2015

State of Utah, Plaintiff/ Appellee, v. Shoni Plexico, Defendant/ Appellant.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. SHONI PLEXICO, Defendant/Appellant.	Criminal No. 131500464 Appellate Case No. 20140590 Trial Court Judge: G. Michael Westfall Sentencing Judge: Keith C. Barnes

REPLY OF APPELLANT PLEXICO

This is an appeal from the judgment, sentence, stay of execution of sentence, and commitment, by the Fifth Judicial District Court of Iron County, State of Utah, the Honorable G. Michael Westfall presiding at trial and the Honorable Keith C. Barnes sentencing and ruling on Appellant's motion for new trial. The judgment, sentence, stay of execution of sentence and commitment filed on the 21st day of May, 2014, and the Court's order upon Defendant's motion to stay execution of sentence and for new trial filed the 17th day of July, 2014. The Appellant is not presently incarcerated.

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I.

JURISDICTION

Appellee agrees with Appellant that jurisdiction is appropriate before the Utah Court of Appeals, pursuant to Utah Code Annotated §78A-4-103(2)(e) (1953, as amended).

II.

RESOLUTION OF STATEMENT OF FACTS

The Appellee makes no attempt to take issue with Appellant's Statement of Facts, but simply as an introduction attempts to reargue the point in controversy regarding the underlying charge of which the Appellant was acquitted but which established the basis for going forward with the felony charge of witness tampering. Appellee goes to great lengths to argue that the Appellant fails to cite to any precedent in support of Appellant's assertion that mere words alone are not sufficient to support a conviction for a charge that

has as its founding qualification a term that invites overbroad application if the same is interpreted to not require some outward act beyond mere words. In other words, "attempts to induce or otherwise cause another person to testify or inform falsely" has not been clearly defined by the Court of Appeals to include mere words in the past and there is no such precedent primarily because this particular case is sufficiently unique to where there are no facts or circumstances that support Appellee's attempted inference that the action taken by Appellant was all that the statute requires. In a subtle way, this is conceded by the Appellee in not making specific reference to the record of activity beyond that stated by the Appellant which involved the alleged misconduct. To that extent, the case is one of first impression and Appellee's attempt to argue that Appellant has failed to persuade by failing to cite to precedent is an acknowledgement of that point and should not be swept under the carpet as established by accepting Appellee's tortured restricted interpretation of the preservation doctrine.

III.

RESPONSE TO APPELLEE'S ARGUMENTS

POINT NO. 1

THE APPELLANT'S ISSUE ON APPEAL REGARDING SUFFICIENCY OF EVIDENCE IS PROPERLY PRESERVED.

The Appellee makes the argument that the issue regarding sufficiency of evidence was not properly preserved primarily because Appellant did not argue specific points as to why the evidence was insufficient at the time Appellant made a motion for directed

verdict. A complete examination of the references to the record, of which Appellant has included in her brief, shows that the court was particularly keyed in on the issue in question not only at the time of the directed verdict but also when admonishing counsel on what it considered to be an appropriate argument (an action taken by the court questionable in and of itself) to admonish beforehand what defense counsel may or may not argue at closing, stating that it would be inappropriate for defense counsel to argue that the law required more than an attempt to persuade. It was based upon this frame of reference as well as the context of the entire trial that the Appellant moved for directed verdict and it was not a matter of rehashing common ground in which the record clearly reveals that the trial court was aware of this distinction in the facts and this is noted when it stated that it had listened with interest but in its mind the elements of the offense did not require an act which in this case would have amounted to a change that was referred to by counsel on making the motion. This is the same as saying that mere words alone are sufficient to establish the crime. That was the issue and that was addressed. For Appellee to attempt to qualify it by stating that it should have been argued differently and then raised as an exception to the preservation doctrine misrepresents the circumstances before the court.

The issue was clearly before the trial court when it made its ruling and it was for that reason that counsel allowed the matter to be submitted rather than attempting further to dissuade it in its thinking. The issue has been raised. The trial court made its decision.

The trial court was well aware of the circumstances upon which counsel was contending that the elements of the offense have not been met by construing the statute to make it a crime by using mere words.

