

2005

Vance Hunt v. John Burton : Brief of Appellee

Utah Court of Appeals

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WILSON

IN THE UTAH COURT OF APPEALS

VANCE HUNT, Plaintiff/Appellant, vs. JOHN BURTON, Defendant/Appellee.	Case No. 20050065
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BRIEF OF APPELLEE

**APPEAL FROM A JURY VERDICT RENDERED IN THE
SECOND DISTRICT COURT, THE HONORABLE
SCOTT M. HADLEY, PRESIDING.**

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IN THE UTAH COURT OF APPEALS

VANCE HUNT, Plaintiff/Appellant, vs. JOHN BURTON, Defendant/Appellee.	Appellate Court Case No. 20050065
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BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

This appeal is from an jury verdict delivered in the Second District Court on the 16th day of December, 2005, which was eventually reduced to a final appealable order signed by the Honorable Judge Scott M. Hadley on 17th day of February, 2005. The Supreme Court has original appellate jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j). The Supreme Court transferred the case to the Appellate Court pursuant to its authority under Utah Ann. Code §78-2-2(4).

ISSUES PRESENTED FOR REVIEW

The Appellee is satisfied with the Appellant's statement of the issues except that the Appellee will argue that the Appellant has failed to properly marshal the evidence as required when challenging a jury verdict. Appellee argues that the trial court erred in allowing Dr. Seth Lewis to bolster Appellant's credibility and espouse a legal conclusion.

STANDARD OF APPELLATE REVIEW

In reviewing a jury verdict, this Court will “view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict. [This Court will] recite the facts accordingly, and present conflicting evidence only to the extent necessary to understand the issues raised on appeal.” *State v. Dunn*, 850 P.2d 1201, 1206 (Utah 1993).

“To successfully attack the verdict, an appellant must marshal all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it.” *Evans v. Doty*, 824 P.2d 460, 468 (Utah 1992) (quoting *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985)). To overcome a jury verdict, a party must marshal “every scrap of evidence that supports” the jury’s finding. *Martinez v. Wells*, 88 P.3d 343, 349 (Utah App. 2004).

PRESERVATION OF ISSUES AND PROPRIETY OF REVIEW

The aforementioned issues were preserved at the trial level.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Appellant identifies the following constitutional provisions, statutes, ordinances and rules as those “whose interpretation is determinative” within the meaning of Utah R. App. P. 24(a)(6): Rule 704 of the Utah Rules of Evidence.

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (b) No expert witness testifying with respect to the mental state or condition of a defendant

in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

STATEMENT OF THE CASE

The Appellee is not satisfied with the Appellant's Statement of the Case but because the Appellant has woefully failed to marshal the evidence in his challenge of the jury verdict, the Appellee declines to expend significant time reciting a lengthy factual statement when one is not necessary to decide this appeal.

SUMMARY OF THE ARGUMENT

The Appellant has failed to marshal the evidence as required when challenging the verdict of the jury.

The Trial Court erred in allowing testimony of Dr. Seth Lewis which improperly bolstered the Appellant's credibility and amounted to a bare legal conclusion.

ARGUMENT

THE APPELLANT HAS FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE JURY VERDICT AND INSTEAD HAS PRESENTED ONLY EVIDENCE THAT SUPPORTS HIS ARGUMENT.

The Appellant's argument challenging the jury's verdict spans a brief three pages. The Appellant cited only to the testimony of Dr. Seth Lewis to satisfy its "marshaling" requirement.

Recently, the Utah Supreme Court took the opportunity to, again, outline the proper

method for “marshaling” the evidence. In *Chen v. Stewart*, the Supreme Court, citing multiple Court of Appeals cases held that

in order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. *Neely v. Bennett*, 51 P.3d 724 (Utah Ct. App. 2002). This does not mean that the party may simply provide an exhaustive review of all evidence presented at trial. *Id.* Rather, appellants must provide a precisely focused summary of all the evidence supporting the findings they challenge. *Id.* This summary must correlate all particular items of evidence with the challenged findings and then convince us that the trial court erred in the assessment of that evidence to its findings. *W. Valley City v. Majestic Inv., Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991). What appellants cannot do is merely re-argue the factual case they presented in the trial court. *Oneida/SLIC v. Oneida Cold Storage & Warehouse Inc.*, 872 P.2d 1051, 1053 (Utah Ct.App.1994). Furthermore, appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court's findings. *Id.* This would inappropriately force an appellee to marshal the evidence in order to refute an appellant's assertion of the absence of evidence. *Id.* In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence. *Oneida*, 872 P.2d at 1054.

