2002

The State of Utah, Plaintiff/Appelle v. Korry Barlow Smedley, Defendant/Appellant : 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. 20020171-CA
KORRY BARLOW SMEDLEY,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR FOUR COUNTS OF AGGRAVATED SEXUAL ABUSE OF A CHILD, FIRST DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-5-404.1 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE PAUL G. MAUGHAN, PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for four counts of aggravated sexual abuse of a child, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1 (1999). This Court has jurisdiction over the case pursuant to Utah Code Ann. § 78-2a-3(2)(e)(Supp. 2002).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. Where defendant's objection to certain evidence at trial focused wholly on its lack of relevance, did the trial court abuse its discretion by not considering whether it might have been inadmissible under other, unargued evidentiary rules?

Where an issue has not been specifically and properly preserved for appellate review, it is waived. No standard of review applies.

2. Did the trial court properly determine that defendant's inquiry to an investigating detective, prior to any charges being filed, about "what kind of a deal he could get if he pled guilty" was admissible pursuant to rules 401 and 402 of the Utah Rules of Evidence?

A trial court has broad discretion to determine whether evidence is relevant. The court commits reversible error in a relevancy ruling only if it has abused its discretion. State v. Harrison, 805 P.2d 769, 780 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Rule of Evidence 401, defining relevant evidence, provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah Rule of Evidence 402, governing admissibility, provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

STATEMENT OF THE CASE

Defendant was charged by information with four counts of aggravated sexual abuse of a child, a first degree felony (R. 1). His first trial ended in a mistrial after the jury failed to reach a unanimous verdict (R. 273: 279). After a second trial, the jury found defendant guilty of four counts of sexual abuse of a child (R. 278: 262). The court subsequently determined that the crimes were aggravated by defendant's position of special trust as an adult cohabitant of the victims' mother (Id. at 263). The court sentenced defendant to concurrent terms of 5 years to life in the Utah State Prison on counts 1 and 2 and concurrent terms of 5 years to life on counts 3 and 4, with the concurrent terms running consecutive to each other (R. 240-42). Defendant filed a timely notice of appeal (R. 247).

STATEMENT OF THE FACTS

Six weeks after Debra Baldwin met defendant, she and her three daughters, ages 8, 6, and 5, moved into defendant's one-bedroom apartment (R. 277: 93). Defendant and Debra slept in the bedroom; the three girls shared a hide-a-bed in the living room (Id. at 100). Defendant was employed as a painter, working a flexible schedule; Debra was not employed (Id. at 97, 100, 108). Defendant assumed the role of father in the girls' lives, playing with them and taking them on errands, both individually and together (Id. at 94-95). This arrangement, although punctuated

by "kind of severe" arguments between Debra and defendant, continued for nine months (Id. at 92-93, 95).

Finally, after an especially severe argument in August of 2000, Debra decided that she "was tired of the abuse" and left defendant's apartment with the three girls (Id. at 92, 95). They walked to a nearby bus stop, where Debra calmed down, thought about her financial dependence on defendant, and ultimately decided to return to the apartment (Id. at 97, 107). When she told her children, "[t]hey were frantic, they did not want to go back" (Id. at 98). Debra testified, "I asked them why and they said, Because he's mean, because he spanks us. And I asked them, Well, don't you love him? And they said, No, no, no, we don't want to go back home" (Id. at 102). At that juncture, Debra testified, "I asked them if he was touching them on the private [sic] and [the two older girls] said yes" (Id. at 98).

Debra did not return to defendant's apartment, nor did she further question the girls (Id. at 103). Instead, she went to her sister's home for a few days, during which time she notified the police. She then moved with the girls to a shelter, where they stayed for about a month (Id. at 106, 108).

Following Debra's call to the police, a detective with the family violence unit interviewed the girls and then decided to interview defendant (Id. at 165, 168). The detective described the encounter with defendant as "just a basic conversation, this

is a sex abuse case, you're listed as a suspect. These girls have said something about you, we want to talk to you about that today, that's why we're here" (Id. at 170).[1] Defendant responded by "den[ying] that and then he wanted to know what - you know, what kind of a deal he could get if he pled guilty, you know, exactly what the penalty would be. If he were to plead guilty, what would he get" (Id. at 170-71). He repeated this inquiry "several times" (Id. at 171). When defendant made these statements, the case was still in the investigation stage. No charges had been filed. Indeed, the investigating officer testified that no charges, penalty, or punishment had even been mentioned. (Id. at 171).

