1978

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

Utah Supreme Court

H. Don Sharp; Attorney for Defendant-Appellant;
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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GENE H. WADMAN,

Defendant-Appellant.

Case No. 15400

BRIEF OF RESPONDENT

APPEAL FROM THE VERDICT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE J. DUFFY PALMER, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 15400
-vs-	:	
GENE H. WADMAN,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by Information with the Crime of Forcible Sexual Abuse, a third degree felony, in violation of Utah Code Ann. § 76-5-404.

DISPOSITION IN THE LOWER COURT

The case was tried to the Honorable J. Duffy Palmer, who found appellant guilty as charged. At sentencing, Judge Palmer reduced the crime to a class A misdemeanor and placed appellant on probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the judgment of the court below.

STATEMENT OF FACTS

Sandra Painter, the ex-wife of appellant, testified that prior to separating from appellant on December 30, 1976, she had been married to him for three years and that although no children were born of that union, her three children from a previous marriage - Monica (4), Shaun (5), and Lisa (7) - lived with them (T.8).

Ms. Painter testified that she had been an eyewitness to two incidents of child molestation by appellant in which he fondled the genitals of her daughter Lisa. The first instance occurred on or about November 28, 1976, when Ms. Painter was driving the family home to Syracuse from appellant's sister's house in Ogden (T.9-10). Although appellant had driven to Ogden to pick up his wife and her children, Ms. Painter testified that she drove home because appellant had been drinking and that Lisa and appellant sat in the rear seat of the Mazda wagon during the ride while Shaun and Monica sat behind the rear seat (T.11-12).

As she drove along the freeway in Davis County, Ms. Painter looked in the rearview mirror and observed Lisa sitting on appellant's lap and appellant's hand inside the front of her pants (T.14). She stated the activity lasted less than five minutes (T.15). Ms. Painter continued driving home and admitted in court that she never confronted appellant about either incident before lodging a criminal complaint, stating that she had not

known how to handle the situation and she was scared of appellant (T.21,27,38).

The second incident occurred on December 12, 1976, when Ms. Painter looked through the slightly open bathroom door and saw appellant, who had been drinking, rubbing Lisa's genitals as she stood in the bathtub, while her younger sister Monica sat playing in the tub (T.16,19,21). Ms. Painter observed the activity for three or four minutes (T.20). She testified that she heard appellant ask Lisa if it felt good; appellant subsequently placed Lisa on his lap where he spread her legs and continued to fondle her genitals and kiss her stomach for a minute or so (T.21). Ms. Painter stated she then went back to the kitchen and called everyone to supper (T.21).

Ms. Painter further testified that on December 30, 1976, she and appellant, who was very drunk, quarrelled. He took a shower and dressed only in his undershorts, spent a few minutes with Lisa in her bedroom (T.23-24). Appellant then left the home to go to a party at a friend's home, where he remained overnight (T.144-145). That same evening, Ms. Painter and her three children moved from the home (T.22) and she and Lisa had their first conversation about the sexual fondling. Ms. Painter testified that she told Lisa that she knew what was going on and wanted Lisa to tell her about it (T.127). Shortly

thereafter Ms. Painter filed for divorce and contacted the County Attorney's Office (T.25).

On cross-examination, some confusion arose as to the accuracy of the November 28 date as evidence was introduced which showed that on that date the family had gone to a movie and out to dinner (T.58-61). Ms. Painter admitted that the incident could have occurred on the previous Sunday but was sure that it happened on a day when she and Pam, appellant's sister, had gone shopping and appellant had come to Ogden to pick her up and drive back to their home in Syracuse (T.60-61).

Seven-year-old Lisa Wadman Painter testified that the first episode occurred near Thanksgiving in their car as she and her family were taking Tara home (T.85). (Tara is appellant's daughter from a previous marriage (T.8)). She reported that as she sat next to appellant in the rear seat, he pulled down her pants and put his finger in her "pee-pee" (T.85-86). Later Lisa said that after thinking about that event some more, she now believed that she was sitting on appellant's lap, adding that he had not been drinking (T.105-107).

Lisa also described the bathtub episode, testifying that appellant put his finger inside of her as she and Monica sat in the tub (T.88,115). She reported that during this time he asked her if she was "boy crazy" and then lifted Lisa out of the tub, placing a towel under Lisa as he sat her on his

lap (T.89,116). Again he inserted his finger (T.117). In her childish language Lisa made clear to the court that appellant's finger was not then-or-ever inserted into her rectum (T.119). She also reported no pain (T.116).

