2018

OREM CITY, Appellee, v. BRIDGETTE CHATWIN, Appellant. : Reply Brief

Utah Court of Appeals

Nathan E. Burdsal, Hutch U. Fale; attorneys for appellant.
D. Jacob Summers; attorney for appellee.

149

IN THE UTAH COURT OF APPEALS

OREM CITY, Appellee, v. BRIDGETTE CHATWIN, Appellant.	**REPLY BRIEF OF THE APPELLANT** Appeal No. 20180006 [ORAL ARGUMENT REQUESTED]

D. Jacob Summers (USB 12253)
City of Orem
56 North State Street
Orem Utah 84057
Telephone: (801) 229-7097
Facsimile: (801) 229-7302
Attorney for Appellee

Nathan E. Burdsal (USB 11034)
Hutch U. Fale (USB 11189)
AVERY BURDSAL & FALE, PC
1979 N 1120 W
Provo Utah 84604
Telephone (801) 788-4122
Facsimile (801) 705-0606
Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

OREM CITY, Appellee, v. BRIDGETTE CHATWIN, Appellant.	**REPLY BRIEF OF THE APPELLANT** Appeal No. 20180006 [ORAL ARGUMENT REQUESTED]

D. Jacob Summers (USB 12253)
City of Orem
56 North State Street
Orem Utah 84057
Telephone: (801) 229-7097
Facsimile: (801) 229-7302
Attorney for Appellee

Nathan E. Burdsal (USB 11034)
Hutch U. Fale (USB 11189)
AVERY BURDSAL & FALE, PC
1979 N 1120 W
Provo Utah 84604
Telephone (801) 788-4122
Facsimile (801) 705-0606
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Orem City's (the "City") inordinate delay as well as the lack of evidence supporting a conviction necessitates this Court's remand and setting aside the guilty verdict in this case.

I. MS. CHATWIN'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO SEEK DISMISSAL FOR VIOLATION OF HER RIGHT TO A SPEEDY TRIAL.

Ms. Chatwin's Trial Counsel was ineffective by failing to raise her right to a speedy trial. Ineffective assistance of counsel exists where an attorney renders a performance below an objective standard of reasonable professional judgment, and the performance prejudices the defendant. *State v. Bond*, 2015 UT 88, ¶ 14. In this case, trial counsel failure to raise a speedy trial defense constitutes ineffective assistance of counsel.

Trial counsel could have and should have raised a speedy trial defense in this action. Indeed, when it became obvious that the state's failure to timely prosecute this action resulted in prejudice to Ms. Chatwin's defense, such an argument became mandatory. The City has not articulated any plausible strategic explanation for the trial counsel's failure to assert his client's right to a speedy trial. Indeed, no legitimate tactic or strategy can be surmised from counsel's failure in this case. *See State v. Maritzsky*, 771 P.2d 688 (Utah App. 1989). Ms. Chatwin's trial counsel's failure to raise this claim below when the significant delay has resulted in an obvious prejudice has no justification. Accordingly, the trial counsel acted below the objective standard of reasonable professional judgment.

Additionally, Ms. Chatwin was clearly prejudiced by her trial counsel's failure. Pursuant to the factors set forth in *Baker v. Wingo,* 407 U.S. 514 (1972), there is at least a reasonable probability that the Court would have dismissed the case against Ms. Chatwin had her attorney asserted this right. The *Baker* factors are (1) the length of the delay, (2) the reason for the delay, (3) assertion of right, and (4) prejudice from the delay. *Id.* at 530. In this case, not only did Ms. Chatwin have to live with the millstone of the unresolved criminal matter, as a direct result of the city's delay a material witness was unavailable to testify.

The City first argues that the delay in the Orem City justice court was a result of Ms. Chatwin's actions. This is not true. Initially, by far and away the largest delay occurred in this case because the City voluntarily dismissed and re-filed this case. The City argues that it had to do this because the justice court did not have jurisdiction over the matter. But it is wholly and solely within the City's discretion where to file the action. Further, the City originally opted to file the action as a Class B misdemeanor. Thus, the Orem City Justice Court did have jurisdiction over the matter. However, a year after filing the action and on the eve of trial, the City dismissed the Class B action and re-filed the action in the Fourth District Court. Again, there can be no fault attributed to Ms. Chatwin of the City's decision to file in its hometown arena, only to dismiss and re-file the action in the proper forum. Courts around the Country have held that the total action, including the time that the prosecutor filed, dismissed, and re-filed is part of the analysis of delay. *See e.g., Ortiz v. State*, 326 P.3d 883, ¶ 40 (Wyoming 2014) ("Dismissal and

re-filing the charges does not restart the clock" for "purposes of the constitutional analysis.").

