1982

# State of Utah v. Zolla Hales : Respondent's Reply Brief to Petition for Rehearing

Utah Supreme Court


David L. Wilkinson; Earl F. Dorius; Attorneys for Respondent;
W. Andrew McCullough; McCullough, Jones & Barlow; Attorney for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | Case No. 18083 |
| ZOLLA HALES, | : | |
| Defendant-Appellant. | : | |

# RESPONDENT'S REPLY BRIEF TO PETITION FOR REHEARING

## Brief in Opposition to Petition for Rehearing

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# RESPONDENT'S REPLY BRIEF TO PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Utah:

Comes now the Respondent, within twenty days of the filing of the Petition for Rehearing in the above-titled case; and respectfully submits this Brief in Answer to Petition for Rehearing, pursuant to and in accordance with Rule 76(e)(2), Utah Rules of Civil Procedure and for cause thereof show:

1. The alleged prosecutorial misconduct did not constitute Plain Error and therefore may not be the subject of review by the appellate court.

2. The appellant could have objected to the alleged misconduct to correct any error and to preserve the issue for appeal.

3. The evidence at trial sufficiently supports the verdict.

4. Appellant had adequate opportunity to respond to newly uncovered cases and authority presented at oral argument.

Wherefore, appellant's Petition for Rehearing should be denied.

## ARGUMENT

### POINT I

THE ALLEGED PROSECUTORIAL MISCONDUCT DID NOT CONSTITUTE PLAIN ERROR AND THEREFORE MAY NOT BE THE SUBJECT OF REVIEW BY THE APPELLATE COURT.

Plain error is reversible whether the error is reserved by objection at trial court or not. Herzog v. United States, 226 F.2d 561, 569 (9th Cir. 1955). Plain error is defined in Federal Rules of Criminal Procedure, Rule 52(b), 18 U.S.C.A., as an "error or defect affecting substantial rights."

> Rule 52 does four things: (1) defines "Harmess Error", (2) provides that "Harmless Error" shall be disregarded by the courts, (3) defines "Plain Error", and (4) provides that "Plain Error" may be noticed although not brought to the attention of the court. The definitions make it clear that all error is either "Harmless" or "Plain" depending upon whether it affects substantial rights. It cannot be disputed that "Plain" error and prejudicial error mean the same thing, as prejudicial error is error which affects substantial rights. There is no

> mysterious third type of error which appellate courts may recognize under certain circumstances. If error is harmless it will not be considered whether called to the attention of the court or not; if it is plain or prejudicial error it must be considered if properly brought to the attention of the court and may be considered although not brought to the attention of the court.

Herzog at 569 (citations omitted).

Utah statutes are clear on the appellate disposition of error. "Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." Utah Code Ann., § 77-35-30(a).

In this case there was no error affecting the substantial rights of the appellant. The alleged impermissible comments were not perceived as an abrogation of the defendant's rights at the time they were uttered since the defendant did not object to them. The context clearly indicates that the statements were made to refute defendant's argument as to who had proved what, not to bring the failure of the defendant to testify to the jury's attention (T. 127-129, 131-132, 142-143). Following the trial the defendant moved for a new trial and the trial court carefully considered the comments and ruled "I have doubts that [the statements were] improper, but, in any event I don't think [they were] prejudicial." Transcript of Hearing on Motion for New Trial at 98 (emphasis added). Utah courts enjoy a presumption of

veracity and correctness which may be disturbed only when an appellant shows such serious inequity as to manifest clear abuse of discretion. First Security Bank of Utah, N.A. v. Wright, Utah, 521 P.2d 563 (1973); Latimer v. Katz, Utah, 508 P.2d 543 (1974). The appellant fails to indicate wherein the trial court abused its discretion in ruling the comments not prejudicial and no such abuse is manifest in the record. Therefore the ruling stands and the comments are not prejudicial, or do not constitute plain error. Amoss v. Bennion, 30 Utah 2d 312, 517 P.2d 1008 (1973) (see, generally, Respondent's Brief, Point I, p. 5).

