1982

State of Utah v. Jan C. Graham : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18123
JAN C. GRAHAM,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction of Theft by Receiving Stolen Property in the Second Judicial District Court in and for Weber County, State of Utah, the Honorable John F. Wahlquist, Judge, presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of theft by receiving stolen property, a second-degree felony, in violation of Utah Code Ann., § 76-6-408 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty on October 6, 1981 in the Second Judicial District Court, the Honorable John F. Wahlquist presiding. Appellant was sentenced October 19, 1981 to an indeterminate term of not less than one year and not more than 15 years in the Utah State Prison. Appellant was placed on probation and imposition of the prison term was suspended on condition that appellant serve 40 days in jail and pay $1,250 in restitution at $50 per month.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of appellant's conviction and sentence.

STATEMENT OF THE FACTS

Appellant was employed as a security guard for a private company whose clients included Browning Arms Company, a weapon manufacturer and research company in Mountain Green, Morgan County, Utah (T. 14).[1] Upon arriving at Browning Arms for his graveyard shift (12-8 a.m.) security patrol, appellant would receive a master key which would open all the doors in the building except one (T. 26). Appellant had access to the gun library, where the Browning Company kept historical guns and other manufacturers' guns for testing (T. 24). Included in the gun library was a Browning 9-mm. high-power pistol with serial number 72089 which appellant was later charged with unlawfully receiving (T. 25).

An annual inventory of the Browning Arms Company weapons was conducted in December 1979 and was completed by about December 15 (T. 22). The Browning pistol, number 72089, was present when the December 15, 1979 inventory was completed (T. 22). Appellant terminated his employment as a security guard at Browning Arms on January 2, 1980 (T. 16).

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[1]Although there is a two-volume transcript in this case, all references herein will be to volume one.

Because there appeared to be numerous weapons missing, a special inventory was conducted in September 1980 and the weapon was listed as missing (State's Exhibit 1).

Appellant was on security duty at night by himself and he was required to check the building's rooms for securely locked doors and exits and watch for fires every two hours. Appellant had access to the gun library. Appellant did not have a key to the locked cabinets in the gun library, but that was not an insurmountable barrier to appellant, as he explained to a co-worker in the fall of 1979. Appellant demonstrated to Trent Petri how it was done:

> One door would shut and latch from the inside, and the other one was shut with a dead bolt with a key. If you would push on the one with the dead bolt, push it in and hit that latch, both doors would open.

(T. 42).

After appellant quit working at Browning Arms, the security system was changed in February 1980 and a master key no longer opened the gun library (T. 28). In the late spring or early summer of 1980, W. R. Betz, a member of the Browning Arms Board of Trustees and a Browning gun specialist, received a phone call from appellant, who did not identify himself (T. 50). Appellant asked general questions about the gun after giving its description and stating it was a lightweight pistol, but appellant did not give the gun's serial number

so Betz had no opportunity to trace the history and ownership of the pistol. The same person phoned again about one week later and gave his name as Jan Graham. Appellant gave Betz his phone number but again he did not give the serial number of the gun (T. 51-53). Appellant did not reveal the owner of the pistol even though Betz expressed interest in buying it or getting a photograph of it (T. 50).

Betz phoned appellant several times to inquire about the owner of the Browning pistol (T. 52). Appellant did not allow Betz to meet the owner or to photograph the gun. Appellant was ambiguous about the owner of the gun, except that the owner was a member of appellant's unit of the National Guard (T. 53).

At a gun show in November 1980 at the Salt Palace in Salt Lake City, Betz saw the pistol for the first time when appellant and appellant's wife showed him the Browning pistol (T. 55). Betz recognized the weapon as a prototype, a one-of-a-kind weapon (T. 55), and immediately checked the serial number (T. 56). Betz then reported the serial number to Allen Carver of Browning Arms, who researched the Browning Arms Company sales records but could find no sale of the weapon with that serial number (T. 57-58). Betz also wrote to the factory asking for a serial number trace but did not receive an answer to his query for six to eight months (T. 59).

