1987

State of Utah v. Lee Allen Aase : Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 870276-CA
v.	:	
LEE ALLEN AASE,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF ATTEMPTED SECOND DEGREE MURDER, A SECOND DEGREE FELONY, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE RODNEY S. PAGE, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of attempted second degree murder, a second degree felony, after a jury trial in the Second Judicial District Court. This Court has jurisdiction to hear the appeal under UTAH CODE ANN. § 78-2a-3(2)(e) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the court properly deny defendant's motion for a change of venue where defendant failed to demonstrate actual prejudice resulting from adverse pretrial publicity?

2. Must this Court affirm the lower court's ruling on the admission of ammunition evidence where defendant did not present the specific objection he raises on appeal to the trial court?

3. Must this Court refuse to review defendant's claim of an alleged violation of § 77-17-11 where defendant had failed to raise the issue at trial?

4. Was defendant adequately notified that the offense was committed using a firearm where the probable cause statement in the information alleged that he shot the victim?

STATEMENT OF THE CASE

Defendant, Lee Allen Aase, was charged with attempted second degree murder, a second degree felony, under UTAH CODE ANN. §§ 76-5-203 and 76-4-101 (1978 & Supp. 1987) (R. 60-64). After a jury trial, he was convicted of that offense (R. 261). The trial court sentenced him to the Utah State Prison for a term of one to fifteen years on the second degree felony conviction and a five year consecutive term for use of a firearm (R. 268-69).

STATEMENT OF FACTS

The issues raised by defendant on appeal generally do not require a recitation of facts beyond that contained in the Statement of the Case. Any additional factual development necessary to the resolution of the issues appears in the argument portion of this brief.

SUMMARY OF ARGUMENT

Defendant's motion for a change of venue was properly denied prior to jury selection because it was premature. Where he failed to renew the objection after the court ruled that it was premature and failed to show that the jury was prejudiced by the allegedly prejudicial publicity he cannot prevail on appeal on his claim that the motion should have been granted.

During trial, defendant objected to the admission of evidence that defendant had previously used ammunition similar to that used in the crime. Defendant did not, however, object upon the same grounds that he raises on appeal. Consequently, he waived the objection.

Defendant also failed to timely object to the fact that the jury was permitted to adjourn for lunch unaccompanied by the officer sworn to keep them together. He cannot raise this issue for the first time on appeal.

Finally, defendant's contention that was not adequately notified in the information that the firearm enhancement provision applied to him is baseless. The probable cause statement included several references to the fact that the victim was "shot" with "bullets." These references were sufficient to notify defendant that a firearm was used in the crime.

ARGUMENT

POINT I

DEFENDANT FAILS TO DEMONSTRATE THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A CHANGE OF VENUE.

Prior to trial, defendant filed a motion for a change of venue (R. 95). Upon defendant's request for a ruling on that motion without a hearing (R. 120), the trial court denied it; however, it stated that the motion could "be renewed at the time of jury selection if a basis therefore [were] exhibited in the jury selection process" (R. 122). Defendant did not renew his venue motion at any time during or after jury selection, and specifically passed the jury for cause (Transcr. of May 7, 1987 Proceedings at 4-80).

On appeal, defendant appears to argue that the pretrial publicity was so massive and prejudicial that it presumptively denied him an impartial jury, and thus the trial court erred in

refusing to grant a change of venue.[1]

In claiming that a venue change was required, defendant makes no references to evidence of the pretrial publicity alleged to have been present in his case. Nor does he discuss in any detail the extent or quality of that publicity. In that the burden is on defendant to show that pretrial news coverage has generated community bias to such a degree that the right to a fair and impartial trial has been put in jeopardy, State v. Wood, 648 P.2d 71, 88 (Utah), cert. denied, 459 U.S. 988 (1982); Utah R. Crim. P. 29(e) (UTAH CODE ANN. § 77-35-29(e) (1982)), the Court should reject defendant's claim of error on the basis that he fails even to identify the publicity alleged to have been present. A bare allegation of prejudice is patently inadequate to justify a change of venue. Wood, 648 P.2d at 88 (citing State v. Gellatly, 22 Utah 2d 149, 449 P.2d 993 (1969)).

