1982

State of Utah v. Charles T. Brown : Brief of Appellant

Utah Supreme Court

Mark A> Besendorfer; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18314
CHARLES T. BROWN,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED KIDNAPPING IN VIOLATION OF § 76-5-302, UTAH CODE ANNOTATED, 1953 (AS AMENDED), BEFORE THE HONORABLE DUFFY PALMER, JUDGE OF THE SECOND JUDICIAL DISTRICT.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of aggravated kidnapping.

DISPOSITION OF THE LOWER COURT

Appellant was charged with forcible sexual abuse and aggravated kidnapping. He was tried before a jury in the Second District Court on January 20, 1982, the Honorable Duffy Palmer, Judge, presiding.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the conviction in the trial court.

STATEMENT OF FACTS

On July 16, 1981, Gale Kuki went to her mother's house in Logan to pick up her granddaughter. Dan Thompson,

Ms. Kuki's neighbor, accompanied her (T. 26). They arrived at Ms. Kuki's mother's house around five to six o'clock, p.m. (T. 26). Charles Brown, appellant in the instant case, called Ms. Kuki several times while she was at her mother's home. He wanted to know when she was going to return (T. 26) and told her he was coming with a gun (T. 27).

Mr. Brown and Ms. Kuki had been having an affair for the last two and one-half to three years (T. 25). They met at Hill Air Force Base, where they both worked (T. 39). Mr. Brown told Ms. Kuki he would be getting a divorce as soon as his wife graduated from college. Ms. Kuki told him she did not care whether he got a divorce or not (T. 41, 44). She had decided she wanted to end the relationship (T. 85).

Ms. Kuki and Mr. Thompson left Logan between ten and twelve o'clock p.m. (T. 27). Ms. Kuki took Mr. Thompson home. While Ms. Kuki was at Mr. Thompson's residence, the appellant called her several times and asked if he could come over. Ms. Kuki told him he could (T. 27). When he arrived, the appellant told Mr. Thompson that "if he didn't quit foolin' around" he was going to slit his throat (T. 28). Ms. Kuki left after awhile to get some cigarettes at a nearby store. On her way there, she was stopped by a policeman for drunk driving (T. 28). The policeman finally allowed her to leave. She returned home and was met there shortly by appellant (T. 28).

Ms. Kuki had started to fix the appellant a drink when he began to wrestle with her. They argued about Dan Thompson (T. 30), whom Ms. Kuki thought of as a friend (T. 26). Ms. Kuki then told appellant she was tired and wanted to go to bed. She went into her bedroom, shut the door, and locked it. She got into bed with her clothes still on and covered up (T. 31).

Appellant broke the doorknob off, came in, and started slapping Ms. Kuki and beating her face. He then drug her by her hair and arms to the front room (T. 31). He threw her on the couch and ripped off her blouse and bra. Appellant began biting Ms. Kuki on her face, eyes, the back of her ears, her back, and breasts (T. 31). Ms. Kuki tried to escape by diverting appellant's attention and running next door to her neighbor's, Mr. Brown's home. She went inside, but he was not there. Appellant caught up with her and began ripping her hair out by the roots (T. 34). At trial, the neighbor testified that he found a wad of chestnut brown hair on the floor of his home (T. 100).

Appellant continued to hit her. Ms. Kuki once again eluded appellant. She ran outside. Appellant caught her and drug her back in the house. He threw her under the kitchen table and started biting and kicking her again (T. 35).

Ms. Kuki managed to rip appellant's shirt (T. 36), but she could not fight back (T. 38). No one answered her screams. Sometime during the beating, appellant told Ms. Kuki he was going to torture her before he killed her (T. 68).

Ms. Kuki got away from appellant once more and ran to the phone. She called her mother (T. 36). Ms. Kuki told her mother that she was in trouble. She asked her mother to come over, or, if she had not arrived at her mother's house in a little while, to call the authorities (T. 90).

When appellant caught up with her this time, she handed him the phone and he began talking to her mother (T. 36). While he was so occupied, she took the opportunity to run from her home to her van (T. 36,37). She was able to lock the doors before he could reach her, although he pounded on the hood of the van before she drove away (T. 37).

Ms. Kuki drove directly to her mother's home. Her mother told her to call the police, which she did upon returning to her home (T. 37). The incident had lasted about four hours (T. 33).

