2000

State of Utah v. Billy Wayne Black : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

BILLY WAYNE BLACK,

Defendant-Appellant.

Supreme Court No. 14211

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BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK PRESIDING.

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BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is an appeal from the conviction of murder in the second degree and a sentence and commitment of from five years to life imprisonment at hard labor at the Utah State Prison. The case was tried before a jury with the Honorable J. Robert Bullock presiding.

DISPOSITION IN LOWER COURT

The appellant was charged by information with the crime of murder in the second degree (R.21). Appellant entered a plea of not guilty (R.23) and the matter proceeded to trial by jury. Part way through the prosecution's case, appellant twice moved for a mistrial after observing conversation and displays of familiarity between jurors and certain of the prosecuting officials (T.74,107-109,145). When the court

denied the second of defendant's motions for a mistrial based on jury prejudice, defendant moved to dismiss the jury and asked to exercise his right to waive trial by jury and have all issues of fact determined by the trial judge (T.145-154). The trial judge took defendant's motion to waive trial by jury and the motion to dismiss for lack of evidence under advisement and ordered the trial to proceed (T.139,145-154). The jury returned a verdict of guilty of second degree murder (R.73). The appellant timely moved for a judgment of acquittal and/or for a new trial (R.93,95). After a hearing, the court denied the motions and sentenced appellant to serve a term of five years to life imprisonment at hard labor at the Utah State Prison.(R.96). Appellant was forthwith committed to the prison to begin serving his sentence. Defendant/appellant now appeals from the verdict and judgment entered.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the conviction and judgment of the lower court and a dismissal of the action, or in the alternative, reversal and remand for a new trial.

STATEMENT OF FACTS

On August 19, 1972, at 2:30 a.m., two Orem City police officers observed an orange and black Chevrolet proceeding

southbound on State Street towards Provo City "at a high rate of speed." They gave chase in separate vehicles and overtook the speeding auto after it stopped at the Emergency Room of the Utah Valley Hospital. The officers approached the driver, appellant Black, and were advised that he had an "emergency" (T.60,79). A nude, bleeding female body was removed from the front seat of the Chevrolet by the police and hospital attendants (T.80). The body was warm and believed to be alive upon arrival at the hospital (T.61), however, the girl was pronounced dead upon inspection by a hospital doctor (T.80). Dr. Terry H. Rich, testifying at trial, stated the death "was secondary to a gunshot wound to the head" (T.49).

The officers asked Mr. Black for identification and he provided them with a drivers license listing his name as Billy Robinson (Ex.1). He also delivered to them the deceased's drivers license (Ex.2) and the keys to the automobile (T.66,81). When asked what happened he told the officers he had come home and found his wife in that condition (T.93). While the police were pursuing their investigation, Mr. Black walked out of the hospital and disappeared (T.95).

Decedent's employer testified that the deceased

had left the bar where she was working in the company of Mr. Black at approximately 1:00 a.m., on the morning of her death (R.28). At 1:15 a.m., a tenant in room 96 of the "Alpine Villa Motel" in Pleasant Grove stated that he was awakened by loud television and shouting coming from room 97, an adjoining room occupied by deceased (T.121). He testified that a man in a loud voice was berating a woman for "dancing" with another man. He stated there was considerable vulgarity, name calling, and sounds of "slapping." He stated a woman's voice kept pleading, "Please, Billy, don't hit me any more. Please stop." (T.122).

The man was overheard to state, "I ought to kill you both" and, "I'm going to leave you to him," (T.122) and she was heard to reply, "Please don't go. I don't want you to go." (T.126). The man's voice demanded to know where the rest of the money was and he ordered her to pack his suitcase.

After hearing the door to the apartment open and shut twice and patches of conversation, including, "take it off," "sit down," and, "turn around," the witness stated that all was "pretty quiet" and music was playing and that he "relaxed," thinking, "It was all over with." Later, he was awakened a second time by a "gunshot" followed by the

exclamation, "God, honey, I didn't mean to do it!" He stated he then heard, "a shuffling of footsteps and the door open, slam. Then I heard a car door open and slam, and the lights came on and the motor started. . . . I could see the car going down the road. . . . so I looked at my clock, and it was 2:30." (T.127).