In response to his inquiries, defendant was told, "'We don't make deals with people, that's not our job, that's not our position. We want to talk about the case, we want to know, you know, what happened. We want to get his side of the story'" (Id.). Defendant then mentioned that "he didn't want the girls to have to testify, but he just needed to know what kind of penalties this would come with before he would, you know, talk to us any further" (Id. at 172).

At trial, the younger girl, who was 8 at the time, testified that defendant was a "bad person" because "he touched me in the

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[1] Prior to the interview, defendant waived his Miranda rights (R. 277: 168-69).

wrong place" (Id. at 114-15). Specifically, she testified that he touched her on the "pee pee" and "bum" both at home and in his red truck (Id. at 116, 117). She said that in the truck he kept one hand on the steering wheel, while he "rubbed" her "pee pee" over her clothes with the other (Id. at 120, 123). She also described defendant making her touch his penis in the truck (Id. at 118). She saw his penis "stuck through his zipper" (Id. at 119). She testified that defendant made her rub lotion on it from a small bottle he kept in the truck, that "[his penis] was soft and then it got hard," and that she saw "white stuff" come out of it (Id. at 121). When they were in the truck, he wiped himself off with a napkin (Id.). She further testified that at home, he touched her under her clothes and that when she rubbed his penis with lotion, the lotion came from a bigger bottle that he kept in the bedroom (Id. at 123-24). Afterwards, he washed himself off in the bathroom with water while she washed the lotion off her hands (Id. at 121, 124).

The older girl, 10 years old by the time of trial, also testified (Id. at 134). She described her relationship with defendant as "kind of good, kind of bad" (Id. at 136). While she testified that she called defendant "Dad" and went places with him, she also reported that he rubbed her "pee pee" and "butt" with his fingers "a lot" of times (Id. at 136-37, 158). This activity, lasting a "few minutes" each time, would occur both at

home and in the truck; sometimes, but not always, her sisters were present (Id. at 138). In the truck, defendant would reach over and rub her "private" (Id. at 140). He would also have her rub lotion on his penis, and he would sometimes buy her treats afterwards (Id. at 140-41). When "white stuff" came out of defendant's penis, he would wipe it off with a napkin from the glove box (Id. at 141). Defendant told her "a lot of times" not to tell anyone "or else he'll go to jail and he'll get in big trouble" (Id. at 139). She testified that she did not tell anyone "[b]ecause I thought he would hurt me" (Id.).

SUMMARY OF ARGUMENT

While defendant argues on appeal that his statement to the investigating detective should have been excluded under rules 401, 402, 408, and 410 of the Utah Rules of Evidence, he failed to present objections based on rules 408 and 410 to the trial court. Absent either plain error or exceptional circumstances, neither of which he has asserted, those arguments cannot now be considered for the first time on appeal. They are waived.

Defendant's only preserved argument is that the evidence should have been excluded because it lacked relevance. His statement to the detective questioning what kind of a deal he could get if he pled guilty, however, constitutes circumstantial evidence of consciousness of guilt and is, therefore, relevant.

Even assuming for purposes of argument that the testimony

was not relevant, its admission did not harm defendant because, even without it, the outcome of his trial would likely have been the same. Both young victims testified in graphic detail about the abuse they experienced. Further, the police detective who interviewed the girls confirmed that their trial testimony was consistent with what they had each told her when she originally investigated the matter.

ARGUMENT

POINT ONE

WHERE DEFENDANT OBJECTED TO THE ADMISSION OF CERTAIN EVIDENCE SOLELY ON THE BASIS OF RELEVANCE, THIS COURT SHOULD NOT NOW CONSIDER FOR THE FIRST TIME WHETHER THE EVIDENCE MIGHT HAVE BEEN INADMISSIBLE UNDER OTHER, UNARGUED EVIDENTIARY RULES

On appeal, defendant argues that the trial court erred by admitting his inquiry to the detective about "what kind of a deal he could get if he pled guilty" (Br. of Aplt. at 8).[2] Defendant

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[2] Defendant asserts that the proper standard for reviewing the admission of his statement to the investigating detective is correction of error. See Br. of Aplt. at 1. For this proposition, he relies on State v. Martin, a case stating that when the prosecutor affirmatively presents evidence, the defendant has a right as a matter of law to rebut that evidence. State v. Martin, 2002 UT 34, ¶ 29, 44 P.3d 805. If a trial court completely precludes defendant from rebutting the prosecution's evidence, then the appellate court reviews that ruling for correctness. Id. However, it a trial court makes an evidentiary ruling based on a relevance objection, that objection is reviewed for an abuse of discretion. See, e.g., State v. Fedorowicz, 2002 UT 67, ¶ 32, 52 P.3d 1194 (articulating abuse of discretion standard of review for relevance rulings).

grounds this argument on four independent bases - that admitting the statement violated rules 401, 402, 408, and 410 of the Utah Rules of Evidence. See Br. of Aplt. at 8-9.

