2003

The State of Utah v. Don Enoch Peterson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DON ENOCH PETERSON,	:	Case No. 20030704-CA
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Child Abuse, a class A misdemeanor, in violation of Utah Code Ann. § 76-5-109 (2002), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Denise P. Lindberg, Judge, presiding. Appellant is incarcerated.

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INTRODUCTION

Contrary to the State's argument, this Court should reverse the denial of the Appellant's motion to dismiss because the State did not prove beyond a reasonable doubt, via direct or circumstantial evidence, that the Appellant possessed the requisite intent to be convicted of a Class A Misdemeanor under Utah Code Ann. § 76-5-109(3)(a).

ARGUMENT

Utah Code Ann. § 76-5-109 (2002) Creates Three Mental States of Which Intentional Child Abuse is the Highest, Thus the State Did Not Present a Prima Facie Case Because They Did Not Present Believable Evidence of Such Quality and Quantity to Prove That the Result of Appellant's Act Was Intentional.

"[A] motion for a directed verdict made at the close of the state's case may be denied *if* the trial court finds that the State has established a 'prima facie case against the appellant' *by producing believable evidence of all the elements of the crime charged.*" *State v. Montoya*, 2004 UT 5, ¶ 29, 84 P.3d 1183, 1190 (emphasis added). Though the

threshold is high on a criminal defendant in challenging the sufficiency of evidence, "it is not impossible." *State v. Gonzales*, 2000 UT App 136 ¶ 10. This Court has held that it "will not make speculative leaps across gaps in the evidence." *Id*. "Every element of the crime charged must be proven beyond a reasonable doubt. To affirm the jury's verdict, we must be sure the State has introduced evidence sufficient to support *all* elements of the charged crime." *Id*. (citations omitted)(emphasis added).

The Appellant never refutes that circumstantial evidence may be sufficient to support a conviction. Appellant's Brief at 15. However, it is well settled law in Utah, that the evidence must still be of "such *quality and quantity* as to justify a jury in determining guilt beyond a reasonable doubt." *State v. Lyman*, 966 P.2d 278, 281 (Utah Ct. App. 1998) (emphasis added). See also *State v. Nickles*, 728 P.2d 123, 127 (Utah 1986). Thus, in order for the State to present a prima facie case of Class A Misdemeanor Child Abuse under Utah Code Ann. § 76-5-109, it must present *believable evidence* of such *quality and quantity* to prove: (1) that the Appellant inflicted a physical injury, with; (2) the specific intent to inflict the resulting physical injury; (3) on a child under the age of eighteen years. The State did not meet this standard.

The State is not merely required to show that Mr. Peterson intended his actions, but also for Class A Misdemeanor Child Abuse, which has the highest mental state and gravest consequences, the State is required to prove that he intended the resulting physical injury.

The great weight of evidence in the record supports the opposite inference, that is, that Mr. Peterson did not intend the resulting injury. For instance, although Mr. Peterson did acknowledge that he "lost it" and that he had an anger problem, his frank admission did not rise to the level of believable evidence of such quality and quantity to prove that he intended to injure his son. R.78. He also testified that he didn't mean to hurt his son, that he was very sorry that he injured his son, that he merely intended to stop his two-year-old son from running outside on his own, and that he lost control of the resulting consequence of his actions. R. 68-88. Moreover, there was evidence that Mr. Peterson had never inflicted injury on his child before or after this incident. R. 46.

The State misstates the evidence in the record, when it claims that the jury was presented evidence to convict Mr. Peterson of intentionally grabbing his son "by the throat and carr[ying] or drag[ging] the two-year-old back to his chair causing the injuries." State's Brief 11. The only evidence in the record regarding the child being "dragged or carried" is from Mr. Peterson and he testified: "The picking up issue is not an issue. His feet never left the ground. I grabbed him by the body, right by the side of the arms and led him to the table." R. 75.

"[T]he prosecution must introduce evidence sufficient to eliminate all reasonable doubt of the individual's innocence from the mind of the jurors." *State v. Lamm* , 606 P.2d 229, 232 (Utah 1980)(dissent). The prosecution did not present evidence to support the proposition that the Mr. Peterson intentionally grabbed his son by the throat and then

"dragged or carried" the child. In fact, the only evidence the State presented to prove intent of injury was circumstantial and is also refuted in the record. R 70-78.