He stated that, "less than a minute" elapsed between the gunshot report and the departure of the automobile and that it occurred, "just about as fast as it could happen." (T.128).

After observing these events, the witness returned to his bed and "listened for any movement" but did nothing to check out the nature of the circumstances related. He did not call the police or notify anyone and said nothing to anyone until contacted by the police several hours later (T.130).

Mr. Black, testifying in his own behalf, described the events of the evening in question. He stated that he and the decedent had been drinking and that he had consumed fifteen bottles of beer at a cocktail lounge where she was working (T.158). He stated they argued on the way home over her activities at the cocktail lounge and that when they arrived at the apartment she took a shower. He stated

that before she dressed they got into a second argument and he announced he was leaving. He stated that she told him not to go and slapped him and in retaliation he jerked her bra off (T.159). He acknowledged that additional slapping took place and that each was involved (T.160). He stated he began packing his belongings and took some of his things to the automobile. He stated that when he picked up his twenty-two caliber pistol from the bed it accidentally discharged (T.161) and when he observed that she had been hit, he grabbed her, placed her in the car and took her to the hospital, driving at speeds "in excess of 100 miles an hour." (T.162).

ARGUMENT

POINT I.

APPELLANT WAS DENIED A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO EXAMINE THE JURORS TO DISCLOSE PREJUDICIAL FAMILIARITY WITH PROSECUTING WITNESSES AND DENIED APPELLANT'S MOTION FOR MISTRIAL WHEN SUCH WAS DISCLOSED.

Soon after the jury was impaneled and witnesses had begun testifying,the conduct of certain jurors began to raise questions as to their suitability as impartial fact finders. The court was alerted that a juror named Holman appeared to be more intent on observing Chief Michael Ferre than he was

on listening to the testimony of witnesses (T.74). It was later learned that Holman had been acquainted with Chief Ferre for "30 to 35 years" and had lived for a time as "across-the-street neighbors" (T.224).

Appellant's motion for mistrial on the grounds that the undisclosed familiarity and friendship between the two prejudiced appellant's rights to a fair and impartial jury trial, was denied (T.110).

Shortly thereafter, a second juror named Laursen was observed in a private conversation with Brent Bullock, administrative assistant to the County Attorney and a chief prosecution witness. It was later disclosed that Mr. Laursen and Mr. Bullock's father had worked together fifteen years and were close friends and that Mr. Laursen was inquiring of Mr. Bullock's father's health following an accident wherein the senior Mr. Bullock had fallen off a roof (T.222). A second motion for mistrial based upon the apparent prejudice of the jurors was made and denied (T.145).

Counsel argued that the jurors were or should have been examined to determine the extent of their familiarity with the complaining witness, Chief Michael Ferre, and other police officers testifying on behalf of the State. Clearly, such information is necessary to determine challenges for

cause or for a rational exercise of preemptory challenges.

The court concluded, "I think you waived it" and furthermore, that there is nothing to show that "an acquaintanceship or whatever with Mr. Ferre would be prejudicial to this case" (T.107,108).

Under Utah law, responsibility for properly examining prospective jurors rests exclusively with the trial court. 77-28-1, Utah Code Annotated (1953), As Amended, provides:

> "TRIAL JURY--Trial juries for criminal cases are formed in the same manner as trial juries in civil cases, <u>except that the examination of the jurors shall be conducted by the judge</u>, the judge may permit counsel for either side to examine the jurors, <u>but such examination by counsel</u> shall be limited by the court." (Emphasis added).

When defense counsel attempted to inquire as to the extent of the relationship between prospective jurors and law enforcement officers, the court cut counsel off stating, "I'll ask that question" and then went on to say, "Have any of you or your immediate families been engaged in law enforcement work?" (T.6).