Finally, Lisa described the third occasion of sexual encounter with appellant. She testified that one night appellant entered her bedroom where Lisa stroked his penis ("pee-pee") until "something came out" and appellant again inserted his finger in her vagina (T.88,120).

Dr. Daniel Bergman testified that he examined Lisa on January 11, 1977, and found no evidence of any trauma to the vaginal or rectal areas, nor to the legs or lower abdomen (T.72), noting that vaginal insection could have been only one-half to one centimeter, as deeper penetration would have damaged the hymen (T.73,77). Finally, he reported that rectal insertion would have caused Lisa pain and discomfort (T.77).

Appellant testified on his own behalf, denying all charges (T.190,195,196), stating that Lisa must have been told to lie about him (T.198) and blaming the entire affair on Ms. Painter's vindictiveness over their marriage break-up, a bitterness he claimed was supported by the letter entered as Defendant's Exhibit No. 1 (T.197).

ARGUMENT

POINT I

AS THE BILL OF PARTICULARS GAVE ONLY AN APPROXIMATE DATE FOR THE COMMISSION OF THE FIRST MOLESTATION, AND THE DATE WAS NOT CRUCIAL TO THE OCCURRANCE OF THE EVENT, THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TESTIMONY WHICH RELATED THE EVENT TO A DIFFERENT DATE.

The original Bill of Particulars, dated April 28, 1977, included the following information about the first allegation:

> "3. A. The first incident occurred on or about November 29, 1976, at approximate (sic) 6:00 or 7:00 p.m. in a car while in transit from Ogden, Utah, to Syracuse, Utah. . .
>
> 4. A. Incident #1: Those present were Sandra Wadman, Lisa Wadman, Monica Painter, Shaun Painter, and the defendant. . .
>
> 5. A. Incident #1: It is alleged that the defendant, while in the back seat of the family stationwagon, did fondle the genital area of Lisa Wadman." (R.12-13)

The Amended Bill of Particulars, dated June 13, 1977 (R.18-19), changed the date of the first incident from on or about November 29, 1976, to on or about November 28, 1976. From the language of both the Original and Amended Bills, it is clear that the prosecution was <u>not</u> going to prove that the molestation necessarily occurred on either November 28th or November 29th; rather the date was an approximation,

indicating that the incident occurred around the Thanksgiving holidays, although it may have actually happened a few days before or a few days after the date given in the Bill of Particulars. Therefore, the limiting factor is not when the incident occurred, but where; for the Bill states that the molestation definitely occurred in appellant's car while the family was in transit from Ogden to Syracuse.

Given these circumstances, the prosecutor did not have to submit an Amended Bill as November 28 is "on or about November 29". Nevertheless, the state wanted to provide a date which seemed to be more likely than other dates, acknowledging by the language of approximation that the state would not and could not prove conclusively the date on which Allegation #1 occurred.

If the allegation had been linked to an event which could have been proven to have occurred on a specific day i.e. arson, bank robbery or murder, then that date would be crucial and an alibi defense perhaps a perfect defense. Here, time was not of the essence of the crime and the changing of the approximated date in the Bill of Particulars violated none of appellant's constitutional rights. In an analogous situation, the court in State v. Rohletter, 108 Utah 452, 106 P.2d 963 (1945) held that under Utah Code Ann. § 105-17-3 (1943) (now

§ 77-17-3) no amendment could be made which would essentially alter the nature of the case. So as to prejudice the defendant in making his defense. Here, although it was the Bill of Particulars which was amended and not the Information, the principle is the same; for amendments and deviations are allowed when they are mere changes in form but not substance. Appellant's defense was that he did not commit the crimes, although a notice of alibi prompted the changing of the date of Allegation #1. That denial defense would be the same on whatever day was established as the date he sat in the rear seat with Lisa on the drive from Ogden to Syracuse. Therefore, appellant suffered no prejudice when the court allowed evidence to come in that related to a different, non-specific day.

The private nature of sexual abuse crimes often present difficulty in attempting to determine and prove their exact dates of commission. The general allegation of the Information against appellant, excerpted below and attached hereto, reveals the wide span of time which covered the three incidents and by implication acknowledges that specific times for all of them might be unknown:

> ". . .From November, 1976, until December, 1976, at Syracuse. . .the above-named defendant did. . .touch the anus or any part of the genitals of another,

> Lisa Painter, or otherwise take indecent liberties with her or cause her to take indecent liberties with himself, with intent to arouse or gratify the sexual desire of any person, without the consent of the other."

