1981

The State of Utah v. Michael Jones : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MICHAEL JONES,

Defendant-Appellant.

APPEAL FROM
FORGERY
IN AND
THE HONO

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MICHAEL JONES,

Defendant-Appellant.

Case No. 17341

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY OF FORGERY IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER F. WILKINSON, JUDGE

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STATE OF UTAH,

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from appellant's conviction of forgery in the District Court, Third Judicial District, Honorable Homer F. Wilkinson, presiding.

DISPOSITION IN LOWER COURT

Appellant Michael Jones, was convicted by a jury of forgery, a second degree felony in violation of Utah Code Annotated, Section 76-2-202 and Section 76-6-501 (1953 as amended). The appellant was sentenced to the Utah State Prison for a term of from one to fifteen years. (R. 89).

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction and denial of the request for a new trial.

STATEMENT OF FACTS

On February 4, 1980, Helen Stokes, the appellant's girlfriend, tried to cash a check for $2,250 at Walker Bank (T. 9-11). Appellant waited outside while she was in the bank (T. 12, 13). When the check was presented to the bank manager for approval, he recognized that the check was forged and immediately called the owner of the check, Mr. Fuoco (T. 10, 11).

Mr. Fuoco indicated that the check had been stolen from his car on February 1, 1980 (T. 37-40). His car was parked at a garage where appellant worked (T. 44), and appellant had serviced Mr. Fuoco's car that day (T. 45). He had not signed the check and had not authorized anyone else to sign it (T. 37). When he was called by the bank, he verified that the check was stolen and he called the police (T. 40).

The police arrived and arrested Helen Stokes and appellant (T. 66, 67). Appellant had fled when the police arrived but was apprehended soon thereafter (T. 19). Appellant was searched and police found money and another forged check in his wallet (T. 71). He gave conflicting answers to the police at that time (T. 74). As appellant and his girlfriend Helen Stokes were taken away, he said to her, "I love you anyway, even if you screwed it up." (T. 59).

Helen Stokes was a minor at the time and was referred to Juvenile court (T. 102). As a minor she knew she could not be prosecuted for forgery with the appellant (T. 108). Appellant was charged as an accomplice to forgery (R. 12). At trial, Helen Stokes claimed that she had stolen the checks, forged them, put one in appellant's wallet and attempted to cash one forged check at the bank (while appellant waited outside) all without appellant's knowledge (T. 91, 93, 94). The State produced evidence showing that appellant was the one most likely to have stolen the checks (T. 46, 48). He had over a thousand dollars in cash which had come from other checks forged earlier (T. 102), as well as an additional forged check (T. 71). At the bank, he had denied knowing Helen Stokes (T. 74), but they had gone to the bank together (T. 12, 13, 94).

While she claimed responsibility for all aspects of the crime, Helen Stokes did not know the color of the car the checks were taken from or the location of the checks inside the car (T. 100, 101), and she admitted to lying to the bank official and the police (T. 103, 104).

The jury returned a verdict of guilty (R. 85). Appellant was sentenced to the Utah State Prison (R. 89, 90).

ARGUMENT

POINT I

THE EVIDENCE PRESENTED WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF FORGERY

Appellant contends that the evidence was insufficient to support the verdict. Respondent disagrees asserting that the evidence produced by the State in this case was legally sufficient to support the verdict of the jury.

It is well established in Utah that in order for a convicted defendant to succeed on appeal in challenging the sufficiency of evidence adduced at trial, he must establish that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained reasonable doubt that the defendant committed the crime. State v. Daniels, Utah, 584 P.2d 880 (1978); State v. Wilson, Utah, 565 P.2d 66 (1977); State v. Jones, Utah, [illegible] P.2d 1321 (1976); State v. Romero, Utah, 554 P.2d 216, [illegible] (1976).

