

1970

State of Utah v. Charles Allen McCarthy : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsVernon B. Romney; Attorney for Plaintiff-RespondentPhil L. Hansen; Attorney for Defendant-Appellant

Recommended Citation

Brief of Respondent, *Utah v. McCarthy*, No. 12260 (Utah Supreme Court, 1970).
https://digitalcommons.law.byu.edu/uofu_sc2/230

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

vs.

CHARLES ALLEN McCARTHY,

Defendant-Appellant

BRIEF OF RESPONDENT

APPEAL FROM THE SUPREME COURT OF THE
JUDICIAL DISTRICT COURT OF
KANE COUNTY, STATE OF UTAH
DON J. ANDERSON, Respondent

VERMILION, UTAH
ALBERT
LAURENCE
Chief Clerk
236 South
Salt Lake City, Utah

WIL L. HANSEN

Empire Building
East Fourth South

Lake City, Utah 84111

Attorney for Appellant

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	2
POINT I. NO ERROR WAS MADE IN REFUSING TO INSTRUCT THE JURY ON DEFENDANT'S THEORY OF THE CASE IN REGARD TO SUB- MISSION OF A LESSER JURY VERDICT	2
CONCLUSION	9

CASES CITED

Bouden v. Denver Rio Grande R. R., 3 Utah 2d 444 (1955)	8
People v. Sanchez, 20 Cal. 2d 560 (1947)	6
State v. Harris, 62 Wash. 2d 858 (1963)	6
State v. Hymas, 64 Utah 285 (1924)	4
State v. Johnson, 112 Utah 130 (1947)	4
State v. Gallegos, 16 Utah 2d 102 (1964)	5
State v. Gillian, 23 U. 2d 372 (1970)	3, 4
State v. Newton, 105 Utah 561 (1943)	4

TABLE OF CONTENTS—Continued

	Page
State v. Roedl, 107 Utah 538 (1945)	6
State v. Spencer, 186 Kansas 298 (1960)	6

STATUTES CITED

Utah Code Ann. § 76-1-20 (1953)	6
Utah Code Ann. § 76-1-30 (1953)	9
Utah Code Ann. § 76-1-44 (1953)	6
Utah Code Ann. § 76-38-1 (1953)	9

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,	}	Case No. 12260
<i>Plaintiff-Respondent,</i>		
vs.		
CHARLES ALLEN McCARTHY,		
<i>Defendant-Appellant.</i>		

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for attempted grand larceny and the sentence imposed thereon in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

The jury found the defendant guilty of attempted grand larceny. He was sentenced to the Utah State Prison for an indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the lower court should be affirmed.

STATEMENT OF FACTS

Respondent submits to the statement of facts as stated by appellant with the addition of the following facts.

The jury was instructed as to the elements of crime for grand larceny, attempted grand larceny, petty larceny as well as lesser and included offenses (Instruction 7-11, 20).

The jury was instructed as to the possibility of lesser crimes, to-wit: attempted grand larceny, petty larceny, lesser and included offenses or not guilty. Therefore, there were, at a minimum, five possible verdicts presented to the jury for consideration. There was ample evidence at trial to show that the value of the property stolen was in excess of \$50.00. In fact, several reliable estimates of the nineteen stolen hams placed the value in excess of \$90.00.

Evidence was presented at trial which linked the appellant to the individual caught with the nineteen hams. Since "the other individual" had left the store with the hams, there was reasonable proof to sustain a conviction against that individual for grand larceny. As it was stated at trial, both men were seen placing hams in boxes. Ample issues of fact were raised that McCarthy might be involved as a principle to the crime of grand larceny as well as petty larceny.

ARGUMENT

POINT I.

NO ERROR WAS MADE IN REFUSING TO INSTRUCT THE JURY ON DEFENDANT'S THEORY OF THE CASE IN REGARD TO SUBMISSION OF A LESSER JURY VERDICT.

The appellant argues that the trial court failed to properly instruct the jury because there was no instruction concerning the lesser offense of attempted petty larceny. Appellant therefore contends that this prejudicially limited the jury's verdict-rendering powers. Appellant cites *State v. Gillian*, 23 U. 2d 372 (1970), in which the court set the standard that "if any reasonable view of the evidence" would support the lesser verdict of attempted petty larceny, it should be included in the instructions.

The Judge instructed the jury that before the defendants could be convicted of grand larceny or attempted grand larceny, the jury must be convinced beyond a reasonable doubt that certain property valued in excess of \$50.00 had been taken, or an attempt made. If the value did not exceed \$50.00, then they must find defendant guilty of petty larceny or lesser and included offenses, or not guilty. All feasible theories of the case were left open to the jury for deliberation in the alleged crime, and the State feels there was no abuse of the trial court's discretion in submitting its jury instructions as it did.

The information charged the appellant with the crime of grand larceny as follows:

"That on or about the 30th day of September, 1969, in Salt Lake County, State of Utah, the said Charles Allen McCarthy stole personal property having a value in excess of \$50.00 lawful money of the United States from Smith's Food King, a corporation."

The value of the property mentioned in the information was

described several times in the evidence. The jury had to decide whether or not the property taken was in excess of \$50.00, as well as whether the appellant took such property.

Authorities generally agree that where parties request jury instructions upon their theory of the case, the courts should allow such instructions where there is reasonable and substantial evidence to justify giving such an instruction. *State v. Gillian*, 23 U. 2d 372 (1970); *State v. Johnson*, 112 Utah 130 (1947); *State v. Newton*, 105 Utah 561 (1943).

The State recognizes that under *State v. Hymas*, 64 Utah 285 (1924) and *State v. Gillian*, *supra*, it is "a delicate matter for a trial court to withhold" jury instructions of a lesser included offense, and the court may only do so in "clear cases." The State contends that this is a "clear case" and clearly distinguishable from *Gillian*.

Unlike the case at bar, in *State v. Gillian*, *supra*, the jury was given only two alternatives to conviction, guilty of the greater offense, murder, or not guilty. Due to the ramifications surrounding the nature of the offense, serious questions were raised as to the appropriate jury instructions regarding the degree of murder committed.

But, again, only two possible verdicts were given in the instructions and the Utah Supreme Court held:

"... From what we have just stated above it will be seen that we do not analyze this case where under reasonable view of the evidence the defendant

must be found guilty either of the greater offense, or not guilty, and we therefore conclude that the instructions on the lesser offenses should have been given." *Id.* at 377.

Again, it must be stressed to this Court that McCarthy had four possible verdicts submitted to the jury. If the jury had believed that a lesser crime had been committed, they could have found the defendant guilty of "the lesser offense of petty larceny or not guilty" (Instructions 7-10, 20). However, they found the defendant guilty of attempted grand larceny because they felt the facts of the case warranted such. There were therefore no reversible errors present in the matters for their deliberation.

The Court in *State v. Gallegos*, 16 Utah 2d 102 (1964), a recent murder case, found:

"Under ordinary factual situations, where a jury finds the defendant guilty of a greater offense, the giving of an erroneous instruction on a lesser offense is not prejudicial. If the jury were convinced from the evidence beyond a reasonable doubt that defendants were guilty of second degree murder, the failure to spell out in detail the required intentions for voluntary manslaughter could not reasonably influence the decision." *Id.* at 105.

The Court goes on to say:

"Further, here there was practically no evidence of any such quarrel or heat of passion as distinguished from first or second degree murder, which requires premeditated planning." *Id.* at 105.

Likewise, respondent submits that no evidence was presented at trial to show that defendant was in any way

predisposed to commit the lesser offense. From the facts of the case as expressed in Utah Code Ann. § 76-1-20 (1953), there existed in the offense committed by appellant "a union or joint operation of the act and the intent" to commit the crime of grand larceny, and appellant was, at the very least, a principle to the crime of grand larceny which would make him guilty equally with the individual in whose possession the hams were later found. Utah Code Ann. § 76-1-44 (1953). Respondent contends that evidence was overwhelmingly present, including the testimony of eye witnesses, to sustain a conviction of grand larceny and the lesser final verdict of attempted grand larceny.

In what is perhaps a clearer illustration of the harmless nature of an erroneous instruction on a lesser offense, this Court has held that where the jury found a defendant guilty of first degree murder, an unnecessary instruction defining second degree murder improperly was not harmful to defendant. *State v. Roedl*, 107 Utah 538 (1945); *People v. Sanchez*, 20 Cal. 2d 560 (1947); *State v. Spencer*, 186 Kansas 298 (1960). Similarly, the Washington Courts have said that an erroneous instruction on second degree murder is not prejudicial error to a defendant convicted of first degree murder. *State v. Harris*, 62 Wash. 2d 858 (1963).

The requirement for valuation in excess of \$50.00 was given in all three verdict instructions. Instruction No. 10 defines this valuation as follows:

"Value as applied to this case means the reasonable market value or in other words the price a willing buyer would be willing to pay and the price at which a willing seller would be willing to sell the

item in question. Neither the retail or wholesale price nor the owner's estimate of value are conclusive evidence of the market value, but they are factors which may be considered by you in determining the market value of the property in question. However, the burden rests on the State to prove to your satisfaction and beyond a reasonable doubt the reasonable market value of the question items." (Instruction No. 10.)

Adequate instruction was given to the issue of aiding and abetting a criminal act and more than substantial evidence was presented at trial to prove beyond a reasonable doubt that McCarthy was a principle to the greater crime of grand larceny even if only directly in possession of four hams at the time apprehended.

Instruction No. 20 stated the following:

"Your verdict in this case must be: Guilty of Grand Larceny, as charged in information, or guilty of grand larceny or guilty of petit larceny, *lesser and included offenses*, or not guilty; as your deliberation may result."

The jury could have found the defendant guilty of petty larceny had it felt a lesser offense had been committed. No questions regarding the valuation of the property stolen nor verdicts of lesser offenses were decided as a matter of law. All such questions were reasonably submitted to the jury for their determination and the verdicts were reasonably submitted in light of the evidence presented. Therefore, defendant's belief that there was reversible error because he feels that the reasonable view of this evidence would support the lesser verdict of attempted

petty larceny is completely without merit. By no stretch of the imagination can the facts of this case support a lesser verdict than that rendered by the trial at trial court level.

Defense counsel failed to present evidence at trial to refute the state's proof as to the value of stolen property, but the jury, in weighing the evidence along with other issues presented, found the defendant guilty of attempted grand larceny although they had also been instructed as to the elements of petty larceny or not guilty had said evidence warranted such findings.

Respondent agrees with this court in its opinion in *Bouden v. Denver Rio Grande R. R.*, 3 Utah 2d 444 (1955) as it states:

"The right of a jury trial is so fundamental and sacred to the citizen that it should be jealously guarded by the courts. But once having been granted such right and verdict rendered, it should not be regarded lightly nor overturned without good and sufficient reason; nor should a judgment be disturbed merely because of error. Only when there is both substantial and prejudicial error, and when there is reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or grant a new trial." *Id.* at 444.

Appellant has failed to show that inclusion of his jury instruction on attempted petty larceny would in all reasonable likelihood have changed the verdict of the jury, especially in lieu of the lesser included verdicts presented for jury deliberation and refused.

CONCLUSION

In summary, respondent urges this Court to affirm the jury verdict and conviction for attempted grand larceny as provided by statute in Utah Code Ann. § 76-1-30 (1953) and Utah Code Ann. § 76-38-1 (1953).

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

LAUREN N. BEASLEY
Chief Assistant Attorney General

Attorneys for Respondent

,