

1997

# Layton City v. Richard Wolfe : Brief of Appellee

Utah Court of Appeals

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O. 970422-CA

## IN THE UTAH COURT OF APPEALS

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LAYTON CITY,

Plaintiff/Appellee,

Case No. 970422-CA

vs.

Priority No. 2

RICHARD WOLFE,

Defendant/Appellant.

---

BRIEF OF APPELEE

---

Appeal from the Second District Court, Layton Department,  
Davis County, Judge K. Roger Bean

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PEALS

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## STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Utah Court of Appeals by virtue of Utah Code Ann. § 78-2a-3(e).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

**United States Constitution--Amendment V**--No person shall be held to answer to a capital , or other wise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**Constitution of Utah--Article I--Section 12**--In criminal prosecutions the accused shall have e the right to appear an defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trail by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

## STATEMENT OF THE FACTS

On January 27, 1996, the victim, Ms. Patricia Kling, called 911 from her home, but hung up before she spoke with a dispatcher. (R. at 22, 25, 48). The 911 dispatcher called Ms. Kling back and had a conversation with her, after which Layton Police Officers went to her home. (R.

at 29). Officers spoke with her upon arriving at her home, and Ms. Kling told them she had had a dispute with her boyfriend, the defendant Richard Wolfe, who had been drinking, but that he had left the residence and everything was fine, that there had been no physical altercation at that time, and that she was sorry for calling and inconveniencing the police department. (R. at 67, 79-80). Seeing no signs of injury or an assault, the officers left Ms. Kling's home. (R. at 67-68, 80).

Lieutenant Dave Nance, not feeling comfortable with leaving the home, phoned Ms. Kling from his car, and she answered. (R. at 81-82). Ms. Kling was crying and told Lieutenant Nance that there was a problem, that her boyfriend was still at the home, and that she'd been hurt. (R. at 82). Lieutenant Nance was responding to another call at that time, so he asked Officer Tom Hill, who had been with him initially, to go to Ms. Kling's home. Id.

Officer Hill arrived at Ms. Kling's home four minutes after he left the first time, and he was met at the door by Ms. Kling, who was crying. (R at 70). Ms. Kling was bleeding from her nose and mouth area and had a bloody tissue on her face and told Officer Hill that her boyfriend hit her in the face and had left the home. (R. at 71).

Ms. Kling also filled out a written statement for the police, which was admitted into evidence at the trial. (R. at 35, 127-28). That written statement indicated the defendant shoved Ms. Kling, she told him he would have to leave in the morning and find another place to live, and "he got angry and hit me with his fist in the nose." (R. at 111-12).

Officer Hill left the home and found the defendant hiding in a bush at the side of the house. (R. at 72). The defendant appeared to be intoxicated and told Officer Hill that he had hit Ms. Kling. (R. at 73). Officer Hill placed the defendant under arrest for assault, placed him in

his patrol car, and eventually took him to the Davis County Jail. (R. at 73-76). The defendant was handcuffed and walked without assistance to the patrol car, approximately fifty to sixty yards, not complaining of any injury. (R. at 74). During the time that Officer Hill drove the defendant to the jail, a trip of approximately ten minutes, and while the defendant was being booked into the Davis County Jail, the defendant made no mention that he was in any pain or that he had been assaulted in any way. (R. at 76).

That same night, Ms. Kling went to the Davis Hospital and Medical Center and saw Dr. Shae Holley, an emergency room physician. (R. at 50). When Ms. Kling arrived, she was tearful and distraught and had some swelling across the bridge of her nose, some red marks around her neck, and a minimal injury to her left wrist. (R. at 53-54). Ms. Kling told Dr. Holley her boyfriend had his hands around her neck and he hit her with a closed fist, giving her a bloody nose; at no time did she indicate to Dr. Holley that she had initiated the confrontation or injured her boyfriend. (R. at 54, 61).

At the trial held in this matter, Ms. Kling did not deny her out-of-court statements to the police and to Dr. Holley or the facts contained in those statements, but she testified that there was additional information not contained in those statements. (R. at 111). She testified that she was the aggressor and that she slapped the defendant after telling him he would need to find another place to live, and he was restraining her, so she kicked him in the groin with a steel-toed cowboy boot, and then he hit her in the face. (R. at 44, 46, 110-12).