In State v. Lamm, Utah, 606 P.2d 229 (1980), the Court said:

> It is the exclusive function of the jury to weigh the evidence and to

> determine the credibility of the witnesses, and it is not within the prerogative of this Court to substitute its judgment for that of the fact-finder. This Court should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

606 P.2d at 231. That case cited numerous other cases as standing for the same proposition. 606 P.2d at 231, N. 2. State v. Reddish, Utah, 550 P.2d 778 (1976) held that where the defendant's version of the story differs from the State's, the court must assume that the jury believed that version which supports their verdict.

In reviewing this case, this Court must survey and review the evidence in the light most favorable to the jury's verdict, State v. Helm, Utah, 563 P.2d 794, 796 (1977); State v. Sinclair, 15 Utah 2d 162, 389 P.2d 465 (1964), and disregard any errors which do not substantially prejudice the rights of the appellant, State v. Sinclair, supra; Utah Code Ann. § 77-42-1 (1953 as amended). Under Utah Code Ann. § 77-42-1, a presumption exists to the effect that any error found is presumed not to have resulted in prejudice.

Appellant asserts that there was no substantial evidence that defendant participated in or had any knowledge of the forgery (Appellant's Brief at 5).

Appellant was charged with and convicted of forgery in violation of Utah Code Annotated Section 76-2-202 and Section 76-6-501 (1953 as amended). They read as follows:

> 76-2-202. Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.
>
> 76-6-501. (1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:
>
> (a) Alters any writing of another without his authority or utters any such altered writing; or
>
> (b) Makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or uterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.
>
> (2) As used in this section "writing" includes printing or any other method of recording information, checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification.
>
> (3) Forgery is a felony of the second degree if the writing is or purports to be:

(a) A security, revenue stamp, or any other instrument or writing issued by a government, or any agency thereof; or

(b) A check with a face amount of $100 or more, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

(4) Forgery is a felony of the third degree if the writing is or purports to be a check with a face amount of less than $100; all other forgery is a class A misdemeanor.

The State's burden consisted of introducing evidence to prove beyond a reasonable doubt that the check had been forged, there was an intent to defraud, the check was in an amount over $100.00, and the appellant solicited, requested, commanded, encouraged or aided Helen Stokes in forging the check and presenting it for cash at the bank. As an accomplice, he was then also criminally liable for the forgery which was committed by Helen Stokes (R. 39).

There was sufficient evidence to satisfy such a burden. The State did prove that the check in question had been forged. The check was not signed by its owner Mr. Fuoco, nor did he authorize anyone else to sign it (T. 37). Helen Stokes admitted to the making and presentment of the forged check with an intent to defraud Walker Bank (T. 95, 103). The check was made out for over $100.00 (T. 9).

The only issue then is whether Helen Stokes acted alone as alleged by the defense or was aided by appellant as the jury found. Appellant had access to the car that the checks were stolen from (T. 45, 47). He serviced the car in the morning then took it to a seventh floor parking area (T. 46). Later in the day Helen Stokes visited him at work (T. 48). She testified that she took the checks from the car (T. 92), but another witness testified that the car would already have been taken to an upper floor (T. 46). Helen Stokes testified that she did not know what color the car was, did not recall the color of the interior and took the checks out of a pouch in the car door (T. 100, 101). The car was brown, not green or blue as guessed by Helen Stokes (T. 100, 109, 110). The checks were in the glove compartment of the car as the car does not have any side pouch (T. 110). This is certainly not so "lacking or insubstantial" as to preclude the jury from finding that the appellant, rather than Helen Stokes, took the checks from the car.

