2016

The State of Utah, Plaintiff/Appellee vs. Timothy James Trujillo, Jr., Defendant/Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, vs. TIMOTHY JAMES TRUJILLO, JR., Defendant/Appellant.	Case No. 20150468-CA Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

An appeal from a judgment of conviction for one count of retaliation against a witness, victim, or informant, a third degree felony in violation of Utah Code section 76-8-508.3, in the Third Judicial District, Salt Lake County, Utah, the Honorable Judge Vernice Trease presiding.

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ARGUMENT

I. The plain language requires a threat be directed against a witness as retaliation.

The State argues that "the Legislature did not require that the offender make a threat to a witness," only "against the witness." State's Brief (SB) 14. But the State concedes that a threat "must . . . be communicated to someone." SB 15. The State's reading of the statute is inconsistent. If all that matters is that the content of the message concern a witness, a "threat" could be written in a diary.

The State cites two cases in the plain language section of its brief, neither of which addressed statutes that included as an element that the defendant "directs the threat or action: against a witness." SB 14-17; *see* Utah Code § 76-8-508.3(2)(b)(i). *State v. Johnson*, 2008 UT App 5, 178 P.3d 915, as argued in the opening brief, addressed a statute that did not include "direct[ed] . . . against" as an element of the offense. Opening Brief (OB) 15-16. The State cites an Ohio case that analyzed a statute that read, "No

person . . . by unlawful threat of harm to any person or property, shall retaliate against . . . an attorney or witness who was involved in a civil or criminal action or proceeding because the . . . attorney[] or witness discharged the duties of the. . . attorney[] or witness." *State v. Myers*, No. WD-15-017, 2016 WL 347093 (Ohio Ct. App. Jan. 22, 2016). The statutory language does not include the separate element included in the Utah statue that the threat be "direct[ed] . . . against" the witness.

And even so, the Ohio court held that there is no violation unless "the defendant was either aware that the threats would be communicated to the intended victim by the third person or could reasonably have expected the threats to be so conveyed." *Id.* (internal quotation marks omitted). In the cited cases, the Court of Appeals of Ohio reversed the judgments where the defendant "had no knowledge that the content of his private correspondence with his friend was being read by law enforcement" and therefore "could not have been convicted of retaliation based on the statements contained in those letters." *State v. Welch*, No. WD-07-057, 2008 WL 5196526 (Ohio Ct. App. Dec. 12, 2008); *see State v. Farthing*, 767 N.E.2d 1242, 1246 (Ohio Ct. App. 2001) ("Because [the defendant] could not have reasonably expected the statements in his letter to Lewis would be conveyed to Johnson, he could not have been convicted of retaliation based on the statements contained in that letter."). "The jury in a retaliation case . . . must find that the accused intended to retaliate against the victim of a crime. Such a finding presupposes an expectation on the part of the accused that the victim would be or, by some manner, would become aware of the threats." *State v. Lambert*, No. 16667, 1998 WL 288957, at *7 (Ohio Ct. App. June 5, 1998). The State did not argue below or on appeal that Mr.

Trujillo reasonably expected the police to help him threaten a witness. The State's argument citing the law in Ohio therefore advocates that Utah's statute, which includes language plainly requiring more than the Ohio statute, be read to require less.

The State also argues that because another third degree felony offense requires "communicating to the juror a threat," no communication must be required in the retaliation statute. SB 16-17 (citing Utah Code § 76-8-508.5). As argued in the Opening Brief, a threat that is directed against a witness as retaliation must, by definition, at least be intended to be communicated to the witness. OB 7-20. Like its counterpart, a bribe, *see* Utah Code § 76-8-508, delivery or at least intended receipt is a definitional aspect. That the legislature made the requirement clear using different words in these two statutes, which were passed over ten years apart, does not mean that the legislature intended to eliminate an element from the retaliation statute. Quite the contrary: that these two statues have similar goals and are both third degree felonies suggests that communication was expected in both instances.

The State's remaining arguments are hypothetical policy reasons why a legislature might wish to criminalize uncommunicated threats. The State is concerned that witnesses "will be less likely to participate in official investigations and other proceedings because no law prohibits threats against them, so long as the threats are not communicated to them directly." SB 15-16. It is doubtful that the fear of a threat the witness would never know about would chill witness participation. The State also argues that "a threat communicated to or in front of the right third party may well result in the threat being

carried out." SB 16.[1] Solicitation, or "importun[ing] another person to engage in" criminal conduct is a separate crime under Utah Code section 76-4-203. The retaliation statute was not intended to prevent conduct that it does not address when another statute already addresses that conduct.

