1970

State of Utah v. John Charles Wilks : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

vs.

JOHN CHARLES WILKS,

Defendant-Appellant

BRIEF OF RESPONDENT

Appeal from the Jury Verdict of the
Judicial District, in and for Utah County
the Honorable Maurice Harding, Presiding

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STATE OF UTAH,
Plaintiff-Respondent.

vs.

JOHN CHARLES WILKS,
Defendant-Appellant.

Case No. 12091

BRIEF OF RESPONDENT

NATURE OF THE CASE

John Charles Wilks appeals from a jury conviction of assault with intent to commit murder in the Fourth Judicial District Court, in and for Utah County, the Honorable Maurice Harding, presiding.

DISPOSITION IN LOWER COURT

The jury found defendant guilty of assault with intent to commit murder. He was sentenced to the Utah State Prison for an indeterminate term of not less than five years nor more than life.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Fourth Judicial District Court should be affirmed.

STATEMENT OF FACTS

The recital of the facts in Appellant's brief is substantially correct. Respondent's corrections and additions are made hereinafter.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING DR. POWELL TO POINT OUT THE BULLET SCARS ON OFFICER WARREN'S HEAD.

After Trooper Charles Warren was brought into the courtroom sitting in a wheelchair, the district attorney interrogated Dr. Powell (T. 44).

> "QUESTION: Doctor, I have in the courtroom Trooper Warren. Could you explain to the jury and show them on his skull where the points of entry were?
>
> "ANSWER: There is a large scar here, a curved scar, which is the surgical incision. This irregularity is where the bone was removed. And the two wounds are here in the right side of the forehead at this point here (indicating). They have become quite pale, and you can barely see them. You can see them clearly enough here and here (indicating)."

The respondent submits that Utah's well developed case law on admissibility of "gruesome" photographic evidence is dispositive of appellant's contention that Officer Warren's appearance prejudiced the jury.

The proper test of admissibility of such evidence and review thereof is stated in *State* v. *Renzo,* 21 Utah 2d 205, 215, 443 P. 2d 392, 399 (1968).

> "The fact that a picture may be gruesome is no reason for excluding it from evidence if it is otherwise competent and relevant. It is a matter of discretion with the trial judge to determine whether the probative value of the picture outweighs the possible adverse effect which might be produced upon being shown to a jury. 23 C. J. S. Criminal Law § 852(1)c. This discretion on the part of a trial judge to admit or reject evidence should not be interfered with by an appellate court unless manifest error is shown."

Accord: *People* v. *Schiers,* 160 Cal. App. 2d 364, 324 P. 2d 981 (1968); *People* v. *Bennett,* 208 Cal. App. 2d 317, 25 Cal. Rptr. 257 (1962); *People* v. *Cheary,* 48 Cal. 2d 301, 309 P. 2d 431 (1957); *Martinez* v. *People,* 124 Colo. 170, 235 P. 2d 810 (1951).

The state had the burden of proving appellant guilty beyond a reasonable doubt of assault with intent to commit murder. Appellant's entry of a not guilty plea puts in issue every material allegation of the information. Utah Code Ann. § 77-24-4 (1953). The Code defines the "malice" which must be shown by the state to prove intent to commit murder at 76-30-2, to-wit:

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, *or when the circumstances attending*

> *the killing show an abandoned and malignant heart.*" (Emphasis added.)

The bullet holes in Officer Warren's skull were thus probative of the issues, even though defendant did not controvert the existence of the scars. The Utah Supreme Court passed on this issue in *State* v. *Russell,* 106 Utah 116, 133, 145 P. 2d 1003, 1010 (1944) :

> "The pictures of the deceased, taken after her death and showing her wounds, were clearly admissible. Even though the defendant did admit the killing, he did not admit the intent to kill and the nature of the wounds may be material on that point. The pictures showed the nature of the wounds more clearly than the testimony of witnesses could."

