

1977

## State of Utah v. William N. Besendorfer, Jr. : Brief of Respondent

Utah Supreme Court

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Gordon F. Esplin; Attorney for Appellant;  
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH in the  
interest of

WILLIAM N. BESENDORFER, JR.,  
(02-07-57)

Case No.  
14595

A person under eighteen  
years of age.

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BRIEF OF RESPONDENT  
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Appeal from an Order of the Second District  
Court for Salt Lake County, State of Utah, the Honorable  
Regnal Garff, Jr., presiding.

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MAR

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(02-07-57) : 14595  
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BRIEF OF RESPONDENT  
-----

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the findings and order of the Second District Juvenile Court that the appellant committed an aggravated assault in violation of Utah Code Ann. § 76-5-103 (Supp. 1975), and requiring appellant to pay \$546.00 restitution to Kory Jackson, the complaining witness.

DISPOSITION IN THE LOWER COURT

On October 23, 1975, Referee Birrell found that the appellant had committed an aggravated assault on Kory Jackson. The appellant appealed the decision to the Juvenile Court, and on March 16, 1976, Judge

Garff of the Juvenile Court found that the appellant had committed the assault. On April 26, 1976, Judge Garff ordered the appellant to pay \$546.00 restitution to Kory Jackson, an amount equal to the injuries to Mr. Jackson's teeth (T.135,136).

#### RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the findings and order of the Court below.

#### STATEMENT OF FACTS

On January 14, 1975, a basketball game was played between Granite High School and Highland High School at Granite High School. Highland won the game (R.p.2,1.31). The complaining witness, Kory Jackson, was a student at Highland, while the appellant, William Besendorfer, was a student at Granite High School (R.p.2,1.19; p.38,1.16). After the game, the appellant walked to a McDonald's restaurant adjacent to the High School. Later, Mr. Jackson drove his automobile into the parking lot of the restaurant. After the car had stopped, appellant made an obscene gesture towards the occupants (R.p.3,1.29). A group of about fifteen to twenty Granite High students surrounded the car and began to rock, kick and swing icescrapers at it (R.p.4,1.14,15). Mr. Jackson left his car and was struck in the face by a snowball.

(R.p.5,1.6,13). Mr. Jackson then walked around to the rear of his car, where the appellant ran to meet him. The appellant then kicked and hit Mr. Jackson with his feet and fists. Mr. Jackson testified that he never hit back (R.p.7,1.15). Randy Newman testified that he never saw Mr. Jackson strike his assailant (R.p.16,1.13), as did Dennis McLaughlin (R.p.22,1.19). Jay Johnson testified that the affray looked more like one person kicking another than a fair fight (R.p.28,1.14,15).

Mr. Jackson testified that he received bruises on his leg and face, that a doctor's treatment was required for the bruises, and that he needed a tooth capped as a result of the assault (R.p.6,1.23;p.7,1.30-31). Mr. Newman testified that Jackson had been beaten badly in the face (R.p.15,1.11), Mr. McLaughlin testified that Jackson's mouth had been cut up (R.p.23,1.3), and Mr. Johnson testified that Jackson was bleeding from the kicking he had received (R.p.27,1.16).

The appellant testified that he was involved in a fight with Rory Jackson on the night in question (R.p.39,1.15). Michael Drachman, Ty Siddoway, Craig Richmond, and Clyde Jessop all confirmed the fact that Rory Jackson and Bill Besendorfer were involved in a

fight on the night in question (R.p.53,1.14;p.75,1.22; p.91,1.6;p.106,1.9).

Counsel for the appellant cross-examined Mr. Jackson after his direct testimony for the State's case in chief (R.pp.8-12), recalled Mr. Jackson (R.pp.31-33), and re-recalled him (R.pp.112-114). On this last occasion, counsel was denied the opportunity to impeach Mr. Jackson with regard to some allegedly inconsistent prior testimony as to the identity of his assailant.

#### ARGUMENT

#### POINT I

THE EVIDENCE WAS SUFFICIENT TO PROVE APPELLANT'S GUILT OF THE CRIME OF AGGRAVATED ASSAULT BEYOND A REASONABLE DOUBT.

Utah Code Ann. § 76-5-102 (Supp. 1975), provides:

"(1) Assault is: (a) An attempt, with unlawful force or violence, to do bodily injury to another; or (b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another."

Utah Code Ann. § 76-5-103 (Supp. 1975), states:

"(1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:

(a) He intentionally causes serious bodily injury to another; or

(b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury."

Utah Code Ann. § 76-1-601 (Supp. 1975), provides:

"(9) 'Serious bodily injury' means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death."

Respondent submits that the State produced more than enough evidence to meet its burden in this case.

In the case of People v. Gray, 224 Cal.App.2d 76, 36 Cal.Rptr. 263 (1964), a defendant had appealed a conviction of assault by means of force likely to cause great bodily harm. The court stated:

"... The gist of the offense is the likelihood of bodily injury as the result of force used and the degree of force used is not as significant as the manner of use. Nor is it required that the injuries be serious. What kind of force is likely to cause great bodily injury is a question of fact for the trial court. It is settled that the offense ... may be perpetrated by hands alone." 36 Cal.Rptr. at 264.

The Court held that evidence that the defendant had struck his victim in the face hard enough to cause bruises and had grabbed her about the throat was sufficient to support a guilty verdict.

