2002

State of Utah v. Richard M. Eldredge : Reply Brief

Utah Court of Appeals

Stewart M. Hanson; Michael W. Homer; Charles P. Sampson; Suitter, Axland, Armstrong and Hanson; Attorneys for Appellant.
R. Paul Van Dam; Attorney General; Sandra L. Sjogren; Assistant Attorney General; Attorneys for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

TATE OF UTAH, Plaintiff-Respondent,	:	Case No. 20558
RICHARD M. ELDREDGE, Defendant-Appellant.	:	Category No. 2

REPLY TO PETITION FOR REHEARING

R. PAUL VAN DAM
Attorney General
SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

STEWART M. HANSON, JR.
MICHAEL W. HOMER
CHARLES P. SAMPSON
SUITTER, AXLAND, ARMSTRONG & HANSON
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

ATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 20558
	:	
CHARD M. ELDREDGE,	:	Category No. 2
Defendant-Appellant.	:	

REPLY TO PETITION FOR REHEARING

- - - - - - - - - - -

R. PAUL VAN DAM
Attorney General
SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

STEWART M. HANSON, JR.
MICHAEL W. HOMER
CHARLES P. SAMPSON
SUITTER, AXLAND, ARMSTRONG & HANSON
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES AND RULES

IN THE SUPREME COURT OF THE STATE OF UTAH

ATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 20558
	:	
CHARD M. ELDREDGE,	:	Category No. 2
Defendant-Appellant.	:	

REPLY TO PETITION FOR REHEARING

- - - - - - - - -

SUMMARY OF ARGUMENT

Defendant's petition should be denied because this court's opinion supports a conclusion that he was not prejudiced by admission of the evidence even if he did preserve the issue for review by making a general hearsay objection. This Court did, however, properly find that defendant did not preserve the issue for review because defendant's general objection to hearsay can only fairly be interpreted to refer back to his specific argument that application of the statutory hearsay exception was ex post facto and cannot fairly be said to have raised an issue to which he never specifically referred.

ARGUMENT

POINT I

THERE ARE NO GROUNDS SUPPORTING A REHEARING.

Defendant petitions for a rehearing asserting that this Court should not have reached the plain error analysis on the issue of the trial court's admission of testimony under Utah Code Ann. § 76-5-411 absent the requisite findings. He points to his

continuing general objection to hearsay as having preserved his objection to the trial court not making those findings. Defendant's petition should be denied for the reasons stated below.

First, this Court in its plain error analysis has already determined that admission of the child's out-of-court statements was not prejudicial to defendant. In State v. Eldredge, case no. 20558, slip op. at 11-12 (decided Feb. 1, 1989), this Court stated that it did not reach the question of whether the hearsay had a substantial impact on the verdict because it had already determined that the error was not "plain." Part of this Court's plain error analysis is a determination of whether admission of the evidence was so harmful that it "might be expected to attract a trial court's attention." Slip op. at 10, n.8. Further, this Court found that it was unable to say that "the hearsay evidence was sufficiently unreliable that it should have been obvious to the trial judge that the testimony's probativeness was substantially outweighed by its potential for unfair prejudice." Slip op. at 11. All of these findings combined lead to a conclusion that admission of the testimony was not so harmful as to constitute reversible error. See, Utah R. Evid. 103(a)(admission of evidence error only if substantial right of defendant is affected); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987) (to require reversal error must create sufficiently high likelihood of a different outcome to undermine confidence in verdict).

Secondly, defendant did not make a proper objection at called to Judge Wilkinson's attention the specific issue fendant raised on appeal. Defendant did specifically object to plication of § 76-5-411 to his case on the grounds that it was : post facto (R. 733). He also argued that the child was not mpetent to testify (R. 728). And, defendant objected generally the admission of hearsay testimony (R. 829, 848, 967). efendant did not, however, articulate specifically to the court hat he believed the court was committing error by failing to ake findings under § 76-5-411(1). Rule 103(a)(1) requires that n objection to admission of evidence be both timely and pecific.

It is his general objection to hearsay that defendant ppears to rely on for his claim that he did preserve the issue of findings for appeal. Close scrutiny reveals that this bjection was not sufficiently clear to apprise the court of the issue to which defendant now claims he was referring. Each time defendant argued the nonadmissibility of the hearsay testimony, he specifically articulated only the ex post facto claim:

> Secondly, counsel went into the use of hearsay, which I hadn't addressed that issue. I have filed a Pretrial Motion to limit them from using hearsay, as soon as I received their Notice to intend to use the hearsay. The law that allows them to use hearsay was introduced and effected after the charges in this case. The Court said it agreed with counsel, procedural changes don't usually make any effect.

(R. 733).

> Your Honor, I would submit, again, they are citing cases which involve procedure and they are going back and forth between competency

> and the use of hearsay. What they are attempting to use here is a complete change in the rules. Under this Section 411, it talks about hearsay. If you read that section of the law, it is such a drastic change, they had to enact certain procedures about the Judge's findings. It is such a change against the traditional laws about using out-of-court hearsay statements in situations such as this, it doesn't matter what the legislature intended in January of 1983; that all happened after the dates in this Information.

