2001

State of Utah v. Daniel L. Peck : Brief of Respondent

Utah Supreme Court

S. Rex Lewis; Attorney for Appellant.
Vernon B. Romney; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, : Case No. 14137

-vs- :

DANIEL L. PECK, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE ALLEN B. SORENSEN, JUDGE, PRESIDING.

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

S. REX LEWIS

120 East 300 North
Provo, Utah 84601

Attorney for Appellant

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120 East 300 North
Provo, Utah 84601

Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

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BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellant was charged with the crime of aggravated assault in that he, with unlawful force and violence, knowingly and intentionally, caused serious bodily injury to Gary Ewell.

DISPOSITION IN LOWER COURT

On March 20, 1975, the matter was tried before a jury which found appellant guilty of aggravated assault as charged. Appellant was granted a suspended sentence and placed on probation for two years.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdict reached by the lower court.

STATEMENT OF FACTS

On the 7th day of December, 1974, at approximately 1:15 o'clock p.m., four men met on a rural road near Pleasant Grove, Utah, to settle some differences by having a fist fight. Two men, Gary Ewell and Clarence Nielsen, accused a third, Jim Peck, of stealing trees. Jim Peck was accompanied to the scene by his brother, Daniel Peck, the appellant in this case. However, it was originally agreed that Daniel would not participate in the fight (T.33,49,67).

After a period of fighting, during which no weapons were used other than fists (Jim Peck may have thrown a rock or two (T.34,50)), Jim Peck was on the ground with Nielsen sitting on top of him and Ewell kneeling down in front of him (T.35,50,69,79). Jim Peck testified that until that time nobody was hurt much (T.73). There is disputed testimony at this point as to whether Nielsen and Ewell were continuing to strike Jim Peck (T.35,50,69,79). However, a disinterested

bystander, Harry Peacock, who had happened onto the fight, testified that neither Nielsen nor Ewell hit Jim while he was on the ground, although they were trying to turn him over or pull him up in order to fight with him further (T.20,30).

At this point the appellant, who had been watching from a car, grabbed a rubber-coated steel tool, ordinarily used to change tires on his sports car. This weapon weighed about two pounds and had a "lug nut thing" on the end of it (T.83). (Some witnesses described the weapon as looking like a hammer (T.21,36).) Appellant ran up behind Neilsen, without any word of warning (T.84), and hit him over the head (T.85). Appellant then struck Gary Ewell in the face (T.22,36,50), and caused the loss of his left eye (T.12). After making this attack, appellant ran back to his car and left the scene (T.22).

ARGUMENT

POINT I

JURY INSTRUCTIONS ON THE LESSER OFFENSE OF SIMPLE ASSAULT WERE UNWARRANTED BY THE EVIDENCE.

Appellant was convicted of aggravated assault. On appeal, he contends that the jury should have been instructed

on the lesser included offense of simple assault, and that the trial court's failure to do so was prejudicial.

Appellant is correct in pointing out that the offense of simple assault is necessarily included in the offense of aggravated assault. Appellant also correctly points out the general rule that a jury should be instructed on lesser included offenses when such a conviction would be warranted by any reasonable view of the evidence. State v. Hunter, 20 Utah 2d 284, 437 P.2d 208 (1968); State v. Nielson, 30 Utah 2d 119, 514 P.2d 535 (1973). However, that rule may also be stated inversely: a jury need not be instructed on lesser included offenses when such a conviction would not be warranted by any reasonable view of the evidence.

In Hunter, supra, this Court stated:

> "Where the facts points unerringly to deadly violence and not to a boxing match between the kids at the Y.M.C.A., there is little need to confuse the two with an emeliorating instruction as to horseplay that is not in any sense of the word reflected in the facts adduced at this trial." 20 Utah 2d at 285.

Respondent submits that the facts of the present case do not warrant an instruction on simple assault. A deadly weapon was used which caused a serious bodily injury. There is no view of the facts that would justify an instruction on simple assault.

Before examining the facts it would be well to go over some definitions. Simple assault is defined in the Utah Code in Section 76-5-102 (Supp. 1975). The crime is committed either by (a) attempting, with unlawful force or violence, to do bodily injury to another or by (b) threatening, accompanied by a show of immediate force or violence, to do bodily injury to another. Nothing is said concerning an actually inflicted injury or the use of a deadly weapon. Those cases are covered by the crime of aggravated assault, which is defined in Utah Code Ann. § 76-5-103 (Supp. 1973). Aggravated assault is committed when simple assault is established and either (a) a serious bodily injury is intentionally caused or (b) a deadly weapon, or force likely to produce a serious bodily injury, is used in the assault.

