1994

State of Utah v. Kevin Eugene Kinross : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 940577-CA
vs.	:	
KEVIN EUGENE KINROSS,	:	Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF AGGRAVATED SEXUAL ABUSE OF A CHILD, A FIRST DEGREE FELONY WITH A MINIMUM MANDATORY SENTENCE, IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

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STATE OF UTAH, Plaintiff/Appellee, vs. KEVIN EUGENE KINROSS, Defendant/Appellant.	:	Case No. 940577-CA Priority No. 2

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ARGUMENT

POINT I

THE PLAIN ERROR DOCTRINE IS NOT LIMITED IN ITS APPLICATION TO ERRORS NOT ADDRESSED BY THE TRIAL COURT

The State, in its Response Brief, asserts that the plain error doctrine "allows an appellate court to review obvious errors that the trial court did not address" (Br. of Appellee at 10). In fact, the State argues that, because the trial court directly addressed the admissibility issue of T.K.'s out-of-court statement "hurt Daddy pee-pee" and ultimately concluded that the statement would be admitted as an "excited utterance", the plain error doctrine is inapplicable in this case (Br. of Appellee at 10).

However, such a proposition is not supported by the case law in Utah which does not distinguish between a trial court's errors of commission or omission. Indeed, the only limitations on the use of plain error as an appellate standard of review in cases where appropriate objections have not been raised are: One, an error must exist. Two, the error should have been obvious to the

trial court. Three, the error must be harmful (e.g., absent the error, there is a reasonable liklihood of a more favorable result for the appellant, or the appellate court's confidence in the verdict is undermined because of the error). State v. Dunn, 850 P.2d 1201, __, 208 Utah Adv. Rep. 100, 102 (Utah 1993). And four, the error must not be "invited". *See* State v. Tillman, 750 P.2d 546, 560-61 (Utah 1987); State v. Perdue, 813 P.2d 1201, 1205 (Utah App. 1991).

POINT II

THE TRIAL COURT'S ERRONEOUS ADMISSION OF T.K.'S STATEMENT AS AN "EXCITED UTTERANCE" WAS NOT "INVITED"

The State argues that even if the admission of T.K.'s out-of-court statement otherwise complies with the requirements for plain error, appellate relief is precluded because the error was "invited" (Br. of Appellee at 10). The State bases its assertion on the fact that Kinross' trial counsel was involved in the evidentiary hearing conducted on the matter during the morning of trial, that he questioned Tamara Kinross, and that he had discussions with the judge indicating "that his concerns had been satisfied" (Br. of Appellee at 10-11). In support of its contention, the State cites the following exchange:

> MR. ELKINS: Your honor, I wouldn't lodge any objections to her not being here. My original concern was simply if we were considering this an out-of-court statement as it relates to child abuse, I think one of the things the Court is called upon to determine is the age and maturity of the child. Maybe this testimony this morning takes care of that.

THE COURT: I think it does. I think there's testimony relative to what her age is, and I think the Court can have its own knowledge of what a two-year old child--

MR. ELKINS: Certainly your honor

(Br. of Appellee at 11).

However, the State takes the conversation between Elkins and the trial court out of context. Immediately prior to the cited conversation, the County Attorney, Phil Hadfield, had raised the question of whether T.K.'s physical presence before the court was necessary to the court's determination of admissibility of her statement (R. 212). Elkins' comments that "maybe the testimony this morning" takes care of his original concern refers back to a *statement made by Elkins at a February 23, 1990, hearing--a* hearing conducted four days before the hearing to which the State cites.

At the February 23, 1990, hearing Elkins indicates that he is concerned about the T.K.'s ability to make such a statement, and the court's subsequent ability to rule on the admissibility of such a statement without first hearing her talk (R. 191). In the conversation cited to by the State Elkins was not, however, commenting on the actual admissibility of T.K.'s statement, but only to the necessity of her presence before such a decision could be made.

On the contrary, Elkins failed entirely to respond to the court's admission of T.K.'s statement as an "excited utterance" (R. 214-15). Therefore, the State's assertion that the error of the admission of T.K.'s statement was invited is incorrect.

Moreover, if the trial court's error is considered as invited by Elkins on this issue, the invitation was the result of ineffectiveness and not intentional behavior. In support of this contention, Utah courts have recognized that "if counsel's decision in leading the court into error falls below the standard of reasonable professional practice, we may find that counsel was ineffective" State v. Dunn, 850 P.2d 1201, ___, 208 Utah Adv. Rep. 100, 109 (citing State v. Bullock, 791 P.2d 155, 158-59 (Utah), cert. denied, 110 S.Ct. 3270 (1989)). Therefore, if the error is deemed "invited" it must be considered as evidence of Elkins' ineffectiveness of counsel--an issue which lies at the heart of Kinross' appeal.

