1978

State of Utah v. Kenneth Sharp : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No.

KENNETH SHARP, :

Defendant-Appellant, :

BRIEF OF RESPONDENT

APPEAL OF A JUDGMENT
BURGLARY, A SECOND
THIRD JUDICIAL DIS
SUMMIT COUNTY, STA
STEWART M. HANSON, JR.

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STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 15915

KENNETH SHARP, :

Defendant-Appellant. :

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crime of Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202(1) (1953, as amended).

DISPOSITION IN THE LOWER COURT

Appellant was tried before the Court and convicted as charged in the Third Judicial District Court by the Honorable Stewart M. Hanson, Jr., presiding, who was also the trier of fact in this case.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the Lower Court's decision.

STATEMENT OF THE FACTS

On November 22, 1977, the appellant and a companion, David Weston Allen, broke into a cabin owned by Joseph H. Cornwall (R. 99). The Cornwall cabin is located at Pines Ranch in Summit County, Utah. Several other cabins are also located in the same area.

The appellant and Allen climbed the fence to Pines Ranch (R. 94), entered several cabins (R. 99), including the Cornwall cabin, by breaking windows (R. 100), and pushing doors open (R. 102). Inside, the contents of drawers and cupboards were emptied onto the floor (R. 60, 63). Although no items were ultimately taken from the cabins, the appellant and Allen moved items within the cabins (R. 103). Mr. Kenneth Rogerson, a security guard for Pines Ranch, said the miscellaneous items had been moved and piled near the entrance in each cabin (R. 62, 63). The appellant and Allen also entered a tool shed near the Cornwall cabin and Allen tampered with a snowmobile in an attempt to start the machine (R. 107, 150).

The appellant was seen within the boundaries of the Cornwall premises by Mr. Rogerson (R. 41, 42). Rogerson also saw the appellant and Allen running east, away from the Cornwall cabin. Rogerson overtook the two men, identified himself as a security guard (R. 42), and told them that they were trespassing (R. 44).

After the appellant and Allen left the private property in compliance with Rogerson's demand, Rogerson walked back to the Cornwall cabin. He saw that the doors to the shed and cabin were open and that windows in each had been broken (R. 44,45). He also noted that a snowmobile, belonging to the Cornwalls, had its cover off (R. 45). There were fresh footprints in the snow leading to and from the cabin and shed and all around the snowmobile (R. 45).

Rogerson then followed the appellant and Allen east up a road, watched them enter and drive off in a green Chevrolet pickup, followed the truck down the canyon (R. 47), and stopped at a service station in Oakley to call the sheriff (R. 47). He gave the police a description of the two men and the vehicle, and the license plate number of the vehicle (R. 47, 48). The appellant and Allen were arrested that same day, taken to the Coalville Sheriff's Department, and later identified by Rogerson as the two men he had ordered off the private property and had followed down the canyon (R. 48, 49).

After identifying the men, Rogerson traveled back to Pines Ranch. He went back to where the green pickup had been parked and followed two sets of tracks leading from the truck (R. 56) to each home in Pines Ranch.

Rogerson entered the Cornwall cabin with its owner, Joseph H. Cornwall. Cornwall observed that the cabin had been entered by force (R. 47); he had not given the appellant or his companion, permission to enter the cabin (R. 154, 155).

Again, two sets of footprints were seen on the Cornwall premises around the cabin and leading to the snowmobile (R. 159). These footprints and others leaving the premises and leading toward the road were identified by Deputy Sheriff Wilde as being consistent with the type of shoes worn by the appellant and Allen. Wilde is employed by the Summit County Sheriff's Office and had had the opportunity to observe the appellant and Allen when they were taken to Coalville (R. 127).

As previously noted, several cabins, including the Cornwall cabin, were burglarized on November 22, 1977 (R. 99). Evidence of these other break-ins was admitted at trial under Rule 55 of the Utah Rules of Evidence to show intent to commit a crime, absence of mistake, motive, opportunity, and a common plan. (R. 153).

The appellant and Allen had entered these cabins by breaking windows, or pushing open the doors and had moved items around inside each cabin (R. 102-106) at Pines Ranch with the exception of the Cardall cabin (R. 62). The two sets of fresh footprints in the snow were seen at every home in the area and were the same at each location (R. 57-59). In addition, all of the cabin doors had been opened and, in all but one cabin, drawers had been opened and their contents emptied onto the floor (R. 63). Miscellaneous objects such as tool kits, electric saws, and saddles had been placed near the doors (R. 61, 62).

