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State of Utah v. Gene H. Wadman : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

Case No.
15400

GENE H. WADMAN,

Defendant and Appellant.

BRIEF OF APPELLANT

Appeal from the verdict of the Second Judicial District
Court for Davis County, State of Utah, the Honorable
J. Duffy Palmer presiding.

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE.	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I - THE TRIAL COURT PERMITTED THE STATE TO PRESENT EVIDENCE OF A CRIME AS BEING COMMITTED ON AN UNSPECIFIED DAY OTHER THAN AS ALLEGED IN THE BILL OF PARTICULARS, AND IN DOING SO, DENIED THE APPELLANT HIS RIGHT TO PURSUE HIS ALIBI	4
POINT II - THE STATE'S EVIDENCE WAS TOO UNRELIABLE AND INCOMPETENT TO JUSTIFY THE VERDICT	7
CONCLUSION	11

CASES CITED

	Page
State vs. Nelson	
52 Utah 617, 197 Pac 860 (1918)	5
State vs. Waid	
92 Utah 297, 62 P 2d 647 (1937)	5
United States vs. Armco Steel Corp.	
255 F. supp 841 (1966)	5,6
State vs. Spencer	
101 Utah 274, 117 P 2d 455 (1941)	6
State vs. Cooper	
114 Utah 531, 201 P 2d at 769.	6
State vs. Waid	
92 Utah 297, 62 P 2d 647 (1937)	6
State vs. Wilson	
Utah 2d , 565 P 2d 66 (1977)	11

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged by Information with the crime of Forcible Sexual Abuse, a Third Degree Felony, under Title 76-5-404, Utah Code Annotated. The appellant was found guilty of a Class A Misdemeanor. From said conviction, the appellant appeals.

DISPOSITION IN THE LOWER COURT

The case was tried to the Honorable J. Duffy Palmer, presiding without a jury. The Judge, on his own motion, after expressing considerable difficulty with the case

(Tr. 224-225), reduced the matter to a Class A Misdemeanor, and placed the appellant on probation with no jail and no fine.

RELIEF SOUGHT ON APPEAL

The appellant requests that the verdict be set aside and that the District Court be ordered to dismiss the charge. In the alternative, the appellant requests a new trial on the reduced charge.

STATEMENT OF FACTS

The appellant separated from his wife, Sandra Wadman, on December 30, 1976. During the week of January 3 to January 7, the appellant's wife filed for divorce and had this criminal charge brought against the appellant, alleging that the appellant sexually abused her daughter (appellant's step-daughter) on three separate occasions. The appellant denied at trial having ever sexually abused the child (Tr. 190).

In an attempt to defend himself, the appellant filed a Motion for Bill of Particulars (Rec. p. 10), requesting that the State supply the appellant with the date, approximate time, and location where each alleged incident took place. The State replied with a Bill of Particulars (Rec. p. 12).

alleging that the incidents took place on: November 29, 1976, at approximately 6:00 to 7:00 p.m. in a car; December 12, 1976, at approximately 8:30 p.m. at the appellant's home; and on December 30, 1976, at approximately 8:00 p.m. at the appellant's home. The appellant subsequently filed a Notice of Alibi (Rec. p. 16), covering the alleged incidents on November 29, 1976 and December 30, 1976. Upon receipt of the Notice of Alibi, the State amended its Bill of Particulars relating to November 29, 1976, and changed it to November 28, 1976. Evidence during the course of the trial proved conclusively that nothing improper happened on November 28, as will be discussed in Argument. Based on this proof, the State was permitted to waver from the 28th of November and to proceed without tying down a date. The appellant objected and moved for either a mistrial or a continuance in order to prepare for a different date. This Motion was denied (Tr. p. 63).

The only evidence against the appellant was the testimony of his former wife and his seven-year-old step-daughter, and Judge Palmer frankly admitted he was not persuaded by the testimony of the appellant's ex-wife. There was a great deal of conflicting testimony between the mother and daughter, and Dr. Bergman testified that the daughter's version of what happened with reference to penetration was impossible (Tr. pp. 76-77).

