1982

The State of Utah v. Mary Holloway : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent v. MARY HOLLOWAY, Defendant-Appellant	: : : : : : :	Case No. 18219

BRIEF OF APPELLANT

Appeal from a judgment and conviction rendered by the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is a criminal action brought by the State of Utah against defendant-appellant, Mary Holloway and others, alleging that said defendants did unlawfully cause the death of another in violation of Utah Code Annotated Section 76-5-203 (1953 as amended), second degree murder, a felony of the first degree. The defendant-appellant appeals the judgment and conviction rendered by the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge presiding.

DISPOSITION IN THE LOWER COURT

Appellant seeks to have her conviction reversed based on the failure of the trial court to give the properly requested jury instructions on the lesser included offense of Manslaughter, Utah Code Annotated Section 76-5-205 (1953 as amended), or in the alternative, judgment to be entered for manslaughter.

STATEMENT OF THE FACTS

The appellant, Mary Holloway, was charged with murder in the second degree for the death on March 15, 1981, of Samuel Taylor Beare, IV. Her trial was joined with that of Charles Creer, however the action of a third defendant, Thomas Garcia was not joined for trial. Garcia was ultimately convicted of Second Degree Murder in a separate trial.

A jury trial was held in the District Court of the Third Judicial District, Salt Lake County, from September 28, 1981, to October 1, 1981, the Honorable Peter F. Leary presiding. At trial conflicting evidence was heard concerning the culpability of appellants Holloway and Creer, and of Mr. Garcia. Most testimony agreed that Mr. Garcia was chiefly responsible for the events of March 15th.

The evidence at trial showed that a vehicle was observed in the area of East High School in the early morning hours of October 1, 1981, and that an individual or individuals were seen to be struggling with an unconscious individual. The evidence ultimately showed the unconscious individual to be the deceased, and that after the deceased was left in the area of East High School, the individual or individuals exited the area and were later stopped and a struggle ensued between Officer Ryan and Thomas Garcia who ultimately fled. The appellants, Holloway and Creer, were apprehended and later released. It was the impression of arresting officer Ryan that the appellants "were intoxicated or on something to impair

them physically" (T. at 6). The appellant Holloway, was at no time seen touching the body of the deceased or assisting in its movement from the car (T. at 11 and 24) and although at the time of his arrest Garcia was covered with blood, and his fingers were broken (T. at 211-222), no blood was observed on the person of appellant Holloway. (T. at 214) These physical facts conflicted with the testimony of Patrick Dumas who indicated that the appellant Holloway, said "Tommy went crazy last night and killed Sam Beare" and paused and said "well really we all killed him". (emphasis supplied)

The theory of the defense at trial was that the appellants, Garcia , and Beare had been drinking that evening and that an altercation ensued between Garcia and Beare, and that in the appellant's attempt to stop Beare from besting Garcia, that Beare was killed. The evidence showed that Beare had a blood alcohol content of .19% (T. at 208) and that a drug screen showed numerous controlled substances in his blood stream at the time of his death. (T. at 202-203)

Due to the evidence and circumstances that mitigated appellant Holloway's culpability, counsel for appellant submitted a proposed Instruction on manslaughter (R. 110). Upon rejection of this instruction, counsel made a timely objection (R. 484). Whereupon the court submitted instead Instruction No. 27 to the jury (R. 29), directing that the verdict must be either guilty of criminal homicide, murder, second degree; or not guilty. No instruction was given as to any possible lesser included offense. After deliberating over eleven hours, the jury returned with a verdict of guilty (R. 52).

ARGUMENT

POINT I

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER CONSTITUTED REVERSIBLE ERROR.

It is appellant's contention that the trial judge in the instant case was legally obligated to instruct the jury on the lesser included offense of manslaughter.[1] The court's failure to so instruct is substantial and constitutes reversible error.

Because the term 'homicide' "embraces every mode by which the life of one person is taken by another"[2], it is clear that both second degree murder and manslaughter fit within the broad category of homicide. Appellant submits that manslaughter is merely a less severe degree of homicide than second degree murder, and thus is included therein.

Support for this position is found in Farrow v. Smith, 541 P.2d 1107, 1108 (Utah 1975) where the Utah Supreme Court cites Clown Horse v. State, 170 Neb. 336, 102 N.W. 2d 625 (1960), wherein that court stated:

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1. Counsel for appellant requested in writing and took exception to the trial court's failure to give such requests to the jury, properly preserving this issue on appeal. Utah Rules of Civil Procedure, Rule 51. State v. Erickson, Utah, 568 P.2d 750 (1977); State v. Bell, 563 P.2d 186 (1977); and State v. Gleason, 17 U.2d 150, 405 P.2d 793 (1965). Accord: Rules of Practice in the District Courts, Rule 5.4

2. 40 Am. Jur. Homicide §1.