The judge carefully avoided any inquiry as to the "acquaintences" the jurors might have had among law enforcement officers. The trial judge rebuked defense counsel saying, "No, I don't think you said anything about acquaintences. I

don't think we can go that far, anyway, as far as acquaintences are concerned, I don't think we should go that far." (T.74). He further clarified his position later by stating, "Well, I think you could have asked me to ask that question. I'm not sure how far I'd havegone even if you had asked it, though." (T.108).

In any event, defense counsel was deterred from exploring the matter more closely by the judge's hostility to the questions and his insistence on asking the questions himself. To get to the issue by a more circuitous route, defense counsel asked if any of the jurors "have a predisposition to give more credence to a law enforcement officer's testimony...simply because...they are...law enforcement officers."

Again, the court rephrased and redirected the question to the jurors and the following colloquy occurred:

MR. ELLINGTON: Your Honor, I don't know that I would do that, but I think that I should mention that I am acquainted with Mr. Ferre and Mr. Blackhurst on the force. I see them here this morning.

THE COURT: And they may be called as witnesses, isn't that right Mr. Wootton?

MR. WOOTTON: Yes, sir. Well, no. I don't have

either Mr. Blackhurst or Mr. Ferre lined up. Mr. Ferre on just one brief portion, your Honor. They were involved in the investigation, however (T.7).

The prosecutor's reply was both inaccurate and misleading. It implied that Chief Ferre would not be called to testify. Furthermore, it failed to disclose that Chief Ferre was the complaining witness, (R.1) the Pleasant Grove police chief responsible for conducting the investigation into the death of the deceased (T.69), and the officer to be allowed to sit at counsel's table throughout the trial when other prospective witnesses were excluded (T.24,25).

It is basic hornbook law that every person charged with crime has an absolute and fundamental right to a fair and impartial trial and the duty rests on the courts and the prosecuting attorney to see that this right is upheld and sustained.

Under Utah law, it is submitted that the trial court has total responsibility for, and control over, the examination of jurors and as such had a responsibility to require the State to fully disclose the identities of all witnesses which the State would rely upon to prosecute the charge. The court then had an obligation to examine the prospective jurors to determine the extent of their relationships and

acquaintance with each of the State's witnesses, particularly the complaining witness.

When the State failed to disclose the complaining witness and/or misrepresented his involvement, as was done in this case, the court should grant a mistrial and select a new panel of jurors. It should be noted that this trial was less than two hours old when the irregularities were first called to the attention of the trial judge.

In U.S. v. Cavell, 287 F.2d 792 (1961), in reversing a state murder conviction, the court declared of a tainted juror:

> "We rest our decision on the firm ground that Stephenson in declaring himself to be impartial and without prejudice, while not revealing that he was the son-in-law of the County Detective who was one of the investigative officers in the very matter to be tried, who was to be a material witness at the trial, and whose testimony Stephenson would believe created an intolerable situation that resulted in fundamentally unfair trial to appellant."

It is submitted that the undisclosed familiarity between jurors Holman and Laursen and officers Bullock and Ferre also created an intolerable situation resulting in a fundamentally unfair trial for appellant.

POINT II.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO DISMISS THE IMPANELED JURY AND HAVE HIS CASE TRIED BY THE TRIAL JUDGE SITTING WITHOUT JURY.

After appellant's motion for mistrial based upon the lack of impartiality of the jurors was denied a second time, he then moved in open court to dismiss the jury and have all issues of fact heard by the trial judge (T.145). He stated that from the actions observed, "I don't think that this particular jury would be fair to me." (T.147).

The trial judge took the motion under advisement and did not formally rule upon it until the time set for sentencing when he entered a written denial of the motion, stating as the basis for its opinion:

> "...that the defendant does not have a federal constitutional right to be tried by the court - as he does to be tried by a jury. That whether or not a jury may be waived and a defendant tried by the court is within the sound discretion of the court and that there was no abuse of discretion in this case, particularly in view of the fact that the first attempt at a jury waiver and trial by the court came after the State had presented its evidence."

(R.97).