Ms. Kuki was badly injured by the beating. One eye was completely shut and the other was going shut. Her nose, lips, and the back of her head were swollen. The appellant had tried to bite her ear off (T. 89). Her lip was split and scraped underneath. Large lumps behind both ears were bruised, the bruises extending down the side of her neck. Both arms were also bruised. She suffered several scrapes across her chest (T. 122). Her mother testified that her daughter was so badly bitten, she thought she had been stabbed (T. 91).

Officer Dean Bell of the Layton City Police Department later arrested appellant and advised him of his

rights (T. 113). Appellant admitted at that time that he had bitten Ms. Kuki (T. 116).

Appellant claimed that he had been bitten on the lip and that his shoulder was pulled out of joint (T. 117). Oficer Bell, however, saw no bruises, scratches, or lip wound, and he sat close to appellant for approximately one hour (T. 117, 120). He saw no injuries at all on appellant (T. 117). Furthermore he observed that appellant was in no pain in taking his shirt off and putting it back on (T. 117).

Ms. Kuki was interviewed and examined by the police department shortly after the incident. Virginia Johnson, a secretary for the Layton Police Department (T. 121), took photographs of Ms. Kuki in the nude, since the male police officers were unable to do this (T. 121). The photographs were presented as evidence at trial (T. 123). When asked by the prosecutor if the pictures accurately portrayed what she personally witnessed, Ms. Johnson answered, "Well, they appeared worse in person than they do in pictures. They were dark bruises . . . . They don't show any tenderness, of course, that she, you know, she was in a lot of pain when she moved. But other than that, they are pretty close " (T. 124). Defense counsel objected to the introduction of the photographs, claiming they were irrelevant, did not accurately depict the observations of Ms. Johnson, and any value was outweighed by the prejudice to the defendant (T. 129). The photos were admitted into evidence.

At trial, appellant claimed that Ms. Kuki had started the fight (T. 158) and that his arm popped out of socket when he tried to grab her (T. 159). He maintained that she started squeezing his arm and that his only defense to this behavior was biting her (T. 163). The appellant admitted, however, that he might have threatened her (T. 177).

Appellant requested the court to give jury instructions on assault and self-defense. The court denied both requests (T. 106).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO SELF-DEFENSE.

Appellant requested a jury instruction on self-defense. This request was denied. Appellant now contends that the failure to so instruct the jury was improper because the evidence warranted the instruction.

The rule for when a self-defense instruction is required was given in State v. Castillo, Utah, 457 P.2d 618, 619 (1968):

> 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. Johnson, 112 Utah 130, 185 P.2d 738 (1947); and Castillo, supra, further require that the evidence be substantial before this instruction is justified.

When these rules are applied to the instant case, it is clear that appellant was not entitled to a self-defense instruction. The evidence supporting such a theory is so slight that it could not possibly raise a reasonable doubt in the jury's mind.

The only evidence supporting appellant's contention is his own self-serving testimony. All other evidence contradicts appellant's assertion. The victim's testimony indicates that appellant was indeed the aggressor. Her testimony was corroborated by the testimony of her mother, Pauline Dinsdale. The best evidence that shows that appellant was not acting in self-defense, however, was the physical states of both parties after the incident was over. The victim, who was the supposed aggressor who put the appellant in fear of bodily harm, was severely injured. Her eyes were swollen shut. Her nose, lips, and the back of her head were swollen. Large lumps behind both of her ears appeared and were bruised, the bruises extending down the side of her neck. Both arms were bruised and her chest was scraped (T. 89, 122). She was so severely injured that her mother thought she had been stabbed (T. 91).

Although appellant claimed that the victim started squeezing his arm after it popped out of socket and slapped and pushed him, the investigating officer saw no evidence of pain or injury (T. 117). Officer Bell spent an hour with appellant (T. 117) and saw no bruises, scratches, or wound. Appellant was in no pain from the alleged injured shoulder.

If the victim were really as aggressive as appellant makes her out to be, and had actually "tried to tear [his] arm off" (T. 163), appellant would have been in a considerable amount of pain. His arm would have necessarily shown signs of the struggle, for it takes no small amount of force to twist someone's arm off, or to even twist it to the extent necessary to give that person an idea of the aggressor's intent.