Furthermore, it is clear that the mere demonstration that some dissemination of news, thought to be prejudicial to a defendant, has occurred does not normally entitle the defendant to prevail on a motion for a change of venue. Wood, 648 P.2d at 89; State v. Pierre, 572 P.2d 1338, 1349-50 (Utah 1977), cert. denied, 439 U.S. 882 (1978). As noted in Wood:

> "The more general showing of publicity thought to be adverse to a party is not sufficient to require a change of venue except in the most extraordinary cases. In

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[1] Defendant does not appear to argue that the jury in his case was actually prejudiced. Insofar as the argument in defendant's brief could be construed as such a challenge, the issue of actual prejudice was waived for appeal when defendant passed the jury for cause in the trial court.

> the usual situation, the movant must at least make a showing that the allegedly prejudicial material reached the veniremen, so that a foundation is laid for the possibility of actual bias." Northern California Pharmaceutical Association v. United States, 306 F.2d 379, 383 (9th Cir. 1962).

648 P.2d at 89 (footnote omitted). In Codianna v. Morris, 660 P.2d 1101 (Utah 1983), the Court similarly observed:

> An accused can be denied a fair trial where the process of news-gathering is allowed such a free rein that it intrudes into every aspect of a trial and creates a "carnival atmosphere" and where the publicity is so weighted against the defendant and so extreme in its impact that members of the jury are encouraged to form strong preconceived views of his guilt. Sheppard v. Maxwell, 384 U.S. 333, 358, 86 S. Ct. 1507, 1519, 16 L.Ed.2d 600 (1966). Nevertheless, "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial." Nebraska Press Association v. Stuart, 427 U.S. 539, 554, 96 S. Ct. 2791, 2800, 49 L.Ed.2d 683 (1976).

660 P.2d at 1111. Defendant fails to demonstrate that the trial court was obligated to order a change of venue in light of this case law. He offers nothing to indicate that his case is significantly different from two recent cases decided by the Utah Supreme Court--State v. Bishop, 75 Utah Adv. Rep. 9, 18-19, ___ P.2d ___, ___ (1988); State v. Lafferty, 73 Utah Adv. Rep. 57, 63, ___ P.2d ___, ___ (1988)--where the trial courts' refusals to order a change of venue were upheld.

POINT II

BECAUSE DEFENDANT DID NOT MAKE A UTAH R. EVID. 406 OBJECTION TO THE ADMISSION OF THE AMMUNITION EVIDENCE AT TRIAL, THE COURT SHOULD NOT CONSIDER HIS RULE 406 ARGUMENT ON APPEAL; FURTHERMORE, THE TRIAL COURT'S REFUSAL TO EXCLUDE THAT EVIDENCE UNDER UTAH R. EVID. 401 AND 403 SHOULD BE UPHELD.

Defendant argues that the trial court admitted the evidence of defendant's previous use of "snake shot" ammunition in violation of Utah R. Evid. 406 which relates to habit or routine practice. However, defendant did not make a Rule 406 objection to that evidence at trial. His only objection to the challenged evidence was that it was "too far removed in time and too prejudicial" (Transcr. of May 8, 1987 proceedings at 62-63). The detailed Rule 406 analysis defendant presents on appeal was never presented to the trial court. Effectively, defendant made only a Utah R. Evid. 401 relevance objection and a Utah R. Evid. 403 objection. Having failed to make a specific Rule 406 objection below, defendant may not raise that objection and have it considered for the first time on appeal. State v. Loe, 732 P.2d 115, 117 (Utah 1987); Utah R. Evid. 103(a)(1). See also State v. Davis, 689 P.2d 5, 14 (Utah 1984) (a defendant must have specifically stated to the trial court the same grounds for objection to evidence presented on appeal). And, as for the trial court's rejection of defendant's relevancy and prejudice objections, defendant fails to demonstrate that there are grounds for reversal. It is well settled that "the trial court's ruling on the admissibility of evidence will not be reversed absent a showing that the trial court so abused its discretion as to

