1980

State of Utah v. Marc Chesnut : Appellant

Utah Supreme Court

Robert B. Hansen, Earl F. Dorius; Attorney for RespondentRobert J. Schumacher; Attorney for Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

Case No. 16945

MARC [illegible] SMITH,

Defendant-Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN UTAH COUNTY, STATE OF UTAH, THE HONORABLE ALLEN B. SORENSEN, JUDGE

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Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Defendant appeals his conviction for theft under Sections 76-6-404 and 76-6-412, U.C.A. (1953), as amended.

DISPOSITION IN THE LOWER COURT

The jury in the lower court found the defendant guilty of exercizing unauthorized control over an operable motor vehicle, and judgment was subsequently entered against him as a third degree felony.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment below.

STATEMENT OF FACTS

After midnight on the 27th of June 1979, the defendant, Marc Chesnut, was stopped while walking his friend's motorcycle in the street in front of the friend's house. The defendant told the officer who stopped him that the motorcycle was his neighbor's and that he planned on riding it in a nearby vacant field (T-10). The officer awakened the neighbor who stated the defendant did not have permission to ride his motorcycle (T-29). An additional officer, Officer Evans, was called who effected the arrest of the defendant for auto theft (T-22).

At trial a principal issue was whether the defendant had the intention to permanently deprive the owner of his motorcycle, as required under Section 76-6-404, U.C.A. (1953), as amended. The arresting officer, Officer Evans, testified that the defendant told him on the way to police headquarters that he had taken the motorcycle because the defendant owed him money (T-23). The defendant took the stand and denied that statement (T-61, 62). He testified that he tried to get permission that night by waking the owner (T-53,55) and that since they were friends he felt it would be all right if he took the bike for awhile (T-59). Additionally, he testified that his intention was to return the motorcycle after an "hour or so," immediately following his ride (T-54, 55, 59).

After the presentation of the State's case-in-chief, the defendant moved to dismiss the case due to the State's failure to present evidence that the defendant's intention was to permanently deprive the owner of his vehicle (T-47). At the

close of all the evidence, the defense moved for a directed verdict on the same grounds (T-71). Both these motions were denied.

At sentencing defense counsel had submitted motions for judgment notwithstanding the verdict and for new trial. These motions, relating to the issues raised in this appeal, were denied.

Further, the trial court refused to allow a jury instruction as to the lesser included offense of "joyriding," Section 41-1-109, U.C.A. (1953), as amended (T-70). The instruction was founded upon the defendant's testimony at trial and the defense's theory of the case.

The trial court also denied the defense permission to cross-examine the owner of the motorcycle, Mr. Covington, with regard to the motives behind his testimony (T-38). Prosecution objections were sustained by the court despite the fact that the arresting officer in this case, Officer Evans, was also the officer investigating the witness in a separate matter (T-38).

The trial concluded on September 19, 1979, with the jury returning a verdict of guilty to the charge of theft of an operable motor vehicle, Section 76-6-404 and Section 76-6-412, U.C.A. (1953), as amended. On February 22, 1980 judgment was entered thereon by the court. This appeal was then filed on March 4, 1980.

ARGUMENT

I. BY FAILING TO PRESENT "INDEPENDENT, CLEAR AND CONVINCING" EVIDENCE, SHOWING DEFENDANT'S INTENT TO PERMANENTLY DEPRIVE, THE STATE DID NOT ESTABLISH THE CORPUS DELICTI FOR AUTO THEFT.

Section 76-6-404, U.C.A. (1953), as amended, states that:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof. [Emphasis added.]

Section 76-6-401(3), U.C.A. (1953), as amended, defines the meaning of "purpose to deprive" that applies to Section 76-6-404:

> "Purpose to deprive" means to have the conscious object:
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost. [Emphasis added.]

Thus, a necessary element of the crime defined by Section 76-6-404 is that the person possess an intention to permanently deprive the owner of his property.

In the case of State v. Knoefler, 563 P.2d 175 (Utah 1977), the issue was whether or not the corpus del cti had been made out so as to sustain a conviction for driving and inflicting injury while under the influence of intoxicants. This court held that the State must "present evidence that the injury specified in the crime occurred" for the court to sustain the conviction. Id. at 176. Applied to the facts at hand, Knoefler requires that the State present evidence specifically demonstrating that the defendant possessed the intention to permanently deprive the

owner of the motor vehicle in order to establish the corpus delicti.

State v. Ferry, 275 P.2d 173 (Utah 1954), and State v. Weldon 314 P.2d 353 (Utah 1957) set standards for the quality of evidence required to demonstrate the intention for corpus delicti purposes.

