2015

State of Utah, Plaintiff/Appellee, v. Donavan Burnside, Defendant/Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, Plaintiff/Appellee, v. DONAVAN BURNSIDE, Defendant/Appellant.	)	REPLY BRIEF OF APPELLANT **Case No. 20140400**

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REPLY BRIEF OF APPELLANT

THIS IS AN APPEAL OF
FINAL JUDGMENT ENTERED IN THE
FIRST JUDICIAL DISTRICT COURT
OF CACHE COUNTY, STATE OF UTAH
THE HONORABLE CLINT S. JUDKINS

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ARGUMENT

Burnside's brief set forth two arguments: (1) the court would not allow him to develop his theory of the case; and (2) ineffective assistance of counsel. Burnside asserts that these two issues are inherently connected and, therefore, in this reply responds by discussing both issues in the same argument.

A. THE COURT DID NOT ALLOW BURNSIDE TO DEVELOP HIS THEORY OF THE CASE.

As set forth in the Burnside brief, at least half of the evidence presented at trial by the State of Utah concerned the principle of Post Traumatic Stress Disorder (PTSD). The key to the State's theory was that the State of Utah had to show that [AS] was happy and then at some point became unhappy. Dr. Hancock, the State's principle expert, testified that [AS]'s behavior is consistent with PTSD. R. 395: 68-74. Further, Dr. Hancock testified that a traumatic experience like sexual abuse could cause a happy child to become sad and depressed, as [AS] was exhibiting. R 395: 110 & R 395: 68-74.

The theory that the child was not happy.

In contrast to the State of Utah's theory, Burnside wanted to show that [AS] was not happy long before Burnside became involved in her life thus showing that the unhappiness in [AS]'s life was not connected to Burnside or any conduct associated with him. In order to support Burnside's theory, he wanted to

introduce evidence from two witnesses, a medical doctor and [AS]'s biological father. Br. Aplt. 17.

The State of Utah first responds by arguing two contradictory positions: (1) It claims, "Defendant does not acknowledge, much less challenge, the motion court's reasoning that Defendant waived this claim." Br. Aple. 55; and (2) It then claims, "For the first time on appeal, Defendant asserts that the trial court also prevented his presentation of the defense theory when it interrupted testimony from one of Defendant's witnesses . . ." Br. Aple. 58.

In order to clarify this matter, Burnside gives the following explanation: In Burnside's appeal, he asserts that there were two theories that his trial counsel was trying to present. " . . . Burnside's theory was two-fold. First, Burnside asserted that the child was not happy . . . Second, if [AS] was suffering from PTSD, then it was caused by other events in the child's life, such as the abuse, neglect, drinking and drug use of the step-father and neglect of the mother." Br. Aplt. 17.

Burnside filed a motion to arrest judgment in the trial court. However, as part of Burnside's motion to arrest judgment, he did not raise all the issues that he has raised on appeal. In the trial court, Burnside did not raise the first prong of his theory - that the child was unhappy prior to contact with Burnside. Therefore, the trial court did not rule on this issue or any questions related to this issue, such as ineffective assistance of counsel.

However, Burnside asserts that he had a right to pursue this theory. "Under Utah Rules of Evidence 401, any evidence that is slightly probative is relevant." See *State v. Jaegen,* 973 P.2d 404, 407 (Utah 1999). "Relevant evidence" means evidence that has any tendency to prove or disprove the existence of any material fact. *Id.* In the present matter, Burnside is asserting that the trial court erred in prohibiting him from introducing evidence of [AS]'s unhappy life prior to contact with Burnside. Br. Aplt. 17.

On the other hand, the State of Utah attributes the lack of presentation of evidence to Burnside's trial attorney. Whether the evidence excluded from the trial was because of an error by the trial court or ineffective assistance of counsel by Burnside's trial counsel, Burnside is nevertheless the one that was injured.

Testimony of [AS]'s natural father:

The following dialogue took place during the trial:

"Q. I'm sorry. And how did you learn about her medical condition?

A. I've known about [AS]'s condition for quite some time.

Q. All right. Starting when, sir?

A. When she was, I want to say, six months to a year old, me and my wife at the time were documenting when she would come over for weekends - - she would constantly come over with diarrhea, severe diaper rash to the point that we couldn't change her without hurting her. We couldn't bathe [sic] her without her crying."

MR. WALSH: And, Your Honor, I guess I would object to what happened when she was six months to a year old. I don't think that's relevant to why we're here today." R. 396: 43-44.