1. The State Only Presented Circumstantial Evidence to Show Intent and Thus Must Show by a Preponderance of Evidence that Such Evidence is Incompatible, Upon Any Reasonable Hypothesis, with the Innocence of the Accused, and Incapable of Explanation Upon Any Reasonable Hypothesis Other than the Defendant's Guilt; The State Failed to Meet this Standard.

It is also well-settled that when "relying exclusively on circumstantial evidence to prove an element of the crime the rule of law applied by this jurisdiction is:

> Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show by a preponderance of evidence. . . that the alleged facts and circumstances are true, but they must also be facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt.

Lamm, 606 P.2d at 233 (dissent)(quoting *People v. Scott*, 37 P. 335, 336 (Utah 1894). See also *State v. Layman*, 953 P.2d 782, 786-87 (Utah Ct. App. 1998)(this Court articulates that when the State relies solely on circumstantial evidence to prove an element of a crime, [w]e thus review the evidence to determine whether it excludes all reasonable hypotheses of [defendant's] guilt."); *State v. Schad*, 470 P.2d 246, 247 (Utah 1970) ("It is true, as the defendant contends, that where a conviction is based on circumstantial evidence, the evidence should be looked upon with caution, and that it must exclude every reasonable hypothesis except the guilt of the defendant.").

The State did not present evidence from an expert or otherwise that the resulting

injury on two-year-old Matthew was inflicted in a certain manner. R. 35-126. The State did not present evidence, from a police interview or otherwise (no interview was ever conducted), from the two-year-old Matthew, that his father was angry with him and intentionally hurt him. R. 35-126. In fact, evidence that the State presented did not even conflict with Mr. Peterson's account of what happened. The State presented testimony from an estranged spouse who did not witness the incident, who did not report the incident to the police, and who married the Appellant fourteen days after the incident. R. 35-47.

The State presented evidence from a responding Officer, Officer Woffinden, who testified to noticing "some reddening on both sides of [Matthew's] neck," that in his opinion those marks are consistent with being "grabbed there," that Mr. Peterson admitted to losing it and having an anger problem. R. 47-53. None of this testimony conflicts with Mr. Peterson's testimony of the incident, that is, that he intended to grab his son by his side, but his hands accidentally slipped to his son's neck while he was intending to stop his two-year-old child from running outside on his own. R. 68-88.

Furthermore, Officer Woffinden testified that Matthew "appeared to be in good physical condition," that as he woke up he "started to get a little more playful," that [h]e did not complain at all," and that "he did not really speak at all." R. 55-56. Significantly, while the State tries to imply that Mr. Peterson's admission to "losing it" was an admission to losing his temper, at no other time has he injured his son in a like manner.

R. 46. Mr. Peterson's admission of having an anger problem, rather than being an admission of losing control, is more of an illustration of his taking control of a situation through the proper channels, that is, anger management courses. Quite simply, the State did not show by a preponderance of evidence that the circumstantial evidence presented was incompatible, upon any reasonably hypothesis with the innocence of Mr. Peterson, and incapable of explanation beyond Mr. Peterson's guilt.

2. The Cases on Which the State Relies to Show that the Jury Properly Inferred Intent are Distinguishable.

The State argues that the jury properly inferred intent through the evidence presented in this case. However, this Court has held that "before we can uphold a conviction it must be supported by a quantum of evidence concerning each element of the crime as charged from which the [factfinder] may base its conclusion of guilt beyond a reasonable doubt. In addition, a guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." *Spanish Fork v. Bryan*, 1999 UT App 61 ¶ 5 (Citations omitted)(modifications).

The State first relies on *State v. Peterson*, 453 P.2d 696 (Utah 1969). It is important to note that the defendant in *Peterson*, argued that the statute required the State to prove intent to inflict "great" bodily harm, while the relevant statute merely required intent to inflict bodily harm. The Utah Supreme Court did not require proof of specific intent because "[t]he essence of the offense here involved is an assault upon another with a deadly weapon with intent to do bodily harm; *and no particular degree of harm is*

specified or required." *Peterson*, 453 P.2d at 697 (emphasis added). However, in our case, the statute specifically sets forth three levels of intent, thus the State must prove the specific intent included in the statute. Furthermore, the Court specifically points out in *Peterson,* that the defendant's "version does not establish the fact [contra intent to inflict bodily harm], nor does it even necessarily raise sufficient doubt to vitiate conviction." *Id.* In *Peterson*, the defendant cut the hand of another with a hunting knife but claimed he was intending to merely threaten the victim rather than injure him. The Court stated "It seems almost too obvious for comment that intent to do bodily harm could reasonably be inferred from the 'slashing' at another person with a hunting knife." *Id* . It is not as obvious to infer intent to harm in our case, where a father, trying to prevent his two-year-old child from running outside alone, grabs him and accidentally harms him in the process. It is not the same thing as waving a hunting knife at someone.