After the November 4, 1980 phone call from Allen Carver stating that there was no evidence of a sale of the Browning pistol with that serial number, Betz phoned appellant and was told that appellant's "friend" had decided to sell the gun (T. 60). On November 19, 1980 appellant received from Betz $1,000 cash and a .357 magnum pistol with ammunition in exchange for the Browning pistol (T. 61). Betz had appellant sign a bill of sale which Betz had prepared (T. 61).

Shortly thereafter, Betz, in consultation with Browning Arms Company, discovered that the Browning pistol was on the September 1980 inventory list of stolen guns from the Browning gun library (T. 62). On December 2, 1980 Betz gave a statement (T. 63) to the Morgan County Sheriff, who elicited the aid of the Ogden City Police Department. Brad Carver, an Ogden police detective, talked to appellant on December 5, 1980 and appellant said he did have possession at one time of the gun, which he claimed to have purchased from a National Guardsman whose name he did not remember (T. 82). Appellant voluntarily accompanied Carver to police headquarters, where, upon entering the police building, he told Carver the name of the previous gun owner, "Jeff Smith" (T. 83). Appellant then gave his statement to the police.

Appellant returned to the police department three days later with an apparent receipt from "Jeff Smith" for

the sale of the Browning pistol (T. 91). Merrill Smith, a personnel administrator at the National Guard State Headquarters, searched the Utah National Guard records back to 1973 and he did not find the name of Jeff Smith in any of the personnel files (T. 91). In January, 1981 appellant was charged with theft, to wit: he unlawfully received, retained or disposed of a firearm, knowing that the property had been stolen or believing that it probably had been stolen, with a purpose to deprive the owner thereof, a conviction from which he now appeals.

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S DETERMINATION THAT APPELLANT WAS GUILTY OF THEFT BY RECEIVING, RETAINING OR DISPOSING OF STOLEN PROPERTY.

Appellant contends on appeal that the prosecution did not establish a prima facie case of theft by receiving because the prosecution did not prove each element as required by Utah Code Ann., § 76-6-408. Appellant correctly states that a "defendant in a criminal proceeding is presumed innocent until each element of the offense charged against him is proved beyond a reasonable doubt." Appellant couples this presumption with his testimony and now assumes that the facts are to be viewed as he stated them. By looking only at

appellant's testimony and ignoring the other probative evidence, appellant argues that the evidence was not sufficient to establish a prima facie case; and it was therefore not sufficient to submit to the jury, and a motion to dismiss should have been granted.

Utah Code Ann., § 76-6-408(1) (1953), as amended, provides:

> A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof.

Under this theory of theft, the prosecution was required to prove: (1) property belonging to another had been stolen; (2) appellant received, retained or disposed of the stolen property; (3) at the time of receiving, retaining or disposing of the property, appellant knew or believed the property was stolen; and (4) appellant acted purposely to deprive the owner of the possession of the property. State v. Murphy, Utah, 617 P.2d 399 (1980). In the present case, the jury found that the evidence was sufficient to establish these elements beyond a reasonable doubt.

In reviewing a claim of insufficient evidence, it is well established that it must appear that reasonable minds

necessarily entertain a reasonable doubt that appellant committed the crime. State v. Wilson, Utah, 565 P.2d 66 (1977). Unless evidence compels a conclusion that as a matter of law evidence was inconclusive or so unsatisfactory that reasonable minds acting fairly must have entertained reasonable doubt that appellant did not commit the crime, the verdict must be sustained. State v. Newbold, Utah, 581 P.2d 991 (1978); State v. Mills, Utah, 530 P.2d 1272 (1975). The evidence need not refute contrary allegations made by appellant if the verdict is supported by substantial evidence. State v. Lamm, Utah, 606 P.2d 229 (1980); State v. Howell, Utah, ____ P.2d ____ (Case No. 17407, decided June 30, 1982). The evidence, and all inferences that may reasonably be drawn therefrom, is to be viewed in the light most favorable to the fact finder's verdict. State v. Gorlick, Utah, 605 P.2d 761 (1979). It is not the prerogative of this Court to weigh the evidence, but that of the fact finder to assess its weight and sufficiency. State v. Romero, Utah, 554 P.2d 216 (1976).

