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State of Utah v. Paul Dubrae Waldoch : Reply of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. PAUL DUBRAE WALDOCK, Defendant/Appellant.	Criminal No. 111600055 Appellate Case No. 20140851-CA Trial Judge: MARVIN D. BAGLEY

REPLY OF APPELLANT WALDOCK

This is an appeal from the judgment and sentence filed on or about the 27th of August, 2014 in Sixth Judicial District Court of Kane County, Utah, the Honorable Marvin D. Bagley presiding, the matter assigned to the Utah Court of Appeals pursuant to Rule 42 (a), Utah Rules of Appellant Procedure, the Appellant sentenced to serve five years to life in the Utah State Prison, no fine imposed, for object rape, a first degree felony and sentenced to no incarceration and no fine for two courts of forcible sexual abuse, each a second degree felony, and the Appellant is presently incarcerated.

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I.

JURISDICTION

Appellee agrees with Appellant that jurisdiction is appropriate before the Utah Court of Appeals, pursuant to Rule 42 (a), Utah Rules of Appellate Procedure, the case having been transferred to the Utah Court of Appeals pursuant to Utah Code Annotated §78A-4-103(2)(j) (1953, as amended).

II.

RESOLUTION OF STATEMENT OF FACTS

The Appellee sets forth what it believes to be the facts recited in the light most favorable to the jury verdict consistent with State v. Dunn, 850 P.2d, 1201, 1205-06 (Utah, 1993). This amounts to simply picking out those portions of the transcript that Appellee believes to be sufficient to support the convictions but making no attempt to reconcile the non-conforming evidence and testimony presented at trial, identified in Appellant's brief, the evidence which is inconsistent or contrary to the assertions made by

the victim.

This amounts to stating that the victim's testimony was sufficient and generally purporting that her assertion of non-consensual contact is corroborated by the fact that she had bruising on her ribcage and on both thighs, vaginal abrasions and that DNA testing found seminal fluid on her sweater.

The Appellee does not attempt to reconcile the inconsistencies in the physical evidence regarding DNA testing, the issue of abrasion verses laceration, as it pertains to consensual v. non-consensual contact or the testimony of at least one expert witness. In short, the Appellant makes no effort to recognize the physical evidence inconsistent with the victim's assertion of non-consensual contact, choosing to simply ignore it. The Appellant takes the position that this is not a case of his word against her word. Rather, one where the physical evidence supports Appellant's version of the facts and does not support the assertions made by the victim that such contact was non-consensual. The case is further complicated by the fact that other events occurred at the trial which compromised the jury deliberation process and impacted its outcome. This included having a husband and wife serve in the same jury, not making full and complete admonition regarding any discussion of the case prior to deliberation, the prosecutor appealing to the jury's passions and prejudices, attempting to invoke sympathy for the victim rather than address the factual findings made by the State's witnesses; getting the jury to relive the victim's experience instead of addressing the inconsistencies and medical testimony, and deliberation was also compromised by Appellant receiving

ineffective assistance of counsel by counsel not objecting to what had transpired.

III.

RESPONSE TO APPELLEE'S ARGUMENTS

POINT NO. 1

THE APPELLANT'S GENERAL ASSERTION OF SUFFICIENCY OF EVIDENCE MISSES THE DISTINSTION RASIED AT TRIAL EVIDENCING CONSENSUAL OVER NON-CONSENSUAL CONTACT

The primary distinction in the evidence which appears to be missed by Appellee is the evidence on injuries which is not consistent with non-consensual contact. Rather, the injuries sustained confirm consensual contact and are inconsistent with the victim's testimony. This case is unique in that it shows how physical evidence must be reconciled to eliminate reasonable doubt.

