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Utah Court of Appeals

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Recommended Citation
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No. 20180055-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

JOSEPH CRESCENCIO GRANADOS,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT

An appeal from a judgment of conviction of attempted murder, a first degree felony; failure to stop or respond at the command or police, a third degree felony; criminal mischief: intentional damage, deface, or destroy property, a third degree felony; possession or use of a controlled substance, a class A misdemeanor; use or possession of drug paraphernalia, a class B misdemeanor; and possession of a dangerous weapon by a restricted, a second degree felony; in the Third District Court, Salt Lake County, Utah, the Honorable Paul B. Parker, presiding.

Appellant is incarcerated

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Defendant/Appellant.

REPLY BRIEF OF APPELLANT

INTRODUCTION

Pursuant to Utah Rule of Appellate Procedure 24(b), this reply brief is "limited to responding to the facts and arguments raised in the appellee's . . . principal brief." The brief does not restate arguments from the opening brief or address matters that do not merit reply.

RESPONSE TO THE STATE'S STATEMENT OF FACTS

The State writes that Granados "stole his girlfriend's red Chevy Malibu." State's Brief (SB) 2 (citing R:627-29), 4, 17, 20, 23. At the record pages the State cites, a property crimes detective testified that he had communication with a woman associated with Granados; the prosecutor then stopped the detective — "I don't want you to tell us what [the woman] told you. I just want you to tell us what you did as a result of that conversation." R:627. The detective said that he "was looking for her vehicle, which was a red 2002 Chevy Malibu" and that he

was looking for the woman's "ex, Joseph Granados." R:627. In closing argument, the prosecution told the jury, "you didn't hear the words 'stolen car.' [The owner] wanted her car back, but [the property crimes detective] wasn't trying to get back a stolen car." R:1135-36.

Regardless, the property crimes detective's testimony that Granados fled the night before the shooting, and that the police were interested in detaining Granados for reasons related to the car he was driving, offer an alternate explanation for his flight from police in the hours after the shooting.

The State writes that the witnesses "all agreed that the person they saw matched Defendant's description — a heavily tattooed Hispanic male with very short hair, a mustache and the word 'eighteen' tattooed on his upper lip." SB 21 (citing R:572-73, 604, 640, 703). It is worth noting that no witness described the distinctive aspect of that description – the "eighteen" tattoo. SM testified that the driver had arm tattoos and was Hispanic. R:572-73. The eyewitness who was provided a photo array and did not select Granados said the shooter "had a round face and he had really dark eyes and he had really dark hair. And it was short all the way but, you know, not — just short, really dark hair" and "a mustache." R:604. Another eyewitness testified that she saw the shooter pull a gun and then she "put [her] daughter's head down" and put her own "head down from there." R:640.

The State writes that "[t]he entire incident — from [SM's] 911 call until Defendant's arrest — lasted approximately two hours." SB 9 (citing R:668). On

the record page the State cites, the testimony is that "from the time of the incident 4:13, Mr. Granados is taken into custody at 6:55." R:668. In any event, there was a significant time gap between the incident and the arrest.

The State writes that Granados's "DNA was found on at least one of the casings." SB 23 (citing R:965, 975, State's Exhibit 51-52). In its Statement of Facts, the State acknowledges that the casings were tested with the live rounds of ammunition. SB 10-11. The technician testified that she "processed the casings and the unspent rounds in the same solution" and there was "no way to determine which item or how many of those items that DNA came from." R:919. The unspent rounds included a 34-caliber bullet, a different caliber from the gun used in the shooting. R:836. As the State put it in closing, "they recover 10 spent shell casings, two live rounds of ammunition. One of those is insignificant in light of the fact it's a different caliber from the rest, but the ten casings and the one live round, are all 40 caliber which is consistent with what the West Jordan crime tech testified were these ballistic findings with respect to the — the bullets that they were able to recover from the scene." R:1110. As argued in the opening brief, the testimony that firing a bullet may destroy DNA made it more likely that the recovered DNA came from the unspent round. Opening Brief (OB) 14-15.