It is noteworthy that after the Bill of Particulars was amended no new alibi defense was raised. The instant case is, therefore, similar to State v. Mecham, 23 Utah 2d 18, 456 P.2d 156, 157-158 (1969) where appellant was convicted of indecent assault against an eleven-year-old girl. The court made the following pertinent observations in upholding his conviction for the crime which was alleged to have occurred on Friday, August 2, 1968:

> "In support of his attack upon that finding, defendant places his reliance upon his denial and the fact that there was evidence from his wife, his 18-year-old son, his 17-year-old foster daughter, and a 13-year-old neighbor boy, which would tend to indicate that the defendant was around his home and in the presence of one or more of them during the afternoon of August 2nd and, thus, could not have committed the offense. It is noteworthy that the exact date of the offense was never made a particular issue at the trial by notice of alibi or otherwise, except as the witnesses were questioned as to what happened on that date, . . ."

That case also was tried without a jury and the court cited comments by the trial judge which while acknowledging possible mistake in the August 2nd date, nevertheless provided a basis

for his judgment against appellant:

> "I think the little girl was telling the truth. The event may not have occurred on the 2nd day of August, but on some date very close to that time."

In the case at bar, appellant may well have proved beyond a reasonable doubt that the molestation did not occur on November 28. However, he admitted that he and his family had made numerous visits to Ogden, where Tara lived, and that on some occasions he had picked up his wife there to drive her home (T.185), and he could not deny that the particular trip in question from his sister's home to his had occurred (T.199). He also admitted that on one occasion he had ridden in the back seat while his wife drove home (T.184-185). Therefore, the heart of the state's case concerning Allegation #1 was Lisa's testimony about the incident which she admitted occurred near Thanksgiving (T.85). Thanksgiving was November 25 (T.53) and "on or about November 29" would include a date defined as "about Thanksgiving."

Under this analysis, appellant's argument that the incident occurred outside the parameters of the Bill of Particulars is flawed. Time was not of the essence of the crime and the state proved to the satisfaction of the trial jury

that on one of the Syracuse-Ogden-Syracuse trips, near Thanksgiving, appellant beyond a reasonable doubt fondled the genitals of his seven-year-old step-daughter. That finding is enough to sustain the verdict, and even if the actual date of the incident is still undetermined, affirmation is in order, for every element of the offense was proved beyond a reasonable doubt and the establishment of a particular date for Incident #1 related only to evidentiary matters and potential problems of proof. Because appellant's defense suffered no detriment or prejudice, relying on denial and testimony of friends, and the Bill of Particulars fully harmonized with the Information and provided adequate information about the incidents so as to enable appellant to understand the nature of the charges against him and prepare a defense, respondent urges this court to reject appellant's argument.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

The principles governing the standard of review for appeals based on allegations of insufficient evidence have been published and affirmed numerous times. A succinct statement of those principles appears in State v. Ward, 10 Utah 2d 34, 39, 347 P.2d 865 (1959):

> "The rules governing the scope of review on appeal as to the sufficiency of the evidence to sustain the verdict are well settled: that it is the prerogative of the jury to judge the credibility of the witnesses and to determine the facts; that the evidence will be reviewed in the light most favorable to the verdict; and that if when so viewed it appears that the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed."

In the instant case the appellant waived a jury trial and the district judge became the sole trier of fact. However, the same standard of review applies to his findings and his judgment and except for compelling reasons, his findings will not be disturbed.

Cannon v. Wright, 531 P.2d 1290 (Utah 1975), is particularly helpful for there the court held that it is the prerogative of the trial court to determine what aspects of the evidence he will believe and that in so doing, the trial judge may be selective, choosing those portions of the testimony of any witness which he thinks has the greater probabili of being true.

In the same vein is the earlier case of DeVas v. Noble, 13 Utah 2d 133, 369 P.2d 290 (1962), cert. denied 83 S.Ct. 37, 371 U.S. 821, where the court found that due to the function of the trial judge as determiner of facts and his

advantaged position in close proximity to witnesses and trial, it is his privilege to be the exclusive judge of credibility of witnesses, weight to be given the evidence, and findings to be found therefrom. Respondent submits that these holidays govern the case at bar.

In his brief, appellant argues that neither Ms. Painter nor Lisa Wadman Painter were believable because Ms. Painter was vindictive, bent on revenge against appellant, who had left her; and Lisa was being controlled by her mother, on occasion changing her testimony, giving testimony inconsistent with her mother's, and making statements about appellant's digital insertion which were likely untrue. Respondent's position is that the trial judge carefully considered these factors in drawing his conclusions, and that because some of appellant's allegations are true, the judgment of guilty beyond a reasonable doubt is even more strongly supported and soundly based.

