

1987

Utah v. Louis Fred Ireland : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

:

870225
Plaintiff and Respondent,

:

vs.

:

CASE NO. 870225

LOUIS FRED IRELAND,

:

Defendant and Appellant.

:

BRIEF OF APPELLANT

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Respondent

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FILED
OCT 15 1987

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SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Respondent,	:	
vs.	:	CASE NO. 870225
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Defendant and Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This appeal is from a conviction in the District Court of Cache County involving a first degree felony, Sodomy on a Child, and jurisdiction is conferred on this Court by Utah Code 78-2-2(h). Trial was to a jury on April 8 and 9, 1987, and a sentencing hearing was held on May 21, 1987, at which time the Defendant was sentenced to five years to life with a minimum mandatory of ten years and committed to the Department of Corrections. The Defendant filed a Notice of Appeal on June 15, 1987.

ISSUES PRESENTED FOR REVIEW

1. Did the Court err in suggesting that the prosecuting attorney used leading questions in examining the alleged victim?
2. Did the Court improperly admit hearsay in Robin Pelham's testimony as to prior similar events?
3. Did the Court err in sustaining the prosecuting attorney's objection to testimony about statements made by his

ex-wife to the Defendant threatening to take custody from him?

4. Was the evidence on the factual issues alleged in the information insufficient to sustain the jury verdict?

5. Did the jury instruction on reasonable doubt unfairly favor the state?

DETERMINATIVE LAW

The interpretation of the following statutes and rules is determinative of the issue involved:

1. Issue 1. Utah Rule of Evidence 611(c)

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.

2. Issue 2. Utah Rule of Evidence 802

Hearsay is not admissible except as provided by law or by these rules.

Utah Rule of Evidence 404(a)(1)&(b)

(a) Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith or a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same....

(b) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

3. Issue 3. Utah Rule of Evidence 801(c)

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Utah Rule of Evidence 803 (3)

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Utah Rule of Evidence 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

NATURE OF CASE

The Defendant, Louis Ireland, was tried and found guilty by a jury of first degree felony of Sodomy on a Child. He was sentenced to a mandatory minimum of 10 years and has appealed his conviction.

STATEMENT OF FACTS

The Defendant was originally charged with Sodomy on a Child and Exhibiting Harmful Material to a Minor. The counts were severed for trial. The second count has not been tried and is not set for trial. The alleged victim in the charge that was tried was the Defendant's eleven year old son, (Trial Transcript, p 47, l. 18) (referred to hereafter by TT), who was a month shy of 11 on the alleged date of offense, July 27, 1986.

The information originally charged the defendant with a sexual act "involving the genitals of the actor and the mouth of the child." After opening statements but prior to testimony the

Court permitted the State to amend by adding the language, "or involving the genitals of the child and the mouth of the actor." (TT, p. 43, l. 5). The prosecuting attorney amended the information in the following language: "or involving the genitals of the child and the mouth of the child." (Court Record, p.7)

In the summer of 1986, the son, David, and his younger sister were living with their father in Smithfield, Utah. (TT, p. 48, l. 9). The defendant and his wife had been divorced for several years. (TT, p. 49, l. 9). They had had a dispute earlier that same summer over visitation with the children. (TT, p. 116, l. 23). That confrontation had ended with the ex-wife driving up and down the road in front of her sister-in-law's house hollering all kinds of foul names. (TT, p. 93, l. 11- p. 94, l. 2).

The children went to visit their mother in Idaho Falls on August 7 or 8. (TT, p. 49, l. 19 and p. 117, l. 6). At the end of the agreed on time, the mother didn't bring the children home. (TT, p. 117, l. 15). The defendant contacted the Idaho Falls police and then the Cache County Sheriff on August 24 regarding the children. (TT, p. 117, l. 17 - p. 118, l. 5). At that time he was informed that there were sexual abuse allegations against him. (TT, p. 118, l. 19). Meanwhile, the mother had brought David to talk to Robin Pelham of the Idaho Department of Health and Welfare on August 22 and a videotape was made August 27. (TT, p. 100, l. 10 - p. 101, l. 9).

According to David, he did not tell his mother that anything

happened. (TT, p. 69, l. 13). Yet his mother questioned him "if he'd done anything" before bringing him in to see the social worker. (TT, p. 70, l. 11). He denied that his mother told him what to say. (TT, p. 70, l. 6). The mother filed for change of custody and was awarded permanent custody October 20, 1986 (Def's exhibit #1), but the children were removed from their mother's home and placed in foster care a couple months before trial. (TT, p. 73, ll. 1-8).

