

1997

State of Utah v. Kenneth Jenkins : 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. 970515-CA
KENNETH JENKINS, : Priority No. 2
Defendant/Appellant.

BRIEF OF APPELLEE

- - - - -

APPEAL FROM CONVICTIONS FOR FORGERY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (1997); THEFT, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (1997); AND SPOUSE ABUSE, A CLASS A MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. § 77-36-1(2) (1997) IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR UINTAH COUNTY, THE HONORABLE JOHN B. ANDERSON, PRESIDING

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APR 30 1998

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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BRIEF OF APPELLEE
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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1997); theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1997); and spouse abuse, a class A misdemeanor, in violation of Utah Code Ann. § 77-36-1 (1997). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1996).

STATEMENT OF THE ISSUES ON APPEAL AND

STANDARDS OF APPELLATE REVIEW

1. Can defendant prevail on an unpreserved claim of prosecutorial misconduct where he has not asserted plain error or exceptional circumstances, where he has provided an insufficient record on appeal, where there is no record evidence of misconduct

by the State, and where, even if there were misconduct, he did nothing to mitigate the potential harm?

2. Where defendant has failed to include any documents related to his spouse abuse case in the record on appeal, can this Court review an issue arising from that case?

Where an appellate court does not reach any substantive rulings made by the trial court, no standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No constitutional provisions or statutes are necessary to the resolution of this case. Rule 16(a) of the Utah Rules of Criminal Procedure is cited in the body of the brief.

STATEMENT OF THE CASE

Defendant was arrested and charged with one count each of forgery and theft, arising out of an incident in which he endorsed and negotiated a check that did not belong to him (R. 6-7). Following a jury trial, defendant was convicted as charged on both counts (R. 61-62). The trial court consolidated the sentencing on the forgery/theft conviction with sentencing on a pending spouse abuse conviction (R. 106-08). Accordingly, the court ordered that defendant serve zero-to-five years in the Utah State Prison on the forgery charge, six months in jail on the theft charge, and six months in jail on the spouse abuse charge, the jail terms to run concurrently with the prison term. In addition, the court ordered a fine of \$1000 and restitution in

the amount of \$149.32 (R. 102-04). Defendant filed a timely notice of appeal (R. 110).

STATEMENT OF THE FACTS

Kim Jenkins was expecting a refund check for \$149.32 from Southwest Gas after she moved from Nevada to Utah in September of 1996 (R. 189). She never received the check (R. 191). At the end of November, however, she received a copy of the cashed check from Southwest Gas and learned that it had been cashed by a Kenneth Jenkins, whose name and driver's license number appeared on the back of the check under an endorsement reading "Kim Jenkins" (R. 190-92).¹ When Kim Jenkins tried to track down Kenneth Jenkins through the Department of Motor Vehicles for repayment of the money, she was referred to local law enforcement (R. 192).

Detective Hollebeke of the Uintah County Sheriff's Office investigated the matter. He interviewed defendant, who stated that he had taken the check from a woman he did not know at the Maeser Trailer Park and that he had cashed it for her as a favor because he had identification, while she did not (R. 236). Defendant said that he did not know the woman's name, but that he could get it if necessary (Id.). He also indicated that he did not know who signed the top of the check (R. 247).

¹ Despite the commonality of surname, Kim Jenkins, the victim, did not know defendant at all (R. 193).

Charlene Helgeson, who lived with defendant, testified that she saw the signed check at the trailer of her former friend, Carma Holler, and that defendant knew Carma Holler through Charlene (R. 217-18, 221-22). Charlene further stated that Carma Holler gave the check to defendant, who took it to the IGA store, co-signed it, and cashed it, while she waited in the car (R. 219-20).

The IGA employee who cashed the check for defendant also testified. She stated that when defendant handed her the check, she looked at it and told defendant that Kim Jenkins, the payee, needed to sign it (R. 200). Defendant flipped the check over, said that she had already signed it, and then volunteered that Kim Jenkins was his wife (R. 200, 204, 206). The clerk asked defendant to co-sign the check and produce identification, which he did (R. 200, 233). She then cashed the check and gave defendant \$149.32 (R. 201).

Based on this evidence, a jury found defendant guilty as charged, of both forgery, a third degree felony, and theft, a class B misdemeanor (R. 61, 62).

SUMMARY OF ARGUMENT

Defendant first argues prosecutorial misconduct, based on an unpreserved assertion that the State knew but failed to disclose both the probationary status and whereabouts of a defense witness. This claim fails for four reasons. First, defendant

neither preserved it below nor argued plain error or exceptional circumstances before this Court. Second, because the record on appeal contains no discovery request, it provides an insufficient basis on which to evaluate defendant's claim. And, in any event, there is no reason to believe the testimony of the missing witness would have exculpated defendant. Third, defendant's claim that the State withheld information is purely speculative. And, fourth, even assuming arguendo a discovery violation, defendant did nothing, when handed a strong lead by the trial court, to mitigate any possible harm stemming from the absence of the witness. Because defendant's prosecutorial misconduct argument is waived and, even on the merits, must fail, this Court should affirm his convictions for forgery and theft.