It is true that the victim tried to defend herself from appellant by striking him, but her actions were futile. Appellant now tries to manipulate these defensive actions into appearing to be threatening to him. If appellant had to defend himself, there is no evidence of a force that he had to defend himself from.

According to State v. Romero, 385 P.2d 967, 970 (N.M. 1963):

> In order to justify an instruction on self-defense, there must be evidence of an actual attempt or offer to do bodily harm, or the accused must have had reasonable ground to apprehend a design or the prosecutor's part to commit a felony on him, or to do some great bodily harm, and that there was imminent danger to him of such design being accomplished. 6 C.J.S. Assault and Battery § 92, pp. 944-945.

In the instant case, the victim did not try to harm appellant other than to try and protect herself by striking back at him when she was able. She was unsuccessful in her efforts. Her actions could not have been perceived as attempts to do bodily harm, and appellant was certainly in no imminent danger of her accomplishing such a design. Appellant was never threatened by the victim and had nothing to fear from her.

Appellant admits to biting and hitting the victim (T. 163). He also admits to threatening her (T. 177). The remaining evidence points to defendant's guilt rather than bolstering his claim of innocence. Therefore, the evidence could not be considered to substantially support appellant's contention that he acted in self-defense.

The Court thus acted properly in refusing his request. As this Court stated in State v. Talarico, 57 Utah 229, 234, 139 P. 860, 861 (1920):

> . . . While the theory of counsel, persistently and strenuously urged, was that of self-defense, it was nevertheless all theory and no evidence, all shadow and no substance.

This statement can be appropriately applied to the instant case.

Furthermore, even if the appellant were using force in self-defense, the force he used was clearly excessive. According to Utah Code Ann., § 76-2-402:

> A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defend

> himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony.

In the instant case, it would certainly not take appellant four hours to subdue the victim. It would not require him to bite her and hit her to the point that she appeared to have been stabbed.

Assuming, arguendo, that the victim provoked the argument, appellant's actions in response could only be regarded as retaliatory rather than defensive. The fact that a small woman strikes a large man does not justify him in brutally beating her. Smith v. Wickard, 85 N.E. 1030 (Ind. App. 1908).

The assault must not have gone beyond what was reasonably brought on by the provocative acts and if more force is used than is necessary to repel the assault, then it is unjustified. Reber v. Sandoz, 63 So.2d 876, (La. App. 1953).

Therefore, even if the victim had provoked the incident, as appellant claims, he was still properly charged and convicted of Aggravated Kidnapping. Any self-defense instruction given to the jury would have had to be accompanied by another one explaining the amount of force that may be used. Such an instruction was mentioned in State v. Woods, 563

P.2d 1061 (Kan. 1977). The instruction stated that a person may lawfully use only such force as may reasonably seem necessary to him in defending himself against unlawful attack and serious bodily harm, and that a person may not go further than appears reasonably necessary for such defense.

Even if appellant had been entitled to a self-defense instruction and the jury had been given one, the results of the trial would have been the same. In the first place, the jury would not have believed appellant's self-serving testimony that he had to beat and bite a woman for hours to defend himself. Secondly, if the jury found that he had been acting in self-defense initially, it would have concluded that he quickly became the aggressor and exceeded the force necessary to protect himself.

This Court has held that:

> Whenever this court believes beyond a reasonable doubt that the error in not giving the instruction would not have affected the verdict, the case should not be reversed. State v. Kazda, Utah, 540 P.2d 949 (1975); State v. Scandrett, 24 Utah 2d 202, 468 P.2d 639 (1970).

Since the result in the instant case would have been the same even if a self-defense instruction had have been given, the conviction should be affirmed. Any error that may have occurred was harmless.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE OF ASSAULT WITH RESPECT TO THE CHARGE OF AGGRAVATED KIDNAPPING.

Appellant argues that assault is a lesser included offense of aggravated kidnapping. He maintains that an assault instruction should have therefore been given to the jury.

The rule of law which defines what constitutes a lesser included offense was given in State v. Brennan, 13 Utah 2d 195, 371 P.2d 27 (1962):

> The rule as to when one offense is included in another is that the greater offense includes a lesser one when establishment of the greater would necessarily include proof of all of the elements necessary to prove the lesser. Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense. (Citation omitted.)

See also State v. Cross, Utah, 649 P.2d 72 (1982); and State v. Elliott, Utah, 641 P.2d 122 (1982).

