2016

State of Utah, Plaintiff/Appellant v. Robbie Michael Macdonald, Defendant/Appellee

Utah Court of Appeals

Case No. 20150123-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellant,

v.

ROBBIE MICHAEL MACDONALD,
Defendant/Appellee.

Reply Brief of Appellant

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Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in the appellee's brief.

ARGUMENT

I.

Police were not required to give *Miranda* warnings because Defendant was not in custody, but police did so anyway, and Defendant waived his rights.

As discussed in the State's opening brief, Defendant was not in custody during the first station house interview on January 18, 2013, nor was he in custody during the second station house interview five days later, on January 23, 2013. Aplt.Brf. 22-28. Accordingly, the trial court erred in concluding that officers were subject to the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). And as discussed, the officers in this case complied with the *Miranda* requirements in any event. Aplt.Brf. 28-38. Defendant makes

two arguments that merit the State's further response: (1) that in reviewing the trial court's *Miranda* decision, the appellate court may not consider unchallenged record evidence if it did not appear in the trial court's factual findings, Aple.Brf. 11-13; and (2) that the standard for determining custody for purposes of *Miranda* is whether a suspect's freedom of movement is restricted, Aplt.Brf. 14-18. Both arguments lack merit.

A. This Court's review of the trial court's *Miranda* decision properly includes consideration of the trial court's factual findings and other relevant, unchallenged record facts.

Defendant contends that an appellant may not rely on evidence in the record unless the trial court made specific factual findings on that evidence. Aple.Brf. 11-13. He thus argues that the State in its brief improperly relies on evidence found in the record but not included in the trial court's factual findings. Aple.Brf. 11-12. Defendant argues that when an appellant relies on evidence that does not make its way into the trial court's factual findings, he in essence is making a challenge to the trial court's factual findings, which, in turn, requires preservation and a showing of clear error. This is not the law. And Defendant has cited nothing to support such a proposition.

When reviewing a decision that includes "essentially undisputed" facts, this Court reviews "the trial court's Findings of Fact *as supplemented by [a] review of the record.*" *State v. McBride*, 940 P.2d 539, 540 n.1 (Utah App.

1997) (emphasis added); *accord State v. Warren*, 2003 UT 36, ¶2, 78 P.3d 590 ("supplement[ing] the trial court's findings of fact with relevant testimony given . . . during an evidentiary hearing"). Indeed, the United States Supreme Court has specifically held that when addressing constitutional challenges, courts look not only to the trial court's factual findings, but also to the unchallenged evidence in the record:

> While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision . . . the fundamental—i.e., constitutional—criteria established by this Court have been respected.

Ker v. California, 374 U.S. 23, 34 (1963).

Defendant takes issue with four record facts cited by the State in its brief that were not included in the trial court's factual findings:

- "MacDonald was never restrained or placed in handcuffs,"
- "the detectives were unarmed and in plain clothes,"
- "MacDonald was never deprived of food or water," and
- "MacDonald had his cell phone with him during the second interview."

Aple.Brf. 11-12 (quoting Aplt.Brf. 26-27). But none of these record facts were in dispute.

In Defendant's motion to suppress his statements to police, Defendant did not claim that he was restrained or handcuffed by police. He conceded that he was not—in both his motion, R289 (acknowledging that "Defendant was not restrained in handcuffs or told he was under arrest"), and at the hearing, R1201:32 (admitting that "he was not in handcuffs"). And the video recordings of the interviews showed that he was not restrained in any way. *See* SE3-4. Defendant did not claim that he was deprived of food or water. *See* R287-93. For good reason—the video recordings showed that he was not. *See* SE3-4. And the video recording of the first interview showed that Defendant in fact had a water bottle with him throughout. *See* SE3. Defendant did not claim that his questioners were armed or uniformed. Again for good reason—the video recordings showed that his questioners were wearing plain clothes and were not armed. *See* SE3-4. Nor did Defendant dispute the fact that he had his cell phone with him during the second interview. R287-93. Again, the video recording made that plain. SE4:1:12:10.