The State next relies on *State v. Maestas*, 652 P.2d 903 (Utah 1982). The question of intent in *Maestas* is not relevant to our case. In *Maestas*, the defendant was arguing that the crime of attempted first degree murder required a "stronger showing of intent than does the crime of murder itself." *Maestas*, 652 P.2d at 904. The holding in *Maestas* is merely that Utah law "only requires the kind of culpability otherwise required for the commission of the [completed] offense." *Id*. If the State relies on circumstantial evidence to prove intent, it must still prove the required level of culpability set out in the statute and still meet the rigors of Utah law.

In *Maestas*, the defendant was in a vehicle being pursued by law enforcement agents in connection with a robbery. The State proved intent through the presentment of a revolver, a photograph, and testimony by various eyewitnesses. A police officer testified that he found the weapon in the defendant's possession. The victim testified that he heard the gunshot and saw the defendant looking at him. Moreover, the victim is a firearms instructor and had expert knowledge that made him capable of determining the direction in which a projectile was traveling from its sound. Another police officer, behind the vehicle in which the defendant was located, heard the shot. He also possessed knowledge, making him capable of determining the direction a projectile is traveling. He heard the shot come from the left front section of the van while the van simultaneously veered to the left and he witnessed the defendant bring his hand back into the van after the shot.. Finally, one officer in pursuit of the vehicle observed the defendant stick his head out of the vehicle with a revolver and turn in the direction of the victim and fire one shot. *Id.* Thus, inference of intent was based on believable direct and circumstantial evidence of such quality and quantity to prove intent, unlike the small amount of circumstantial evidence in our case.

The State uses *State v. James*, 891 P.2d 781 (Utah 1991) to argue that injuries sustained by the victim can show intent. Again, Mr. Peterson concedes that circumstantial evidence can be used to prove intent, however, that evidence must still be believable and of such quality and quantity to prove intent. The evidence presented in

James to show intent far outweighs the evidence presented in our case. The defendant in *James* was convicted of first degree murder for killing his infant son. His son was found bound in a weighted mattress cover in a marsh. In *James*, the Supreme Court of Utah held that the nature of injury leading to death and relative level of carelessness can be inferred in "these types of cases," that is cases where the State must prove "the cause of death was by criminal means, not by accident." *Id.* at 790. Intent is a much harder element to prove when the victim is dead.

The evidence presented in *James* was the victim's mother testified that the defendant had harmed the infant on several occasions before the death, defendant was jealous of the infant getting so much attention from the mother, the defendant was stressed over finances to care for the infant, the defendant got angry with the victim's mother when she helped with the criminal investigation, the defendant had used drugs. *Id.* at 785. Witnesses testified that the defendant seemed nervous during the relevant time frame, that the defendant did not ask for help from a uniformed officer when he claimed his child was kidnaped from his vehicle. The physical evidence found with the victim was connected to the defendant. The defendant had just been to the area where the victim was found the day prior to the disappearance. *Id*. at 793.

The extensive evidence of prior injuries to the victim inflicted by the defendant was an important factor in that case. In fact, the Utah Supreme Court specifically points to the evidence of prior injuries to the infant caused by the defendant and states: "[i]n

cases of child abuse, such as the one before us, evidence of specific instances of defendant's treatment of the child is relevant to establish not merely a general disposition for violence of ill-will towards all children, but to establish a specific pattern of behavior by defendant toward ...the victim." *Id.* at 792. The weight and quality of the evidence in *James* is not comparable to the evidence in our case. Specifically, there is no proof that Mr. Peterson ever harmed his son before this incident.

The State then claims that in *State v. Widdison,* 2001 UT 60, "a more factually similar case," the court found intent from injuries. State's Brief at 9. *Widdison* is not factually similar to our case, indeed it is remote. Furthermore, the evidence presented in *Widdison* was overwhelming and not even comparable to the evidence presented in our case. In *Widdison*, evidence was presented that the victim suffered a history of abuse from the defendant, of which she sustained extensive bruises all over her body, lack of proper medical attention, several broken bones, injuries to her nose, chin and inside of her mouth, the skin connecting her ear to her scalp was ripped, and a diaper rash so severe it resulted in ulcerated skin before she suffered death. *Widdison* , 2001 UT 60, ¶ 22. Several witnesses testified of the defendant's mistreatment of all of her children, including the victim. *Id*. at ¶ 24. In *James,* the Utah Supreme Court acknowledged that intent can be inferred from prior abuse to children. *James*, 819 P.2d at 792. That history of abuse is clear in the record in *Widdison.* It is absent in our case.