Appellant claims that the prosecution failed to present sufficient proof of three elements of the crime: (1) there was no evidence that the Browning high-powered pistol had been stolen; (2) there was no evidence that appellant had knowledge that the pistol was stolen; and (3) there was no evidence that appellant had acted purposely to deprive the owners of the possession of the Browning

pistol. The one element of theft by receiving, retaining or disposing stolen property which appellant concedes is that appellant had possession and disposed of the pistol.

Appellant argues that there never was any direct evidence to prove the element that the property of another had been stolen, but that the evidence merely indicated the Browning pistol was "missing." It is not a significant matter that witnesses stated the Browning pistol was "missing" rather than "stolen." Regardless of the semantic label attached, the evidence reveals that the Browning pistol was a prototype, one-of-a-kind, which was locked in a display cabinet in the Browning Arms Company gun library. There was direct evidence that after a September 1980 inventory, the Browning pistol was on a stolen weapons list given to the FBI, indicating that the Browning pistol was stolen and was not merely misplaced or "missing." Other direct evidence included the testimony that the Browning pistol had not been sold and that the Browning Arms records did not show that the pistol had been properly borrowed by an authorized person.

Circumstantial evidence of the element that the property of another had been stolen also was presented by the prosecution. The Browning pistol was sold by appellant, who had easy access as a security guard to the weapons in the Browning Arms gun library, although appellant was not authorized to borrow or possess the pistol. Appellant also

demonstrated to other security guards how to unlock the gun cabinets by pushing on the doors and hitting the latches. There was also evidence of security problems at Browning Arms Company which appellant understood and which he could take advantage of without difficulty. Appellant had ample opportunity to unlawfully take the Browning pistol as he was on duty by himself during the graveyard (12-8 a.m.) security watch. The prosecution is not required to present evidence that appellant stole the Browning pistol, but must show that the pistol was stolen property. By looking at the facts and circumstances of appellant's employment as a security guard at Browning Arms Company, there is an indication that the pistol was stolen. From the direct and circumstantial evidence presented in this case, the jury could reasonably believe that the pistol was stolen, regardless of who actually stole the pistol from Browning Arms Company.

Appellant also claims that the pistol could have been "raffled" or given to a Browning Arms employee, but this is mere speculation and highly unlikely that a weapons manufacturer would give away a rare and valuable pistol instead of placing it in the company's historical gun library. There is no evidence that Browning Arms gave the gun away and the jury was entitled to believe that Browning Arms had not done so.

The prosecution also offered evidence of the element of knowledge, which appellant claims was not shown by direct

or circumstantial evidence. Guilty knowledge that the pistol received, retained or disposed of was stolen can be proved by inferences and circumstances. State v. Zeman, 63 Utah 422, 226 P. 465 (1924). Knowledge that property was stolen can seldom be proved by direct evidence and resort must be made to circumstantial evidence; however, no distinction is made between direct and circumstantial evidence in degree of proof required. Dutton v. State, 581 P.2d 856 (Nev. 1978); Russel v. State, 583 P.2d 690 (Wyo. 1978).

Appellant denies knowledge that the property was stolen because of an alleged purchase from "Jeff Smith." Not surprisingly, Smith's whereabouts are unknown. Appellant's explanation is an old one--the pistol was acquired from a person who could never be located. The fact that appellant denies knowledge that the Browning pistol was stolen does not end the matter; it is just another fact and circumstance to be considered by the jury. United States v. Luman, 624 F.2d 152 (10th Cir. 1980). The United States Supreme Court has held that possession of recently stolen property, if not satisfactorily explained, is a circumstance from which the jury may properly draw an inference and find that the person in possession knew the property had been stolen. Barnes v. United States, 412 U.S. 837 (1973).

Moreover, whether the evidence of appellant's knowledge that the pistol was stolen is labeled as direct or

circumstantial is of no consequence. In Holland v. United States, 348 U.S. 121 (1954), reh. denied, 348 U.S. 932 (1954), the court stated that circumstantial evidence is intrinsically no different from direct evidence:

> In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the trier of fact must use its experience with people and events in weighing the probabilities. If the fact finder is convinced beyond a reasonable doubt, we can require no more.

