

1980

State of Utah v. Marc Chesnut : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MARC CHESNUT,

Defendant-Appellant.

Case No.
16945

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE
ALLEN B. SORESENSEN, JUDGE, PRESIDING

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FILED

JUL 3 1980

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MARC CHESNUT,

Defendant-Appellant.

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Case No.

16945

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with theft in violation of Utah Code Ann. § 76-6-404 (Supp. 1973), for the obtaining or exercising unauthorized control of another's motorcycle with a purpose to deprive them thereof.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty on September 19, 1979, in the District Court of Utah County, the Honorable Allen B. Sorenson, presiding. The appellant was sentenced February 22, 1979, to be confined in the Utah State Prison for an indeterminate term not to exceed five years.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the jury.

STATEMENT OF FACTS

In the summer of 1979, Marc Chesnut was twenty-two and Kenny Covington was twenty. They lived a few houses from each other in Lehi, Utah (T.51). Mr. Covington owned a motorcycle which he had purchased for \$1,650 (T.27).

On June 27, 1979, at 2:45 a.m. Officer Carl Zimmerman, of the Lehi Police Department, observed appellant pushing a motorcycle down the road towards his home. The officer pulled along side the appellant and asked whose motorcycle it was (T.10). Appellant responded that it belonged to Kenny Covington (T.10). When asked what he intended to do, appellant said he intended to ride it in a nearby vacant lot (T.10). The motorcycle was a dirt bike that did not require a key (T.10).

The officer knew both the appellant and Covington. After talking to appellant, Officer Zimmerman went to Mr. Covington's house and aroused him from his sleep (T.11). Covington told the officer he had not given appellant permission to ride his bike that night (T.29). During this conversation, appellant pleaded with Covington to give him a break (T.21 and 29).

Officer Zimmerman called Officer Evans to assist him. Officer Evans arrested appellant and took him to the county jail (T.22). In the presence of Officer Evans and Deputy Yance Horne, appellant stated that he had taken the bike because Mr. Covington owed him \$300. Appellant denies making this statement. Covington testified that when the theft occurred he owed the appellant \$100.

During cross-examination, the defense counsel tried to elicit from Covington what his motive was in testifying (T.37). Covington had been involved in a separate, unrelated, criminal investigation which occurred after appellant took his bike (T.44). Officer Evans had made this investigation (T.37). Defense counsel tried to show that Officer Evans had coached Covington on his testimony (T.38). When Covington testified that no one told him how to testify, the court did not allow defense counsel to pursue this line of questioning further (T.42).

Appellant claims he was pushing the bike to his house to get some gas because the bike was empty (T.55). Covington testified that there was gas in the bike (T.66).

The defendant made a motion to dismiss after the state's case claiming that the state's evidence was

insufficient to prove the element of intent. The motion was denied (T.47). A motion for a directed verdict was also denied (T.67). The court, over defendant's objection, refused to instruct the jury on the lesser included offense of joyriding (T.70). On September 19, 1979, appellant was found guilty as charged.

ARGUMENT

POINT I

THE STATE PROVED THE CORPUS DELECTI OF THE CRIME OF THEFT.

Utah Code Ann. § 76-6-404 (1953), as amended, states:

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

The appellant's only contention is that the state failed to show by "clear and convincing evidence," independent of the defendant's own confession, that the appellant intended to permanently deprive Mr. Covington of his motorcycle, and therefore the state failed to establish the corpus delecti of the crime of theft. Utah case law does not support this contention.

In State v. Cazier, 521 P.2d 554 (Utah 1974), this Court defines corpus delecti as ". . . the body of the crime;

and that as it is used in regard to proof of crime, it refers only to evidence that a crime has been committed." Id. at 555.¹

The Court also said, referring to prior Utah cases which the defendant had cited, that:

We see nothing in those cases to support the idea that the corpus delecti includes all the elements of a crime.

Id. at 555.

In State v. Atin, 203 Kan. 920, 457 P.2d 89 (1969), the defendant was convicted of larceny. On Appeal he asserted that the state had failed to establish the corpus delecti. The Kansas Supreme Court defined the corpus delecti as:

The corpus delecti of larceny is consisted of two elements: (1) that the property was lost by the owner; and (2) that it was lost by a felonious taking.

Id. at 95.

This Court in State v. Knoefler, 563 P.2d 175 (Utah 1977), stated the necessary requirements to establish the corpus delecti:

1 Black's Law Dictionary defines the corpus delecti as: "The body of a crime. . . . In a derivative sense, the substance as foundation of a crime; the substantial fact that a crime has been committed." Black's Law Dictionary 413 (4th ed. 1968).