The purpose of this rigorous and strict requirement is to promote two interrelated court objectives: efficiency and fairness. *Id.* at 1053. A proper marshaling of the evidence promotes efficiency by avoiding “retrying the facts” and by assisting the appellate court in its “decision-making and opinion writing.” *Id.* It promotes fairness by requiring that the appellants bear the expense and time of marshaling the evidence rather than putting the appellee in the “precarious position” of performing the appellant's work at “considerable time and expense.” *Id.* at 1053-54. This deference to a trial court's findings is “based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal.” *Id.* at 1053.

If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone. *Wilson Supply, Inc. v. Fraden Mfg. Corp.*, 54 P.3d 1177 (Utah 2002). If appellants have failed to properly

marshal the evidence, we assume that the evidence supports the trial court's findings. *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 233 (Utah 1998).

Chen v. Stewart, 100 P.3d 1177, 1195 (Utah 2004). The Appellant in presenting only the limited testimony of Dr. Stewart does not satisfy this Court's marshaling requirement. Although, the Appellant cited to the testimony of Vance Hunt in his Statement of the Facts, he does not marshal any evidence from the testimony of the Appellant to support the jury's verdict. Nor does Appellant cite any of the other testimony from the Appellee, James Arthur Hansen, or David Noorda to support the verdict of the jury and effectively discharge the marshaling requirement.

The Appellant could have provided examples wherein the Appellant had previously reported the sequences of punches and pushing to the military police and then changed his story during his testimony before the Court. The Appellant lied to his doctor when he was admitted to the hospital. The Appellant claimed that the alleged assault caused his diabetes when it clearly predates the alleged assault by at least four years. The Appellant withdrew his request for money damages related to heart surgery he had months after the alleged assault because his heart condition predated the altercation.

The Appellant has woefully failed to marshal the evidence from multiple witnesses to support the jury's verdict. The Appellant has essentially, on appeal, re-argued his case. The Appellant provides no "comprehensive and fastidious" recitation "of competent evidence introduced at trial which supports the very findings the appellant resists." The Appellant has instead presented a total of six separate questions and answers posited too and answered by

Dr. Seth Lewis. A total of sixty-seven words are cited by the Appellant from a total of five witnesses with testimony stretching over two days of trial. The Appellant has failed to marshal the evidence and has instead burden the Appellee with the task of having to respond to this inadequate brief. This shifting of the burden to the Appellee should not be tolerated. Since the Appellant has not marshaled the evidence in support of the jury verdict, this Court can affirm the jury's verdict "on that basis alone." *Wilson Supply, Inc. v. Fraden Mfg. Corp.*, 54 P.3d 1177 (Utah 2002).

ARGUMENT

EVEN THOUGH THIS COURT CAN AFFIRM THE JURY'S VERDICT IN THIS CASE BASED UPON THE FAILURE OF THE APPELLANT TO MARSHAL THE EVIDENCE, THE TESTIMONY OF DR. SETH LEWIS PROVIDES THE SCINTILLA OF EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Although the Appellant has made no claim that there is no evidence to support the jury's verdict his lack of adequate marshaling may be interpreted by this Court as just such a charge. The Appellant argues in his brief that, at trial, the Appellant "presented testimony of an expert that Defendant's assault caused Mr. Hunt's damages and Defendant offered no direct evidence refuting this testimony." Applt's Brief, pg 8. The jury did find that an assault occurred. However, problematic for the Appellant, was that the jury verdict form did not delineate between the multiple alleged hits by the Appellee. The Appellant had alleged that the Appellee struck the Appellant in the chest with his elbow, then raised his fist up to hit the Appellant in the face and then lowered his fist in a karate like move to hit the

Appellant in the testicles and then the Appellee turned and shoved the Appellant. Thus, although the jury found that, in general, an assault had occurred it does not prove that the Appellant was hit in the eye which later caused the hematoma under his chin.

The conclusion by Dr. Seth Lewis that the Appellant was hit in the face is based solely on the Appellant's self-reporting. Dr. Lewis was not present when the assault had occurred. Dr. Lewis never saw any evidence of an injury to the area around the Appellant's eye.

The Appellant was allegedly struck in the face by the Appellee on the 19th day of November, 2002. The Appellant presented no photographs or eye witness accounts of any swelling, bruising, discoloration to the area around his eye at trial besides his own self serving testimony.