Holland, 348 U.S. at 140. See also: State v. Clayton, Utah, ____ P.2d ____ (Case No. 17518, decided May 6, 1982).

In the present situation, the Browning pistol apparently was stolen shortly after an annual inventory in December 1979. Over a period of several months beginning in late spring or early summer of 1980, appellant tried to obtain information on the Browning pistol and to determine if the Browning Arms Company had discovered that the weapon was missing. Appellant cautiously proceeded to gather information, phoning Betz, an expert on Browning weapons, but never giving Betz the serial number of the pistol and leaving his name and phone number only in subsequent phone calls. Appellant refused to give the name of the gun's owner to Betz and did not show Betz the weapon until November 1980. Appellant attended gun shows and asked gun dealers about the

values of Browning pistols. When Betz told appellant that Browning Arms had not yet been able to find any sales record of the Browning pistol, appellant acted and it was clearly to his belief to quickly dispose of the weapon while Browning Arms personnel did not know the weapon was stolen. Appellant's careful gathering of information on the Browning pistol, his sale to Betz months later when Browning Arms Company had not yet discovered that the pistol was stolen and the questionable, improbable explanation of appellant's possession was sufficient evidence to be submitted to the jury on the element of guilty knowledge that the weapon was stolen.

Appellant argues that the prosecution did not establish sufficient evidence of guilty knowledge because the prosecution did not introduce the original thief to testify, implying that a necessary element of the crime of receiving stolen property is that the State prove someone other than appellant stole the pistol, which presumably would establish a guilty knowledge nexus between the original thief and the appellant charged with receiving the stolen property.

However, a conviction under § 76-6-408 does not require that the actual theft be proven by the prosecution. The original theft is not an element of the crime. Murphy, supra. Nor is the original thief required to testify on the element of appellant's guilty knowledge, as this element can be proved by circumstantial evidence. The prosecution need

not prove that the pistol was stolen by someone other than appellant in a conviction for receiving stolen property. State v. Watkins, 481 P.2d 689 (Mont. 1971).

Appellant also argues that a presumption of guilty knowledge of appellant was not shown by the prosecution. It is the State's position that these presumptions were never invoked at the trial because the facts of the present case do not correspond to any one of the four theories of presumption of guilty knowledge as listed in § 76-6-408. However, simply because the instant facts do not invoke a presumption of guilty knowledge does not preclude a finding of guilty knowledge beyond a reasonable doubt that the pistol was stolen, as the jury could reasonably believe.

The third element of receiving stolen property which appellant alleges was not established is acting purposely to deprive the owner of the possession of the property. Appellant bases this claim on his testimony that he bought the pistol and was the rightful owner. Whether appellant was the rightful owner was disputed at trial and was a fact to be detemined by the jury. Appellant's testimony is not conclusive simply because he claims to be the owner of the pistol. The facts and circumstances indicate that appellant was not the rightful owner and the jury could reasonably believe so. The jury could find that by selling the Browning pistol to Betz, appellant intended to act purposely to

deprive the owners of the possession of the pistol. A sale of property by a person not the rightful owner lessens the likelihood that the true owner will recover the stolen property. Thus, the jury could reasonably find that appellant acted purposely to deprive the owners of the possession of the pistol.

Appellant's only defense at trial was his own testimony and he now argues that his testimony alone serves to destroy all the other evidence, leaving the State without an established prima facie case. It is the respondent's position that a prima facie case was established when the prosecution presented some evidence on each element of the crime; it was then the jury's responsibility to weigh the evidence and decide on a verdict, which cannot be overturned unless reasonable minds must have had reasonable doubt. Newbold, supra.

