2002

State of Utah v. daniel Mario Munoz : Reply Brief

Utah Court of Appeals

James K. Slavens; Attorney for Defendant.
J Fredrick Voros, Jr.; Karen A. Klucznik; Attorney General\'s Office.

UTAH COURT OF APPEALS

STATE OF UTAH	)	Case No.: 20020662-CA
	)	
Plaintiff,	)	
vs.	)	
	)	
DANIEL MARIO MUNOZ	)	
	)	
Defendant.	)	
	)	

AMENDED REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT IS REQUESTED

PRIORITY NUMBER 1

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT
MILLARD COUNTY, STATE OF UTAH

J. Fredrick Voros, Jr.
Karen A. Klucznik
Attorney General's Office
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114-080

James K. Slavens
Attorney for the Defendant
P.O. Box 752
Fillmore, UT 84631

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STATEMENT OF FACTS

The State provides in its Brief citations from the record supporting its position that the alleged victim was raped. It is important to note that the only testimony that the State can produce to support its position of the facts are based upon hearsay statements. The State did not produce any live testimony from a witness who had personal knowledge to support the State's position regarding the facts.

ARGUMENT

1. **The Court's Order and Findings on April 26, 2002 Regarding the State's Motion for Admission of Out-of-Court Statement by Child Victim/Witness at Trial was not proper.**

A. The Unrecorded Excited Utterance Statement

On January 31, 2002, the State filed a motion for Admission of Out-of-Court Statement by Child Victim/Witness at Trial made to Officer Kimball at the hospital on the day of the alleged incident. On April 25, 2002, the Court held a contested hearing in response to the State's Motion. On May 6, 2002, the trial court signed an Order prepared by the State which allowed Officer Kimball to recount to the jury statements made to him by the alleged victim. The Court held that the statements fell under the "excited utterance" exception to hearsay. The Appellant is now challenging this order on appeal.

As provided in Appellant's Brief, the Appellant takes exception with the Court's Order regarding the "excited utterance" statement on two fronts. First, the Appellant argues that the facts presented at trial in this case do not support the Court's finding that the

statements fell within the excited utterance exception to the hearsay rule. Instead the testimony presented at trial obviously demonstrated that the declarant had the wherewithal to protect her self-interest and was not under the influence of the startling event. Second, the Appellant argues that the trial Court erred by allowing the officer to provide a full account of her testimony instead of limiting his testimony.

The State opposed the first of Appellant's position by first arguing that the Appellant failed to provide a transcript of the hearing on April 25, 2002, then after that transcript was provided, argued that the Appellant failed to provide a transcript of the preliminary hearing to this Court.

First, the Appellant complied with Utah Rules of 11 (e)(1) by providing this appellate court the transcript of which he "deems necessary" to support his position that the statement did not fall within the excited utterance exception to the prohibition against hearsay. The Appellant cited from the trial record the following facts to support his position that the statement was not made under the influence of the event:

1. After the alleged victim returned home, she went about her normal duties. Trial Transcript P. 151, ll. 6-8;
2. She was washing dishes when a family member noticed blood on her cloths. Trial Transcript P. 151, ll. 6-8;
3. When asked about the blood, the alleged victim indicated that it must be from her "period." Trial Transcript P. 151, ll. 10-14;
4. When the family member questioned that her "period" could not have been the source of the blood, she ran to the bathroom and started crying. Trial Transcript PP. 164-165, ll. 25-24;
5. However, the family member also testified that the alleged victim started her period three or four days later.

The Appellant has satisfied his "duty and responsibility to support [his] allegations with adequate record." *State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993).

On the other hand, the State did not present to this Court any facts from the record to support its position that the victim's statements fell under the hearsay exception. If the State felt there was evidence presented at the preliminary hearing to support the Court's ruling, it could have requested a transcript of the hearing pursuant to Rule 11 (e)(3). The State failed to make such a Request.

In addition, it should be noted that the State prepared the Order which was presented to the Court for signature regarding the Court's ruling and failed to support the finding with any facts which would support a finding that the alleged statements were made under the influence of the event.

Finally, the State has taken the unsupported position that the startling event may have been the victim's knowledge that the blood was from a serious injury and not from her menstrual cycle. There is nothing in the record to support such a speculative assertion. If there is such evidence, the State has the burden to provide the support from the record.[1]

The Appellee failed to address in any manner the second aspect of Appellant's position that the Trial Court erred by allowing the officer to provide a full account of all the

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[1]Apparently, the State has abandoned this argument that the statement was an excited utterance because the "stressful event may very well not have been the rape at all but the child's realization subsequent thereto that her severe bleeding was not due to her menstrual cycle but to serious injuries she sustained during the rape." Brief of Appellee, p. 10.

alleged victim's statements. Consequently this Court should find for the Appellant in that the trial court erred in allowing Officer Kimball to testify to all of the alleged victim's statements during the night in question.