The trial court convicted the defendant, indicating in its memorandum of decision that the court found the city's evidence persuasive and that the court did not believe Ms. Kling's in-court testimony or the defendant's testimony. (R. at 183). The defendant filed a motion to arrest



judgment, arguing that the court improperly convicted the defendant on Ms. Kling's out-of-court unsworn hearsay statement, and that the court improperly inferred defendant's guilt from the exclusions in his pre-*Miranda* statements. (R. at 186). The trial court denied the defendant's motion. (R. at 157). The defendant appeals this ruling. (R. at 232).

### **SUMMARY OF THE ARGUMENT**

An unsworn, uncorroborated, out-of-court statement standing alone is insufficient to support a conviction as a matter of law. In the case before the court, the trial court did base its conviction upon Ms. Kling's hearsay statements; however, the out-of-court statements were corroborated by other statements by Ms. Kling, both in court and out of court, by Ms. Kling's injuries, and by the defendant's statements and lack of injuries himself. Therefore, there was sufficient evidence to convict the defendant as a matter of law.

In addition, a defendant's decision to invoke his Fifth Amendment rights before *Miranda* warnings have been given cannot be used by the prosecution in its case in chief as evidence of a defendant's guilt. In this case before the Court, the defendant did not invoke his rights; he elected to speak and told the police what happened. Therefore, the fact that he did not tell officers that he had been hit or complained of any injury was properly considered by the trial court in determining his guilt.

### **ARGUMENT**

#### **I. There was sufficient evidence as a matter of law to sustain defendant's conviction.**

##### **A. Uncorroborated out-of-court testimony standing alone cannot sustain a conviction as a matter of law.**

The defendant argues the trial court erred when it denied the defendant's motion to arrest

judgment because the conviction was based upon the refuted hearsay testimony of the victim, Patricia Kling. The defendant asserted self-defense at trial, both through his own testimony and Ms. Kling's testimony; therefore, the City had the burden of proving the absence of self-defense beyond a reasonable doubt. State v. Knoll, 712 P.2d 211 (Utah 1985). Defendant relies specifically on two cases: State v. Ramsey, 782 P.2d 480 (Utah 1989), and State v. Webb, 779 P.2d 1108 (Utah 1989). These two cases involve felony sexual abuse charges. In each case, the defendant was convicted based solely on a single out-of-court hearsay statement by a very young victim. Id.

In State v. Ramsey, Count I alleged that the defendant caused his five-year-old son to take indecent liberties with his three-year-old daughter. Ramsey, 782 P.2d at 482. While both children testified at trial, neither testified that the defendant had caused the boy to engage in any sexual activity with the girl; "(t)he only probative evidence that defendant caused his son to take indecent liberties with the girl was an out-of-court hearsay statement allegedly made by the son during an interview with Harrison." Id. at 482-83. Harrison was a licensed social worker who interviewed both children. Id. at 482.

The Utah Supreme Court concluded that an out-of-court statement which is denied at trial by the declarant is insufficient by itself to sustain a conviction. Id. at 484. The Court went on to say that "when [out-of-court statements are] the only source of support for the central allegations of the charge . . . we do not believe that a substantial factual basis as to each element of the crime providing support for a conclusion for guilt beyond reasonable doubt has been offered by the Government." Id. (quoting United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979)). Further,

(o)ther cases have also held that uncorroborated, unsworn hearsay statements alone are

insufficient evidence to convict when later repudiated at trial. See Brower v. State, 728 P.2d 645, 647-48 (Alaska Ct. App. 1986); State v. Moore, 485 So.2d 1279, 1281 (Fla. 1986); State v. Allien, 366 So.2d 1308, 1311 (La. 1978); State v. White Water, 634 P.2d 636, 639 (Mont. 1981); Chambers v. State, 755 S.W.2d 907, 910 (Tex. Ct. App. 1988), review granted, No. 01-86-00520-CT. (April 26, 1989); Fernandez v. State, 755 S.W.2d 220, 222 (Tex. Ct. App. 1988), review granted, No. 01-87-1105-CT. (May 3, 1989).