In this case, evidence was admitted that tended to show that Mr. Jackson was badly bruised and that his teeth were seriously injured (R.p.7,1.30-31), that his mouth was cut up (R.p.23,1.3), and that he was beaten badly in the face (R.p.15,1.11). Mr. Johnson's description of Mr. Jackson being repeatedly kicked while he was on the ground is particularly significant (R.p.27,1.1-16). Respondent submits that this evidence is substantial and fairly supports the trial court's verdict.

Appellant has contended that the evidence clearly shows that Jackson consented to his beating. Assuming that such consent would be a defense, respondent submits that the evidence permits no such inference to be drawn. In retrospect, Jackson's actions may seem ill-advised and even provocative, but they did not amount to an invitation to mutual combat or justify the appellant's assault. In Prell Hotel v. Antonacci, 86 Nev. 390, 469 P.2d 399 (1970), the court stated that oral abuse and provocation independent of any overt hostile act, however insulting, is not justification for an

assault. Respondent submits that the complaining witness's rash actions did not license the appellant to commit a felony, particularly where the evidence shows that no mutual combat occurred (R.p.7,1.15). Respondent submits that the evidence demonstrates appellant's guilt beyond a reasonable doubt.

## POINT II

CONSENT IS NOT A DEFENSE TO THE CRIME OF AGGRAVATED ASSAULT.

Assuming that the evidence demonstrated that Jackson consented to the assault, that consent would not avail the appellant as a defense. Appellant has cited Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956), for the proposition that where there is consent there is no assault. The assault alleged in that case was a non-violent homosexual touching of an apparently consenting plainclothes police officer. The case plainly does not apply to the case at bar. In 58 A.2d 664, it is stated:

"Although the cases are replete with broad general statements that consent is a defense in a prosecution for assault, most of these statements are drawn from

cases involving sexual assault of one kind or another, and in the few cases which have involved an actual battery, without sexual overtones, the courts have usually taken the view that since the offense in question involved a breach of the public peace as well as an invasion of the victim's physical security, the victim's consent would not be recognized as a defense, at least where the battery was a severe one."

The above quotation is supported by an ample annotation, with many of the cases containing stronger indications of consent than is shown here. Respondent urges this Court to recognize the sound policy of protecting the public peace as well as individual physical security, and to disapprove the notion that consent is a defense in a criminal prosecution for aggravated assault.

### POINT III

THE JUVENILE COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT DENIED THE APPELLANT THE OPPORTUNITY TO IMPEACH THE TESTIMONY OF KORY JACKSON.

When counsel for the appellant had recalled the complaining witness Kory Jackson for the second time, the prosecutor objected to questions about allegedly inconsistent prior testimony given before Referee Birrell. The objection was based on the grounds

that it is improper to impeach your own witness (R.p.13, 1.3). Judge Garff apparently agreed (R.p.113,1.5). Respondent admits that this is an incorrect statement of the law, and that the ruling was erroneous on the grounds stated. Respondent submits, however, that the ruling is sustainable on other grounds. The Juvenile Court did not limit the cross-examination of Jackson (R.pp.8-12), or the first recall examination (R.p.32,1.15), nor did the court absolutely forbid the second recall examination. Appellant was only precluded from attempting to impeach Jackson's testimony on one issue: identity. As the record clearly shows, identity was not an issue in this case (R.p.39,1.15; p.53,1.14;p.75,1.22;p.91,1.6;p.106,1.9). This limitation on respective testimony on a non-essential issue is well within the trial court's discretion.

As this Court stated in State v. Zolantakis,  
70 Utah 296, 259 Pac. 1044 (1927):

" . . . the right of cross-examination is an absolute right and not a mere privilege of the party against whom the witness is called. It is only after such right has been substantially and fairly exercised that the allowance of further cross-examination becomes discretionary."  
70 Utah at 305.

Because Jackson had already been thoroughly cross-examined, the allowance of any further testimony was

discretionary. State v. Burton, 55 Cal.2d 328, 11 Cal.Rptr. 65, 359 P.2d 433 (1961); Collins v. State, 492 P.2d 999, 88 Nev. 9 (1972). Since the allowance of further testimony was within the court's discretion, limitation on that testimony if allowed is within the court's discretion.

Assuming that the court had exceeded the bounds of the discretion committed it by law, the error would have resulted in no prejudice to the appellant. In this respect, the case at bar is very similar to State v. Gill, 24 Utah 2d 261, 470 P.2d 250 (1970). In that case, defendant claimed error in a limitation on his cross-examination of the State's witness on the issue of identification. The court had refused permission to cross-examine the witness as to a prior lineup identification because it was beyond the scope of direct examination. This Court held that the limitation was error, but in view of the evidence that it was the defendant who had committed the crime, the error was harmless. In similar facts, see State v. Fox, 22 Utah 2d 211, 450 P.2d 937 (1969).

Because appellant can demonstrate no prejudice to himself in the record, he has asked this Court to

presume that the error resulted in prejudice. This is contrary to the express command of Utah Code Ann. § 77-42-1 (1953), as amended:

"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 not 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."

Respondent submits that the record demonstrates no prejudice to the appellant and asks this Court to affirm the court below.

#### CONCLUSION

Respondent submits that the appellant was found guilty beyond a reasonable doubt upon substantial evidence, and that the Juvenile Court committed no prejudicial error affecting appellant's substantial rights. Respondent therefore asks that the court below be affirmed.

Respectfully submitted,

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