The State writes that the Opening Brief "does not cite to any record evidence for [the] proposition" that Granados's "DNA could end up on the spent casings simply because he was in the car." SB 24 (citing OB 15). The Opening Brief provided record citations to pages 967, 987, 786, 899-900, 912-915, and

970 for that argument. OB 15. The DNA analyst testified that she had no way to tell "whether [the DNA in the filter] came from transfer of DNA or . . . if it was directly deposited." R:967. The police officers testified that Granados was sweaty and that the chase would have shifted around the items in his car. R:987, 786. The crime scene technician testified that DNA can come from sweat, saliva, and skin cells. R:899-900. DNA can be transferred by sneezing or touching and crime scene technicians must take precautions to avoid transferring DNA. R:900. The DNA analyst and crime scene technician both testified that finding DNA on a spent shell casing was rare. R:914, 970. The technician explained that heat damages DNA. R:915. This was evidence that Granados's DNA could end up on the spent shell casings — or the unspent rounds — simply because he was in the car during a high speed chase. R:967, 987, 786, 899-900, 912-915, 970.

ARGUMENT

I. This Court should apply the standard prejudice test for violations of the rules of criminal procedure.

The State argues that *State v. Knight*, 734 P.2d 913 (Utah 1987), a case addressing the standard of prejudice for a violation of the Utah Rules of Criminal Procedure is "wholly inapplicable," SB 28, to the determination of what standard of prejudice governs the violation of Utah Rule of Criminal Procedure 17(g) alleged in the Opening Brief. OB 16-17. Counsel is unaware of a controlling case where a judge replaced a juror with an alternate without questioning the juror and over the defense's objection. And the State cites no case addressing this

issue. SB 28-29 (citing *Ross v. Oklahoma*, 487 U.S. 81 (1988), *Taylor v. Louisiana*, 419 U.S. 522 (1975), *United States v. Taylor*, 663 F. Supp. 2d 1157 (D.N.M. 2009), *State v. Menzies*, 889 P.2d 393 (Utah 1994)). But precedent suggests that the *Knight* standard — a reasonable likelihood of a more favorable result — should apply to a violation of Utah Rule of Criminal Procedure 17(g).

The State relies on *Taylor v. Louisiana*, which held that a jury venire must not "systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof" and did not address replacing a competent juror with the alternate over the defense's objection. 419 U.S. at 538. *United State v. Taylor* also addressed an alleged "violation of the fair cross-section requirement." 663 F. Supp. 2d at 1162-63.

Ross v. Oklahoma addressed the loss of a peremptory challenge, and rejected "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." 487 U.S. at 88. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* If, however, a ruling "result[ed] in the seating of any juror who should have been dismissed for cause[,] . . . that circumstance would require reversal." *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

As argued in the Opening Brief, *State v. Menzies*, 889 P.2d 393 (Utah 1994), also addressed a lost peremptory challenge, not the replacement of a juror after the presentation of evidence had begun. OB 22-23. And it is notable that

Menzies overruled *Crawford v. Manning*, 542 P.2d 1091, 1093 (Utah 1975), which was so concerned with the strategic selection of the jury that it held prejudice should be presumed when one side is deprived of a peremptory challenge.

In addressing the standard of prejudice for mid-trial juror replacement, this Court should keep in mind that requiring the defendant to demonstrate that the alternate juror should have been struck for cause before the trial began would sanction the replacement of sitting jurors over the defense's objection and open the door to abuse. OB 20-24 (citing *Bruckshaw v. Frankford Hosp. of City of Philadelphia*, 58 A.3d 102, 153 (Pa. 2012)).

