1972

The State of Utah v. Jan George Hansen : Brief of Respondent

Utah Supreme Court

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

JAN GEORGE HANSEN,

Defendant-Appellant.

Case No. 12945

BRIEF OF RESPONDENT

APPEAL FROM A VERDICT OF G
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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

JAN GEORGE HANSEN,

Defendant-Appellant.

Case No. 12940

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a jury verdict of guilty to the crime of second degree burglary.

DISPOSITION IN THE LOWER COURT

The jury found the appellant guilty of burglary in the second degree in the Third Judicial District Court in and for Salt Lake County, State of Utah, on March 10, 1972. Appellant was sentenced to serve the indeterminate sentence as provided by law.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the

Third Judicial District Court, Honorable Joseph G. Jeppson, Judge, should be affirmed.

STATEMENT OF THE FACTS

Respondent stipulates to appellant's statement of the facts except as follows:

On gaining entry to the market, one officer proceeded to search the attic and found the appellant in a ventilator shaft with only his shoes and buttocks visible (63). The appellant had apparently gained entrance to the building by smashing a hole in its roof which was constructed out of wood and tar (65).

Appellant took the stand and confirmed that at the time of his arrest on the instant charge he was on probation for a second degree burglary conviction in 1970 (97, 109). He claimed that on the night in question he had taken two LSD and two sleeping tablets (98). No one saw him ingest the tablets which he claimed to have done at about 9:00 p.m. (107, 110). Shortly thereafter the appellant, driven by a friend, proceeded into downtown Salt Lake City where he allegedly began having hallucinations in which he saw castles (104). The appellant and his companion arrived in the vicinity of the market approximately one hour later whereupon the appellant asked to be dropped off (106). Appellant testified that he was familiar with the market since he had shopped there on other occasions (103-04).

A state toxicologist thought it quite probable that a two-tablet dose of both LSD and barbituates, if actually taken and of the typical potency, would cause substantial disarrangement (121). He cautioned, however, that the effect of barbituates and LSD taken in combination was still open to question and that his opinion was therefore purely spectulative (119).

The three arresting officers offered generally corroborating testimony as to appellant's mental and physical capacity. The first officer testified that the appellant acted "strange" (66), but that he did appear to have control of his body (70). He testified under cross-examination that the reactions of LSD users were difficult to predict since he had observed so many varied responses (77). The second officer also testified that appellant's physical ability seemed unimpaired and added that appellant seemed unresponsive to directions (90). The third officer confirmed the fact that the appellant whimpered and babbled on the way to the police station (127), but he did think that appellant understood on being questioned and being given the Miranda warning (123-25).

The state introduced a small hacksaw, a tire iron, a pair of gloves, a flashlight and a pair of pliers into evidence—all allegedly used by appellant on the night in question. All but the last two exhibits were admitted (63, 73-74). The store manager testified that the cigarette cartons which had been removed from the front of

the store were neatly stacked in a large cardboard box next to the rear door (82-83). He noted further that two auxiliary drawers in each of two cash registers had been pried upon (80) and that a desk had been broken into and its contents scattered (81).

ARGUMENT

POINT I

THE COURT BELOW DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION FOR THE LESSER OFFENSE OF UNLAWFUL ENTRY. THE TRIAL COURT'S DECISION SHOULD BE UPHELD ON ONE OF TWO ALTERNATIVE GROUNDS:

A. UNLAWFUL ENTRY IS NOT A LESSER INCLUDED OFFENSE OF THE CRIME OF SECOND DEGREE BURGLARY.

To be "necessarily included' in the offense charged, the lesser offense must be such that it is impossible to commit the greater without having first committed the lesser. *Larson v. United States,* 296 F.2d 80 (10th Cir. 1961). This rule has been consistently followed by this Court. *State v. Gillian,* 23 Utah 2d 372, 463 P.2d 811 (1970); *State v. Brennan,* 13 Utah 2d 195, 371 P.2d 27 (1962); *State v. Woolman,* 84 Utah 23, 33 P.2d 640 (1934). The *Woolman* court stated the rule with somewhat greater particularity:

> The only way this matter [whether or not one offense is included in another] may be determined is by discoverning 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 the legal and factual elements, it may safely be said that the greater includes the lesser. 84 Utah at 35, 33 P.2d at 645.

When this test is applied to Utah's second degree burglary and unlawful entry statutes, it is apparent that they differ in one very significant respect: burglary requires that the intent "to commit larceny or any other felony" be proved, whereas unlawful entry, requires only that the intent "to damage property or to injure a person or annoy the peace and quiet . . . ." be established. Compare Utah Code Ann. § 76-9-3 (1953) with Utah Code Ann. § 76-9-9 (Supp. 1971). It is submitted that the difference in the intent requirement between the two crimes precludes the one crime from being necessarily included in the other under the test set forth above.