The State also indicates that the Court admitted the alleged victim's hearsay statements to the officer pursuant to Utah Code Section 76-5-411(2). A careful reading of the Court's Order, however, does not support the State's position. The Order does not even attempt to comply with 76-5-411(2), which states in part as follows:

> Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall *consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.* [Emphasis added]

The Court never performed this legally required analysis before admitting the unrecorded hearsay statement. This failure alone justifies overturning the guilty verdict and an order for a new trial. *See, State v. Seale*, 853 P.2d 862 (Utah 1989).

Finally, the State argues that the Appellant did not preserve his objection by raising the objection to the admission at the trial level. The court conducted a contested hearing on the admissibility of the "excited utterance" statement on April 25, 2002. R. 137-138. During that hearing, the Appellant objected to the admissibility of the statement. (R. 314:5)

Based upon the above, the Court erred in allowing the out-of-court statement pursuant to the excited utterance exception. Even if the Court did not err, the Court should not have allowed the officer to testify about all of the victim's statements.

B. Video Recording

As to the video recording, the Appellant asserts that the Trial Court erred in allowing the video tape to be presented for evidentiary purposes. Utah Rule of Criminal Procedure 15.5 require that the video be of such a quality that the jury can easily ascertain what is being said and by whom. The prerequisites of Rule 15.5 can never be met, as is the situation here, when the video tape is of such a poor quality that the jury listening to the tape is forced to declare to the judge that they are "at a loss as to what is being said."

Again, the Appellee counters the Appellant's position by arguing that the Appellant failed to provide this Court a transcript of the preliminary hearing and a copy of the video tape in question.

The Appellant, however, complied with Utah Rules of 11 (e)(1) by providing this appellate court the transcript of which he "deems necessary" to support his position that the video did not comply with the prerequisites of Rule 15.5. These facts are as follows:

1. The jury was "at a loss as to what [was] being said." Trial transcript P. 24, l. 22.
2. the camera "itself [was] inserted into a clock, which was on the wall" that caused a ticking sound on the video making it difficult in some spots and impossible in others, to hear the interview. Trial transcript P. 23, ll. 19-25.
3. In fact, the ticking sound was very distracting, making it so difficult to ascertain what was being said that the Court allowed portions of the out-of-

court statement to be read into the record from the transcript. Trial transcript P. 25, ll 17-25.

On the other hand, the Appellee has not provided any facts from the record to support its position that the video complied with Rule 15.5.

Finally, the State counters the Appellant's position by arguing that the Court did comply with the analysis mandated by Rule 15.5. The Appellant's position is articulated within his initial brief and will not be discussed further herein.

C. Transcript

The Appellant argued that it was error on part of the Trial Court to allow a reading of the transcript of the video into the record and to also allow the jury to review the transcript during the deliberation process. The Appellee counters the Appellant's position by arguing that the Appellant's claims were not preserved and/or were inadequately briefed.

First, the State attempted to have the transcript admitted for the purpose of establishing certain elements of the offense. There is no dispute that the transcript was a recording of out-of-court statements. The transcript is clearly hearsay. *See*, Utah Rules of Evidence 801(c). The state has made no attempt to provide an exception to hearsay that would allow the hard copy of transcript or a reading of the transcript into the evidence. Instead, the state has elected to focus its position on arguing that the Appellant did not preserve his objection.

The Appellant made the following objections to the transcripts at trial. First, the court conducted a contested hearing on the admissibility of the video tape on April 25, 2002. R.

137-138. Second, when the State attempted to distribute the transcript to the jury, the Appellant objected of which the Court agreed. R. 313:22. Third, when the State attempted again to admit the video, the Appellant objected. R.313:171-172. Fourth, when the State asked the police officers to read a portion of the transcript into the record, the Appellant objected. R: 313:25 However, the Trial Court did not allow counsel to complete his objection by cutting in and overruling the objection. What is interesting to note is the reason the Court allowed the witness to read from the transcript: "the jury indicated they could not hear, and I think they'll have the video and the transcript." Id. In other words, since the jury could not understand what was being said on the video (which because of this reason never should have been admitted), the Court solved the problem by giving them additional inadmissable hearsay–the transcript. Two wrongs do not make a right. The result is a person was convicted of a 1st degree felony based solely on hearsay testimony.

