1979

State of Utah v. Robert Alex Valdez : Brief of Respondent

Utah Supreme Court

Dean R. Mitchell; Attorney for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 15920

ROBERT ALEX VALDEZ, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD [illegible]
DISTRICT COURT, IN AND FOR SALT LAKE [illegible]
THE HONORABLE JAY E. BANKS, JUDGE, [illegible]

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was convicted of the crime of negligent homicide by a jury in the Third Judicial District Court, the Honorable Jay E. Banks, Judge, presiding.

DISPOSITION IN THE LOWER COURT

On February 9, 1978, after preliminary hearing, appellant was charged by information with second degree murder in violation of Utah Code Ann. § 76-5-203 (1953) (R.10). A jury trial was held in the District Court of the Third Judicial District on June 12, 1978, and the jury returned a verdict on June 14, 1978, of guilty of the lesser included offense of negligent homicide (R.70). On June 15, 1978, the appellant was sentenced to serve one year in the Salt Lake County Jail.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdict of guilty rendered by the jury below.

STATEMENT OF FACTS

On December 11, 1977, the appellant shot Melvin Gregory Miller to death in Salt Lake County. The facts leading up to this event are as follows:

The daughter of the appellant, Debbie Valez (R.128,129), was not living at home with her parents on December 11, 1977. However, on that day, around 4:00 a.m. she entered her parents' home, took a set of car keys, and drove away in her father's car. Debbie then met and picked up the deceased, Melvin Miller, around 8:00 a.m. that same morning (R.130).

On the morning of December 11, 1977, the appellant noticed that his car was missing (R.237). After finding that the keys were also missing and realizing that his dog would have barked if a stranger had taken the car, the appellant assumed that his daughter had taken the car (R.

The appellant arranged to have his brother-in-law Bill LeFevre, assist him in looking for the car, but before leaving, the appellant armed himself with a gun (R.238,23 which he had purchased while working part-time as a securi

guard at Webb Security (R.229). The appellant put his bullets in the gun (R.239), and left to find his vehicle and his daughter. The appellant was accompanied by his brother-in-law. Appellant stated that he took the gun with him as a means of scaring his daughter (R.256, 257,273).

At approximately 10:40 a.m., the appellant's vehicle was spotted in the vicinity of North Temple and Third West (R.129). Bill LeFevre was the first to spot the car. When the appellant saw his car he could see that it was being driven by a black man, Melvin Miller (R.241), and that it was stopped at a red light (R.132,133,215). LeFevre stopped his car and the appellant got out (R.215).

The appellant walked to his car, holding his gun in both hands (R.133), and told Miller to get out (R.242). The appellant opened the car door and saw his daughter laying down on the passenger's side of the car (R.242). He then told Miller to go to the back of the car (R.242). Miller obeyed the command. The appellant had his gun on Miller at this time and Miller was telling the appellant to "Take it easy with that thing." (R.242). The appellant also stated that he thought Miller said, "Take it easy. She took the car." (R.250).

The two men walked to the back of the car and the appellant grabbed Miller on the shoulder and ordered him to "just lean on the car." (R.243). The appellant then looked back at his daughter, who was inside the appellant's car. At that time, while he was looking at Debbie, his gun went off and Miller fell to the ground (R.243). The bullet had gone through Miller's head and had lodged in his hat band (R.154,155,188). Debbie Valdez then drove away in her father's car (R.136).

At the trial, defense counsel requested that the court instruct the jury to the effect that the appellant was justified in threatening or using force against another if he reasonably believed that such force was necessary to defend himself or third person against such others' imminent use of unlawful force and that he was justified in using non-deadly force if he reasonably believed that such force was necessary to prevent or eliminate criminal interference with his personal property (R.37). This request was denied on June 14, 1978, and the appellant cites this denial as error.

The appellant also cites as plain error Instruct 17 and 17C (R.55,56,59), which were given to the jury. Appellant did not object to their use at trial.

POINT I

THE TRIAL COURT DID NOT ERR BY DENYING THE APPELLANT'S REQUESTED INSTRUCTION SINCE SUCH INSTRUCTION WAS NOT SUPPORTED BY THE FACTS.

Respondent does not dispute the basic premise that a defendant in a criminal case should be allowed to present his theory of the case to the jury. This right is not absolute, however, and has been modified by statute and case law. Case law dealing with requested instructions, State v. Close, 28 Utah 2d 144, 499 P.2d 287 (1972); State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971); State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947), indicates that a defense theory must be supported by a certain quantum of evidence before an instruction will be given. Because the right is not unlimited the trial court is not necessarily bound to give all instructions relating to defense theories just because they are requested or because they are characterized by the defendant as reflecting his theory of the case.

Therefore, if a defendant's theory of the case is all theory and no evidence, or so unreasonable based on the evidence presented that it does not satisfy the requirements of a defense, no instruction thereon is required.

The appellant requested the following instruction:

> The law provides to persons charged with criminal homicide absolute defenses to the charge of criminal homicide and by law, justifies the death of the person involved. If after you have reviewed the evidence in this matter and feel that the criteria for these defenses exist, the law mandates that you must find the defendant not guilty.
>
> 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 third person against such others 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.
>
> A person is justified in using force, other than deadly force, against another when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with his personal property.

(R.37,38).

The facts do not support the instruction. The second paragraph of the requested instruction indicates that force is justified to defend against unlawful force. In the instant case, the deceased did not show any signs of resistance and did not use force to retain possession of the appellant's vehicle. On the appellant's demand, t deceased was cooperative and obeyed the demand by getting out of the car. At no time did the deceased use any kind force to retain possession of the vehicle. There was no threat of death or serious bodily injury to the appellant

to LeFevre, therefore, the appellant was not justified in using deadly force to obtain his property.