Evidence as to what took place at the bank is also in dispute, but there is sufficient basis to find appellant guilty of encouraging Helen Stokes to forge the check. She testified that appellant waited while she went into the

bank (T. 94). Appellant told the police that he had not gone to the bank with her and did not know what she was doing (T. 74, 75). He was, however, waiting outside at the time. Other discrepancies also appeared in the testimony. Helen Stokes said that she put a check in his wallet but did not tell the defendant about the check (T. 99). When he was arrested, the defendant first denied any knowledge of the check, then indicated that Helen Stokes had given it to him (T. 74). When questioned about the cash he had, the defendant first responded that his mother had given it to him (T. 74). Helen Stokes also admitted that she lied to the bank manager (T. 103) and lied to the police on several occasions (T. 104, 105).

The defendant also acted very suspiciously. He left the bank as soon as he saw the police (T. 19), gave varying stories to the police and denied any knowledge of Helen Stokes. As they were led away into custody, the appellant said to Helen Stokes, "I love you anyway even if you screwed it up." (T. 59).

The defense consisted of the testimony of Helen Stokes, who had a motive for taking the blame. She was a minor and had already been dealt with by Juvenile Court. She could not be prosecuted for the forgery (T. 108). By testifying that she was to blame, the defendant would be absolved from any liability and they would both go free.

Considering the evidence, respondent submits that the jury had sufficient evidence on which to base a verdict of guilt. The jury could reasonably have found that appellant did take the checks, that he knew they were forged and that he encouraged Helen Stokes to forge and present the checks. He fled when the police arrived and gave conflicting responses to their questions.

Since the credibility of the witnesses became crucial and the testimony was conflicting, it was left to the jury to determine which of the conflicting testimonies it would believe. State v. Wilson, Utah, 565 P.2d 66 (19 State v. Romero, Utah, 554 P.2d 216 (1976).

The evidence was not so inconclusive and insubstantial that there must have been reasonable doubt as to whether the defendant committed the crime. State v Daniels, supra; State v. Wilson, supra; State v. Jones, S State v. Lamm, supra; State v. Menzies, Utah, 601 P.2d 92 (1979); and State v. Logan, Utah 563 P.2d 811 (1977). Vi the evidence presented, in the light most favorable to th state, the record clearly contains substantial evidence f which the jury could reasonably determine beyond a reaso doubt that appellant did solicit, encourage and aid Helen Stokes in the commission of a forgery.

In addition, this issue was not properly raised before the trial court in a motion for a new trial. Her it is not a proper question before this Court on appeal.

trial court should have been given a chance to rule on this issue. See State v. Pierre, Utah, 572 P.2d 1338 (1977); Johnson v. Simons, Utah, 551 P.2d 515 (1976).

POINT II

THE PROSECUTOR'S CLOSING ARGUMENTS WERE NOT PREJUDICIAL ERROR INASMUCH AS THE STATEMENTS WERE WITHIN THE BOUNDS OF PROPER TRIAL TACTICS.

Appellant alleges that statements by Ms. Strachan, prosecutor, establishing the credibility of Officer Yontz, were prejudicial because they amounted to an improper bolstering of that witness' testimony. Respondent submits that the comments made by the prosecutor constituted a proper exercise of counsel's right to sum up her case.

The prosecutor has the right and the duty to analyze the evidence as a whole and to include any statements or deductions reasonably to be drawn from such evidence. State v. Kazda, Utah, 540 P.2d 949, 951 (1975); State v. Eaton, Utah, 569 P.2d 1114, 1117 (1977). Furthermore, the trial court judge is allowed considerable latitude of judgment as to what is permissible for counsel to argue. Hales v. Peterson, 11 Utah 2d 411, 360 P.2d 412 (1961).

In State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973), the defendant in a rape case claimed that the prosecutor, in closing argument, was guilty of misconduct. This Court, however, held that there was no misconduct since the prosecutor, in summing up his case, has "wide discretion and is entitled to exercise considerable freedom in expressing to the jury his view of the evidence." Id. at 533.