The Appellant objected to the video and transcript on at least four different occasions. The issue has been preserved. Even if it was not, it was plain error for the Court to allow the jury to view the video, allow the officer then to read from the record, and allow the transcript into the jury room and finally allow the officer to restate the victim's statements through the excited utterance exception.

D. Leading Questions

Again, the State does not in any manner dispute the merits of Appellant's position that the questions presented to the victim on the video tape were very leading and would

never have been permitted if asked at court. Based upon this the Court should grant the Appellant's request that he be allowed a new trial.

In response, the Appellee has argued that the Appellant did not preserve the issue and/or did not argue plain error. If the Court finds that the Appellant did not preserve this issue, he affirmatively asserts, as previously supported, that it was plain error to allow the testimony.

2. **It was reversible error to allow an uncle and niece (by marriage) to serve together on the jury;**

Again, the State does not in any manner dispute the merits of the Appellant's position that it was reversible error to allow an uncle and niece to serve together on the jury. Based upon this the Court should grant the Appellant's Request that he be allowed a new trial.

In response, the Appellee has argued that the Appellant waived this issue and/or did not argue plain error. If the Court finds that the Appellant did not preserve this issue, he affirmatively asserts, as previously supported in his initial brief, that it was plain error to allow the uncle and niece to serve together on the jury.

3. **The Court should have granted Defendant's Motion for Leave to Withdraw as Counsel on April 25, 2002;**

Again, the State does not in any manner dispute the merits of the Appellant's position that the Trial Court should have granted the Defendant's motion for leave to withdraw as counsel. Based upon this the Court should grant the Appellant's request that he be allowed a new trial.

In response, the Appellee has argued that the Appellant waived this issue and/or did not argue plain error. If the Court finds that the Appellant did not preserve this issue, he affirmatively asserts, as previously supported, that it was plain error not to grant the Appellant's motion for leave to withdraw as counsel.

4. **The State violated the Appellant's Right to Remain Silent by allowing testimony that indicated that he exercised his right to remain silent;**

Again, the State does not in any manner dispute the merits of Appellant's position that his right to remain silent was violated by allowing testimony that indicated that he had exercised his right to remain silent. Based upon this the Court should grant the Appellant's request that he be allowed a new trial.

In response, the Appellee has argued that the Appellant waived this issue and/or did not argue plain error. If the Court finds that the Appellant did not preserve this issue, he affirmatively asserts, as previously supported in his initial brief, that it was plain error to allow the testimony.

5. **Whether or not the Court improperly allowed hearsay testimony into evidence.**

Again, the State does not in any manner dispute the merits of Appellant's position that the Court improperly allowed hearsay testimony into evidence. Based upon this the Court should grant the Appellant's Request that he be allowed a new trial.

In response, the Appellee has argued that the Appellant waived this issue and/or did not argue plain error and if the hearsay was improper, it was harmless error. If the Court

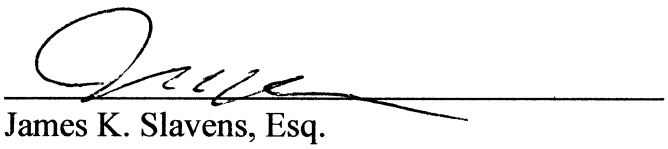
finds that the Appellant did not preserve this issue, he affirmatively asserts, as previously supported in his initial brief, that it was plain error to allow the testimony.

It is also important to note that the State argues that the admission of hearsay statements was harmless error "given the compelling evidence of defendant's guilt." Amended Brief of Appellee, p. 42. However, the support the State gives of this "compelling guilt" consists entirely of hearsay statements. The fact that only hearsay evidence was used to convict this Defendant is very disturbing. There should be some direct testimony and/or physical evidence to support the State's position that the guilty verdict was justified.

CONCLUSION

Based upon the arguments presented above, this Court should overturn the jury's verdict of guilty and send the matter back to the trial court for a new trial.

DATED this 22 day of September, 2003.



James K. Slavens, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Utah, resident of and with my office in Fillmore, UT; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 22 day of September, 2003.

DOCUMENT SERVED: APPELLANT'S AMENDED BRIEF

PERSONS SERVED:

J. Fredrick Voros, Jr.
Attorney General's Office
160 East 300 South, Sixth Floor
Salt Lake City, Ut 84114-080

Dexter L. Anderson
Millard County Chief Deputy Attorney
750 South Highway 99
Fillmore, UT 84631

James K. Slavens, Esq.

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