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State of Utah v. Kenneth Sharp : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
 :
 Plaintiff-Respondent, :
 :
 -v- :
 :
 KENNETH SHARP, : Case No. 15915
 :
 Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal of a judgment and conviction of Burglary, a
Second Degree Felony, in the Third Judicial District Court in and
for Summit County, State of Utah, the Honorable Stewart M. Hanson,
Jr., Judge presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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 Plaintiff-Respondent, :
 -v- :
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 KENNETH SHARP, : Case No. 15915
 :
 Defendant-Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a criminal proceeding in which the appellant was charged and convicted of Burglary in violation of Utah Code Ann. §76-6-202(1) (1953 as amended), a Second Degree Felony.

DISPOSITION IN THE LOWER COURT

Appellant was convicted of the crime of Burglary as defined in Utah Code Ann. §76-6-202(1), a Second Degree Felony.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and sentence imposed by the lower court. Appellant further seeks the case to be remanded for a new trial.

STATEMENT OF THE FACTS

On November 22, 1977, a Complaint was issued by the Justice of the Peace, Stanley Leavitt, the Justice Court, Kamas Precinct,

Summit County, State of Utah. The Complaint charged the appellant, Kenneth V. Sharp, with the crime of Burglary, in violation of Utah Code Ann. §76-6-202(1) (1953 as amended) (R. 1). After a preliminary hearing the appellant was charged by an Information filed on January 5, 1978, alleging the aforementioned offense in the Third Judicial District Court, Summit County, State of Utah (R. 4).

On April 6, 1978, a trial was held before the Honorable Stewart M. Hanson, Jr., Judge presiding. The appellant made an intelligent waiver of the jury and the case was heard before Judge Hanson, Jr. as the trier of the fact (R. 36). The appellant was found guilty as charged in the Information on April 6, 1978. The appellant was sentenced to an indeterminate sentence of one to fifteen years at the Utah State Prison.

At the trial the State called Mr. Kenneth Rogerson, a security guard for Pines Ranch (R. 38). Mr. Rogerson testified he observed the appellant and another person leaving the Pines Ranch area. Mr. Rogerson told the two people to leave the Ranch, which they did (R. 44).

Mr. Rogerson then continued and inspected the area. He observed the Cornwall cabin, the cabin alleged in the Information, with the door open and a pane of broken glass in it (R. 45). He also testified the nearby tool shed door was open and a snowmobile in the area had its cover off and the cowl was open (R. 44-45).

Over objection the trial court allowed the State to examine this witness about his further observations that day of

other cabins in the area. The trial court allowed the witness' testimony of other alleged break-ins at Pines Ranch for the purpose of intent, modus operandi, or general scheme or plan subject to a motion to strike (R. 49-53).

Mr. Rogerson testified there were fresh footprints in the snow leading to several other cabins. He stated these other cabins, not alleged in the Information, appeared to be burglarized and in a general state of disaray.

The State next called Mr. Daniel Allen, previously a co-defendant in the instant case (R. 99). Mr. Allen pleaded guilty to a lesser degree of burglary, a third degree felony (R. 99). Sentence was pending at the time he testified in the instant case (R. 119). Mr. Allen testified that the appellant did not enter the Cornwall cabin (R. 97,99,108,115) and he was unsure if the appellant entered the adjacent tool shed (R. 106). Mr. Allen further testified that he was the only one who attempted to start the nearby snowmobile (R. 107).

Over the continuing objection of defense counsel (R. 99), Mr. Allen testified he and the appellant entered some other cabins in the area. However, he further testified the appellant did not remove any items from any of the cabins (R. 123).

Defense counsel's renewed motion to strike was overruled (R. 156-159) and the evidence was received to show a plan, motive, opportunity and absence of mistake.

ARGUMENT

THE APPELLANT CONTENDS THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER ALLEGED CRIMINAL ACTS BY THE APPELLANT.

The trial court erred in admitting evidence of other alleged criminal acts by the appellant. The appellant further contends the erroneous ruling is due solely to the trial court's inability to apply the amorphous "balancing test" concept enunciated in Rule 45, Utah Rules of Evidence. Therefore, the appellant requests this Court to adopt a more lucid formula when balancing the probative worth and the prejudicial effect of evidence of other crimes.

Several sound policy reasons support the adoption of a new formula. However, to fully evaluate this rationale, it is necessary to view the historical development of admission of evidence of prior criminal acts.

Traditionally, an accused's past criminal history has been reviewed suspiciously by American courts. This distrust is also evidenced in the Utah Code Ann. §78-24-9 (1953 as amended), where the state legislature prohibited examination concerning prior misdemeanor convictions.

A major reason for distrust is the fear that the trier of fact will be prejudiced against the accused by introduction of such evidence. The result of this prejudice is manifested in several

ways. First, the evidence indicates the defendant committed another unpunished crime or he is a "bad man" and should be punished regardless of his present guilt. Second, a tendency exists to infer that, if the defendant committed a previous crime, he probably committed the crime charged. Recognizing these consequences, American courts generally exclude evidence of other crimes. State v. Scott, 111 Utah 9, 21-22, 175 P.2d 1016, 1022 (1947).

However, in some instances, evidence of other crimes is extremely probative. For example, in sexual offense cases, often the criminal conduct has particular characteristics identifying the assailant. It is these circumstances which require the trial court to balance the probative value of the evidence submitted against the prejudice.

Although all jurisdictions prohibit other crimes evidence to show a criminal propensity,¹ the approach in admitting certain previous criminal acts varies according to the jurisdiction. In Utah, the legislature and this Court have adopted the inclusionary² rule.