The appellant in the instant case could have been convicted of aggravated assault if he either intentionally caused Gary Ewell to suffer a serious bodily injury or if he assaulted Gary Ewell with a deadly weapon. Respondent submits that appellant did both and that his conviction could be affirmed on either ground. For definitions of other terms, Utah Code Ann. § 76-2-103(1) (Supp. 1975), states:

> "Intentionally . . . when it is his conscious objective or desire to engage in the conduct or cause the result."

Utah Code Ann. § 76-1-601(9) states:

> "'Serious bodily injury' means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death."

Utah Code Ann. § 76-1-601(10) states:

> "'Deadly or dangerous weapon' means anything that in the manner of its use or intended use is likely to cause death or serious bodily injury."

An examination of the evidence demonstrates that the trial court handled the matter correctly. It is not disputed that Gary Ewell was struck and blinded in his left eye (T.12). Appellant admits grabbing the two pound steel tool with the "lug nut thing" on the end (T.83), and swinging it at Nielsen and Ewell (T.84). Appellant also admits that his weapon was the instrument which gouged out Ewell's eye (T.80). Therefore, since a serious bodily injury and a deadly weapon are established, the jury could only come to one of two verdicts: "Guilty of Aggravated Assault" or "Not Guilty by Reason of a Justification." This case is simlar in this respect to State v. Hunter, supra, wherein the Utah Supreme Court said:

> "The trial court decided that it was all or nothing--and rightly so--under the facts of this case." 20 Utah 2d at 284.

Respondent submits that the evidence does not warrant an instruction on simple assault and that the trial court acted correctly. Actions of a trial court are indulged with a presumption of validity, and the burden is upon appellant to prove such serious inequity as to manifest clear abuse of discretion.

Searle v. Searle, Utah, 522 P.2d 697 (1974). Respondent submits that appellant has failed to carry the burden of proof required and asks that the conviction be affirmed.

POINT II

THE TRIAL COURT COMMITTED NO ERROR IN PREVENTING THE DEFENDANT FROM TESTIFYING AS TO HIS PERSONAL FEELINGS.

While directly examining the appellant, his attorney attempted to submit evidence to the jury concerning appellant's state of mind at the time of the criminal act. The trial court ruled: "He can testify as to what happened and what was said . . . Not his personal feelings." (T.79). Appellant contends that this ruling was prejudicial since the intent issue was essential to his plea of defense of a third person. Respondent contends that the trial judge ruled correctly and that the personal feelings of the appellant were not at issue.

In Utah, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent the death or serious bodily injury of himself or a third person.

Utah Code Ann. § 76-2-402 (Supp. 1975). Appellant clearly used force that was likely to cause serious bodily injury, as has been previously discussed. The question then is whether or not he reasonably believed that his brother was about to be killed or receive a serious bodily injury.

The entire issue focuses on the word "reasonably." Guilt or innocence depend on what a "reasonable man" would have believed under the circumstances, not what the appellant himself believed. The question is: "Would a reasonable man have believed that Jim Peck was about to be killed or injured seriously?"

The "reasonable man" standard must be assessed by the jury. It is the jury's responsibility to decide whether or not a reasonable man would have done what appellant did under the circumstances. In State v. Hunter, supra, this Court said:

> "The urgence by counsel for defense is that although there was an assault with a deadly weapon, the jury was entitled to ponder as to the intent to do bodily harm--which in our opinion is nonsense under the facts of this case. . . ."

Likewise, under the facts of the instant case, the jury did not need to receive evidence on appellant's state of mind. The jury had only to ask themselves: "Under the same circumstances would I have attacked Nielsen and Ewell with a deadly weapon." In State v. Peterson, 22 Utah 2d 377, 453 P.2d 696 (1969), this Court said:

> " . . . it is the jury's privilege to weigh and consider all of the other facts and circumstances shown in evidence in determining what they will believe. . . ." 22 Utah 2d at 378.

The trial court recognized this duty of the jury and so instructed them:

> "A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony." Jury instruction No. 7.

The jury evaluated the totality of the circumstances in this case and decided that appellant was not justified in his actions and that a reasonable man would not have done what appellant did. Such a finding is entirely reasonable. Jim Peck, the man who was receiving the beating (and to whose aid appellant came) testified himself that "nobody was hurt much" (T.73).

The law in Utah is that a jury verdict must stand unless it appears that the evidence was so inconclusive or unsatisfactory that reasonable minds must have entered reasonable doubts that the crime was committed. State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957); State v. Danks, 10 Utah 2d 162, 350 P.2d 146 (1960). Respondent submits that the trial court acted correctly, that the issue was properly presented, and that the jury reasonably reached a guilty verdict and that appellant's conviction should be affirmed.

CONCLUSION

Respondent submits that the trial court acted properly in the instant case. A jury instruction concerning the lesser offense of simple assault was unwarranted by the facts of the

case. Also, the appellant's state of mind, or personal feelings, were not at issue. Respondent seeks affirmance of the conviction.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent