

1999

Utah v. Harry Gooch : Brief of Appellant

Utah Court of Appeals

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Jay Frederic Voros Jr; Assistant Attorney General; Attorney for Appellee.

Cindy Barton-Coombs; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff and Appellee,	:	No. 991004-SC
	:	971800203
VS.	:	
HARRY GOOCH	:	Priority No. 0 2
Defendant and Appellant.	:	

BRIEF OF APPELLANT

DEFENDANT'S APPEAL FROM HIS CONVICTIONS FOR TWO COUNTS OF AGGRAVATED KIDNAPPING, A FIRST DEGREE FELONY, UTAH CODE ANNOTATED SECTION 76-5-302(1), (1953 AS AMENDED), AND ONE COUNT OF AGGRAVATED BURGLARY, A FIRST DEGREE FELONY, UTAH CODE ANNOTATED SECTION 76-6-203(1), (1953 AS AMENDED). ENTERED ON OR ABOUT OCTOBER 28, 1999 BY THE EIGHTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY, UTAH, THE HONORABLE A. LYNN PAYNE PRESIDING.

CINDY BARTON-COOMBS
193 North State Street (73-13)
Roosevelt, Utah 84066

Attorney For Appellant

JAY FREDERIC VOROS, JR.
Assistant Attorney General
160 East 300 South, 8TH FLOOR
P.O. Box 140854
Salt Lake City, Utah 84114

Attorney for Appellee

Oral Argument Requested

MAY 07 2000

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
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CINDY BARTON-COOMBS
193 North State Street (73-13)
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Attorney For Appellant

JAY FREDERIC VOROS, JR.
Assistant Attorney General
160 East 300 South, 8TH FLOOR
P.O. Box 140854
Salt Lake City, Utah 84114

Attorney for Appellee

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

Jurisdiction is conferred upon this Court pursuant to Rule 26(2)(a), Utah Rules of Criminal Procedure (1992), and Utah Code Annotated Section 70-2-2(3)(I) whereby the Defendant in a District Court criminal action may take an appeal to the Utah Supreme Court from a final order involving a conviction of a first degree or a capital felony. The Utah Supreme Court may thereafter assign such a case to the Utah Court of Appeals under Rule 44 of the Utah Rules of Appellate Procedure. This case was sent by the Supreme Court to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Is Aggravated Burglary as defined in Utah Code Annotated 76-6-203(1) unconstitutional as vague and overbroad and failing to give notice of the prohibited actions.
2. In the alternative: That the charges of Aggravated Kidnapping merge into the conviction for Aggravated Burglary.

STANDARDS OF APPELLATE REVIEW

"The standard of review for a simple legal interpretation of a Rule or Statute is correctness. Legal determinations are defined as those which are not of fact, but are

essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances. When reviewing legal determinations, an Appellate Court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." State v. Brooks, 908 P.2d 856, 858-859 (Utah 1995) (internal quotes omitted).

PERTINENT STATUTORY AND RULE PROVISIONS

Utah Code Annotated Section 76-6-203(1) (1953 as amended), dealing with the crime of First Degree Felony Aggravated Burglary, and Utah Code Annotated Section 76-5-302(1) (1953 as amended) dealing with the crime of First Degree Felony Aggravated Kidnapping.

Utah Constitution Article I, Section 12.

United States Constitution Amendment V.

Utah Code Annotated 76-1-402(3) (1953 as amended)

STATEMENT OF THE CASE

1. Appellant was arrested on May 21, 1997 in Uintah County, State of Utah, on charges of Aggravated Kidnapping (two counts), Aggravated Burglary, Possession of a Dangerous Weapon and Tampering with evidence.

2. Preliminary Hearing was held June 20 1997 and Appellant was bound over on all counts.

3. Jury Trial was held July 17, 18, 1997 before the Honorable A. Lynn Payne. At Trial, Appellant was convicted of one count Aggravated Burglary and two counts of Aggravated Kidnapping. Appellant was found not guilty on the Possession of a Dangerous Weapon and Tampering with Evidence charges.