This approach differs from the more traditional exclusionary rule. The major criticism against the exclusionary approach

1. McCormick on Evidence (Cleary) 2nd Ed. 1972 p. 447.

2. Boyce, Evidence of Other Crimes or Wrongdoing, 5 Utah Bar Jnl. p. 37 (Summer 1977); State v. Harries, 118 Utah 260, 221 P.2d 605 (1950); State v. Dixon, 12 Utah 2d 8, 361 P.2d 412 (1953); State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969); State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972).

is the rigidity of the rule itself. It requires the party offering evidence of other crimes to be able to pigeonhole the offer into one of the specifically enumerated exceptions.³

In Utah, the application of the inclusionary rule is based upon Rules 45 and 55, Utah Rules of Evidence. Rule 55 specifically states:

Subject to Rule 45 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 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.
[Emphasis Supplied]

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.
[Emphasis Supplied]

Thus the current application of Rule 55, Utah Rules of Evidence is an inclusionary rule based primarily upon the relevancy of the evidence offered and the discretion of the trial court as stated in Rule 45.

3. Ibid. Boyce p. 33-34.

However, adoption of the generally preferred rule is not without pitfalls. Concentration on relevancy of the offered evidence alone ignores the varying degrees of prejudice caused by the offer. Thus again Rule 45 comes into play by requiring a balancing test of probative worth against prejudicial effect. Whichever rule is applied, the "balancing test" of Rule 45 is the appellant's only guarantee against prejudice. The appellant submits this amorphous standard requires greater definition by this Court.

The problem of leaving all balancing to the discretion of the trial court is best summarized in 70 Yale Law Journal 763, at 769:

Whichever form of the rule is followed, the "balancing test" becomes the chief barrier against the use of prejudicial other crimes evidence. The statement of this test gives it an attractive simplicity: "probative worth" is weighed against "tendency to prejudice." Difficulties of application may be swept under the carpet of "discretion" found in all good trial courts. Unfortunately, the trial judge must be armed with more than discretion and a formula to apply the test correctly. [Emphasis Supplied]

McCormick on Evidence also cites the problem of the trial court's discretion. McCormick states:

Such a balancing calls for a large measure of individual judgment about the relative gavity of imponderables. Accordingly, some opinions stress the element of discretion. It should be recognized, however, that this is not a discretion to depart from the principle that evidence of other crimes, having no substantial relevancy except to ground the inference that

that the accused is a bad man and hence probably committed this crime, must be excluded. The leeway of discretion lies rather in the opposite direction, empowering the judge to exclude the other-crimes evidence, even when it has substantial independent relevancy. . . . [Emphasis Supplied] McCormick on Evidence (Cleary) 2nd Ed. (1972) p. 453.

The problem of discretion versus the mechanical operation of Rule 55 is further complicated by the difficult concepts of probative worth and prejudicial effect. Probative value is more than logical relevance or persuasiveness. No matter how persuasive the evidence offered, it has no probative value if the fact it is supposed to prove is not in issue. Many courts have extended this proposition to prohibit introduction of evidence on issues conceded by the defendant or issues impossible to dispute.⁴ This adds "necessity" as an element of probative worth.

The best example of the necessity test is State v. Gillig, 92 Conn. 526, 103 A. 649 (1918). In that case the Connecticut Supreme Court held that other crimes evidence of intent could not be admitted in a homicide case where poisoning was unequivally intentional. The Court added that the State could use the prior convictions in rebuttal if the defendant specifically placed intent in issue, for example, by claiming accident.

The principle of necessity should have similar application where the State's evidence is overwhelming on a disputed issue. In such a case prejudice only results when the State is allowed to

4. 70 Yale Law Journal 763, at 770.

introduce the additional evidence of other crimes. Thus as a matter of law this Court should dictate that the prejudicial effect of other crimes evidence outweighs the probative value where a disputed issue is established beyond a reasonable doubt.

As in the instant case, there was no legitimate issue of identity. The State's main witnesses all established the presence of the appellant in the area of the cabins. Thus, only the State would benefit by the prejudice it caused in introducing other alleged criminal activity by the appellant.

The appellant concedes this requires an early factual determination. However, this is the present practice in cases where intent evidence is excluded in "unequivocally intentional" crimes.

The appellant further submits that adoption of the "necessity test" would not substantially alter the partys' positions at trial. The State still has the ability to use other crimes evidence in rebuttal, when a material issue becomes disputed. The defendant still has the onerous decision whether to testify. The defendant is still open to impeachment by his previous criminal acts. The appellant seeks only to change the procedure of admitting evidence of other crimes.

In the instant case, the State was intially allowed to introduce evidence of other crimes to show intent and modus operendi (R. 52). Later the Court expanded its decision to include ". . . intent or plan or motive or modus operendi, nothing else" (R. 57). Still later, during defense counsel's motion to strike

the evidence was allowed "to show commonality of a plan, the absence of mistake . . . motive, opportunity . . . intent" (R. 158).

Thus what started as evidence of intent and modus operandi ended by including opportunity, motive, absence of mistake, and a general plan. This is indicative of the confusion surrounding admissibility of evidence of other crimes. The result in this case was the trial court accepted all the evidence of other crimes and pigeonholed the evidence into Rule 55. The appellant submits the proper approach would evaluate the necessity of such evidence and limit its introduction to those issues genuinely in dispute.

CONCLUSION

The underlying principal throughout appellant's brief is a sincere attempt to safeguard an accused from the character smear that results from evidence of other crimes. The prejudicial effect is overwhelming. Prosecuting attorneys are aware of the pragmatic effects of introducing such evidence. The appellant seeks only to require the State to use its best and most direct evidence before introducing the explosive evidence of other criminal acts. Adoption and application of the "necessity test" will insure this result. Since this type of prejudicial evidence was admitted in the appellant trial, the conviction should be set aside and the case remanded for a new trial.

Respectfully submitted,

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