Accord: *People* v. *Bennett,* 208 Cal. App. 2d 317, 25 Cal. Rptr. 257, (1962); *McKee* v. *State,* 31 So. 2d 656 (Ala. 1947); *State* v. *Woods,* 62 Utah 397, 220 P. 215 (1923).

The fact that the evidence may be cumulative does not prevent its admission.

> "There was oral testimony to the effect that the defendant shot four bullets into the face and neck of the victim, missed with two shots, and then snapped the pistol at the victim's head two more times. The defendant, therefore, reasons that there was no need for pictures at all, as the crime was amply proved. The fallacy of this reasoning is his failure to see that the oral testimony may be discounted by the jury; and while the picture may not enable the jury to count the bullet holes in the victim's face, the various sources of blood indicate a number of bleeding sources, all of which is proper as showing the viciousness of the assault and the

> depravity of the defendant in making it." *State* v. *Jackson,* 22 Utah 2d 408, 409, 454 P. 2d 290, 291 (1969).

In *State* v. *Renzo, supra,* this court pointed to the corroborative value of demonstrative evidence.

> "The extent and nature of the wound and the atrocity of the crime also were material questions. Clearly the photographs, though cumulative, served to corroborate the doctor's testimony and were admissible for that purpose."

Accord: *State* v. *Martinez,* 92 Idaho 183, 439 P. 2d 691 (1968); *State* v. *Aubuchon,* 394 S. W. 2d 327 (Mo. 1965); *People* v. *Toth,* 182 Cal. App. 2d 819, 6 Cal. Rptr. 372 (1960).

The evidence of two identical holes ¾ inch apart in Officer Warren's head is especially probative in light of appellant's contention that his gun discharged accidentally. (Appellant's brief at 25). Not only is the evidence pertinent to the issue of whether the shooting was accidental or intentional, it is also pertinent to the question of degree of the crime, i.e., whether there was specific intent to murder or only a general intent to do bodily harm. The jury was instructed on assault with intent to do bodily harm as a lesser included offense of assault with intent to commit murder. See: generally 23 C. J. S. Criminal Law § 852 (1)c, (1967); 29 Am. Jur. 2d Evidence §§ 785-89 (1966); 159 A. L. R. 1413 (1945); 73 A. L. R. 2d 769 (1960).

The state should be permitted to prove its case by the strongest evidence possible.

> "[A] colorless admission by the opponent may sometimes have the effect of depriving a party of the legitimate moral force of his evidence; furthermore a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof." 9 Wigmore on Evidence § 2591 (3d Ed. 1948).

Accord: *State* v. *Upton,* 60 N. M. 205, 290 P. 2d 440 (1955); *Hawkins* v. *State,* 219 Ind. 116, 37 N. E. 2d 79 (1941); *State* v. *Nelson,* 162 Ore. 430, 92 P. 2d 182 (1939).

> "[T]he prosecution, with its burden of establishing guilt beyond a reasonable doubt is not to be denied the right to prove every essential element of the crime by the most convincing evidence it is able to produce. No one would be heard to object to testimony which does no more than faithfully describe the wounds which were inflicted upon the victim of a homicide, no matter how horrifying the narration might be. But a photograph of the corpse may fortify the oral testimony. Should it be excluded because it is, perhaps, even more revolting? We think not, as long as the defendant stands upon his plea of not guilty." *State* v. *Jensen,* 209 Ore. 239, 280, 296 P. 2d 618, 638 (1956).

Appellant's reliance on *State* v. *Poe,* 21 Utah 2d 113, 441 P. 2d 512 (1968) is misplaced. The Poe color slides held inadmissible by the Court depicted the "gory procedures of the pathologist," not marks left on the decedent by the criminal. This court held properly admissible two photographs of the victim as he appeared at the culmination of the crime. In the instant case it was far better for appellant that Officer Warren was permitted to appear at

the time of trial with his external wounds almost healed (T. 44) than if the prosecution had introduced pictures taken at the scene of the shooting.