Instead the circumstantial evidence presented in our case to show intent is more

similar to the quality and quantity of evidence presented in *State v. Gonzalez*, 2000 UT App 136. In *Gonzalez*, the defendant was convicted of tampering with evidence in a case where the defendant was riding in a vehicle with a person who shot a gun into another vehicle. The State charged the defendant with tampering with evidence because the defendant had an ammunition clip in his possession and admitted to being the owner of some marijuana found under the seat in the vehicle. The State's claim was that by the defendant possessing the clip, he must have helped conceal the gun and because the defendant's marijuana was under the car seat, he must have hid it there. This Court held that the mere fact the defendant had an ammunition clip in his possession does not support the inference that he tampered with evidence by helping the shooter conceal the weapon after the incident. This Court stated, "it is just as possible, absent any evidence presented by the State, that [defendant] had the clip in his pocket all evening. Thus, by merely establishing defendant's possession of the extra clip, the State did not present sufficient evidence from which the jury could infer timing, concealment, and *intent* to conceal the gun beyond a reasonable doubt." *Gonzalez*, 2000 UT App 136, ¶ 18.

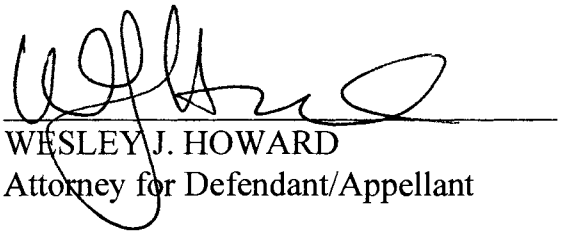
This Court further held that just because the defendant admitted to owning the marijuana and the fact that the marijuana was found under a seat, does not prove beyond a reasonable doubt that the defendant "hid the marijuana *believing* an investigation was going to occur and in order to impede the investigation." *Id*. at ¶ 20. The defendant was clearly involved in wrongdoing, but the State has the burden to prove each element of the

particular crime charged. Likewise, in our case, there is evidence that Mr. Peterson injured his son, he admits to that fact, and that his son was under eighteen years. There is also the likely explanation, especially considering Mr. Peterson never harmed his son before, that he accidentally injured his two-year-old son while preventing him from going outside alone. There is not evidence of such quality and quantity to prove that Mr. Peterson intended to injure his son. The only evidence presented to prove that he intended to injure his son was his admission that he "lost it" and that he had anger problems. However, Mr. Peterson also admitted to attending anger management classes, which show the proper control of the situation. This Court has stated that it will not make "speculative leaps across gaps in the evidence." *Id*. at ¶ 20. The State did not show that Mr. Peterson had the necessary intent to convict him under Utah Code Ann. § 76-5-109.

CONCLUSION

The State did not meet its burden to prove that Mr. Peterson intended to injure his son. While circumstantial evidence can be conclusive, it must still be believable evidence of such quality and quantity to prove the element of the crime. The State did not prove intent as required for Class A Misdemeanor Child Abuse as Required by Utah Code Ann. § 76-5-109. Based on the foregoing, Appellant respectfully request this Court to reverse the trial court's denial of the motion to dismiss.

RESPECTFULLY SUBMITTED this 26th day of August, 2004.



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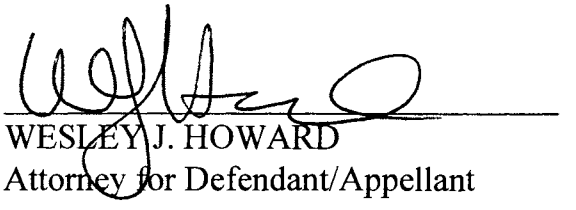
CERTIFICATE OF DELIVERY

I, WESLEY J. HOWARD, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Salt Lake District Attorney's Office, 2001 South State Street, Suite 3700, Salt Lake City, Utah 84190-1200, this 26th day of August, 2004.



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DELIVERED to the Utah Court of Appeals and the Salt Lake District Attorney's Office as indicated above this _____ day of August, 2004.

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