

1978

## State of Utah v. Gary William Daniels : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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:  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

GARY WILLIAM DANIELS, :

Defendant-Appellant. :

Case No. 15509

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:  
BRIEF OF RESPONDENT  
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APPEAL FROM A VERDICT OF GUILTY IN THE  
THIRD JUDICIAL DISTRICT COURT, IN AND  
FOR SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE JAY E. BANKS, JUDGE.

-----  
ROBERT B. HANSEN,  
Attorney General

MICHAEL L. BARNES,  
Deputy Attorney General

CRAIG L. BARNES,  
Assistant Attorney General

236 State Capitol  
Salt Lake City, Utah

Attorneys for Respondent

P. JOHN HILL

Salt Lake Legal  
Defender Association  
343 South Sixth East  
Salt Lake City, Utah 84102

Attorney for Appellant

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## RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the verdict of the lower court.

## STATEMENT OF THE FACTS

The facts in this case are not disputed. Sometime during the evening of June 14, 1977, the appellant and a companion took a 1968 Corvette from the sales lot of Midvalley in Sandy, Utah (T.48,7).

The appellant stated that he was in Salt Lake City to visit relatives, and that his residence was in Alameda, California (T.46). During his stay in Salt Lake the vehicle had used to drive from California to Salt Lake was impounded (T.46) and he was unsuccessful in securing its release (T.47). The appellant was unable to borrow money from members of his family, and testified that he took the car to get to his home in California (T.47).

The appellant and his companion set out for California in the evening of June 14 and were stopped by a California Highway Patrolman outside of Turckee, California the next morning, after a chase in which the cars drove at speeds well over 100 miles per hour and the engine in the Corvette blew out (T.28-29). The owner of the lot from which the car was taken testified that at the time he got the car back, about 30 days later, approximately \$1750 worth of damage had been

incurred (T.8). Prior to the car's removal, it had been rebuilt (T.6).

The appellant was booked for reckless driving and transported to the Nevada County Sheriff's Office (T.31). At that time he represented that he had purchased the car for \$1875 some four or five months earlier (T.33). Also, at this time the car had a Utah license plate on the rear (T.38).

The appellant made no attempt to alter the vehicle identification numbers on the car (T.35), and at trial, testified that at the time he took the car he only had \$15.

#### ARGUMENT

#### POINT I

THE CROSS-EXAMINATION OF THE DEFENDANT ABOUT FACTS SURROUNDING THE INCIDENT WAS PROPERLY ALLOWED BY THE TRIAL COURT.

The appellant admitted at trial that he did steal the automobile from the sales lot (T.47), and his sole defense was that he did not intend to permanently deprive the owner of its use or value. Whether or not the appellant intended to return the car can only be determined from the facts surrounding the case. It would be absurd to expect the appellant to admit that he intended to permanently deprive the owner of the car when his intentions are dispositive of his guilt. Webber v. State,

The cross-examination complained of by the appellant is as follows:

"Q It only cost you \$15.00 to get gas to go from here to Truckee, California?

A No.

Q Where did you get the rest of your money for gas?

A My friend had a couple dollars, and, then, there's other ways.

Q Would you like to elucidate?

MR. HILL: I'm going to object.

THE COURT: Overruled.

Q (BY MS. MARLOWE) Tell me how you got gas between here and California.

A What you call a garden hose.

Q What do you mean by garden hose?

A Well, it's a piece of garden hose about six feet long. You insert into a gas tank, which is commonly known as siphoning.

Q You siphoned gas or you stole gas to get to California?

A Yes, because I used all my money up before I even did that." (T.51, lines 9-27)

The law in Utah is quite clear on the issue of admission of other bad acts: evidence of prior bad acts or crimes is not admissible if it merely disgraces the accused



or shows a propensity to commit crime.

"However, where evidence has special relevancy to prove the crime of which the defendant stands charged, it may be allowed for that purpose; and the fact that it shows another crime will not render the evidence inadmissible."

State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 at 415 (1961);

State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969).

Evidence is also admissible if it tends to prove that the defendant had the intent necessary to commit the crime.

State v. Torgerson, 4 Utah 2d 52, 286 P.2d 800, (1955).

Rule 55 of the Utah Rules of Evidence makes specific reference to the admissibility of evidence when relevant to prove intent:

". . .subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity."

