

2016

**State of Utah, Pl a inti. ff/ Appellee, vs. Douglas Ewald Isaacson,
Defendant/ Appellant.**

Utah Court of Appeals

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Case No. 20150591-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

Vs.

DOUGLAS EWALD ISAACSON,
Defendant/Appellant.

Brief of Appellee

Appeal from a Judgment of Conviction entered on June 11,
2015 after a Bench Trial, in the Third District Court, Salt Lake
County, the Honorable William K. Kendall presiding.

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- Utah Code Ann. § 76-10-502 (when weapon deemed loaded)
- Utah Code Ann. § 76-10-504(2) (carrying concealed firearm)

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IN THE
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STATE OF UTAH,
Plaintiff/Appellee,

vs.

DOUGLAS EWALD ISAACSON,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals the judgment of conviction entered on June 11, 2005 for one count of carrying a loaded concealed dangerous weapon, a class A misdemeanor, after a bench trial conviction in the Third Judicial District, Salt Lake County, Utah, the Honorable Judge William K. Kendall presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2014).

STATEMENT OF THE ISSUES

Issue: Whether the court erred when it did not allow Mr. Isaacson to call two witnesses who would have testified about his character for truthfulness.

Standard of Review. An appellate court “will review a trial court’s evidentiary rulings for an abuse of discretion.” *State v. Alzaga*, 2015 UT App 133, ¶ 31, 352 P.3d 107, citing *State v. Davis*, 2013 UT App 228, ¶ 13, 311 P.3d 538.

“Even obvious error by the district court will not result in the reversal of a criminal conviction unless the error was prejudicial” and there is a high likelihood there would be a different result. *State v. Bragg*, 2013 UT App 282, ¶ 32, 317 P.3d 452, quoting *State v. Adams*, 2000 UT 42, ¶ 14, 5 P.3d 642.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

On February 20, 2014, the State charged the Defendant with one count of carrying a loaded concealed dangerous weapon, a Class A Misdemeanor, in violation of Utah Code Ann. § 76-10-504(2), for an offense that occurred on October 28, 2013. R 1-2. A petition for inquiry into competency to proceed was filed by the defense, and after evaluations were completed, a hearing was held and on April 2, 2015, the court ruled that the Defendant was competent to stand trial. R. 25-26; 57-63; 108-29.

A bench trial was held on April 27, 2015. R. 69-71. The state called one witness, Officer Elkins, and the Defendant testified on his own behalf. *Id.* The court denied Defendant’s request to have two character witnesses testify. *Id.* The Defendant was convicted as charged. *Id.* Defendant was sentenced on June 11, 2015 to 365 days in jail, which was suspended pending the successful completion of 18 months good behavior probation, completion of 24 hours of community service, and payment of \$100.00 recoupment fee. R. 77-78.

B. Statement of Facts

1. The Offense

On October 28, 2013, police received a tip from the Draper Library that the Defendant was carrying a weapon and was known to not have a concealed carry permit. R. 133:7. While en route, Officer Elkins and Officer Braegger were advised that the Defendant had left the library and was headed to the Draper Senior Center. *Id.* The officers located the Defendant in the cafeteria at the senior center. R. 133:9. Defendant admitted to officers that he had a weapon concealed inside his jacket and allowed Officer Braegger to remove it. R. 130. The weapon was a fully loaded, single action .357. *Id.* R. 133:13. In the past, Defendant had been told that he needed to “open carry” in order to be legal. R. 133:21. Defendant could not afford a holster and would just “put it in [his] inside pocket away from everything.” *Id.* Defendant admitted that he had taken the concealed carry class twice but did not have a concealed carry permit. *Id.* R. 133:19-20. Officer Braegger confirmed that the Defendant did not have a permit. R. 133:12.

2. The Bench Trial

Defendant stipulated that at the time of the offense he did not have a concealed carry permit, eliminating it as an affirmative defense. R. 69. Defendant indicated he was planning on calling two witnesses to testify to his truthfulness and

his “comprehension abilities” relating to “the concealed carry permit law” and carrying a weapon. R. 133:4. The State objected and the court reserved ruling until later. *Id.*

Officer Elkins testified for the state. R. 133:6-12. Body cam video was introduced and admitted. R. 133:11. The video showed that the Defendant was carrying a weapon concealed in his jacket and that the weapon was a fully loaded, single action .357. R. 130; 133:51.

Defendant testified for the defense. R. 133:16-26. Defendant testified that he had taken the concealed carry class twice but had not applied for or received a concealed carry permit. R. 133:28. Defendant also testified that he did not get a permit because he was waiting for the legislature to change. R. 133:20. He testified that he had been told that he could open carry the weapon and that he could not carry it concealed. R. 133:21. Defendant testified that he did not have a holster and carried it in his jacket instead. *Id.* Defendant further testified that he paid \$300 for the gun and had to economize in order to save enough money to purchase it. R. 133:27. He also testified as to his budget and how he was living on a minimal income which required economizing. R. 133: 19-20, 31-33.