POINT III

THE TRIAL COURT COMMITTED PLAIN ERROR IN ADMITTING T.K.'s STATEMENT AS AN "EXCITED UTTERANCE"

Kinross asserts that the position he takes in Point I of Appellant's brief is correct and should be adopted by this Court.

POINT IV

SECTION 76-5-411 FINDINGS WERE NECESSARY IN THIS CASE TO CURE THE ERROR IN THE TRIAL COURT'S EXCITED UTTERANCE ANALYSIS

The State misunderstands Kinross' position with respect to the necessity of Utah Code Annotated § 76-5-411 findings. Kinross agrees that § 76-5-411 findings are not required when an out-of-court statement of an alleged child abuse victim is admissible under an existing hearsay exception. However, where there is no applicable hearsay exception--or as in this case,

where the admission of the out-of-court statement under an existing hearsay exception is in error--Kinross asserts that it is plain error for the trial court not to have made such findings.

In this case, the trial court admitted T.K.'s statement as an "excited utterance" or alternatively under § 76-5-411 (R. 214). Because the trial court committed plain error in admitting the statement as an excited utterance, Kinross asserts that the § 76-5-411 findings required by law--and set forth in Point II of Appellant's brief--were necessary in this case to cure the error in the admission of the statement as an excited utterance. Absent such findings, or without the proper admission of T.K.'s statement under another hearsay exception, the trial court committed plain error.

POINT V

KINROSS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Kinross stands on the merits of his "ineffectiveness of counsel" arguments presented in the Appellant's brief at Point III. However, Kinross brings to this Court's attention the State's erroneous analysis of the first-prong of the Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984), test. In the Appellee's brief the State, in two separate arguments, engages in erroneous analysis of Strickland's first prong.

First, the State asserts that "to satisfy the first prong of the Strickland standard in this case, defendant must establish, at a minimum, that T.K.'s statement was inadmissible as an

'excited utterance'" (Br. of Appellee at 12). Second, the State argues, with regards to Elkins' failure to move to suppress Kinross' admissions to Senn, that "To show ineffectiveness in this matter, defendant must go through two steps. First, he must show that a motion to suppress would have been granted. . . " (Br. of Appellee at 21).

Based upon these statements, the State appears to be confusing the first-prong of Strickland with its second-prong. An establishment that T.K.'s statement was in fact not an excited utterance, or a showing that a motion to suppress Kinross' admissions would have been granted, are findings which are more applicable to Strickland's second-prong--which is that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" has been described as "a probability sufficient to undermine the confidence in the outcome." See Strickland v. Washington, 104 S.Ct. at 2068; State v. Tennyson, 850 P.2d 461, 466 (Utah App. 1993); and State v. Crestani, 771 P.2d 1085, 1089 (Utah App. 1989).

Strickland's first-prong, however, requires only a showing that Elkins' representation of Kinross fell below an objective standard of reasonableness. Strickland, 104 S.Ct. at 2065; Tennyson, 850 P.2d at 465; Crestani, 771 P.2d at 1089. The United States in Strickland elaborated on this prong further: "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so

serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 104 S.Ct. at 2064.

Kinross asserts that Elkins' lack of trial preparation--including his failure to order the transcript of preliminary hearing which was conducted before his appointment to the case, his failure to object in any fashion to the admission of T.K.'s out-of-court statement, and his failure to challenge the constitutionality of Senn's interrogation of Kinross, demonstrate that Elkins' representation of Kinross in fact fell below an objective standard of reasonableness. Kinross further argues that Elkins' deficient performance prejudiced him or that at the very least it was sufficiently deficient to undermine this Court's confidence in the outcome.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing arguments and the arguments set forth in Appellant's brief, this Court should vacate Kinross' conviction of Aggravated Sexual Abuse of a Child, a first degree felony, and remand the case to the Fourth District Court for new proceedings.

RESPECTFULLY SUBMITTED this 5 day of September, 1995.

Margaret Lindsay

Margaret P. Lindsay
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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Reply Brief Of Appellant to the following: Jan Graham, Utah Attorney General, James H. Beadles, Assistant Attorney General, 236 State Capitol, Salt Lake City, UT 84114, this 5 day of September, 1995,

Margaret Lindsay