The evidence would tend to discredit his claim that he did not intend to permanently deprive the owner of the vehicle. State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972). The limitations on Rule 55 do not affect admissibility in this court.

Wigmore states that "we are further reenforced by the fundamental canon that admissibility for one purpose is not affected by inadmissibility for another." § 218, Wigmore, Third Edition.

The appellant has failed in his brief to distinguish the inadmissibility of prior bad acts from the admissibility of evidence of acts concurrent with the crime charged. The testimony complained of is an inadvertent admission of a crime committed during the course of the theft of the automobile. The problem presented by the testimony is one of balancing the probative value of the evidence against the danger of prejudice to the defendant. State v. Manrique, 271 Or. 201, 531 P.2d 239 (1975). The sole issue in the case at bar was the intent of the defendant, and the testimony complained of was probative of that issue.

There are numerous cases that discuss the admissibility of "concomitant parts of the criminal act." Wigmore on Evidence § 218 (Third Edition). Many cases deal with instances in which the defendant has been charged with one violent crime when he has in fact committed several at the same time. State v. Gibson, 565 P.2d 783 (Utah 1977); State v. Izatt, 96 Ida 667, 534 P.2d 1107 (Idaho 1975). These cases refer to the need to present the entire picture of the crime to the jury in allowing evidence of other concurrent crimes. However, the "complete picture" theory is not limited to violent crimes. In State v. Baran, 25 Utah 2d 16, 474 P.2d 728 (1970), the appellant went on a spree that included a robbery of a gas station, a robbery

of a service station and another establishment, the theft of a car, and a conspiracy to rob a theatre and cafe. The defendant was convicted for his role in the robbery of the gas station, and on appeal alleged prejudicial error after the trial court permitted his accomplice to testify as to the other crimes committed on the same night as the crime for which he was charged. The court took note of State v. Lopez, supra, and rejected his appeal.

Tillman v. State, 820 O.Cr. 276, 169 P.2d 223 (1946) involved a theft of an auto by three boys. The issue in Tillman was the same issue as is before the court in the instant case: the intent of the appellant to either retain or return the car. In the Tillman case the prosecution was allowed to introduce evidence that indicated the defendant, after stealing the car, broke into a cafe and then obtained gas without paying for it during the time he still had the stolen car. The court admitted the evidence of the other crimes as part of the *res gestae* of the crime charged, and at 169 P.2d 227 said:

"It certainly became competent for the state to trace all the actions of the accused and his associates during their asportation of the stolen property for the purpose of showing whether their actions were such as to indicate a purpose to permanently deprive the owner of his property."

The testimony complained of in the present appeal

was not an attack on the credibility or truthfulness of the defendant. Nor was it designed to show that the defendant had a prior history of bad acts. At trial, the appellant's attorney made an effort to show that the appellant was not bent on crime, and that he was merely trying to get home in the only way he could. However, his commission of other crimes in the course of his efforts to get home is probative of his general intent, which was the only contested issue at trial. There was a legitimate purpose to be served by the evidence, and the fact that it may also show the commission of another crime will not render it inadmissible. State v. Mason, 530 P.2d 795 (Utah 1975).

The admissibility of evidence of other crimes, including the balancing of its probative value against the danger of prejudice, is a matter to be left to the discretion of the trial court in each case, subject to reversal only where "clearly wrong." State v. Gibson, supra. In looking at the total circumstances of the case, and at the abstract nature of the intent issue which was determinative of the case, the trial judge acted properly in permitting the cross-examination to proceed over appellant's objection. The testimony was probative and relevant.

The appellant, in his brief (p.7) refers to the judge's improper assumption that items had been stolen from

vehicle, and his failure to instruct the jury to disregard the testimony complained of (T.54). The judge's comments regarding the stereo equipment were made out of the presence of the jury, and there was no need to instruct them to disregard those comments. In view of the fact that the testimony concerning the siphoning was properly admitted there was no need to instruct the jury to disregard that testimony.

#### POINT II

THERE WAS ADEQUATE EVIDENCE PRESENTED AT TRIAL TO CONVINCE A REASONABLE JUROR THAT THE APPELLANT WAS GUILTY OF THE CRIME FOR WHICH HE WAS CONVICTED.