During cross-examination of the Defendant, the state explored the Defendant’s inability to pay for a permit by requesting clarification of his prior testimony. R. 133:26-27, 35-38. The Defendant confirmed that he economized to

purchase the gun and to take the concealed carry classes, but he did not economize to save money to apply for a permit and did not know how much the permit cost. R. 133:27-31.

The Defendant renewed his request to call two character witnesses to testify to the Defendant's truthfulness and "comprehensive abilities" relating to "gun carrying and the concealed carry permit." R. 133:38-39. The state objected on the grounds that Defendant's character for truthfulness had not been attacked and any testimony as to Defendant's comprehension of gun laws was not relevant as it was already in evidence through Defendant's own testimony. R. 133:39-40.

The court ruled that there was no attack on the Defendant's truthfulness and pursuant to Rule 608 of the Utah Rules of Evidence, the court would not allow his witnesses to testify. R. 133:40-41. The court then ruled the Defendant testified, and the video showed, that he knew about the need for a permit, he took two permit classes, and "was aware of legislation that was there to change," and therefore, the proposed testimony would not be relevant or admissible. R. 133:41

The court found the Defendant knowingly and intentionally carried a concealed loaded dangerous weapon and was guilty as charged. R. 133:51. The court also found its duty was to "interpret and apply the laws to the facts," and that it need not reach an equal protection argument, noting that State law allows for the owning and possessing of firearms. R. 133:51-52.

SUMMARY OF THE ARGUMENT

Defendant claims that the trial court erred by not allowing his two character witnesses to testify as to his character for truthfulness. Defendant argues that the state's cross-examination was an attack on the Defendant's character for truthfulness when it questioned him concerning his direct testimony regarding his finances and inability to afford a permit or holster, and that the court should have allowed the defense to present the two witnesses. Defendant's claim fails because cross examination of Defendant's testimony by prosecution was merely that – cross-examination of the testimony of the Defendant – and not an attack of Defendant's *character for truthfulness*. Therefore, the trial court did not abuse its discretion when it did not allow Defendant's character witnesses to testify. Even if the court erred, any error was harmless because the Defendant was not prejudiced, nor would the outcome have changed with the testimony of his character witnesses.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT ALLOW DEFENDANT'S CHARACTER WITNESSES TO TESTIFY WHEN THERE HAD BEEN NO ATTACK ON DEFENDANT'S CHARACTER FOR TRUTHFULNESS.

Under the abuse of discretion standard, an appellate court reviews trial court evidentiary decisions for abuse of discretion. *Alzaga*, 2015 UT App 133.

Defendant contends that the standard of review is "correctness" and that this is a

question of law; however, that standard is for the admission of evidence. *Glauser Storage, L.L.C. v. Smedley*, 2001 UT App 141, ¶ 14, 27 P.3d 565. The issue before the court in *Glauser* was whether the trial erred when it excluded parol evidence in a breach of contract case, and it involved the application of the parol evidence rule and not a rule of evidence as in this case. *Id.* Here, under the abuse of discretion standard, the trial court did not err when it did not allow the testimony of character witnesses under Rule 608 of the Utah Rules of Evidence.

The crux of Defendant's argument is that the state's cross examination of the Defendant was an attack on his character for truthfulness. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject to the broad discretion of the trial judge, "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i. e., discredit, the witness." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

In his direct examination, Defendant testified as to his budget and how he had to economize in order to make special purchases or pay for entertainment. R. During cross, the state asked questions to elicit more detail about the Defendant's budget and how he would economize for entertainment and purchases. Defendant argues that the purpose of the state's cross examination was to prove that the Defendant was lying about his finances. However, contrary to the Defendant's

assertions, the State merely asked clarifying questions regarding what he had testified to in order to show, not that he was lying about his finances, but that he would routinely economize when he wanted to make purchases and that he chose not to do so when it came to applying for a permit. In fact, the Defendant stated he did not even know how much a permit cost and that he had never submitted an application for a concealed carry permit. R. 133:28.

To support his equal protection claim, Defendant inferred in his direct testimony that he was on a fixed budget and could not afford to apply for a concealed permit. The cross examination showed that even though the Defendant knew how to economize to purchase specific items like a weapon or take a concealed carry class, he chose not to make any effort to obtain a concealed carry permit. This line of questioning is permissible, and in fact, routine in cross examinations and was not an attack on Defendant's character for truthfulness. Therefore, the court did not err when it determined that the line of questioning was not an attack on his character for truthfulness and was not an abuse of discretion.

II. EVEN IF THIS WAS AN ABUSE OF DISCRETION, THE ERROR WOULD HAVE BEEN HARMLESS AS THE DEFENDANT WAS NOT PREJUDICED AND THE INCLUSION OF ADDITIONAL WITNESS TESTIMONY WOULD NOT HAVE RESULTED IN A DIFFERENT OUTCOME.