Notwithstanding the Appellee's assertion, the testimony at the trial showed that the physical evidence did not support the victim's assertion of penetration and where the conduct occurred while she was sitting upright in a vehicle, penetration would not have been possible without her making accommodation by repositioning her lower body to allow for it. Non-consensual contact would have left laceration not abrasion. Laceration is the injury that would have corroborated the victim's testimony. Abrasion does not. Abrasion is not inconsistent with consensual contact and the evidence presented at trial does not exclude the possibility that this was the result of contact over clothing or caused by the clothing itself. In other words, the physical evidence is not as suggested by

Appellee consistent with the victim's testimony and does not corroborate her testimony. Still, it is the evidence presented at trial is what it is and this constitutes the basis upon which the jury's convictions are to be sustained. It would be inappropriate for a jury to simply ignore the inconsistent physical evidence just as it should be inappropriate for this Court to ignore such to sustain a conviction based only upon the testimony of the victim with such inconsistent physical evidence. The evidence in this case presents a circumstance consistent with State v Maestas, 2012 UT, 46, 299 P. 3d 892, that it is sufficient to disturb a jury verdict where it is physically impossible or obviously false. The physical evidence here reveals circumstances upon which the victim asserts non-consensual penetration, physically impossible and/or obviously false without her accommodating such penetration by repositioning herself while sitting upright in her vehicle. Moreover, the testimony of the victim is not precise. There is no clear evidence of penetration. Rather, the evidence of penetration is cobbled together by the victim's imprecise assertion with regard to penetration where conclusions are drawn from medical personnel based upon abrasion, an injury consistent with consensual contact. This does not make the evidence sufficient to confirm the conviction of object rape but points out clearly the insufficiency of it.

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POINT NO. 2

APPELLANT HAS SHOWN EXCEPTIONAL CIRCUMSTANCES AND THE BRIEFING IS SUFFICIENT AND COMPLETE.

Appellee attempts to assert that Appellant has not met its burden under Rule 24, Utah Rules of Appellant Procedure, by failing to cite to authority or offering reasoned analysis on that authority. The reply is a simple one. There is no such authority in the State of Utah because this is a matter of first impression. Appellant has addressed the issues of concern which even the case law cited by Appellee support. In short, when circumstances arise where a husband and wife are serving on the same jury, the trial court should have been prompted to make further inquiry into each juror's ability to render an independent decision or to dismiss one of the two as having a relationship too close as to imply a bias or undue influence depriving the Appellant of his right to have the matter tried before an impartial and fair jury. The circumstances were discussed in detail and presented in the context or Rule 17 (k), Utah Rules of Criminal Procedure, which deals with making appropriate and complete admonition and in the present case this was never done. Appellee cites to Childs v State, 257 Ga. 243, 357 S.E.2d 48 (1987) in support of its assertion that the great weight of case law from other jurisdictions shows that having spouses on juries does not constitute error; however, in that case, spouses serving on juries was never discussed let alone addressed in the context suggested by Appellee. In State v Richie, 960 P.2d 1227, the Hawaii Supreme Court addressed the matter but considered allowing such to occur only upon the assurance that further voir dire inquiry

was made. In pertinent part, it stated:

> We disagree with Richie's assertion that jurors that are married to each other must be disqualified from jury service. Both Mr. and Mrs. Ferguson expressly stated during voir dire that they would each make their own decisions and would not automatically go along with the other person. Thus, there is no evidence that Mr. and Mrs. Ferguson was incapable of fulfilling his or her responsibilities as a juror. Richie cannot demonstrate actual impairment of the Fergusons' ability to serve as jurors. Id at 1244.

The court in that case went on to suggest that there was an implied bias where a perspective juror is a prosecutor employed at the same office as the prosecutor trying the defendant but found that to be a disguising characteristic in the case before it. In the present case, this part of the admonition was never sufficiently given particularly in light of the fact that two of the juror would be returning home to the same household.