A ruling that "result[s] in the seating of any juror who should have been dismissed for cause" will "require reversal" under the U.S. Constitution. *Martinez-Salazar*, 528 U.S. at 316. But replacing a strategically selected juror with an alternate over the defense's objection is troubling in a different way. "[T]he process of jury selection is a highly subjective, judgmental, and intuitive process" and trial attorneys make "conscious and strategic choice[s]." *State v. Litherland*, 2000 UT 76, ¶ 20. "A prospective juror's demeanor, interaction with others in the courtroom, and personality in general may all play an important role in providing clues as to that juror's likely predilections toward the case at hand." *Id.* ¶ 21. "Defense counsel acting on their own intuitions, or upon their clients' requests, clearly have the right to identify and prefer particular jurors." *Id.* ¶ 23. And counsel has "little reason to save . . . peremptory challenges for the

last alternate chosen because there is only a small chance of the last alternate juror deliberating with the jury." *Bruckshaw*, 58 A.3d at 113.

"[P]arties view their peremptory challenges as a tactical tool" and use them on jurors they "suspect[] of harboring hidden biases." *Turner v. Univ. of Utah Hosps. & Clinics*, 2013 UT 52, ¶ 27. "[T]here are cases where attorneys have good reason to suspect bias, but lack sufficient grounds to challenge those jurors for cause." *Id.* ¶ 30. In fact, counsel may suspect that a juror counsel "suspected of bias (but lacked grounds to challenge for cause)" "posed the greatest threat to a verdict in her favor." *Id.*

Moreover, when "counsel was able to observe jurors, including the alternate, over the course of" the actual presentation of evidence, "[e]verything from the jurors' demeanors to their reactions to testimony may have played a role in counsel's decision not to insist on replacing the sleepy juror." *State v. Marquina*, 2018 UT App 219, ¶ 39, *cert. granted* Supreme Court Case No. 20180994-SC (Attached as Addendum A). This Court should not import the requirement for a constitutional violation — showing that a biased or incompetent juror sat on the case — to a claim that the court violated the rules of criminal procedure by replacing a competent, strategically selected juror with an alternate over the defense's objection.

State v. Knight addressed the standard of prejudice for a violation of the Utah Rules of Criminal Procedure. The defendant in *Knight* had "filed a written motion requesting that the trial court order the prosecution to disclose certain

specified items and information, including the addresses and telephone numbers of the State's potential witnesses and any statements taken from them" "[p]ursuant to Rule 16(a)(5) of the Utah Rules of Criminal Procedure." 734 P.2d at 915. The Utah Supreme Court held that the "prosecutor's obligation to comply with [the] request for discovery must be evaluated under Rule 16 of the Utah Rules of Criminal Procedure," which mandates disclosure of "'evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.'" *Knight*, 734 P.2d at 916 (quoting Utah R. Crim. P. 16(a)(5)). After determining the State had violated its disclosure duties and "the trial court denied all requested relief," the Utah Supreme Court explained that the next question was "whether the prosecutor's failure to produce the requested information resulted in prejudice sufficient to warrant reversal under Rule 30" — it described that standard as the determination of whether, "without the error there was a reasonable likelihood of a more favorable result for the defendant." *Id.* at 919 (internal quotation marks omitted) (italics omitted).

After *Knight* issued, the Utah Supreme Court cited it for the proposition that "[b]ecause the error was in violation of a rule of criminal procedure, its harmfulness is analyzed under the standard provided by Utah Rule of Criminal Procedure 30." *State v. Bell*, 770 P.2d 100, 105 (Utah 1988).

In Granados's case, he challenged the replacement of a juror the defense had strategically selected and observed during the presentation of evidence. Utah

Rule of Criminal Procedure 17(g) explains that a "case shall proceed using the alternate juror" when "a juror becomes ill, disabled or disqualified." A claim that the court violated this rule because the juror the court dismissed was not ill, disabled or disqualified, is different from a claim that a biased or incompetent juror sat in violation of the U.S. Constitution. As argued in the Opening Brief, this Court should analyze the rule violation's harmfulness under the standard provided in Utah Rule of Criminal Procedure 30 — the reasonable likelihood of a more favorable result standard. *Knight*, 734 P.2d at 913; *Bell*, 770 P.2d at 100; OB 20-25. And for the reasons articulated in the Opening Brief, this Court should reverse under that standard. OB 20-25.

II. The court abused its discretion when it dismissed a juror over the defense's objection and without first questioning the juror.

