2001

State of Utah v. Ben J. Wauneka : Brief of Respondent

Utah Supreme Court

Vernon B. Romney; Attorney General; William W. Barett; Assistant Attorney General; Attorneys for Respondent.
Lynn R. Brown; Salt Lake Legal Defender Association; Attorney for Appellant.

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

BEN J. WAUNEKA,

Defendant-Appellant.

Case No. 14306

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY OF MANSLAUGHTER IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PETER F. LEARY, JUDGE, PRESIDING

VERNON B. ROMNEY
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

LYNN R. BROWN
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102

Attorney for Appellant

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with second degree murder in connection with the death of his wife, Rose, which occurred at their home in Salt Lake County on January 22, 1975.

DISPOSITION IN THE LOWER COURT

Appellant was tried to a jury in the Third District Court, the Honorable Peter F. Leary, Judge, presiding, and was found guilty of manslaughter, a lesser included offense to murder in the second degree.

RELIEF SOUGHT ON APPEAL

Respondent maintains that the verdict rendered by the jury was correct and should be affirmed.

STATEMENT OF FACTS

Appellant and his wife, Rose, lived at 1229 Stringham Avenue, Salt Lake City, Utah. On the night of January 21, 1975, they both were drinking heavily (Tr.227,230,232). Appellant called the police the next morning, January 22, 1975, at about 10:00 a.m. to report that his wife appeared to be dead (Tr.32,35)

A police and medical examiner investigation found bloody clothing belonging to the deceased in the bathroom (Tr.43-44), and revealed that Rose's body was covered with bruises (Tr.65). Appellant was charged with his wife's death and was tried August 25, 1975.

At trial the prosecution introduced testimony showing that Rose was afraid of her husband, that he beat her regularly, and that she felt he would kill her (Tr.137,138,191,193). Dr. Serge Moore, the State Medical Examiner, testified that Rose had 75 bruises over her body and gave his expert opinion that the injury which caused her death was caused by a fist and then a fall (Tr.65,75,76,78).

The defense consisted of appellant's testimony that his wife fell during the night of January 21, 1975, and that he slapped her only to revive her (Tr.236,242, 243).

The Court gave a limiting instruction concerning Rose's statements about her fear of the appellant and the jury returned a verdict of guilty. Appellant challenges the propriety of the statements concerning Rose's fear of appellant in this appeal.

ARGMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY THE DECEASED, ROSE WAUNEKA.

The State called two witnesses to establish Rose Wauneka's state of mind just before her death. A neighbor, April Dahl, testified that Rose had come into the grocery store where April worked five days before her death. April described Rose as having puffy eyes, and a bruise on her face (Tr.137). When April asked her about her condition Rose replied: "You call the police for me . . . I can't, if Ben finds out I called the police, he'll kill me." (Tr.138).

The State also called Regina Betonney, a social worker, to testify. Regina visited Rose on January 20, 1975, and stated that Rose had bruises all over her body and that she was shaking (Tr.191). After questions from Regina, Rose stated that appellant had beaten her (Tr.193), and that if she left him appellant would kill her (Tr.195).

Appellant objected to this testimony, but it was with a limiting instruction that it only be considered as an indication of Rose's state of mind.

The status of testimony admitted for the limited purpose of showing the state of mind of a deceased declarant is unclear in Utah. There are decisions from other jurisdictions, however, validating the Court's action in the present case.

The Idaho Supreme Court in State v. Radabaugh, 471 P.2d 582 (Idaho, 1970), held:

> "Evidence tending to show the mental state of the victim and ill-feeling or hostility between decedent and defendant is admissible." Id. at 586.

In Radabaugh, the challenged testimony related statements of a deceased victim to the witness concerning her fear of the defendant. The court determined that such testimony was proper.

Bustamonte v. People, 157 Colo. 146, 401 P.2d 597 (1965), is supportive of the decision in Radabaugh. The Colorado Supreme Court upheld a trial court decision to admit testimony showing the mental state of the victim. The Colorado Supreme Court even stated that "to have

rejected the testimony for the purpose it was offered here would have been an abuse of discretion. . . ." Id. at 601.

The Oregon Court of Appeals has likewise voiced approval of allowing testimony to show a deceased victim's mental state. In State v. Shirley, 7 Or.App. 166, 488 P.2d 1401 (1971), the Oregon Court said concerning challenged hearsay testimony about a deceased's mental condition:

> "The state had a right to show the state of mind of the victim at the time of and shortly prior to the homicide and for that purpose to show what circumstances as expressed by the victim contributed thereto." Id. at 1403.

Appellant correctly states that testimony showing a declarant victim's fear of the defendant is admissible if relevant to an issue at trial, especially self-defense, suicide or accident. See People v. Lew, 68 Cal.2d 774, 441 P.2d 942 (1968), and State v. Goodrich, 546 P.2d 1180 (Idaho, 1976), fn. 7.

