

1980

The State of Utah v. Carl Wilkerson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

CARL WILKERSON,

Defendant-Appellant.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This appeal represents two criminal cases:

(1) forcible sodomy, pursuant to Utah Code Ann. § 76-5-403 (1953), as amended, a first degree felony; and (2) forcible sexual abuse, Utah Code Ann. § 76-5-404 (1953), as amended, a third degree felony. The cases have been consolidated for purposes of appeal.

DISPOSITION IN THE LOWER COURT

The defendant was tried in the Fourth District Court, Judge Kenneth G. Anderton, presiding, sitting without a jury. The charges were severed for purposes of trial, but each case was heard on June 6, 1979. The defendant was convicted on both offenses.

RELIEF SOUGHT ON APPEAL

Respondent submits that the verdict of the trial court judge should be affirmed.

STATEMENT OF FACTS

The defendant, Carl Wilkerson, is the grandfather of the victim, Nicole Wilkerson. The defendant resides in Duchesne County, Utah. Nicole, age six, lives with her mother, Sandra May, and her stepfather, Robert May, in Maeser, Utah. Nicole's father, Glen Wilkerson, is the son of the defendant and also lives in Duchesne, Utah. During the summer of 1977, Nicole spent a considerable amount of time with her father. In mid-September of 1977, Nicole went to visit her father, Glen Wilkerson, for several days while Sandra May and Robert May traveled to Lake Powell for vacation (T.53-54).

On September 15, 1977, Glen Wilkerson took Nicole to stay with her grandparents. That evening, Nicole took a bath and went to the living room and sat on the couch with her grandfather, Carl Wilkerson. Nicole was not wearing clothes at the time, but was wrapped in an afghan blanket. During the time that Nicole was sitting on the couch with the defendant, the defendant committed an act of forcible sexual abuse on

the child by touching her genitals with his fingers (T.74,83).

Six months after this incident, on February 24, 1978, Nicole was again left with her father, Glen Wilkerson. Nicole's mother and stepfather had gone to Salt Lake City to compete in a horseracing event (T.54, 154-155). Again, Nicole was taken by her father to stay with her grandfather, Carl Wilkerson, in Duchesne. This incident took place in the defendant's bedroom when the defendant touched the child's genitals with his tongue and fingers (T.44,132-133).

The defendant was charged on June 5, 1978, in Duchesne County, with violating Utah Code Ann. § 76-5-404 (1953), as amended (forcible sexual abuse). This offense involved the incident on September 15, 1977. The defendant was also charged with violating Utah Code Ann. § 76-5-403 (1953), as amended (forcible sodomy with a person under the age of fourteen years). This offense involved the incident on February 24, 1978. Preliminary hearing was held on July 11, 1978, in the Justice of the Peace Court for Duchesne County, before C. Dean Powell, a Justice of the Peace, presiding. The trial in district court was held even months later, on June 6, 1979.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR
IN RULING THAT A SIX YEAR OLD VICTIM
WAS COMPETENT TO TESTIFY.

The law in Utah requires that in order for a child under the age of ten years to testify in court there must be evidence that the child is competent to do so. Utah Code Ann. § 78-24-2 (1953), as amended. In determining the competence of such testimony, the court considers several factors:

The testimony of a six year old child is not rendered completely incompetent nor entirely discredited solely because of her age. As we have previously observed, no particular age nor any specific standard of mental ability can be set as the qualification for giving testimony, but it is an important fact to be considered, along with others, in determining whether she should be allowed to testify. What is essential is that it appear that the child has sufficient intelligence and maturity that she is able to understand the questions put to her, that she has some knowledge of the subject under inquiry and the facts involved therein; that she is able to remember what happened; and that she has a sense of moral duty to tell the truth. Whether she meets these tests and is therefore a competent witness is within the sound discretion of the trial court to determine. His ruling will not be

disturbed in the absence of a clear showing of abuse. State v. Smith, 401 P.2d 445 at 447 (Utah 1965). (Emphasis added.)

See also State v. Dickson, 114 Utah 301, 199 P.2d 775 (Utah 1948); State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174 (Utah 1961); State v. Zeizich, 61 Utah 61, 210 P.2d 927 (Utah 1922); State v. Mills, 530 P.2d 1272 (Utah 1975). The law in Utah gives the trial court substantial discretion to determine the competence of a child as a witness in court.

In this case, there was sufficient evidence to establish that Nicole Wilkerson had a sense of moral duty to tell the truth; that she understood the questions put to her; and that she had some knowledge of the incident under investigation. Nicole testified in both cases that raising her right hand and taking an oath was significant and was important because it meant "to tell the truth." (T.66,127). The child said she knew the difference between telling the truth and telling a lie. Nicole said that telling a lie is "when you're making up a story" (T.66, 127). The child said that it was wrong to tell a lie, and that she could get in trouble if she did so (T.66, 70,127).