Lisa Wadman Painter did give testimony inconsistent with her mother's, acknowledged in respondent's Statement of Facts and detailed at page ten of Appellant's Brief. These inconsistencies actually make her testimony more believable, rebutting appellant's subtle allegation that Lisa and her mother were in collusion to decieve the court. Specifically, the

following excerpts from Lisa's testimony reflect the frankness of her answers to sometimes difficult questions during lengthy direct and cross examinations. Respondent submits that the trial court reasonably was persuaded by her testimony that this seven-year-old little girl was being subjectively truthful even if she was unclear on some matters, and that her credibility being established, her testimony was deserving of great weight.

Mr. Gennerson first got assurances from Lisa that she would tell the whole truth (T.84). He subsequently asked Lisa if either he or Ms. Painter had told her what to say or to change her story and Lisa replied that they had not (T.90-91). When asked why she had changed her testimony about her sitting on appellant's lap in the car and not next to him she answered:

"A. Because I wasn't sure that time.

Q. Are you sure now.

A. Yes.

Q. What happened to make you get sure?

A. I thinked.

Q. Who?

A. I thinked.

Q. You thinked, you have been thinking about it? Did somebody talk to you to ask you to be sure if you wasn't sitting on his lap then?

A. No." (T.105)

On the matter of the digital insertion, Lisa initially said that she couldn't remember how far into her appellant pushed his finger, stating only that it didn't hurt (T.90,108). Later Mr. Sharp stated to her that when they had talked before trial she had said that appellant had inserted his finger about "this far" (holding his fingers spread 1 1/4 to 2 inches) and asked if that was right. Lisa replied, "Yes." (T.116). Although Dr. Bergman did refute her last response (T.73), respondent submits that her third response, inconsistent with her first two, was likely a response to Mr. Sharp's suggestion of that depth, and that her earlier testimony on the subject was more credible, those questions having been non-suggestive.

An exchange which rebuts the insinuation of callusion occurred at T.115-116, during cross-examination:

> "Q. . . .Were you standing up in the tub or were you sitting down, where were you?
>
> A. Sitting down.
>
> * * *
>
> Q. Now is that something you remember pretty well?
>
> A. Yes.
>
> Q. You are sure you were sitting in the tub; is that right?
>
> A. Yes.
>
> * * *

Q. Now, if your mommy testified in here earlier today that she saw Gene playing with your pee-pee when you were standing up in the tub, I guess that's wrong, is that right?

A. But I was sitting down."

Respondent submits that taken as a whole and exemplified by these excerpts, Lisa's testimony merited the great weight the trial judge gave it, revealed in his comments at sentencing:

> "I was persuaded by this little girl even to the point she corrected counsel when they would make statements in examining that she felt were not true. I was impressed with her frankness." (T.224)

Respondent does not rely upon the testimony of Ms. Painter, acknowledging that the trial judge did not find persuasive (T.224), but refusing to speculate upon his reasons for so finding. However, based upon Lisa's testimony, and th of other witnesses and appellant himself, giving each the due credibility, the trial judge decided the facts of the case and found appellant to be guilty as charged. He had no reasc able doubts:

> "Mr. Wadman, if I had to sit and listen to what I had to listen to the other day, if I had to listen to it all over again, I would have to give the same decision." (T.224)

Supported by the principles of Ward, Cannon, and

DeVas, respondent requests this court to uphold the judgment of the court below.

CONCLUSION

Because the alleged incidents were proven to have occurred within the dates supplied in the Bill of Particulars, and the evidence amply supports the judgment, respondent urges the court to affirm the judgment of the trial court.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

STATE OF UTAH, :

Plaintiff, :

vs. : INFORMATION

GENE H. WADMAN, : No. ~~11611~~ 2678

Defendant. :

GENE H. WADMAN, having heretofore been duly committed by Cornell M. Jensen, a committing magistrate of this County to this Court, to answer this charge, is accused by the County Attorney of Davis County, by this Information, of the crime of FORCIBLE SEXUAL ABUSE (76-5-404 UCA), a felony of the third degree, as follows: From November, 1976, until December, 1976, at Syracuse, County of Davis, State of Utah, the above-named defendant did, under circumstances not amounting to rape or sodomy, or attempted rape or sodomy, touch the anus or any part of the genitals of another, Lisa Painter, or otherwise take indecent liberties with her or cause her to take indecent liberties with himself, with intent to arouse or gratify the sexual desire of any person, without the consent of the other.

MILTON J. HESS

DAVIS COUNTY ATTORNEY

By Rodney S. Page

Rodney S. Page

Deputy County Attorney

Preliminary hearing was waived by the defendant on the 23rd day of March, 1977.

The offense set forth in this Information carries a penalty upon conviction of a term of imprisonment of up to five years