The State relies on *State v. Marquina*, 2018 UT App 219, to argue that the principle predominating cases involving sleeping jurors is discretion. SB 31-35. *Marquina* issued after the Opening Brief, and the Utah Supreme Court has granted certiorari to review it in an order dated March 18, 2019. Addendum A.

Marquina includes analysis that is helpful to Granados's case. It explains that the court's response "depends on the facts of the case, including how the issue was brought to the court's attention." 2018 UT App 219, ¶ 31. *Marquina* involved an unpreserved claim of constitutional error where the "prosecutors mentioned a sleepy juror" but defense counsel "had not noticed any of the jurors sleeping" and did not object to allowing the juror to remain on the panel. *Id.* ¶¶

14-15 (alteration omitted). The claim on appeal was that the defendant's "Sixth Amendment right to an impartial jury was violated because at least one juror reportedly slept during his trial." *Id.* ¶ 17. As explained above, Granados's case is different. "[T]he issue was brought to the court's attention" by defense counsel, who explained that the seated juror was strategically selected and that the defense had not observed her sleeping. R:743-45; 789 (the defense had seen the juror taking notes and paying attention); 791. Additionally, the prosecutor agreed it would be appropriate to question the juror before dismissing her. R:789; 791-92. Therefore, where *Marquina* involved an unpreserved constitutional claim, Granados's case involves a preserved claim that the trial court dismissed a competent, strategically selected juror and replaced her with the alternate.

Additionally, *Marquina* explained that "Utah law does not require a court to conduct sua sponte a voir dire after a report of a sleepy juror." 2018 UT App 219, ¶ 34. That does not mean that the court can dismiss a juror over objection without first questioning the juror. To the contrary, it suggests that, as argued in the district court and the Opening Brief, the observation that a juror appears to have fallen asleep for portions of the trial does not necessarily require the strong medicine of dismissing that juror. R:743 (defense counsel saying he was also getting tired of video of the car chase); 745 (defense counsel explaining that he had seen jurors nod off in many trials and arguing the juror was not observed

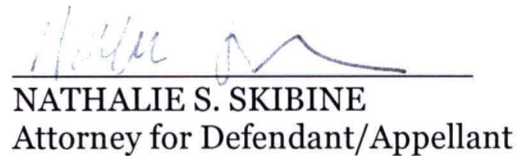
sleeping during the presentation of critical evidence); OB 16-20 (arguing that falling asleep is not necessarily disqualifying for a juror).

As argued in the Opening Brief, the district court erred when it dismissed a juror suspected of sleeping without first questioning her. OB 16-20.

CONCLUSION

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

SUBMITTED this 1st day of April 2019.



NATHALIE S. SKIBINE
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CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,647 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.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

NATHALIE S. SKIBINE

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, , hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114, this 1st day of April 2019. A searchable pdf will be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov within 14 days, pursuant to Utah Supreme Court Standing Order No. 8.

NATHALIE S. SKIBINE

DELIVERED this _______ day of April 2019.

____

ADDENDUM A

The Order of the Court is stated below:
Dated: March 18, 2019 /s/ Thomas R. Lee
08:52:18 AM Associate Chief Justice

IN THE SUPREME COURT OF THE STATE OF UTAH

---ooOoo---

State of Utah, Respondent, v. Raymond Jesus Marquina, Petitioner.	ORDER Supreme Court Case No. 20180994-SC Court of Appeals Case No. 20150854-CA Trial Court Case No. 141914264

This matter is before the court upon a Petition for Writ of Certiorari, filed on December 7, 2018.

The Petition for Writ of Certiorari is granted as to the following issues:

1. Whether the Court of Appeals erred in concluding Petitioner had failed to demonstrate that the district court plainly erred in declining to inquire into the attentiveness of a juror.

2. Whether the Court of Appeals erred in concluding Petitioner had failed to demonstrate his trial counsel provided ineffective assistance in responding to observations that a juror may have been sleeping.

A briefing schedule will be established hereafter. The parties shall comply with the briefing schedule upon its issuance. Requests for extension are disfavored, but may be granted with good cause.

End of Order - Signature at the Top of the First Page