Further, the Kentucky Supreme Court in *Napier* v. *Commonwealth*, 426 S. W. 2d 121 (Ky. 1968) suggested that courts should be skeptical of claims that a jury can be changed from a body of rational men into a passionate mob by the introduction of demonstrative evidence. Where the issue was whether a post mortem photograph of the victim's face showing a bullet hole was admissible, the court reasoned as follows:

> "The fact is that it was not so gruesome as to be likely to prejudice or inflame the men and women, inured as they are to the horrors of both war and television, who sit on a modern jury. The time has come when it should be presumed that a person capable of serving as a juror in a murder case can, without losing his head, bear the sight of a photograph showing the body of the decedent in the condition or place in which found."

Finally, respondent submits that even if it were error to permit Officer Warren to appear, in light of the overwhelming evidence supporting conviction of assault with intent to commit murder and sentence for an indefinite term in prison of from five years to life, such error could not be considered prejudicial within the meaning of Utah Code Ann. § 77-42-1 (1953).

> "After hearing an appeal the court must give judgment without regard to errors on defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be pre-

sumed to have resulted in prejudice. The Court must be satisfied that it has that effect before it is warranted in reversing the judgment."

POINT II.

APPELLANT'S CONVICTION IS WELL SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL.

Ample evidence was adduced on each element of the crime charged to convince the jury of appellant's guilt beyond a reasonable doubt. Officer Duke of the Springville Police was 15 feet away from the appellant at the time Officer Warren was shot. He testified that he drew and fired his gun at appellant *only after* he saw appellant turn toward Warren and fire two shots, hurling Officer Warren to the ground (T. 13). The appellant then turned and fired at Officer Duke, and these shots sounded the same to Duke as those which had felled Officer Warren (T. 22, 25). Officer Rasmussen of the Highway Patrol testified that after the shooting he saw appellant running into a nearby field with a revolver in his hand (T. 30). Only appellant's testimony controverts these facts. The jury could well discount appellant's "ricochet" theory (Appellant's brief at 16) on the basis of this evidence. The "accidental discharge" theory (Appellant's brief at 25) deserved little credence in light of the location of the bullet holes in Warren's head. Appellant's claim that it is physically impossible for his single-shot six-shooter to have fired shots one or two seconds apart (Appellant's brief at 16) is contradicted by common experience.

POINT III.

THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING DR. POWELL TO TESTIFY AS TO THE CALIBER OF BULLETS IN OFFICER WARREN'S HEAD.

The district attorney laid the following foundation for his question of Dr. Powell regarding the bullet size (T. 38):

> "QUESTION: Doctor, were you able to tell the size of the holes that you mentioned of entry?
>
> "ANSWER: Yes. The two holes were approximately a quarter of an inch in diameter. About three quarters of an inch apart. And they looked to me like they might have been made by a .32 — size bullet. And I put that down on my emergency room report, that they suggested a .32 caliber bullet. And then I put a question mark, because I wasn't entirely sure.
>
> "QUESTION: Are you familiar with the different sizes of bullets, .32, .22, .38, .357 et cetera?
>
> "ANSWER: Yes.
>
> "QUESTION: Do you have an opinion as to whether or not this size of hole — strike that. Have you in your work, had occasion to examine other gunshot wounds?
>
> "ANSWER: Many.
>
> "QUESTION: And based on your training and experience, do you have an opinion as to whether or not this hole could have been caused by a shell larger than a .32?
>
> "ANSWER: Yes.
>
> "QUESTION: And what is your opinion?

"ANSWER: No, it could not have been. It could have been a .32 caliber bullet hole, but it was too small to be larger than a .32 caliber.

"QUESTION: Could it have been a .357 magnum?

"ANSWER: No.

"QUESTION: Could it have been a .22?

"ANSWER: Yes, it might."