Appellant's right to waive trial by jury is estab-

lished by Utah statutory law not federal constitutional law. 77-27-2, Utah Code Annotated (1953) As Amended, outlines appellant's right to waive trial by jury, stating:

> "Issues of fact must be tried by a jury, but in all cases except where a sentence of death may be imposed trial by jury may be waived by the defendant. Such waiver shall be made in open court and entered in the minutes." (Emphasis added).

The right of waiver provided by the Utah Legislature is unqualified and leaves nothing to the "discretion" of the trial judge. The issue as to whether or not the trial judge has discretion to deny appellant's right to waive trial by jury appears to be of first impression with this court.

In other jurisdictions, however, the law appears to be clear. Where the State has acted to grant the defendant an unconditional right to waive trial by jury as the Utah Legislature has done, the prevailing authority is that neither the court nor the prosecutor can deny this waiver. The logic is well summarized in 25 Mich.L.Rep. (p.736) where it is stated:

> "If trial by jury, as we have been contending, is a protection for the benefit of the individual, then it is hardly consistent to require also the consent of the court, or the prosecuting attorney, or both, as a condition precedent to a trial without jury. The act of the Legislature is itself consent by the State; and there is a curious

> contrariety in calling jury trial a privilege and then making its surrender subject to the control of the court."

Where the State has acted to grant a right to waive trial by jury as has the state of Utah, state courts have uniformaly respected that right. In Grady v. State, (1931) Tex. Crim. Rep., 35 S.W.2d, 158, a defendant sought to waive the jury but the District Attorney demanded trial by jury and such was had with a verdict of guilty. In reversing on appeal, the court stated:

> "The matter is not an open question. The Constitution recognizes the right of one accused of a misdemeanor to waive a jury, and the statute. . . emphasizes this right. It has frequently been expressed and held that the right was one the exercise of which it was not within the power of the court to deny."

In State v. Smith, (1931) 121 Ohio St., 237, 147 N.E. 758, the court held that upon arraignment and plea of an accused the statutory provisions giving him the right to waive a jury and to elect to be tried by the court are mandatory, and that the court has no power to reject the accused's waiver and order the case to be tried by a jury unless it comes to the notice of the court the accused is not sane. The court observed:

> "Were there no statutory provision conferring the right upon the defendant to waive a jury and be tried by the court, a

> different situation would be presented. But where the state law confers the right as it has here, it cannot be successfully claimed that the prosecution or the court may ignore the law."

See also People v. Martin, (1931) 256 Mich. 33, 239 N.W. 341 and People v. Steele, (1882) 94 Mich. 437, 54 N.W. 171, where the court held that the accused has a choice of two modes of trial and that such is a "substantial right of which the court could not deprive him."

It is not possible or practical for this writer to list the multitude of constitutional and statutory provisions in other jurisdictions affecting the right of an accused to waive a trial by jury. It is enough to note that many jurisdictions have not granted an unqualified right of waiver as has the state of Utah. Federal law requires the consent of the government's counsel and the sanction of the court. Patton v. United States, 281 US 276, 50 S. Ct. 253, 74 L.Ed. 854 (1930). The state of Arizona, without benefit of legislative directive, has chosen to follow the federal rule. See Arizona v. Durham, 111 Ariz. 19, 523 P.2d 47 (1974). The New Mexico Supreme Court confronted by a constitutional provision establishing the right to trial by jury and in absence of any statute authorizing waiver of said right has ruled that a defendant cannot waive his "right" to trial by jury in a felony

case without leave of the court where the state declines to consent and formally objects thereto. See State Ex. Rel. Gutierrez v. First Judicial Dist. Court Within and For McKinley County, 191 P.2d 334, 52 N.M. 28.

The State should not be heard to argue that somehow this defendant is estopped to assert his right to waive trial by jury by failing to do so until the jury had been impaneled and the State had presented its evidence. There is certainly precedence to rebut such an argument. The Oregon Supreme Court found proper a waiver of jury in a first degree murder trial wherein the jury was waived by the defendant contrary to advice of court and counsel after the State had rested following four days of presenting evidence. The appellant court concluded that the defendant's reasons for waiver were "entirely rational." His reasons of record were, (1) he had noted a juror glaring at him, (2) he did not trust the jury, and (3) he believed the judge would be "broader minded than regular people." Oregon v. Swint, 475 P.2d 434 (1970).