An admission or a confession, without some independent corroborative evidence of the corpus delicti, cannot alone support a guilty verdict. To sustain a conviction, the requirement of independent proof of the corpus delicti requires only that the State present evidence that the injury specified in the crime occurred, and that such injury was caused by someone's criminal conduct. An admission or confession is admissible to connect an accused with the crime committed; but the connection of the accused with the crime need not be proven to establish the corpus delicti.

Id. at 176 (emphasis added).

In the instant case the State established the corpus delicti for theft. Officer Zimmerman's testimony showed (1) that the act specified in the crime occurred--the obtaining or exercising of unauthorized control over the motorcycle (T.10); and (2) that someone was criminally responsible--that the motorcycle was taken by the appellant (T.10).

This Court in State v. Perry, 2 Utah 2d 371, 275 P.2d 173 (1954), stated the standard for establishing the corpus delicti was "clear and convincing evidence," independent of the defendant's testimony.

The rationale behind the corpus delicti rule is to assure that a crime has been committed. In State v. Weldon, 6 Utah 2d 372, 314 P.2d 353 (1957), this Court emphasized that "the rule should be applied with caution and not permitted to be used as a technical obstruction

to the administration of justice." 314 P.2d at 356. In the instant case, there was clear and convincing evidence, independent of the appellant's admission that a motorcycle had been stolen, which established the corpus delecti. There is no requirement that the state prove the defendant's intent to establish the corpus delecti. Such a requirement is contrary to State v. Knoefler and State v. Cazier, supra.

POINT II

THE STATE ESTABLISHED BY SUFFICIENT EVIDENCE THAT APPELLANT TOOK THE MOTORCYCLE WITH THE INTENT TO PERMANENTLY DEPRIVE THE OWNER THEREOF.

The appellant was convicted of theft, in violation of Utah Code Ann. § 76-6-404 (1953), as amended, in that he "did obtain or exercise unauthorized control over the property of Kenny Covington with the purpose to deprive the owner thereof. . . ." Utah Code Ann. § 76-6-401 (1953), as amended, defines "purpose to deprive" as having 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; or
- (b) To restore the property only upon payment of a reward or other compensation; or
- (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

The appellant argues that the State has failed to prove the requisite element of intent. In State v. Canfield, 18 Utah 2d 292, 422 P.2d 196 (1967), this Court warned:

Defendant's case is presented in the all-too-common manner of defense counsel: arguing from his own theory of the evidence that it does not show the necessary intent to justify the verdict. But this is at variance with the correct pattern of procedure on appeal and paints quite a different picture of this case than we are obliged to see. It is our duty to respect the prerogative of the jury as the exclusive judges of the credibility of the witnesses and as the determiners of the facts. Consequently, we assume that they believed the state's evidence, and we survey it, together with all fair inferences that the jury could reasonably draw therefrom, in the light most favorable to their verdict.

422 P.2d at 197.

In State v. Hopkins, 11 Utah 2d 486, 359 P.2d 486 (Utah 1961), this Court rejected the defendant's contention that the prosecution had not proven his intent to burglarize an apartment. The Court held:

It is to be remembered that intent, being a state of mind, is rarely susceptible of direct proof. But it can be inferred from conduct and attendant circumstances in the light of human experience. . . .

359 P.2d at 487. Accord: State v. Romero, 554 P.2d 216,

218 (Utah 1976) ("The intent to steal or unlawfully deprive the rightful owners of their property can be inferred by defendant's conduct and the attendant circumstances testified to by the witnesses,"); State v. Canfield, supra at 198 (" . . . [W]e are aware of no better nor persuasive way to do it (prove what a man intended) than by showing both what he did and what he said. . . .").

In the instant case the appellant's purpose in taking the motorcycle was shown from his actions and what he said. The appellant was apprehended at 2:45 a.m. while pushing his neighbor's motorcycle down the street (T.10). His neighbor had not given him permission to take the bike (T.29), yet he pleaded with the neighbor to give him a break (T.21).

This was a dirt bike, which started without a key (T.10). There was gas in the bike (T.66), enough that Mr. Chesnut did not need to push the bike silently down the road. The area was a residential business area (T.14).

Finally Officer Evans testified that Mr. Chesnut told him he took the bike because Mr. Covington owed him \$300 (T.23). Mr. Covington verified that he did owe the appellant money (T.30). It is the respondent's position that there was sufficient evidence to prove the defendant

had the purpose to permanently deprive the owner of the motorcycle.

