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State of Utah v. Carl Archie andrew, Amd Kenneth Ervin : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff- Respondent,

vs.

KENNETH WILLIAM ERVIN
and CARL ARCHIE ANDREW,

Defendants-Appellants.

Case No.
11158

BRIEF OF RESPONDENT

Appeal from the judgment of the Fifth Judicial District Court
in and for Juab County
Honorable C. Nelson Day, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff- Respondent,

vs.

KENNETH WILLIAM ERVIN
and CARL ARCHIE ANDREW,

Defendants-Appellants.

Case No.
11158

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

Appellant Ervin appeals from a conviction of assault with a deadly weapon with the intent to commit robbery and appellant Andrew appeals from a conviction as an accessory to an assault with a deadly weapon with the intent to commit robbery.

DISPOSITION IN THE LOWER COURT

On September 26, 1967, appellants were found guilty of the above-mentioned charges by a jury verdict in the Fifth District Court in and for Juab County, Nephi, Utah. The Honorable C. Nelson Day, Judge of the Fifth Judicial District, presided.

On October 10, 1967, appellants argued a Motion for a New Trial which was denied. Sentence was imposed upon the defendants by Judge Day. Commitment was stayed pending the decision of this appeal.

RELIEF SOUGHT ON APPEAL

The respondent requests that this court uphold the jury verdict of the lower court, sustaining the conviction of defendants.

STATEMENT OF FACTS

Defendant Kenneth William Ervin was traveling from Los Angeles, California to Rawlins, Wyoming, when his car broke down near Levan, Utah on June 25, 1967. Reaching Levan, Utah, he called his mother in Rawlins, Wyoming, to assist him, since the car trouble was serious. On June 26, 1967, around noon, Mr. Ervin's mother, his brother Dino and the codefendant Carl Archie Andrew arrived in Levan. Mr. Ervin and Mr. Andrew chained Mr. Ervin's car to his mother's and around 2:00 p.m. started for Rawlins, Wyoming.

The towing car had trouble with overheating and stops were made along the way, one near the victim's home. While the defendants were stopped, they proceeded to the home of the victim, Mrs. Gaydra Jackman, located off the main highway. They entered her home and in the next 45 minutes, Mr. Ervin threatened her with a gun, severely beat her around the head, made improper advances and took \$7.00 in cash, Mrs. Jackman's wristwatch and her husband's pistol. Mr. Andrew stood outside the home for most of the time where he was seen and identified by Mr. Dan Hatch Warner. Defendants rejoined their group and proceeded to Rawlins, Wyoming.

On June 29, 1967, the defendants were arrested in Rawlins, Wyoming, and returned to Utah waiving extradition. At this time, defendants were informed of their rights by the Juab County Sheriff. (Tr. 23) Also, a Rawlins, Wyoming attorney notified Mr. Udell Jensen of Nephi, Utah, concerning the case. (Tr. pg. 16 line 9-30)

On July 5, 1967, a line-up was held at the Utah State Prison, after which the victim, Mrs. Gaydra Jackman, identified Mr. Andrew positively but was hesitant in her identification of Mr. Ervin. The line-up was properly conducted and Mrs. Jackman was not subject to any suggestive questions or statements during the course of the line-up.

On August 15, 1967, the defendants were arraigned on the information. Upon seeing Ervin wearing dark

glasses, which he wore during the period of time he was with the victim, Mrs. Jackman made a positive identification. This positive identification was made to the District Attorney. The trial was later held and defendants were found guilty by a jury verdict.

ARGUMENT

POINT I

THERE WAS NO PREJUDICIAL ERROR COMMITTED BY THE TRIAL COURT IN EXCLUDING EVIDENCE OF DEFENDANTS' REPUTATION AND CHARACTER. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE COURT'S RULING PRECLUDES THE RAISING OF THIS ISSUE ON APPEAL.

Appellant claims that the trial court's ruling that the defendants' witness' could only testify as to defendants' reputation in the community for truth and veracity instead of their general good character in the community was prejudicial error. While the state admits that there is authority supporting appellants' contention that the ruling was erroneous, the state contends that any such error was not prejudicial to defendants requiring this court to overturn the conviction or remand for a new trial. Under Utah Code Ann. § 77-42-1 (1953),¹

¹ The statute reads that:

After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

the court is to recognize and give effect to errors only if they are prejudicial to defendants. In this case, the trial court's ruling was not prejudicial to defendants.