At trial, David responded negatively to the prosecutor's question, "Can you tell me what your Dad said to you?" (TT, p. 53, l. 11). After the prosecutor made several gratuitous remarks such as "You don't like to talk about it, do you?" and "And I know that it's tough to try to tell about this in front of these people, isn't it?" (TT, p. 53, ll. 14 & 22), the Court interjected, "You can liberally use leading questions if you wish." (TT, p. 54, l. 1). After a number of other leading questions, the prosecutor asked, "Did your Dad want you to take your pants off?" (TT, p. 55, l. 12).

After several more leading questions and a negative reply to a question as to what his dad said to threaten him, (TT, p. 59, ll. 16-21), the Court again interjected, "You can use leading questions or proceed as to what happened as opposed to conversations." (TT, p. 59, l. 25). With the assistance of dolls, the testimony was elicited that the Defendant's mouth touched David's penis. (TT, p. 61, l. 17).

On cross-examination, David admitted that at the preliminary

hearing he had testified this had happened in the afternoon rather than at night (TT, p. 68, ll. 9-18), and that he had been dressed in pants and shirt as opposed to just his underwear (TT, p. 68, ll. 19-24). He was also questioned about his conversations with the social worker and said he didn't remember telling her that his Dad did not put his mouth on David's penis (TT, p. 71, l. 21) but when asked whether he had told her the truth when he said that a mouth did not touch a penis on that occasion, he responded, "Yes." (TT, p. 76, ll. 12-15).

On redirect, the prosecutor tried to resolve the contradictions by suggesting through leading questions that there were two separate occurrences in Smithfield, one in the afternoon and one in the evening (TT, p. 77, ll. 13-19) and that the oral-genital contact occurred on the incident in the evening. (TT, p. 77, l. 23).

Further cross-examination indicated that the evening incident occurred two weeks before visiting his mother but he couldn't recall when the other incident had occurred, (TT, p. 80, ll. 2-9) and he couldn't remember whether he had claimed that the incident he testified to at the preliminary hearing had also occurred two weeks before the visit to his mother. (TT, p. 80, ll. 10-17). When asked whether it wasn't true that on this particular occasion two weeks before the visit to his mother that his Dad never put his mouth on David's penis and asked if he could remember, he responded, "No." (TT, p. 81, ll. 6-10). When asked further if it was difficult that he couldn't remember, he

responded, "Yes." (TT, p. 81, l. 11 & 12). On redirect, David, in answer to the question whether there was oral-genital contact on the evening occasion, first said "He did," then "He didn't," and then "No," but then "In the evening he did." (TT, p. 83, ll. 1-12).

Robin Pelham, the social worker in Idaho who had initially interviewed David on August 22 with a videotaped interview on August 27, (TT, p. 101, ll. 2 & 9), testified that at one point David said there had been oral-genital contact in Utah but also said there hadn't. She recalled that toward the end of her conversation with him she asked him whether he was sure that his father never did anything with his mouth in Utah and David said he was sure. (TT, p. 101, l. 17 - p. 102, l. 4). She further indicated that while she believed David understood all her questions in these interviews, he told her about sexual incidents in Idaho and Utah, "but it was hard for him to differentiate between where and when and what exactly happened each time." (TT, p. 102, ll. 19-22, p. 104, ll. 1-6).

Robin Pelham also testified over objection that David told her the abuse started when he was five and he first told someone when he was eight. (TT, p. 107, ll. 10-20).

During the testimony of the Defendant, the Court sustained an objection to testimony about a conversation that he had had with his wife earlier in the summer regarding the children. (TT, p. 116, ll. 2-14).

The Defendant objected to the jury instruction on reasonable

doubt and submitted an alternate instruction that was denied by the Court. (TT, p. 151, ll. 1-10).

SUMMARY OF ARGUMENT

I. The Court erred in suggesting that the prosecuting attorney use leading questions in examining the alleged victim. The prosecuting attorney was already using leading questions, and the Court's suggestions in face of the child's reluctance essentially permitted the prosecutor to testify to the central acts alleged to constitute the crime.

II. The Court improperly admitted hearsay testimony of Robin Pelham regarding prior similar events. The testimony of prior similar acts was admitted on the grounds that it 1) constituted the basis of her investigation and 2) was a statement of the child. The hearsay testimony was irrelevant to show that this witness had a basis for investigation and the particular hearsay statements elicited from the witness did not fall under any recognized exception to the hearsay rule nor admissible under Utah Code 76-5-411.