Finally, the State's policy arguments do not address the evidence in this case. The evidence was that, because of what Mr. Trujillo said to the police, Mr. Trujillo "would realize that if anything did happen, that it would be traced directly back to him, and probably said, yeah, let's not do anything there." R. 733. The legislature did not craft the retaliation statute to criminalize talking to the police, and this case provides an example of why that decision was good policy.

II. The gang evidence was unfairly prejudicial.

The State argues that "much gang-related evidence is not evidence of any act at all." SB 21. It may be possible to present expert testimony on gangs that addresses affiliation "'without any testimony of particular prior bad acts [the defendant] participated in as a gang member.'" SB 21 (quoting *State v. Gonzalez*, 2015 UT 10, ¶ 39, 345 P.3d 1168). But that did not happen in this case. The expert testimony in this case was that Mr. Trujillo gained a position of authority in the gang by "putting in work" like

[1] Notably, the State quotes testimony later in its brief that Mr. Trujillo's words could "plant a seed in the minds of younger gang members," but there was no evidence that younger gang members heard the words. SB 18-19. Present at the scene were "Detective Voorhies, Detective Willis, Sergeant Eldard, [Detective Van Wagoner], the defendant, another individual that had been handcuffed and arrested [named] Robert Wallace, and then someone who claimed to be the owner of the residence, who was a woman." R. 687. There was testimony that Robert Wallace was a leader, not a younger gang member. R. 707.

"steal[ing] beer" and "drive-by shooting for the gang." R. 707-11. All parties and the trial court agreed that there was "no question that the evidence is prejudicial." R. 526, 535. And the jurors made apparent that they had been convinced that Mr. Trujillo had a character and propensity for committing the charged crime when they asked for protection in case he committed it again. R. 821.

The State argues that "even where evidence presented is bad acts evidence, it is presumptively admissible and the court must admit it unless the defendant shows that the evidence does not meet the low relevancy standard of rule 402, that the evidence is being offered solely for an improper character purpose under rule 404(b), or that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under rule 403." SB 23. As the Utah Supreme Court has explained, it is "often . . . the case for evidence of prior misconduct" that the evidence "may be worse than immaterial to a legitimate narrative." *State v. Verde*, 2012 UT 60, ¶ 29, 296 P.3d 673. "It may risk creating an alternative, illegitimate narrative — that the defendant has a reprehensible character, that he probably acted in conformity with it, and that he should be punished for his immoral character in any event." *Id.* This Court has explained that gang evidence "must be carefully examined" and avoid "straying into marginally relevant and highly prejudicial areas." *State v. High*, 2012 UT App 180, ¶ 27, 282 P.3d 1046. That was the case here: evidence that Mr. Trujillo had risen to a position of power in his gang through bad acts and that he expected others to do the same convinced the jury that he was probably guilty and should be in prison in any event.

The evidence's probative value was very low. The State argues that gang-related evidence was "relevant to explain" that Mr. Trujillo's words suggested he could "send younger gang members to harm the Spites or their property." SB 25. But, as argued in the Opening Brief, it was the non-expert testimony that addressed this issue without objection. OB 23 (citing R. 689). The State next argues that testimony "about how gangs respond to slights against gang members and to evidence of 'snitching' was relevant to whether Defendant acted to retaliate or punish." SB 26. Testimony about how gangs generally retaliate is only relevant to show that gang members have a character and propensity for retaliation. It was not necessary where the real issue in this case was whether someone can make a threat directed against a witness as retaliation in the absence of any intent to communicate with the witness.

The State argues both that "the relevance and significance of the alleged threat was 'encompassed almost entirely on the alleged fact that he belongs to a gang,'" SB 27 (quoting R. 535-36), and that "admitting the evidence did not likely make a difference in the verdict," SB 29. The gang evidence in this case strayed from what happened at the incident into an "illegitimate narrative," *Verde*, 2012 UT 60, ¶ 29, that was "certainly prejudicial," R. 526. In a retaliation case, the jury heard evidence that "you can guarantee there's going to be retaliation," and they heard evidence that Mr. Trujillo was a gang leader. R. 707; 725-26. This is exactly the kind of evidence that would lead the jury to believe he had a propensity to commit the offense and deserved punishment in any case. *See id.* There is a reasonable probability that, absent this unfairly prejudicial testimony, the jury would have acquitted.

CONCLUSION

For the reasons above and in the opening brief, Mr. Trujillo respectfully requests that this Court reverse.

SUBMITTED this 14th day of June, 2016.

NATHALIE S. SKIBINE
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 1,738 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

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114, this 14th day of June, 2016.

Nathalie S. Skibine

DELIVERED this 14th day of June, 2016.