The third paragraph of the requested instruction states, in compliance with Utah Code Ann. § 76-2-406 (1953), that non-deadly force is justified when used to terminate criminal interference. This section of the requested instruction is inconsistent with the facts of the instant case, since the type of force used by appellant was deadly. The Utah Supreme Court held, in State v. Nielsen, 544 P.2d 489 (Utah 1965), that a gun is a deadly weapon whether it is loaded or not. In addition, Utah Code Ann. § 76-1-601(a) (Supp. 1975), defines a deadly weapon as:

> Anything that in the manner of its use or intended use is likely to cause death or serious bodily injury.

In the instant case, implementation of a deadly weapon constituted the use of deadly force which is not sanctioned by the instruction in question or by Utah law.

The lower court, therefore, correctly refused to instruct the jury as the appellant requested since the instruction was an incorrect statement of the law as applied to the present case and could have confused or misled the jury.

POINT II

THE APPELLANT IS PRECLUDED FROM RAISING ISSUES FOR THE FIRST TIME ON APPEAL REGARDING THE USE OF INSTRUCTIONS 17 AND 17C.

The appellant contends that the instructions on excusable negligence and criminal negligence created a disparity in the law in that the jury was not specifically instructed on the issue of simple negligence. At trial, however, the appellant's counsel failed to object to the instructions given to the jury and did not request an instruction on the degree of negligence required to convic the appellant. Failure to do so precludes the raising of these issues on appeal.

The United States Supreme Court held, in Henderse Kibbe, 97 S.Ct. 1730, 431 U.S. 407 (1977), that orderly procedure requires that views as to how the jury should b instructed be presented to the trial judge and that it wo indeed be a rare case in which an improper instruction wo justify reversal of a criminal conviction when, in fact, n objection has been made at the trial court level.

United States v. Riebold, 557 F.2d 697 (CA 10, 1 also held that objection to an instruction made for the fi time on appeal is untimely.

In State v. Kazda, 545 P.2d 190 (1976), this Court held that failure to object to an instruction and furnish a proper request precludes any contention of error. This Court also stated that the requirement of an objection gives an "opportunity for the court to correct or to fill in any inadequacy in the instructions so that the jury may consider the case on a proper basis. In order to accomplish this purpose, the rule should be adhered to." Kazda, at 192.

In State v. International Amusements, 565 P.2d 1112 (1977), this Court added this exception: that the rule announced in Kazda would not apply if the giving or failure to give certain instructions is so "palpable as obviously to reflect prejudice amounting to a denial of due process." Id. at 1113.

Respondent submits that Instructions 17 and 17C (R.55,56,59), were not prejudicial to the defendant and therefore, did not constitute plain error. First, the appellant was originally charged with second degree murder; the instructions in issue acted in his favor and were not prejudicial to him since they constituted defenses to the original charge. The appellant was given the benefit of an opportunity to be excused from any criminal punishment for his act (Instruction 17C, R.59), and the additional benefit of having the jury determine if the appellant was guilty of

a lesser offense than that of second degree murder (Instruction 17, R.55,56).

The facts support these two instructions: A human being died at the hand of the plaintiff. The court, however, realized that loss of life does not necessarily call for retribution if the appellant acted reasonably. For this reason, the instruction on excusable negligence was included. It instructed the jury to find the appellant innocent if he acted as a reasonable man would under like circumstances. Therefore, the instruction was not prejudicial to the appellant.

The facts also indicate that the death of Melvin Miller was not intentional (R.245). Other facts show that the jury could have found that the appellant acted negligently in using deadly force in a situation where no force was exerted by the deceased. The nature of the case that is, that a human being died, justified the higher standard of negligence required to find the appellant guilty of criminal negligence. The jury had to find that the appellant acted in a manner which constituted a gross deviation from the standard of care which a reasonable man would have exercised under like circumstances. The jury found such a deviation and concluded that the appellant had acted unreasonably under the circumstances. Had the

jury not found a gross deviation from such a standard of care, appellant may have been acquitted if the elements of second degree murder could not have been met.

Thus, the jury was informed that the law would excuse an act which caused the death of another human being if the actor had acted reasonably. They were also informed as to the result required by law if they found that the actor had been unreasonable. The jury was properly informed of the law favorable to the appellant. The appellant was not unduly prejudiced by these instructions to the extent that he was denied due process of law. Therefore, appellant is precluded from raising issues regarding the instructions for the first time on appeal. Hendersen v. Kibbe, supra; State v. Kazda, supra; State v. International Amusement, supra; and State v. Pierren, 583 P.2d 69 (Utah 1978).

CONCLUSION

A criminal defendant has a right to present his theory of the case to the jury under proper circumstances. The obligation of the trial court to instruct on that theory is guided by the evidence presented, not a defendant's characterization of his theory. The facts of this case do not support the appellant's theory that deadly force was threatened but not used since the facts show that Melvin Miller died as a result of the use of deadly force.

The instructions given to the jury on excusable negligence and criminal negligence were not prejudicial to the appellant. In fact, they were favorable to him. The appellant therefore cannot contend error as to such instructions on appeal due to the fact that his counsel failed to object or to request additional instructions at the trial court level.

Respondent, therefore, submits that appellant's contentions are without merit and prays that the Court will affirm the verdict of guilty rendered by the jury below.

Respectfully submitted,

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