4. Appellant was sentenced September 19, 1997 to two five years to life terms, with a minimum mandatory sentence of fifteen years for the Aggravated Kidnapping and one five years to life term for the Aggravated Burglary - the sentences to run concurrent.

5. An Appeal was untimely filed on this Order and was dismissed Sua Sponte by the Court on May 6, 1998.

6. Appellant filed a Writ of Habeas Corpus and relief was granted. He was resentenced before Judge A. Lynn Payne on the 12th day of October, 1999. The Judgment and Order was filed October 28, 1999.

7. Notice of Appeal was filed November 24, 1999.

STATEMENT OF THE FACTS

1. On May 21, 1997, Appellant and Co-Defendant, Harley pulled into the driveway of Ted Jenkins after 10:00 p.m. Mr. and Mrs. Jenkins were preparing for bed and heard the van drive in. Mr. Jenkins went outside to investigate.

2. Mr. Harley went up to Mr. Jenkins and started asking him about

purchasing gold coins. After Mr. Jenkins repeatedly said he was not interested, Mr. Harley approached him, pulled out a gun and told him this was a robbery.

3. Appellant, Mr. Gooch, had gone to the front door and was talking to Mrs. Jenkins when he heard the commotion. He went to the side of the house about the time that Mr. Jenkins testified he was hit in the head. Mr. Jenkins' loud yelling brought his son, Darrell Jenkins, who lives on the adjoining lot, to his aid. As he approached, Mr. Jenkins told him to be careful, they have guns.

4. Both Ted Jenkins and Darrell Jenkins told the men they would cooperate. They were told to go to the house. Ted Jenkins and his son, Darrell Jenkins, lead the way down a twenty foot sidewalk to the back door. Mr. Jenkins tapped at the door; but Mrs. Jenkins, who was inside the house, had also heard the commotion. She had locked the door and was in the process of calling 911. When Mrs. Jenkins did not open the door, Appellant, Mr. Gooch, left and Mr. Harley soon followed, getting back into their van. Ted Jenkins and Darrell Jenkins ran away from them. Darrell Jenkins then went after them in his van. The police were soon in pursuit. The Defendants were apprehended about twenty miles up the canyon.

ARGUMENT I

AGGRAVATED BURGLARY IS DEFINED IN UTAH CODE ANNOTATED SECTION 76-6-203(1) IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE PROVISIONS OF THE CONSTITUTION.

Appellant was charged with Aggravated Burglary under the provisions of Utah Code Annotated Section 76-6-203(1) alleging that he committed Aggravated Burglary by attempting to enter a building or any portion thereof with the intent to commit a felony or theft or assault on any person and (a) causes bodily injury to any person who is not a participant in the crime; and/or (b) used or threatened the immediate use of a dangerous weapon against any person who is not a participant in the crime.

The Statute of Aggravated Burglary is vague and overbroad as it relates to Appellant. The testimony of Ted and Darrell Jenkins, the victims in this case, was clear in that, at no time, did Appellant or any other participant in the crime enter the building. The testimony was that Mr. Harley, the Co-Defendant, has met Mr. Ted Jenkins in the front of his home and informed him that this was a robbery, Trial Transcript Page 123. During a scuffle that ensued, Mr. Harley administered a blow to Mr. Ted Jenkins' head, Trial Transcript Page 124. At that point, Ted Jenkins' son, Darrell Jenkins, arrived at the scene and was informed by Ted Jenkins that this was a robbery, Trial Transcript Page 125. After the parties all talked for a moment, the Appellant, Mr. Gooch, attempted to withdraw from the situation seeing that it was not going to work and stated to the Co-Defendant "let's get out of here", Trial Transcript Page 127. At that point, it was proposed that they get into the house. Both Ted and Darrell Jenkins walked over and up the sidewalk to the back door, Trial Transcript

Page 127. Ted Jenkins tapped on the door. The door was locked. At that point, Mr. Gooch, who was the furthest away from the door of the four men, again stated that things have gone awry and "let's get the hell out of here", Trial Transcript Page 128, Line 1-11. When the door was not opened, Darrell Jenkins instructed his father to run to the house (meaning Darrell's house) and they took off running, Trial Transcript Page 128 Lines 24-25. Also see Trial Transcript Page 156, Line 6-24. The testimony is clear that neither Defendant, Harley or Gooch, ever entered the home, never tried to enter the home or never tried to open the door, but that they did instruct Mr. Jenkins to open the door, which he was unable to do since it was locked.