The appellant relies on several federal and state cases in an attempt to show that there was plain error in this case. Each of the following cases is cited by the appellant: In United States v. Bohr, 581 F.2d 1294 (8th Cir.) cert. denied, 439 U.S. 958 (1978), the prosecutor "obviously misstated the evidence" (Id. at 1301) in closing argument. The court opined:

> Although we feel that it would have been better if the government had not made the questioned remark, we note that the trial court has broad discretion in controlling closing arguments. Absent a showing of abuse of discretion this court will not reverse. "The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial." We must view the prosecutor's remarks in the context of

> the entire trial. With this in mind we find that the remarks of the prosecutor do not require reversal.

United States v. Bohr at 1301 (citations omitted).

In United States v. Gilliland, 586 F.2d 1384 (10th Cir. 1978), the prosecutor made reference to the defendant's failure to respond, or to respond truthfully, to an FBI investigator's inquiries where the defendant did not testify at trial.

> In several cases this court has noted as plain or fundamental error questions to a witness, including the defendant himself, which reveal that defendant refused comment when questioned by police or FBI agents, when the prosecution made comments which stated or inferred that there was something wrong with defendant's failure to deny or explain. The instant situation falls easily within that line of cases.

United States v. Gilliland at 1390. The appellant cites a quotation in the Petition for Rehearing at pages 1 and 2 attributed to the Gilliland case which does not appear in the text of the opinion.

In United States v. Segal, 649 F.2d 599 (8th Cir. 1981), the prosecution allegedly vouched for the credibility of government witnesses and expressed his personal opinion on the merits of the case. The court found no error and affirmed the conviction, citing United States v. Bohr. The appellant quotes footnote 10 on page 604 of Segal which includes a

citation to United States v. Splain, 545 F.2d 1131 (8th Cir. 1976). The Splain court said:

> Splain's counsel did not proffer an objection to this particular comment. Therefore, this court will review the alleged error only if it is shown that the argument was so prejudicial as to have "affected the substantial rights resulting in a miscarriage of justice." As indicated above, the overwhelming evidence of guilt in this case belies any contention that Splain's substantial rights were adversely affected by the prosecutor's comments.

Splain at 1136.

In United States v. Harbin, 601 F.2d 773 (5th Cir. 1979), the prosecutor attempted to provide the full evidence for the jury.

> Appellants' attack on statements made by government counsel as comments on their failure to testify in violation of their fifth amendment rights, requires more discussion. The United States entered extensive wiretapped conversations as evidence at trial, which necessitated calling witnesses to identify the various voices heard on the recordings as those of particular defendants. During his closing argument the United States Attorney stated to the jury:
>
> Now, you personally, of course, don't have knowledge of the voices of various people in the case, but the people who testified said that they knew these people. They explained to you how they knew them and the circumstances of their voice identification.

He also declared, in another comment on prosecution witnesses:

> And it was clear--it was clear as it could be that these people were telling the truth and that they were not holding back anything or getting anybody. Did you hear the defense attorney spring out anything, weren't you trying to get this guy because you hate him? No, there is no undercurrent to that in this trial at all. These people were merely getting up here, if you want to use the term, "spilling the whole beans" on everybody. Just laid it right out.

Appellants characterize these two statements as improper comments on their failure to take the stand by reasoning that the jurors could only have personal knowledge of their voices by having heard them testify, and the government witnesses' testimony could only have been contradicted by that of defendants so that the comments served to point out their failure to take the stand. While oblique comments on a defendant's failure to testify, if sufficiently suggestive, can be as pernicious and as unlawful as direct comments, we find no such reversible error here.

> The test to be applied when it is claimed that a prosecutor has impermissibly commented on a defendant's fifth amendment protected silence is whether or not "it can be said that the prosecutor's manifest intention was to comment upon the accused's failure to testify [or] was . . . of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. We conclude that appellants have failed to satisfy either of these criteria.

Harbin at 776 (citations omitted); See also: State v. Jefferson, 353 A.2d 190, 198 (R.I. 1976).

Although the cases United States v. Graham, 325 F.2d 922 (6th Cir. 1963) and Viereck v. United States, 318 U.S. 236 (1943) support the proposition that plain error is reversible error, they do not address the issue of prosecutorial comments on defendant's failure to testify. In People v. Cruz, 605 P.2d 830, 162 Cal. Rptr. 1 (1980), the alleged prosecutorial misconduct was held not to have been such as to cause a harmful result that could not have been cured by timely admonition (Cruz at 842). If the defendant had objected to the various remarks complained of, the alleged defect could have been cured.