Counsel's reference to the credibility of Offic Yontz was not improper. Defense testimony was conflict and resolution of the trial required a determination of which version to believe. Helen Stokes, the proponent o the other version, admitted to lying to bank officers an police officers as well as having difficulty recalling certain aspects of the case. Thus, it was not improper the prosecutor to explain why the police officer's versi was credible. The record fails to show that the jury kn of the prosecutor's law school connection that is complained of. Consequently, the jury could not have dra the inferences suggested by the appellant.

Appellant has not shown why it was improper to argue the credibility of Officer Yontz. There is no indication as to why appellant claims prejudice resultin from the prosecutor's comment itself. If the statement that law students are more perceptive and alert was such improper suggestion, then the burden is on the defense counsel to correct that error on cross examination. Defense counsel should have taken the opportunity at tri to attack the credibility that was "improperly bolstere In her closing arguments, defense counsel did attack the credibility of the officer by reminding the jury that "w rely on Yontz' memory, a memory alone." (T. 132). The

prosecution then later tried to rehabilitate the credibility of the police officer (T. 141). If the statements were improper and appellant failed to correct that error on cross examination, then the error is the fault of appellant and not the trial court.

In addition, appellant failed to object at trial to the alleged improper statements. It is probable that appellant failed to object at trial because she knew the statements were part of proper trial tactics. Consequently, appellant may not complain on appeal that statements were improperly made at trial. The failure to object to the prosecutor's remarks, which would have allowed the trial court to rule on the alleged errors, resulted in a waiver of the right to have the issue reviewed on appeal. State v. Winger, 26 Utah 2d 118, 485 P.2d 1398, 1400 (1971); State v. Dillon, 104 Ariz 33, 448 P.2d 89, 91 (1968).

In State v. White, Utah, 577 P.2d 532 (1978), counsel made objections to some of the remarks made by the prosecutor in summation, but failed to object to all remarks listed as grounds for mistrial. This Court held:

> If counsel desires to object and preserve his record as to such an error during argument, he must call it to the attention of the trial court so that if he thinks that it is necessary and appropriate to do so, he will have an opportunity to rectify any error or impropriety therein and thus obviate the necessity of an entire new trial.

Id. at 555.

It is important to note that it is the responsibility of the trial court to determine if alleg improper arguments were prejudicial or harmless. This Court has reiterated continuously that it will give gre deference to the judgment of the trial court. In State Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974), the prosecutor asked a question which was clearly objectionable. Defense counsel moved for a mistrial. The tr court ruled that the prosecutor's conduct was not so prejudicial as to violate the defendant's right to a fa trial, and denied the motion. The defendant appealed. After noting that the action of the prosecutor was certainly not to be commended, the Utah Supreme Court foun that the real issue on appeal was whether to sustain th judgment of the trial court. Before affirming the conviction the Court said:

> Due to his advantaged position and consistent with his responsibilities as the authority in charge of the trial, the inquiry is necessarily addressed to the sound discretion of the trial court. . . Inasmuch as this is his primary responsibility, when he has given due consideration and ruled upon the matter, this court on review should not upset his ruling unless it clearly appears that he has abused his discretion.

30 Utah 2d at 369-70.

Further, appellant has pointed to no harm that resulted from this allegedly improper statement. Abse

such a showing, appellant has failed to suffer harm and the statement, if it was error at all, was harmless. See Rule 4, Utah Rules of Evidence.

Finally, the test found in State v. Valdez, 30 Utah 2d 54, 60 513 P.2d 422 (1973), cited by appellant, is not met in this case. First, the statement did not "call to the attention of the jurors matters which they would not be justified in considering." The statement was made to emphasize the credibility of the officer. Certainly the jury is entitled to hear information concerning the credibility of the witnesses. In fact, the jury members were told that they were "the exclusive judges of the credibility of the witnesses and the weight of the evidence." (R. 46). Thus, the jury was justified in considering the remark.

Second, there is no showing that if the statement had been improper, the jury was influenced by the remark. While the jury may have been influenced by the officer's testimony, Valdez requires that the jury be influenced by the prosecutor's statement, not that of the witness. Appellant has not alleged that the jury was influenced by the prosecutor's remarks. (See Appellant's Brief at p. 8).