In State v. Romero, supra, the defendant appealed his conviction for burglary and theft, claiming there was insufficient evidence to uphold his conviction. He based his claim upon the fact that the witnesses could not identify all the co-defendants and gave conflicting testimony about the circumstances of the crime. This Court rejected his appeal and held:

This court has long upheld the standard that on an appeal from conviction the court cannot weigh the evidence nor say what quantum is necessary to establish a fact beyond a reasonable doubt so long as the evidence given is substantial. Further, this court has maintained that its function is not to determine guilt or innocence, the weight to give conflicting evidence, the credibility of witnesses, or the weight to be given defendant's testimony.

Id. at 218 (citations omitted). This Court continued:

This court has set the standard for determining sufficiency of evidence to require that it be so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant committed a crime. Unless there is a clear showing of lack of evidence, the jury verdict will be upheld.

Id. at 219 (citations omitted). Accord: State v. Mills, 530 P.2d 1272 (Utah 1975).

The appellant has not shown that the evidence presented at trial was so inherently improbable that this

court should decide as a matter of law that the defendant did not have the requisite intent.

POINT III

THE APPELLANT WAS PROPERLY CONVICTED OF THEFT OF AN OPERATIONAL MOTOR VEHICLE AND THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF JOYRIDING.

In State v. Dougherty, 550 P.2d 175 (1976), this Court stated the standard to be used for determining when a trial court is obligated to instruct the jury on a lesser included offense:

When an appellant makes an issue of refusal to instruct on included offenses, we will survey the evidence, and the inferences which admit of rational deduction, to determine if there exists reasonable basis upon which a conviction of the lesser offense could rest.

Id. at 176. Accord: State v. Close, 28 Utah 2d 144, 499 P.2d 287 (1972); State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971).

The standard set forth in Utah Code Ann. § 76-1-402(4) (1953), as amended, states there has to be a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the excluded offense."

In State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414 (1964), this Court added:

Also, it is generally held, under ordinary factual situations, that where a jury finds the defendant guilty of a greater offense, the giving of an erroneous instruction on a lesser offense is not prejudicial. If the jury were convinced from the evidence beyond a reasonable doubt that defendants were guilty of second degree murder, the failure to spell out in detail the required intentions for voluntary manslaughter could not reasonably influence their decision.

Id. at 416. In State v. Ash, 23 Utah 2d 14, 456 P.2d 154 (1969), the defendant was convicted of grand larceny of an automobile. The evidence disclosed that he had left a motel where he was staying, driving another person's car. He was subsequently chased down by a deputy sheriff, who discovered shaving equipment, underwear, a gun and some gun shells in the car. On appeal, the defendant alleged error in that the trial court failed to instruct on the lesser offense of driving a vehicle without the owner's consent and with intent to temporarily deprive the owner of possession. The Court rejected this contention, stating:

. . . the defendant could not have been prejudiced by a failure to have the jury consider whether his intent was to deprive the owner of the use of his car temporarily because the court clearly told the jury to find the defendant not guilty if they failed to find beyond a reasonable doubt that he intended to deprive the owner permanently of the use of the car.

456 P.2d at 155.

Finally, this Court stated in State v. Bell, 563 P.2d 186 (Utah 1977), that:

. . . The trial court should give the instructions for lesser included offenses whenever, by any reasonable view of the evidence, the defendant would be guilty of the lesser included offense. The instructions for included offenses may be properly refused if the prosecution has met its burden of proof on the greater offense and there is no evidence tending to reduce the greater offense.

563 P.2d at 188.

The Court added a very significant comment at 563 P.2d 188:

Whenever this court believes beyond a reasonable doubt that the error in not giving the instruction would not have affected the verdict the case should not be reversed. . . .

The respondent agrees that Utah Code Ann. § 41-1-109 (1953), as amended, is a lesser included offense of the theft statutes, Section 76-6-404. However, the right to have the jury instructed on the lesser included offense is not absolute. Utah Code Ann. § 76-1-402(4) states:

The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the excluded offense. (Emphasis added.)

The facts of this case do not justify an instruction on the lesser included offense of joyriding. The evidence presented by the appellant is inherently suspect and uncorroborated. Appellant claims that he had heard bikes at night before but offers no evidence to corroborate this. His claim that he merely intended to go for a ride at 2:45 a.m. in a vacant lot was also uncorroborated (T.10). According to Covington there was enough gas to ride the bike for awhile (T.66). Yet, appellant was caught pushing the bike not riding it (T.10). Appellant does nothing more than dispute the testimony of Officer Evans that appellant admitted taking the bike because Mr. Covington owed him a debt (T.23).

The respondent submits that the appellant should not benefit merely because he was apprehended quickly. The State presented substantial evidence of the defendant's intent. The jury was convinced beyond a reasonable doubt that the defendant had the purpose to permanently deprive Mr. Covington of his motorcycle. Therefore, appellant was not prejudiced by a failure to have the jury consider whether he intended to temporarily deprive Covington of his motorcycle. If there was error in not giving the

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instruction, it was not prejudicial error because it did not affect the verdict.

