

1995

The State of Utah v. Mark E. Child : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 MARK E. CHILD, :
 :
 Defendant/Appellant. :

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.A10
DOCKET NO. 950070-CA

Case No. 950070-CA
Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from the trial court's restitution order under Utah Code Ann. § 76-3-201(4)(a)(i) (1995) based on Defendant's guilty plea to Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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COURT OF APPEALS

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INTRODUCTION

Defendant/Appellant Mark E. Child relies on his opening brief and also refers this Court to that brief for the statements of jurisdiction, the issues, the case, the facts, and the summary of the argument. Appellant replies to the State's answer to his opening brief as follows.

ARGUMENT

POINT. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING RESTITUTION IN THE AMOUNT OF \$45,443.

Although the State claims that Appellant failed to marshal the evidence in this case, it fails to articulate the precise evidence it believes was not marshaled.¹ While the

¹ Where the State claims a defendant has not adequately marshaled the evidence, in fairness, this Court ought to require the State to outline the precise evidence it believes was not included. While in many cases, a party may be able to find an item not included in the marshaled evidence, the marshaling requirement is not aimed at requiring the party opposing the ruling to include an exhaustive list and extensive argument supporting the ruling. Rather, the requirement is designed to inform this Court as to the evidence supporting the ruling so that this Court may more readily ascertain whether the ruling was erroneous. Where the State makes a general assertion of failure to marshal, a defendant may feel compelled to repeat the State's evidence which is already outlined in Appellant's opening brief to establish that the marshaling

State certainly argued the evidence in support of the order at greater length, Appellant nevertheless adequately met the marshaling requirement by explicitly outlining the State's evidence. A review of Appellant's opening brief establishes that Appellant cited the following evidence in support of the order.

"In August 1991, Roger Ashment, the owner of Star Steel, hired Mark Child as the office manager for Star Steel. R. 295, 304. In that capacity, Child wrote payroll checks for all employees, managed the books, paid vendors, made purchases of materials and bid for jobs, and handled taxes. R. 198,304."

Appellant's opening brief at 3.

"Mr. Sherwood, the auditor, came up with a figure of \$47,843.48. R. 196." . . . "He . . . compiled figures based on what he believed to be excess payroll, excess automobile allowance, checks made out to Child, checks made out to cash and signed by Child, and what Sherwood termed 'unauthorized' checks. R. 167, 169-73."

Appellant's opening brief at 7.

After vendors contacted Ashment, Ashment found discrepancies in the payment of vendors. "As a result of these discrepancies, in approximately January 1993, Ashment hired Thomas Sherwood, a Certified Public Accountant, to conduct an audit or review of the records of Star Steel." R. 164.

Appellant's brief at 3.

requirement was met. This requires an additional expenditure of resources and puts a defendant in the position of yet again outlining the State's evidence. Rather than affirming based on a general assertion that the party challenging the order failed to marshal the evidence, this Court should require the party seeking to benefit from the marshaling requirement to state the evidence it believes was not marshaled. The challenging party then would be in a position to discuss whether such evidence was indeed omitted and, if so, the importance of any such oversight.

Sherwood "testified that he found Child was overpaid as follows: 1991 payroll \$452.14 (R. 169), and automobile allowance \$818.00 (R. 169-70). Sherwood found checks in the amount of \$16,425 made out to Child. R. 170. Sherwood also found checks made out to cash and signed by Child in the amount of \$8,328.50 (R. 171). He found other checks which he claimed were unauthorized totalling \$18,525.34. R. 171. Those checks were made out to cash, Mark Child or a utility which Sherwood testified had nothing to do with Star Steel. R. 173. Another set of checks totalled \$1,900.00. R. 173. The total of all these checks was \$47,843.45."

Appellant's opening brief at 3-4.

Appellant also pointed out that the State submitted a letter from Mr. Sherwood which indicates that \$13,745 should not be credited Mr. Child because those cash deposits "were traced through bank statements and have proved to be deposits made through other Star Steel accounts.'" Appellant's opening brief at 9 quoting Sherwood letter. In addition, Appellant included a copy of the letter in Addendum B to his opening brief.

Although Appellant did not use the term "marshal," a review of his brief demonstrates that Appellant adequately marshaled the evidence supporting the trial judge's restitution order.

In civil cases, the prevailing party must prove actual loss with a "reasonable certainty." Cook Assoc. v. Warnick, 664 P.2d 1161, 1166 (Utah 1983). A reasonable certainty exists where "there is sufficient evidence to enable the trier of fact to make a reasonable approximation." Id. at 1166. At the very least, this standard of proof should apply in criminal cases. Appellant contends that the State failed to establish with reasonable

certainty that the amount of restitution ordered in this case reflected the actual loss sustained by the company.

Although Appellant has only a high school diploma, he was responsible for the accounting in this company which made thousands of dollars in purchases and paid thousands of dollars in payroll each month. R. 428. The bookkeeping and records were disorganized and "slipshod." Defense counsel pointed out:

And I think, Judge, that what's happened here is that there are purchases that quite, that can't quite be solidified through invoices, although nobody has taken the time to look through all the invoices to add them up to make sure that all the numbers correspond and correlate together, and because there was a debt due to the IRS and who else, Mr. Child is expected to be responsible for the entire amount.

He's admitted responsibility for an amount, Judge, but he's not admitting responsibility for the entire amount.

R. 428-29. Child maintains that in this case, where all of invoices and checks were not "solidified," the State did not establish to a reasonable certainty that the company sustained \$45,443 in damages.

The State contends that "[a]s part of his plea bargain, defendant agreed to pay full restitution. R. 430." State's brief at 24. The cited transcript page reflects, however, that the trial judge found that the defendant was required to make full restitution as part of his plea bargain and sentence.

Indeed, the trial judge stated in part at R. 430:

It'll be the finding of the court that the defendant is obligated, under the plea bargain, and under the sentencing order of this court, to make full restitution in an amount to be

determined by the court after having heard testimony.

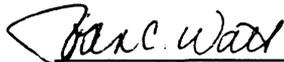
R. 430.

Appellant acknowledged that he was responsible for restitution in the amount of \$3,250 but maintained that he was not responsible for the "entire amount" of loss sustained by the company. R. 429-30.

CONCLUSION

Appellant Child respectfully requests that this Court reverse the restitution order and remand this case for a new hearing on the restitution issue.

SUBMITTED this 10th day of May, 1996.



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JAMES A. VALDEZ
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, 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 10th day of May, 1996.



JOAN C. WATT

DELIVERED this _____ day of May, 1996.
