2007

State of Utah v. Christopher Manuel R. Tapia : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20070844-CA
CHRISTOPHER MANUEL R. TAPIA,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION ON ONE COUNT OF BURGLARY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (WEST 2004), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, THE HONORABLE SCOTT M. HADLEY, PRESIDING

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NO ADDENDUM NECESSARY

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction on one count of burglary, a second degree felony. R. 101-02. This Court has jurisdiction over the appeal pursuant to Utah Code § 78A-4-103(2)(e)(West 2008).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

Did defense counsel render ineffective assistance or did the trial court plainly err where defendant has failed to establish that, in the absence of the testimony to which he now objects, the outcome of his trial would likely have been more favorable?

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether trial counsel's performance was deficient and, if so, whether the deficient performance prejudiced defendant. Strickland v. Washington, 466 U.S. 668,

687 (1984). An ineffective assistance claim presents a question of law, reviewed on the record of the underlying trial. See State v. Litherland, 2000 UT 76, ¶¶ 16-17, 12 P.3d 92. To prevail on a claim of plain error, defendant must demonstrate that the trial court erred, that the error should have been obvious, and that, absent the error, he had a reasonable likelihood of a more favorable outcome. State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993).

When asserted together, claims of plain error and ineffective assistance embody a "common standard," in that they both require a showing of prejudice or harm in order for a reviewing court to reverse. State v. Verde, 770 P.2d 116, 124 n.15 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-202 (West 2004), governing burglary, provides:

> (1) An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit:
>
> . . .
>
> (b) theft[.]

Utah Code Ann. § 76-6-404 (West 2004), governing theft, provides:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

STATEMENT OF THE CASE

Defendant was charged by amended information with one count each of burglary, a second degree felony; unlawful possession of another's identification documents, a class A misdemeanor; and unlawful possession of a dangerous weapon, a third degree felony. R. 9-10. A jury found defendant guilty of the burglary charge only. R. 96-98. The court sentenced defendant to one-to-fifteen years in the Utah State Prison, consecutive to time he was already serving, and recommended credit for time served. R. 101-02. Defendant filed a timely notice of appeal. R. 106-07, 108-09.

STATEMENT OF THE FACTS

Defendant, whose half-brother was affianced to Brittany Walton, began associating with Brittany while his brother was incarcerated. R. 130: 107-08. According to Brittany, "[defendant] wanted to be in a relationship with me, but I never wanted to be in a relationship with him." Id. at 125. Nonetheless, until several weeks prior to the events giving rise to this case, they spent a lot of time together. Id. at 122. They argued so frequently, however, that Brittany told defendant she "couldn't be around him anymore, and so we didn't have any contact, no phone calls or anything, for like three weeks." Id.

Then, on March 13, 2007, Brittany, her young son, and defendant traveled from Ogden to Sunset to visit defendant's father. Id. at 109. On the way home that evening by bus, defendant and Brittany began arguing again. Id. at 109. The argument escalated as they changed busses in Ogden. When defendant got off at the stop for Brittany's apartment, Brittany, seeking to avoid further conflict, remained on the bus. She and her son rode to the end of the line and then back to a 7-11 store, where Brittany telephoned a friend to come pick them up. Id. at 110-11. They stayed at the friend's house that night. Id. at 111.

The next morning, Brittany went back to her apartment without her son. Id. There she found a pack by the front door full of things belonging to her and her fiancé. Id. at 113.[1] She also found defendant in the apartment, going through both her possessions and her fiancé's. Id. at 112-13. She told him to stop what he was doing and leave. Id. 113. Defendant told her he was taking his brother's stuff for safekeeping, he called her

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[1] According to Brittany, this pack and another found in the bedroom contained a Norelco shaver, men's clothing, a framed picture of Mother Mary, several DVDs, a cellphone, and breast-feeding cream. R. 130: 117. Brittany testified that the cream and the picture belonged to her and that she and her fiancé "pooled resources" for the DVDs and cellphone. Id. at 118-19. The police officer gave a slightly different recitation of what items were found by the door and in the bedroom. Compare R. 130: 117 with R. 130: 132-33. The differences, however, are not relevant to the outcome of the case.

derogatory names, and he did not leave. Id.. Not wanting to deal further with him and needing to take her son to daycare, Brittany left, telling defendant that when she returned in a few minutes, "he better be gone. . .and all my stuff better be there." Id. at 114.

When Brittany returned, defendant was in the bedroom, still going through things. Id.. He said he was taking his brother's things to store them. She told him he had no right to take either her stuff or his brother's. Id. at 115. After arguing further about the possessions, she left, informing defendant she was going to call the police. Id.[2]

The police arrived, and Brittany told Officer Checketts that she needed defendant out of her house, that he did not have permission to be there, that he was verbally aggressive to her and was threatening to take her things. Id. at 116. As Brittany entered the apartment behind the officer, she saw her fiancé's backpack full of belongings by the front door. Brittany testified that she "asked [defendant], I was like, were you gonna take all that stuff. And right in front of the police, he said, yeah." Id.

