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Utah v. Hunter : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

KENNETH PAUL HUNTER,

Defendant/Appellant.

Case No. 20030126-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT JUDICIAL COURT, SALT LAKE COUNTY, STATE OF UTAH, FROM A CONVICTION OF MURDER, A FIRST DEGREE FELONY, BEFORE THE HONORABLE ROBIN W. REESE

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REPLY BRIEF OF APPELLANT

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING INFLAMMATORY AND IRRELEVANT EVIDENCE REGARDING HUNTER'S PARTICIPATION IN A WHITE SUPREMACIST PRISON GANG

The State first claims that Hunter's trial counsel's repeated objections to references that he was a member of a white supremacist prison gang failed to preserve the Rule 404(b) issue because the objections were based on relevance and not verbally linked to Rule 404(b) (Br. of App. at 10). The State misses the crux of the claim: while evidence that Hunter belonged to a gang may have been admissible to help the jury understand why the deceased was beaten and subsequently killed, evidence that Hunter was a member of a white supremacist prison gang called Silent Aryan Warrior was inadmissible under the Rules of Evidence because it was completely irrelevant and highly inflammatory and it was only introduced to show that Hunter had a propensity to commit

crime. Moreover, “When analyzing the admissibility of bad-acts evidence, the trial court must determine ‘(1) whether the evidence is being offered for a proper, non- character purpose under rule 404(b), (2) whether such evidence meets the requirements of rule 402, and (3) whether the evidence meets the requirement of rule 403.’” *State v. Rees*, 2004 UT App 51, ¶2, 88 P.3d 359 (quoting *State v. Decorso*, 1999 UT 57, ¶20, 993 P.2d 837, *cert. denied*, 528 U.S. 1164, 120 S.Ct. 1181, 145 L.Ed.2d 1088 (2002)).

The State further claims that because the objections were not specifically stated, the only remedy left is plain error (Br. of App. at 11). Hunter asserts that this claim was made with specificity as the question of relevancy and probative value of evidence is at the heart of the analysis concerning the admissibility of evidence of prior bad acts. *See Rees, Decorso supra*.

The State next claims that this remedy is also not available because Hunter failed to object to the highly inflammatory evidence during opening statements and closing arguments by both the State and the co-defendant, thereby waiving any plain error claim because this “foreclosed the trial court’s opportunity to cure an alleged error” (Br. of App. at 11-14). However, counsel’s statements at the opening and closing of trial constitute argument and not evidence. Although trial counsel failed to object during opening statements, timely objections were raised during trial when the evidence was presented and these objections were overruled by the trial court (R. 224: 155-63). These objections gave the trial court sufficient opportunity to correct error and to admonish the jury not to consider the fact that Hunter was involved in a white supremacist prison gang.

The State lastly claims that even if this issue was not waived, it fails under the plain error standard since there was no danger the probative value of the evidence was “substantially outweighed” by Rule 403 concerns (Br. of App. at 15). The State then cites to *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988), in order to determine whether the probative value is outweighed by unfair prejudice.

Shickles lists a variety of factors that may be relevant in determining whether evidence is inadmissible due the danger of unfair prejudice. One such factor is strength of the evidence. The State’s claim that the evidence against Hunter “was quite strong” is inaccurate (Br. of App. at 20). As shown in the original brief, the State’s main witness--and good friend of the deceased--testified that Hunter did not “take any part in any of it” (R. 223: 90). The only two witnesses that laid any blame on Hunter were unreliable at best, considering their rampant methamphetamine use, prior history of lying, and not being charged for their admitted participation in the crime (R. 223: 197, 211; 224: 149, 175, 211).

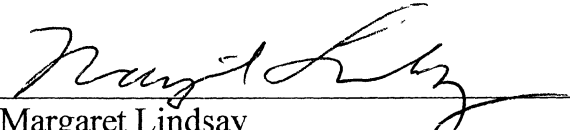
While factors regarding the strength of evidence, the need for the evidence, and other factors listed in *Shickles* regarding the admissibility of evidence are relevant, the most pertinent query for this case is “the degree to which the evidence probably will rouse the jury to overmastering hostility.” *Shickles*, 760 P.2d at 295-96 (citation omitted). As explained above and in Appellant’s original brief, evidence of participation in a gang may have been relevant, but evidence that Hunter was a member of a white supremacist prison gang was inadmissible because of its highly inflammatory nature and likelihood to inflame the jury against him. Letting the jury know that Hunter was a member of a white

supremacist prison gang certainly conjured images in the jurors' minds of extremist white men with shaven heads terrorizing innocent minorities. Moreover, these groups are often associated with Hitler and Nazism. Thus this evidence would inflame any reasonable jury and incite overmastering hostility toward any defendant. Accordingly, the evidence should have been excluded.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the original brief, Hunter asks this Court to reverse his convictions.

RESPECTFULLY SUBMITTED this 19th day of May, 2004.


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CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 19th day of May, 2004.