> . . . where the defendant was charged with murder in the second degree but convicted of manslaughter, the conviction was proper, and the crime of manslaughter was an included offense.

Further support is found in State v. Williams, 636 P.2d 1092, 1097 (Utah 1981) citing State v. Gandee, 587 P.2d 1064 (Utah 1978). There the Court held that carrying a loaded firearm in a vehicle was not a lesser included offense of carrying a concealed dangerous weapon. In so doing, the court distinguished these crimes from that of homicide, "with the various lesser degrees thereof."

Utah Code Ann. §76-5-203 (1953 as amended) defines second degree murder as follows:

> Murder in the second degree.---(1) Criminal homicide constitutes murder in the second degree if the actor:
>
> (a) Intentnionally or knowingly causes the death of another; or
>
> (b) Intending to cause serious bodily injury to another, he commits an act clearly dangerous to human life that causes the death of another; or
>
> (c) Acting under circumstances evidencing a depraved indifference to human life, he recklessly engaged in conduct which creates a grave risk of death to another and thereby causes the death of another; or
>
> (d) While in the commission, attempted commission, or immediate flight from the commission or attempted commission of aggravated robbery, robbery, rape, forcible sodomy, or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary aggravated kidnapping, or kidnapping, causes the death of another person other than a party.
>
> (2) Murder in the second degree is a felony of the first degree.

Utah Code Ann. §76-5-205 (1953 as amended) defines manslaughter as follows:

> Manslaughter.---(1) Criminal homicide constitutes manslaughter if the actor:
>
> (a) recklessly causes the death of another; or
>
> (b) Causes the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse; or
>
> (c) Causes the death of another under circumstances where the actor reasonably believes the circumstances provide a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.
>
> (2) Manslaughter is a felony of the second degree. Utah Code Ann. §76-5-205 (1953 as amended).

The factor which distinguishes second degree murder from manslaughter is malice. The Supreme Court noted this in Farrow v. Smith, supra, wherein it stated:

> For many years the definition of second degree murder has been the unlawful killing of a human being with malice aforthought and that of manslaughter was the unlawful killing of a human being without malice. In our opinion the new criminal code has not changed those definitions. Id. at 1109, (the court was interpreting the above quoted statutes as they were set forth in the 1975 pocket supplement to the Utah Code.)

The test given to determine if one offense is a lesser included offense of another is that found in the recently revised Utah Criminal Code. Utah Code Ann. §76-1-402(3) (1953 as amended), provides in pertinent part:

> A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
>
> (a) It is established by proof of the same or less than all 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 a statute as a lesser included offense.[3]

The process by which such a determination is made was described in State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934):

> The only way this matter may be determined is by discovering all of the elements required by the respective sections, comparing them and by a process of inclusion and exclusion, determine those common and those not common, and, if the greater offense includes all legal and factual elements, it may safely be said that the greater includes the lesser, if, however, the lesser offense requires the inclusion of some necessary element or elements in order to cover the completed offense, not so included in the greater offense, then it may be safely said that the lesser is not necessarily included in the greater. (33 P.2d at 645)

Section 76-1-402(4) states:

> (4) The court shall not be obligated to charge the jury with respect to an included offense unless there is rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

A proper reading of the above section demonstrates that where a rationalbasis for instructing on a lesser included offense exists, the court is obligated to charge the jury thereon.

Appellant submitted sufficient evidence to require presentation of the Manslaughter instruction to the jury. Appellant requests that this Court "survey the evidence and inferences which admit

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3. This statute was recently intepreted in State v. Lloyd, Utah, 568 P.2d 357 (1977), and its companion case, State v. Cornish, Utah, 568 P.2d 360 (1977), wherein this court held that the Utah joyriding statute is a lesser included offense of theft of an operable motor vehicle.

of rational deduction, to determine if there exists reasonable basis upon which a conviction of the lesser offense could rest." State v. Dougherty, 550 P.2d 175, 176 (Utah 1976).[4]

POINT II

THE DEFENDANT IN A CRIMINAL CASE HAS A RIGHT TO SUBMIT HIS THEORY OF THE CASE TO THE JURY IN THE INSTRUCTIONS.