Officer Checketts testified that when he entered the apartment, he found defendant in the bedroom. Id. at 129.

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[2] Brittany testified that previously she "had him kicked out of my house a few times." R. 130: 124.

Defendant admitted to the officer that he did not live in the apartment, did not have a key, and did not have permission to be there. Id. at 130-31. He further conceded that many of the things he was gathering belonged to his brother, who had not given him permission to take anything and was unaware of his activity. Id. at 131. Indeed, defendant conceded he had not even talked to his brother "for several months." Id..

Based on these facts, Officer Checketts arrested defendant Id. at 134-35.

SUMMARY OF ARGUMENT

Defendant argues that his counsel was ineffective for failing to object to a prejudicial remark made by the victim and that the court committed plain error by failing to sua sponte exclude the remark. These related arguments fail on the common standard of prejudice.

The allegedly problematic remark arose when the State asked the victim why she had a knife in her house. She responded that she had it for protection from defendant. Defendant now claims for the first time the remark was "highly prejudicial," warranting reversal of his conviction.

Defendant's inadequately-briefed claim fails on the merits because he has not established prejudice. Even absent the remark, the jury knew that the victim had called the police many times on defendant and had thrown him out of the house before.

To also know that the victim felt she needed protection from defendant adds nothing new or prejudicial to the jury's knowledge base. Indeed, the jury did not convict defendant of burglary because the victim testified incidentally to having a knife as protection. The jury convicted defendant because he admitted to the police and the victim that he had collected two bags full of things that did not belong to him and that he intended to leave the apartment with those things.

ARGUMENT

DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE NOR DID THE TRIAL COURT PLAINLY ERR WHERE DEFENDANT HAS FAILED TO ESTABLISH THAT, IN THE ABSENCE OF THE TESTIMONY TO WHICH HE NOW OBJECTS, THE OUTCOME OF HIS TRIAL WOULD LIKELY HAVE BEEN MORE FAVORABLE

Defendant asserts two related arguments. First, he contends that his counsel performed deficiently by failing to object to Brittany's explanation that she had a knife in her apartment for protection from defendant "because of past instances." See Br. of Aplt. at 16 (quoting R. 130: 120). Second, he contends that the trial court plainly erred by not sua sponte conducting a rule 404(b) analysis of the allegedly "prior bad act" remark about the knife and then by not excluding it. Id. at 13-15. He avers that the misstep by counsel or the court was harmful because defendant "was in some type of relationship with the victim where they had spent a considerable amount of time together" that presumably

would have explained his actions enough to exonerate him if the derogatory evidence had not come in. Id. at 14, 17.

To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate both objectively deficient performance and prejudice. State v. Litherland, 2000 UT 76, ¶¶ 19, 12 P.3d 92. To prevail on a claim of plain error, defendant must show obvious legal error and prejudice. State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993). In cases such as this one, "[w]hen defendant raises the issues of both plain error and ineffective assistance of counsel, 'a common standard is applicable.'" State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992)(quoting State v. Verde, 770 P.2d 116, 124 n.15 (Utah 1989)); accord State v. Brooks, 868 P.2d 818, 822 (Utah App. 1994). "Because the defendant must show prejudice to prevail under either argument, the 'common standard' . . . functions as an analytical shortcut that avoids treatment of the other prongs of the ineffective assistance and plain error standards." Litherland, 2000 UT 76 at ¶31 n.14.

In this case, after Officer Checketts arrested defendant and was handcuffing him, defendant threw a knife on the bed.[3] R.

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[3] Officer Checketts explained at trial: "I had placed one hand in cuffs and was going to handcuff the other one is when he reached in [his back pocket] and grabbed [a sharp, unsheathed, fixed blade knife] and threw it [on the bed] as I was grabbing his hand." R. 130: 139; see also id. at 135-36.

120: 130. On direct examination, Brittany testified that the knife belonged to her. The following exchange then occurred:

The State:	Why did you have that knife?
Witness:	Because—I don't know if I can answer this one. . . because, remember, I told you—anyways, someone else gave it to me—
The State:	Was it—
Witness:	—for protection.
The State:	Okay.
Witness:	Okay. Is that good enough? I don't—
The State:	You can answer the question. I'm not. . .trying to tell you what you should or should not be saying.
Witness:	But—
The State:	If you had it for protection, that's—
Witness:	It was for protection from Chris [i.e., the defendant]. I'll just leave it at that. Because of past instances—

Id. at 120. Defendant here cannot prevail on his claims of ineffective assistance and plain error because he has not, and cannot, demonstrate how the verdict on the burglary charge would likely have been better, absent the alleged error of admitting this testimony.[4]

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[4] Notably, the jury acquitted defendant of the charge of possession of a dangerous weapon. R. 98.