In applying this statute, the court must be convinced that if error occurred, such error affected the substantial rights of the party before the error will be deemed prejudicial and affect the determination of the case on appeal. In *State v. Neal*, 1 Utah 2d 122, 262 P.2d 756, 759 (1953), this court said, "We will not reverse criminal causes for mere error or irregularity. It is only when there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted." This court also stated in *State v. Estes*, 52 Utah 572, 176 Pac. 271 (1918), "... this court may not reverse a judgment unless some substantial right of the defendant has been invaded or ignored." In applying this statute, a test was enunciated by this court in *State v. Woods*, 62 Utah 397, 220 Pac. 215 (1923). It reads:

Did the erroneously admitted evidence strengthen the prosecution? If not admitted, might the result have been different? Unless they probably affected the result and are clearly harmful to defendant, all technical errors must be disregarded. Error, when it occurs in a criminal case, is not presumed to be prejudicial in this state.

Rephrasing the questions to fit the present case, we must answer whether further evidence of defendants' general reputation in the community would have

changed the result? The state contends that it would not have made any difference in this case. The defense witness' were restricted to testifying to defendants' reputation as to truth and vericity. In responding to such a question, one witness responded:

Well, they have been really nice and respectful in our family when they come over and everything; and *everybody who knows them says they are real nice.* (Emphasis added.) (Tr. 215)

The effect of this testimony is that defendants' have a good reputation in the community. It is testimony not to their truth and veracity but general reputation and despite the trial court's ruling, the type of testimony appellants claim was erroneously excluded was, in effect, admitted.

Turning to the question of whether the alleged error probably affected the result, the state contends it is doubtful. Since the defense witness' testified defendants had a good reputation for truthfulness (Tr. 217) and a good reputation in the community (Tr. 215), the effect was to bolster the testimony given by defendants. Since the verdict shows that the jury did not believe defendants' alibi defense, it is highly unlikely that a little more testimony as to their general reputation in the community would have resulted in a different verdict.

Appellants are further precluded from raising on appeal that the trial court ruling was error. Since the ruling was not objected to at the trial level, nor an

exception taken, the alleged error was not preserved for appeal. (Tr. 214) Since no error was claimed at the trial court level, the issue of error cannot now be raised for the first time before this court.

Even though this court will notice errors not objected to and committed at the trial court level, this prerogative is exercised only “ . . . rarely and with caution in an awareness of the importance of timely and proper objections.” *State v. Smith*, 16 Utah 2d 374, 401 P.2d 445 (1965). This court has further stated the type of error they will take notice of and when in *State v. Nelson*, 12 Utah 2d 177, 364 P.2d 409 (1961):

. . . even the absence of an objection this court might nevertheless take note of and correct an egregious error. But this could properly be done only in an unusual case where there was some substantial error unobjected to by inadvertence or neglect of counsel and where it was of such critical import that it appears likely an unjust conviction resulted therefrom.

In *State v. Nelson*, supra, the court continued:

It would be manifestly unfair to the interests of the state and disruptive of the orderly processes of law enforcement to permit an accused to thus go forward and participate in a trial, attempting to obtain a favorable verdict, and then after it goes adverse to him, come forward with a claim of some antecedent error of irregularity which was known to him prior to the trial, contending that such error was fatal and that the verdict rendered was invalid anyway. This court stated in the case of *State v. Gustaldi*, 41 Utah

63, 123 P. 897, 900: Orderly procedure, as well as the rules of practice, requires that unless objections are timely interposed, all irregularities if any occur at the preliminary examination and preceding the filing of the information . . . must be deemed to be waived.

As this Court has ruled, the type of error they will notice on appeal absent objection is "palpable and significant" or "egregious." *State v. Smith*, supra, *State v. Nelson*, supra. As respondent has shown, if the trial court's ruling was error, it did not prejudice the defendants in any way nor would further testimony have influenced the jury to find a different verdict. This error was not significant, palpable or egregious so that this court need not exercise its prerogative and notice the error on appeal.

POINT II

THE DEPOSITION TAKEN BY THE DISTRICT ATTORNEY HAS NOT BEEN MADE PART OF THE RECORD FOR APPEAL AND THEREFORE ANY IRREGULARITIES THEREIN ARE NOT PROPER MATTER TO BE CONSIDERED ON APPEAL. ANY OBJECTIONS TO THE DEPOSITIONS WERE WAIVED BY APPELLANT WHEN DEFENSE COUNSEL USED THE DEPOSITION AT TRIAL.

