1978

State of Utah v. George David Mellen : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -v- GEORGE DAVID MELLEN, Defendant-Appellant.	:	Case No. 15528

BRIEF OF APPELLANT

Appeal from a verdict of guilty and the judgment based thereon by the Honorable Jay E. Banks, Judge of the Third Judicial District Court.

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Plaintiff-Respondent,	:	
-v-	:	
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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with the crimes of Aggravated Kidnapping and Aggravated Sexual Assault, two First Degree Felonies, and entered a plea of not guilty and filed a Notice of Intent to rely on the defense of insanity.

DISPOSITION IN THE LOWER COURT

The matter was tried before the Honorable Jay E. Banks, sitting with a jury, on October 11 and October 12, 1977. Verdicts of guilty as charged on each count were returned by the jury. On October 28, 1977, judgment was entered and the defendant was sentenced to an indeterminate term in the Utah State Prison of not less than five years nor more than life, the sentence for each offense to run concurrently with each other.

RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of his conviction and a new trial.

STATEMENT OF THE FACTS

On March 13, 1977, Tamara Fay Shields was walking along the street in Salt Lake City and the defendant approached her in his car and asked her if she needed a ride (R. 89, 90, 92). Miss Shields testified that she was pulled by the hand into appellant's automobile and appellant then drove her very near her home, came almost to a complete stop directly across the street from her home, and then made a U turn and sped away, grabbed her by the neck, threatened her with death, and forced her to perform fellatio (R. 93, 96, 97, 98). This all occurred inside the automobile in a location not exactly known to Miss Shields but thereafter appellant took her back to her home and let her out (R. 103).

Appellant spoke with Detective Pat Smith of the Salt Lake City Police Department on July 18, 1977, and confessed to the police that he had lured Tamara Fay Shields into his automobile and then forced her to perform a sexual act (R. 112).

Appellant relied on the defense of insanity and presented psychiatric testimony from Dr. James Whitten, who was appointed by the Court (R. 12, 18). Dr. Whitten, a psychiatrist, testified that he had met with appellant on August 8, 1977, pursuant to court order, and that he diagnosed appellant as an acute and chronic paranoid schizophrenic and gave as his opinion that at the time of the interview and at the time of the offense, appellant lacked capacity to be responsible for

his actions, lacked capacity of knowing whether what he did was right or wrong.

Appellant proffered testimony as to the defense of insanity which was excluded by the Court (R. 164-174).

Appellant testified in a bizarre manner and said that he had lied to his attorney, doctors who had examined him, police, and he did so and so testified in part to confuse the jury and make people think he was "crazy" (R. 183-191).

In rebuttal the State presented the testimony of a psychiatrist, Dr. Van Austin, who testified that when appellant was examined in the month of June, 1977, he was found to be competent to stand trial and no evidence was found of mental disease or defect in June, 1977, or in March, 1977. Based upon the foregoing the jury rejected the defense of insanity and found appellant guilty of Aggravated Kidnapping and Aggravated Sexual Assault.

ARGUMENT

POINT I

THE COURT BELOW COMMITTED ERROR BY QUESTIONING A WITNESS AND TAKING AN ADVERSARIAL ROLE ON A KEY ISSUE IN TRIAL.

During defendant's case he presented evidence on the issue of insanity. Dr. James Whitten was called and examined by appellant, cross-examined by counsel for the State (R. 131-147) and was then examined further by appellant on re-direct examination. Following all of that the Court questioned the witness as follows: (R. 150)

THE COURT: I take it, Doctor, that you make your

diagnosis of the mental state of an individual based on his behavior pattern at a certain time as to what he says and what he does in your experience, is that correct?

A. That's correct, mostly his thinking at that time.

THE COURT: So, if we were to look back to March the 13th, what he says and does at that time would be in his behavioral pattern, and that's what you would have to base your opinion on?

A. I would — that's true.

THE COURT: And schizophrenic goes in cycles, does it not?

A. Characteristically.

THE COURT: Characteristically and they are responsible at times, is that correct?

A. Quite.

THE COURT: And at times they do know the difference between right and wrong and can choose the right from the wrong?

A. Absolutely so.

THE COURT: So, it depends upon the behavior pattern at any particular time that you're trying to examine as to whether or not he would be responsible.

A. That's correct.

THF COURT: Thank you, Doctor. You're excused.

Such questioning was done in the presence of the jury.

Appellant moved for a mistrial based upon the questioning the Court on the basis that the Court was taking an adversarial role in the trial (R. 176, 177). The motion was denied (R. 178).

