1982

Cathy Jean Terry Jensen v. David Knight Jensen : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and
Respondent,

-vs-

Case No. 18314

CHARLES T. BROWN,

Defendant and
Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a conviction of aggravated kidnapping.

DISPOSITION OF THE LOWER COURT

Appellant was charged with forcible sexual abuse and aggravated kidnapping and tried before a jury on the 20th day of January, 1982, the Honorable Duffy Palmer, Second District Court Judge, presiding. The jury convicted appellant on the kidnapping charge and acquitted him on the charge of forcible sexual abuse.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the conviction and asks for a new trial.

FACTS

The largest part of the testimony in this case centered around Gale Kuki, the alleged victim. She testified that during the preceding two and a half to three years she had an affair with the appellant. (T.R. 25) She testified that on the day before the incident in question she had gone to Logan to pick up her granddaughter with a Mr. Dan Thompson. She returned at approximately 5:00 P.M. to 6:00 P.M. that evening to her mother's house. At that time she stated she received several phone calls from the appellant inquiring as to when she expected to return home (T.R. 27). Ms. Kuki then went to Mr. Thompson's house with him. The appellant called at Mr. Thompson's and was invited over. (T.R. 27) The appellant arrived and the complainant left shortly thereafter to return home. On the way she was stopped by a police officer for suspicion of driving under the influence and then released (T.R. 28).

According to the alleged victim, she arrived at home and the appellant was inside her mobile home, a fact which the appellant denied. An argument ensued and Ms. Kuki testified that she was physically assaulted. She testified that the fight lasted continuously for approximately four hours, during which time she left the mobile home once to run next door (T.R. 33). She stated the appellant forced her back to her mobile home where the fight continued.

somewhat from what she observed at the scene.

Defense counsel objected to the introduction of the photographs on the grounds that (1) They did not accurately depict the observations of Ms. Johnson, and (2) Any probative value was outweighed by the prejudice to the Defendant. The photographs were admitted. (T.R. 31).

The defense called Barbara Brown, the appellant's wife to the stand. Mrs. Brown testified as to a long history of harassment by Ms. Kuki.

The appellant testified in his own behalf. The appellant testified of a long and stormy relationship with Ms. Kuki, lasting two and one-half to three years. He stated that on the night the incident occurred he arrived at Ms. Kuki's mobile home after she had arrived. He said that they were to prepare for a fishing trip the next day. They talked for approximately one hour before an argument began (T.R. 157). He testified that Ms. Kuki threw a glass and then slapped him while he sat in a chair. A pushing match ensued and appellant's shoulder was injured. Appellant admitted that he bit Ms. Kuki in an effort to gain his release (T.R. 163). At some point the situation calmed and appellant left. He was arrested later that morning.

Defense counsel requested that the court instruct the jury as to simple assault, alleging it to be a lesser included offense to the charge of aggravated kidnapping, as well as self-

defense. The court refused and appellant's counsel excepted (T.R. 107).

ARGUMENT

POINT I

THE LOWER COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO SELF-DEFENSE.

Defense counsel requested that the judge instruct the jury on the theory of self defense (T.R. 107). Such request was denied and the jury was given no instruction dealing with self defense. Utah Code Annotated § 76-2-402 provides that:

> A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such a force is necessary to defend himself or a third person against such other's imminent use of unlawful force.

Generally, if evidence is introduced at trial which would raise the issue of self defense, an instruction is required. In a leading case, although the instruction was not given, this court discussed the standard to be applied in determining whether to instruct the jury on a self defense theory.

> If the defendant's evidence, although in material conflict with the State's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused.

State v. Castillo, 457, P.2d 618,619 (Utah 1968)

In the case before the court the evidence concerning self defense came mainly from two sources. The appellant testified extensively about the aggression by Ms. Kuki (T.R. 157-163). He stated that she slapped him, threw and broke a glass, pushed him, and severely injured his shoulder, which he said she knew to be injury prone. He stated that the actions he took were in response to her acts. Additionally, Detective Ball stated that appellant, in a statement made the morning after the incident, told Ball essentially the same story (T.R. 116).

There is no question that this is in material conflict with the state's evidence. However, it was at least substantial enough and credible enough, to entitle appellant to the instruction. It should be noted in this regard that the "victim", Ms. Kuki admitted to striking appellant several times, and to tearing his shirt, indicating some force, although she characterizes her actions as defensive (T.R. 73).

This court has stated the rule in a different way in State v. Johnson, 112U.130,185 P.2d 738 (1947), After reviewing many previous cases the court noted that in cases where the defendant's request for instructions was sustained, defendant's evidence established a state of facts which, if believed by the jury, established adequate provocation, lawful acts on the part of the defendant, or other facts justifying defendant's actions.

In other words, if the evidence offered is believed, defendant could conceivably make out his defense and the jury should be instructed accordingly.

In this case, had the jury been properly instructed and had they believed the testimony of the appellant, a jury could have seriously entertained a reasonable doubt as to whether or not appellant acted in self-defense, and there can be no question that failure to instruct the jury in this regard is reversible error, where the jury is precluded from even considering the evidence and theory of the defendant.