Appellants' claim that the taking of certain witness' depositions prejudicially influenced the courtroom

identification of the defendants and further that the taking of the deposition was irregular and contrary to statute. This deposition is not a part of the record for this appeal. Appellant, in his Designation of Record, designates "the following to be the record on appeal . . .

1. All of the pleadings and records in the case.

2. A transcript of the proceedings and Motion for New Trial."

The general rule guiding an appellate court in deciding the issues on appeal is that "the rights of the parties to an appellate proceeding must be determined on the record before the appellate court. The appellate court is not required to and may not pass on questions not presented by the record, although decided by the trial court." 4 Am. Jur. 2d *Appeal and Error*, § 491. Here the deposition is not part of the record and as stated by the rule, this court may not pass on questions regarding the use of the deposition, irregularities in the taking, or any other issues in regard to the deposition raised by appellant. The State has not seen the deposition, has not read it and cannot refute the arguments made by the appellant since it is not a part of the record.

Even if appellant has an objection to the deposition, under rulings of this court, any such objections were waived when defense counsel, and only defense counsel, used the deposition of the State's witness in an attempt to impeach them. In *State v. Tuttle*, 16 Utah 2d 288, 399 P.2d 580, 582 (1965), where defense counsel did

not object to the seizure of evidence and continually referred to the evidence to aid the defendant, then later objected to the search and seizure producing the evidence, the court said:

No objection was made to the evidence . . . Defendant's counsel in his questions continually referred to these exhibits. Fairness requires that if he disputed the competency of the evidence he should make his objection at the earliest reasonable opportunity . . . Inasmuch as he chose to conduct his examination upon the basis of this evidence, before he stated his objection to it, he should be deemed to have waived any such objection.

Here, defense counsel used the deposition to impeach the State's witness', both Mrs. Gaydra Jackman (Tr. 73-74) and Dan Hatch Warner (Tr. 133). Since he used the depositions to aid defendants, he cannot now complain that the depositions were prejudicial to his case.

POINT III

APPELLANT IS PRECLUDED FROM
RAISING THE ISSUE THAT DEFENDANT
ANDREW WAS TRIED UNDER THE
WRONG CHARGE SINCE THERE WAS NO
OBJECTION OR EXCEPTION.

As the discussion indicates in Respondent's Point I, failure of counsel to object to the charge at Andrew's

arraignment, preliminary hearing, trial and motion for a new trial precludes the raising of this issue on appeal.

Certainly Andrew could be found an accessory within the statutory definition, see Utah Code Ann. § 76-1-45 (1953). He knew a felony had been committed and knowingly concealed this fact from a magistrate while riding with Ervin to Wyoming, doing nothing to bring to anyone's attention that a felony had been committed, either en route to Wyoming or upon arrival. These actions indicate a purpose to protect Ervin, thereby committing the crime of being an accessory.

If appellant contends that the information charging Andrew with the crime of being an accessory is in error, his failure to object to it or move for it to be dismissed at any of the pre-trial or trial proceedings precludes him from raising the issue on appeal. In *State v. Durfee*, 77 Utah 1, 290 Pac. 962 (1930), the court said:

If the sufficiency of the information is not challenged until after verdict, all defects appearing on the face of the information other than the objections that the court is without jurisdiction, and that the facts stated do not constitute a public offense, are waived.

See also *United States v. West*, 7 Utah 437, 27 Pac. 84 (1891). Here, the court had personal jurisdiction over the defendant, Andrew. The facts alleged in the information constitute the crime for which he was charged, and the court had jurisdiction over the crime. Therefore, defense counsel's failure to object to

the information charging defendant Andrew with being an accessory, at any time before or after the trial, precludes appellant from raising this issue as error on appeal.

POINT IV

THE COURTROOM IDENTIFICATIONS OF THE DEFENDANTS WERE NOT TAINTED BY EVENTS PRIOR TO TRIAL SO AS TO MAKE THEM INADMISSIBLE.

Appellant argues that the courtroom identification of defendant Andrew by Dan Hatch Warner and both defendants by Gaydra Jackman were tainted by the District Attorney taking their depositions over a month before trial. As has been argued, appellant is precluded from arguing that the taking of the depositions were prejudicial due to his failure to object that the depositions were prejudicial at or prior to defendants' trial. However, the fact that Dan Hatch Warner's deposition was taken did not make his testimony inherently unreliable. As appellant admits, on page 21 of the Amicus Brief, "there is certainly nothing wrong with an attorney discussing the case with a witness and going over the witness' testimony in preparation for trial" Although he states there are limits beyond which an attorney should not go, the state contends that the testimony given by Dan Hatch Warner has more validity through the deposition process than a private discussion with the District Attorney. In taking the oath to tell

the truth, Warner is under stronger moral compulsion to state the truth than in a private discussion with the District Attorney where he is not under oath. Such a private interview would solidify a witness' testimony without the moral compulsion to tell the truth, under oath, that was present here.