ARGUMENT

POINT I

THE TRIAL COURT PERMITTED THE STATE TO PRESENT EVIDENCE OF A CRIME AS BEING COMMITTED ON AN UNSPECIFIED DAY OTHER THAN AS ALLEGED IN THE BILL OF PARTICULARS, AND IN DOING SO, DENIED THE APPELLANT HIS RIGHT TO PURSUE HIS ALIBI.

The State alleged in its original Bill of Particulars that the appellant sexually abused his step-daughter on three occasions, to-wit: November 29, 1976; December 12, 1976; and December 30, 1976. A Notice of Alibi was filed as to November 29, 1976 and December 30, 1976, and upon receipt of said alibi, the State amended its Bill of Particulars from November 29, 1976 to November 28, 1976. The appellant did not file a new Notice of Alibi as to November 28, 1976, electing to prove that nothing criminal happened on November 28, 1976, through the State's own witnesses.

Initially at trial, the State's Witness, Sandra Wadman, contended that the incident took place on November 29, 1976, but the evidence and exhibits brought out during Sandra Wadman's testimony (Tr. pp. 31, 53-60) showed that nothing could have happened on November 28. When the Court continued to permit evidence alleged to have taken place on November 28, 1976, the appellant moved for a mistrial and in the alternative, a continuance to permit the preparation

of his defense for a different day (Tr. pp. 61-63). The Court denied the Motions and the appellant was required to continue with the trial (Tr. p. 63).

In State vs. Nelson, 52 Utah 617, 176 Pac 860 (1918), the defendant had been charged with an act of Carnal Knowledge on July 13, 1917. Defendant had had a preliminary hearing based on the July 13th incident. At trial, the State relied upon evidence of carnal knowledge on July 15, 1917. In reversing the decision of the Trial Court, it was held as follows, at page 864:

"We are clearly of the opinion in this case that the court erred in overruling defendant's objection to the testimony offered by the state to prove a different transaction from the one for which the defendant had been given a preliminary examination. It follows as a necessary corollary from this conclusion that the court erred in instructing the jury to the effect that defendant might be convicted for such transaction."

This Court has further held that to permit the State to waver from a specified date of an offense is, in effect, to deny the defendant defense of alibi. State vs. Waid, 92 Utah 297, 62 P 2d 647 (1937).

In United States vs. Armco Steel Corp., 255 F. Supp 841 (1966), the District Court of California discussed the nature of a Bill of Particulars and held as follows, at page 846:

"[2] A bill of particulars once obtained concludes the right of all of the parties that are affected by it. And he who has furnished the bill of particulars under it must be confined to the particulars he has specified as closely and effectively as if they constituted essential allegations in a special declaration."

The Utah Supreme Court also went into the nature of a Bill of Particulars in State vs. Spencer, 101 Utah 274, 117 P 2d 455 (1941), as follows; at page 458:

"The bill of particulars is a pleading on the part of the state which limits or circumscribes the area or field, the transaction, as to which the state may offer evidence. It does not follow that the state may offer evidence of any matters set out in the bill of particulars. Only those matters in the bill of particulars which come within the charge stated in the information, is open to investigation and evidence. The bill of particulars thus limits the field of inquiry under the charge laid in the information, but cannot extend or expand the field beyond the elements constituting the crime charged."

Since the appellant in this case planned to, and in fact did use, the State's Witness to prove nothing happened on November 28, 1976, and in effect proved his alibi for that day, the State should not have been allowed to bring out evidence of some other, unspecified day. This principle has been supported by this Court in State vs. Cooper, 114 Utah 531, 201 P 2d 764 at 769, where it reaffirmed State vs. Waid, supra, as follows:

"[9] The issue of time may be very important where defendant's defense is alibi. See State v. Waid, 92 Utah 297, 67 P 2d 647."

Based on the nature of the State's case and the weaknesses in it as discussed in Point II, the Court's consideration of the State's evidence concerning the alleged incident of November 28, 1976, was extremely prejudiced and denied the appellant his right to prepare and present an alibi for whenever the incident was alleged to have taken place.

POINT II

THE STATE'S EVIDENCE WAS TOO UNRELIABLE AND INCOMPETENT TO JUSTIFY THE VERDICT.

The State called four witnesses to prove its case, and only two of those witnesses testified as to matters of an incriminating nature, to-wit, Sandra Wadman Painter, the appellant's former wife, and Lisa Wadman, the appellant's step-daughter.

