

1992

# The State of Utah v. Robert A. Lucero : Reply Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 920821 IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee :  
 :  
 v. :  
 :  
 ROBERT A. LUCERO, : Case No. 920821-CA  
 : Priority No. 2  
 Defendant/Appellant :

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REPLY BRIEF OF APPELLANT

Appeal from a Judgment and Sentence entered on February 5, 1993 and Order denying Defendant's Motion for a New Trial entered on February 5, 1993 by the Honorable William A. Thorne, Third Circuit Court, in and for Salt Lake County, State of Utah, West Valley Department.

This case involves a charge of Possession of a Deadly Weapon with Intent to Assault, a Class A Misdemeanor, in violation of Utah Code Ann. §76-10-507 (1973).

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**FILED**  
Utah Court of Appeals

AUG 16 1993

  
Mary T. Noonan  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
Plaintiff/Appellee :  
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INTRODUCTION

Appellant relies on his opening brief and replies to the State's brief as follows.

TEXT OF RELEVANT STATUTE

Utah Rule of Criminal Procedure 19(c) states:

Instructions. No Party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid manifest injustice.

### SUMMARY OF THE ARGUMENT

Mr. Lucero is not precluded from challenging the trial judge's supplemental instruction to the jury and ex parte communication with the jury since the court was given an adequate and timely opportunity to consider those issues. Mr. Lucero was prevented from objecting prior to the supplemental instruction being submitted to the jury as the court acted on its own initiative. Mr. Lucero's counsel expressed concern over the court's procedure and chose to challenge the court's actions by filing a Motion for a New Trial. In Lucero's Motion for a New Trial the court ruled on the merits that Mr. Lucero was not entitled to a new trial. The court did not deny Mr. Lucero's Motion for a New Trial on the ground that he was precluded from challenging the Court's actions for his failure to object at the time his counsel was informed of the Court's actions.

Therefore, the trial court's consideration, on the merits, of Mr. Lucero's Motion for New Trial resuscitated his right to assert the issues on appeal. This Court should consider Mr. Lucero's issues as they were properly presented to the trial court and decide those issues on the merits.

### ARGUMENT

Point. THE ISSUES RAISED BY MR. LUCERO ARE PROPERLY BEFORE THIS COURT.

The State's reliance on State v. Kotz, 758 P.2d 463 (Utah App. 1988), ignores the timing of events leading up to Mr. Lucero's appeal. In Kotz the Court conferred with counsel prior to

instructing the jury and Kotz's counsel failed to specifically object. Id. 463-464. In Lucero, the Court had already instructed the jury and subsequently called counsel into Court to place on the record what had transpired. T. 181-183. Reservations as to the Court's action were expressed by Mr. Lucero's counsel who repeatedly clarified that the Court had already instructed the jury absent counsel's input.<sup>1</sup> T. 181-183.

Regardless of whether this court finds that Lucero did not timely object, the trial court's consideration and ruling on the merits of the issues addressed in Lucero's Motion for a New Trial sufficiently preserved those issues. In State v. Seale, 207 Utah Adv. Rep. 10, 14 (Utah 1993), Seale's counsel raised an issue for the first time in his Motion for a New Trial. The trial court in Seale addressed the issue on the merits and denied his motion. Id. Based on that sequence of events, the Supreme Court in Seale held that since the trial court had considered the alleged error rather than finding it waived, Seale's right to assert the issue on appeal was resuscitated. State v. Seale, 207 Utah Adv. Rep. 10, 14 (Utah 1993).

The rationale for this position was explained by the Supreme Court in State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991), wherein the Supreme Court noted that if the trial court had already

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<sup>1</sup> Rule 19 (c) of the Utah Rules of Criminal Procedure contemplates that counsel will have an opportunity to object to jury instructions prior to those instructions being sent to the jury. Furthermore, the rule provides that a party's failure to object does not always preclude this Court from addressing the correctness of instructions when it is necessary to avoid manifest injustice.



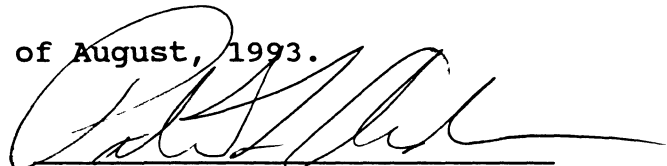
had an opportunity to consider an issue, the justification for rigid waiver requirements was weakened considerably. See State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991) (because the trial court addressed the issue fully in a Motion for a New Trial and did not rely on waiver, the Supreme Court considered the issue on appeal, even though trial counsel had failed to properly preserve the issue).

Additionally, the Court's submission of an erroneous verdict form wherein it asked the jury to find the defendant "'GUILTY' OF: POSSESSION OF DEADLY WEAPON," constitutes plain error which this Court can consider. R. 108. State v. Brown, 201 Utah Adv. Rep. 4 (Utah 1992) (issues raised for the first time on appeal were reviewed under the plain error standard).

#### CONCLUSION

Lucero requests that this Court reverse the trial court's order denying Lucero's Motion for a New Trial, and remand the case for new trial.

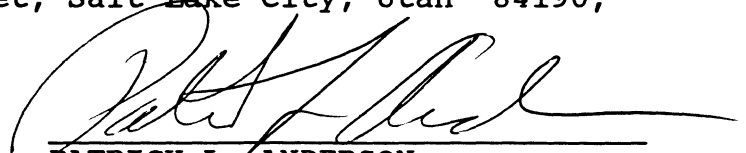
SUBMITTED this 16<sup>th</sup> day of August, 1993.



PATRICK L. ANDERSON  
Counsel for Defendant/Appellant.

CERTIFICATE OF DELIVERY

I, PATRICK L. ANDERSON, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and two copies to C. Dane Nolan, Salt Lake County Attorney, 2001 South State Street, Salt Lake City, Utah 84190, this ~~16<sup>th</sup>~~ day of August, 1993.

  
\_\_\_\_\_  
PATRICK L. ANDERSON

DELIVERED/MAILED this \_\_\_\_\_ day of August, 1993.

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