do to - and give up your own convictions?

(No response)

Mr. Gravis: You each would be willing to stand by your convictions, your position, no matter if it's seven to one against and - and you wouldn't give into pressure to go along with the rest of the jurors, correct?

(No response)

Mr. Gravis: Okay. Nothing further, Your Honor

(id. at 60).<sup>2</sup> These were the last voir dire questions asked of the prospective jurors. After defense counsel asked them, he passed the panel for cause (id. at 61).

Before the trial began, the trial court instructed the jurors: 1) to base their verdict on the evidence and the law; 2) to keep an open mind during the trial and to form no opinions about defendant's guilt or innocence until they heard all the evidence, the closing arguments, and the legal instructions; and 3) not to infer that the court had any opinion about the case's merits based on any of the court's comments; 4) that they were the sole judges of the facts, and that the court could not invade that responsibility; and 5) to keep an open mind until they retired to deliberate the case (R. 56-58; R. 124 at 7).

In the instructions at the close of evidence, the trial court further instructed the jury: 1) to decide the case on the facts and law without regard to sympathy, passion, or prejudice; 2) to decide the case only on the evidence from witnesses and exhibits and to disregard anything heard from any other source; 3) that the court had no intention to give any hint about the

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<sup>2</sup>At the beginning of the voir dire, the trial court had instructed the jury that not responding to a question asked to the entire panel would indicate that there was "no problem" with the question (id. at 2).

verdict the jurors should return; that the court did not wish to influence the jurors' verdict in any way; that only the jurors could determine the proper verdict; that it would be improper for the court to influence the verdict; and that the jurors should disregard any comments suggesting the court preferred a particular verdict, believed certain witnesses, or considered certain evidence more important; and 4) to select a foreperson, but not to allow the foreperson to dominate the jury (R. 71, 78, 80, 94).

The court also instructed the jurors that they had a duty to deliberate with a "view to reaching an agreement," but that they "should not surrender [their] honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors" (R. 96).

#### SUMMARY OF THE ARGUMENT

Trial counsel affirmatively waived defendant's only appellate claim when he addressed the "Edith Bunker" comment in voir dire, then passed the panel for cause when no prospective juror indicated the comment would affect his or her vote. On appeal, defendant has not argued that trial counsel performed ineffectively for making that choice. The affirmative waiver and absence of an ineffectiveness claim bars appellate relief based on the comment.

Alternatively, defendant did not preserve the claim; therefore, he may succeed only by establishing plain error. Plain error does not justify appellate relief for two independent reasons. First, defendant has not argued plain error.

Second, defendant cannot establish that, absent the "Edith Bunker" comment, there would exist a reasonable likelihood of a more favorable result. The trial court immediately retreated from the comment; defense counsel's voir dire established that it would not affect the jurors' ability to vote against their convictions; and the jury instructions clearly instructed the jurors on their responsibilities, including their responsibility not to abandon their individual convictions merely to reach consensus.

## ARGUMENT

### POINT I

DEFENDANT AFFIRMATIVELY WAIVED HIS APPELLATE CLAIM WHEN HIS TRIAL COUNSEL CHOSE TO DETERMINE WHETHER THE COMMENT TAINTED THE PANEL, THEN CONCLUDED IT HAD NOT; HIS WAIVER BARS APPELLATE REVIEW

When defense counsel declines to object to an error for tactical reasons, defendant may not obtain appellate relief based on that error, even if the error amounts to plain error. See, e.g., *State v. Bullock*, 791 P.2d 155, 158 (Utah 1989); *State v. Hall*, 946 P.2d 712, 716-18 (Utah App. 1997), cert. denied, 953 P.2d 449 (Utah 1998); *State v. Morgan*, 813 P.2d 1207, 1210-11 (Utah App. 1991). The Court may infer from the record whether

counsel failed to object for tactical reasons even though trial counsel may not have expressly waived the objection. See *State v. Bullock*, 791 P.2d at 158-59 (inferring an affirmative waiver of a hearsay objection because waiving the objection was consistent with trial strategy); *State v. Hall*, 942 P.2d at 717-18 (finding an affirmative waiver of a hearsay objection because the admitted evidence was integral to the defendant's case).

The record establishes that trial counsel affirmatively chose not to object to the "Edith Bunker" comment. The comment did not merely slip by counsel. Counsel pointed out to the trial court, in front of the jury, that a hold-out juror was "not necessarily" an Edith Bunker (R. 142 at 13).

Trial counsel used his last two direct voir dire questions to determine whether the comment had tainted the prospective jurors' ability to render individual verdicts (*id.* at 60). The responses apparently satisfied counsel because he ended his voir dire and passed the panel for cause (*id.* at 60-61). Counsel's decision to query further about any taint and subsequent conclusion that no taint existed affirmatively waived defendant's claim that the comment was reversible error.