Appellant contends that the Statute involving Aggravated Burglary is unconstitutional due to the fact that it prohibits an act that is not a burglary. It, in fact, prohibits an attempted burglary while carrying a gun. Under the Shondel Doctrine, State v. Shondel, 453 P.2d 146 (Utah 1969), a Statute creating a Doctrine should be sufficiently certain that a person of ordinary intelligence, who desires to obey the law may know how to conduct themselves in conformity to it. As quoted in State v. Vogt, 824 P.2d 455, 457 (Utah App. 1991).

One would normally expect that an Aggravated Burglary would require additional facts to be proved on top of the burglary. However, that is not the case with this Statute. This Statute is overbroad and does not fairly give notice to those whom

would violate it. This is illustrated by the statements made in State v. Brooks, by Justice Stewart, being a man of more than ordinary intelligence who states "Aggravated Burglary always requires proof that the Defendant entered or remained in a building:..." and that is State v. Brooks Supra at 862. The Statute for Aggravated Burglary should be unconstitutional.

ARGUMENT II

THE CHARGES OF AGGRAVATED KIDNAPPING SHOULD MERGE INTO THE CONVICTION FOR AGGRAVATED BURGLARY.

The prohibition on conviction for lesser included offenses follows the double jeopardy clauses of the Utah and United States Constitution (See Utah Constitution Article I, Section 12) "nor shall any person be twice put in jeopardy for the same offense" (United States Constitution Amendment V) "nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb". The Utah Court of Appeals has interpreted Utah Code Annotated Section 76-1-402(3) to comply with the underlying constitutional guarantees against double jeopardy. This Section provides: "A Defendant may be convicted of an offense included in the offense charged, but may not be convicted of both offenses charged in the included offense. An offense is so included when (a) it is established by proof of the same or less than all of the facts required to establish the commission of the offense charged; or (b) it constitutes an

attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or (c) it is specifically designated by Statute as a lesser included offense, (quoted in State v. Ross, 951 P.2d 236 (Utah App. 1997)).

This Court has ruled that a two tiered analysis should be applied to identify the lesser included offenses (See State v. Hill, 674 P.2d 96, 97, (Utah 1983). The first analysis is to determine whether the lesser offense is established by proof of the same or less than all the facts required to establish the commission of the offense charged. If the two crimes are such that the greater cannot be committed without necessarily having committed the lesser, then the lesser offense merges into the greater crime, and the State cannot punish the Defendant for both offenses. See (State v. Baker, 671 P.2d 152, 156 (Utah 1983) quoted in State v. Ross, Supra at 241. In the case at Bar, the Amended Information establishes the elements of the crime the Defendant was charged with. It states "Count III, Aggravated Burglary, a First Degree Felony in violation of Section 76-6-203(1), Utah Code Annotated 1953 as Amended, in that Harry George Gooch, did on or about the 21st day of May, 1997, Uintah County, State of Utah, attempt to enter a building or any portion thereof with the intent to commit a felony or theft or assault on any person, and Harry G. Gooch or another participant in the crime: (a) caused bodily injury to any person who was not a participant in the crime, and/or (b) used or threatened the immediate use of a dangerous weapon against

any person who was not a participant in the crime.

Counts I and II, Aggravated Kidnapping, a First Degree Felony, in violation of Section 76-5-302(1), Utah Code Annotated 1953 as Amended, in that Harry George Gooch did himself or as a party, on or about the 21st day of May, 1997, Uintah County, State of Utah, intentionally or knowingly, without authority of law, and against the will of Ted Jenkins (and Darrell Jenkins in Count II) and by any means and with any manner, seized, confined, detained or transported - Count I Ted Jenkins and Count II Darrell Jenkins - with the intent: (b) to facilitate the commission, attempted commission or flight after commission or attempted commission of a felony; and/or (c) to inflict bodily injury on or to terrorize - Count I, Ted Jenkins and Count II, Darrell Jenkins - or another. (See Amended Information as Exhibit I in the Appendix).