Id.

In State v. Webb, the defendant was accused of aggravated sexual abuse of a child. Webb, 779 P.2d at 1108. The alleged victim was a female, eighteen months old at the time of the incident, who made a statement to her mother of “Ow bum” and “Ow bum daddy.” Id. at 1109. This statement was the only direct evidence linking the defendant to the abuse. Id. at 1115. The Utah Supreme Court stated that “(t)he law is that a single uncorroborated hearsay statement is not substantial evidence and not sufficient to support a verdict.” Id. at 1115 (citing United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979); Brower v. State, 728 P.2d 645, 647-48 (Alaska Ct. App. 1986); State v. Moore, 485 So.2d 1279, 1281 (Fla. 1986)). The child obviously could not be cross-examined on the statement, and the Court went on to conclude the “evidence is not sufficient as a matter of law to support a conviction.” Id.

**B. Ms Kling’s out-of-court statements were corroborated and therefore sufficient evidence existed as a matter of law to support defendant’s conviction.**

These two cases are clearly distinguishable from the case at bar, primarily by the existence of corroboration of the out-of-court statements. In both Ramsey and Webb, the Court stated that uncorroborated out-of-court testimony **standing alone** as a matter of law is not sufficient evidence upon which to base a conviction. Such is not the situation in the case currently before this Court.

Ms. Kling's written out-of-court statement that was admitted into evidence is corroborated by her oral out-of-court statements to the police officers, by her out-of-court statements to an emergency room physician, by her in-court testimony, by her injuries, and by the defendant's own statements and lack of injuries.

Ms. Kling's written statement says that the defendant "was shoving me around and pushed me down." (R. at 111). The statement goes on to say Ms. Kling told the defendant he would have to leave in the morning and find another place to live, and "(h)e got angry and hit me with his fist in the nose." (R. at 111-12). Ms. Kling gives no indication in her written statement that she was the aggressor in the altercation between her and the defendant. (R. at 41, 110).

This written statement is corroborated by her oral statements to the police officers on the date of the incident. When Lieutenant Nance phoned her after leaving her residence, Ms. Kling was crying and said her boyfriend was still there, there was a problem, and she had been hurt. (R. at 82). Further, when Officer Hill arrived at her home, she told him her boyfriend, the defendant, had hit her in the face and left the house. (R. at 71). Both of these oral statements to the police are consistent with her written statement, and she makes no mention to either police officer that she was the aggressor or that she may have kicked the defendant.

Further, Ms. Kling was treated by Dr. Holley at the Davis Hospital and Medical Center and spoke with him about the altercation. She was tearful and distraught when she arrived at the hospital and told Dr. Holley her boyfriend hit her with a closed fist which gave her a bloody nose. (R. at 54, 61). This corroborates her statements to the police, and again Ms. Kling did not indicate to Dr. Holley that she kicked the defendant or was the aggressor in the situation.

Ms. Kling's statements are also corroborated by her in-court testimony and her injuries.

Ms. Kling testified in court that the defendant hit her in the face with his fist. (R. at 47, 86).

Officer Hill observed her bleeding from her nose and mouth area and holding a bloody tissue on her face and Dr. Holley observed swelling across the bridge of her nose. (R. at 50, 71). These injuries are consistent with her statements that the defendant hit her in the face with his fist.

While she testified in court that she was the aggressor and while her injuries are consistent with both her hearsay statements and her in-court testimony, the trial judge, whose function is to assess weight and credibility to testimony, did not believe her in-court testimony. (R. at 183).

In addition to Ms. Kling's statements and injuries corroborating each other, the defendant's own statements and behavior also corroborate Ms. Kling's statements made the night of the incident. The defendant was found hiding in the bushes at the side of the house. (R. at 72). The defendant told Officer Hill he hit Ms. Kling and at no time did he state that such force was in the exercise of self-defense nor was any other explanation or excuse offered. (R. at 73). Officer Hill arrested the defendant, walked him to the patrol car, drove him to the jail, and waited with the defendant while he was booked. (R. at 73-76). At no time during his contact with Officer Hill, who was investigating the incident and arresting the defendant, did he ever tell Officer Hill that he had been kicked in the groin or that Ms. Kling had been the aggressor. Id. Not once did the defendant exhibit any signs or injury or complain of any injury or pain or tell Officer Hill he had been assaulted. (R. at 74-76).

Moreover, the case at bar can also be distinguished from State v. Webb because in that case, the victim declarant, an eighteen-month-old child, was not cross-examined on her out-of-court statement. Webb, 779 P.2d at 1115. In the case now before the Court, Ms. Kling was cross-examined on all of her out-of court statements. (R. at 40-47).

In addition, while in State v. Ramsey, the declarant repudiated his out-of-court statement and also the conduct his statement described, Ms. Kling never denies she made her out-of-court statements, nor does she deny the conduct alleged in those statements. Ramsey, 779 P.2d at 483; (R. at 44, 46, 110-12).

The evidence relied upon to convict the defendant was sufficient as a matter of law; Ms. Kling's hearsay statements were corroborated by other statements she made, by her injuries, by the defendant himself, and those statements were cross-examined and not repudiated by Ms. Kling.

**II. The trial court properly considered the exclusions in the defendant's statements to police and the inferences therefrom.**

**A. A defendant's invocation of his Fifth Amendment rights prior to *Miranda* cannot be used as evidence of his guilt.**

The Fifth Amendment provides, "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment right to silence is a right not confined to in-court testimony; the privilege "can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." In re Gault, 387 U.S. 1, 47-48 (1967) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring)).

Defendant argues that the trial court improperly considered the fact that the defendant did **not** tell the police officers that Ms. Kling was allegedly the aggressor in the confrontation or that Ms. Kling had allegedly kicked him. Defendant relies on State v. Palmer, 860 P.2d 339 (Utah Ct. App. 1993). In that case, in a pre-*Miranda* conversation with a detective, the defendant said he was neither admitting or denying anything because he wanted to talk to an attorney or that he

wanted to get some advice before talking further. Id. at 345-46. The prosecution used those statements that involved his rights as evidence of guilt in its case in chief.

The Court began its discussion of cases with the statement, “Utah courts have never explicitly addressed whether evidence of a person exercising the constitutional right to remain silent or to consult with an attorney prior to custodial interrogation can be used as inferential evidence of guilt during the State’s case in chief.” Palmer 860 P.2d at 346-47. The Court eventually concluded, “(m)erely because an individual does not need to be advised of his right to remain silent until he is subject to a custodial interrogation does not mean he should be penalized for invoking that right earlier.” Id. at 349. In Palmer, the Court concluded that allowing the defendant’s statement as evidence of guilt in the case in chief was error. Id. at 349-50.

**B. In the case at bar, the defendant did not invoke his rights at anytime; therefore, his statements, coupled with the lack thereof, could be considered by the trial court in determining guilt.**

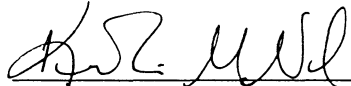
The facts in the case currently before this Court have some important differences from Palmer. The discussion in Palmer focuses on a defendant invoking constitutional rights pre-*Miranda*. The defendant in the case at bar never invoked his rights. He did not ask to speak with an attorney, he did not decline to speak with the police, and he did not remain silent. Instead, he told Officer Hill what happened based upon Officer Hill’s questions. (R. at 73). Therefore, defendant’s statements about what happened were properly admitted, and the fact that he did not make any claim that Ms. Kling had kicked him or hurt him or claim that he was acting in self-defense could be used as evidence of his guilt. It would be improper if the defendant’s statement to the police were allowed to be admitted, yet no inferences from what he said or didn’t say could not be made. The court properly inferred defendant’s guilt from defendant’s lack of

statements regarding his own injury or a claim of self-defense.

### CONCLUSION

For the foregoing reasons, Appellee hereby requests this court affirm the conviction entered by the trial court in this matter.

Dated this 21<sup>st</sup> day of July, 1998.

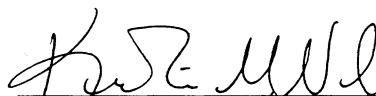
  
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### CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to the following:

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Dated this 21<sup>st</sup> day of July, 1998.

  
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