At trial, however, defendant objected to the admission of the statement made to the investigating detective based only on its relevance.[3] Counsel argued:

> Your Honor, you'd made a ruling [at the first trial] that the State could go into a statement that was made by my client. And the statement was basically just that Detective Rackley - and she did testify at our last trial, that when they went to interview him he asked her what kind of deal he could get if he pled guilty. And I'm renewing my objection that that come in because it's irrelevant.
>
> I have since talked with the other detective that was there . . . and his recollection is a little bit different. His recollection is that at some point later on in the conversation [defendant] suggested that he thought he should talk to an attorney about what he was looking at. . . And I realize that that simply creates a factual question. But I think it is a question that does go to, again, the relevance of this. And that is, when they're talking to him about a certain charge to say they have a conversation with the client who doesn't have an attorney there and then for the client to ask, Well, what kind of deal are you looking at offering me

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[3] For preservation of his argument, defendant not only cites to his second trial, but also to his first trial, which ended in a mistrial. See Br. of Aplt. at 2 (citing R. 272: 182-86). However, "what happened by way of ruling on the admissibility of evidence in the first trial, has nothing to do with anything that eventuated at the second trial, which was a trial anew, with no kinship whatever with the first case." State v. Lloyd, 662 P.2d 28, 28 (Utah 1983).

> is irrelevant to guilt in the case. . .
> [T]hat's my objection, your honor.

(R. 277 at 79).

The law is well-settled that "[t]rial counsel must state clearly and specifically all grounds for objection." State v. Larsen, 865 P.2d 1355, 1363 n.12 (Utah 1993). Absent such objection, an issue is not preserved for appeal. Id. And, the objection that is stated must "'be specific enough to give the trial court notice of the very error' of which counsel [or defendant] claims." State v. Bryant, 965 P.2d 539, 546 (Utah App. 1998)(quoting Tolman v. Winchester Hills Water Co., 912 P.2d 457, 460 (Utah App. 1996)).

Here, defendant stated "clearly and specifically" that his objection was based on relevance. On appeal, therefore, his claims based on rules 401 and 402 of the Utah Rules of Evidence are plainly preserved.

In contrast, defendant nowhere stated at trial that he was objecting based on rules 408 and 410 of the Utah Rules of Evidence. Nor did he argue the substance of those rules to the trial court.[4] Defendant thus failed to "give the trial court notice of the very error" he now asserts on appeal. Tolman, 912 P.2d at 460. Because defendant failed to provide fair notice to

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[4] That is, defendant did not argue to the trial court that his statement should be inadmissible because it was part of a plea discussion or intended to be a compromise negotiation. See Utah Rule of Evidence 408 and 410(4).

the trial court that he intended to object to the admission of the evidence based on rules 408 and 410, and because the trial court never had the opportunity to consider these grounds for objection, defendant's rule 408 and 410 arguments are not preserved for appeal.[5]

POINT TWO

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING DEFENDANT'S STATEMENT BECAUSE IT WAS RELEVANT TO SHOW HIS CONSCIOUSNESS OF GUILT

Defendant argues that his statement inquiring about what kind of a deal he could get was inadmissible because "[i]t did not have any bearing on any element of the crimes charged, and it did not make the fact that [he] otherwise denied the alleged abuse more or less probable" (Br. of Aplt. at 8-9). Defendant's relevance argument is premised on the notion that his statement was made as part of a plea negotiation (Id. at 24-25).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401. Here, after waiving his Miranda rights, defendant uttered and then

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[5] Nor did defendant in his appellate brief assert either plain error or exceptional circumstances as a way around the waiver doctrine. See State v. Pledger, 896 P.2d 1226, 1229 n.5 (Utah 1995)(where defendant failed to argue that plain error or exceptional circumstances justified review of unpreserved issue, appellate court declined to consider it).

repeated his query to the investigating detective several times, all well before the State had identified, much less filed, any criminal charges against him (R. 277: 169, 171, 207-08). His sua sponte statement, made only to an investigator well before any charges were filed, was thus plainly not part of a "plea negotiation," as defendant asserts.[6]

Under the circumstances here, defendant's inquiry about "what kind of a deal he could get if he pled guilty" suggested that he was thinking ahead to identify any advantages that might accrue to him in exchange for an admission of guilt. The reasonable implication of his anxious statement is that he thought he was guilty and was exploring ways to mitigate the consequences of his conduct, if at all possible. His statement is thus relevant as circumstantial evidence of his consciousness of guilt.[7]

Assuming that the statement was not relevant, defendant further argues that its admission prejudiced him because "[t]his case hinged on credibility" (Br. of Aplt. at 26). He characterizes the testimony of the two child victims as

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[6] Had defendant made his statement after charges had been filed as part of a true plea negotiation with the prosecutor or with someone expressly authorized to negotiate a plea, then defendant's argument would certainly be far more palatable.