At this point, the proper procedure is for the court to either sustain or overrule the objection. If the court sustains the objection, then the attorney cannot continue that line of questioning. If the court overrules the objection, then the attorney can continue on with the questioning. The proper procedure is not always followed by attorneys or judges. Attorneys don't always object in the proper form and judges don't always rule in the proper form.

In this matter, the trial judge did not rule in the proper form by either "sustaining" or "overruling". However, it appears clear from the judge's answer that he sustained the objection. The court stated:

"THE COURT: That very well may be. Again, respond directly to the question. It's important that proper foundation for the knowledge that you're imparting be given. To do that, Mr. Henderson has to ask certain questions. Just respond to the question after - - the response." R 396:44.

The court's response was equivalent to sustaining the objection. The prosecutor had objected on the grounds of relevance. The court counseling the witness to respond only to the question clearly implied that he was sustaining the objection.

The State of Utah argues in its brief that the trial court did not sustain the objection, "thus, counsel could have continued that line of inquiry had he believed it was important." Br. Aplt. 58. As stated above, the trial court's response was the equivalent of sustaining the objection. Therefore, Burnside's trial counsel was not free to continue that line of questioning.

Next, the State of Utah claims that Burnside did not object to the trial court's ruling, thus not preserving this claim at trial. Br. Aplt. 58. The State of Utah suggests that in order for a party to preserve an issue for appeal, the losing party to the ruling is required to object to the trial court's decision. When one party asks a question and the other party objects, Burnside asserts that the attorney asking the question is not required to object to the judge's ruling in order to preserve the objection.

According to the State of Utah, the requirement to properly object would go as follows:

Attorney A: Was there marijuana use in your home?

Attorney B: Objection, relevance.

Judge: Sustained.

Attorney A: I object to your ruling.

This is not the proper procedure and goes against the rules of professionalism and civility to argue with the judge after the court has made a ruling.

The testimony of [AS]'s former medical doctor or the medical report:

During the trial, the following dialogue took place:

"Q. Yeah. Was there any time when you took her for medical treatment for either the rash or the spicy pee when a doctor, after he tried to examine her, told you that in fact he was unable to do so because she, [AS], was so upset she would not let him examine her?" R. 395: 58-59.

"MR. WALSH: Your Honor, I'm going to object to what the doctor said. That would be hearsay, but I guess if she wanted - - if we could ask it a different way and say was there any time where she wasn't able to see the doctor because she was so upset. His statement I would object to because the doctor's not here.

THE COURT: It would appear it's being offered for the truth of the matter asserted. The court will sustain the objection as being hearsay." R. 395: 59.

B. BURNSIDE DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

On appeal, Burnside has argued that this information was important for the first prong of Burnside's theory of his case, specifically that [AS] was not happy prior to Burnside living in the home. Burnside argued that his trial counsel was ineffective because he did not subpoena the doctor to testify about [AS]'s unhappy attitude. "Burnside's attorney did not take any action to subpoena the doctor that treated [AS]. He could have testified that [AS] had been a very unhappy child long before Burnside was in her life. Because Burnside's trial

attorney did not subpoena the doctor, the information in the doctor's medical report was not conveyed to the jury. This information was relevant and material to Burnside's defense." Br. Aplt. 13-14.

The State of Utah first responds to Burnside's argument by claiming that this issue was raised in his motion to arrest judgment and that the "motion court" found that this testimony would have been merely cumulative. Br. Aple. 29. As stated above, Burnside did not raise this first prong of his theory at the trial court, and the trial court did not rule with regard to this issue. Therefore, when the State of Utah asserts in its brief that the "motion court" found this testimony would have been merely cumulative, any such ruling by the "motion court" would have to apply to the second prong of Burnside's theory, which is "if [AS] was suffering from PTSD, then it was caused by other events in the child's life, such as the abuse, neglect, drinking and drug use of the step-father and neglect of the mother." Br. Aplt. 17. This second prong is what the "motion court" ruled was cumulative evidence.

As state above, Burnside asserts that the trial court erred by not allowing him to present evidence related to his theory that the child was not happy prior to having contact with Burnside. In the alternative, Burnside asserts that if the State of Utah is correct that all the error that occurred in presenting this theory at trial is attributable to his trial counsel, then Burnside argues ineffective assistance of counsel.

With regard to ineffective assistance of counsel, the State of Utah has asserted the following: "'Courts apply a heavy measure of deference to counsel's judgments,' *id.* (quoting *Strickland,* 466 U.S. at 691), because, '[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client.' *Richter,* 131 S.Ct. at 788. And though 'in hindsight it may be easy . . . to second guess counsel's actions,' this court 'must appreciate that an attorney's job is to act quickly, under pressure, with the best information available.' *State v. Lenkart,* 2011 UT 27, ¶25, 262 P.3d 1.'" Br. Aple. 32.