POINT NO. 2

SINCE COUNSEL FOR APPELLANT WAS HER ATTORNEY AT TRIAL, IT WOULD BE INAPPROPRIATE TO ARGUE INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellee attempts to make an extension as to how Appellant should have argued an exception to the preservation rule by arguing ineffective assistance of counsel. It would be inappropriate for counsel for Appellant to argue ineffective assistance of counsel when he was the one who represented the Appellant at trial. This is not a case involving ineffective assistance of counsel. In fact, this appears to be an attempt to simply argue precedent rather than key into the facts and circumstances of this particular case. Appellant concedes that there are points and authorities out there that apply to circumstances that are different than the present circumstances. However, the present circumstances do not warrant arguing ineffective assistance of counsel where the issue was preserved on appeal regarding the arguments that Appellant has made on appeal. For Appellee to argue matters not pertinent to the circumstances of this case is a distortion of that which is before the court.

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POINT NO. 3

THE APPELLEE CITES TO NO CASE LAW THAT SUPPORTS THE PROPOSITION THAT MERE WORDS ARE SUFFICIENT TO SUPPORT A CHARGE OF WITNESS TAMPERING.

Appellant disagrees with Appellee's assessment that the evidence the State produced "amply supported" a finding of attempt to induce or otherwise cause CRUZ to testify or inform falsely if the following were believed:

(1) CRUZ initially reported to Officer Triplet that Defendant shoved CRUZ to the ground and hit LISTER. 1-20-21, 1-50-51;

(2) Officer Triplett cited Defendant for misdemeanor assault, R180:152;

(3) Defendant called Officer Triplett to report that CRUZ wanted to change her statement, R180:153; and

(4) Defendant asked CRUZ "to lie to the cop and say that she never hit Josh (LISTER) R180:120-21, 153. (emphasis added)

The Appellant takes the position that this alone is not sufficient to establish a charge of witness tampering if attempt to induce or otherwise cause is not construed to include an act that goes beyond merely asking someone to lie. Since this case does not support any act above and beyond the asking, the Appellant takes the position that the evidence is not sufficient for the charge. Since Appellee's brief fails to allude to any other activity above and beyond those points asserted, it concedes that there is no such act apparent in the record and therefore the issue is one squarely before the Court for

consideration but the matter is not supported by precedent. Appellee's citation that evidence is sufficient to support a witness tampering conviction is not supported by State v. Holgate, 2000 UT 74, ¶18, which simply restates the standard for plain error under a sufficiency of evidence claim but involved murder and aggravated burglary. It had nothing to do with interpreting the phrase "to attempt to induce or otherwise cause". Appellee cites to no appropriate authority in this case because there is none.

POINT NO. 4

APPELLANT HAS ADEQUATELY BRIEFED THE ISSUE SINCE THERE IS NO PRECEDENT THAT ESTABLISHES THE POINT ONE WAY OR THE OTHER.

Appellee attempts to argue that the Appellant has failed to follow Rule 24, Utah Rules of Appellate Procedure, in presenting substantive arguments by not citing to controlling authority to support the argument as though such points and authorities existed. Appellee makes no attempt to cite to points and authorities that would otherwise be controlling but restates the position stated by Appellant and without further argument even points out that a statute is unconstitutionally overbroad when it prohibits a substantial amount of protected speech. Appellee does so without addressing the matter as to why the speech in this case is not protected, a position not supported by controlling authority. Appellee attempts to assert that use of the word "induce" in the statute clearly indicates that it applies to verbal as well as physical **interference** with a witness. In this case, there was no such interference which connotes an act above and beyond simply asking someone to lie for them. State v. Carlson, 638 P.2d 512, 515 (Utah 1981),

involved conduct supportive of an inducement which is not found in the present case. Appellee argues that Appellant should have made a point of distinguishing such case even though the case predated the present version of the law. The points made by Appellant are adequate and appropriate to address the issue at hand without having to cite to authority that no longer applies due to such change.

