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State of Utah v. William Scott Pulley : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	APPELLANT'S REPLY
Plaintiff/Appellee,)	BRIEF
)	
vs.)	
)	
WILLIAM SCOTT PULLEY,)	Case No. 20010291-CA
)	Priority No. 2
Defendant/Appellant.)	(Appellant Incarcerated)

APPEAL FROM THE JUDGMENT AND CONVICTION FOR RAPE OF A CHILD, AND SODOMY ON A CHILD, IN VIOLATION OF UTAH CODE ANNOTATED § 76-5-402.1 AND § 76-5-403.1, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE RANDALL SKANCHY, JUDGE PRESIDING

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ORAL ARGUMENT REQUESTED

UTAH COURT OF APPEALS
PAULETTA STANG
CLERK OF COURT

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SUMMARY OF THE ARGUMENT

Appellant submits that his trial counsel was ineffective for failing to move for a directed verdict or in the alternative to move to arrest judgment based upon insufficiency of the evidence presented at trial. Trial counsel's ineffectiveness in that regard prejudiced Appellant's right to a fair trial.

Additionally, this Court can consider Appellant's argument regarding insufficient evidence under the plain error analysis, or to avoid manifest injustice. Appellant had demonstrated that there was error, which should have been apparent to the trial court, and that the error prejudiced Appellant's right to a fair trial. Had the trial court considered a sufficiency of the evidence argument, as this Court should now do, Appellant submits that his convictions should be reversed.

ARGUMENT

POINT I

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH PREJUDICED HIS RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Standard of Review

To prevail on an ineffectiveness claim, a defendant must show: "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant." *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997), *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

B. Trial Counsel's Deficient Performance

Appellant submits that trial counsel's failure in moving for a directed verdict of not guilty, "fell below an objective standard of reasonableness" as guaranteed by his Sixth Amendment right to counsel. *Classon*, 935 P.2d at 532. Appellant's trial counsel failed to move or argue that the State failed prove the elements of the offense beyond a reasonable doubt; or that the evidence was insufficient to prove guilt.

As stated in *State v. Holgate*, 2000 UT 74, 10 P.3d 346:

As a general rule, to ensure that the trial court addresses the sufficiency of the evidence, a defendant must request that the court do so. The Utah Rules of Criminal Procedure state that when a defendant moves the court to arrest judgment on the basis of insufficient evidence, the directive is mandatory in that the court "shall arrest judgment if the facts proved or admitted do not constitute a public offense." Utah R. Crim. P. 23.

Id. at ¶ 14.

Because the alleged victim's testimony and the medical, physical findings were inconsistent, Appellant's trial counsel provided deficient performance by failing to move for a directed verdict or arrest of judgment for insufficient evidence.

C. *The Error of Trial Counsel Prejudiced Appellant's Right to Effective Assistance of Counsel and a Fair Trial*

This Court has held that the *Strickland* standard does not end the analysis under and ineffective assistance claim, and that "the benchmark for judging any claim of

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997). In conjunction with Appellant's claim of ineffectiveness, this Court can consider the cumulative error doctrine, where a court will reverse a defendant's conviction only if "the cumulative effect of the several errors undermines our confidence . . . that a fair trial was had." *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 928 (Utah 1990); *accord State v. Johnson*, 784 P.2d 1135, 1146 (Utah 1989).

Appellant submits that the above argument, in conjunction with his ineffective assistance of trial counsel by his failure to adequately subpoena and secure an expert witness¹, cumulatively show that Appellant's right to a fair trial was prejudiced. Not only would a different result been probable, if the jury had the appropriate instructions from the trial court, the principles of fundamental fairness in the trial process were not adhered to. Even though the court in *Classon* held that the *Strickland* test was not met, they further looked at the claimed errors in light the defendant's fundamental right to a fair proceeding. *Classon*, 935 P.2d at 533. As noted there, "the right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and

¹ As argued in Appellant's Opening Brief at Point II.

knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Id.*

The instances of plain error and ineffective assistance of counsel argued herein, and in Appellant’s Opening Brief, detail the failure of counsel to adequately defend Appellant by securing and offering appropriate expert witness testimony, as well moving for a directed verdict or arrest of judgment. As such, Appellant submits that the adversarial process was so undermined that the trial in the instant case cannot be relied upon as having produced a just result. *Id.*

POINT II

THIS COURT CAN CONSIDER APPELLANT’S INSUFFICIENCY OF THE EVIDENCE ARGUMENT UNDER THE PLAIN ERROR ANALYSIS

A. Standard of Review

The State argues that Appellant’s insufficiency of the evidence argument was not preserved below, therefore this Court cannot consider that issue. However, this Court may still consider such argument under the plain error analysis or to avoid manifest injustice. *See State v. Saunders*, 1999 UT 59, ¶ 30, 992 P.2d 951, 961 (Utah 1999); *State v. Rudolph*, 970 P.2d 1221 (Utah 1998). In order to demonstrate plain error, defendant must show: 1)

error, 2) that the error should have been obvious to the trial court, and 3) that the error was harmful. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

B. Error

Appellant submits that the fact that his prior counsel never argued insufficiency of the evidence or made a motion for such before the trial court, is an appropriate circumstances under which a plain error analysis can apply. The error is evident where the issue was not preserved in the trial court below. Trial counsel could have made a motion to dismiss based upon insufficient evidence at the close of the State's case as well as at the close of all the evidence. Because trial counsel failed to do so, this Court can consider that error.

C. Obviousness of Error to Trial Court

Appellant submits that trial counsel's failure to move for a directed verdict in favor of Appellant or a motion for arrest of judgment should have been obvious to the trial court. Such motions are typically made by defense counsel in criminal cases. As *Holgate*, advises:

... [E]ven when a defendant fails to move the court for relief based on the sufficiency of the evidence, the trial court's discretion is not unlimited. The Code of Criminal Procedure provides, "when it appears to the court that

there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.” Utah Code Ann. § 77-17-3 (1999). . . . the trial court shall grant relief when the evidence is insufficient, even if a defendant fails to properly raise the issue, but only when the evidentiary defect is “apparent” to the trial court.

Id. at ¶ 15 (citations omitted). Therefore, even if trial counsel failed to raise the issue of insufficiency, the error should have been apparent to the trial court.

D. Harmfulness of Error

The State argues that Appellant has failed to marshal the facts in support of his argument that the evidence was insufficient. Appellant, however, marshaled the relevant facts from the alleged victim as well as the State’s medical expert. Failing to include facts from the detective, which merely repeat the facts already presented does not detract from the facts already marshaled. Based upon Appellant’s prior argument in his Opening Brief, the testimony from the alleged victim and others was inconsistent with the physical findings, which supports the notion that the evidence was insufficient to support the verdict.

The harmfulness in trial counsel’s failure to move for a directed verdict or arrest of judgment is the fact that the trial court did not have the opportunity to rule on that issue, nor to ensure that Appellant’s right to a fair trial were protected. The State’s failure to prove the offense beyond a reasonable doubt is the harmfulness Appellant has suffered.

As such, this Court can consider that error and Appellants submits that it should reverse his convictions on that basis.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Appellant respectfully requests this Court reverse his conviction and/or grant him a new trial.

RESPECTFULLY SUBMITTED this _____ day of April, 2002.

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By _____
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CERTIFICATE OF SERVICE

I hereby declare that I mailed/delivered two true and correct copies of the foregoing Appellant's Reply Brief, postage prepaid, this _____ day of April, 2002, to:

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