

1980

State of Utah v. William Luis Forsyth : 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- :

Case No.
16636

WILLIAM LUIS FORSYTH, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE
GEORGE E. BALLIF, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- :
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
WILLIAM LUIS FORSYTH, : 16636
Defendant-Appellant. :

----- :
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appeal from conviction of four counts of theft
by deception, second degree felonies in violation of Utah
Code Annotated § 76-6-405 (1953, as amended).

DISPOSITION IN THE LOWER COURT

Defendant was tried by a jury on June 25, 26, and
27, 1979 before the Honorable George E. Ballif of the Fourth
Judicial District Court, Provo, Utah County. The jury
returned a verdict of guilty on the four counts of the
information on June 27, 1979. The defendant appeals from
the jury's verdict. (Upon State's motion, Count V of the
information was dismissed.)

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the convictions in the lower court.

STATEMENT OF THE FACTS

Defendant was the founder and president of Great Outdoors, Incorporated, (hereafter GOI), a Utah Corporation, which had as its purpose the construction of a large spa in Orem, at 250 West Center Street. The proposed spa was to contain, among other things, a dance floor, archery range, swimming pools, and weight lifting rooms. Defendant actively solicited investors for the spa project to provide needed capital.

Defendant told investors that for \$5,000.00 investment, they would have an interest in the large spa and a life time membership. He further told them that the large spa was to be financed through the completion of and sale of membership in a smaller spa in Orem, Utah, at 1650 East South State Street.

During the solicitations of investors, defendant knowingly made several material misrepresentations, inconsistent promises and mutually exclusive claims to investors.

For example, Benjamin De Hoyos, James Broadbent, Wayne Turley, and Ralph Ladle were told by defendant that their investment was totally secured by the large spa property.

site at 250 West Center Street. De Hoyos testified that defendant told him that the land was owned by GOI free and clear and was sure collateral for any investments (Tr. 122). De Hoyos relied on these representations in making his investment (Tr. 103,105). Defendant told Broadbent that he (defendant) owned the Center Street property. Broadbent, on the basis of this representation, felt secure in his investment in the company (Tr. 138,139). Turley was told by defendant that the Center Street property was the ace in the hole, and that there was enough money wrapped up in the property to guarantee the return of any money to investors. Turley felt that his investment was a sure thing since defendant represented it as being backed up with all that land (Tr. 172). Ladle testified that defendant represented the Center Street property as being the security for Ladle's investment (Tr. 174).

The evidence, contrary to defendant's representations, was that the Center Street property was neither owned free and clear, nor did defendant or Great Outdoors, Incorporated have sufficient equity in the property to guarantee the return of the money of investors. The Center Street property was foreclosed on after defendant had paid only \$34,000.00 of the principal owing on the property (Tr. 223,224). Despite the more than \$182,000.00 received by the defendant

from investors, (Exh. 58). Defendant defaulted on two relatively small payments on the property and left construction projects on the property unfinished (Tr. 224-228).

Defendant made representations to prospective investors that only \$50,000.00 was needed to complete the small spa project, that there would be only ten investors investing \$5,000.00 each, and that the money was to be used to finish the smaller spa project. Ivan Park, who invested \$5,000.00 in GOI as early as May, 1973, testified that at that time defendant named "seven or eight, or some such number" of investors (Tr. 304). After defendant named seven or eight, at least nine people paid monies to defendant. Helen Evans invested \$12,000.00 in June, 1973 (Tr. 256); Ladle invested in September, 1973 (Tr. 273); Brown invested in 1973 (Tr. 280-283); Taylor invested in February, 1974 (Tr. 314,315), as did Brothers (Tr. 346), and the four victims. Significantly, the defendant first told the four victims listed in the information - De Hoyos, Uzelac, Turley, and Broadbent - that there were only to be ten investors at a total of \$50,000.00 after Park, the "seven or eight" investors mentioned to Park, Evans, Ladle, Brown Taylor and Brothers had invested. (Tr. 31,34,161,167,168). Defendant even told De Hoyos, as late as May, 1974, that De Hoyos was the seventh

person to invest (Tr. 100). Defendant's Exhibit 58 revealed that, in fact, there were over one hundred investors who had invested \$182,625.00 in defendant's corporation. (Exh. 58, p.1, line 26).