At the outset, defendant's briefing is inadequate. Briefing requirements are articulated in Rule 24, Utah Rules of Appellate Procedure, and require not only that the appealing party cite pertinent authority but also that the party develop that supporting authority through reasoned analysis. Utah R. App. P. 24(a)(9). A party must carefully analyze and apply the cited authority to the facts of the case in order to convince the reviewing court that a specific and harmful mistake has been made. An issue is inadequately briefed "'when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" State v. Sloan, 2003 UT App 170, ¶13, 72 P.3d 138 (quoting Smith v. Smith, 1999 UT App 370, ¶8, 995 P.2d 14). When this occurs, the law is well-settled that this Court should not consider the issue on appeal. See, e.g., State v. Thomas, 1999 UT 2, ¶13, 974 P.2d 269 (when a party fails to offer any meaningful analysis of a claim, reviewing court declines to consider the merits).

Here, defendant argues that he was convicted because Brittany's testimony "was [used] to show [he] had a bad character and there had been instances in the past that caused the victim to believe she needed a knife to protect herself from him." Br. of Aplt. at 11. Defendant asserts that the jury's knowledge of Brittany's prior need for protection was "highly prejudicial." Id. at 13. Presumably, it was so prejudicial because it

undermined defendant's theory that his past relationship with Brittany was so close that it precluded his conduct from amounting to burglary. See id. at 14. Defendant nowhere, however, makes this argument explicit or articulates how relevant law, applied to specific facts, would help him reach the result he desires. On the basis of inadequate briefing, then, the Court may decline to even consider his claim. See, e.g., State v. Thomas, 961 P.2d 299, 305 (Utah 1998)(appellate court is "not a depository in which the appealing party may dump the burden of argument"); Utah R. App. P. 24(a)(9).

Even on the merits, the argument fails. Burglary requires "enter[ing] or remain[ing] unlawfully in a building. . .with intent to commit. . .theft." Utah Code Ann. § 76-6-202(1)(b)(West 2004). Theft requires that a person "exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (West 2004). In this case, although "entering" and "remaining" are alternative types of culpable conduct, defendant admitted to Officer Checketts that he both entered and remained in Brittany's apartment without her permission. R. 130: 131. While he also stated that he had previously entered the apartment without permission, in some cases climbing onto the roof and entering through a window, his past, apparently tolerated conduct does not render the entry in this case lawful. Id. Brittany made

absolutely clear to Officer Checketts and then to the jury as well, that defendant both entered and remained in her apartment without her permission and contrary to her express wish that he leave. Id. at 112-14, 116, 121, 129, 134.

Defendant did not dispute her testimony. In fact, he conceded his intent to exercise unauthorized control over the property of another with a purpose to deprive the owner thereof. While defendant took many items belonging to his half-brother, he told both Brittany and Officer Checketts that he was only "storing these things" for his brother. Id. at 119, 131. Even assuming arguendo the truth of defendant's statement, he also took items that he knew belonged to Brittany or in which Brittany had a partial interest. The two had argued over the picture of Mother Mary, evidencing not only defendant's knowledge that Brittany owned it but also his intent to deprive her of it. Id. at 114. The breast feeding cream was also plainly Brittany's. Id. at 118-19. Moreover, Brittany made clear to defendant that, while her fiancé was incarcerated, his possessions were left in her care. And, because they were a couple, they owned many things, such as the DVDs and the cellphone, jointly. Id. at 115. After having been explicitly told this, defendant continued looking through and taking items, thus demonstrating his intent to deprive Brittany of them.

Under these factual circumstances, the jury did not convict defendant because Brittany revealed that she had acquired a knife for protection from defendant. Indeed, even without that evidence, the jury knew that Brittany had defendant "kicked out of" her house "a few times" and had called the police on him "numerous" times. Id. at 124. Given defendant's history of overstaying his welcome until the police were summoned, Brittany's expressed need for protection from defendant did not tell the jury anything it could not readily surmise from the unchallenged evidence before it.

In reality, the jury convicted defendant of burglary because he entered an apartment that was not his own without permission, he collected two bags full of things that he knew were individually or jointly owned by Brittany and her fiancé, and he intended to leave the apartment with those items. Defendant's claim fails because he has wholly failed to establish that, absent the incidental reference to defendant's impliedly aggressive nature, the verdict on the burglary charge would have been different.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction on one count of burglary, a second degree felony.

RESPECTFULLY submitted this 27th day of May, 2008.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Dee W. Smith, The Public Defender Association of Weber County, 2550 Washington Boulevard, Suite 300, Ogden, Utah 84401, this 21st day of May, 2008.