In addition to her testimony concerning her duty to tell the truth, Nicole testified concerning her

age, birthday, and schooling. The child testified that she was almost eight years old at the time of trial and that her birthday was on July 27 (T.64,65,124). Nicole testified that she had been in the first grade last year and had just completed the second grade at the time of trial (T.65,124-125). The child testified that she attended school in Maeser, Utah, received good grades (T.124-125), and her teacher was Miss Johnson (T.125). She also testified that she was born in Roosevelt, Utah, and lived with her mother and step-father, Robert May (T.65,126-127). Nicole also said she knew the trial was being held in 1979 (T.90).

The child also demonstrated some knowledge of the facts and her capacity to remember what happened.

Nicole was able to explain where the incidents occurred (T.72;133), who was present (T.132,73); and what she was doing before the incident (T.80). Nicole explained the events surrounding both charges.

Based upon the testimony of Nicole Wilkerson, the trial court entered the following findings:

The court was satisfied that the child had sufficient intelligence to understand the questions, that she had sufficient attitude to remember and relate relevant and material facts,

and that she had the ability to distinguish between truth and error, and to understand the nature of the oath. The evidence indicates that she was a good student in school. The court is cognizant of the fact that it was difficult for the child to remember certain time sequences and that she paused frequently before responding to questions. The court was convinced that the condition was caused by the lapse of time between the incident in question, the tender age of the child and the difficult subject in which the child was required to respond. The court holds that the child Nicole Wilkerson was qualified and competent to testify. (T.41)

Based on the evidence and testimony contained in the record, respondent submits that the trial court did not err in ruling that Nicole Wilkerson, age six, was competent to testify in the case. The trial court's ruling was not an abuse of discretion but was based on substantial evidence introduced at the trial.

POINT II

THERE WAS SUFFICIENT EVIDENCE TO
FIND THE DEFENDANT GUILTY OF BOTH
CHARGES.

The rule governing a claim of insufficient evidence on appeal is that the evidence and all inferences fairly to be drawn therefrom must be viewed in a light most favorable to the verdict.
State v. Wilson, 565 P.2d 66 (Utah 1977).

In order to convict the defendant of the charge of forcible sodomy pursuant to Utah Code Ann. § 76-5-403 (1953), as amended, the court must find that the defendant engaged in a sexual act involving the genitals of one person and the mouth or anus of another person. Additionally, the court must find that the victim is under the age of fourteen. The evidence in the record and the inferences drawn from the record, viewed in the light most favorable to the verdict, are as follows: Nicole Wilkerson said that at the time of this incident she had been left with her grandfather while her mother went to Salt Lake City to attend a horseracing event. The defendant took her to his bedroom, had her disrobe (T.139), and engaged in a sexual act involving her genitals and his mouth. The child testified that the defendant placed "his tongue where I go to the bathroom" (T.132-133).

In addition to the testimony of Nicole Wilkerson, the State called Sandra May. Mrs. May was called by the State in order to corroborate the child's testimony. Mrs. May testified that her daughter told her about the incident involving the defendant (T.159). The conversation between Mrs. May and Nicole took place in April, 1978.

The second charge involved the crime of forcible sexual abuse. In order for the court to convict the defend

of the charge of forcible sexual abuse pursuant to Utah Code Ann. § 76-5-404 (1953), as amended, there must be a finding that the defendant touched the genitals of another or took indecent liberties with that person and that there was an intent to cause substantial emotional or bodily pain or to do so with the intent to arouse or gratify the sexual desires of another person. The evidence in the record and the inferences drawn from the record concerning the charge of forcible sexual abuse which occurred on or about September 15, 1977, are as follows: Nicole Wilkerson testified that after taking a bath, she had gone into the living room and sat on the couch with the defendant. Nicole Wilkerson was not wearing clothes but wrapped in an afghan. During the time she was on the couch, the defendant "put his fingers where I go to the bathroom." (T.74,83). Nicole said that this act hurt or caused some discomfort (T.83,88).

In addition to the testimony of Nicole Wilkerson, the State called Douglas Horrock, Chief of Police for Duchesne County, who testified in rebuttal concerning a conversation he had with the defendant. The conversation involved the charges and allegations brought by Nicole Wilkerson. The defendant told

Officer Horrock that he had a "problem" and had contacted a psychiatrist to eliminate the problem (T.118). The defendant also told Officer Horrock that if Nicole had been injured, he would pay for any psychiatric help which the child required (T.118).

Although the charges are based almost entirely on the testimony of Nicole Wilkerson, the trial court was at liberty to judge the weight and credibility of her testimony. The decision to give Nicole's testimony significant weight and credibility was within the prerogative of the trial court and should not be reversed unless there is evidence of an abuse of discretion. The record fails to disclose that her testimony was either incompetent or inadmissible.