Appellant's only defense was that Rose died accidentally, as a result of a fall. Rose's statements of her fear of appellant and the circumstances contributing to that fear (State v. Shirley, supra) are probative of the probable cause of her death.

Moreover, Rose's statements have a special reliability that justify admission. As the Supreme Court of Arizona has succintly explained in State v. Gause, 107 Ariz. 491, 489 P.2d 830 (1971):

> "We note that in the cases on this and related points the courts often resort to strained logic to attain the desired result. In determining the identity of the person committing a murder, the fact that the victim had reason to fear the defendant has some probative value. The indicia of reliability of the hearsay statements are as certainly present on the question of identity as they are on the issue of accident or suicide. We fail also to grasp the attempted distinction regarding when the state of mind of the victim is or is not in issue. We are not impressed with pious instructions to the jury which tell them to consider the statements of the victim only for the purpose of determining the victim's state of mind.
>
> Courts have tended to permit hearsay to be introduced in evidence when, for some reason or other, such evidence has a special reliability. Udall, Arizona Law of Evidence 355 § 174. In examining the evidence objected to here, we find that although it does not completely fit into any of the well recognized categories of exceptions to the hearsay rule, it does have a special reliability.
>
> * * *
>
> Let us meet the problem head-on, brush aside the sophistry, and say that expressions of fear by a murder victim, though they may be hearsay, are relevant, have probative value on the issue of identity, and, when in human experience they have sufficient reliability, they should be admitted in evidence." (Emphasis added.)

Rose's conversations with April Dahl and Regina Betonney had the elements of reliability. Rose had no reason to lie about her injuries or her fears. Her statements did not benefit her in any appreciable way. The comments were illicited by specific questions and Rose did not make elaborate explanations. As the Arizona Supreme Court stated, they had sufficient reliability in human experience to be admitted.

The cases cited by appellant which suggest exclusion of a victim's state of mind statements are too restrictive and contravene the advice of commentators that the use of hearsay should be expanded. See McCormick, Evidence, 464-65, 468, § 228.

There are other distinguishing differences between the present case and the cases cited by appellant. In State v. Kump, 76 Wyo. 273, 301 P.2d 808 (1956), the trial judge admitted statements of the deceased for the purpose of showing the relationship of the deceased and the defendant. In the present case, the explicit purpose for the statements of the deceased was to show her mental state prior to her death as it related to the identity of her murderer and probability of an accident. In People v. Ireland, 70 Cal.2d 522, 450 P.2d 580 (1969), the hearsay statements were introduced to prove the truth of the

matter stated. The challenged testimony in the instant case was presented for a permissible and limited purpose--to show the decedent's state of mind.

People v. Lew, 68 Cal.2d 774, 441 P.2d 942 (1968), does not preclude the use of a decedent's statements. It poses a two pronged test for admissibility. Rose's statements in the present case meet that test. Her statements were not admitted solely to indicate past conduct of the defendant, Lew, supra at 945. They also were more credible and trustworthy than the statements of the declarant in Lew, supra.

People v. Hamilton, 555 Cal.2d 881, 362 P.2d 473 (1961), is distinguishable from the instant case on several grounds. The California Court explained that the deceased's statements focused primarily on the defendant's past conduct and state of mind, not her own. Moreover, the prosecution improperly introduced the cumulative testimony of nine witnesses. The court questioned the reliability of the hearsay statements. In the present case the statements made by Rose to April Dahl and Regina Betonney were concerned with her own mental state. The statements were made under conditions (her bruises, injuries, general shaky condition, and the confidentiality of the situation) which suggested trustworthiness and reliability. That test is present in

Hamilton, supra, and is met in this case.

United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973), does not preclude the use of state of mind evidence. The D.C. Court indicated that state of mind evidence is admissible when relevant and not prejudicial. The potential prejudicial effect of evidence is a decision best made by the trial judge. In the present case, Rose's declarations were relevant to the identity of her assailant and the defense of accident raised by appellant. The trial judge correctly determined that the challenged testimony was not invalidly prejudicial to appellant's case and therefore admitted the evidence with a limiting instruction. On these grounds the statements of Rose to the two witnesses was properly admitted under the rule of United States v. Brown, supra.

Hearsay evidence was held to have been improperly admitted in State v. Bartolon, 495 P.2d 772 (Oregon Court of Appeals, 1972), because it inseparably linked defendant's specific past conduct with the decedent's state of mind. No such link occurs in the instant case.

Brown v. People, 273 P.2d 128 (1954), has been effectively overruled by Bustamonte, supra, which deals more specifically with a decedent's state of mind declaration.