POINT NO. 5

THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING APPELLANT'S ASSAULT ACQUITTAL.

Appellee misses the point entirely with regard to the issue of advising the jury of Appellant's acquittal of the underlying charges. The point is that the trial court did not make an evaluation of the circumstances based on the rules of evidence. There was no analysis made and no consideration given where if such would have been done it is likely the evidence would have been admitted had the Appellant been convicted of the charge. However, in this case, the trial court did not make the proper assessment but simply concluded that such evidence would be inadmissible. Any evaluation of the circumstances pursuant to the Rules of Evidence, particularly Rule 404, would have concluded differently. Moreover, the matter is not one simply involving the discretion of the trial court without a determination or finding that such in some way would have been prejudicial to the State. The information was clearly relevant and it was probative to the issue at hand. There is nothing in the record to suggest that such information would have been prejudicial to the State and this in and of itself distorts the basis for such

consideration in the first place. The Appellant contends that while the issue of evidence being less probative than prejudicial against a Defendant is an appropriate consideration for trial, the State is not entitled to have evidence not admitted on the same basis. The Appellant is not aware of a single case that attempts to apply Rule 404 in the manner that the trial court infers which is that information regarding a defendant's acquittal would be prejudicial to the State in attempting to convict a defendant of witness tampering. The very thought of such application is absurd. This is by any definition an abuse of discretion on the part of the trial court in not properly addressing the matter in context, considering it in light of the defendant being prejudiced by not allowing such information is what should have been assessed but was not. For Appellee to argue that such information was not relevant is to ignore Rules 401 and 402, Utah Rules of Evidence, which state clearly that evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence. The comments made by the juror that came forward clearly show that the issue was one that the jury in its deliberation thought was relevant and to argue otherwise is to again ignore the underlying facts and circumstances of this case.

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POINT NO. 6

THE INSTRUCTION OFFERED BY THE COURT ADMITTING ASSAULT EVIDENCE WITHOUT ADVISING THE JURY OF ACQUITTAL ALLOWED THE JURY TO DRAW AN UNREASONABLE INFERENCE AS TO ITS RESULT WHICH PREJUDICED THE JURY IN THEIR DELIBERATION NOTWITHSTANDING THE INSTRUCTION TO NOT CONSIDER SUCH ACCORDINGLY.

Appellee misses the point with regard to the instruction that was given at trial that improperly allowed an inference of conviction under circumstances where the jury was entitled to know whether the defendant had been convicted of the underlying charge as part of their deliberation. To allow such prejudiced the Appellant. The trial court refused to submit the instruction provided by defense counsel because it believed that the State would be prejudiced by informing the jury of the acquittal. The State is not entitled to such non-prejudicial consideration. This is not going to be a matter that has precedent because it is a distortion of the application of the Rule. The Rule is not designed to consider whether or not the State is prejudiced by submitting information regarding an acquittal of an underlying charge that is relevant and material to the jury's deliberation. Had the instruction been given offered by Appellant at trial, the jury would not have been allowed to speculate about the Appellant having been convicted of the underlying charges.

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POINT NO. 7

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

Appellee attempts to argue that the motion for new trial was unfounded because it was based upon information that was inadmissible. In fact, the affidavit is part of the record and there has been no ruling of inadmissibility. The State did not oppose the affidavit in its argument and submitted no points and authorities for such proposition. To assume that the information was inadmissible, goes beyond that which is in the record. The motion for new trial was appropriate also based upon the ruling of the trial court to deny information regarding the acquittal and the opportunity presented itself because it was before a different judge to consider such ruling. The new trial court judge denied the same without such consideration. Appellee's attempt to argue the precedent set forth in Rule 606 fails to recognize that there is no underlying determination made by the trial court to exclude such evidence that was made a part of the record. The issue of its admissibility is one that should be made at the trial court level and not second guessed on appeal without having the opportunity to address such matters before the trial court.

POINT NO. 8

THE APPELLEE ATTEMPTS TO BLAME THE APPELLANT FOR THE IMPROPER INFERENCE THAT THE JURY WAS LED TO BELIEVE THAT THE APPELLANT WAS CONVICTED OF ASSAULT.