The Court stated, under Rule 45 of the Utah Rules of Evidence, that receipt of this evidence did not create a substantial danger of undue prejudice or of confusion to the trier of fact. Defense counsel's motion to strike the evidence of other criminal conduct was therefore denied (R. 158).

ARGUMENT

POINT I.

EVIDENCE THAT THE APPELLANT BURGLARIZED OTHER CABINS IN THE PINES RANCH AREA WAS PROPERLY ADMITTED AS IT DEMONSTRATED INTENT, ABSENCE OF MISTAKE, MOTIVE, OPPORTUNITY, AND A COMMON PLAN.

Rule 55 of the Utah Rules of Evidence provides:

> "Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rule 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." (Emphasis added)

See also State v. Schieving, 535 P.2d 1232, (Utah 1975).

This general principle of evidence was explained by this Court in State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969):

> "Concededly, evidence of other crimes is not admissible if the purpose is to disgrace the defendant as a person of evil character with a propensity to commit crime and thus likely to have committed the crime charged. However, if the evidence has relevancy to explain the circumstances surrounding the instant crime, it is admissible for that purpose; and the fact that it may tend to connect the defendant with another crime will not render it incompetent." (Id. at 775).

Appellant contends that evidence of other criminal conduct was admitted at trial to show his bad character. However, the purpose of such evidence was made clear to the Court by Mr. Christiansen, the prosecuting attorney:

"Your Honor, if I can respond to that. Rule 55 indicates that evidence of a person committing another crime is admissible where such evidence is relevant to prove a material fact including absence a [sic] mistake or absent [sic] motive or opportunity, intent, preparation, plan, knowledge or identity. I would submit to the Court that the evidence Mr. Rogerson is about to testify to goes specifically to intent and to plan and to motive. And I would also cite to the Court the case of State v. Gibson, a 1977 case, found at 565 P.2d 783, where the evidence of a rape was admissible in a murder trial under Rule 55 on two bases: number one, that it showed possible motive for killing; number two, it was part of the total picture.

I would also cite to the Court the case of State v. Demeer, found at Utah 2d 107, a 1944 case. In that particular case the defendant was charged with assault with a deadly weapon upon a prison guard while attempting an escape. The trial court let into evidence testimony concerning a gunfight with the Salt Lake City police that occurred just subsequent to the escape. On appeal it was argued that this evidence was inadmissible inasmuch as the assault had already taken place. The Supreme Court ruled the evidence admissible, and specifically stated a party cannot, by multiplying his crime, diminish the volume of competent testimony against him." (R. 49, 50).

"Your Honor, this evidence is relevant to show that the defendant intended to commit a theft, and by showing the fact that other cabins were broken into and what Mr. Rogerson observed in those cabins, directly relates to that intent." (R. 51)

Rule 55 has been consistently followed by this court. In State v. Jones, Utah, Case No. 15705 (September 1978), this Court upheld a heroin sale conviction and ruled that testiomony of previous purchases of the drug from the appellant was properly admitted.

Again, in State v. Van Dyke, Utah, Case No. 15687 (December 28, 1978), Rule 55 was applied to admit evidence of other bad acts of the defendant to establish a plan and motive for the robbery in question. This court held that evidence that the defendant "had been hitting a few rinky-dink places" "was relevant to the issues of intent, plan, preparation, and knowledge".

Similarly, evidence that the appellant entered other cabins at Pines Ranch tends to show a common plan or scheme. Testimony that items inside the cabins were piled near each door demonstrates a plan and preparation to steal the items, and intent to commit a theft, as required for conviction under Utah Code Ann. § 76-6-202(1) (1953 as amended) is thereby established.

The appellant further contends that the trial court abused the discretion granted in Rule 45 of the Utah Rules of Evidence by failing to properly balance the probative worth and the prejudicial effect of the evidence. This court, in State v. Lopez, supra, noted that "such harm as there may be in receiving evidence concerning another crime is to be weighed against the necessity of full inquiry into the facts relating to the issues." Appellant suggests that a "necessity test" be adopted wherein the court evaluates the necessity of evidence of other crimes and limits its admission to the disputed issues. In the instant case, intent was in issue (R. 51). Thus, even under the "necessity test" recommended by the appellant, evidence of the other cabin break-ins was properly admitted as it was relevant to show that the appellant intended to commit a theft (R. 51).