III. The Court erred in sustaining an objection to testimony of the Defendant regarding a conversation he had with his ex-wife earlier in the summer in which she threatened to take custody of the children from him. Such evidence should have been admissible as an exception to hearsay, showing the ex-wife's existing state of mind including intent, plan, and motive, without requiring the defendant to first affirmatively prove that

the ex-wife instructed her son to make a false report to the social worker. The state of mind of the child's mother, under the circumstances of this case, was relevant and the statements should have been admitted.

IV. The conviction should be reversed because of the insufficiency of the evidence. There was no testimony to substantiate the material allegations of the information as amended, and the evidence was so insubstantial and contradictory with regard to the added allegations that the prosecuting attorney had expressed a desire to amend to, that it should be held to be insufficient as a matter of law.

V. The jury instruction defining reasonable doubt was misleading and unfairly favored the State by placing emphasis on conviction rather than on acquittal, and the Defendant's proposed instruction, which balances both sides, should have been given.

ARGUMENT

I.

At two points in the direct examination of the alleged victim, an eleven year old boy, the Court spontaneously encouraged the prosecuting attorney to use leading questions. The prosecuting attorney had already been using leading questions to a significant degree, but the result of these interventions was to give the prosecutor free reign in use of leading questions to the point he was in effect testifying to the central acts alleged to constitute the crime.

After the court stated, "You can liberally use leading questions if you wish," (TT, p. 54, l. 1), the prosecutor asked, "Dave, did your dad want you to take your pants off." The answer was, "Yes." (TT, p. 55, ll. 12 & 13). After the Court interjected a repeated suggestion to use leading questions (TT, p. 59, l. 25), the prosecutor asked the following questions: "And did it scare you?" (TT, p. 60, l. 12), "Was he going to hurt you?" (TT, p. 60, l. 16), "Did your dad touch your penis with his mouth?" (TT, p. 61, l. 17), "Did he put his mouth over your penis, Dave?" (TT, p. 61, l. 19) and, "Did you feel his tongue on your penis?" (TT, p. 61, l. 23).

Utah Rule of Evidence 611 (c) proscribes the use of leading questions on direct examination of a witness "except as may be necessary to develop his testimony." Courts have been traditionally lenient in permitting use of leading questions with children in sex abuse cases. See John Meyers, Child Witness Law and Practice, 1987, at page 130. However, the trial court must balance the legitimate need for leading questions against the danger of making it too easy for the child to please the prosecutor whom he sees as his friend or protector, or the danger of supplying a false memory to the witness.

Where should the line be drawn? In the New Mexico case of State v. Orona, 589 P. 2d 1041 it was held to be an abuse of discretion to allow the prosecutor "to lead the witness as to each critical element of the offense." p. 1046. In the instant case, the Court actively invited the prosecutor to go beyond a

proper and limited use of leading questions so that the prosecutor himself supplied the testimony on the critical elements of the offense.

II.

Certain hearsay testimony of Robin Pelham, the Idaho social worker who talked with the alleged victim was admitted over objection. After asking about other claims of abuse, the prosecutor asked, "How far back do these claims of abuse go, back to what year, do you recall?" (TT, p. 107, l. 10). After the Court permitted the question, the social worker replied, "He told me that he first -- that 'it first started happening when I was five,' and he first told someone about it in 1983 when he was eight." (TT, p. 107, p. 107, ll. 8-20). Subsequent questions explored her "investigation" of the prior alleged abuse with which she had had no involvement.

The admissibility of this information can be sustained only if it is not hearsay, that is, not offered for the truth of the matter asserted, or comes within a recognized exception to hearsay. In a case involving a similar offense, a statement of a child to his mother was offered as non-hearsay to explain her bringing the child to the hospital. State v. Rivers, 678 P. 2d 1373 (Orig. 1984). In holding the admission improper, the Court stated, "The reason the mother took her daughter to the hospital is not relevant to the legal issue of the molestation charge." p. 1378. Likewise, in this case, statements of prior incidents

of sexual abuse were irrelevant as a basis for her interviewing the child. She would have done that anyway in connection with the incident charged in this case.

Nor are the statements admissible under any exception to the hearsay rule, the most applicable which would be Utah Code 76-5-411. No findings were made by the Court as required and a reasonable reading would require that the statement of the child pertain specifically to the incident charged.

It appears that the statements were designed to go primarily to the defendant's character to show that he acted in conformity therewith, but such is not admissible under Rule of Evidence 404(a)(1)&(b).

III.

The Court should have permitted the Defendant to testify to a conversation he had with his ex-wife a short time earlier that summer when she threatened to get custody of the children from him. When inquiring as to the dispute that they had in the summer of 1986, the prosecuting attorney objected on the basis of hearsay. (TT. p. 114, l. 21). The Court sustained the objection indicating we would have to show that statements were made to the child to provide a motive for what he would say or testify to. (TT, p. 115, ll. 1-5, 14-16, p. 116, ll. 14 & 16).

