2017

State of Utah, Plaintiff/Appellee v. John Robert Fox, Defendant/ Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, v. JOHN ROBERT FOX, Defendant / Appellant.	)))))))))	Case No. 20140857-CA

REPLY BRIEF OF APPELLANT

Appeal from Sentence, Judgment, Commitment entered on August 6, 2014, in the Second District Court, Davis County, the Honorable David Connors, presiding

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ORAL ARGUMENT REQUESTED

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ARGUMENTS

I. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF DEFENDANT'S GENERAL ALCOHOL CONSUMPTION AND FAILED TO PROVIDE A CURATIVE INSTRUCTION REGARDING THE SAME; AND ABSENT THIS ERROR, THERE IS A SUFFICIENTLY HIGH LIKELIHOOD OF A DIFFERENT OUTCOME.

The State – in its Brief – claims that Defendant "failed to meet his burden of showing that any error requires reversal." *See* Brief of Appellee, p. 9 (citing *State v. Honie*, 2002 UT 4, ¶ 54, 57 P.3d 977). This contention is without merit.

In *State v. Honie*, 2002 UT 4, 57 P.3d 977, the Utah Supreme Court stated, "An error is harmful if it is such that absent the error, there is a sufficiently high likelihood of a different outcome, undermining our confidence in the result." *Id.* at ¶ 54 (citing *State v. Lafferty*, 200 UT 19, ¶ 35, 20 P.3d 342 (quoting *State v. Robertson*, 932 P.2d 1219, 1227 (Utah 1997) (quoting *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992)).

Contrary to the State's position, Defendant – throughout the arguments set forth in the Brief of Appellant – meticulously sets forth both the surrounding factual circumstances and applicable law establishing the prejudice or harmfulness that requires reversal in this case. *See, e.g.*, Argument I, pp. 19-31. Hence, not just one or two paragraphs plucked out of the Brief of Appellant may be utilized to formulate an argument that Defendant somehow failed to establish prejudice or that he inadequately briefed an issue.

Moreover, the improper admission of the evidence of Defendant's general alcohol consumption in conjunction with the failure to provide a curative instruction concerning the inadmissibility of the same and the excess to which he drank, constitutes a structural error that is not subject to a harmless error analysis. A structural error is defined as a "defect [that] affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *See Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991); *see also State v. Cruz*, 2005 UT 45, ¶ 17, 122 P.3d 543. The error of allowing evidence of Defendant's general alcohol consumption to be admitted – contrary to the court's own ruling – and the failure to provide a curative instruction regarding the same affected the very framework of the jury trial; and therefore prejudice or harm is presumed. *See State v. Arguelles*, 2003 UT 1, ¶ 94, n.23, 63 P.3d 731.

This is consistent with the fundamental principle of law "that a person may be convicted criminally only for his acts, not for his general character." *State v. Saunders*, 1999 UT 59, ¶ 15, 992 P.2d 951. "That principle is violated if a conviction is based on an inference that conviction is justified because of the defendant's criminal character or propensity to commit bad acts." *Id.*

Instead of substantively arguing the merits of the trial court's failure to properly analyze the issues surrounding the admissibility of Defendant's general alcohol consumption and the excess to which he drank, the State engages in what is more akin to a sufficiency-of-the-evidence argument. *See, e.g.*, Brief of Appellee, pp. 12-13. The

State's argument also fails to substantively address how the trial court's rulings on the Rule 404(b) evidence concerning Defendant's general alcohol consumption and the excess of that consumption do not reflect the "care and precision" Utah case law requires. *See State v. Lucero*, 2014 UT 15, ¶ 36, 328 P.3d 841. "[T]he scrupulous examination requirement is met when the trial court engages in [the] three - or four - step analysis on the record." *Id.* at ¶ 37 (footnote omitted). This the trial court failed to do, which the State essentially concedes.

II. THE RECORD DEMONSTRATES THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MOVE FOR A MISTRIAL OR FAILING TO REQUEST A CURATIVE INSTRUCTION CONCERNING THE EVIDENCE OF DEFENDANT'S GENERAL ALCOHOL CONSUMPTION AND THE EXCESS TO WHICH HE DRANK.

