2016

State of Utah Plaintiff/Appelle, v. Abelardo Cruz, Defendant/ Appellant : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	**Ct. App. Case No. 20140994-CA**
	)	
ABELARDO CRUZ,	)	Dist. Ct. Case No. 131800746
	)	
Defendant/Appellant.	)	

APPELLANT'S REPLY BRIEF ON APPEAL FROM THE JUDGMENT OF CONVICTIONS FOR TWO COUNTS OF SODOMY, A FIRST DEGREE FELONY, IN THE SECOND DISTRICT COURT, UINTAH COUNTY, THE HONORABLE CLARK L. MCLELLAN, JUDGE PRESIDING

Jeremy Delicino, UT #9959
JEREMY DELICINO, LLC
10 W Broadway, Ste 650
Salt Lake City, UT 84101
Telephone: (801) 364-6474
Facsimile: (801) 364-5014
jeremy@jeremydelicino.com

Hakeem Ishola, UT #5970
Carlos Navarro, UT #14735
ISHOLA LAW GROUP, PLLC
1750 W. Research Way, Ste. 204
West Valley City, UT 84119
Telephone: (801) 886-0500
Facsimile: (801) 908-0500
carlos@isholalawgroup.com
hakeem@isholalawgroup.com

Counsel for Defendant-Appellant

Karen A. Klucznik
Assistant Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Counsel for Plaintiff-Appellee

ORAL ARGUMENT REQUESTED

DETAINED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	**Ct. App. Case No. 20140994-CA**
	)	
ABELARDO CRUZ,	)	Dist. Ct. Case No. 131800746
	)	
Defendant/Appellant.	)	

APPELLANT'S REPLY BRIEF ON APPEAL FROM THE JUDGMENT OF CONVICTIONS FOR TWO COUNTS OF SODOMY, A FIRST DEGREE FELONY, IN THE SECOND DISTRICT COURT, UINTAH COUNTY, THE HONORABLE CLARK L. MCLELLAN, JUDGE PRESIDING

Jeremy Delicino, UT #9959
JEREMY DELICINO, LLC
10 W Broadway, Ste 650
Salt Lake City, UT 84101
Telephone: (801) 364-6474
Facsimile: (801) 364-5014
jeremy@jeremydelicino.com

Hakeem Ishola, UT #5970
Carlos Navarro, UT #14735
ISHOLA LAW GROUP, PLLC
1750 W. Research Way, Ste. 204
West Valley City, UT 84119
Telephone: (801) 886-0500
Facsimile: (801) 908-0500
carlos@isholalawgroup.com
hakeem@isholalawgroup.com

Counsel for Defendant-Appellant

Karen A. Klucznik
Assistant Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Counsel for Plaintiff-Appellee

ORAL ARGUMENT REQUESTED

DETAINED

TABLE OF AUTHORITIES

CASES

U.S. Supreme Court Cases

State Cases

PROCEDURAL RULES

TABLE OF ONTENTS

PAGE NO.

Case No. 20140994-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,
v.
ABELARDO CRUZ,
Defendant/Appellant.

APPELLANT'S REPLY BRIEF ON APPEAL FROM THE JUDGMENT OF CONVICTIONS FOR TWO COUNTS OF SODOMY, A FIRST DEGREE FELONY, IN THE SECOND DISTRICT COURT, UINTAH COUNTY, THE HONORABLE CLARK L. MCLELLAN, JUDGE PRESIDING

PREAMBLE

Defendant-Appellant Abelardo Cruz ("Cruz") hereby files this reply brief in response to Appellee's brief of January 19, 2016. *See* Utah R. App. P. 24(c).

The State essentially contends that 1) Cruz waived the right to challenge the trial court's Rule 15.5 findings of reliability of the videotaped interviews of MR because trial counsel told the court that he "did not care" about the court admitting the tapes [State's Brief at 14]; 2) Cruz's claim that allowing unconfronted

statements of MR to go with the jury into deliberations is misplaced because "confrontation" goes to admissibility of evidence rather than whether the jury could view the vtapes [*id.* at 15, 33]; 3) Cruz has not shown that allowing the tapes in the jury room over-emphasized MR's testimony or, in the alternative, that admission of the tapes was not prejudicial because admitting them benefited Cruz more than hurt him [*id.* at 15, 37–38]; 4) Cruz affirmatively waived his right to challenge the trial court's curative instruction on the essence of MR's non-verbal responses to questions [*id.* at 17, 39–43]; 5) Cruz's trial counsel was not ineffective in joining the *Allen* instruction given by the trial court or, in the alternative, that the *Allen* charge was neither coercive nor prejudicial [*id.* at 17, 51–58]; 6) MR's videotaped statements to the interviewers and her mother's corrobation of the statements show sufficient evidence to convict Cruz of two sodomy counts [*id.* at 18, 59–61]; and Cruz failed to show that cumulative error affected his trial because he did not even show that any error occurred [*id.* at 19, 62].