The testimony held to be error in Commonwealth v. Lippert, 311 A.2d 586 (Pa. 1973), was hearsay by the decedent going solely to the past conduct of the defendant and was not introduced or intended to show the victim's state of mind.

The state of mind exception was correctly applied in the present case. Rose's statements were made under conditions suggesting credibility. They were expressive primarily of her fear of appellant and did not prejudicially focus on his past conduct. The statements were relevant to issues of identity of her murderer and the defense of accident raised by appellant. The jury was instructed as to the narrow purpose for which Rose's declarations had been admitted.

For the above reasons, respondent submits that the trial court properly admitted testimony concerning the deceased's state of mind and appellant's conviction should therefore be upheld.

POINT II

THE LOWER COURT CORRECTLY ADMITTED TESTIMONY DESCRIBING THE DECEDENT'S PHYSICAL APPEARANCE.

Appellant contends that admission of the testimony

of April Dahl and Regina Betonney describing Rose Wauneka's physical appearance was prejudicial error. Appellant makes this contention by assuming that the inference which the jury drew from these descriptions were inappropriate and unwarranted.

Respondent submits that the admission of April's and Regina's description was not error.

It is well settled that it is the jury's province to determine the weight and effect of evidence and to draw inferences from both direct and circumstantial evidence. State v. Vigil, 111 Ariz. 498, 533 P.2d 578 (1975); State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945). It is not this Court's responsibility nor the prerogative of appellant to speculate as to the inferences which a jury might draw from evidence.

Even if the jury determined that Rose's physical appearance indicated prior beatings by appellant, such evidence would be permissible under Utah Rules of Evidence, Rule 55. Her appearance would be relevant to prove absence of accident and identity of her murderer.

The testimony given by April and Regina would be admissible on other grounds also. Because neither woman

speculated as to the cause of the bruises, their testimony merely related what they observed. This information is relevant direct evidence and the jury could draw inferences from it and determine its weight and they could have been cross-examined and the accuracy of their observations challenged. Also description of Rose's appearance helped establish the reliability of her declarations that appellant was beating her (Respondent's Brief, point I).

State v. Huggins, 18 Utah 2d 219, 418 P.2d 978 (1966), cited by appellant, is substantially different from the present case. In Huggins, the prosecution attempted to introduce the testimony of a ten year old girl charging the appellant with a similar offense for which he was charged. This proffered testimony was a surprise to the defense and was accompanied by the trial judge's comment to the jury that the girl's mother had filed a complaint against the defendant that morning.

The cumulative effect of the testimony and the judge's comment was determined to be prejudicial. In the instant case, the challenged testimony merely described the decedent's physical appearance and made no reference at all to appellant. The testimony of April Dahl and Regina Betonney was relevant, non-prejudicial evidence and was therefore properly admitted.

POINT III

THE COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY AND ALLOWING THE JURY TO DETERMINE THE WEIGHT OF THE EVIDENCE AND CREDIBILITY OF WITNESSES.

The State presented substantial evidence to show that appellant killed his wife. As this Court stated in State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970), explaining the effect of circumstantial evidence:

> "Nevertheless, that proposition does not apply to each circumstance separately, but is a matter within the prerogative of the jury to determine from all of the facts and circumstances shown; and if therefrom they are convinced beyond a reasonable doubt of the defendant's guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis. Unless upon our review of the evidence and the reasonable inferences fairly to be deduced therefrom, it appears that there is no reasonably basis therein for such a conclusion, we should not overturn the verdict."

The total effect of the evidence presented by the State was to convince the jury beyond a reasonable doubt of appellant's guilt. This evidence consisted of the expert testimony of the state medical examiner, the testimony of a neighbor, and police.

The case of State v. Bassett, 27 Utah 2d 272, 495 P.2d 318 (1972), is not applicable to the present case. In Bassett, the parents of a deceased child were tried and convicted of involuntary manslaughter. This Court stated that "no evidence" was presented at trial indicating the defendants' guilt. Considerable evidence was presented in the instant case connecting appellant with his wife's death. Moreover, in Bassett, the trial court instructed the jury on a theory of gross negligence even though the criminal nature of the charge required proof beyond a reasonable doubt.

In the present case the State proved appellant's culpability beyond a reasonable doubt by direct and circumstantial evidence. The jury was justified in returning a verdict of guilty.

CONCLUSION

The trial court properly admitted statements by the deceased, Rose Wauneka, for the limited purpose of showing her state of mind. The testimony of April Dahl and Regina Betonney relating the decedent's physical appearance was properly admitted. The jury had sufficient evidence to convict appellant of

manslaughter. Wherefore, appellant's conviction should be upheld and the actions of the trial court affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

Attorneys for Respondent