2016

The State of Utah, Plaintiff/Appellee v. Vratislav Roger Bilek, Defendant/Appellant

Utah Court of Appeals

No. 20160285-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

VRATISLAV ROGER BILEK,
Defendant/Appellant.

Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Kidnapping, a second degree felony, in violation of Utah Code § 76-5-301, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Bruce Lubeck presiding.

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INTRODUCTION

As required by Utah Rule of Appellate Procedure 24(c), this reply brief is "limited to answering any new matter set forth in the opposing brief." The brief does not restate arguments from the opening brief or address matters that do not merit reply.

With the exception of the final two pages of its brief, the State argues prejudice and raises new arguments never presented to the district court. It argues that Bilek violated a less serious statute even if he did not violate the statute on which his revocation of probation was based. SB 18-20. And it argues for the first time that "concealed or disguised" applies only to "other equipment" and not to the list of equipment in the voyeurism statute. State's Brief (SB) 20-24. This brief will respond to the State's new arguments. The opening brief

adequately addressed prejudice and the absence of concealment. *See* SB 17-18; 25-26.

ARGUMENT

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

The State argues that its "plain reading of the statute" does not require concealment unless the device is "other equipment." SB 20. That was never argued below. R:2032 (State's argument was that "[s]he doesn't now these videos are being taken"). It was not the basis for the court's ruling. R:2035-36. The court ruled that "when someone is unconscious or asleep [the equipment] is concealed from them." R:2036. Likewise, the State never alleged that Bilek violated a different and less serious voyeurism statute and the court never addressed that statute. SB 18-19.

Utah's appellate courts "will not affirm a judgment if the 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 omitted) (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] . . . [were] entirely absent from the record." 2010 UT 62, ¶ 21. That is the case here, too. Counsel below never had the opportunity to address the argument that concealment applies only to "other equipment." Nor did it have the opportunity to defend against a separate statute or to argue that violating a less serious statute, a class B misdemeanor, should not result in the revocation of felony probation. There is nothing in the record that would have placed Bilek on notice that the State would rely on these new alternate grounds for affirmance on appeal.

The State's reliance on an uncharged class B misdemeanor for affirmance is particularly problematic and raises the kinds of concerns better suited for fact-finding district courts. That statute requires that a person view an individual "without the knowledge or consent of the individual" and "under circumstances

in which the individual has a reasonable expectation of privacy." Utah Code § 76-9-702.7(4). The State faults Bilek for "challeng[ing] only the use of a qualifying device and not any other element of the voyeurism statute," below. SB 19. But Bilek never had the opportunity to consider consent and the expectation of privacy absent an electronic device because no such offense was charged. Consent to be seen and consent to be photographed are different. And a person may have a reasonable expectation of privacy from electronic devices, but not from the person with whom she is sharing a hotel room and engaging with in sexual behavior. The class B misdemeanor may have some similar language to the charged offense, but it would result in a different analysis. This Court should not affirm based on an uncharged, less serious offense.

II. The plain language of the statute requiring that electronic devices be concealed or disguised applies to the statutory list of electronic devices.

The relevant statutory language provides, "A person is guilty of voyeurism who intentionally uses a camcorder, motion picture camera, photographic camera of any type, or other equipment that is concealed or disguised to secretly or surreptitiously videotape, film, photograph, record, or view by electronic means an individual . . ." Utah Code § 76-9-702.7(1). The State argues that "concealed or disguised" modifies only "other equipment." SB 20.

"When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry, Light &*

Power Co. v. Mor, 253 U.S. 345, 348 (1920). Under the series-qualifier canon of construction, when "there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (Thomas/West) (2012). The State suggests that, in order to modify the entire list, "concealed or disguised" would have to "precede the equipment list: A person is guilty of voyeurism who intentionally uses a *concealed or disguised* camcorder, motion picture camera, photographic camera of any type, or other equipment . . . " SB 21. But series qualifiers can be prepositive or postpositive. Scalia & Garner, *supra*, at 147. And the State offers no satisfying explanation why, under its reading of series modifiers, a prepositive modifier would not mean that "concealed or disguised" applied only to "camcorder."

"Other equipment" is "a catchall term at the end of an exemplary list." *E.g.*, *State v. Bagnes*, 2014 UT 4, ¶ 18, 322 P.3d 719. In *Paroline v. United States*, the United States Supreme Court explained that "it is a familiar canon of statutory construction that catchall clauses are to be read as bringing within the statute categories similar in type to those specifically enumerated." 134 S. Ct. 1710, 1721 (2014) (alterations omitted) (internal quotation marks omitted). A "broad, final category" is "most naturally understood as a summary" of the type of devices covered — disguised or concealed electronic equipment that captures images. *See id.* In *Paroline*, the statute enumerated six categories of covered

losses including medical services and lost income and "a final catchall category for 'any other losses suffered by the victim as a proximate result of the offense.'" *Id.* at 1720 (citing 18 U.S.C. § 2259(b)(3)(F)). The Court therefore rejected the argument "that because the 'proximate result' language appears only in the final, catchall category of losses set forth at § 2259(b)(3)(F), the statute has no proximate-cause requirement for losses falling within the prior enumerated categories." *Id.*

Furthermore, "there is no reason consistent with any discernible purpose of the statute" to apply concealed or disguised to the catchall provision but not the exemplary list. *See United States v. Bass*, 404 U.S. 336, 341 (1971). The State argues that "other equipment" could mean Google Glasses, but provides no explanation for why the legislature would be more concerned with the concealment of Google Glasses than with a camera or camcorder. SB 21-22.

The State argues that if concealed or disguised applies to the enumerated list, "it would render superfluous the 'secretly or surreptitiously' portion of the statute." SB 21. That is not the case. A concealed camera can be used in a way that is not surreptitious. For example, a sign at a store might alert customers they are being filmed. And an unconcealed camera can be used surreptitiously. A photographer might take candid photographs with an unconcealed camera, hoping to blend in and be overlooked. Furthermore, the legislature's use of "secretly or surreptitiously," two words that largely overlap, suggests that some overlapping statutory language is natural and can be the result of emphasis.

The State argues that its definition would reach behavior that criminalizing voyeurism "was intended to address." SB 23. The legislature does not act with a singular purpose. It must also guard against vagueness and anticipate potential constitutional challenges. The Court of Criminal Appeals of Texas held that state's statute, which "proscribes taking photographs and recording visual images," without a person's consent and to gratify sexual desire, "facially unconstitutional in violation of the freedom of speech guarantee of the First Amendment." *Ex parte Thompson*, 442 S.W.3d 325, 330 (Tex. Crim. App. 2014). The Utah legislature therefore used clear language to define a specific offense. That language requires that the equipment be "concealed or disguised."

As argued below and in the opening brief, Bilek did not use a concealed device. R:2030; Opening Brief 7.

CONCLUSION

For the reasons above and in the opening brief, Bilek respectfully requests that his sentence be reversed.

SUBMITTED this 22nd day of December, 2016.

NATHALIE 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 1,580 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 Georgia 13 point.

NATHALIE SKIBINE

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused to be hand-delivered six 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 Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114. I have also caused a searchable pdf of this opening brief to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and to the Attorney General's Office at criminalappeals@utah.gov pursuant to Utah Supreme Court Standing Order No. 11, this 22nd day of December, 2016.

NATHALIE S. SKIBINE

DELIVERED this 22 day of July, 2016.