In Ferry the court reversed a conviction of carnal knowledge for lack of "independent, clear and convincing evidence of the corpus delicti" other than a confession of the accused. Id.at 173 State v. Weldon, supra, relied upon Ferry and reinforced the requirement that there be a high quality of evidence, "clear and convincing," and that it be "independent" of the accused's confession.

Weldon involved a conviction for conspiring to commit a robbery. It is significant here for demonstrating that a "plausible argument" that evidence supporting a specific element of the crime charged does not establish the corpus delicti.

> It is appreciated that a plausible argument can be made that the facts here shown, independent of the confession, constitute sufficient independent evidence of the corpus delicti. . . Id. at 357 [Emphasis added].

The court required a high standard as to the quality of evidence. Despite there being "A plausible argument" that the evidence satisfied the corpus delicti, despite a possible "sufficiency" under some other standard of proof, the evidence presented did not meet the "independent, clear and convincing"

standard in force in Utah. Such is the case here with regard to the defendant's alleged intention to permanently deprive the owner of his motorcycle.

Excluding the alleged confession of defendant (T-23), the evidence upon which the state relies to meet the "independent, clear and convincing" standard is the following: the defendant was walking a motorcycle away from his friend's house after midnight, along the street, and in the direction of his own house which was on the same block. This evidence differs markedly from the evidence needed in other similar cases to demonstrate that there was an intention to permanently deprive.

In Webber v. State 376 P.2d 348 (Ok.Cr.Ap. 1962) intention to permanently deprive sufficient to meet the corpus delicti standards was inferred after the car had been driven to another state, wrecked, abandoned, and not discovered until one week later. See also State v. Daniel, 584 P.2d 880 (Utah 1978).

Nothing of that nature has occurred here. On the facts, defendant was within a few yards of the owners house and walking the motorcycle toward his own home on the same block (T-10). This does not constitute "independent, clear and convincing" evidence that the defendant had an intention to permanently deprive. At best it could be said only that there was clear and convincing evidence that the appellant exercised unauthorized control over the property. Accordingly, the State's evidence does not meet the standard necessary to establish the corpus

delicti. The ruling on the Motion to Dismiss should be reversed.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF "JOYRIDING," SECTION 41-1-109 (1953), AS AMENDED.

At the commencement of the trial the defense requested that the court give a jury instruction that pertains to the offense of "joyriding." This instruction was later refused. The defense took exception and cited the refusal as error (T-70).

Recent Utah Supreme Court cases have made it clear that "joyriding" is a lesser included offense in the crime of auto theft. In State v. Cornish 508 P.2d 360 (Utah 1977), the defendant was charged with auto theft under Section 76-6-404, U.C.A. (1953), as amended, yet convicted of joyriding under Section 41-1-109, U.C.A. (1953), as amended. This court upheld the conviction as proper, stating that "joyriding" was a lesser included offense. The reason stated for this holding was that all essential elements of the theft statute and the "joyriding" statute were similar with the exception of the requirement as to intent. "The only fact the state is not required to establish for 'joyriding,' which is required for theft, is the intent to permanently deprive." Id. at 361.

Similarly in State v. Lloyd 568 P.2d 357, 358 (Utah 1977):

> The contention stated by defendant that the unlawful taking of a vehicle under Section 41-1-109, U.C.A. (1953), as amended, is not a lesser and included offense of theft of an operable motor vehicle under Section 76-6-404, U.C.A. (1953), as amended, supra, is rejected for reasons stated today in State v. Cornish, 568 P.2d 360.

In the Cornish case the court went on to say that the burden of showing the intention to permanently deprive required by the theft statute, as compared to the intention to temporarily deprive, required by the joyriding statute, was upon the state. Further, the Court stated that:

> "If there is an issue as to whether the prosecution has sustained the burden, or if the defendant presents evidence under his theory which negates the factors in Section 76-6-401 (3) [defining intention to permanently deprive], the matter of circumstances of the intent should be presented to the trier of fact." 508 P.2d at 362

It is this issue upon which the defense here relies. Evidence was presented by the defense which negates a finding of the necessary intent to permanently deprive. There was an issue as to whether or not the defendant's intent was to permanently or temporarily deprive.

Defendant testified under oath that his intention was solely to have possession of the vehicle for an hour or so (T-54). Further, he presented evidence for taking the motorcycle without asking permission. (He couldn't wake the owner), (T-53, 55), for pushing the motorcycle instead of riding it (the vehicle was out of gas) (T-55), and for wishing to ride the motorcycle at that hour (others had done it at that time of night, the neighbors

who could most likely hear the noise were out of town, the field and school yard were lighted).

All of the above factors must at least be construed as "evidence presented" or creating "an issue" as to whether or not the defendant's intention was to deprive the owner permanently or temporarily. These matters of evidence create the situation as described in Cornish. Thus the question of permanent or temporary intent to deprive, auto theft versus joyriding, needed to be submitted to the jury, the trier of fact.