The Appellant scheduled an appointment, some eight days later, to see Dr. Lewis on the 27th day of November, 2002. At the time of the visit, the Appellant made no mention that he had been assaulted eight days earlier and instead "he complained of sore throat, painful lump under his chin." Trial Transcript, pg 90, lines 14-15.

Q: So when he come in and tell, and tell you what's, said Doc, this what's wrong with me, you'd write all that stuff down?

A: Yes. So at that time he complained of sore throat, painful lump under his chin..

Q: So he didn't complain about any pain to the chest?

A: No, not that I -

Q: Didn't tell you about any pain to his eye at that point?

A: No.

Q: And you didn't note in your, in your report that was any discoloration some eight days later after allegedly he'd been hit, is that right?

A: No.

Q: I mean you're looking right at them, he's close to you, right?

A: Yes.

Trial Transcript, pgs 90-91, lines 11-25, and 1-2. Dr. Lewis prescribed some pain medication and observation of the lump under the Appellant's chin. Trial Transcript, pg 85, lines 12-13. The Appellant later returned to Dr. Lewis complaining of increased swelling and pain and was advised that the Appellant should be admitted to the hospital. *Id.* at lines 21, 22, and 25.

It is when the Appellant is admitted to the hospital that he tells Dr. Lewis on the 13th day of December, 2002, about the altercation and the injury to his eye.

A: ...I record, at least that time in the his history and physical that he, noticed initially bruising and swelling under his right eye and subsequently enlarging and mildly tender mass under his, under his chin...

Q: And that's what he reported to you?

A: Yes, that's what I recorded in my admission history and physical to the hospital on the 13th day of December.

Trial Transcript, pgs 102-03, lines 19-22.

Dr. Lewis' concluded that a hematoma formed around the area of the Appellant's eye and later, prior to the office on the 27th day of November, 2002, migrated to the Appellant's chin eventually causing an infection requiring surgery and intravenous antibiotics. "Q: And your hypothesis about the migration of one hematoma from supposedly his cheek to his, underneath his chin is based upon the reporting done by Mr. Hunt; is that right? A: Yes, and it's consistent with, with the natural history of the hematoma and the location." Trial Transcript, pg 91, lines 1-7.

a. Dr. Lewis' expert status.

Dr. Lewis testified that he had been private practice for twelve years. Trial Transcript, pg 83, lines 17-19. When asked how many patients, besides the Appellant, he has treated with facial injuries caused by a fight, Dr. Lewis testifies "Probably a handful, less than five." Trial Transcript, pg 92, line 19.

Q: So with, of the five people that you treated before with facial [inaudible] –

A: Yeah [inaudible] –

Q: - Injuries? Facial injury, injuries, did any of them have that draining hematoma?

A: No, I've, I've not, no.

Q: So this is all pretty hypothetical, given the facts?

A: Yeah, it's based on history that, that -

Q: Mr. Hunt told you?

A: Yeah, seemed consistent with the, with what I saw when I started seeing him.

Trial Transcript, pg 105, lines 5-15. It is conceded that Dr. Lewis is a practicing physician with twelve years experience dealing with patients. He has no previous background in facial hematomas caused from being hit that then migrate to another part of the body or the face. The jury could have discounted the limited experience of Dr. Lewis in this particular area of medicine in finding for the Appellee.

b. The Appellant's credibility.

Dr. Lewis believed that swelling had occurred around the Appellant's eye after the 19th day of November, 2002, because that is what the Appellant told him when he was admitted to the hospital on the 13th day of December, 2002.

Q: So would it be safe to say that would there be any correlation between the

size of, for lack of a better phrase, the goose egg on his face and the one that later was found on the chin? In other words, would they be relatively the same size? Would you expect that?

A: Yes, they should, they would be generally similar.

Q: So, if you were told that the very next day after he was assaulted, Mr. Hunt reported that there was no puffiness to the his cheek, would that seem odd? Would that seem inconsistent with the fact that you believe that this hematoma came from his injury to his cheek?

A: It was eight days later that, that I saw him that I didn't notice significant puffiness to his cheek, but ---

Q: What about the next day, if there was no puffiness the next day, wouldn't that seem kind of odd, because --

A: Yes.

Q: You've got a deposition in front of you, just happens to be Mr. Vance Hunt's deposition. Will you open that up?

A: Okay.

Q: And turn to page 87.

A: Okay.

Q: If you start with line 14 on that page, this is occurring right after the incident. If you could just read through that to yourself, page 87 and then all of 88.

A: Okay.

Q: And then 89. Are you, is that 89?

A: Yeah.