As to his second claim, defendant has not provided this Court with the record on appeal necessary to evaluate it. Consequently, this Court should presume the regularity of the proceedings below and affirm defendant's conviction for spouse abuse.

ARGUMENT

POINT ONE

DEFENDANT HAS WAIVED HIS CLAIM OF PROSECUTORIAL MISCONDUCT BY NOT PRESERVING IT BELOW OR ASSERTING PLAIN ERROR OR EXCEPTIONAL CIRCUMSTANCES ON APPEAL; EVEN ON THE MERITS, HOWEVER, THE CLAIM FAILS

Defendant claims that the State engaged in prosecutorial misconduct by intentionally withholding critical information about the sole witness who could allegedly exonerate him (Br. of App. at 6). Specifically, he asserts that the State knew but failed to disclose both the fact that Carma Holler was on probation and its concomitant knowledge of her whereabouts (Id. at 5). Her testimony, he argues, would have established that Holler gave him the check, thinking the signature on it was legitimate (Id.). Absent the State's misconduct, defendant concludes, Holler would have so testified and defendant would not have been convicted of forgery and theft (Id. at 6). This claim was not preserved at trial. Indeed, while defendant argued against the State's motion in limine to exclude Holler's hearsay statements, he never argued prosecutorial misconduct or asked the State to produce the witness. In addition, defendant has asserted neither plain error nor exceptional circumstances on appeal. Consequently, this Court may decline to consider defendant's claim and affirm the judgment below. State v.

Pledger, 896 P.2d 1226, 1229 n.5 (Utah 1995).

Even on the merits, however, defendant's claim fails. First, the record on appeal provides an insufficient basis on which to evaluate it. See, e.g., Sampson v. Richins, 770 P.2d 998, 1002 (Utah App.), cert. denied, 776 P.2d 916 (Utah 1989) (counsel has burden of providing appellate court with all evidence relevant to issues on appeal). Here, defendant's prosecutorial misconduct claim is based on both the prosecutor's duty to disclose, which is governed by rule 16 of the Utah Rules of Criminal Procedure, and on the principle articulated in Brady v. Maryland, 372 U.S. 83, 86-88 (1963), which gives the prosecution an affirmative Constitutional duty to disclose exculpatory evidence.

Rule 16 provides in pertinent part:

(a) Except as otherwise provided, the prosecutor shall disclose to the defendant upon request the following material or information of which he has knowledge. . .

Utah R. Crim. P. 16(a) (emphasis added). In this case, while defendant asserts that he requested discovery, he fails to reference where in the record on appeal such a request may be found. See Br. of App. at 7. On this basis alone, the Court may decline to consider his claim. See, e.g., Trees v. Lewis, 738 P.2d 612, 612-13 (Utah 1987) (court dismisses appeal because appellant "has not supported the facts set forth in his brief with citations to the record" as required by the Utah Rules of

Appellate Procedure). In any event, a close examination of the appellate record fails to reveal any discovery request. Under such circumstances, where "the logical starting point for an analysis of the propriety of the prosecutor's conduct" is missing, this Court cannot evaluate defendant's claim. State v. Knight, 734 P.2d 913, 916 (Utah 1987).

Insofar as it rests on Brady v. Maryland, defendant's claim also fails because there has been no showing that the testimony of the missing witness would have been exculpatory. At best, Carma Holler could have testified that the check she gave defendant already had a signature on it when she received it, thus corroborating the story defendant told the detective (R. 247). Such testimony, however, falls short of exonerating defendant, where both defendant and the missing witness knew the signature was not theirs, and both could have known the check was stolen. Furthermore, to the extent that Holler's testimony may have had any exculpatory value, defendant already knew its substantive content. The stumbling block facing defendant was not the content of Holler's testimony, but the practical matter of locating her. In this respect, the rule of law articulated in Brady has no relevance to this case.

Second, defendant's assertion that the State knew where Carma Holler was and intentionally withheld that information is

purely speculative.² In essence, defendant has extrapolated from the court's statement that the missing witness was on probation to reach the unsupported conclusions that Holler was, in fact, on probation and that the prosecutor knew and intentionally failed to disclose that information to defendant.

And, finally, defendant did nothing to mitigate any possible harm stemming from the absence of the witness. Specifically, just prior to trial, the court addressed the state's motion in limine, in which the State asked the court to disallow any questioning that would elicit what the missing witness, Carma Holler, might have said about the origins of the check (R. 45-47, 116).³ Shortly thereafter, the following colloquy ensued:

The Court: Well, first of all, I guess you claim that Carma Holler is unavailable?

Def. Counsel: I cannot locate her, Your Honor.

The Court: What have you done?