In sum, the foregoing record facts were not in dispute. Accordingly, it is appropriate for this Court to examine those facts in assessing whether the trial court's decision on the constitutional issue of *Miranda* was correct. *See Ker*, 374 at 34.

B. A determination of custody under *Miranda* not only requires a finding that the suspect's freedom of movement is restricted, but also a finding that the restriction is akin to arrest—that was not the case here.

According to Defendant, the State "acknowledges that the relevant standard for determining whether a person is in custody for *Miranda* purposes is whether, in light of the objective circumstances of interrogation, a reasonable person would have felt he was not at liberty to terminate the interrogation and leave." Aple.Brf. 14 (citing Aplt.Brf. 23 and *Howes v. Fields*, 132 S.Ct. 1181, 1189 (2012)). But the State did *not* acknowledge that such is the standard for custody, and *Fields* does *not* identify that as the standard. Defendant leaves the Court with an incomplete, and thus inaccurate, test.

As the State explains in its opening brief, Aplt.Brf. 23, the United States Supreme Court in *Fields* held that "the freedom-of-movement inquiry" is only half the test: "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." 132 S.Ct. at 1189-90. Restricting a suspect's freedom of movement is "'only a necessary and not a sufficient condition for *Miranda* custody.'" *Id.* at 1190 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)). If a court finds that a suspect's freedom of movement was restricted, it must then decide "whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at 1189-90. As explained

in the State's opening brief, neither part of the custody test was met here. *See* Aplt.Brf. 22-28.

Relevant factors in determining whether a suspect's freedom of movement is restricted "include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Fields*, 132 S.Ct. at 1189 (internal citations omitted). Defendant was no doubt the focus of questioning at the station house, which factors in favor of a finding that his freedom of movement was restricted. But that has never been enough for such a finding. *See* Aplt.Brf. 24-25; *California v. Beheler*, 463 U.S. 1121, 1125 (1983) ("*Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect' ") (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). The remaining factors in this case weigh against a finding of custody. *See* Aplt.Brf. 24-28. Significantly, Defendant returned home after both interviews, just as the officers said he would. R1150:¶8, SE3 (1:08–1:09); R1148:¶7, SE4 (6:20, 1:09, 1:12, 2:52).

Nor did the environment present "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*,

132 S.Ct. at 1189-90. Even if restrained, a suspect is not in custody for *Miranda* purposes unless "there is a 'formal arrest or restraint on freedom of movement ' of the degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125 (quoting *Mathiason*, 429 U.S. at 495). "In the paradigmatic *Miranda* situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures." *Fields*, 132 S.Ct. at 1190. But this is not a case where a suspect is "yanked" from his home and hauled into the police station for questioning. *See Fields*, 132 S.Ct. at 1191. Defendant came to the station house of his own will and left after both interviews—not like the four cases at issue in *Miranda*, where the suspect was arrested or hauled off by police and never allowed to leave the station house afterward. *See Miranda*, 384 U.S. at 491-98.

Defendant argues that the fact officers read Defendant his *Miranda* rights before the first interview, and referenced them in the second interview, also weighs in favor of the trial court's finding of custody. Aple.Brf. 17-18. He contends that the mere giving of a *Miranda* warning suggests to the suspect that he is in custody, since *Miranda* warnings "are prevalently associated in the popular mind with arrest." Aple.Brf. 18. But Defendant cites to nothing in support of that assertion. And nothing in the *Miranda*

warning itself suggests that it need only be read when a suspect is arrested. Moreover, holding that an officer's reading of the *Miranda* warning supports a finding of custody would be counterproductive, discouraging police from reading suspects their rights. Although reading the *Miranda* warning is only required before custodial interrogations, the rights discussed in the warning apply whether or not someone is in custody. If reading the *Miranda* warning is suggestive of custody, officers may be reluctant to read them generally for fear that it will turn an otherwise noncustodial interview into a custodial interview. Indeed, Detective Metcalf doubted that he needed to read the *Miranda* warning, SE3 (4:30-5:02), but did anyway. This should be encouraged, not discouraged.