Cruz addresses the State's argument as follow:

ARGUMENT

POINT I. CRUZ DEMONSTRATED THAT THE TRIAL COURT ERRED, AND HE WAS PREJUDICED, BY THE COURT ALLOWING THE VIDEOTAPES OF MR'S INTERVIEWS TO GO TO THE JURY IN DELIBERATIONS.

The State argues that Cruz has not demonstrated that the trial court erred in allowing the videotapes of MR's testimony to go into the jury room for deliberations. State's Brief at 15, 37–38. In fact, the State confidently posited that the admission of the videotapes "helped [Cruz] more than it hurt him." *Id.* at 15. The State based this speculation on the fact that Cruz was convicted only on the November 9 conduct where MR's mother allegedly walked in on Cruz laying down on the bed, with his pants unzipped. *Id.* at 38.

While it is true that the jury hung on five of the eight counts against Cruz (State's Brief at 38, 45), it is quite a leap to then suggest, as the State does, that if any error exists [1]in allowing the tapes into the deliberation room with the jury, it *helped* Cruz more than hurt him, and thus he cannot show prejudice. *Id.* at 37. To perfect this argument, the the State downplays the vigor of its repeated insistence that the jury must be allowed to take the tapes into the jury room for deliberation, from pretrial proceedings to trial. *See, e.g.*, R.11:356 (State explicitly arguing that the videotape must be allowed to go to the jury room just as dash cams are allowed in DUI cases). The State then shifts the blame to trial counsel, arguing that during closing, the defense rather than the State wanted the tape played to the jury. *See*

[1] Cruz has adequately pointed out in his opening brief that the videotapes of MR's statements should not have been allowed in the jury room under any circumstances. *See* Cruz's Opening Brief at 41–47.

State Brief at 37 (citing R.13:834).[2]

The issue of whether a district court may allow the jury to go into deliberations and re-play admitted videotapes was one of first impression at the time Cruz filed his opening brief. *See* Cruz's Opening Brief at 42. A month or so after his initial brief, this Court tangentially ruled on the issue in another case. *See State v. Ashby*, 2015 UT App. 167, ¶47, 357 P.3d 554. This Court deemed

---

[2] Contrary to the State's assertion, the prosecutor at closing implored the jury to watch the videotapes. *See* R.13:852 ("I encourage you to review all the evidence."); R.11:851 (the prosecutor telling the jury about how he made the decision to file charges based on the videotapes and concluding, "If you chose to review it."). Admittedly, trial counsel similarly implored the jury at closing to "go and watch th[e videotpaes]." R.11:834. But this was after the trial court had made it abundantly clear to counsel, numerous times --pretrial and during trial -- that he was bent on sending the tapes with the jury for deliberations. *See,e.g.*, Cruz's Opening Brief at 17–18 (describing trial court's ruling on allowing the videotapes to go to the jury). In other words, after being beaten down by the trial court on this issue, and knowing that the jury would eventually watch the tapes, it makes perfect sense that defense counsel, in amelioration, would point to the aspect of the tapes that may be favorable. Nevertheless, ameliorating the impact of the videotapes is *sine qua non* under the circumstances, but such is not to be equated with "inviting an error," or the so-called defense "complicity" in allowing the tapes to go to the jury. *See,e.g., Ohler v. United States*, 529 U.S. 753, 762–63, 120 S. Ct. 1851 (2000) (Souter, J., dissenting) (citing multiple treatises for the proposition that a "party who has made an unsuccessful motion in limine to exclude evidence that he expects the proponent to offer may be able to first to offer that same evidence without waiving his claim of error;" and a party may "himself bring out evidence ruled admissible over his objection to minimize its effect without it constituting a waiver of his objection." (citing 1 J. Wigmore, Evidence § 18, p. 836 (P. Tillers rev. 1983); McCormick on Evidence § 55, at 246 (5th ed. 1999)).

submission of the videotape of the victim's CJC interviews harmless where the "record does not suggest that the jury actually played the DVD" in deliberation. *Id.* However, this Court declined to rule on whether allowing the videotape to go to the jury was erroneous. *Id.* at ¶ 46.