The foregoing rule is also set forth in Utah Code Ann., 1953 (as amended), § 76-1-402(3)(a), which provides that one may be convicted of an offense included in the offense charged when:

> It is established by proof of the same or less than all of the facts required to establish the commission of the offense charged. . . .

Appellant contends that all of the elements of the greater crime are necessarily included in this lesser crime. He cites State v. Dougherty, Utah, 550 P.2d 175 (1976) for the proposition that when this occurs, a lesser included offense jury instruction should be given.

When the statute is applied to the instant case, however, it appears that the offense of assault is not a lesser included offense of aggravated kidnapping since it is indeed possible to commit an aggravated kidnapping without committing assault. This is clear from a comparison of the respective elements of the two offenses. According to Utah Code Ann., § 76-5-102, 1953 (as amended), elements of assault include:

1) an attempt
2) with unlawful force or violence
3) to do bodily injury to another

or

1) a threat
2) accompanied by a show of immediate force or violence
3) to do bodily injury to another.

Utah Code Ann., § 76-5-302, 1953 (as amended) sets forth the elements of aggravated kidnapping:

1) intentionally or knowingly
2) by force, threat, or deceit
3) detains or restrains another against his will
4) with intent to
   a) hold for ransom or reward, or
   b) facilitate the commissioner . . . of a felony . . . , or
   c) inflict bodily injury or to terrorize the victim or another, or
   d) interfere with the performance of any governmental or political function.

It can be easily demonstrated that assault is not a lesser included offense of aggravated kidnapping. The assault statute contains elements which were not required to be proven in order to obtain a conviction for aggravated kidnapping. Therefore, no lesser offense instruction is required. See State v. Williams, Utah, 636 P.2d 1092 (1981).

First, an aggravated kidnapping does not necessarily require attempted bodily harm. A kidnapper may detain his victim without ever attempting physical violence. He may, for example, detain through deceit. Furthermore, assault requires an attempt to do bodily injury to the victim. Aggravated kidnapping, on the other hand, is expanded to read harm done to the victim or another.

Second, an aggravated kidnapping does not require a threat. The kidnapping may be accomplished through deceit, as noted above. Even if a threat is involved, however, assault requires the threat to be accompanied by a show of immediate force or violence. Aggravated kidnapping requires only a threat.

It is evident that assault is not a lesser included offense of aggravated kidnapping since the kidnapping can be performed without resorting to either of the two main elements of assault. Appellant in essence admits this by stating, "it would be almost impossible to sustain a conviction of aggravated kidnapping without also proving all of the elements of assault." (Appellant's Brief, p. 9, emphasis added). As

long as the possibility of sustaining a conviction of aggravated kidnapping exists without simultaneously proving assault, assault cannot be considered a lesser included offense of aggravated kidnapping.

The Court in People v. Hobson, 396 N.E.2d 53 (Ill. App. Ct. 1979) held that aggravated assault is not a lesser included offense of aggravated kidnapping. While the Illinois statutes are somewhat different from Utah's, the Court's reasoning behind this decision is applicable to the instant case. The Court stated that an individual can kidnap an individual while armed without necessarily putting the victim in reasonable apprehension of receiving a battery through the use of a deadly weapon. Consequently, it is possible to commit the offense of aggravated kidnapping without committing assault and the latter is, as a result, not a lesser included offense of the former.

Assault is not a lesser included offense because aggravated kidnapping may be proven without proving assault. Conversely, an assault may be committed that is unrelated to any of the elements of aggravated kidnapping. Therefore, appellant's argument is without merit.

POINT III

THE TRIAL COURT PROPERLY ADMITTED THE PHOTOGRAPHS OF THE VICTIM INTO EVIDENCE.

Virginia Johnson, secretary of the Layton Police Chief, took photographs of the victim in the nude so that the

full extent of her injuries could be recorded. Ms. Johnson viewed these photographs after they were developed (T. 125). They were then checked out of evidence and enlarged by the County Attorney (T. 127).

Mr. McGuire asked Ms. Johnson whether the pictures accurately portrayed the victim's condition or that occasion. Ms. Kuki replied: "Yes, they, they don't show the tenderness, of course, that she, you know, she was in a lot of pain when she moved. But other than that, they are pretty close" (T. 124, lines 12-14).