Appellant would argue that State v. Finlayson, 956 P.2d 283, (Utah App. 1998) is controlling in this matter. In Finlayson, the Court held that "the secondary test set forth in Hill, Supra 674 P.2d at 97 is required by the circumstance that some crimes have multiple variations so that a greater/lesser relationship exists between some variations of these crimes and not between others. A theoretical comparison of the statutory elements of two crimes, having multiple variations will be insufficient in order to determine whether a defendant can be convicted and punished for two

different crimes committed in connection with a single criminal episode, the Court must consider the evidence to determine whether the greater/lesser relationship exists between the specific variations of the crime actually proved at trial", Finlayson at 288. In this situation, the elements of Aggravated Kidnapping that the State sought to prove are contained within the Amended Information. The State sought to prove that the Appellant did seize, confine, detain or transport both Ted and Darrell Jenkins with the intent of (b) to facilitate the attempted commission or flight after the commission or attempted commission of the felony and/or (c) to inflict bodily injury on or to terrorize Ted Jenkins or Darrell Jenkins or another. The crime, however, that the Appellant was charged with attempting to commit, as specified in part (b), was the Aggravated Burglary and the elements of the burglary considering the bodily injury to any person is identical to the elements of the same in part (c) of the Aggravated Kidnapping. The only element that would, therefore, be different would be whether or not the detention of the victims was significantly independent of another crime to justify a separate conviction for kidnapping. The Courts have developed a three-pronged test for determining whether a detention is significantly independent of another crime - (a) the detention must not be slight, inconsequential, and merely incidental to the other crime; (b) must not be of the kind inherent to the nature of the other crime; and (c) must have some significance independent of the other crime in

that it makes the other crime substantially easier of commission or substantially lessens the risk of detention. (See State v. Buggs, 547 P.2d 720, 731 (Kansas 1976) quoted in Finlayson Supra at 289). The facts in the case as testified to show that Mr. Ted Jenkins came out into his yard, was approached by Mr. Harley who informed him that this was a robbery, held a gun on him, and roughed him up some. (See Trial Transcript Page 123 - 130). A few moments later, being attracted by the scream of his father, Darrell Jenkins approached the parties. Both Darrell and Ted Jenkins were then waived toward the back door of the house, where they attempted to open the door, but were unable to do so. At that point, Mr. Gooch and Mr. Harley left. The movement of the victims, according to their testimony, was down about twenty feet of sidewalk from the back of the house to the back door, and is completely incidental to the commission of the Aggravated Burglary. Without attempting to go into the house, there would not have been any Burglary, Attempted Burglary or Aggravated Burglary. Under the third part of the three-pronged test, having significant independence of the other crime, it is not substantiated by the facts since the intent at that point would have been to enter the home and commit the felony of theft, which was their stated purpose.

In State v. Ross, 951 P.2d 236, 243 (Utah App. 1997), this Court quotes State v. Bradley, 752 P. 2d 874 (Utah 1988), which establishes a test for whether the


theory of two crimes argued at Trial has created a lesser/greater relationship. After convicting on the greater offense, was the jury required to find any additional elements before it could convict on the lesser offense. If the jury was not required to find any additional element, then the lesser crime merges into the greater one and the Defendant may not be convicted of both...Bradley does not permit this Court to uphold conviction of a lesser offense merely because the Jury could have found an additional element. Rather there, Bradley demands that we reverse the lesser offense conviction unless the Jury was required to find **the additional element**. Ross at 243.

The Appellant urges this Court to find that the charges of Aggravated Kidnapping are lesser included offenses under the facts in this case.

CONCLUSION

Appellant argues that Argument I and Argument II are in the alternative. If the Court chooses to find that the Aggravated Burglary Statute is unconstitutional, then it would not be the the greater included offense to the Aggravated Kidnapping. However, if the Court finds that the Aggravated Kidnapping Statute is valid, then Appellant urges this Court to rule that the Aggravated Kidnapping charges are a lesser included inherent part of the Aggravated Burglary.