Here, the record undisputably shows that the jury went into deliberations with a DVD player and the videotapes of MR's interviews provided to them *by* the trial court. *See* R.11:353–356; R.13:853, 854, 857 ((trial court stating that "we know that these two videotapes have been pre-admitted and are going to be part of the evidence that the jury has to consider in deliberation."); ("You now have all the evidence."); ("you are also going to receive both of the interviews on the video"); (trial court inquiring about whether the DVD player and TV were actually in the jury room for the jurors to use)). The record further shows that the State, over defense strong objection, vigorously argued that the jury be allowed to watch the tapes. R.11:355–356. In fact, the State made the analogy that admitting the videotapes is no different from admitting dash cams in DUI cases. *Id.*

In *Ashby*, the trial court explicitly stated that it generally ("automatically") does not allow DVD players to go into the jury room unless the jurors asked for it. *See id.,* 2015 UT App. 167, at ¶47. This Court found that there is no indication that the trial court deviated from this practice. *See id.* at ¶47–48. *Ashby*, therefore,

is easily distinguished from the instant case where the trial court painstakingly arranged for a TV and DVD player to go into the jury room before the jury requested it, and also implored the jury to take the tapes with them. Accordingly, it defies credulity for the State to now claim that the jury may not have played the DVD of MR's videotaped interviews during deliberation. State Brief at 38. Rather, the more reasonable inference is that the jury actually played the tapes in deliberation because, unlike *Ashby*, the trial court provided all the necessary ingredients for the jury to watch the tapes. It is also reasonable to conclude that the jury employed the tapes to over-emphasize MR's testimony over all others and therefore convicted Cruz of sodomy. As such, the issue left open in *Ashby*, whether the trial court erroneously allowed the videotapes in the jury room for deliberation, is squarely before this Court, and the Court should rule favorably for Cruz.

POINT II. CRUZ DID NOT WAIVE OBJECTION TO THE TRIAL COURT'S ERRONEOUS INSTRUCTION THAT THE JURY VIEW MR'S NONVERBAL RESPONSE AS AN AFFIRMATIVE RESPONSE.

The State posits that Cruz did not object to the trial court's instruction to the jury to view MR's non-verbal response as an affirmative gesture in response to questions. State Brief at 17, 39. The State points to trial counsel's statement that

he did not object to the trial court's first suggestion to the jury to view the gesture as an affirmative response as indicating that counsel "affirmatively" waived any objection. *Id.* at 43.

However, as detailed in Cruz's opening brief, "[r]ather than give a timely curative instruction, and notwithstanding counsel's strenuous objection, the district court acted as if nothing was wrong, proceeded with the trial unperturbed, only to then issue the curative instruction later in the trial when the State felt compelled to confess error. R.11:441–94." Cruz's Opening Brief at 50.

What the State neglected to point out to this Court was that trial counsel not only strenuously objected to the trial court's needless intervention, but also requested a curative instruction, which the trial court refused to give one on time. *See* Cruz's Opening Brief at 47–48. Rather, after being asked by trial counsel to cure its error "right then" and there, R.11:447, the trial court proceeded with the trial unperturbed and only returned to give the curative instruction when the State joined trial counsel (by confessing error) in asking for one. Thus, as Cruz pointed out in his opening brief, the trial court's "curative instruction was neither prompt nor effective." Cruz's Opening Brief at 50.

Accordingly, the State's attempt to shift the blame to trial counsel here -- by claiming that he somehow affirmatively waived any objection to the court's

needless instruction to view MR's nonverbal gesture in particular way, or "invited" the error by remaining silent as the trial court committed this glaring error, State Brief at 43 -- is at best disingenuous. In sum, not only did trial counsel "strenuously" object to the trial court's instruction, he also challenged the timing of the curative instruction. *See* R.111:441–442.

POINT III. CRUZ HAS SHOWN TRIAL COUNSEL'S INEFFECTIVENESS PREJUDICED HIM BY NOT OBJECTING TO THE COERCIVE *ALLEN* CHARGE.

The State argues that the *Allen* charge given by the trial court was not coercive.[3] State's Brief at 17, 48–51. In the alternative, the State contends that the fact that the jury did not conduct further deliberations after the trial court gave the instruction and thereafter came back swiftly with a decision shows that the jury was not coerced, even if the instruction given by the court itself was coercive. State's Brief at 54.