That the court of the City's choosing did not have jurisdiction over the matter is 100% the fault of the City and the long ensuing delay is also the fault of the City. The City does not have the right to delay, dismiss, and re-file with impunity. It must respect Ms. Chatwin's Constitutional rights.

The City claims that it was Ms. Chatwin's fault her case was delayed. This is not true. Here, Ms. Chatwin sought one continuance in November of 2016. A one month continuance can hardly explain why the City took 18 months to prosecute a simple misdemeanor. It took the City three months after the issuance of the citation for the City to even schedule the first appearance. Additionally, while Ms. Chatwin did miss a hearing in December of 2016, there is no evidence that she received notice of this hearing. It is telling the trial court did not issue a bench warrant or other sanction for this failure to appear and simply rescheduled the hearing. In short, there is simply no evidence that Ms. Chatwin is responsible for the exceptional delay in this matter.

Additionally, the inability to have a material witness at trial is huge prejudice that the City callously disregards. Ms. Chatwin cannot be responsible for ensuring that the witnesses do not leave the country when the City takes 18 months to bring a case to trial. She does not have that power. Further, the City speculates that this witness was unavailable during the first scheduled trial. However, it is unclear at best whether he was out of the country when the trial was originally set, or if the witness was in Provo in the Missionary Training Center at the time. In any case, the City does not contest that this

witness had important testimony that would have contradicted the evidence provided by his father. But the City did not disclose that this witness was unavailable when it dismissed the original action. The City waited over a year before dismissing the action on the eve of trial and re-filed it in the Utah District Court. The significant delay was the result of the choices made by the City.

Further, the City also disregards the cloud of being accused and the prejudice that this caused Ms. Chatwin. Indeed, the City seems to suggest that because Ms. Chatwin was not incarcerated while waiting for her trial, the right to speedy trial does not apply. This is inaccurate. The City quotes *State v. MacNeill*, 2012 UT App 263, for the proposition that "the right to a speedy trial is not to prevent prejudice to the defense caused by the passage of time but rather to minimize the possibility of lengthy incarceration prior to trial." (Opp. Brief P. 14. (citing *U.S. v. MacDonald*, 456 US 1, 8 (1982)).) However, the Supreme Court stated, "[t]he speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *U.S. v. MacDonald*, 456 U.S. 1, 8 (1982).

Ms. Chatwin unnecessarily suffered this substantial impairments in the 18 months before she finally had her trial. Indeed, the US Supreme Court wrote, "arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his

friends." *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 532-533 (1972).) Accordingly, Ms. Chatwin suffered prejudice as a result of the delay in bringing this case to trial. The City also cites to *State v. Miller,* 747 P.2d 440, 443 (Utah App 1987) for the proposition that a defendant may not claim the anxiety and stress of being accused of a crime as a violation of the right to a speedy trial without pressing a case forward. However, in *State v. Miller*, the defendant filed multiple motions that delayed the case. *Id.* That is not true in this case. In this case, Ms. Chatwin asked for one continuance. She did not get notice of the next hearing. She told her attorney from the outset she wanted to go to trial as soon as possible. All the other delays were the direct result of the City's choices.

Ms. Chatwin's right to a speedy trial was violated. Her counsel erred by not seeking the dismissal of the action against her. The United States Supreme Court set forth in *Baker* that the right to a speedy trial is not waived based on a failure to claim it. This is especially true where the failure to argue this important constitutional right is not a result of a defendant acting alone, but a defendant who was relying on the competency of her attorney to make the arguments for her. Under the *Baker* factors, Ms. Chatwin's right to a speedy trial was violated. Specifically, an 18-month delay for a simple misdemeanor is unreasonable. The City is responsible for this delay based on its decision to file the suit in its home court and waiting until the eve of trial to re-file it. Ms. Chatwin suffered prejudice from the delay in that a material witness was unavailable to testify, and she suffered the anxiety of the millstone of prosecution for a year and half. While Ms. Chatwin did not expressly assert her right to a speedy trial, this is the failure of her

attorney and the basis of the ineffective assistance of counsel claim. Accordingly, this Court should hold that Ms. Chatwin received ineffective assistance of counsel.