Q: So -

A: Read through 89.

Q: That, and does it seem to be the fact that Vance is telling us that the next morning he wakes up and this is on, found on page 89 I ask him was his face still puffy? He says just red. So that would seem to indicate that there wasn't any swelling of the tissues, is that safe to say from a self-reporting aspect?

A: Yes.

Q: So there wasn't a large hematoma that formed on his cheekbone, is that, is that what you're getting, at least from his own sworn testimony?

A: Yeah, yes.

Q: The very next day?

A: Yes.

Q: And that would be consistent with what you saw when he came in to see you 8 days later? In other words, there wasn't that kind of stages of discolorization that would be associated with somebody getting really hit in the face, is that right?

A: Yes.

Trial Transcript, pgs 93-95, lines 19-25, 1-25, and 1-16 The Appellant's sworn testimony at his deposition conflicts with what he told Dr. Lewis on the 13th day of December, 2002. The Appellant had told Dr. Lewis that "he noticed initially bruising and swelling under his right eye..." Trial Transcript, pg 102, lines 19-22. After reviewing the Appellant's deposition, Dr. Lewis is asked about the statements made by the Appellant during his deposition.

Q: ...And I ask him "Did you see any bruising the next morning when you got up?" What is his answer?

A: "No."

Q: So that seems to conflict with your, with his self-reporting to you?

A: Yes.

Q: Okay. So if he's telling us there's there's no large mass, that there's only at best, some redness. There's no puffiness and there's no bruising then there was no hematoma, right?

A: That's a possibility. The other possibility is that blood drained directly through the soft tissues into the chin. But that's [inaudible]

Q: That would -

A: - not a large collection here before the hematoma developed. That's another possibility.

Q: Have you ever, in your practice, have you seen that happen before?

A: No.

Trial Transcript, pgs 103-04, lines 14-25, and 1-8.

The jury did not believe the Appellant was telling the truth when he reported bruising and swelling. Since there was no large mass of blood that could possibly drain through the "soft tissues" into the chin, the mass under the Appellant's chin could have come from some other cause. Remember, there is no corroboration in the record that the Appellant actually

was hit in the eye. No photographs of any bruising or swelling other than the mass under his chin. No eyewitness accounts -- other than the Appellant's own testimony.

c. *Other sources for the infection and mass under the Appellant's chin.*

Dr. Lewis testified upon cross-examination that because the Appellant is a diabetic he is more susceptible to infections. "So streptococcus pneumonia is the bacteria that was found in Mr. Hunt's abscess and the bacteria can cause a wide variety of infections as widespread as skin infections, pneumonia, meningitis and even urinary tract infections." Trial Transcript, pg 97, lines 18-23. The following exchange took place during cross-examination of Dr. Lewis.

Q: "...are people with diabetes more susceptible to bacterial infections?

A: Yes, they are.

Q: And, and Mr. Hunt has diabetes?

A: Yes.

Q: How long has he had diabetes?

A: For a number of years.

Trial Transcript, pg 98, lines 17-23. Dr. Lewis is asked "people with diabetes are, could be more susceptible with strep bacterial infection?" Trial Transcript, pg 100, lines 3- 4. Dr. Lewis responds "Yes, any, any infection". *Id.* at line 5. Again Dr. Lewis is queried about the mass under the chin. "And is it possible that on the 27th when you saw him that what you saw was not necessarily a hematoma, but a massive bacterial infection of strep at that point that was so deep inside his, below the skin?" *Id.* at lines 6-9. Dr. Lewis concedes "that's a, that's a possibility." *Id.* at line 10.

The jury in not finding any liability could have relied on any one of a number factors

outlined above. The lack of direct medical experience in facial injuries and “draining hematomas” of the Appellant’s expert. The fact that the Appellant lied to his doctor about the alleged bruising and swelling that he did not experience. Finally, the jury could have concluded that because of the diabetes the Appellant was more susceptible to infections and that the streptococcus pneumonia was independent and unrelated to the alleged blow to his face. “An appellee need only point to a scintilla of evidence that supports a court’s findings in order to refute an appellant’s claim of no evidence.” *Wilson Supply, Inc. v. Fraden Mfg. Corp.*, 54 P.3d 1177 (Utah 2002). The Appellee has provide a scintilla of evidence to support the jury verdict and this Court should affirm the decision rendered by the jury in favor of the Appellee.

ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING DR. LEWIS TO TESTIFY THAT HE BELIEVED THAT THE APPELLANT WAS STRUCK IN THE FACE AND THAT THE INJURY CAUSED THE HEMATOMA BECAUSE SUCH TESTIMONY IS IMPROPER BOLSTERING AND IT INVADES THE PROVENANCE OF THE JURY.

At the close of Dr. Lewis’ testimony, counsel for the Appellant asked “Dr. Lewis do you have any doubt that Vance Hunt was struck in the face and that’s what caused the hematoma?” Trial Transcript, pg 106, lines 9-10. Counsel for Appellee objected to the question arguing that it called on “him to comment on the veracity of the witness at this point in time.” *Id.* at lines 11-12. Counsel for Appellant argued that he asking Dr. Lewis’ “opinion, which he’s being asked to do. He’s well qualified to do it based upon the facts that

he's heard." *Id.* at lines 17-18. The trial court overruled the objection and allowed Dr. Lewis to answer the question. Dr. Lewis answered "no" to the question whether he had "any doubt that Vance Hunt was struck in the face and that's was caused the hematoma.

Rule 704 of the Utah Rules of Evidence allows expert testimony regarding ultimate issues. However, this rule does not allow all opinions by experts. Previously, this court considered the question of what expert opinions are permissible as going to the "ultimate issue," and what expert opinions are inadmissible as "legal" conclusions. This Court held that it was proper to "excluded an expert opinion which concluded that the defendant was negligent. In doing so, we stated that [q]uestions which allow a witness to simply tell a jury what result to reach are not permitted. A witness may testify as to the defendant's actions, including whether the defendant acted with care; however, the witness may not consider all the facts and render a final legal conclusion." *Steffensen v. Smith's Management Corp.*, 820 P.2d 482, 491 (Utah App. 1991). The trial court erred in allowing Dr. Lewis to state a legal conclusion and invade the provenance of the jury.

The objected to question and subsequent answer also amounted to improper bolstering by an expert witness. "[A]n expert may not testify that what a witness told the expert was the truth," *State v. Kallin*, 877 P.2d 138, 140 (Utah 1994), because "rule 608(a)(1) [of the Utah Rules of Evidence] bars admission of an expert's testimony as to the truthfulness of a witness on a particular occasion." *State v. Rimmasch*, 775 P.2d 388, 392 (Utah 1989). If this Court remands this case for a new trial, the trial court should be instructed to exclude any future testimony of the Appellant's expert regarding the veracity of the Appellant or which

constitutes a legal conclusion.

CONCLUSION AND PRECISE RELIEF REQUESTED

The Appellant has failed to satisfactorily marshal the evidence in support of the jury's verdict. Instead, the Appellant has provided only a minimal amount of testimony which supports his contention that the verdict is wrong. This Court should affirm the jury verdict because the Appellant has not even attempted to compile every scrap of competent evidence introduced at trial which supports the very findings the Appellant resists. Pursuant to *Wilson Supply* this Court can affirm on that failure alone.

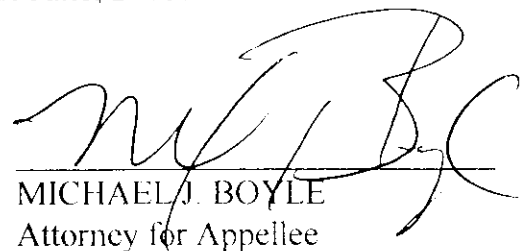
If this Court gives the Appellant the benefit of the doubt and believes that Appellant is contending that the record was devoid of any evidence to support the jury verdict then Appellee has provided a scintilla of evidence to support the jury's finding and verdict.

Finally, if this Court is to remand this case for further proceedings, this Court shall instruct the lower court to exclude expert testimony that is a bare legal conclusion and which invades the province of the jury and improperly bolsters the Appellant's credibility.

ORAL ARGUMENT REQUESTED

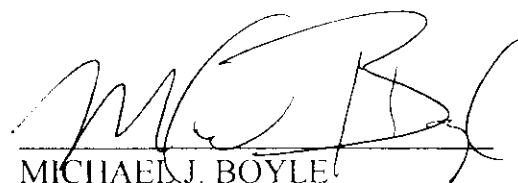
Oral argument is requested to assist this Court in defining the issues and understanding the determinative law.

RESPECTFULLY SUBMITTED this 27th day of June, 2005.


MICHAEL J. BOYLE
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellee, this 27th day of June, 2005, to Rex B. Bushman, Esq., 115 East Social Hall Avenue, Salt Lake City, Utah 84111.


MICHAEL J. BOYLE
Attorney for Appellee