II.

Evidence that Defendant hated the baby and treated him roughly was admissible rule 404(b) evidence and that evidence was not unfairly prejudicial under rule 403

The trial court excluded testimony that Defendant was jealous of G.B. and that he called G.B. a whiner, flipped G.B. off, yelled at G.B., and inflicted injury on G.B. R1163-69. For the reasons explained in the State's opening brief, the trial court abused its discretion in excluding that evidence. *See* Aplt.Brf. 38-51. But two claims made by Defendant in his brief merit further response: (1) that the trial court excluded testimony of him flipping off the

baby under evidence rule 104, Aple.Brf. 32-33; and (2) that the State did not challenge the basis for the trial court's exclusion of the mother's testimony that Defendant was jealous of G.B., Aple.Brf. 34.

A. The trial court did not rely on evidence rule 104 in excluding the testimony that Defendant flipped off the baby.

Defendant argues that the trial court "[a]pparently . . . did not believe that the evidence was strong enough" to prove that Defendant flipped off G.B. and thus excluded it under evidence rule 104. Aple.Brf. 32-33. "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." Utah R. Evid. 104(b). But Defendant did not challenge the evidence on this ground and the trial court did not deem it inadmissible on that ground.

A trial court can exclude evidence under rule 104 only if it finds that "there is [in]sufficient evidence upon which *the jury* could make such a determination." *State v. Lucero*, 2014 UT 15, ¶19, 328 P.3d 841 (emphasis added). The mother testified that through the reflection in their fish tank, she saw Defendant flip the baby off with both hands during an argument on January 13, 2013. R1205:46. That testimony was sufficient to submit the matter to the jury to determine that fact, and the trial court did not suggest otherwise. Nor could the court have properly done so—" 'the trial court neither

weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.'" *Lucero*, 2014 UT 15, ¶19 (quoting *Huddleston v. United States*, 485 U.S. 681, 690 (1988)).[1]

An examination of the trial court's ruling reveals that it excluded the evidence under rule 403, not rule 104 or rule 404(b). The trial court ruled that the flipping-off incident was "offered for a proper non-character purpose—to show that the Defendant had contempt for [G.B.]." R1167. But the court then ruled that the evidence was inadmissible under rule 403. The court concluded that the "probative value of this evidence is thin" and that "the strength of the evidence is lacking." R1167. But the trial court here was not making a ruling under rule 104. The court was conducting the rule 403 analysis it had described earlier in its opinion, i.e., whether the evidence's "probative value is substantially outweighed by the danger of unfair prejudice" in light of the "*Shickles*" factor concerning "the strength of the evidence." R1172. For all the reasons discussed in the State's opening brief, the court abused its discretion in excluding the evidence under rule 403. *See* Aplt.Brf. 48-51.

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[1] In the court's findings of fact in its rule 404(b) ruling, the trial court in fact found that during the January 13, 2013 argument, "Defendant flipped off [the baby] with both hands" and that the mother "witnessed" it "through the reflection in the fish tank." R1174.

B. The State has challenged the basis of the trial court's ruling excluding the mother's testimony that Defendant was jealous of the baby.

Defendant claims that the State failed to analyze the trial court's rule 701 analysis of the mother's testimony that Defendant was jealous of G.B. Aple.Brf. 34. He is mistaken.

The trial court ruled that to be admissible under rule 701, the mother's lay opinion that Defendant was jealous of G.B. "must be 'rationally based on the witness's perception' and 'helpful . . . to determining a fact in issue.'" R1166 (quoting Utah R. Evid. 701(a)-(b)). The court concluded that the mother's opinion was, in fact, "rationally based on the facts she observed." R1165. And the State does not take issue with that conclusion.[2] But the trial court went on to conclude that the mother's opinion "would not be helpful to the trier of fact" because Defendant's jealousy "does not suggest a deep-seated envy that would motivate Defendant to commit a violent act against" G.B. R1165. The State has challenged that conclusion.