Finally, the City's reliance on *State v. Steele*, 2010 UT App 185 is misplaced. The City argues that pursuant to *Steele*, to make an argument that a speedy trial violation occurred, Ms. Chatwin must marshal evidence. This is simply not true. Unlike in *Steele*, Ms. Chatwin argues her trial counsel rendered ineffective assistance of counsel by failing to seek a dismissal based on the violation of her right to a speedy trial. As set forth above, to show ineffective assistance of counsel, Ms. Chatwin need only show deficient performance and prejudice. Prejudice exists if, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In this case, such a reasonable probability exists. Here there is a probability that had Ms. Chatwin's trial counsel asked the court to dismiss this case because her rights to a speedy trial were violated, she may have been granted that right. There is accordingly no need to marshal evidence.

II. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION IN THIS MATTER.

Further, there is clearly insufficient evidence to support a conviction in this case. To establish a criminal trespass, the City must prove every element of the crime beyond a reasonable doubt. *State v. Harman*, 767 P.2d 567, 568 (Utah Ct. App. 1989). This Court should reverse a jury verdict when it finds that the evidence is "so inconclusive or

inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *Id.*

The City claims that Ms. Chatwin committed criminal trespass pursuant to Utah Code Ann. § 76-6-206 under three different theories. This is initially problematic as the City failed in the eighteen months leading up to trial, at trial, and now after trial to identify its theory of culpability. Nevertheless, under any of the three theories, the City failed to present adequate evidence to uphold Ms. Chatwin's conviction.

A. There is no evidence that Defendant acted Recklessly as to whether her presence will result in fear.

The City's first theory is that Ms. Chatwin acted recklessly as to whether her presence will result in fear when she entered the home after seeing a grown man choke her teenage brother. The City specifically argues that based on the "reasonable inferences" of the evidence presented, there is an adequate basis for the jury to conclude that Ms. Chatwin acted recklessly as whether her presence will cause fear. The City is incorrect.

To support the City's reasonable inference theory, the City undertakes the same tactic in this appeal as it took at trial: focus on the bad acts of Ms. Chatwin's teenage brother. In a story more appropriate for romantic pages of Chaucer, Ms. Chatwin's brother went to his rivals home and fought for a girl's affection. This conduct is not okay, but it does not mean that Ms. Chatwin trespassed.

The uncontroverted testimony in this case is that is that after Ms. Chatwin saw her brother being choked by an adult, she went to the home. (R.277:7-10.) Although there is

a dispute as to whether Ms. Chatwin entered the home to break up the fight or remained outside, even if she did enter the home there is no evidence that her entrance was reckless as to whether her presence will cause fear. This is especially true where her presence was clearly an effort to stop a melee.

Indeed, if Ms. Chatwin were walking by a random house and saw through an open door two individuals fighting and entered the house to break up the fight, her action would never be a conscious disregard that a substantial and unjustifiable risk that her presence will cause fear. Any risk of fear would be considered *de minimus* and justified. However, in this case the City focuses on the conduct of Ms. Chatwin's brother to formulate what amounts to guilt by association argument. The undisputed evidence is that Ms. Chatwin's brother never shared this desire to fight his rival with Ms. Chatwin. Ms. Chatwin did not accompany her brother to the door, and only exited the car to stop the fight after she saw an adult choke her brother. Utah Code Ann. § 76-2-402 explicitly justifies the use of force to defend a third person. Certainly if the use of force is justified, the mere presence in the home to break up the fight must also be justified. As set forth in the opening brief, the home owner did not feel afraid by Ms. Chatwin's presence. This is strong evidence that Ms. Chatwin did not act with the prerequisite intent.

While the City is correct that this Court should look at the evidence in light most favorable to the jury verdict, this Court should not make any and all reasonable inferences to fill the gaps left in the evidence. *See State v. Petree*, 659 P.2d 443, 443 (Utah 1983) (overturning a jury verdict where there was disputed inference from the evidence regarding the defendant's intent.) The City may not rely on inference to

overcome the lack of evidence. There is no evidence that Ms. Chatwin was reckless as to whether her presence in the home where she was trying to break up a fight created a substantial and unjustified risk of fear. Because this necessary element of trespass was unproven, this Court should overturn the jury verdict in this case.

B. All evidence is that Ms. Chatwin left the home when asked.

Alternatively, this Court argues that Ms. Chatwin trespassed because even if her presence was justified, Ms. Chatwin failed to leave upon request. Again, this is not true.

