2016

The State of Utah, Plaintiff/Appellee v. Kristopher England, Defendant/Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. KRISTOPHER ENGLAND, Defendant/Appellant.	Case No. 20150218-CA Appellant is incarcerated

APPELLANT'S REPLY BRIEF

An appeal from the district court's final order in a restitution hearing following conviction and sentence for one count of theft, a third degree felony, in violation of Utah Code section 76-6-404, in the Third Judicial District, Salt Lake County, Utah, the Honorable Judge Charlene Barlow presiding.

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ARGUMENT

I. The State's alternate grounds for affirmance are not apparent on the record.

The State acknowledges that "the prosecutor and the trial court focused generally on fair market value and did not discuss either of [its two appellate] justifications," but argues that this Court should affirm on alternate grounds. State's Brief (SB) 12 n.3. Utah's appellate courts "will not affirm a judgment if [an] alternate ground or theory is not apparent on the record. To hold otherwise would invite [each] party to selectively focus on issues below, the effect of which is holding back issues that the opposition had neither notice of nor an opportunity to address." *Francis v. State*, 2010 UT 62, ¶ 19, 248 P.3d 44 (brackets in original) (footnote omitted) (internal quotation marks omitted). "[T]o be apparent on the record requires more than mere assumption or absence of evidence contrary to the alternate ground or theory. The record must contain sufficient

and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal." *Id.* (brackets omitted) (internal quotation marks omitted). The Court explained that "it falls to the party seeking the benefit of the rule to explain why it is eligible to have the alternative arguments considered." *Id.* ¶ 21. Furthermore, "[i]t is well settled that a party cannot take advantage of an error committed at trial when the party led the trial court into committing the error." *State v. Swogger*, 2013 UT App 164, ¶ 3, 306 P.3d 840 (internal quotation marks omitted).

In *Francis*, the Utah Supreme Court declined to affirm on alternate grounds where "the two alternative arguments the State . . . present[ed] . . . are entirely absent from the record." 2010 UT 62, ¶ 21. In this case, any alternative to fair market value was expressly dismissed: the prosecutor and the trial court "focused generally on fair market value," SB 12 n.3, because all parties agreed at the outset that it was the proper measure of restitution. R. 161:5. The two-day restitution hearing began with this exchange:

> THE COURT: But first let me ask: Is there any opening statement from either side? I have read through the information, the victim impact statement and everything, so . . .
>
> MR. HAMILTON [the prosecutor]: Well, I — not really an opening statement. Maybe — I think this would go for both sides. Is that — it's my — the only thing we're determining today, I believe, is the value — and Mr. England's pled guilty to a theft of a car, so it's just the fair market value of the car that was stolen —
>
> THE COURT: Right.
>
> MR. HAMILTON: — when it was stolen.
>
> THE COURT: That's my understanding.
>
> MR. HAMILTON: I may — I probably should have mentioned that when I had everybody in here.
>
> THE COURT: Yeah.

MR. HAMILTON: I think it's more for their benefit, but that's what we're here to decide is just the restitution hearing for the value of this car.

THE COURT: That's my understanding, so . . .

MR. HOWARD [defense counsel]: The value of the car at the time that Mr. England took possession of it is —

MR. HAMILTON: Illegal possession and then —

MR. HOWARD: Yeah.

MR. HAMILTON: Yeah.

THE COURT: Okay. Yeah. Okay.

R. 161: 4-5. The parties agreed the restitution figure would be the "fair market value," the "measure . . . explicitly endorsed in the restitution statute." SB 11 (citing Utah Code § 77-38a-102(6)).

And the two-day restitution hearing continued with each party and the judge attempting to determine fair market value. When defense counsel asked what the car without an engine would have sold for, the mechanic responded that selling the car belonging to M.M. would be "unethical." R. 161:59-60. The judge then stepped in to explain the hypothetical: "If [M.M.] came to you and said, 'I don't want it anymore, it's not worth the hassle anymore. You take it and sell it for whatever you can get for it.' What do you think you would have been able to get for it?" R. 161:60. This was the exchange that yielded the "at least $3,500" figure. R. 161:60.[1] At argument, the court

[1] The State argues that "the mechanic presented the $3,500 as a *minimum* value, giving a range from $3,500 to $5,000." SB 22 (citing R. 161:10-11, 14-17, 60). The $3,500 to $5,000 range came in response to a different question. SB 6 (stating that the mechanic's "testimony conflicted as to whether that estimate applied before or after the modifications"). The State asked the mechanic to estimate the value for a 1995 Eagle Talon with 140,000 miles on it in 2011, "when he brought it in and you had it at the beginning." R. 161:10-11. "I would say the Kelley Blue would have to be somewhere in at least $5,000 to $3,500" for good to poor condition because the "cars do hold their value." R. 161:11. The State then produced Exhibit One, the Kelley Blue Book print out. R. 161:11-12. The mechanic then stated that "the Kelley Blue book is denominating

asked, "What are you — what's the State asking for?" R. 161:90. The prosecutor responded, "[t]he State is asking for the fair market value of the car as testified by [the mechanic]." The prosecutor later summed up his argument, "so that would be the State's argument is that it's the fair market value of the car." R. 161:93. Because all parties expressly agreed that fair market value was the appropriate measure of restitution, the defense "had neither notice of nor an opportunity to address," *Francis*, 2010 UT 62, ¶ 19 (internal quotation marks omitted), the State's new arguments that the car was unique and that there was no market for it.