This Court ruled in State v. Smith, supra, that a conviction may be obtained on the testimony of the child alone:

In this connection, it must be borne in mind that when such an offense is committed, it is done with the greatest possible stealth and secrecy, so that most often the testimony of the

victim, coupled with the type of corroboration we have here, is the only evidence available upon which to determine guilt or innocence. The fact that there is difficulties involved should not prevent the processes of justice from functioning. The resolution of disputes is the purpose for which courts and juries exist, and they must perform their duties in spite of such difficulties. Both trial judges and jurors are aware of the various considerations involved in such a situation. For these reasons they invariably approach cases of this character with caution as the trial court appropriately instructed the jury here. Id. at 447.

POINT III

EVIDENCE WAS SUFFICIENT TO ESTABLISH THE DATE AND TIME OF BOTH OFFENSES.

The purpose of pleadings in a complaint or information is to put the defendant on notice as to the contents of the offense and also to set forth the date and time of such offenses. Utah Code Ann. § 77-21-8 (1953), as amended. However, this Court has held that the time or date of the offense may or may not be critical or important as an element for conviction. In State v. Cooper, 114 Utah 531, 201 P.2d 764 (Utah 1949), the defendant was prosecuted for an indecent assault upon a child. One of the issues on appeal

involved the date and time of the offense. In reference to that issue, the Supreme Court said:

In this case, the act with which defendant was charged was sufficiently identified and singled out by the locus of the offense, and the particular circumstances surrounding it, viz., that it was committed upon the person of Doral Elder in the front seat of defendant's car, while Ferrell Sorenson was sitting in the rear seat. For aught that appears in the record, there can be no danger of double jeopardy to this defendant, even though the state's evidence points to a crime committed some ten days before the alleged date of the information. In this connection, we said in State v. Distefano, 70 Utah 586, 262 P. 113, 116:

"It is therefore well established in this jurisdiction that where time is not of the essence of the crime, the exact time is immaterial, and if the evidence otherwise supports the charge relied upon by the prosecution, a conviction may not be set aside because the crime was committed after the date charged in the information or indictment, so long as it was committed prior to the bringing of the prosecution."

See also the concurring opinion of Mr. Justice Straup, wherein it was said:

"It undoubtedly is true that the State in the first instance is not bound by or confined to the exact date stated in the information. It may elect to prove the charged offense at any time prior to the filing of the information and within the statute of limitations; . . ."

Id. at 770 (emphasis added).

In this case, the acts or offenses for which the defendant was charged were sufficiently identified and singled out so that the defendant could be given notice of the particular offenses.

The forcible sexual abuse charge occurred on or about September 15, 1977. Nicole Wilkerson testified that the incident took place "just after summer" while she was staying with her father, Glen Wilkerson, and while her mother was at Lake Powell (T.75-76). Nicole testified that her father had taken her to the defendant's house prior to the incident occurring (T.75).

Robert May testified that Nicole Wilkerson had been left with her father while he and Nicole's mother went to Lake Powell during the "second or third week" in September of 1977 (T.98). The testimony of Robert May corroborated the testimony of the victim and also sufficiently identified the time of the incident.

Although Nicole Wilkerson testified that this incident occurred in 1978 and although this testimony was in error, the child testified that the incident occurred prior to her testimony at the preliminary hearing (T.90). The preliminary hearing was held on July 11, 1978. Based on the date of the preliminary hearing and the date of the trip to Lake Powell, the incident could not have occurred

in 1978, but rather occurred in 1977.

The offense involving forcible sodomy occurred on or about February 24, 1978. Nicole Wilkerson testified that this offense also occurred at the defendant's home while she was in the defendant's bedroom. Nicole testified that the incident occurred at a time when her mother "Had a horse trailer with her on the back of a truck" (T.132,153). Although the child testified that she thought the incident occurred "before Christmas, I think" (T.136), she said the incident occurred at a time when her father, Glen Wilkerson, had taken her to the defendant's house (T.137).

Robert May, Nicole's stepfather, testified that Nicole had visited with her father, Glen Wilkerson, in Duchesne on only one occasion between December, 1977, and February, 1978. That visit occurred during the "third weekend" in February, 1978 (T.154-155). Mr. May testified that he had dropped Nicole off at Glen Wilkerson's home because he was planning to attend horseraces in Salt Lake City. May said at the time he left Nicole with her father, he was driving a pickup with a horsetrailer attached to the truck (T.155).

Donna Wilkerson, wife of the defendant, was called to testify for the defendant and said that Nicole may have been with the defendant in February, 1978 (T.167). Sandra May, the victim's mother, testified that Nicole told her about the February incident in April, 1978 (T.159).

The testimony of Robert May, Sandra May, Nicole Wilkerson, and Donna Wilkerson was sufficient to identify the time of the incident.

CONCLUSION

Based on the evidence introduced at trial and the case law submitted herein, respondent requests that the verdict of the trial court be affirmed.

Respectfully submitted,

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