Burnside agrees with the State of Utah, appellate courts should give great deference to a trial counsel's judgment. Being a jury trial attorney is much like being a football coach. When a defense attorney wins the jury trial, the defendant is happy, the defendant's family is happy, they give the attorney accolades. But like the football coach, when the jury trial is lost, everyone wants to second guess the attorney's judgment.

A good illustration of this happened in the 2015 Super Bowl. The New England Patriots played the Seattle Seahawks. At the end of the fourth quarter, New England led Seattle 28 - 24. With 26 seconds left in the game, Seattle had the ball on New England's 1-yard line. In order to win the game, Seattle only needed to move the ball one yard. Also, Seattle had one of the best running backs in the National Football League. Instead of running the ball Seattle

passed the ball, and it was intercepted, thus losing the game. After the game, Seattle's coach received intense scrutiny for his play selection. Most people believe that Seattle should have run the ball instead of passing it. Although, in hindsight, it may be easy to second guess the coach's decision, if Seattle would have scored on the pass play, Seattle's coach would have been hailed as a hero. Likewise, it is easy to second guess a jury trial attorney.

However, what Burnside has raised on appeal goes way beyond what play should have been called or what trial strategy Burnside's trial counsel should have employed. The issue that Burnside has raised is similar to calling a play, whether it be a run or pass, and then not putting enough players on the field to properly execute the play.

Burnside's trial counsel had a strategy but, because of personal problems, did not make adequate trial preparation. In one instance, he did not subpoena a necessary witness and, with regard to [AS]'s biological father, did not pursue a necessary line of questioning. When asked what impact Mr. Henderson's personal life had on the trial, Mr. Henderson testified it impacted his preparation for trial. R. 696: 21.

The record is clear. Mr. Henderson wanted to introduce evidence about [AS] not being happy long before she had contact with Burnside. With regard to the biological father, if Mr. Henderson was not prohibited by the trial court from introducing this evidence as discussed above, then he improperly failed to pursue

this line of questioning. In addition, when it came to the medical doctor, Mr. Henderson tried to introduce the evidence but was unable to introduce the evidence because the court ruled it was hearsay. R. 395: 57-58. It was Mr. Henderson's lack of trial planning and preparation that caused this evidence to not be presented to the jury. When a witness is not subpoened that has material evidence that could have assisted the defendant in his defense, this is ineffective assistance of counsel and is grounds for a new trial. See *State v. Templin,* 805 P.2d 182 (Utah 1990). Likewise, in *State v. Crestani,* 771 P.2d 1085 (Utah App. 1989), this court reversed and remanded for a new trial when an attorney did not subpoena a material witness. *Id.* The *Crestani* court went on to state that "[c]ertainly, there can be no appropriate performance in the courtroom without adequate preparation, and without such preparation, representation is nothing but a sham and a pretense." *Id.* In *Crestani*, Crestani was the sole stockholder of the Alta Title Company (Alta). *Id.* On February 10, 1982, Crestani opened a commercial money market demand checking account (MMD-2) at Sandy State Bank in Sandy, Utah, on behalf of Alta. *Id.* MMD-2 was one of several accounts Alta used until it ceased doing business in March 1993. A large amount of money flowed through this account; from March through August 1982, $9,448,613.44 was deposited and $9,579,594.90 was withdrawn. *Id.* During its thirteen-month existence, MMD-2 was used as a customer account, a deposit

account for contract service fees due to Crestani, and Crestani's personal account. *Id.*

On March 14, 1985, a five-count information was filed charging Crestani with theft of $57,300.00 from MMD-2 during the period of May 7 to August 13, 1982. *Id.* The gist of the information was that, on five occasions, Crestani had withdrawn funds from MMD-2 and used them for his personal benefit, and that this conduct constituted theft because MMD-2 should have been used exclusively for funds held in escrow by Alta for real estate closing. *Id.*

Shortly after the information was filed, Crestani approached Attorney Phil L. Hansen to conduct his defense. *Id.* In his initial consultation with Hansen, Crestani told Hansen that his defense to the charges was that the money he withdrew from MMD-2 was his personal money. *Id.* He described to Hansen the large amount of preparation he considered to be necessary for his defense, including an audit of MMD-2. *Id.* Hansen assured Crestani that he would do a thorough job and, specifically, that he would identify and interrogate all witnesses, thoroughly review all bank accounts involved, travel to California to prepare Crestani and his wife for their trial testimony, hire paralegals to prepare witnesses and exhibits, thoroughly research case law, and perform all other necessary efforts to properly prepare the case for trial. *Id.*