Even if the two witnesses had testified to Defendant's character for truthfulness and his "comprehensive abilities," their testimony would not have

changed the outcome of the case. Neither witness was present at the time of the incident; therefore, neither witness could provide any additional facts or evidence to the court to help in its determination. As Defendant indicated to the court, they would have testified as to his beliefs and his character for truthfulness, and not to any of the elements of the charge that was before the court.

The Defendant was charged with a violation of Utah Code Ann. § 76-10-504(2) which requires the State prove beyond a reasonable doubt that the Defendant was carrying a firearm that was concealed, and that the firearm was loaded. Addendum A. Utah Code Ann. § 76-10-502 provides that a weapon is deemed loaded “when an unexpended cartridge, shell, or projectile is in a position whereby the manual operation of any mechanism once would cause the unexpended cartridge, shell, or projectile to be fired.” *Id.* Here, the defendant admitted to carrying the loaded weapon concealed in his jacket. R. 130. The body cam video admitted into evidence clearly confirms that the weapon was concealed from view in his jacket. *Id.* The video also shows that the weapon was fully loaded, with a round in the chamber and that that round could be fired with one single action. *Id.* This was sufficient evidence to prove each element of the offense charged.

The issue of whether or not the defendant was truthful regarding his finances is not relevant to any of the elements of the charge. Similarly, any testimony as to

the Defendant's "comprehension abilities" relating to his second amendment right to bear arms would not be relevant to the elements of the charge. In fact, it was stipulated that he did not have a permit, therefore, the reasons why he did not have a permit were not relevant because there was no affirmative defense.

The Defendant argues that the error was prejudicial and claims that the witnesses "might have made the [equal protection] argument more persuasive" but does not show how it *might have* made the equal protection argument more persuasive. Def. App. Brief. The court clearly ruled that there was no equal protection argument or claim because the legislature does provide "a number of means by which someone can exercise their Second Amendment right to keep and bear arms." R. 133:51-52. Having two witnesses testify about Defendant's beliefs regarding his "comprehension abilities" relating to those rights would not have brought anything new to the table or given the court anything additional to consider. Moreover, such testimony would not change the fact that Defendant admitted to, and was found to be, carrying a concealed loaded dangerous weapon. Therefore, the Defendant was not prejudiced and had the testimony been allowed it would not have changed the outcome of the case.

CONCLUSION

The trial court did not abuse its discretion when it did not allow Defendant to have two character witnesses testify because Defendant's character had not been


attacked. Even so, if the court did abuse its discretion, the error would have been harmless since the testimony anticipated would not have related to any of the elements required to prove the offense or resulted in a different outcome, and the Defendant was therefore not prejudiced by its exclusion.

For the foregoing reasons, the State respectfully request this Court affirm the Defendant's conviction and deny his motion to reverse and remand.

RESPECTFULLY SUBMITTED this 22nd day of January, 2016.

SIM GILL
District Attorney

By:


COLLEEN K. MAGEE
Deputy District Attorney

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2453 words, excluding the table of contents, and table of authorities. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 14 point.


Colleen K. Magee

CERTIFICATE OF DELIVERY

I, Colleen K. Magee, hereby certify that I have caused to be hand-delivered an original and seven (7) copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114.


Colleen K. Magee

I hereby certify that two true and correct copies of the foregoing were mailed to Nathalie S. Skibine and Heather Chesnut, attorneys for defendant, Douglas Ewald Isaacson, on the 22nd day of January, 2016.

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable document format (pdf) was filed with the Court and served on appellant.


Colleen K. Magee

Tab A

Utah Code Ann. § 76-10-502. When weapon deemed loaded.

- (1) For the purpose of this chapter, any pistol, revolver, shotgun, rifle, or other weapon described in this part shall be deemed to be loaded when there is an unexpended cartridge, shell, or projectile in the firing position.
- (2) Pistols and revolvers shall also be deemed to be loaded when an unexpended cartridge, shell, or projectile is in a position whereby the manual operation of any mechanism once would cause the unexpended cartridge, shell, or projectile to be fired.
- (3) A muzzle loading firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinders.

Utah Code Ann. § 76-10-504. Carrying concealed firearm -- Penalties.

- (1) Except as provided in Section 76-10-503 and in Subsections (2), (3), and (4), a person who carries a concealed firearm, as defined in Section 76-10-501, including an unloaded firearm on his or her person or one that is readily accessible for immediate use which is not securely encased, as defined in this part, in or on a place other than the person's residence, property, a vehicle in the person's lawful possession, or a vehicle, with the consent of the individual who is lawfully in possession of the vehicle, or business under the person's control is guilty of a class B misdemeanor.
- (2) A person who carries a concealed firearm that is a loaded firearm in violation of Subsection (1) is guilty of a class A misdemeanor.