Such testimony should have been permitted under Rule 803 (c) which permits introduction of hearsay statements to show the declarant's then existing state of mind as it relates to intent,

plan, or motive. The rule does not limit the declarant to the alleged victim and given the close proximity of the argument to the time a report was made of the alleged incident of abuse while the child was with the mother in Idaho, it would seem to fit the definition of "relevant evidence" in Rule 401, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." While the connection to the child is circumstantial, the motive or intent of the ex-wife would appear to be relevant.

IV.

The evidence as to the factual issues alleged in the information was insufficient to sustain the jury's verdict of guilty.

The material allegation of the information originally read, "engaged in a sexual act upon a child under the age of 14 involving the genitals of the actor and the mouth of the child." The prosecutor, after opening argument but prior to testimony moved to amend to include the alternative "or involving the genitals of the child and the mouth of the actor" apparently because of uncertainty as to what the child would testify. The prosecutor, however, amended the information to read, "or involving the genitals of the child and the mouth of the child." (Court Record, p. 7). There was no evidence presented to substantiate either of the alternatives in the information.

In criminal cases, the pleadings, consisting of the information, bill of particulars furnished defendant, and his plea, form the issues and limit the accusation to matters therein alleged and denied. State v. Anderson, 116 P.2d 398 at 401. In the case of State v. Taylor, 378 P.2d 352 (Utah, 1963), the Court cited with approval the cases of State v. Meyers, 302 P.2d 276 and State v. Pettit, 93 P.2d 675 for the proposition that variances of form (immaterial) could be overlooked in contrast to variances of substance (material) which would prove fatal. State v. Meyers, involved a bill of particulars where the evidence adduced at trial from the testimony of one of two alleged victims showed substantially more loss to that particular victim than indicated in the bill. State v. Pettit involved a charge of forgery where a facsimile of a check different than the one actually charged was made a part of the information. "The code of criminal procedure is not designed to eliminate essential averments or to permit the pleading of misleading factual data, whether or not it is done knowingly." Pettit at 676. The fact that it was done by mistake in the instant case does not in any sense lessen the requirement of proving the material elements of the offense as alleged. Both Meyers and Pettit were remanded for new trials.

Even if these material variances are for some reason held to not be fatal, there was so much confusion in the testimony of the alleged victim, there was so much improper leading by the prosecuting attorney, and his allegation of the oral-genital

contact occurring in Utah so contradicted by the social worker's testimony as to her video-taped interview of him shortly after the incident that this Court should hold that there was insufficient evidence as a matter of law on the issue of whether or not there was substantial evidence on the material elements as they were meant to be amended, and in particular, whether such incident occurred in the state of Utah. At the end of her video-taped interview with him shortly after the incident was alleged to have happened, he told her he was sure that his father never did anything with his mouth in Utah. (TT, p. 101, l. 23 - p. 102, l. 4).

V.

The jury instruction on the definition of reasonable doubt unfairly favored the State by placing emphasis on conviction rather than acquittal. The given instruction was believed to be number 6 but appears as number 7. (Court Record, p. 72). The whole emphasis of the instruction is on what doesn't constitute reasonable doubt. "It is not mere possible doubt...", "...there is not a reasonable doubt", "...Doubt to be reasonable must be actual and substantial...." The instruction offered by the defendant (Court Record p. 65) is much more balanced and lets the jury know that if, after an impartial consideration and comparison of all the evidence they can honestly say they aren't satisfied of the defendant's guilt, they have a reasonable doubt. The instruction as given placed emphasis on conviction rather

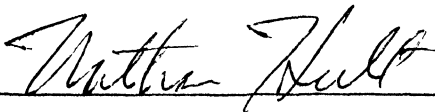
than on acquittal, and thus because of undue emphasis tended to be misleading to the jury. An instruction likely to mislead the jury should not be given. State v. Hughes, 469 P.2d 503.

CONCLUSION

The defendant requests in the alternative, that this Court remand the case with instructions to dismiss or for new trial, or for imposition of sentence on the lesser included offense of sexual abuse of a child

RESPECTFULLY SUBMITTED:

Dated this 14 day of October, 1987.

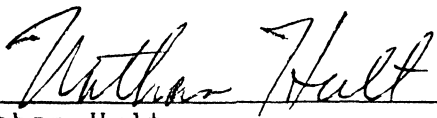


Nathan Hult

CERTIFICATE OF SERVICE

I hereby give notice that I mailed a copy of the foregoing: BRIEF OF RESPONDENT to the below named individuals on October 14, 1987.

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Nathan Hult