The City admits Ms. Chatwin left the home within 30-45 seconds upon request. Even if it took 30-45 second – which the home owner admits is a rough estimate – that evidence does not support a conviction for criminal trespass.

When being asked to leave, Ms. Chatwin was out within seconds. To commit trespass, Ms. Chatwin must remain on the property after receiving notice against entering. This is exactly what she did. Less than a minute after being told to leave, she was in the car. In *Griffin v. Maryland*, 378 U.S. 130, 133 (1964) the United States Supreme Court recognized a criminal trespass action where a party was asked to leave and was given "reasonable time" to comply. Here, leaving 30 seconds after being told is quite reasonable, especially in light if Ms. Chatwin's testimony that she was trying to jockey herself between the home owner and her brother so the home owner could not continue his assault. The City has provided no precedent that leaving 30-45 seconds after being told to do so is anything but reasonable. Accordingly, this Court should overturn the trial jury's decision as there is a lack of evidence that Ms. Chatwin refused to leave or did so outside of a reasonable time.

C. A door is not an enclosure based on the Supreme Court's precedent.

Finally, the City claims that Ms. Chatwin committed criminal trespass because the house had a door. As set forth, in the opening brief, it is already long-settled law in Utah that entering into a building with a locked door is not criminal trespass under the statute that provides for trespass into a property as to which notice against entry is given by fencing or other enclosure. In *State v. Wilson*, 701 P.2d 1058, 1060 (Utah 1985) the Utah Supreme Court held,

> [breaking a window to enter a locked building] is distinguishable from entry on property as to which notice against entry is given by fencing or other enclosure obviously designed to exclude intruders. Under well-established rules of statutory construction, the language of this statute can hardly be stretched to encompass the forced entry into a locked building. The general word "enclosure" is restricted to a sense analogous to the less general word "fence."

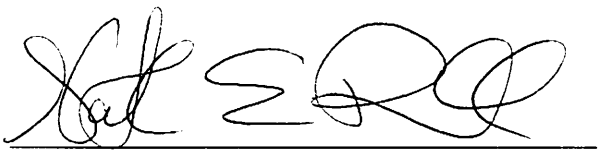
Further, the City's argument that an unimproved lot is given more protection than a house is simply not accurate. But even if it were the case, it is not incumbent upon the City or the courts to create and enforce common-law criminal penalties. Indeed, if such a massive hole exists in Utah criminal jurisprudence, the legislature could have easily remedied it decades ago. The reality is that Utah criminal statutes provide more than adequate protection for homes. The subsection that provides notice of private property via a "fence or other enclosures" is just not one of them. Ms. Chatwin can accordingly not be held criminally liable under this provision for entering the home.

CONCLUSION

This Court should conclude that Ms. Chatwin's trial counsel was ineffective by failing to raise Ms. Chatwin's rights to a speedy trial. Alternatively, this Court should conclude that the jury had insufficient evidence to enter a guilty verdict for criminal trespassing.

DATED this 12 day of November, 2018.

AVERY BURDSAL & FALE, PC

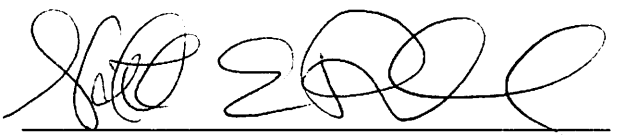


Nathan E. Burdsal
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Utah Rules of Appellate Procedure, Rule 24(g)(1) limits this brief to 7,000 words. I hereby certify that this brief in total consists of 3,354 words based on the word count of the word processing system used to prepare the brief. I also certify that this brief complies with Rule 21 governing public and private records.

AVERY BURDSAL & FALE, PC



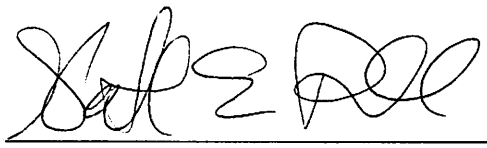
Nathan E. Burdsal
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of November, 2018 two (2) true and correct copies of the foregoing Reply Brief was sent to Orem City Attorney's Office via United States first-class mail, postage prepaid to the following:

D. Jacob Summers
City of Orem
56 North State Street
Orem Utah 84057

AVERY BURDSAL & FALE, PC



Nathan E. Burdsal
Attorney for Appellant