Although the affirmative waiver precludes reversal even for plain error, it does not preclude reversal if counsel's waiver amounted to ineffective assistance of counsel. See, e.g., *State v. Bullock*, 791 P.2d at 159-60. Defendant does not claim that

counsel's decision violated his Sixth Amendment right to the effective assistance of counsel.

Because trial counsel affirmatively waived the only appellate claim, and because defendant has not argued, let alone established, ineffective assistance of counsel, he has presented the Court with no cognizable basis for reversing his conviction.

#### POINT II

ALTERNATIVELY, THE TRIAL COURT'S VOIR DIRE COMMENT DOES NOT WARRANT REVERSAL EVEN UNDER A PLAIN ERROR ANALYSIS

As stated, defendant did not object to the "Edith Bunker" comment. If this Court does not agree that he affirmatively waived the objection, it may reverse only if the comment amounted to plain error. See *State v. Parker*, 2000 UT 51 ¶6, 4 P.3d 778 (trial counsel's failure to object to judge's comment during voir dire limited appellate review to plain error). To establish plain error, defendant must demonstrate: 1) the comment was erroneous; 2) the error should have been obvious to the trial court; and 3) a reasonable likelihood of a more favorable result would exist if the trial court had not made the comment. *Id.* at ¶7.

Plain error does not justify reversal in this case. First, petitioner has not argued plain error on appeal; instead, he treats the issue as though he preserved it below. Defendant's failure to argue plain error independently defeats his appellate challenge to the unobjected-to comment. *State v. Sepulveda*, 842

P.2d 913, 917-18] (Utah App. 1992).

Second, as in *Parker*, defendant cannot establish that, absent the ill-conceived comment, there would exist the reasonable likelihood of a more favorable result.<sup>3</sup> The State charged Parker with murder for stabbing his victim with a five inch blade. *State v. Parker*, ¶¶2, 4. During voir dire, the trial judge showed the prospective jurors his pocket knife with a three inch blade and commented that it "was 'probably as thick a pocket knife that a fellow really ought to carry.'" *Id.* ¶4.

On appeal, Parker contended that the comment discounted his self-defense theory because it suggested that he had no legitimate reason to carry the knife used to kill the victim. Relying solely on an instruction admonishing the jury not to be influenced by any comment the judge made, the supreme court found any error harmless.

The comment in this case presents even less potential for prejudice than the one found harmless in *Parker*. First, the trial court immediately retreated from the comment after making it. When the trial court quipped that the hold-out juror in the Phoenix case must have been "Edith Bunker," defense counsel responded, "Not necessarily." The trial court acknowledged that defense counsel had made a "good point." (R. 142 at 13).

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<sup>3</sup>By relying on the third element of the plain error analysis, the State does not concede that any error in the comment was obvious.

Second, defense counsel's voir dire assured that the comment did not have the effect about which defendant now complains: telling the prospective jurors that a hold-out juror is a "dingbat." Defense counsel inquired whether the jurors would feel like an "Edith Bunker" if they reached a conclusion different from the other jurors, and whether each could stand by his convictions even if he were a single hold-out (id. at 60). The prospective jurors indicated that they could do so (id.).

Finally, as in *Parker*, the jury instructions negated any possible prejudicial effect from the comment. Those instructions stressed the jurors' duties, among others, to decide the case on the law and evidence, not passion or prejudice. They reminded the jurors that only they, not the judge, had the authority to determine the verdict; and admonished them not to regard any comment from the judge as an indication of his opinion of the evidence or the proper verdict. (R. 57-58, 61, 68, 71, 78, 80, 94.)

Most importantly, the trial court instructed the jury that, while they should deliberate with "a view to reaching agreement," they were not to surrender their honest convictions for "the mere purpose of returning a verdict or solely because of the opinion of the other jurors" (R. 96). Thus, while the judge's quip may have suggested a personal opinion about hold-out jurors, the instructions clearly informed each juror not to vote in conflict

with his or her honest convictions and not to vote in a way that the juror might think the judge wanted him or her to vote.

The judge's immediate retreat from the comment, the prospective jurors' denial that it would affect anyone's vote, and the instructions obligating each to vote in according to his or her convictions without regard to the judge's comments establishes that no reasonable likelihood of a more favorable result would exist if the judge had not made the comment.

CONCLUSION

For the reasons argued above, the Court should affirm defendant's convictions.

RESPECTFULLY SUBMITTED

Sept 25, 2000.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed by first-class mail, postage pre-paid, to the following on Sept 25, 2020:

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## ADDENDUM A

**76-6-302. Aggravated robbery.**

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

**History:** C. 1953, 76-6-302, enacted by L. 1973, ch. 198, § 76-6-302; 1975, ch. 51, § 1; 1989, ch. 170, § 7; 1994, ch. 271, § 1.