In State v. Smith, 420 P.2d 278 (Ariz. 1966), the prosecution made statements which provide a good example of the kind of comments amounting to plain error:

> Counsel talked about the defendant not taking the stand. He gave several reasons for which the defendant did not have to take the stand. Since he has opened the door in that area, I would like to say that one of the reasons the defendant does not have to take the stand is because when he does take the stand, he is submitted to cross-examination, and on cross examination the state would be allowed to go into any aspect of the defendant's life which might have a bearing on the case and he would be asked about anything that he may have done in the past, any trouble he had been in, any conviction that he may have had, and certainly if he had been in trouble before, he wouldn't want to take the stand.

Smith at 279. These comments clearly address the defendant's failure to testify and therefore breach the defendant's fifth amendment privilege against self-incrimination. The Smith comments are much different from those of this case.

It is clear that plain error is reversible error despite a defendant's failure to object. However, none of the authority appellant cites in her Petition for Rehearing tends to show that the prosecutor's comments in this case were prejudicial. These cases show that the comments were permissible under the circumstances at the trial (see, generally, Respondent's Brief, Point I, p. 5).

## POINT II

### THE APPELLANT COULD HAVE OBJECTED TO THE ALLEGED MISCONDUCT TO CORRECT ANY ERROR AND PRESERVE THE ISSUE FOR APPEAL.

The appellant contends that an objection out of the hearing of the jury prior to deliberation would have compounded the error because it would have "cause[d] the jury to pause and reflect at that point on the damaging comments." Petition for Rehearing, p. 6. The appellant fails to note the admonition of Justice Oaks in State v. Hales (Utah, No. 18083, filed July, 1982, Oaks, J.). The objection should have been made at the close of the state's argument out of the hearing of the jury prior to the deliberations (State v. Hales at 4), not, as the appellant perceives, as an interruption of the state's argument in close proximity to the alleged erroneous comments.

The appellant further argues that to object would have been fruitless since the trial court ruled subsequently that the comments were not prejudicial. On the contrary, objection at trial would have reserved the issue for review, the precise end the appellant seeks. The comments were so innocuous that defendant's counsel apparently did not perceive that the comments might be prejudicial until they were taken out of context.

## POINT III

THE EVIDENCE AT TRIAL SUFFICIENTLY SUPPORTS THE VERDICT.

The appellant maintains that the testimony of two fire inspectors was inconclusive; therefore the guilt of the appellant was in doubt. However, the appellant fails to weigh the remainder of the evidence introduced at trial.

> Contrary to the defendant's assertion, the verdict in this case did not hinge on the prosecution's comments; there was substantial evidence presented sufficient to sustain the conviction without the prosecutor's comments. The lack of evidence of fire in the home shortly after the burning was to have taken place, the great evidence of burning outside the home, the inadequate damage to the metal chair, lack of burns or singes on defendant's person, the high improbability of a spark igniting the records as the defense postulates, the theory of embezzlement providing a motive for the destruction, and the unreliability of the appellant's husband's testimony could have sustained the verdict without any argument by the prosecutor whatsoever.

Respondent's Brief, p. 12.

The jury was convinced beyond a reasonable doubt that Zolla Hales willfully destroyed public records in her custody.

## POINT IV

### APPELLANT HAD ADEQUATE OPPORTUNITY TO RESPOND TO NEWLY UNCOVERED AUTHORITY PRESENTED AT ORAL ARGUMENT.

The appellant contends that she was not afforded adequate opportunity to respond to newly uncovered cases and authority presented at oral argument. Appellant's counsel was notified several days prior to the oral argument of the new cases not included in Respondent's Brief. Appellant made no objection at oral argument to the use of the cases and even attempted to analyze one of the cases in her favor. Appellant has, even now, failed to adequately rebut the provisions of the new authority.

## CONCLUSION

The alleged error complained of was not reserved for appellate review and was ruled not prejudicial by the trial judge. It therefore not plain error. The appellant's failure to object at the trial should preclude her from raising the issue on appeal or on rehearing. The Petition for Rehearing should be denied.

Respectfully submitted this 30th day of August, 1982.

EARL F. DORIUS
Assistant Attorney General

## CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Respondent's Reply to Petition for Rehearing, postage prepaid, to W. Andrew McCullough, Attorney for Appellant, 930 South State, Suite 10, Orem, Utah, 84057, this 30th day of August, 1982.

Susan Patton