The case of State v. Gillion, 463 P.2d 811 (Utah 1970), supports the position that the Court took in Cornish and deals with the Court's obligations to instruct the jury that joyriding is a lesser and included offense to the crime of auto theft.

In Gillion, the Court held that the presentation of any reasonable evidence supporting a lesser included offense requires that a jury instruction for the lesser included offense be given. Failure to do so results in reversible error.

> One of the foundational principles in regard to the submission of issues to juries is that where the parties so request they are entitled to have instruction given upon their theory of the case; and this includes lesser offenses if any reasonable view of the evidence would support such a verdict. Id. at 812. [Emphasis added.]

The Court stressed the fact that the jury should not be presented with an either/or proposition. Additionally, the question which the court had on appeal was not whether any

reasonable evidence justified the verdict of the jury, but rather whether there was "any reasonable view of the evidence" which would support a theory based upon a lesser and included offense. If there was such a view of the evidence, the Court was required to instruct the jury as to that lesser and included offense.

As stated above, there exists ample evidence in the case at hand to draw a "reasonable view" that joyriding might have existed. The defendant testified that his intent was only to ride for an "hour or so." The circumstantial evidence also shows this entirely plausible. A field for riding was nearby, defendant had heard others riding at night before, and the only person he was seriously concerned about waking was his mother (T-61).

To conclude, Cornish requires a matter to be submitted to a jury when there is "an issue." Gillion requires submission of lesser included offenses if there is "any reasonable view of the evidence" to support it. Defendant's proposed instruction for joyriding qualified on both grounds. The Court's refusal to submit it to the jury constituted reversible error.

III. REFUSAL TO PERMIT QUESTIONS AS TO THE STATE'S WITNESS, MR. COVINGTON'S, MOTIVE FOR TESTIFYING WAS PREJUDICIAL ERROR.

During cross examination of the State's witness, Kenny Covington, the Court sustained objections to a line of questioning which would have demonstrated the witness' motive for

testifying as he had (T-36, 40). The defense sought to show a relationship existed between the arresting officer in the matter at hand, Officer Evans, and Mr. Covington. Officer Evans was at that time the investigating officer in a crime for which he had investigated Mr. Covington's involvement. The Court relied upon Rule 45 of the Utah Rules of Evidence to sustain the objection (T-37).

Rule 45 allows a trial judge to exclude otherwise admissible evidence if admission would result in an undue consumption of time, create confusion or prejudice in the minds of the jury or unfairly surprise another party.

> "Except as in these rules otherwise provided, the Judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, of (b) create substantial danger of undue prejudice or of confusing the issues or misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered."

This discretionary right of the trial judge, however, must be balanced against the specific right to cross-examine a witness as to his motive for testifying. This right has both statutory and constitutional roots.

Section 78-24-1, U.C.A. (1953), as amended, provides in part that "in every case the credibility of the witness may be drawn in question. . . by his motives; and the jury are the exclusive judges of his credibility." Cross-examination as to motives is vital if the jury is to play its proper role.

In the case of Davis v. Alaska 415 U.S. 308, 316 (1974) the United States Supreme Court emphasized the constitutional right to cross-examine as to motive:

> Cross examination is the principal means by which the believability of a witness and the truth of the testimony is tested. . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

This statement was relied upon in the Utah case of State v. Maestas, 564 P.2d 1386 (Utah 1977), where the Court re-emphasized the "long recognized. . . particular significance of cross-examination and the fact that the interest of a witness is a matter which the jury must weigh against his credibility." Id. at 1388. This restated the rule from State v. Cerrar, 207 P.597 (Utah 1922) where the Court held:

> The interest of a witness in any particular case in which he becomes a witness may always be shown, and the effect, if any, upon the weight of the testimony is always a question for the jury. Id. at 602.

Hence, there are strong and deep rooted statutory and constitutional rights accorded to the right to cross-examine in order to determine a witness' motive for testifying.

State v. Maestas, supra, is of particular significance here as it sets out the standards to determine when an error in limiting cross-examination results in prejudicial error. In Maestas the defendant was convicted of assault by a prisoner and appealed on grounds that limiting cross-examination as to the victim's motive for testifying as he did was prejudicial error.

The defense sought to demonstrate that the victim testified as he did so that he would be removed from maximum security at the prison. Counsel was prohibited from pursuing a line of questioning that would show an agreement between the testifying police officer to the effect that the victim would be removed from maximum security depending upon how he testified. The Court held that there was error, but that it was not prejudicial error. The reason that the error was not prejudicial was because the Court held the issue of an agreement between the police officer and the victim made it to the jury despite the limitations on the cross examination.