Def. Counsel: I have looked through all the phone books in the area. I have called

² Defendant argues that the State's motion in limine to exclude Holler's hearsay statements was untimely (Br. of App. at 3). However, the State only learned that defendant might call Carma Holler as a witness on Friday, May 9, 1997, when it received a faxed witness list from defendant (R. 44). Notably, the list was produced only after the State filed a motion and accompanying order for defendant to produce the list (R. 35). On the following Monday, May 12, 1997, knowing that Holler's whereabouts was unknown, the State's motion in limine was filed (R. 45-47). The trial was held the following day.

³ The State so moved because it would have no way of cross-examining and thus testing Carma Holler's credibility (R. 116).

everyone that has a name close to that. I understand she is married and moved to Price. I called everyone in Price that may have any association to her.

The Court: She's on probation, I know, to our court. Maybe it's supervised. I don't know.

Def. Counsel: I didn't contact her p.o. I didn't know she was on probation, Your Honor. I knew she had been arrested at some time because I do have a picture from the jail saying she had been arrested.

(R. 117). From this interchange, at least two things become clear. First, while defense counsel knew prior to trial that Carma Holler had an arrest record, she did not follow up on that lead with the police or other appropriate authorities to locate Carma Holler. Cf. State v. Workman, 635 P.2d 49, 53 (Utah 1981) (failure to exercise reasonable diligence in conducting discovery tends to negate a claim that nondisclosure was erroneous). And, second, when the court revealed its belief that Carma Holler was on probation, defense counsel did not move for a continuance or make any other effort to delay the proceedings in order to pursue the court's lead. Cf. State v. Knight, 734 P.2d 913, 919 (Utah 1987) (where trial court denied defendant's motions for a continuance and mistrial, prejudice to defense stemming from state's failure to disclose not mitigated). Thus, even assuming arguendo that the prosecutor violated the discovery rule, by failing to so move, defendant denied the trial court the opportunity to exercise its "ample power to obviate any prejudice

resulting from a breach of the criminal discovery rules.”

Knight, 734 P.2d at 918 (citing Utah Code Ann. § 77-35-16(g) (1982 ed.) (now Utah R. Crim. P. 16(g))).

Under these factual circumstances, where the claim is unpreserved, where defendant has failed to provide an adequate record to support his claim, where defendant's claim of intentionally-withheld knowledge is purely speculative, and where the record indicates defendant made no attempt to mitigate potential harm caused by the absence of the witness, the claim of prosecutorial misconduct must fail and defendant's convictions for forgery and theft should be affirmed.

POINT TWO

WHERE DEFENDANT HAS FAILED TO
INCLUDE ANY DOCUMENTS RELATED TO
HIS SPOUSE ABUSE CASE IN THE RECORD
ON APPEAL, THIS COURT HAS NO BASIS
ON WHICH TO REVIEW A CLAIM ARISING
FROM THAT CASE

Defendant asserts that the trial court abused its discretion in evaluating the testimony of the victim in the spouse abuse case, from which he now appeals (Br. of App. at 7-8). The record on appeal, however, contains no documents related to the spouse abuse proceeding. Because defendant has failed to include the record of evidence dealing with the issue he wishes this Court to review, his claim must fail.

Rule 11(e)(2), Utah Rules of Appellate Procedure, requires the appellant to include in the record a transcript of all

evidence relevant to any finding or conclusion appellant claims is unsupported by or contrary to the evidence. "In essence, Rule 11 directs counsel to provide this court with *all evidence* relevant to the issues raised on appeal." Sampson v. Richins, 770 P.2d 998, 1002 (Utah App.), cert. denied, 776 P.2d 916 (Utah 1989). Where an appellant fails to provide an adequate record on appeal, the reviewing court presumes the regularity of the proceedings below. Call v. City of West Jordan, 788 P.2d 1049, 1053 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990).

The burden to ensure that the record contains the materials necessary to support an appeal rests with the appellant. State v. Lindon, 761 P.2d 1386, 1388 (Utah 1988); State v. Thieson, 709 P.2d 307, 309 (Utah 1985). This Court will not "speculate on the existence of facts that do not appear in the record." Thieson, 709 P.2d at 309. "Absent that record[,] defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine. This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record." State v. Wetzel, 868 P.2d 64, 67 (Utah 1993) (emphasis omitted) (citations omitted).

Because a transcript of the spouse abuse proceeding is not part of the record on appeal, this Court cannot evaluate any claim related to it. Consequently, this Court should presume the regularity of the proceedings below and affirm defendant's

conviction for spouse abuse.

CONCLUSION

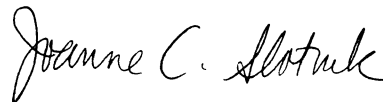
For the reasons stated, this Court should affirm defendant's convictions for forgery, theft, and spouse abuse.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this case may be disposed of on well-established legal grounds and raises no substantial questions of law, the State requests neither oral argument nor a published opinion.

RESPECTFULLY submitted this 30th day of March, 1998.

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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 Cindy Barton-Coombs, 193 North State Street, Roosevelt, Utah 84066, this 20th day of March, 1998.