The State never argued that the car was unique to the district court and the district court made no finding that the car was unique. R. 138-39; 161, 162 (transcript word indices have no entry for "unique"); *Francis*, 2010 UT 62, ¶ 21 ("In contrast [to a case where the court would affirm on alternate grounds], the two alternative arguments the State now presents to this court are entirely absent from the record."). And for good reason. *Black's Law Dictionary* defines "unique chattel" as "[a] chattel that is absolutely irreplaceable because it is one of a kind." CHATTEL, *Black's Law Dictionary* (10th ed. 2014). Examples in case law include "antiques or paintings," *State v. Frampton*, 737 P.2d 183, 192 (Utah 1987), and the definition has been extended in other jurisdictions to encompass "a pedigreed, registered female Irish setter" despite the common law conception that "dogs were . . . property of an inferior sort." *Saunders v. Regeer*, 271 N.Y.S.2d 788, 789 (Dist. Ct. 1966). *But see Daughen v. Fox*, 539 A.2d 858, 864 (Penn. Super. Ct. 1988) ("While the appellants undoubtedly had sentimental attachment to their

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the car at a lesser value." R. 161:14.

dog, this would not make it unique chattel under the law."). The car in this case was upgraded, but it was intended for the everyday use of a new driver. R. 161:80. And it was not "absolutely irreplaceable" — the original car appeared in the Kelley Blue Book and the kits were apparently ordered from a manufacturer that ships nationwide. R. 161:21; State's Ex. 1. In the absence of any evidence or argument on the car's uniqueness, there is nothing "supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal." *Francis*, 2010 UT 62, ¶ 19 (internal quotation marks omitted).

Additionally, the cases the State cites for the first time on appeal to support its argument that it is "apparent in the record" that fair market value is not the measure of unique property are civil cases, not restitution cases.[2] SB 12-13. And the cases discuss unique property only in non-binding dicta. In *Winters v. Charles Anthony, Inc.*, 586 P.2d 453, 454 (Utah 1978), the Court did not rely on a finding that the chattel — an emerald and pearl bracelet — was unique. Rather, it relied on the appraisal value as calculated by

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[2] The Restitution Act notes that potential civil recovery is relevant to determining criminal restitution, but defines "pecuniary damages" to include "fair market value" and to exclude certain damages like "pain and suffering" that often form the bulk of recovery in a civil action. Utah Code § 77-38a-102(6); *see Paroline v. United States*, 134 S. Ct. 1710, 1724 (2014) ("Aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from (though they overlap with) the purposes of tort law."). The State's argument for affirmance on an alternate ground apparent on the record relies on the non-exhaustive nature of the word "includes," not on any statutory language endorsing its alternate measures. SB 16.

The one criminal restitution case the State cites, *State v. Ludlow*, 2015 UT App 146, 353 P.3d 179, is discussed at length in the opening brief. Opening Brief 7-12. *Ludlow* reversed a restitution order because "electronics of various ages . . . would clearly have a market value." *Id.* ¶ 10. It does not address "unique property."

an expert and "based on the value of each individual stone with no consideration given to any aesthetic or sentimental value." *Id.* at 455. In *Firkins v. Ruegner*, 2009 UT App 167, ¶¶ 7-8, 213 P.3d 895, the uniqueness of the catering truck was mentioned, but the $100,000 restitution figure was calculated primarily by considering the "sweetheart" nature of the $50,000 purchase price, the improvements made to the truck, and the testimony that trucks with such improvements are worth between $75,000 and $140,000. In *Henderson v. For-Shor Co.*, 757 P.2d 465, 468 (Utah Ct. App. 1988), this Court addressed cement forms where "documentary and testimonial evidence" supporting the restitution figure included an invoice for the property in question and the court relied on "market value." It is far from apparent that the cases create precedent for imposing a criminal restitution figure based on "value to the property's owner." SB 12.

As with the argument that the car was "unique chattel," there was no evidence or argument presented below that there was "little or no market" for the car. SB 15. "[T]o be 'apparent on the record' requires more than mere assumption or evidence contrary to the alternate ground or theory." *Francis*, 2010 UT 62, ¶ 19 (brackets omitted) (interior quotation marks omitted). The State's argument that there is "likely little or no market," for the car, which it bases on "common sense inferences" in the absence of "proof," is contradicted by the testimony in the record. SB 15-16. The mechanic provided a figure for the fair market value of the item: "at least $3,500." R. 161:60. The closest the evidence came to addressing lack of market for the car is defense counsel's question of whether "there are certain modifications that don't really add to the value?" R. 161:61. The mechanic answered "I've never looked at it that way, no" and the court directed

defense counsel to "move on." R. 161:62. It is the State's burden to "explain why it is eligible to have [an] alternative arguments considered." *Id.* ¶ 21. That burden is not met by the assertion, supported by a citation to dicta in a case about the fair market of emeralds and pearls, that "there is likely 'no demand'" for the car. SB 17 (citing *Winters*, 586 P.2d at 454).

