

2004

Utah v. Robert Kelton Berry : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee :
 :
 v. :
 :
 ROBERT KELTON BERRY, : Case No. 20040142-CA
 :
 Defendant/Appellant :

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for aggravated robbery, a first degree felony, in violation of Utah Code Annotated § 76-6-302 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Stephen L. Roth, presiding. Appellant is incarcerated.

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POINT I. THE SECOND ELEMENT OF THE ROBERTSON TEST
SURVIVED THE UTAH SUPREME COURT’S REASONABLE DOUBT LINE
OF CASES.

As argued in Appellant’s Opening Brief, the Utah Supreme Court did not overrule the second element of the Robertson test that states a reasonable doubt definition “should not state that a reasonable doubt is one which ‘would govern or control a person in the more weighty affairs of life,’ as such an instruction tends to trivialize the decision of whether to convict.” Robertson, 932 P.2d 1219, 1232 (quoting State v. Ireland, 773 P.2d 1375, 1380-82 (Stewart, J., dissent)). The continued validity of the second element of the Robertson test is evident from the third of the Utah Supreme Court’s reasonable doubt cases, State v. Weaver, 2005 UT 49. In Weaver, the Court clarified that Reyes “overruled the Robertson test mandating that a reasonable doubt instruction specifically require the state to ‘obviate all reasonable doubt.’” Weaver, 2005 UT 49 at ¶7 (quoting Reyes, 2005 UT 33, ¶30, 116 P.3d 305. The Supreme Court overruled this element because “it tends to diminish the degree of proof necessary to convict and in that respect

violates the Victor standard.” Reyes, 2005 UT 33 at ¶27. Unlike the first element of the Robertson test, the second element remains valid after Reyes because it, as required by the Victor test, ensures the reasonable doubt definition given to the jury does not “tend[] to diminish the degree of proof necessary to convict” the defendant. Reyes, 2005 UT 33 at ¶27.

In In re Winship, 397 U.S. 358 (1970), the United States Supreme Court said the “government must prove beyond a reasonable doubt every element of a charged offense.” Victor v. Nebraska, 511 U.S. 1, 5 (1994) (citation omitted). “The beyond a reasonable doubt standard is a requirement of due process.” Id. A definition of reasonable doubt violates the due process clause if, ““taken as a whole,” “there is a reasonable likelihood that the jury understood the [definition of reasonable doubt] to allow conviction based on proof insufficient to meet the Winship standard.” Id. at 6 (citation omitted). For example, in Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam), the trial court defined reasonable doubt as “a grave uncertainty” or “an actual substantial doubt” that prevents the jury from reaching a “moral certainty.” Cage, 498 U.S. at 40. The Supreme Court held the instruction was unconstitutional because “a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.” Id. at 41.

As argued in Appellant’s Opening Brief, Justice Stewart’s Ireland dissent, which ultimately produced the Robertson test, discussed how comparing the reasonable doubt standard to major life decisions “tends to diminish and trivialize the constitutionally required burden-of-proof standard.” Ireland, 773 P.2d at 1381; Appellant Supp. Brief 8-

9. These same concerns were expressed by Justice Ginsburg in urging the adoption of the Federal Judicial Center’s Pattern Criminal Instruction for reasonable doubt. See Victor, 511 U.S. at 24 (Ginsburg, J., concurring); Appellant Supp. Brief 9-10.

In Holland v. United States, 348 U.S. 121 (1954), the Supreme Court briefly addressed a jury instruction that defined reasonable doubt “as ‘the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.’” Id. at 140. The Court held there was no prejudicial error because, “taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.” Id. It noted, however, that:

We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act. But we believe that the instruction as given was not the type that could mislead the jury into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension.

Id. (internal citation omitted). Several jurisdictions have interpreted Holland to draw a distinction between “hesitate to act” and “willingness to act” and to uphold use of the “hesitate to act” language. See, e.g., United States v. Tobin, 576 F.2d 687, 694 (5th Cir. 1978); Tillman v. Cook, 215 F.3d 1116, 1126-27 (10th Cir. 2000), cert. denied, 531 U.S. 1055 (2000). This interpretation, however, is unlikely:

The Court’s problem seems to have been not with the willingness to act phrasing itself, but instead with the definition of doubt as something people would act upon. The instruction should have either defined proof beyond a reasonable doubt as the kind of certainty people would act upon or, as the Court suggested, defined reasonable doubt as the kind of doubt that would undermine a person’s willingness to act.

That the Court was concerned with the instruction's nonsensical phrasing rather than the quantum of doubt described thereby is suggested by its observation that "[a] definition of doubt as something the jury would act upon would seem to create confusion rather than misapprehension."

Ramirez v. Hatcher, 136 F.3d 1209, 1214 n.8 (9th Cir. 1997) (citations omitted) (emphases in original), cert. denied, 525 U.S. 967 (1998); see Victor, 511 U.S. at 24-25 (Ginsburg, J., concurring) (criticizing "hesitate to act" language without referencing Holland); United States v. Drake, 673 F.2d 15, 20 n.5 (1st Cir. 1982) (noting "[s]ome courts appear to have misunderstood" Holland, where the instruction at issue was "manifestly wrong as it turn[ed] the reasonable doubt standard on its head").