In *Crestani*, a preliminary hearing was held in May 1985, and Crestani was bound over on four counts to stand trial. *Id.* Over the next two years, the trial

date was continued on four occasions. *Id.* Hansen prepared a subpoena and served it on the bank. However, the bank did not deliver the records because Hansen failed to pay the bank's requested copy charges. *Id.* In short, Hansen only obtained part of the records needed for trial. *Id.*

In addition, Hansen did not meet witnesses in a timely manner. *Id.* Hansen first contacted witness Gary Clawson two days before trial and witness James McIntyre the day before trial. *Id.* On the evening before trial, Hansen finally met with Crestani and his wife. *Id.* Hansen failed to tell Crestani's wife that she would be a witness at trial and failed to review any of the bank records with her. *Id.* Finally, Hansen failed to subpoena and call Blake Hammond, a former Alta vice president. *Id.* "When counsel knows of the existence of a person or persons who possess information relevant to his client's defense, and he fails to use due diligence to investigate that evidence, such a lack of industry cannot be justified as 'strategic error.'" *Id.* citing *Jennings v. State*, 744 P.2d 212, 214 (Okla. Crim. App. 1987). Basically, the court in *Crestani* concluded that Hansen's failure to prepare and investigate was so serious and his performance so deficient that he was not functioning as the "counsel" guaranteed by the sixth amendment. *Id.*

In the present matter, Burnside asserts that there are several similarities between his counsel's performance and Attorney Hansen's performance in *Crestani*. In both cases, both attorneys requested numerous continuances but failed to use the time to prepare the case when the continuance was granted. In

Crestani, Attorney Hansen did not subpoena all the MMD-2 documents from the bank and did not subpoena witness Blake Hammond. *Id.* In the present matter, Burnside's trial attorney did not request funds for an expert in a timely manner and did not subpoena [AS]'s former doctor to testify about her unhappy nature.

Burnside asserts that when a material witness is not called to testify, then trial counsel's performance clearly falls below an objective standard. Furthermore, as stated above, half the testimony elicited by the prosecutor dealt with PTSD. This evidence was material to the outcome of the trial.

Without the State of Utah's PTSD theory, the State of Utah was not likely to prevail at the jury trial. On appeal, the State of Utah has argued that the outcome of the trial would likely have been the same even if the doctor was called as a witness because Burnside admitted to touching the child's vaginal area three times. Br. Aple. 35.

Burnside admits that he testified that he touched [AS]'s vaginal area three times. However, Burnside argues that this was not material evidence because the vaginal area was defined in the trial court different than in its ordinary meaning. "In an interview with police, Burnside admitted to checking [AS]'s spicy pee on three occasions." R. 396: 79. During the interview, the police defined the vaginal area as an area that included the upper thighs and surrounding area. R. 396: 132-133. Based on this definition, Burnside admitted to touching the vaginal area. R 396: 132-133. At trial, Burnside described to the jury how the

officer had defined the "vaginal area". R 396: 132-133. Burnside's testimony was never rebutted at trial by the officer conducting the interview. Br. Aplt. 6.

CONCLUSION

Burnside asserts that he was prohibited from presenting part of his theory of his case, to wit: that [AS] was not happy prior to the contact with Burnside. If the court is persuaded by the State of Utah's argument that the error in the presentation of Burnside's theory is the fault of his trial counsel, then Burnside argues, in the alternative, ineffective assistance of counsel. Consequently, Burnside requests the matter be remanded to the trial court for a new trial.

Respectfully submitted on this, the 15th day of April, 2015.

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Attorney for DONAVAN BURNSIDE
APPELLANT

Rule 24(f)(1)(c) Certification

I do hereby certify that the foregoing brief complies with Utah R. App. Pro. 24 in that it contains 3,756 words and 447 lines of text, exclusive of this Certification. I do further certify that I relied upon my word processing software to count the words and lines for me.

Gregory Skabelund

CERTIFICATE OF SERVICE

I do hereby certify that on the 15th day of April, 2015, I did cause to be mailed via U.S. First Class Mail, 2 true and correct copies of the foregoing REPLY BRIEF OF APPELLANT as well as a searchable PDF of the brief via email to the following, addressed as follows:

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ADDENDUM

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is comparable in substance to Rule 1(2), Utah Rules of Evidence (1971), but the former rule defined relevant evidence as that having a tendency to prove or disprove the existence of any "material fact." Avoiding the use of the term "material fact" accords with the application given to former Rule 1(2) by the Utah Supreme Court. State v. Peterson, 560 P.2d 1387 (Utah 1977).