In Baader v. State, (1917) 201 Ala. 76, 76 So. 370, the court succinctly summarized the same issues now before this court and concluded:

> "Any other construction of the act would put it in the power of the state's counsel to deny, or render nugatory, the defendant's right of waiver of a trial

> by jury under the constitution and the statutes having application. That such was the legislative intent is refuted by the history of the waiver by defendants of such constitutional rights as averted to. . . . The substitution of a jury trial by the judge of the court at the instance of the state in the case at bar was an unauthorized exercise of supposed judicial discretion; it finding no support in the constitution or in statutes." (Emphasis added).

Appellant respectfully submits that under Utah law the trial court's denial of appellant's request to waive trial by jury was also "an unauthorized exercise of supposed judicial discretion." Appellant cannot be criticized for his timing in submitting his request to waive this jury. He was alert and observing and called the court's attention immediately to the problems of this jury with motions for mistrial. When these motions were denied, he moved promptly to rid himself of the tainted jury by the only means left available to him. The motion to waive the jury was made at the close of the State's evidence but before commencement of defense's case.

It should be noted that nowhere in this record was appellant ever advised that there were any deadlines after which a waiver of jury was subject to the "discretion" of the trial court.

POINT III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AS THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION OF MURDER IN THE SECOND DEGREE.

To establish the crime of murder in the second degree the State must prove that a killing was "unlawful," "intentional," and with "malice aforethought," and the State has a burden to prove each of these elements beyond a reasonable doubt (Instruction 15).

There were no witnesses to the shooting and the State relied upon circumstantial evidence in its effort to prove the elements of the alleged crime. The State's evidence consisted of testimony by a barmaid that Mr. Black was with the deceased an hour and one-half prior to her death (T.28) and the testimony of a witness described by the prosecutor as "an old alcoholic" who "has a difficult time remembering" (T.73), that he overheard an argument, threats and what could be described as a beating of the deceased in her room sometime prior to her death (T.124-132). The State's evidence established that the cause of death was a gunshot wound, not a beating (T.49).

The State produced no evidence as to what occurred

immediately prior to the shooting. The State's witnesses testified that he had "relaxed" and was "partly asleep when the gun went off," and that the next thing he heard was an exclamation, "God, honey, I didn't mean to do it!",and immediately thereafter, he heard what "sounded like a shuffling of feet, and then the door opened, then shut, then a car door opened and shut, and the lights came on, and the car started." (T.127). He went on to testify that the exclamation and the departure all occurred within a "matter of seconds" and "about as fast as it could happen" after the gun had discharged (T.128).

It is possible that defendant waited until tempers had cooled and then picked up the gun and intentionally shot the deceased in the head. To conclude that such in fact happened requires the rankest form of speculation. One must totally ignore Mr. Black's testimony that the gun discharged accidentally and his actions thereafter which support his claim of an accident and no other conclusion. His exclamation, "My God, honey, I didn't mean to do it!", and his wild dash at speeds in excess of 100 miles per hour from Pleasant Grove through Orem to the Emergency Room of the Utah Valley Hospital in Provo rebut all inference of any intent to kill.

From this evidence, there can be no doubt that the

jury did in fact speculate and ignored jury instruction number nine advising them in part as follows:

> "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt the interpretation which will admit to the defendant's innocence, and reject that which points to his guilt." (R.61).

There can be no doubt that the evidence before the court was susceptible to an interpretation that the shooting was accidental. The prosecutor acknowledged in open court, "I don't think there's any question about the fact that there is evidence by which the jury could reasonably conclude an accident or murder." (T.136).

This jury had been properly instructed that:

> "The killing of a human being was excusable and not unlawful when committed by an accident and misfortune in doing any lawful act by lawful means. . . ." (Instruction 13, R.57).