The appellant claims that the State has failed to meet its burden of proving that he had the requisite intent for the crime of theft. In addition, the appellant states that in light of State v. Cornish, 568 P.2d 360 (Utah 1977) and State v. Romero, 554 P.2d 216 (Utah, 1976), the State must prove

"beyond a reasonable doubt that the defendant had a conscious objective to deprive the owner of the vehicle permanently or for such an extended period of time that a substantial portion of the economic value is lost." (Appellant's brief, pp. 10-11).

During the course of the trial, the appellant moved to dismiss the action based on this same contention (T.39). The trial

judge noted that the appellant had attached a Utah license plate to the car and driven it across two state lines before he was apprehended (T.40), and concluded that these facts supported a prima facie case against the appellant.

Utah Code Ann. § 76-6-404 (1953 as amended) states:

"A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof."

Section 76-6-401 defines the terms used in § 76-6-404 in the following manner:

"(1) 'Property' is anything of value. . .

(3) 'Purpose to deprive' means to have the conscious object: (a) to withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or (b). . . (c). . .

(4) 'Obtain or exercise unauthorized control' means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement."

The appellant does not contend that the State has met its burden of proof in regards to § 76-6-401(1) and (4). There remains then only the need to show that appellant acted with an intent to permanently deprive.

The prosecution had no way to prove by direct evidence what the appellant's actions would have been after he arrived

at his intended destination of Alameda, California. While it is true that the prosecution carries the burden of proof (Cornish, supra), the Romero court stated at 554 P.2d 218 that

"[T]he intent to steal or unlawfully deprive the rightful owners of their property can be inferred by defendant's conduct and the attendant circumstances testified to by the witness."

This was essentially the position of the Illinois Supreme Court in People v. Norris, 362 Ill. 492, 200 N.E. 330 (1936), where they held that possession coupled with evidence of flight is sufficient to sustain a verdict of auto theft. Circumstantial evidence is sufficient to prove intent. State v. Joseph, 510 P.2d 69 (Ariz. App. 1973); State v. Romero, supra. The Arizona court in State v. Jackson, 101 Ar. 399, 420 P.2d 270 (1966), dealt with the issue confronted here and stated that:

"In considering the evidence of appellant's criminal intent, we adhere to the view that the wrongful taking of another's property, without his consent and with no apparent purpose of returning it, in the absence of explanatory circumstances, evidences an intent to deprive the owner permanently of his property." (Court's emphasis)

If there is a question as to whether or not the prosecution has met its burden of proof, "The matter of circumstances of the intent to deprive should be submitted to the trier of fact."

Cornish, supra, at 362.

The prosecution must make out a prima facie case to sustain its burden of proof, Romero, supra, which it did in this case. The intent of the appellant can only be construed from his conduct during the event itself. The jury is free to disregard the appellant's statement that he intended to park the vehicle in front of the police station in Alameda and they apparently did so. The jury also heard the testimony to the effect that the defendant represented to the California Highway Patrol that he had purchased the car several months prior to his apprehension (T.33), and that the defendant attempted to outrun the patrolman at the time he was arrested (T.28). This evidence is supportive of the jury verdict.

It is important to note that the trial court gave proper instructions for both the theft and joy-riding offenses (R.23-28), which included the statement that the burden of proof is on the prosecution (R.22,26,27). The standard for determining the insufficiency of evidence is set forth in Romero, supra, as follows:

"it [must] be so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime."

See also State v. Mills, 530 P.2d 1272, (Utah 1975); State v. Logan, 563 P.2d 811, (Utah 1977) and State v. Harless, 23 Utah 2d 128, 459 P.2d 210 (1969).



It is not the Supreme Court's prerogative to weigh evidence. That function is reserved for the finder of fact. State v. Fort, 572 P.2d 1387 (Utah 1977). This court needs only to decide whether or not the prosecution made out a prima facie case at trial.

#### CONCLUSION

The trial judge acted properly when he allowed the defendant to testify to the effect that he siphoned gas from other vehicles during the course of his trip. The testimony was probative of the appellant's intent. In addition, there was adequate evidence to support the jury verdict. Romero, supra.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

MICHAEL L. DEAMER  
Deputy Attorney General

CRAIG L. BARLOW  
Assistant Attorney General

Attorneys for Respondent