Respondent submits that the statements complained of were within the realm of proper trial tactics. Appellant failed, at trial, to object to the statements, to

attack the witness' credibility, or to request a new tr
Thus, appellant may not complain on appeal. The trial
court properly exercised its discretion and did not rule
that there was any prejudice. Appellant has not shown a
prejudice and therefore this court should find that the
statements were not error or that if they were, they were
harmless.

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE A REQUESTED ALTERNATIVE HYPOTHESIS INSTRUCTION TO THE JURY

Appellant asserts that the trial court erred in giving a jury instruction that did not include an alternative hypothesis. Respondent answers that such an alternative hypothesis instruction was not required in th case.

Appellant has not shown why this instruction was required. There has been no authority cited which suppo the contention that the ommission of the alternative hypothesis was improper.

The standard in Utah as to the giving of such a instruction was stated in State v. Fort, Utah, 572 P.2d 1387 (1977); and State v. Garcia, 11 Utah 2d 67, 355 P.2d 57 (1960):

> [W]here the only proof of material fact or one which is a necessary element of defendant's guilt consists of circumstantial evidence, such circumstances must reasonably preclude every reasonable hypothesis of defendant's innocence. . .
>
> [T]his rule is applicable only where the proof of a material issue is based solely on circumstantial evidence . . .

355 P.2d at 59, 60 (emphasis added). The principle was cited and reaffirmed in State v. Schad, 24 Utah 2d 255, 470 P.2d 246, 247 (1970); State v. Romero, Utah, 554 P.2d 216 (1976); State v. Dumas, Utah, 554 P.2d 1313 (1976); and State v. Bender, Utah, 581 P.2d 1019 (1978).

In the present case, that standard was met by the trial court. The evidence was not solely circumstantial and thus did not require giving such an instruction to the jury. Evidence consisted of direct as well as circumstantial evidence. The physical evidence introduced at trial, the testimony of witnesses as to the appellant's actions, and the lack of credibility of the alternative hypothesis propounded by Helen Stokes all constituted direct evidence and precluded requiring an alternative hypothesis instruction to the jury. Where the evidence is both direct and circumstantial, the trial judge may properly leave the determination to the jury on the basis of reasonable doubt. State v. Romero, Utah, 554 P.2d 216 (1976); State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970); State v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961).

An instruction on reasonable doubt provides an understandable criterion for decision making; an

instruction on reasonable alternative hypothesis is unnecessary and may confuse the jury. In the instant case the jury was properly instructed on reasonable doubt. See Instruction No. 20 (R. 54). The trial judge determined that the presence of direct evidence was sufficient cause to exclude a reasonable alternative hypothesis instruction. Such a determination was within his discretion and was properly exercised.

The trial judge, exercising his discretion, refused to give the alternative hypothesis instruction explaining that it was "given in substance." (R. 65) Since this is an area for the exercise of judicial discretion, appellant must show an abuse of discretion, i.e., that the judge was required to give such an instruction. Appellant has not alleged, nor shown, an abuse of discretion.

Appellant has not only failed to show that his requested instruction is required, but has also failed to show that if it were to be required in this case, it would have made some difference in the verdict.

CONCLUSION

The evidence was not inconclusive or improbable but was sufficient to support the verdict. The prosecutor's closing arguments were not prejudicial error as they were part of proper trial tactics designed to establish the credibility of witnesses. The alternative

hypothesis instruction was properly denied by the trial judge as it was not required in this case. For these reasons, the request for a new trial should be denied and appellant's conviction affirmed.

DATED this 18th day of August, 1981.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing to G. L. Fletcher, Attorney for Appellant, 333 South Second East, Salt Lake City, UT 84111 this 18th day of August, 1981.

Robert N. Parrish