Both rules 701 and 702 require a showing of helpfulness before opinion testimony—whether lay or expert—may be admitted. *See* Utah R. Evid. 701-02. As explained by the Tenth Circuit, "'this [helpfulness] condition goes primarily to relevance' because '[opinion] testimony which does not

[2] Nor does the State take issue with the trial court's conclusion that the proffered testimony is not bad acts evidence under rule 404(b). R1166.

relate to any issue in the case is not relevant and, ergo, non-helpful.' " *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1136 (10th Cir. 2014) (citation omitted) (discussing Fed. R. Evid. 702). And this is precisely what the State has argued in its opening brief. Contrary to the trial court's ruling, the mother's testimony that Defendant was jealous of D.B. "is relevant" because it "*helps* establish [Defendant's] contempt for G.B., thereby (1) showing that he had a motive to hurt him, and (2) refuting [Defendant's] claim that the baby's injuries were accidentally inflicted." Aple.Brf. 47 n.1 (emphasis added).

The trial court concluded that the evidence did not show that Defendant's jealousy was so "deep-seated" that it "would motivate Defendant to commit a violent act against" G.B. R1165. But that is for the jury to decide, not the trial judge. As explained in the State's opening brief, the jury was entitled to examine all of this evidence to decide whether Defendant's contempt and jealousy was sufficient to motivate him to harm G.B. The "more reasons" Defendant had to harm G.B., "the more plausible was the State's theory that he did so intentionally rather than recklessly" or by accident. *State v. Pearson*, 943 P.2d 1347, 1351 (Utah 1997).

C. This Court's rule 403 analysis is more fully governed by the Utah Supreme Court's recent decision in *State v. Cuttler.*

Defendant argues that the State's discussion of rule 403 "shoots wide of the trial court's ruling, because the trial court excluded the 404(b) evidence on the ground of a lack of proper non-character purpose, and not on 403 grounds." Aple.Brf. 38. But as explained in the State's opening brief, the trial court concluded that the "flipping off" and "whiner" evidence was offered for a proper, noncharacter purpose. Aplt.Brf. 44. But it then ruled that such evidence, together with the prior abuse evidence, was substantially outweighed by the danger of unfair prejudice. R1164,1167-69. For the reasons explained in the State's brief, the trial court abused its discretion in so ruling. Aplt.Brf. 47-51.[3]

Since the filing of the State's brief, the Utah Supreme Court further clarified rule 403 analysis in *State v. Cuttler*, 2015 UT 95, 367 P.3d 981. There, the Court held that "it is inappropriate for a district court to ever consider whether evidence will lead a jury to 'overmastering hostility' " *Id.* at ¶20.

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[3] Defendant argues that the bruising to G.B.'s cheeks resulting from Defendant administering medicine is not sufficiently similar to the alleged abuse here. Aple.Brf. 38. But Defendant, like the trial court, seeks to impose a much harsher burden than is required to show the probative value of such evidence. Neither administering medicine, nor putting a baby to bed, should result in the injuries suffered by G.B. The evidence is thus highly probative that Defendant intentionally inflicted injury upon G.B.

The Court explained that "[o]vermastering hostility is both a stricter and looser metric by which to judge evidence under rule 403." *Id.* On the one hand, evidence may be unfairly prejudicial "in ways other than by rousing a jury to overmastering hostility," and on the other hand, "overmastering hostility is much stronger language than the 'unfair' language actually used in rule 403." *Id.* Accordingly, evidence is properly examined " 'by the text of rule 403,' " *id.* at ¶18 (quoting *Lucero*, 2014 UT 15, ¶32)—i.e., whether the evidence's "probative value is *substantially outweighed* by the danger of . . . unfair prejudice" or other rule 403 concern. Utah R. Evid. 403 (emphasis added).

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, the Court should reverse.

Respectfully submitted on May 5, 2016.

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CERTIFICATE OF SERVICE

I certify that on May 5, 2016, two copies of the Reply Brief of Appellant were ☑ mailed ☐ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.