As to Gaydra Jackman, her identification was based on observation of the defendant over a 45 minute span of time, giving her ample time to be able to observe the defendants so that she could identify them. While she may have hesitated in identifying Ervin after the line-up, it was because she remembered him while he was wearing dark glasses during the 45 minutes he was in her home. When she saw him wearing those glasses at the arraignment and at the trial, as she had first observed him, she was positive in her identification.

It must be remembered that in this case, Mrs. Jackman observed Ervin for approximately 45 minutes and Andrew for approximately 5 to 10 minutes. Her identifications were not based on any fleeting glance of defendants, as was the case in *People v. Caruso*, 65 Cal. Rep. 336, 436 P.2d 336 (Sup. Ct. Cal. 1968). While eye-witness identification may not be extremely reliable, it become more reliable the longer a person has to observe another person. Here, Mrs. Jackman observed defendant Ervin for approximately 45 minutes, a period of time sufficient for a person to know what a person looks like, and to remember his appearance for a long time afterwards.

As is the case with the state's witness Dan Hatch Warner, the deposition procedure did not "taint" Mrs. Jackman's courtroom identification any more than a private discussion with the District Attorney would, and it had the greater moral compulsion for truth since it was given under oath.

POINT V

THE LINE-UP DID NOT PREJUDICE DEFENDANT'S RIGHTS WITHOUT DUE PROCESS OF LAW SINCE IT WAS PROPERLY CONDUCTED AND DEFENSE COUNSEL WAIVED HIS RIGHT TO BE PRESENT.

As the trial judge stated:

I do not find . . . that there was any unfairness or impropriety in the present line-up. You did reproduce it . . . here in the courtroom . . . There were many similarities in their appearance and certainly in their dress. It is true that there were distinguishing features in all of us. I didn't find that there was any unfairness in the thing . . . I don't find that there was any impropriety in the conduct of the line-up. (Tr. 44, Motion for New Trial)

This statement was based on actual observation of those who were present in the line-up as it was reconstructed in the courtroom. Every attempt was made to insure a proper line-up set up by men experienced in these matters. It was not so grossly suggestive so as to deny defendants a fair trial or their constitutional

rights, based on actual observation of the participants in the line-up. (Tr. 44, Motion for New Trial)

Appellants argue that they were denied their right to counsel at the line-up. However, the record shows that the sheriff asked appellants' only known counsel, Mr. Udell Jensen, if he wished to be present at the line-up. (Tr. 22-26, Motion for New Trial) This offer was rejected by defense counsel. (Tr. 25, Motion for New Trial) Under the facts, the sheriff did all he could do to protect the defendants' constitutional rights. Mr. Udell Jensen waived his right to be present at the line-up. It is reasonable to assume that he was representing defendants since he had been contacted by a Rawlins, Wyoming attorney to take the case and his testimony at the Motion for a New Trial supports this interpretation. (Tr. 12, 16, 23-24, 31, Motion for New Trial)

The facts show that the line-up was not overly nor unduly suggestive as to deny defendants their constitutional rights. To the contrary, all possible efforts were made to insure its fairness. Mrs. Gaydra Jackman was not influenced by suggestive comments or questions and made her identifications based on her personal observation and recollection. Since the argument for the presence of defense counsel at a line-up is to insure that identifications are not influenced by suggestive comments or questions, appellants cannot complain that the absence of counsel affected their rights in this case since appellant does not show that any suggestive com-

ments or questions were asked during the line-up. (Tr. 79, 82-83) Therefore, their rights were fully protected and it is probable there would not have been any difference in the conduct of the line-up had defense counsel been present. If there was any error with the conduct of the line-up, it was harmless in nature and did not result in any prejudice to the defendants. Under Utah law, Utah Code Ann. § 77-42-1 (1953), non-prejudicial error cannot overturn a conviction.

CONCLUSION

This appeal constitutes another attempt by guilty individuals to subvert the ends of justice. The appellants are before this court with a record demonstrating evidence clearly contrary to their contentions, and would urge error not preserved by objection or exception. The judgment of the lower court should be affirmed. To do otherwise would be to ignore a body of evidence of the strongest nature and erode our long-established judicial processes.

Respectfully submitted,

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