POINT II

THE LOWER COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE OF ASSAULT WITH RESPECT TO THE CHARGE OF AGGRAVATED KIDNAPPING.

Defense counsel requested that the court instruct the jury as to simple assault, arguing that it was a lesser included offense of aggravated kidnapping. Two Utah statutes govern whether a defense instruction as to a lesser included offense will be given. Section 77-33-6 U.C.A. 1953, as amended, states:

> The jury may find the defendant guilty of any offense the commission of which is necessarily included in that which he is charged in the indictment of information, or of any attempt to commit the offense.

Section 76-1-402 (4), U.C.A. provides that:

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

This court has restated this rule in State v. Dougherty, 550 P.2d 175 (Utah 1976). Discussing with approval principles laid down in a Nevada case, Lisby v. State, 82 Nev. 183, 414 P. 2d 593 (1966), this court stated that

> if there be any evidence, however slight, on any reasonable 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. Lisby v. State, supra at 177.

The court in Lisby v. State, supra, discussed three categories of cases wherein the question of giving lesser included instructions arose. First, cases wherein there is evidence which would absolve defendant from the greater offense, or degree, but would support a finding of guilt on the lesser offense. In such cases the instruction is mandatory. Second, cases where the elements differ or evidence shows that defendant is not guilty of the lesser crime, wherein the instruction is inappropriate. Third, a situation where the greater crime necessarily includes all elements of the lesser crime, where the greater crime could not be committed without having the intent and doing the acts which constitute the lesser crime. In such cases the instruction should be given unless the state has conclusively proved the greater crime and there is no evidence which would tend to reduce the greater offense, if believed by the jury.

This case would seem to fall within the third category, specifically, that all of the elements of assault are included

able, a proper foundation must be made and the pictures must be shown not to be misleading Kaps Transport, Inc. v. Henry, 572 P. 2d 72 (Alaska 1977). That test was not met in this case. Further, Ms. Johnson went on to give value judgments about the photographs. This clearly undermines the purpose behind the authentication requirements and the photos should have been excluded.

CONCLUSION

The facts as presented at trial clearly raised the issue of self defense, both by the defense and state witnesses. The court erred in removing this aspect of the trial from consideration by not properly instructing the jury. As the elements of aggravated kidnapping overlapped the elements of assault, and as the evidence raised doubts as to guilt on the greater offense, the court should have instructed the jury on the lesser included offense. Finally, the court should not have admitted photographic evidence which, admittedly, did not accurately depict what it was represented to show. By taking the major portion of the defense theory away from the jury, the court committed reversible error and the conviction for aggravated kidnapping must be reversed and appellant granted a new trial.

Respectfully submitted

MARK A. BESENDORFER

within the elements of aggravated kidnapping.

The elements of the assault instruction which defense counsel urged on the court are as follows:

1. an attempt;
2. with unlawful force or violence;
3. to do bodily injury to another. U.C.A. 76-5-102

The elements of aggravated kidnapping, as applicable to this case are:

1. intentional and knowingly;
2. by force, threat or deceit;
3. detains or restrains another against his will with intent;
4. to inflict bodily injury on or to terrorize the victim or another. (U.C.A. 76-5-302)

A bare reading and comparison of these elements reveals that it will be almost impossible to sustain a conviction of aggravated kidnapping without also proving all of the elements of assault. Furthermore, the previous discussion of the facts clearly shows that the evidence presented required the court to give the instruction as requested.

There was a dispute in the evidence as to whether or not Ms. Kuki was detained or restrained against her will. She testified that she was restrained, while the appellant denied that was the case. No other testimony or evidence was offered.

In analyzing the elements it can be seen that if the jury had a reasonable doubt as to the question of restraint, but

they were satisfied as to the remaining elements, an assault, as defined above, would be proved. Thus, according to the applicable statutes and case law, it was error on the part of the lower court to refuse to instruct the jury as to assault, a lesser included offense.

POINT III

THE LOWER COURT ERRED IN ADMITTING THE PHOTOGRAPHS, AS THEY DID NOT ACCURATELY DEPICT THE OBSERVATIONS OF THE VICTIM.

The state at trial introduced several photographs of Ms. Kuki, taken the morning after the incident (state's Exhibits D through J). The items were authenticated by Virginia Johnson, a secretary of the Layton Police Department, who took the photographs. She testified that Exhibits D through J were not the same photographs she took, but were enlargements, apparently made by the county attorney, who checked them out of evidence. She was also the evidence officer and did not see them until they were shown to her at trial.

When asked whether the photographs accurately depicted what she observed, she stated they did not, that they differed somewhat.

The general rule is that before photographs can be admissable they must be shown to be fair, accurate and truthful representations of what they purport to depict. Ross v. Colorado National Bank of Denver, 463 P.2d 882 (Colo. 1969). In order to be admiss-

CERTIFICATE OF DELIVERY

I hereby certify that I delivered 2 copies of the foregoing Brief of Appellant to David L. Wilkinson, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, this 24th day of March, 1983.

MARK A. BESENDORFER