The State argues that Defendant's "trial counsel did not render ineffective assistance of counsel." *See* Brief of Appellee, pp. 21-23. This argument lacks merit as well.

We know that the United States Supreme Court – in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984) – established a two-prong test for determining when a defendant's Sixth Amendment[1] right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. This test – as adopted by Utah courts – requires a defendant to

[1]The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Stidham*, 2014 UT App 32, ¶ 18, 320 P.3d 696; *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *See Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

A defendant – to satisfy the first prong of the test – must "'identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). This requires a defendant to "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability

is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

In light of the circumstances of this case as outlined in detail in Argument I of Defendant's Brief of Appellant, it is extremely difficult, if not impossible, to conceive of a sound trial strategy that would justify trial counsel's decision to remain completely silent concerning the State's failure to tie the evidence of Defendant's general alcohol consumption or the excess to which he drank with any time period or alleged event of sexual abuse. In the face of such improper and inflammatory evidence, trial counsel should have immediately objected and moved for a mistrial or – at the very least – demanded a curative instruction. By failing to do so, not only did trial counsel fail to address the prejudice elicited by the improperly admitted evidence, but he also failed to preserve the issue for appeal. *See and cf. State v. Larrabee*, 2013 UT 70, ¶ 26, 321 P.3d 1136. Thus, these failures are sufficiently egregious to support the conclusions that trial counsel's decision cannot be considered to be a "sound trial strategy," as required by *Strickland*, and that defense counsel's performance fell below the objective standard of reasonableness set forth in *Strickland*. This is demonstrated by existing Utah case law, as previously discussed, the plain and mandatory language of Utah Rule of Evidence 103(d), and the underlying factual circumstances of this case.

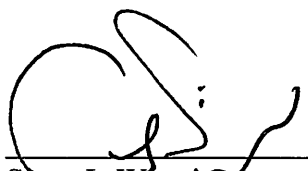
But for counsel's unprofessional failure to request a mistrial or at least request a curative instruction, there is a sufficiently high likelihood of a different outcome. Had the trial court been alerted of its obligation, there is a reasonable probability that the court would have declared a mistrial or, at the very least, would have given a curative instruction concerning the improperly admitted evidence of Defendant's general alcohol consumption or the excess to which he drank. The prejudice to Defendant resulting from this critical failure is evinced by the fact that the jury considered improperly admitted evidence in arriving at Defendant's convictions.

CONCLUSION

Based on the foregoing as well as that previously submitted to the Court by way of the Brief of Appellant, Defendant respectfully requests that this Court reverse Defendant's convictions and remand the case for a new trial on the charges consistent with this Court's instructions as set forth in its opinion. Defendant further requests that the Court provide him with any other remedy deemed just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 16th day of February, 2017.

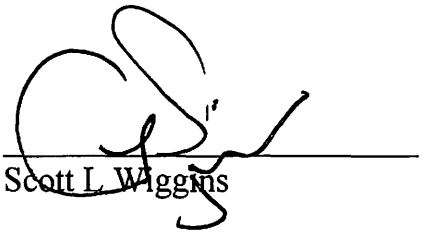
ARNOLD & WIGGINS, P.C.



Scott L. Wiggins
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned, Scott L Wiggins, hereby certifies, pursuant to Utah Rule of Appellate Procedure 24(f)(1)(C), that the Reply Brief of Appellant complies with the applicable type-volume limitation set forth in Utah Rule of Appellate Procedure 24(f)(1)(A) by containing 1,659 words.



Scott L Wiggins

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 17th day of February, 2017:

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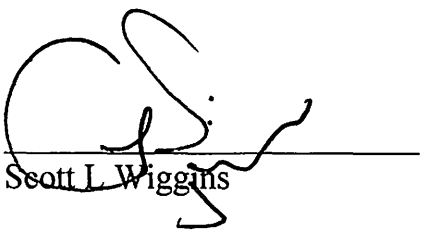
The undersigned also certifies that he included a digital copy of the Reply Brief of Appellant.



Scott L Wiggins

ADDENDA

No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).