The jury was further instructed:

> "...that to warrant a conviction on circumstantial evidence, each fact necessary to establish the guilt of the accused must be proved by competent evidence beyond a reasonable doubt and the facts and circumstances proven should not only be consistent with the guilt of the accused but must be inconsistent with any other reasonable hypothesis. . . ." (Instruction 24,R.46).

To allow the jury verdict of guilty to stand constitutes a judicial acceptance and ratification of this jury's refusal to follow the court's instructions. Such renders useless this jury as a fact-finding body, and deprives this appellant of his rights to a fair trial. In light of the evidence presented by the State, this case should never have been allowed to go to the jury. Appellant was entitled to a dismissal of the Second Degree Murder charge as a matter of law.

POINT IV.

IT WAS IMPROPER AND PREJUDICIAL FOR THE PROSECUTING ATTORNEY TO ARGUE MATTERS NOT IN EVIDENCE FOR THE PURPOSE OF PREJUDICING THE JURY AGAINST THE DEFENDANT.

During the trial, the prosecution produced a rag, which a police officer characterized as a "skirt." It was offered into evidence with no other identification than the statement that it was found in a paper bag with a "bra." Appellant had testified he had ripped the bra off the deceased when she slapped him.

In his argument to the jury, the County Attorney made an emotional appeal for deceased, stating:

> "It's difficult for me to present a picture to you of Barbara Owens as a human being. But I want you to understand that she's something besides

> simply a piece of meat that's now been buried. I concede I haven't got much left of her. I've got a torn dress, I've got a torn bra, I've got a picture of her, and I've got her drivers license. And that's all. . . . (T.189). (Emphasis added).
>
> . . . He was mad. He had been drinking. He was jealous. He had beat her for almost an hour, apparently very violently. If you'll examine, much more violently than he says. All you've got to do is look at the marks and look at the torn dress, which he didn't mention, incidentally. According to him, she took it off herself." (T.193). (Emphasis added).

At this point, defense counsel objected but the damage had been done and the trial court took no action to set the record straight (T.193).

This argument by the prosecuting attorney was totally improper. There was no testimony from any witness that the rag was ever deceased's "skirt" or that it had ever been worn by her as any form of clothing, much less a "dress."

Clearly, the prosecutor was arguing that which was not in evidence and his arguments were in no way a good-faith interpretation of the evidence. Appellant had testified:

> "During the time that we went home, we was arguing, and we argued after we got there. She went in and took a shower. She come out of the shower, and she put her bra and stuff back on. And we got into another argument over I told her I was leaving, and she told

me not to. Then she slapped me, and I jerked her bra off." (T.159).

The prosecutor knew or should have known that there was no evidence identifying this rag as a "dress" much less decedent's dress. His argument to the jury identifying it as such coupled with the clear inference that appellant lied by not stating he tore it off her and by saying that she took it off itself was clearly calculated to prejudice defendant by further characterizing him as a liar and a brute.

It is improper for the prosecutor to go outside the record and make argument for the sole purpose of appealing to the passion and prejudice of the jurors. Sykes v. State, 238 P.2d 384, 95 Okl. Cr. 14. It is natural and necessary that the counsel for the State should have the mind of an advocate but the County Attorney, as representative of the people, is bound to refrain from making inflamatory statements and is bound by a somewhat higher duty of fairness than is the ordinary practitioner in a court of law. People v. Vienne, 297 P.2d 1027, 142 C.A.2d 172.

The trial Court erred by admitting the rag into evidence without proper identification or foundation and over the objection of defense counsel as to its relevancy (T.186). The prosecutor's use of this seemingly innocuous

bit of evidence made its admission prejudicial and grounds for reversal. Its admission and use as specified deprived this defendant of a fair trial.

CONCLUSION

The individual and cumulative effect of the foregoing assigned errors is clearly and uncontrovertedly prejudicial and reversible error.

Appellant therefore prays that the conviction and judgment against appellant be reversed and appellant be discharged, or in the alternative, that the case be reversed and remanded for a new trial.

Respectfully submitted,

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