[7] Notably, defendant does not argue on appeal that if the evidence was relevant, its probative value was substantially outweighed by the danger of unfair prejudice. See Utah R. Evid. 403.

"unsubstantiated and vague reports of abuse," speculating that "[t]he jurors may have been searching for some reason beyond the girls' testimony to believe that abuse occurred" (Id. at 27). Absent his statement, defendant surmises that the jury would have acquitted him (Id. at 28).

Even assuming arguendo that defendant's statement was not relevant, excluding it would not have created a reasonable likelihood of a more favorable verdict for him. The testimony of the child victims was consistent with what each had told the detective shortly after the mother notified the police and with each other. And contrary to defendant's repeated characterization of their testimony as "vague," it was, in fact, punctuated with numerous specific and telling details. Many of these details related to matters about which young children would normally have no knowledge, absent personal experience.

For example, the younger child did not merely state, as defendant implies, that he touched her in "the wrong place." See Br. of Aplt. at 26. Rather, she specifically described the parts of her body she was referring to (R. 277: 115-16). She described the details of how she came to see defendant's penis, what it looked like, and how he made her touch it (Id. at 119-20). She described the lotion he made her rub on his penis, where he kept it, and what color it was (Id. at 120-21). She described the physiological change in defendant's penis and described

ejaculation (Id. at 120-21). She described the difference, depending on whether they were at home or in the truck, in how he cleaned himself up afterwards (Id. at 121-22).

The older sister's testimony also detailed defendant's touching, listing the various locations at which it occurred and details of how defendant would touch her (Id. at 137-38, 152, 156). She mentioned the lotion, described ejaculation, and described defendant retrieving napkins from the glove box in his truck to wipe himself off (Id. at 141). She also stated that defendant would sometimes buy her treats afterwards. (Id. at 152). She testified that defendant told her "a lot of times" not to tell or he would go to jail (Id. at 139).

Furthermore, the investigating detective corroborated that the girls' testimony was substantially similar to what they had related to her during her initial interview (Id. at 167). Specifically, the detective stated that the in-court testimony of the children was consistent with what they had told her regarding trips to the store with defendant in his truck, the use of lotion, wiping himself off with a napkin, where and how the touching occurred at home, and where the mother was when it happened (Id. at 167).

Finally, the record contains no evidence that the mother influenced the children's testimony in any way. Indeed, she had no motive to do so. Defendant was not the father of the

children, the mother was financially dependent on defendant, and she would have had nothing at all to gain by trying to influence their testimony (R. 277 at 93, 97, 107). And the evidence is undisputed that, after the initial revelation at the bus stop, the mother did not question either girl further about defendant's activities with them (Id. at 98, 104, 126, 143).

Ultimately, of course, "determinations of witness credibility are left to the jury. The jury is free to believe or disbelieve all or part of any witness's testimony." State v. Hayes, 860 P.2d 968, 972 (Utah App. 1993)(citing State v. Jonas, 793 P.2d 901, 904-05 (Utah App.), cert. denied, 804 P.2d 1232 (Utah 1990)). And,

> [w]hen the evidence presented is conflicting or disputed, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence. Ordinarily, a reviewing court may not reassess credibility or reweigh the evidence, but must resolve conflicts in the evidence in favor of the jury verdict.

State v. Workman, 852 P.2d 981, 984 (Utah 1993)(citations omitted).

Here, the evidence was essentially undisputed and, as was well within its prerogative, the jury chose to believe the girls and the investigating detective. Although defendant's repeated statement suggested a guilty consciousness, the State's case did not rise or fall on it. Considered in light of the girls' consistent and persuasive testimony, even if the trial court had

excluded defendant's statement about what kind of a deal he could get, the outcome of the trial would likely have been just the same. Consequently, defendant has failed to demonstrate that he suffered harm by its admission.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction on four counts of aggravated sexual abuse of a child, all first degree felonies.

RESPECTFULLY submitted this 4th day of November, 2002.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were hand delivered to Linda M. Jones, attorney for appellant, Salt Lake Legal Defender Association, 424 East 500 South, Salt Lake City, Utah 84111, this 4th day of November, 2002.