The Appellee seems to take the position that it is Appellant's fault for allowing the jury to infer that she had been convicted by eliciting information that was part of the facts

and circumstances of the case. Trial should not be a game of hide and seek. The facts are what they are. The issue is not one of what information should be kept from the jury but rather allowing the jury to receive relevant information in proper context. The jury in this case was denied the opportunity to consider all the evidence in its proper light by being denied the opportunity to be informed of the resulting acquittal of the charges. The evidence introduced by Appellant on cross examination and as part of her defense were relevant because it was part of the case just as it was relevant for the jury to be properly admonished as to whether or not she was convicted or acquitted of the underlying charges without being instructed in such a way for them to improperly infer that she had been convicted when she had not. That is in fact the issue before the Court and the reason why the admonition given by the trial court in this case was not appropriate. The Appellant is not complaining about the evidence that was presented at trial, the Appellant is complaining about a key piece of evidence that was not allowed to be presented at trial. Therefore, Salt Lake City v. Williams, 2005 UT App 493 does not apply to the circumstances of this case.

POINT NO. 9

THE APPELLANT WAS DENIED THE OPPORTUNITY OF IMPEACHING THE WITNESS WHO IN THIS CASE WAS HER ONLY ACCUSER BASED UPON INCONSISTENT STATEMENTS AT THE PREVIOUS TRIAL.

The Appellee attempts to argue that the trial court did not abuse its discretion in this matter because it invited counsel for Appellant to address issues of impeachment in

other areas. However, the Appellant asserts that the basis upon which the trial court ruled disallowing the inquiry of impeachment sought by the Appellant is inappropriate and Appellee cites to no authority to the contrary. Rather, Appellee takes the position of admonishing this Court to decline from addressing the matter because it its view Appellant should have argued plain error when in fact the issue was preserved at the trial court level and has been set forth in Appellant's brief. The issue is not one of what the trial court thought to be reasonable areas of inquiry for impeachment purposes but rather whether or not the trial court was correct in disallowing the inquiry made by Appellant at trial. Appellant argues that the trial court erred in not allowing such inquiry and this should not be compromised by the fact that counsel for Appellant did not follow the line of inquiry that the trial court suggested was open for impeachment. The issue of trial court discretion is not one of whether invited areas of cross-examination are offered but that which the trial court ruled upon in denying the Appellant the opportunity to impeach the witness as it deemed necessary.

POINT NO. 10

THE APPELLANT DID NOT INVITE ERROR IN THE ELEMENTS INSTRUCTION.

Counsel for Appellant' response for the court's own inquiry as to whether there was an objection is to say that there was none. However, counsel for Appellant did not offer the instruction and that which was given was not sufficient. This is not enough to assert that the failure to object alone is sufficient to invite error to an instruction given by

the court. The circumstances of State v. Geukgeuzian are distinguishable for the reasons set forth in Appellant's initial brief and the position in that case should not be applied in this case due to that distinction.

IV.

CONCLUSION

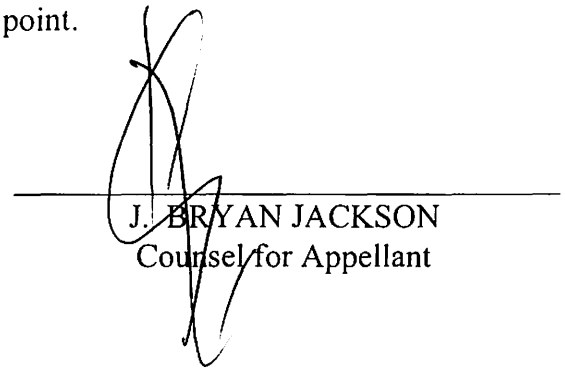
On the grounds and for the reasons set forth above, counsel for Appellant prays that this Court reverse or remand as it deems appropriate together with such other and further relief as to it appears equitable and proper.

DATED this 17 day of June, 2015

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 3,208 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.



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CERTIFICATE OF MAILING

I hereby certify that on the 25th day of August, 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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