Although defendant told investors GOI only needed \$50,000.00 the following debts, known by defendant, were proven to be owed by GOI prior to May, 1974:

<u>date debt payable</u>	<u>amount</u>	<u>to whom payable</u>
1 January 1974	\$20,000	due on the contract on the land for the large spa (Tr. 219-222)
30 January 1974	\$ 5,000	due Wayne Brown (Tr. 287, Exhibit 37)
30 January 1974	\$ 5,000	due Ralph Ladle (Tr. 271, 275, 276, Exhibits 15,16)
30 January 1974	\$ 8,500	due Ivan Park (Tr. 305,306 Exhibit 451)
30 January 1974	\$13,496	due on large spa (Tr. 226-228)
16 April 1974	\$12,000	due Helen Evans (Tr. 257-259, 262, Exhibit 31)

TOTAL - \$63,996

In addition, defendant knew GOI owed significant sums of money to sub contractors who had worked on the small spa property. Eldon Adams, who leased property to defendant for the small spa, gave testimony that he (Adams) paid over \$34,000 to persons who had done work on the small spa property

while defendant had control of the property under the lease (Tr. 359-364). Adams subsequently completed the work on the small spa for a total cost of \$193,000 (Tr. 380-381).

Defendant represented to many investors, both victims in the information and others, that they would receive a rapid return on their investment. Park, who invested in May, 1973, was promised his money back in a maximum of six months (Tr. 302,303). Taylor, who invested in February, 1974, was promised that he would be the first to get his money back, that his money would be returned within three months, and that this offer would not be made to anyone else (Tr. 314-319). Helen Evans, who invested in June, 1973, was to have been paid back by the first of January, 1974. Defendant promised in writing to pay her \$3,000.00 in each of the months of May, June, July, and August, 1974 (Tr. 262, Exh. 32). Evans never received her money back (Tr. 256, 259, 260, 262, 263). De Hoyos was promised his money back in four months (Tr. 103). Defendant promised Uzelac and Turley their money back in one year's time (Tr. 35, 168). Terry was to receive his return of investment within three or four months (Tr. 347). The victims in the information did not receive their money back.

Defendant made mutually exclusive representations

concerning enterprises. Defendant told De Hoyos that GOI, the company involved with the spas, was the parent Company and owner of Build Estate, Incorporated (Tr. 127-129). Thorell, who was also investing in the spas, was told by the defendant to make his check payable to Build Estate (Tr. 311). Defendant told several of the other investors, including Thorell and Evans, that they were investing in Build Estate, Incorporated, the parent company which owned GOI and which was to draw income from GOI (Tr. 265, 266, 311). For prior rulings in this case see State v. Forsyth, 560 P.2d 337 (Utah 1977); and State v. Forsyth, 587 P.2d 1387 (Utah 1978).

ARGUMENT

POINT I

TESTIMONY OF INVESTORS OTHER THAN THOSE VICTIMS LISTED IN THE INFORMATION WAS PROPERLY ADMITTED UNDER RULE 55 OF THE UTAH RULES OF EVIDENCE TO DEMONSTRATE DEFENDANT'S INTENT, PREPARATION, PLAN, KNOWLEDGE, SCHEME OF OPERATIONS, AND ABSENCE OF MISTAKE.

Although evidence of crimes committed by the defendant other than those covered in the immediate prosecution is generally inadmissible, Utah rules and legal precedent specifically allow certain logical and reasonable exceptions. Rule 55, Utah Rules of Evidence, provides:

Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specific 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 Rule 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 added.) See also State v. Schieving, 535 P.2d 1232 (Utah 1975).

This general principle of evidence was explained by the court in State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969):

Concededly, evidence of other crimes is not admissible if the purpose is to disgrace the defendant as a person of evil character with a propensity to commit crime and thus likely to have committed the crime charged. However, if the evidence has relevancy to explain the circumstances surrounding the instant crime, it is admissible for that purpose; and the fact that it may tend to connect the defendant with another crime will not render it incompetent.

451 P.2d at 775.

Rule 55, Utah Rules of Evidence allows evidence of other crimes or civil wrongs to show not only "absence of mistake or accident, motive . . . intent . . . plan, knowledge," but to prove "some other material fact. . ." Thus, other crimes may be used to show anything which has a legitimate evidentiary purpose other than merely to discredit the defendant. The following Utah criminal cases are illustrative of the types of

evidence which may be properly admitted under Rule 55:

State v. Schieving, supra, evidence of heavy indebtedness and two garnishments admitted to show motive and intent for embezzlement.