Appellant contends that such questioning by the Court favored the prosecution and hindered appellant's claim and defense of insanity. This Court has dealt with such an issue in State v. Tuggle, 28 Utah 2d 284, 501 P.2d 636 (1972). In that case this Court quoted the Canon

of Judicial Ethics of the American Bar Association and held that questioning by the Court was not error in that case. It was pointed out that the prosecutor was new and inexperienced and the questions the Court framed were done in the interest of saving time. The Court said it was preferrable for a trial judge to refrain from interfering with the orderly examination of witnesses but in that case there was no error.

In appellant's case the matter is not so simple. From the cross-examination which takes up sixteen pages of transcript it is obvious that the prosecutor was not new and inexperienced and it is obvious from the entire examination of Dr. Whitten that the questions were not neutrally framed and did not clear up any issues but instead helped to point out that Dr. Whitten's examination in August was less than reliable in determining a mental state at the time of the offense in March. The questions simply were not neutral and were an attempt to illicit from the psychiatrist, Dr. Whitten, that the behavior pattern in March, described by Tamara Fay Shields, is the best source to examine in determining the mental state at that time. The State, even though extensive cross-examination had preceded this questioning, did not illicit that from the psychiatrist.

Obviously no two factual situations are ever identical and so case law on the point can do no more than point up specific instances. Under the standard set forth by this Court Tuggle, supra, and under the facts and circumstances of this case where insanity was the sole defense and really the sole issue it was improper for the Court to take such an active role in questioning, when such questions did not merely clear up issues left unclear but elicited testimony

unfavorable to appellant's defense. Appellant submits that such questions were calculated to do that and it was not mere happenstanc that the questions made the defense of insanity weaker than it would have been without such questions. Whatever the merits of appellant' defense of insanity, appellant contends that it is not for the trial court to elicit weaknesses as that is the purpose of cross-examinat Appellant contends that on such a key and vital issue questioning by the Court was prejudicial to appellant and was error that requires a new trial.

POINT II

THE COURT BELOW ERRED IN EXCLUDING EVIDENCE OFFERED BY APPELLANT FROM LAY WITNESSES.

Appellant contends that the exclusion from evidence by the Court of lay witness testimony was prejudicial error. In view of th fact that the Court below established through its own examination (s Point I) that the best way for anyone to judge a person's mental sta is to look at his behavior, appellant attempted to introduce testimo from lay witnesses as to appellant's behavior pattern at a time clos to the alleged defense than Dr. Whitten was able to observe, and appellant also sought to have those witnesses state their opinion as to appellant's sanity at the time they were aquainted with him. Tho acquaintances were much nearer in time to the alleged offense than t the examination of Dr. Whitten and appellant reasoned that the jury was free to disregard Dr. Whitten's opinion because of the length o time between the alleged offense and Dr. Whitten's examination. Appellant contends that the Court below erred in excluding testi

which was corroborative of Dr. Whitten's opinion as the observed conduct was consistent with what Dr. Whitten observed and it was much closer in time than Dr. Whitten's examination.

Appellant called to the stand Randall Oster who had a Master's Degree in Psychology and was working on his Ph.D. and had worked for the Salt Lake County Mental Health Center as a pyschologist in the Salt Lake County Jail where appellant was housed at the time of his arrest and thereafter (R. 151, 152). He testified that he had interviewed approximately 150 people in the Salt Lake County Jail and that he spoke with appellant on July 17 and July 28, 1977. Appellant sought to ask the witness about behaviors exhibited and conversations held (R. 154) and the Court then excused the jury and required appellant to proffer his testimony. Appellant proffered (R. 164, 165) that Mr. Oster had a two hour conversation with the appellant and that appellant related a delusional system that was consistent with the delusional Dr. Whitten testified about. The witness would have testified that appellant related his need to confess to the offense because the Judge was God, the District Attorney was the Son, and the police were the Holy Ghost. The witness would have been asked his opinion as to appellant's sanity on July 28, 1977, and from his training and the experience in the jail he would testify that he reached a clinical diagnosis that appellant was a paranoid schizophrenic and was not responsible for his actions at that time.

The Court ruled (R. 167, 168) that the proffer was denied because the witness could not give his opinion as of the state of the mind of the appellant at the time of the offense, in March, 1977.

Appellant was also required to proffer the testimony of Ron

Yengich, who was the attorney appointed to represent the appellant shortly after his arrest on May 4, 1977 (R. 171). He would have testified that he met appellant five or six days after that date in the Salt Lake County Jail and saw him until the end of July approxi 15 times. Mr. Yengich would have described appellant's physical con dition and related conversations with appellant. He would have testified that appellant related the same delusional system in May w was described by Dr. Whitten. He would have been asked and given as his opinion that during that period of time appellant was not compet to stand trial and was not responsible for his actions as he was suf from a mental disease and it affected his ability to conform his conduct to requirements of the law. The witness would have also testified that he instructed appellant on at least ten occasions not to speak with police officers and shortly after one of those instructions appellan confessed to police officers. The Court denied the proffer (R. 174) ruling that because the opinion of the lay witness would have bee seven or eight weeks after the offense it was not probative and not material as to his mental state on the date of the offense.