In this case, the distinction between "willingness to act" and "hesitate to act" is immaterial because defense counsel used the "willingness to act" language when comparing reasonable doubt to major life decisions. R. 267:294 (defense counsel defining proof beyond a reasonable doubt in the following way "And I have talked about how serious these offenses are, and how important, if not more important, than deciding who you are going to marry or if you are going to buy a house. That's how careful you have to be and what factors you would weigh in saying, 'Am I going to marry this person?'" R. 267:294.

Other jurisdictions agree "there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him." Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965), cert. denied, 398 U.S. 883 (1967); see, e.g., United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) (noting that "comparing the reasonable doubt standard with the process

employed by a juror in making important decisions in his or her own life” has potential “for impermissibly reducing the government’s burden of proof”); United States v. Jaramillo-Suarez, 950 F.2d 1378, 1381 (9th Cir. 1991) (holding “most important decisions in life—choosing a spouse, buying a house, borrowing money, and the like—may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases”); Commonwealth v. Rembiszewski, 461 N.E.2d 201, 204-09 & n.1 (Mass. 1984) (finding error based on instruction including comparisons to decisions regarding professions, marriage, home, and surgery); Commonwealth v. Ferreira, 364 N.E.2d 1264, 1273 (Mass. 1977) (holding “degree of certainty required to convict is unique to the criminal law” and people do not “customarily make private decisions according to this standard”).

As argued in Appellant’s Supplemental Brief, Robertson’s prohibition against defining reasonable doubt by analogizing it to major life decisions remains good law. See Robertson, 932 P.2d at 1232. Therefore, by violating this prohibition, defense counsel’s performance fell “below an objective standard of reasonableness.” State v. Montoya, 2004 UT 5, ¶23, 84 P.3d 1183. Given the well-established case law that the use of these types of analogies tends to diminish the standard of proof necessary to convict, defense counsel’s comparisons cannot be considered sound trial strategy and prejudiced Mr. Berry because there was a reasonable likelihood of a different outcome had defense counsel not lowered the State’s burden of proof by misstating the reasonable doubt standard. Thus, defense counsel’s performance meets the Strickland test. See Strickland v. Washington, 446 U.S. 668 (1984).

POINT II. IT WAS PREJUDICIAL ERROR FOR THE COACHING OF THE PROSECUTION'S ONLY WITNESS TO THE EVENTS TO BE EXCLUDED FROM THE JURYS CONSIDERATION OF CREDIBILITY.

“[A] number of state courts have held that coaching is a matter which bears upon a witness’ credibility[.]” State v. Rodriguez, 509 N.W.2d 1, 3 (Neb. 1993). Therefore, “the question of coaching is one for the jury.” Id. Utah has also determined that “[i]t is for the factfinder to determine witness credibility.” State v. Stefaniak, 900 P.2d 1094, 1096 (Utah Ct. App. 1995) (citing State v. Workman, 852 P.2d 981, 984 (Utah 1993); see also Gillespie v. Southern Utah State College, 669 P.2d 861 (1983) (“It is the exclusive province of the jury to determine the credibility of the witnesses”). Indeed, recently in Tillman v. State, 2005 UT 56, where transcript evidence of coaching of one of the state’s witnesses had not been disclosed to defendant, the Utah Supreme Court determined that had the transcripts been disclosed the defendant may have been able to use them to “raise[] questions in the minds of the jurors as to the overall veracity or credibility of [the witness’] account.” Id. at ¶67. Therefore, the trial court’s error in excluding the coaching of the state’s key witness from the jury consideration of credibility was prejudicial.

When the trial court instructed the jury that they could not consider the coaching of the state’s key witness, it “usurp[ed] the fact-finding function of [the] . . . jury.” Stafaniak, 900 P.2d at 1096) (citation omitted). In giving the jury a curative instruction, “our judicial system greatly relies upon the jury’s integrity to uphold the jury oath, including its promise to follow all of the judge’s instructions.” State v. Harmon, 956 P.2d 262, 272 (Utah 1998) (emphasis in original). Hence, it must be presumed that the

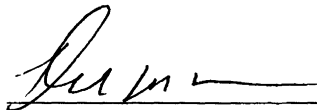
jury followed the trial court's instruction limiting their ability to determine the effect Brandon's mother's coaching had on Brandon's credibility.

As argued in Appellant's Opening Brief, the judge's error was prejudicial because Brandon's credibility, perceptions, and memory provided the only evidence supporting guilt. Appellant's Opening Brief 50. This was a close case where Brandon's testimony was inconsistent regarding many aspects of what took place making Mr. Berry's involvement in the offense suspect. Appellant's Opening Brief 34-40; Appellant Supp. Brief 11-14. Given that Brandon's testimony was the only evidence supporting Mr. Berry's guilt, the trial court's erroneous jury instruction usurping the jury's ability to consider the coaching of his testimony was "sufficiently prejudicial that there is a reasonable likelihood of a more favorable result for the defendant in its absence." Seel v. Van Der Veur, 971 P.2d 924, 926 (Utah 1998).

CONCLUSION

As set forth more fully in the opening and supplemental brief, Appellant, Robert Kelton Berry, respectfully requests this Court to reverse his conviction and remand for a new trial.

SUBMITTED this 9 day of November, 2005.



DEBRA M. NELSON
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 9 day of November, 2005.



DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 9 day of November, 2005.