create a likelihood that injustice resulted." State v. Royball, 710 P.2d 168, 169 (Utah 1985). See also State v. Mildenhall, 747 P.2d 422, 425 (Utah 1987); Utah R. Evid. 103(a). No such abuse is apparent here.

POINT III

BECAUSE DEFENDANT FAILED TO TIMELY AND PROPERLY OBJECT TO AN ALLEGED VIOLATION OF UTAH CODE ANN. § 77-17-11 ( ), BY THE TRIAL JUDGE, THE COURT SHOULD NOT CONSIDER THIS ALLEGATION ON APPEAL.

Defendant argues that he was unduly prejudiced when the jury, during its deliberations, was permitted to adjourn for lunch in the absence of the officer sworn to keep them together pursuant to UTAH CODE ANN. § 77-17-11 (1982). However, defendant waived this objection by failing to object to this alleged impropriety at trial. The issue is instead raised for the first time on appeal. "In the absence of exceptional circumstances, this Court has long refused to review matters raised for the first time on appeal where no timely and proper objection was made in the trial court." State v. Steggell, 660 P.2d 252, 254 (Utah 1983). Defendant fails to show any exceptional circumstances that would give rise for a review of this matter on appeal. Indeed, the trial court's strict instructions to the jury "not to discuss the case with anyone, draw conclusions, or read any newspapers or articles," (R. 83), safeguarded against any likelihood of prejudicial exposure.

POINT IV

THE STATE'S INFORMATION CLEARLY NOTIFIED DEFENDANT OF ITS INTENTION TO RELY ON THE FIREARMS ENHANCEMENT PROVISION OF UTAH CODE ANN. § 76-3-203(2) (1983, as amended).

Defendant argues that the State's information failed to notify him adequately of its intention to rely on the firearms enhancement provision of UTAH CODE ANN. § 76-3-203(2). Defendant points out that the charging portion of the information contains no allegations regarding the use of a firearm and does not cite or refer to the statute. This failure, concludes defendant, violates fundamental fairness and due process of law under State v. Angus, 581 P.2d 992 (Utah 1978).

State v. Schreuder, 712 P.2d 264 (Utah 1985) is dispositive of defendant's argument. Schreuder found that the State's information provided defendant adequate notice of the State's intention to rely on the firearms enhancement statute, where, even though the charging portion of the information contained no allegation regarding use of a firearm and did not cite or refer to the statute, the probable cause statement which was made part of the information stated that the victim "was shot in the back and in the head by a weapon, determined to be a .357 magnum." Id. at 272. Schreuder relied on section 77-35-4(b) of the Utah Rules of Criminal Procedure, which states that an "information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate."

In light of Schreuder, defendant's argument in this case is without merit. The probable cause statement, which is

found immediately below the information containing the statutory charge of attempted criminal homicide, gives clear notice that the attempt was committed with a deadly weapon. Sentences 1-6, 8, 10, 20 and 21 of the probable cause statement all pertain to a "shooting" or "shots" committed by defendant or a "bullet" and that the caliber of the bullet was probably a .38 or .357 (R. 60-64). Consequently, this written notice on the face of the information that the state intended to show a crime was committed with the use of a firearm satisfies the requirements of Angus and constitutional due process. Schreuder at 273.

RESPECTFULLY submitted this 15th day of April, 1988.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Randine R. Salerno, Attorney for defendant, 427 27th Street, Ogden, Utah 84401, this 15th day of April, 1988.