The State's argument is rather novel. The courts, however, have held that an *Allen* charge cannot urge anxiety on the part of the jury by "demanding a verdict,"

[3] The State also takes Cruz to task for not providing a text of the *Allen* charge itself in his opening brief. *See* State's Brief at 55. But Cruz did not quibble with the *Allen* charge itself, and thus the text of the charge is not in dispute. Rather what Cruz objected to was the timing of the charge, coupled with the trial court's coercive language that it wanted a decision pronto. *See* Cruz's Opening Brief at 52–54.

or by not appearing "even-handed." *See,e.g., State v. Harry*, 2008 UT App. 224, ¶ 9, 25, 189 P.3d 98. The crux of Cruz's argument here is that by stating it wanted a decision in short order, the trial court's instruction did exactly the impermissible -- urged a particular verdict. Coupled with this is the timing of the instruction, made before the jury announced it was deadlocked. This issue was adequately briefed by Cruz. *See* Cruz's Opening Brief at 52–55. As such, this Court should hold that the *Allen* instruction here was ill-conceived and became more coercive when the trial court urged that a decision be forthcoming, in short order.

POINT IV. CRUZ DEMONSTRATED THAT, EVEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE JURY DETERMINATION, THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO SUPPORT THE SODOMY CONVICTIONS.

The State argues that Cruz merely claims that the evidence he marshaled "undermines the conviction," and did not properly view the evidence in the light most favorable to the verdict. State's Brief at 18, 59–60. The State then chronicled the evidence presented at trial as "constitut[ing]" reasonable inferences from which the requisite elements of the two sodomy convictions can be found." State's Brief at 69 (citing *State v. Lucero*, 2012 UT App. 202, ¶ 2).

The State is clearly mistaken to the extent it claims that Cruz merely chronicled evidence "undermin[ing] the conviction." State Brief at 60. Cruz spent

no less than three pages discussing the evidence that could have supported the jury decision. *See* Cruz's Opening Brief at 56–59. He spent less time, however, describing evidence that undermined the jury decision. *See id.* at 59–61. Cruz then argued that the State's case against him was neither overwhelming nor insurmountable because the jury acquitted him on one count and deadlocked on four others. *Id.* at 62

Therefore, even though he was not required to "marshal" the evidence, Cruz did not minimize the evidence presented by the State that could have conceivably supported the jury decision. Rather, Cruz has shown that the evidence, when viewed in the light most favorable to the verdict, is sufficient inconclusive or inherently improbable to support the sodomy convictions, particularly given the trial court's erroneous *Allen* and curative instructions, both of which also swayed the jury towards conviction. *See* Cruz's Opening Brief at 62 (citing *State v. Nielsen*, 2014 UT 10, ¶ 46).

POINT V. CRUZ HAS PATENTLY SHOWN CUMULATIVE ERROR AFFECTED HIS TRIAL.

The State minimizes the numerous errors at trial, contending that Cruz has not shown that any error occurred at his trial, let alone that there was cumulative error or that he was prejudiced. State's Brief at 62. However, the errors Cruz

complained of are mostly of constitutional significance, and were not properly cured at trial by the district court, and may have even been magnified by the court's untimely and ineffective curative instruction. *See* Cruz's Opening Brief at 62.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based on the foregoing and the arguments raised in his opening brief, Cruz respectfully request that this Court reverse the decision of the district court and remand for further proceedings consistent with this Court's opinion.

RESPECTFULLY DATED this 18th day of February, 2016.

Hakeem Ishola

HAKEEM ISHOLA
Attorney for Appellant Abelardo Cruz

CERTIFICATE OF COMPLIANCE

Appellant's reply Brief has been prepared using:

Google Docs 2016;
Times New Roman;
14-Point Type Space.

I certify that this brief complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure and contains 7000 words or less, excluding the parts of the brief exempted by Rule 24, such as table of contents, authorities, and addenda. I further certify that this brief is in compliance with rule 27(b), Utah R. App.

I understand that material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.

Hakeem Ishola

HAKEEM ISHOLA
Attorney for Appellant Cruz
Ishola Law Group, LLC
1750 West Research Way, Suite 204
West Valley City, Utah 84119
Telephone: (801)886-0500
Facsimile: (801)908-0500
hakeem@isholalawgroup.com

CERTIFICATE OF SERVICE

I hereby declare that I will mail two true and correct hard copies of the foregoing Appellant's Reply Brief, by FIRST-CLASS mail, postage prepaid, this 18th day of February, 2016, to:

Karen A. Klucznik
Assistant Attorney General
Sean D. Reyes, Attorney General
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854
Counsel for Appellee

Also, in accordance with the Utah Supreme Court standing order No. 8, a digital, searchable pdf courtesy copy of the brief was also included and served on the Court and opposing counsel: [x] Yes [ ] No

Hakeem Ishola

HAKEEM ISHOLA
Attorney for Appellant