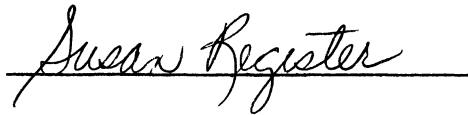
RESPECTFULLY SUBMITTED this 3 day of May, 2000.


CINDY BARTON-COOMBS
Attorney for Appellant/Defendant

CERTIFICATE OF MAILING

I certify that on this 3rd day of May, 2000, I mailed a true and accurate copy of the foregoing BRIEF OF APPELLANT by United States mail, postage prepaid, to:

JAY FREDERIC VOROS, JR.
Assistant Attorney General
160 East 300 South, 8th Floor
P.O. Box 140854
Salt Lake City, Utah 84114



APPENDIX

JoANN B. STRINGHAM #0353
Uintah County Attorney
Attorney for Plaintiff
152 East 100 North
Vernal, Utah 84078
Telephone: (801) 781-5436

IN THE EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF UINTAH, STATE OF UTAH

STATE OF UTAH,	:	BAIL _____
Plaintiff,	:	
vs.	:	AMENDED INFORMATION
HARRY GEORGE GOOCH,	:	CASE NO.
DOB: 03/10/52	:	
Defendant.	:	

The undersigned **JoANN B. STRINGHAM** states on information and belief that the Defendant committed the crime(s) of:

COUNT I **AGGRAVATED KIDNAPING**, a First Degree Felony, in - violation of Section 76-5-302(1), Utah Code Annotated, 1953, as amended, in that Harry George Gooch, did himself or as a party, on or about the 21st day of May, 1997, in Uintah County, State of Utah, intentionally or knowingly, without authority of law and against the will of Ted Jenkins, by any means and in any manner, seize, confine, detain, or transport Ted Jenkins with the intent:

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; and/or

(c) To inflict bodily injury on or to terrorize Ted Jenkins or another.

COUNT II **AGGRAVATED KIDNAPING**, a First Degree Felony, in violation of Section 76-5-302(1), Utah Code Annotated, 1953, as amended, in that Harry George Gooch, did himself or as a party, on or about the 21st day of May, 1997, in Uintah County, State of Utah, intentionally or knowingly, without authority of law and against the will of the Darrell Jenkins, by any means and in any manner, seize, confine, detain, or transport Darrell Jenkins with the intent:

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; and/or

(c) To inflict bodily injury on or to terrorize Darrell Jenkins or another.

COUNT III **AGGRAVATED BURGLARY**, a First Degree Felony, in violation of Section 76-6-203(1), Utah Code Annotated, 1953, as amended, in that Harry George Gooch, did on or about the 21st day of May, 1997, in Uintah County, State of Utah, attempt to enter a building or any portion thereof with the intent to commit a felony or theft or assault on any person, and Harry G. Gooch or another participant in the crime:

(a) Caused bodily injury to any person who was not a participant in the crime, and/or;

(b) Used or threatened the immediate use of a dangerous weapon against any person who was not a participant in the crime.

COUNT IV **POSSESSION OF A DANGEROUS WEAPON**, a Third Degree Felony, in violation of Section 76-10-503(3)(a), Utah Code Annotated, 1953, as amended, in that Harry George Gooch, did on or about the 21st day of May, 1997, in Uintah County, State of Utah, having been previously convicted of a felony, did have in his possession a handgun.

COUNT V **TAMPERING WITH EVIDENCE**, a Second Degree Felony, in violation of Section 76-8-510, Utah Code Annotated, 1953, as amended, in that Harry George Gooch, did on or about the 21st day of May, 1997, in Uintah County, State of Utah, believing that an official proceeding or investigation was pending or about to be instituted did alter, destroy, conceal, or remove an item of property with a purpose to impair its verity or availability in the proceeding or investigation.

This information is based on evidence obtained from the following witnesses: Steve Hatzidakis

Authorized for presentment
and filing:



UINTAH COUNTY ATTORNEY

7-15-97

DATE