> While neither Hart [the victim] nor other witnesses were actually asked whether any promise was given, the implication that one may have been was clearly before the jury.
>
> Courts have found no prejudice where information that may be brought out by further questioning was already before the jury either from the testimony of others or by implication from the witness' own testimony. Id. at 1389.

Despite the limitations on cross examination, and the fact that they were error, the issue had sufficiently made its way to the jury in the Maestas case.

Here, however, though the issue is identical, the facts are not. Unlike Maestas, here the jury did not receive evidence to judge whether the witness' testimony (Mr. Covington's) was influenced by the ability of the officer to be lenient or harsh with the charge for which he had been investigated. The only indications that the jury had as to this relationship were during the restricted cross examination of Mr. Covington

(T-36, 40) and another series of questions directly following (T-40, 42).

The pertinent part of the latter series of questions was as follows:

> Question: [Defense] Has anyone told you that you had to testify you did not give him (defendant) permission to ride the bike?
>
> Answer: [Mr. Covington] What do you mean I had to testify?
>
> Question: [Defense] So we are sure you understand the question, Kenny, I will ask this again in different words. Since the time that you came out of your house on the 27th of June at 2:45 in the morning, have you had conversations with anyone concerning your testimony?
>
> Answer: No, not really. I just -- No.
>
> Question: You said before that you had talked with Officer Evans earlier. Was it last Sunday you said?
>
> Answer: He told me when I had to be here and that I had to testify, you know.
>
> Question: [The Court] What Mr. Schumacher is asking you, did anybody tell you how you had to testify?
>
> Answer: No, they just told me if I didn't tell the truth I would be the one that went to jail (T-40, 42).

This series of questions did bring before the jury Mr. Covington's testimony that no one told him that he did not give the defendant permission to ride his motorcycle. What it did not bring before the jury was the very real ability of Officer Evans to increase

Mr. Covington's chances of actually going to jail for another crime, depending upon Mr. Covington's testimony. This relationship, that of both Officer Evans and Mr. Covington to another pending criminal charge, did not come before the jury. The reason for this was the denial of the defense's questions on cross-examination as shown below:

Question: Okay. You have talked within the last few days with Officer Kenny Evans about the trial?

Answer: [Mr. Covington] Yes.

Question: When was that?

Answer: Sunday.

Question: Where did you talk with him?

Answer: In the cops car.

Question: Did you go anywhere with him?

Answer: Yes.

Question: Where did you go?

Answer: County Jail.

Question: Was that in connection with an investigation he was doing?

Mr. Anderson [Prosecution] Your Honor, I object. [Objection sustained] (T-36, 37)

Question: Did Officer Evans question you concerning what your testimony would be today?

Answer: He just told me if I lied I would go to jail.

Question: He had already taken you to the jail that night?

Mr. Anderson: Your Honor, I object to that question.

The Witness: This was over a different thing.

The Court: Just a moment. I sustain that objection. I will instruct the jury not to pay any attention to the question or the answer.

Question: (By Mr. Schumacher) Isn't it true he had arrested you for another offense?

Mr. Anderson: Your Honor, I object.

The Court: I sustain that objection.

Although these questions do bring out that there was a criminal charge against Mr. Covington and that Officer Evans was involved in the case, it does not establish the fact that the charge was pending and that Officer Evans as investigating officer had a very real ability to influence Mr. Covington's testimony.

Failure to allow this relationship to come before the jury constitutes error under an infringement of the right to cross-examine under Davis and Section 78-24-1, U.C.A. (1953), as amended, as cited above. Because the error actually prevented significant evidence from coming before the jury, Maestas shows that the error was prejudicial.

CONCLUSION

The appellant has presented three arguments as to why the Court should reverse the judgment of the Court below: (1)

The State did not provide "independent, clear and convincing" evidence of the defendant's alleged intention to permanently deprive necessary to establish the corpus delicti of auto theft under Section 76-6-404 U.C.A. (1953), as amended. (2) The trial Court committed reversible error by refusing to instruct the jury on the defendant's proposed instruction for the lesser and included offense of "joyriding," Section 41-1-109 U.C.A. (1953), as amended. (3) The trial Court further committed prejudicial error by denying the defense permission to cross-examine the State's witness, Mr. Covington, as to his motives for testifying as he did.

For the reasons above, the appellant prays that the judgment of the lower Court be reversed.

RESPECTFULLY SUBMITTED,

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MAILING CERTIFICATE

I hereby certify that I mailed true and correct copies of the foregoing Brief Of Appellant, to the following: three copies to the Office of the Utah Attorney General at 236 State Capitol, Salt Lake City, Utah 84114; and eleven copies to the Utah Supreme Court, State Capitol, Salt Lake City, Utah 84114, this 15th day of May, 1980.

Dantzelle Maynard