At the district court, it was understood that "value to the property's owner" was not the right standard for a criminal restitution cases. M.M. initially requested $17,202.76. R. 112. By the conclusion of the restitution hearings, the State clarified that it was not arguing for the "initial amount" requested, but for the "fair market value." R. 162:89-90. There is no dispute that Mr. England wrongfully took from M.M. something he was excited to present to his son. But the restitution statute "includes the fair market value of property taken" and "excludes punitive or exemplary damages and pain and suffering." Utah Code § 77-38a-102(6). That exclusion likely reflects the legislature's understanding that in criminal cases, the defendant pays for the pain and suffering he caused by serving a prison sentence. R. 108-09 (sentencing Mr. England to prison).

The State's arguments rejecting the fair market values in the opening brief all rely on its new alternate argument that the car was unique or that there was no market for it. The State argues that "[u]sing the scrap-metal market to measure the value of a customized car that still had value to its owner would thus be inconsistent with the rule that the value of unique property is measured by value to its owner." SB 21. It argues that "[w]hile the trial court could have accepted the mechanic's estimation" of $3,500, that was "merely a guess based on an unlikely hypothetical scenario." SB 22. And it

argues that basing the fair market value on the purchase price of the car with an engine when the engine was in the mechanic's custody "highlights the fact that there was likely little or no market in which to determine the value of the stolen property." SB 23. "[T]he link England says the State failed to make is necessary only when purchase price stands in for retail price. As shown, fair market value — whether determined using retail price or purchase price — is not the measure of damages when the thief converts property for which there is no market." SB 24. And even the State's final argument that the Kelley Blue Book value for a comparable car was "$2,147 at the end of 2014" and "the purchase price of $2,500 is not far off," SB 25, does not address the absence of an engine at the time of the theft. The State did not show that the fair market value for the car with no engine was $8,277.87 — the original retail price of the car with an engine and the original retail price of each improvement — in the district court and it has not done so in its brief. This Court should reverse.

II. Mr. England's appellate arguments are preserved.

The State argues that Mr. "England's burden-shifting argument is unpreserved" because he "made no contemporaneous objection and did not bring the alleged error to the trial court's attention at any other time." SB 26 n.5 (citing R. 162:95-96). The State does not argue that Mr. England was obligated to produce evidence of the car's fair market value or that the absence of a "burden-shifting" objection in this context meant that he actually bore the burden. The district court's comment came in response to the defense's objection that purchase price was not the fair market value in this case. The

district court said it was considering "tak[ing] the value of the car when it was purchased and then add the value of the items that were actually added on." R. 162:94. Defense counsel disagreed with this proposed formula: "first of all, [M.M.] testified what he paid. We don't know if that was actually a good market value, . . . We really don't have an independent witness to tell us what this car was worth." R. 162:95. The district court agreed, but reminded defense counsel that both sides failed to produce such a witness. R. 162:95. Defense counsel did not need to make a "contemporaneous objection," SB 26 n.5, to the comment the court interrupted his objection to make in order to keep the burden where it belonged. Defense counsel argued that the court's restitution formula was flawed, and the court's interruption provides some insight into why it reached the wrong figure.

Mr. England's counsel brought the error to the court's attention and argued for a lower figure. He argued throughout the restitution hearing that the purchase price was not the fair market value in this case. R. 162:95. He elicited evidence that the car was sold for $300 and that the mechanic believed the market value of the car without the engine but with the improvements was $3,500. R. 162:70; 161:60. He argued that "this is a vehicle — a 1995 vehicle that had — some work had been done on it, but it was still — it was still a vehicle with no motor . . . ." R. 162:88. He continued, "we have received no testimony from any independent witness here who has been able to look at the photos and tell what in his experienced opinion that vehicle [would] be worth." R. 162:88. He suggested that the "most valuable part in the car . . . is the engine." R. 162:89. The court's comment is an acknowledgement that there was insufficient evidence of fair

market value and a suggestion that the court erred in favor of the victim instead of holding the moving party to its burden.

Mr. England's arguments are preserved. This Court should not affirm based on new arguments that are not apparent on the record.

CONCLUSION

For the reasons above and in the opening brief, this Court should reverse the district court's restitution order.

SUBMITTED this 5 day of January, 2016.

NATHALIE S. SKIBINE
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 5 day of January, 2016.

NATHALIE S. SKIBINE

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,520 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R.App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

NATHALIE S. SKIBINE

DELIVERED this 5 day of January, 2016.