In Harris v. Commonwealth, 313 S.W.3d 40, the Supreme Court of Kentucky followed a procedure that should have been followed in the present case. In that case, the Court stated as follows:

> Following individual voir dire and prior to commencement of general voir dire, Harris noted that the remaining panel included two married couples, jurors' 28 and 29, and another couple. Arguing that these jurors would not be independent but would unduly influence each other and also they would find it difficult not to discuss the case as it was proceeding, Harris moved to have one member of each couple randomly selected and dismissed. The trial court denied the motion at that point in time, ruling instead that the couples could be questioned and if their answers confirmed Harris' concerns one member of the couples could then be removed. During general voir dire Harris referred to these couples and asked them whether they would not find it difficult to refrain from discussing the case as it was going on. Both couples gave assurance, however, that they would be able to abide by the admonition not to discuss the case. Harris did not ask these couples whether they would be apt to influence each other, and he did not renew his

objection at the end of the voir dire and did not remove either juror 28 or 29 peremptorily. Both served on the jury. Id at 49

When the Appellant in that case challenged the married jurors status, the Kentucky Supreme Court stated as follows:

> Indeed, we have held that notwithstanding a perspective jurors responses during voir dire, whatever his or her protestation of lack of bias, the jurors close relationship, (be it familial, financial or situational, with any of the parties, counsel, victims or witnesses) is sufficient to require the court (to sustain the challenge for cause and excuse the juror). (Citation omitted). This is so, we explained, because however sincere and well-meaning such prospective jurors may be, such close personal relationships are apt to unconsciously affect their decision in the case. (Citation omitted). Bias, however, presumptive or otherwise refers generally to jurors favoring or disfavoring one side of the case or the other, a risk not posed by relationships between jurors. For that reason, the few courts that have addressed the issue of married jurors have held that such jurors are not presumptively disqualified and that their independence may be adequately assured through voir dire. Id at 50.

Again, this is what did not occur in the present case. In other words, the great weight of authority cited by Appellee supports the proposition that having married jurors serve on the same jury prompts a more detailed voir dire questioning and admonition which did not occur. This case is the consequence of inadequate inquiry by the trial court or defense counsel's failure to object and it was error on the part of the court or ineffective assistance of counsel and in either case the matter warrants remand.

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POINT NO. 3

THE CIRCUMSTANCE INVOLVING A HUSBAND AND WIFE SERVING ON THE SAME JURY IS AN EXCEPTIONAL ONE FOR CONSIDERATION UNDER THE PLAIN ERROR DOCTRINE.

Appellee treats the circumstance involving married jurors the same as something one might see in the normal course of jury selection or deliberation. The event is so rare that there is no previous Utah authority on the matter that attempts to address the issue. Since Mrs. Rasmussen only served as an alternate and did not participate in the deliberation process, the Appellee contends that it is not really an issue. This position misses the point entirely. The issue is one of influence upon those who did serve on the jury and to that extent the influence does not simply go away by having the alternate dismissed. In fact, the entire voir dire process becomes unreliable when it comes to relationships that are so closely connected. To assume that such influence would not be present or not have an impact simply because each married member of the jury responded appropriately to voir dire questions seems to cast a blind eye upon the process for which the very purpose is to preserve a defendant's right to a fair and impartial trial. It makes a mockery of the entire voir dire process. This is exactly the kind of undue influence that cannot be cured through voir dire on rehabilitated by asking additional questions. Appellee argues that Appellant failed in establishing that such a circumstance is a rare one simply because Appellant has failed to cite to authority calling it such. The

circumstances of this case are even more rare because there is no such authority addressing this situation in that context.

POINT NO. 4

THIS CASE WARRANTS A STANDARD OF PRESUMED PREJUDICE

To hold Appellant to establish actual prejudice verses a presumed standard creates an impossible burden. The Appellant argues that when it concerns the impact of one juror upon another this can never be established when such inquiries are barred through the deliberation process under Rule 606, the Utah Rules of Evidence. The only way such information would come to light after deliberation would be through the testimony of another member of the jury and this would be disqualified to the extent that is was not presented extraneously or manifested as an outside influence improperly utilized by the jury. This is exactly why the influence of a spouse is one that should give rise to suspicion because it would not necessarily manifest itself in such outward expression. Rather, it is the type of influence and impact that would not necessarily be declared or conveyed through the deliberation process but would have its influence upon deliberation. While Appellee cites to various sources in conjunction with a standard of actual prejudice, the circumstance before the Court is unique and not one upon which the failure to admonish concerned a jury of this composition. Therefore, the cases cited do not reflect the heightened sensitivity upon the issue as to why such failure to admonish

should be presumed prejudicial.