Appellant said he met "Jeff Smith" in August 1980 at a National Guard Armory in West Jordan and that they talked about the Browning pistol. Appellant stated that "Smith" wanted $350 for the pistol, which he was selling because he was going to move. Appellant then claims to have made his first telephone contact with Betz. Appellant claims he saw both "Jeff Smith" and Betz at the November gun show in Salt Lake City. He said "Smith" still had the gun for sale and loaned it to appellant to show Betz. When Betz telephoned

about one week after the gun show and offered $1,000, appellant claims "Smith" also phoned about the same time. Appellant said he then bought the gun from "Smith" and sold it to Betz.

The jury properly regarded appellant's self-interest as a factor in judging the credibility of appellant's testimony. The jury was not obliged to believe appellant's claim that he purchased the Browning pistol from "Jeff Smith." The jury is entitled to believe or disbelieve witnesses. State v. Fort, Utah, 572 P.2d 1387 (1977).

Betz, a retired member of the U.S. Air Force , a member of the Board of Trustees of Browning Arms Company, executive director of the Browning Gun Collector's Association and a specialist in Browning weapons, said appellant phoned him in late spring or early summer of 1980 about a lightweight, Browning pistol, while appellant claims he did not see the pistol until August 1980 and he also claims that he did not handle the pistol at that time. The phone calls interested Betz, who desired to see the pistol or obtain a photograph of it, but appellant claimed this was not possible because appellant did not have the pistol. Appellant did tell Betz and Officer Carver that the owner of the pistol was a member of appellant's National Guard unit.

Upon entering the Ogden police station, appellant told Officer Carver that he remembered the name of the pistol's owner, "Jeff Smith." Admittedly such person could

exist except for the fact that he was nowhere to be found and was not listed in the Utah National Guard records.

During the conversation with Officer Carver and in the statement appellant gave at police headquarters, appellant did not mention a bill of sale he supposedly received when he purchased the pistol from "Jeff Smith." Certainly, the first step in exculpating oneself from an allegation of theft by receiving stolen property would be to show Officer Carver the receipt immediately when appellant was suspected of the crime. This apparently entered appellant's mind only after the conversation with Officer Carver and after reflecting on the bill of sale appellant signed for Betz when appellant sold the pistol to Betz on November 19, 1980. Three days after talking to Officer Carver, appellant returned to the police department with a bill of sale. The signatures were written in the same color of ink and apparently in the same handwriting. It was the jury's prerogative to give this evidence whatever weight it felt it deserved.

Appellant's testimony also indicates a number of highly unlikely coincidences. He claims "Jeff Smith" wanted to sell the Browning pistol in August because he needed the money to move. Appellant claims to have been interested in purchasing a Browning pistol for about a year, and when he did find someone willing to sell, appellant did not get a name or phone number, so appellant had no opportunity to contact

"Smith." Later, appellant discovered "Jeff Smith" at a gun show, and "Smith," who desperately needed to move, had still not sold the pistol and apparently had not moved, although it was three months later.

Appellant claims that "Jeff Smith," someone who appellant alleged he had talked to for only one brief time before and whose name appellant could not even remember, agreed to allow appellant to "borrow" the pistol and walk away at a convention center with thousands of people milling around the gun show displays. It is highly unlikely that any "John Doe" or "Jeff Smith" would have such high trust in his fellow human beings. The jury could reasonably believe that the alleged owner of a valuable pistol would not lend it to a stranger, but would walk with appellant to Betz's Browning gun display to inquire of the pistol's value. Appellant's wife, who appellant himself claims was present when he allegedly talked to "Jeff Smith," was not called as a witness, nor was any other person who could verify the existence of "Smith."

CONCLUSION

The record is replete with evidence that appellant committed theft by receiving, retaining or disposing of stolen property. The jury had an opportunity to hear the testimony and was in the best position to assess the witnesses' credibility from their demeanor and responses to questions.

This Court is obliged to assume that the jury believed those aspects of evidence, and drew those inferences that reasonably could be drawn therefrom, in the light favorable to the verdict.

Based upon the foregoing, respondent urges that the conviction and sentence of appellant be affirmed.

Respectfully submitted this 9th day of July, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Merlin G. Calver, Attorney for Appellant, 3293 Harrison Boulevard, Suite 120, Ogden, Utah, 84403, this 12 day of July, 1982.

Susan Patton