State v. Cauble, 563 P.2d 775 (Utah 1977), evidence of other sales proceeds having been taken by appellant was admissible to establish a common plan or a scheme and to show a motive.

State v. Baran, 25 Utah 2d 16 (1970), evidence of several other crimes committed by the defendant on an evening spree admitted to "explain the circumstances surrounding the instant crime." Id. at 19.

State v. Mason, 530 P.2d 795 (Utah 1977), defendant's use of heroin on the day in question admissible to determine her mental condition at the time she testifies, even though the charge is for theft.

State v. Lopez, supra, property taken from defendant's car which came from an unrelated crime admitted "to explain the circumstances surrounding the instant crime." Id. at 260.

State v. Kasai, 27 Utah 2d 321, 495 P.2d 1265 (1972), prior drug contacts shown to explain the circumstances surrounding the crime and to show a state of mind of the

defendant.

State v. Maestas, 560 P.2d 343 (Utah 1977), evidence of a robbery committed a few days before the homicide admissible to show the motive for the homicide, and intent on the part of the defendant.

State v. Neal, 254 P.2d 1053 (Utah 1953), four robberies in California for which the defendant was not convicted admissible to establish that the defendant was facing a series of prosecutions in Utah and California and thereby supplied a strong motive for trying to shoot his way to freedom.

State v. VanDyke, 589 P.2d 764 (Utah 1978), evidence of the defendant's robbing several other smaller places admissible to show preparation and plan.

State v. Sharp, No. 15915 (Utah, April 2, 1979), evidence of entry into other cabins admissible to show plan and the activities of the defendant concerning the crime charged.

State v. Daniels, No. 15509 (Utah, Sept. 13, 1978), evidence that the defendant stole gasoline was relevant to explain the circumstances surrounding the crime for which he was charged.

State v. Brown, 577 P.2d 135 (Utah 1978), evidence of theft of an automobile, sale of a stolen automobile, and

an attempt to conceal the crimes by placing parts in a wrecked automobile was admissible on a separate charge to show intent and knowledge and also to reveal a modus operandi. See also State v. Goodliffe, 578 P.2d 1288 (Utah 1978); State v. Mitchell, 571 P.2d 1351 (Utah 1977); State v. Boone, 581 P.2d 405 (Utah 1978).

Defendant says the testimony of the investors other than the victims was improperly admitted. Respondent asserts that the testimony of the other investors reveals substantial relevant misrepresentations made by the defendant in perpetration of a common plan or scheme, completes the picture of the entire investment scheme rather than just the relatively small part played by the victims, and shows the entire circumstances under which the defendant was operating at the time he spoke to the victims. See Facts, supra.

Late in the scheme, defendant asserted that no more than ten investors would be allowed to participate, at \$5,000.00 each. The testimony of victims other than those named in the information showed more than ten investors had already participated. Specifically, Parks was told by defendant of seven or eight investors at the time he invested, in May, 1973 (Tr. 304). After Park was told that there were already seven or eight other investors, additional persons invested in the corporation, including Evans, Ladle, Brown, Taylor,

and Brothers. After that, the defendant represented to the victims, De Hoyos, Uzelac, Turley, and Broadbent, that there were only to be ten partnerships in total.

Although in April, 1974, defendant and GOI owed \$63,996.00--on the large spa property, to investors, and for work done on the large spa property--and an additional \$34,000.00 for work done on the small spa property, and although \$193,000.00 was needed to complete the small spa, defendant maintained, as late as May, 1974, that only \$50,000.00 was necessary to complete the small spa project, that the small spa would pay for the large spa completely, and that there were, at that time, seven out of ten investors who had invested their money. \$50,000.00 would not have even paid the current, known obligations of GOI, let alone result in completion of the small spa and the large spa.

Testimony of other investors showed that defendant misrepresented the ownership of the large spa property at 250 West Center Street in Orem to victims and other investors alike, telling them that he owned the property free and clear and held it as collateral to pay investors, and that enough money was wrapped up in the property to guarantee the return of any and all investments. Later testimony established that the defendant did not own the property free and clear, nor did he have sufficient equity to

guarantee the return of investments. The testimony of other investors better showed the amounts of equity in the property which would have been necessary, but which was not available, to collateralize investor and victim's moneys.