Sandra Wadman Painter testified that she in fact watched the appellant fondle her daughter on two occasions. The first occasion was the incident in November, 1976, in which she was unable, during trial, to determine the date. On that occasion, however, she testified that she was driving the family car and the appellant was in the back seat with

Lisa. She said that she adjusted the rear view mirror and watched the appellant put his hand down Lisa's pants (Tr. pp. 11-15). She claims this happened while she was driving from Ogden to Syracuse (Tr. p. 15). Sandra acknowledged that she never said anything to the appellant (Tr. p. 16).

Mrs. Painter also testified that on November 12, 1976, the appellant came home from work and went into the bathroom where Lisa and her sister were taking a bath, and that she watched through a crack in the bathroom door while the appellant rubbed Lisa's genitals at a time when Lisa was standing in the tub (Tr. pp. 16-21). But again, she acknowledged that she did not discuss this incident with Gene or with anyone else (Tr. 21). It seems rather difficult to believe that the mother of a seven-year-old daughter would stand idly by and watch her daughter being molested and say or do nothing about it. In reviewing Sandra's testimony as a whole, it is obvious that she and the appellant argued considerably, and for her not to even bring up the subject during an argument is unbelievable. The question must be then asked, Why didn't she? Of course, the appellant's answer is that these incidents never happened.

The appellant does contend that Sandra's reason for so testifying was out of vindictiveness in connection with their divorce. In that respect, we draw the Court's

attention to Defendant's Exhibit 1 which was a note to the appellant written either the day or the day before she filed the criminal Complaint (Tr. p. 36). That note read as follows:

"If you know what's good for you, you will get the hell out of here. I have filed for divorce so you can expect papers anytime. You already have your clothes packed so it won't take you long. You better expect a sad ending, you will never be forgiven for what you have done. I will burn you if it's the last thing I do. For someone who bitches because the kids make a mess, you sure are one to talk. If it's only you living here, you sure keep a messy house. You can't even clean up water off the floor when the machine floods over. Why can't you do your own dirty dishes or even make your bed once in awhile. How does it feel being single again? Are your meals any good?"

It seems rather ironic that Sandra would complain about the things she complained about and did not mention Lisa. We draw the Court's attention to the sentence that states: "I will burn you if it's the last thing I do."

Sandra's testimony should be reviewed in its entirety in order to get the feel of her attitude, particularly in light of Judge Palmer's statement at the time of sentencing when he said, "I am not persuaded by your wife... I have to be frank." (Tr. p. 224).

The testimony of Lisa differed with that of her mother in many respects. She testified that the incident

in the car happened on the way from Syracuse to Ogden (Tr. p. 98), the opposite direction testified to by her mother. She also said Gene took her pants down to her knees (Tr. p. 110), whereas her mother said Gene put his hand down inside her pants. Lisa also said that the incident in the car took place while she was sitting next to Gene (Tr. p. 97), when Sandra said that Lisa was sitting on his lap when it happened. It should be noted, however, that, after going to lunch with her mother during the noon recess, Lisa changed her testimony so that it was in agreement with her mother's (Tr. 104-105).

Lisa also testified that the incident in the bathroom took place while she was sitting in the tub (Tr. p. 104) whereas her mother testified that Lisa was standing (Tr. p. 105).

Lisa also testified that the appellant inserted his finger into her "pee-pee" about an inch and a quarter to two inches (Tr. p. 116). This was absolutely contradicted by Dr. Bergman when he testified that Lisa's hymen was still intact (Tr. p. 73), and that a penetration of only one-half to one centimeter would be all that was necessary to come in contact with the hymen.

As to the alleged incident on December 30, 1976, the appellant contends that his alibi for that date as

confirmed by Terry Smith (Tr. pp. 141-145) and Cindy Smith (Tr. pp. 151-153) was very strong, and the State did not overcome its burden of disproving beyond a reasonable doubt. State vs. Wilson, Ut 2d , 565 P 2d 66 (1977).

CONCLUSION

Based upon the appellant's inability to present an alibi, due to the State's wavering from the Bill of Particulars, and the basic unrliability of the State's witnesses, the appellant respectfully requests this Court to order the charge against him dismissed, and in the alternative, that he be granted a new trial.

Respectfully submitted by the Attorney for the
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