It has long been the law in the State of Utah, that an accused in a criminal case has the right to submit to the jury his theory of the case, and that such theory, when properly requested, should be given to the jury in the form of written instructions. State v. Stenbeck, 78 U. 350, 2 P.2d 1050 (1931). In Utah this right allows for the presentation of instructions on all defenses and theories, including lesser included offenses, when such are properly requested by the accused. State v. Gillian, 23 Utah 372, 374, 463 P.2d 811 (1970); State v. Mitcheson, Utah, 560 P.2d 1120 (1977).

An accused may make the decision as a matter of trial strategy to go "for broke" and decline to request instructions on a lesser included offense if his theory of defense so dictates. State v. Mora, Utah, 558 P.2d 1335, 1337 (1977); State v. Gellaty, 22 U.2d 149, 152 449 P.2d 993 (1969); State v. Valdez,79 U.2d 426, 428, 432 P.2d 53 (1967); State v. Mitchell, 3 U.2d 70, 278 P.2d 618 (1955). However, when the accused, as his theory

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4. Interpreting Utah Code Ann. §77-33-6 (1953 as amended), a precursor to §76-1-402. (See, also, State v. Gillian, 23 Utah 2d 372, 463 P.2d 811 (1970).

of the case, requests instructions on lesser included offenses and is willing to submit his guilt or innocence to the jury on that theory, the trial court as a general rule is duty bound to submit these alternatives to the trier of the fact. State v. Gillian, 23 U.2d 374, 375, 463 P.2d 811 (1970).

When the theory of defense embraces an argument, in effect in mitigation, that he is guilty of not the crime as charged in the Information, but some lesser offense, the teachings of Gillian apply. On this point the Gillian court stated:

> One of the fundamental principles to the submission of issues to juries is that where the parties so request they are entitled to have instruction given on their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict. State v. Gillian, supra, 23 U.2d at 374.

In Gillian this court pointed out the reasons for this rule and the instant case illustrates the soundness of such a rule. This court said it should not be the prerogative of the trial court to direct the jury as to what degree of crime they may find a defendant guilty or to direct them that they must find him not guilty if they do not find him guilty of the greater offense. To allow this permits the court to be a judge of the facts and to in effect direct a verdict on the lsser included offenses. Such a procedure violates the historical spirit as well as letter of our system of jury trial under the Sixth and Fourteenth Amendments to the Unites States Constitution and Article I, Sections 10 and 12 of the Constitution of Utah. State v. Ferguson, 74 Utah 263, 279 P.2d 55 (1929) (Straup, J. concurring). See also United States v. Skinner, 437 F.2d 164, 165 (5th Cir. 1971).

Both the Utah Supreme Court and the United States Supreme Court have declared as a matter of policy and procedural safeguard the right of a defendant to receive instructions on a lesser offense if such is supported by evidence or if there is some doubt as to elements of the greater offense. In State v. Mewhinney, 42 Utah 498, 134 P. 632, the Utah Court stated:

> In passing this point we desire to say that a trial court should, in every case where there is any direct or inferential evidence with respect to the different degrees of murder, charge the jury with regard to all the degrees, and this rule should be followed where there may be any doubt with regard to whether the higher degree is established or not. This is contemplated by our statute which divides crimes into degrees and which requires the jury to find in the lesser degree in case of doubt. State v. Mewhinney, 42 Utah 498, 134 P. 632, 639.

In Beck v. Alabama, 447 U.S. 625, 637 (1980), the United States Supreme Court held:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense---but leaves some doubt with respect to an element that would justify conviction of a capital offense---the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enahnce the risk of an unwarranted conviction.

While this is not a capital case, neither does appellant rely solely on public policy, but also on case law and Utah statutes, supra.

In State v. Bartias, 91 Utah 574, 65 P.2d 1130 (1937), this court noted that the failure to give an instruction on lesser included offenses when requested ". . . clashes with two fundamental rules of trial in criminal cases: It has the effect of the court weighing the evidence and, in effect, limiting the jury to a consideration of only part of the evidence (the defendants'): and it, in effect, casts upon the accused the burden of proving his innocence or justification." (65 P.2d at 1132).

When the accused requests a lesser included instruction there should exist a presumption that the requested instruction be given.[5] Such is the tenor of this court's discussions in the past. In State v. Hymas, 64 U. 285, 230 P.2d 349 (1924), it was stated:

> It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense, and determine the question of the state of the evidence as a matter of law. That should be done only in very clear cases. (64 U.2 at 297). Accord: State v. Barkas, 91 U. 574, 580, 65 P.2d 1130 (1937). [Emphasis Supplied]

In recent years this court has endeavored to set specific guidelines providing for the submission of lesser included offenses when requested.