POINT IV

THE TRIAL JUDGE PROPERLY SUSTAINED THE STATE'S OBJECTION TO CROSS-EXAMINATION OF MR. COVINGTON.

The right of the trial judge to exclude admissible evidence is provided for in Rule 45 of the Utah Rules of Evidence. Rule 45 states:

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, or (b) create substantial danger of undue prejudice or of confusing the issues or of 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.

The trial court's obligation to control the trial and to prevent prejudice and waste of time is weighed against the competing right of confrontation. Part of the right of confrontation, which is guaranteed in Article I, Section 12 of the Utah Constitution and in the Sixth Amendment of the United States Constitution, is the right to cross-examine the witness. The respondent does not take issue with the proposition that exposure of a witness' motive in testifying is a significant aspect of cross-examination. However, the Rules of Evidence do not preclude a court from restricting such cross-examination when the concerns expressed in Rule 45 are present.

In State v. Starks, 581 P.2d 1015 (Utah 1978), this Court examined a defendant's claim that the trial judge unduly limited cross-examination of the witness' character. This Court stated:

The matter of cross-examination and the extent thereof rests largely in the discretion of the trial judge, and he will be reversed only if he abuses his discretion in a given case. Even if an error is made in limiting cross-examination, it is not to be reversed unless it also is prejudicial.

Id. at 1017. See also: State v. Curtis, 542 P.2d 744 (Utah 1974); State v. Maestas, 564 P.2d 1386 (Utah 1977).

Rule 5 of the Utah Rules of Evidence discusses further the effect of erroneous exclusion of evidence:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

The Utah Supreme Court in Maestas, supra, addressed the question of what is prejudicial error, and made note of State v. Chance, 279 N.C. 643, 185 S.E.2d 227

(1971), where the court found prejudice lacking because the mere asking of the question on cross-examination implied the contention of counsel who asked the question.

Also in Maestas the court cited People v. Winston, 46 Cal.2d 151, 293 P.2d 40 (1956). In Winston, the trial judge refused to allow questions of witnesses as to whether they had been promised leniency from the police in return for their testimonies. This was found to be error but not prejudicial error because the jury was aware that the witnesses had broken the law and were under the supervision of the juvenile authorities.

In People v. Bliss, 76 Ill.2d 232, 222 N.E.2d 57 (1966), the witness for the prosecution had disclosed that a charge against her for possession of narcotics had been dropped. Defense counsel continued on cross-examination to further inquire as to promises by police to dismiss such charges. The court sustained objections to further questions on cross-examination as being repetitious and superfluous. This was held not to be improper limiting of cross-examination.

In the instant case, Mr. Covington admitted he was arrested in a criminal investigation (T.44). The defense asked him if Officer Evans had taken him to jail in connection with this investigation (T.37), and further elicited testimony that Officer Evans had discussed Covington's testifying in the

instant case (T.42). Covington stated that no one told him how to testify, Evans merely advised him that if he did not tell the truth, he would go to jail (T.40,42).

Through these questions the jury was aware that Mr. Covington had been arrested by Officer Evans in connection with a separate, criminal investigation. The issue whether Mr. Covington may have had a motive in testifying was before the jury. Mr. Covington testified no one told him how to testify. Further inquiries would have been speculative and repetitious. The trial court, therefore, did not abuse its discretion.

CONCLUSION

The corpus delicti of the crime was made out by clear and convincing evidence independent of the appellant's admissions. The evidence showed there was an unlawful asportation of the motorcycle and it showed someone was criminally responsible. The appellant's intent, in taking the motorcycle, can be determined from what he said and did. From the circumstances surrounding the theft and from the appellant's admission to Officer Evans, the jury could conclude the appellant had the intent to permanently deprive the owner of the motorcycle. The appellant has not shown that the evidence was so inconclusive that reasonable minds

could not reasonably believe he had the intent to permanently deprive the owner.

The trial court properly refused to instruct the jury on the lesser included offense of joy-riding. The evidence presented by the appellant to negate the theory he intended to permanently deprive the owner of the motorcycle was inherently suspect and uncorroborated. Even if there was error in not giving the instruction on the lesser included offense it would not have affected the verdict.

This verdict should not be set aside by reason of the erroneous exclusion of evidence, because the trial judge did not abuse his discretion in limiting cross-examination. The fact that Mr. Covington was being investigated by Officer Evans was before the jury. Also, Mr. Covington said no one told him how to testify. Further questioning would have been repetitious.

Respondent asserts the rulings of the lower courts were proper and prays the jury verdict and court sentence be affirmed.

Respectfully submitted,

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