(R. 735-6). After that, defendant only stated that he objected to the hearsay coming in, he did not state to the court that there was any other basis for that objection other than his claim that the statute was ex post facto. Thus, it is generous to construe defendant's continuing hearsay objection as a general one since it seems to have been irrevocably tied to his argument that application of the statutory exception was ex post facto and to no other argument. Defendant's specificity on that point easily misled the court into a belief that defendant was only objecting because he thought that the statute should not apply, not that the court's admission of the evidence was mechanically defective under the very rule it was applying.

Defendant may argue that his oblique reference to findings buried in the ex post facto argument above should have alerted the Judge to the need for findings. This Court has always, however, required that an objection to the admission of evidence be specific, State v. Larocco, 665 P.2d 1272 (Utah 1983) and further requires that it be made upon the same grounds at trial in order to preserve the issue for appeal. State v. Davis, 689 P.2d 5 (Utah 1984). Neither defendant's objection that the

ild was incompetent to testify nor his objection that the atute was ex post facto can fairly be said to have alerted the ial court to a mechanical error in its application of the atute.

In fact, this Court ruled in State v. Marcum, 750 P.2d 9 (Utah 1988) that a specific objection to the lack of findings der § 76-5-411 is required to preserve the issue for appeal. arcum states:

> Although the record before us does not contain findings of the trial court that such a determination was made, no objection was raised by defendant at trial as to lack of findings. See State v. Nelson, 725 P.2d 1353, 1355 n.3 (Utah 1986).

50 P.2d at 603 (emphasis added).

Apparently counsel did just what this Court has ttempted to avoid by application of the specificity requirement: e objected to application of the statute on one ground at trial, hought of an additional ground after trial and seeks reversal on ppeal without having provided the trial court with a fair pportunity to correct an error that could easily have been orrected at the time of trial. Larocco, 665 P.2d at 1272-73; f. State v. Tillman, 750 P.2d 546, 561, n.41 (Utah 1987) ("if he objector fails to preserve the record by calling attention to bjections, one could easily invite error by silence").

At the time of trial in this case, § 76-5-411 had been in effect for approximately six months. It was a rule with which the trial court was undoubtedly unfamiliar. This Court had not ruled in any case on any aspect of the statute. In fact, until State v. Nelson in 1986, this Court made no comment on the need

for the trial court to make findings on the record. The language of the statute was not clear as to whether a "determination" of the listed factors involved a requirement that there be specific record findings. Indeed, this Court noted the unclarity and took the opportunity in Nelson to alert trial courts and counsel that record findings were necessary even though the issue was not raised in that case at trial or on appeal. In light of these circumstances, a defendant seeking findings on these factors should be held to a standard requiring a specific request for findings.

This Court should deny defendant's petition for rehearing either because the outcome of the case would not be affected since admission of the evidence did not prejudice defendant or because the Court correctly found that defendant did not properly preserve his objection on the specific grounds raised on appeal.

CONCLUSION

Based upon the foregoing, the State requests that this Court deny defendant's petition for a rehearing.

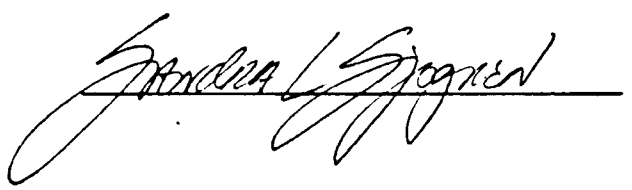
RESPECTFULLY submitted this 17th day of March, 1989.

R. PAUL VAN DAM
Attorney General

SANDRA L. SJØGREN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of
e foregoing Brief of Respondent were mailed, postage prepaid,
Stewart M. Hanson, Jr., Michael W. Homer, and Charles P.
mpson, attorneys for defendant, Suitter, Axland, Armstrong &
nson, 700 Clark Leaming Office Center, 175 South West Temple,
lt Lake City, Utah 84101-1480, this 17th day of March, 1989.



SUITTER AXLAND ARMSTRONG & HANSON
A UTAH PROFESSIONAL LAW CORPORATION
SEVENTH FLOOR
CLARK LEAMING OFFICE CENTER
175 SOUTH WEST TEMPLE
SALT LAKE CITY, UTAH 84101-1480
TELEPHONE (801) 532-7300

CABLE ADDRESS: SAXLAW
TELEX: 453157
TELECOPIER: (801) 532-7355

PARK CITY, UTAH
(801) 649-4000

November 26, 1986

[AND DELIVERED

Geoffrey J. Butler, Esq.
Clerk
Utah Supreme Court
322 State Capitol Building
Salt Lake City, Utah 84114

Re: State v. Eldredge - Case No. 20558

Dear Mr. Butler:

Pursuant to Rule 24(J) Utah Rules of Appellate Procedure, I am supplementing Appellant's Reply Brief at page 12, et seq. with the following citation:

W.D. Slicker, Child Sex Abuse: The Innocent Accused, Case & Comment, November/December 1986, page 12.

Very truly yours,

Stewart M. Hanson, Jr.

SMH:ss

cc: David L. Wilkinson, Esq.
Sandra L. Sjogren, Esq.