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5. This seems to be the feeling of the court in State v. Gillian, supra, 23 U.2d at 376, wherein it said:

> The usual rule on an appeal in which the challenge is to the sufficiency of the evidence to support the verdict, is that we review the record in the light favorable to the jury's verdict. However, in this situation where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein to sustain a conviction of the lesser offenses.

The statutory necessity of instructing a jury on a lesser included offense was described in State v. Dougherty, supra. This court cited Lisby v. State, 83 Nev. 183, 414 P.2d 592 (1966), which followed a provision similar to Utah Code Ann. §77-33-6 (1953). Describing the holding of the Nevada Court this court said:

> The Court discussed three situations in which the problem of lesser included offenses are frequently encountered. First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.
>
> Second, where the evidence would not support a finding of guilty in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.
>
> Third, is an intermediate situation. One where the elements of the greater offense include all elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser included offense. In such a situation instructions on the lesser included offense may be given, because all elements of the lesser offense have been given. However, such an instruction may properly be 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. The court concluded by stating that if there be any evidence, however slight, on any reasonble theory of the case under which the defendant might be convicted

> of a lesser included offense, the court must, if requested, give an appropriate instruction. (550 P.2d at 176-177).[6]

The question that arises then when lesser included instructions are requested is: was there ". . . any evidence, however slight, on any reasonable theory under which the defendant might be convicted of the lesser [and] included offense . . ." of criminal trespass. State v. Dougherty, supra, at 177; State v. Bell, Utah, 563 P.2d 186, 188 (1977) (Justice Wilkins, concurring). If there was such evidence, then the instructions were properly requested and should have been submitted to the jury for consideration.

POINT III

THERE IS SUBSTANTIAL EVIDENCE TO JUSTIFY THE REQUESTED INSTRUCTION AND DENIAL OF THAT ENTITLED INSTRUCTION CONSTITUTED REVERSIBLE ERROR.

Appellant submits that substantial evidence was presented at trial in the instant case to which a reasonable view, based on appellant's theory of the case, would support presentation of the instruction for the lesser included offense. For example, appellant's testimony indicated that she did not participate in the confrontation between the victim and Tommy Garcia (T. 243-244). Appellant also indicated that everyone had been drinking heavily (T. 242). This testimony was substantiated by Officer Nelson who indicated that it was his "impression that they were intoxicated or on something to impair them physically." (T. 6-7).

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6. State v. Dougherty, supra, has been followed in State v. Pierre, Utah 572 P.2d 1338, 1355 (1977), and State v. Bell, 563 P.2d 186, 188 (1977).

Besides appellant's own testimony, there was evidence that she did nothing with the body of the victim (T. 13), nor was there any blood on her person (T. 14). Also, the evidence showed that appellant was merely a passenger in the car (T. 26). Further, there was absolutely no evidence introduced at trial to indicate that appellant aprticipated in the homicide. She was merely present.

The above mentioned factors clearly justify the need for giving an instruction on the lesser included offense of manslaughter. It is at least reasonable to assume that the jury could have, as the triers of fact, found appellant to have been reckless, and thus within subsection (a) of the Manslaughter statute.

A portion of the evidence relied on by appellant is her own testimony. However, this fact itself does not per se destroy its credibility. In State v. Larry Elliot and Harrison Clayton, Nos. 17350, 17351, 17358 (Utah, January 21, 1982) the Utah Supreme Court found that a defendant's testimony, when received, has the same status as any other evidence, and is to be considered by the jury, who can then decide its crediblity.

This statement by the court has support in another recent case. In State v. Chestnut, 621 P.2d 1228, (Utah 1980) (original emphasis) the court, in discussing lesser included offenses, stated:

> If there be any evidence, however slight, on any reasonable theory of the case, under which defendant might be convicted of a lesser included offense, the trial court must, if requested, give an appropriate instruction. (Id. at 1232).

There is no question that in the instant case at least some evidence was introduced to require the requested instruction on manslaughter. The trial judge's failure to leave such a determination to the jury to decide constitutes reversible error, under both Chestnut and Elliot.

It is also important to note that the facts introduced at trial vis-a-vis Tommy Garcia could reasonably support a manslaughter instruction on his part, regardless of the serious nature of the wounds. (See State v. Gaxiola, 550 P.2d 1298 (Utah 1976). Since appellant is basically in a position of an accomplice, those facts, as applied to Garcia, should justify a manslaughter instruction as to appellant.

CONCLUSION

Appellant respectfully submits that sufficient evidence was introduced at trial to warrant an instruction on manslaughter. The trial judge's failure to so instruct constitutes reversible error and appellant requests this Court to so rule.

DATED this 18 day of June, 1982.

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