Respondent submits that the lower Court did not err in its application of Rule 45. Rule 45 provides:

> "Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

The appellant suggests that the trier of fact was prejudiced by the admission of other criminal acts, however, the case was tried to the judge as a result of the appellant's intelligent waiver of jury (R. 34-36), and the judge was already aware of the evidence (R. 52). In addition, the judge had a clear understanding that the purpose for admitting such evidence was to show common plan, absence of mistake, motive, opportunity and intent, but not to prove the guilt of any other offense (R. 158).

Moreover, as this Court noted in State v. Park, 17 Utah 2d 90, 94, 404 P.2d 677, 679 (1965):

> ". . . it can be safely assumed that the trial court will be somewhat more more discriminating in appraising both the competency and the effect properly to be given evidence. The rulings on evidence are looked upon with a greater degree of indulgence when the trial is to the court than when it is to the jury."

This position has been reaffirmed in several cases: State v. Burke, 102 Utah 249, 129 P.2d 560 (1942); and State v. Meachum, 23 Utah 2d 18, 456 P.2d 56 (1969).

The Court was aware of Rule 45 and after consideration of its provisions, the Court specifically ruled that "receipt of such evidence did not create a substantial danger of undue prejudice or of confusion or possibility of misleading the trier of fact" (R. 159).

The instant case is consistent with State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1953), cited in appellant's brief. In that case, which involved the robbery of a Salt Lake City market, this court held that it was error for the trial court to have admitted evidence of a Texas robbery where the defendant had been charged as an accessory. The prosecution offered such evidence to show modus operandi, however, the only similarity shown was that two men were involved in both incidents. The court said that in the absence of any greater similarity between the two situations, evidence of the Texas incident should have been excluded since its only effect was to imply that the defendant was a person of evil character. This court also stated that the Texas incident would have been properly admitted if it had had "special relevancy to prove the crime of which the defendant stands charged".

Admission of evidence of other crimes conducted by the appellant is relevant to prove the burglary with which he was charged. Testimony that there were two sets of fresh footprints around each cabin at Pines Ranch, that the cabins had been entered unlawfully, and that miscellaneous items inside had been moved near the door shows that the appellant intended to take these items from the cabins.

Common plan and modus operandi are shown by the fact that each cabin was entered by either breaking a window in the door or pushing the door open. In addition the contents of drawers and cupboards in the cabins had all been emptied in preparation of the theft. The similarity between each incident and the Cornwall break-in fits the Dickson requirement that there be a similarity between the offense charged and the evidence of other criminal conduct.

State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972), a case dealing with an unlawful sale of marijuana, is also consistent with the case presently before this Court. This Court in Kasai upheld the trial Court's admission regarding a previous marijuana "buy". This Court said:

> "Evidence of other crimes is not admissible if the purpose is to disgrace the defendant as a person of evil character with a propensity to commit crime and thus likely to have committed the crime charged. However, relevant evidence is admissible for the purpose of explaining the circumstances surrounding the crime of which the defendant stands accused; and the fact that it may tend to connect the defendant with another crime will not render the evidence incompetent."

Evidence that the appellant broke into several cabins on November 22, 1977 and moved numerous items inside

those cabins close to the doors is relevant to supply the Court with an accurate account of the circumstances surrounding the burglary of the Cornwall Cabin.

This evidence would likewise have been admissable under State v. Harries, 118 Utah 260, 221 P.2d 605 (1950), where this Court stated:

> ". . . the state was not seeking to introduce evidence of separate and distinct offenses, it was seeking to complete the form and structure of the scheme under which the defendant was alleged to have been operating and the evidence which was introduced was admissible for such purpose. All of it was relevant and tended to convict the defendant of the crime for which he was being tried." (at 618).

CONCLUSION

The evidence claimed by appellant to be erroneously admitted was not admitted for the purpose of demonstrating the appellant's bad character, but, was admitted for the permissible purpose of explaining the circumstances surrounding the crime in order to show intent, absence of mistake, motive, opportunity, and a common plan. These are ligitimate reasons for the introduction of the evidence and the fact that the evidence tends to show that the appellant had committed other crimes does not render the evidence incompetent.

The Lower Court did not abuse the discretion granted by Rule 45 by admitting this evidence and denying the Motion to Strike.

For these reasons, the respondent urges the Court to affirm the judgment of the Lower Court.

Respectfully submitted,

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