Appellant contends for several reasons that the Court's ru in requiring a proffer and excluding such testimony from the jury wa prejudicial and reversible error. Dr. Whitten's testimony was based upon an examination in August, 1977. He was asked to give his opini as to appellant's mental state in March based upon that observation. He did so. Clearly, the jury could disregard such testimony and say "that is too big of a leap, while he may have been insane in August we do not believe based upon the contact you had with him that you

properly tell what he was like in March." Therefore, the lay testimony describing behavior consistent with that which was observed by Dr. Whitten was important. Further, the lay witnesses would have given testimony concerning conversations with appellant that were consistent with conversations related to Dr. Whitten. Dr. Whitten was specifically cross-examined as to whether or not appellant was "fooling" him (R. 135). Appellant contends that such examination was in essence a challenge to the truthfulness of the statements by appellant that he was suffering some kind of delusional system. Under Utah Rules of Evidence, Rule 63(1)(c) evidence is admissible if it supports testimony made by the witness when such testimony has been challenged. These prior statements by appellant to the lay witnesses were consistent with statement related to Dr. Whitten and when Dr. Whitten was challenged on the basis of being "fooled" that was a necessary foundation to allow testimony by lay witnesses as to prior consistent statements.

More importantly, testimony from the lay witnesses as to their opinion of appellant's sanity in July and May, 1977, was admissible under almost all cases which have considered the topic. The Court below admitted that lay witnesses can give their opinion as to someone's sanity not held that in this case the opinions would have been as to appellant's sanity approximately seven weeks after the alleged offense and approximately four months after the alleged offense. Thus, the Court concluded that the opinion was too remote and not probative as to the mental state of appellant at the time of the alleged offense. Appellant contends that the Court erred in such ruling. The Supreme Court of Oregon recognized the problem the defendant faces when an insanity defense is asserted. In State v. Gary Mark Gilmore, 410 P.2d

240 (Ore., 1966) the Court said:

> Whether or not the defendant was insane is a very difficult question to be answered. Insanity is an elusive concept. The evidence provided for the jury is usually, as it was here, the opinions of the experts called by the defendant that the defendant could not tell the difference between right and wrong, in the opinions of the experts called by the State that the defendant could tell the difference between right and wrong. With the issue and the evidence so incapable of precise measurement, any finding on any aspect of the defendant's mental condition would be relevant and an assistance to the jury in reaching its most difficult decision.

Appellant contends that such statement recognizes the need juries must face in making their decision. That is, any evidence wo be helpful for a determination as to a person's mental state. Whate the value of the testimony of the witnesses may have been, it was fo the jury's consideration and not the Court's. In Criswell v. State 443 P.2d 552 (Nev., 1968) the Court, citing another Nevada case, sai

> In this case and in virtually every other jurisdiction in the United States a lay witness (1) having had adequate opportunity for observation may (2) after stating the facts, (3) give his opinion as to the sanity or insanity of the person involved, where-upon (4) the weight to be given to his testimony is a matter for the jury's determination.

Such is the rule in all states surrounding our jurisdictio See, for example, People v. Medina, 521 P.2d 1257 (Colo., 1974); Sta v. Lujan, 534 P.2d 1112 (N.M., 1975); State v. Robison, 408 P.2d 2 (Ariz., 1965); State v. Odell, 227 P.2d 710 (Wash., 1951); People Webb, 300 P.2d 130 (Cal.,1956).

While the witnesses were not experts and thus could not be asked to relate back to the time of the alleged offense, surely thei opinions and the behaviors they described between the date of the

alleged offense and the date of an examination by an expert witness were irrelevant as that term is used in our law, meaning any evidence that has any tendency in reason to prove or disprove the existence of any significant fact. For the Court to rule that such testimony was not relevant or material is clearly erroneous; it may or may not have been of much worth to the jury but it clearly did bear upon the issue of appellant's sanity at the time of the alleged offense. Particularly so when coupled with the expert testimony based upon a later observation consistent in the extreme with the previous observations by lay witnesses

Insanity was appellant's only defense. Because of the Court's ruling appellant had to try to meet his burden of proof in showing the defense of insanity based upon the testimony of one expert witness who conducted an examination five months after the alleged offense. There was helpful evidence in existence and the Court refused to allow the jury to hear such evidence. Because of that erroneous ruling appellant was severely prejudice in his defense and is entitled to a reversal and a new trial.

CONCLUSION

For the reasons above stated, that the Court below took too active a role in the questioning of witnesses, and the Court erred in excluding evidence of appellant's mental state, appellant respectfully submits that the Court below should be reversed and the matter remanded for a new trial.

Respectfully submitted

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