Mr. Besendorfer further questioned Ms. Johnson about the pictures:

> Q. And I believe you also stated that -- now you were asked if these accurately depicted how you observed her at that particular time and you said no; is that correct?
>
> A. No.
>
> Q. Okay, you said that there was a difference between these photographs and how she looked?
>
> A. She appeared. The bruises were darker and you can't depict in a picture, tenderness, you know.
>
> Q. Okay, but physically, are they different from how you observed her?
>
> A. Not too much, I wouldn't say.
>
> Q. Okay, not too much, but some?
>
> A. Right. I don't believe they show to the degree that she's injured.

(T. 126, lines 16-29).

Appellant objected to the admission of the photographs into evidence, claiming that they did not accurately depict the situation (T. 130).

The Court overruled the objection, stating that "[t]he motion is not well taken, the exhibits may be received" (T. 131).

It is clear from the transcript that the photographs accurately portray the victim's condition. The only difference Ms. Johnson noted between the pictures and the victim's condition was that the pictures could not convey the degree of pain that the victim was in.

Appellant maintains, however, that the photos did not accurately depict the photographer's observations. He claims that this violates the general rule that before a photograph can be admitted into evidence, its accuracy and correctness must be proved. Landrum v. Taylor, 536 P.2d 406 (Kan. 1975).

Appellant can support his contention only by taking Ms. Johnson's words out of context. He points out only that Ms. Johnson stated that the photos did not accurately depict what she observed, that they differed somewhat. He does not mention the fact that Ms. Johnson clarified her statement.

Ms. Johnson was concerned that the jurors would not observe the tenderness of the victim's bruises or the intensity of pain that the victim was in. Photographs cannot convey these impressions. The photos, however, depicted Ms. Johnson's observations as accurately as is possible in a

photograph. This slight differentiation does not detract from the admissibility of the photographs. Film which is a substantially accurate and correct representation of relevant facts observed is admissible. Lavler v. Industrial Commission, 537 P.2d 1340 (Ariz. App. 1975).

The prosecution laid a proper foundation for the photographs in this case. He asked the witness her name and place of employment, whether she took those particular photographs, and whether they accurately portrayed the victim (T. 123, 124). The witness answered all of the questions to the Court's satisfaction, and the Court properly admitted the photos into evidence.

Ordinarily, the question of admissibility of photographic evidence rests within the sound discretion of the trial court. Landrum, supra. The trial court's ruling will be reversed only for an abuse of discretion. Hansel v. Ford Motor Co., 473 P.2d 219 (Ct. App. Wash. 1970). Appellant has not and cannot show that the trial court abused its discretion on this issue. It properly admitted into evidence photographs of the victim which were taken shortly after the incident.

Appellant also argues that Ms. Johnson made value judgments of the photographs. Appellant does not state what these value judgments might be, but goes on to say that these so-called value judgments undermine the purpose behind the authentication requirements.

Appellant's conclusion on the nature of value judgments (if indeed there were any) are contrary to the Utah

Rules of Evidence. Rule 56 states that a nonexpert witness may give opinions or inference if the judge finds they are (a) rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue. If opinion testimony is allowed under these conditions, it could certainly not be construed as undermining the purpose behind the authentication requirements; the opinion testimony is a help rather than a hindrance in such a situation, since it clarifies the facts in issue.

In the instant case, Ms. Johnson's opinions were both (a) rationally based on her perceptions and (b) helpful to a clear understanding of her testimony. These statements helped to authenticate the pictures that Ms. Johnson took.

CONCLUSION

The conviction of the trial court should be affirmed because appellant received a fair trial at that time. There was inadequate evidence to justify a jury instruction on self-defense. Even if the instruction had been given, the verdict would have remained the same.

Appellant was not entitled to an instruction or assault because assault is not a lesser included offense of aggravated kidnapping. It is possible to commit an aggravated kidnapping without committing assault, making the instruction inapplicable.

Appellant's contention that the photographs should not have been admitted is particularly weak. The pictures

accurately portrayed the victim. Their only limitation was that they could not show the considerable amount of pain that the victim suffered. The photographs were therefore properly admitted into evidence.

RESPECTFULLY SUBMITTED this 22ND day of August, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondent, postage prepaid, to Mark A. Besendorfer, Esq., attorney for appellant, 7355 South 9th East, Midvale, Utah 84047, on this 22nd day of August, 1983.

Carol Dahlberg