The same argument applies with regard to a show of actual bias. Again as explained above, the circumstances go beyond merely a juror responding appropriately to questions being asked but due to the relationship require a deeper inquiry to ensure that the Appellant receives a fair and impartial jury at trial. However, the circumstances of the present case are void of any such inquiry entirely and this was due to the fact that such inquiry was never made either by the Court or by defense counsel.

POINT NO. 5

THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The Appellee finds no inconsistency in arguing that issues on appeal have not been preserved and failed to qualify under the Plain Error Doctrine and at the same time argue that there was no ineffective assistance of counsel. Appellee attempts to argue that the fact that defense counsel did not object or make more adequate inquiry into jury selection was somehow a calculated trial strategy which is not manifested in the record. There is no sound trial strategy which would have condoned keeping a husband and wife on a jury involving a criminal case of sexual abuse and object rape. In short, the performance of defense counsel was deficient and the defendant was prejudiced by suffering a conviction, see Strictland v. Washington, 466 U. S. 668 (1984).

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POINT NO. 6

APPELLANT HAS ADEQUATELY ADDRESSED THE ISSUE OF PROSECUTORIAL MISCONDUCT AS IT PERTAINS TO APPEALING TO JUROR'S PASSIONS AND PREJUDICES CONCERNING THE VICTIM.

This was a case that came down to an issue of evidence regarding consensual verses nonconsensual contact. One where the victim's testimony was called into question and the issues before the trial court concerned those as to whether or not the medical testimony corroborated her assertion. The fact is that the physical evidence did not corroborate the testimony of the victim and as a result the prosecutor enticed the jury to follow a course to get its members to relive the event from the victim's perspective and made an appeal vouching for her truthfulness and how she might feel if they ruled against her. Having the prosecutor vouch for the truthfulness of the victim is not appropriate in closing argument. Addressing the matter in the context in having jurors relive the victim's experience appealing to their sympathies for the victim is also not appropriate. The impact that it had upon the jury is a matter that cannot be preserved due to the Rules of Evidence that have been heretofore addressed. Counsel for the defense was ineffective in failing to make a proper objection notwithstanding the fact that the parties approached the bench during the prosecutor's closing argument which seemed to have diverted at least in part the direction which the prosecutor was intending to argue. It is, however, in

light of all these factors that the matter should be considered as a whole. In particular the evidence in not precise nor sufficient to establish the key element of penetration for purposes of the rape charge and this has been compromised by the unusual makeup of the jury in light of the status of two of its members, as well as, ineffective representation at trial, incomplete and infrequent admonition and prosecutorial misconduct during closing argument. When viewing the matter in its entirety, there can be no doubt that the Appellant in this case failed to receive a trial by a fair and impartial jury. In fact, it is the obvious nature of these particular characteristics that make this case a particularly egregious one since the process itself is one focused on addressing such concerns with particularity to ensure that a situation such as this one does not arise and in fact it is a situation that has not manifested itself in the State of Utah at least to the extent of this Court has addressed such concerns in the past. In light of these circumstances, the Appellant asserts that the case should be remanded for a new trial.

IV.

CONCLUSION

On the grounds and for the reasons set forth above, counsel for Appellant prays that this Court reverse or remand as it deems appropriate together with such other and further relief as to it appears equitable and proper.

DATED this 14th day of Sept, 2017.

J. BRYAN JACKSON
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with Rule 24(f)(1), Utah Rules of Appellate Procedure, this reply brief contains 3,233 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with Rule 27(b), Utah Rules of Appellate Procedure, this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 13 point.

J. BRYAN JACKSON
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CERTIFICATE OF MAILING

I hereby certify that on the 14th day of Sept, 2015, I mailed a true and complete photocopy of the forgoing, *REPLY BRIEF OF APPELLANT*, by way of the U.S. mail postage fully paid to:

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