Testimony of other investors revealed that defendant promised investors a rapid return of their investment, and that he made conflicting representations as to who would get his money back first. Park, who invested in May, 1973, was to get his money back in six months from the time of investment, yet defendant promised Taylor, who invested in February, 1974, that Taylor was to be the first to get his money back. At that time, in February, 1974, defendant already owed substantial sums of money to Park, Ladle, and Brown (see chart of defendant's debts, p. 5, supra). Yet defendant continued to make representations to both victims and other investors alike that they would receive a rapid return on their investment.

Evidence of investments by investors other than the victims listed in the information showed that defendant misrepresented the appropriate business of the company. He told some investors that Build Estate, Incorporated was the parent company of GOI, that Build Estate owned the spas and would receive a portion of anything that GOI made. However, De Hoyos and Broadbent, two of the named victims, were told that GOI was the parent company. See Facts.

Defendant did not pay for the work on the small spa with the investment of victims and other investors as he

represented that he would. He did not own the large spa property outright, nor did he own equity in it sufficient to guarantee the return of the money to the victims, let alone other investors.

In State v. Schieving, supra, (which appellant mis-cites as Olson v. Swapp, 535 P.2d 1233 (Utah 1975)), this Court set the standard for receiving evidence of a common plan or scheme:

. . . evidence of another crime is admissible . . . to show a common scheme or plan embracing commission of similar crimes so related to each other that the proof of one tends to establish the crime for which the defendant is on trial. 535 P.2d at 1233.

The testimony of investors other than the victims named in the information did meet this Court's standard. Such testimony corroborated the testimony of the victims in great detail, and the combined testimony of victims and other investors showed the modus operandi of the defendant. The common scheme of the defendant was to make people believe that there were only two or three openings left for investors, take as much money from as many people as possible, ostensibly to invest in a small spa, expenses for which were not paid. To that end, defendant made many significant representations to both the victims and other investors, all of which are extremely relevant. The fact that he made similar and

sometimes exactly the same false statements to other investors as well as to the victims helps to establish that proof of a common scheme necessary for a proper determination by the jury.

In State v. Tuggle, 28 Utah 2d 284, 501 P.2d 636 (1972), this Court pointed out that "ordinarily the admissibility of evidence is for the trial court, and in the absence of an abuse of discretion on the part of the court, the ruling will not be disturbed on appeal." (Id. at 637). This Court has further noted, in State v. Lopez, supra, that "such harm as there may be in receiving evidence concerning another crime is to be weighed against the necessity of full inquiry into the facts relating to the issues." (451 P.2d at 775).

In the present case the trial judge exercised sound discretion in admitting the evidence of investors other than the victims. He was given ample opportunity to weigh and consider the probative value of the evidence, and he allowed it in. Clearly, in his view, the importance of the evidence in explaining the situation and putting the entire matter before the jury outweighed any prejudicial effect it may have had upon the jury. In the absence of any clear showing of an abuse of discretion, the trial judge's

ruling on this matter should stand.

It is questionable whether or not the evidence of other investors even fits the category of other crimes or other civil wrongs according to defendant's theory of the case. The defendant's defense was that he was engaged in a normal business operation which attempted to succeed but which legitimately failed. Defendant argues the legitimacy of a business on one hand and at the same time alleges that evidence of that business is not admissible because it was a crime. Representations, conversations, and transactions in defendant's declared legitimate attempt at business cannot be simultaneously a crime.

CONCLUSION

The evidence claimed by defendant to be erroneously admitted was not admitted for the purpose of demonstrating the accused's evil nature or character, or his propensity to commit a crime, but was admitted for the permissible purpose of explaining the circumstances surrounding the crime in order to demonstrate intent, preparation, plan and common scheme of operation. These are legitimate reasons for the introduction of the evidence and the fact that the evidence tends to show that the appellant had committed other crimes

does not render the evidence incompetent.

For these reasons, the State urges this Court to uphold the verdict of the lower court.

Respectfully submitted this 27th day of January, 1981.

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CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing Brief of Respondent to Mr. Stephen R. Madsen, Attorney for Appellant, 381 West 2230 North, Suite 201, Provo, Utah 84601, this 27th day of January, 1981.

A handwritten signature in cursive script, appearing to read "Sharron K. Hunsaker", is written over a horizontal line.