It is well settled in Utah that a trial judge has wide discretion in determining whether proper foundation has been laid for opinion evidence. In *Road Commission* v. *Silliman*, 22 Utah 2d 33, 34, 448 P. 2d 347, 348 (1968), this Court held as follows:

> "The qualification of an expert witness is to be determined by the trial judge, and if he determines that a witness by reason of training and experience can assist the jury by giving an opinion on a matter properly before the court, we on appeal should not hold that testimony should be stricken unless such palpable ignorance of the subject matter is manifested by the witness as to indicate an abuse of discretion on the part of the trial judge in allowing the witness to express an opinion in the first place or in refusing to grant a motion to strike after it has been given."

Accord: *Marsh* v. *Irvine*, 22 Utah 2d 154, 449 P. 2d 996 (1969); *Stagmeyer* v. *Leatham Bros., Inc.*, 20 Utah 2d 421, 439 P. 2d 279 (1969).

POINT IV.

THE COURT DID NOT COMMIT REVERSIBLE

ERROR IN ITS INSTRUCTIONS TO THE JURY.

The Court refused to give defendant's requested instructions Nos. 2, 10, 11 and 13, giving instead instructions which adequately covered these fields.

Defendant's requested instruction No. 2 defines "unlawful and unlawfully", "deliberate", "premeditate", "intent", and "specific intent". The instructions given by the court substantially cover these matters. No. 6 sets forth the elements of the crime, No. 7 deals with "malice aforethought", No. 10 defines abandoned and malignant heart; No. 12 covers "specific intent".

Defendant's requested instruction No. 10 defining assault with intent to commit murder is as well covered in the court's instructions Nos. 6 and 7.

Instructions Nos. 11 and 13 requested by the defendant dealing with "accidental discharge" was substantially given in the court's instruction No. 16.

The matter of "specific intent" is thoroughly dealt with in the court's instructions Nos. 8 and 10.

Since the matters raised by appellant were substantially covered by the court's instructions, no reversible error appears. *People* v. *Anderson,* 64 Cal. 2d 633, 414 P. 2d 366 (1966);*Clews* v. *People,* 151 Colo. 219, 377 P. 2d 125 (1962); *Carlson* v. *State,* 445 P. 2d 157 (Nev. 1968).

Appellant's dispute with the court's instruction No. 6 defining assault with intent to commit murder is based

upon his incorrect quotation of that instruction. The full sentence reads as follows:

> "(b) an assault with intent to commit murder is an unlawful attempt, coupled with a present ability, *to murder a human being.*"

The inclusion of the final phrase makes it clear that an attempt to murder must be made, and the court fully instructed the jury as to the intent necessary for a murder.

Further, the element of intent is specifically defined by the court in instruction No. 8. There can be little doubt that the jury was fully advised that intent to murder is a requisite element of the crime.

Appellant finds instruction No. 7 objectionable because it refers to "killing". An instruction on assault with intent to commit murder must define "murder". It is difficult to imagine how the court could define "murder" without reference to killing, since murder is a type of killing.

Appellant contends that giving instructions Nos. 12 and 17 overemphasized the significance of circumstantial evidence. No. 17 deals with the value of circumstantial evidence in general, while No. 12 is a more detailed explanation regarding the finding by the jury of intent to kill from the circumstances. Appellant seems to argue both ways: (1) that the jury was inadequately instructed on intent, and (2) that too much was said about intent and the circumstances under which it can be inferred by the jury.

Respondent submits that appellant's critique of the

court's rulings on his requested instructions, as well as his dispute with the instructions finally given by the court, raises no legal issues of any significance.

CONCLUSION

It is resectfully submitted that Officer Warren's appearance in court cannot be held to be cause for reversal in light of Utah's well developed case law on the subject. His appearance was probative on the issues of intent and degree of the crime, and was far less inflammatory than pictures taken at the scene of the crime could have been. The jury's verdict, rendered on the basis of substantial evidence and correct instruction, should be affirmed.

Respectfully submitted,

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