State v. Hadley, 364 S.W.2d 514 (Mo. 1963), stands for exactly this proposition. In *Hadley,* the appellant was convicted of attempted burglary. On appeal, he assigned error to the trial court's failure to instruct the jury on a lesser charge of breaking and entering which required the intent to "injure or destroy" prop-

erty. The Missouri Court, noting that the burglary charge required an intent "to steal or commit any crime . . . .", held that the malicious destruction or injuring of property is not a lesser included offense of second degree burglary. 364 S.W.2d at 517. The California Supreme Court expressed a similar conclusion by way of dictum in *People v. Proctor,* 46 Cal.2d 481, 296 P.2d 821 (1956). *State v. Garrett,* 263 N.C. 754, 140 S.E.2d 311 (1965) is also on point. In *Garrett* the court noted that:

> The charges of house breaking for the purpose of committing a felony do not include malicious or intentional injury to the buildings as lesser offenses. 140 S.E.2d at 315.

While this Court has never expressly addressed itself to this narrow issue, it appears to be in substantial agreement with the governing principles. In *State v. Ash,* 23 Utah 2d 14, 456 P.2d 154 (1969), for example, the court held that the unlawful taking offense was not necessarily included within the grand larceny charge, suggesting that the difference in the specific intent requirements for the respective crimes was decisive of the issue. The court said:

> In the instant case the jury found the appellant guilty of intending to deprive the owner permanently of the use of his car, and we cannot see why they should also have been required to decide if he only intended to deprive

> the owner temporarily. *The two crimes are based in contrary intentions in the mind of the defendant.* 23 Utah 2d at 16 (emphasis added); *accord, Sandoval v. People,* 490 P.2d 1298 (Colo. 1971).

The reasoning in *Ash* and the other cases herein cited compels the conclusion that differences in specific intent requirements constitute materially significant distinctions between crimes. Hence, under the Utah rule, it is impossible that the crime of unlawful entry be necessarily included in the charge of second degree burglary.

B. ASSUMING *ARGUENDO* THAT THE OFFENSE OF UNLAWFUL ENTRY IS INCLUDED IN THE CHARGE OF SECOND DEGREE BURGLARY, A REASONABLE VIEW OF THE EVIDENCE DOES NOT JUSTIFY THE SUBMISSION OF THE REQUESTED INSTRUCTION ON THE LESSER INCLUDED OFFENSE TO THE JURY.

The general rule followed in this state is that a trial court need not in every case instruct on lesser included crimes; it must do so only where, under some reasonable view of the evidence, there is a basis for finding the accused innocent of the higher crime and yet guilty of the lower one. See *State v. Gillian, supra; State v. Johnson,* 112 Utah 130, 185 P.2d 738 (1947). This rule has also been embodied in our statutes. Utah Code Ann. § 77-33-6 (1953). Appellant cites a number of cases

which generally support this rule but none of which suggest how it should be applied in the case at bar. More specifically, appellant fails to come to grips with the narrow issue now before this court: would the evidence adduced have *reasonably* led the jury or the court to conclude that the appellant was innocent of second degree burglary and yet guilty of unlawful entry?

There are two Utah cases which suggest the outlines of a possible standard against which the facts of this case can be tested. In short, that standard is that the court will not indulge every presumption in favor of instructing on the lesser offense; rather, it will insist that the defendant clearly show that he has substantial reasonable grounds for requesting the instruction. In *State v. Dodge,* 18 Utah 2d 63, 415 P.2d 212 (1966), the defendant was caught in the act of breaking into a safe. He was convicted and appealed, claiming that the trial court erred in not instructing the jury on the offense of unlawful entry. The *Dodge* court did not reach the issue of whether unlawful entry was an included offense of burglary. Instead, it was content to observe that the jury would have been composed of unreasonable men had it even considered that the defendant entered with the "altruistic intent to damage property or to injure a person or annoy the peace . . . ." and that the court would have acted just as unreasonably had it given such an instruction. 18 Utah 2d at 64-65. In *State v. McCarthy,* 25 Utah 2d 425, 483 P.2d 890 (1971), defendant was caught in the act of stealing

twenty-three hams from a supermarket. Nineteen hams had been carried away from the store's meat department and another four had been placed in a box nearby. The defendant was convicted of grand larceny and appealed, claiming that the trial court erred in not instructing the jury on the lesser offense of petit larcency. The court rejected this argument, reasoning, as it had in *Dodge,* that the evidence was insufficient to support the contention.

The instant case is very similar to *Dodge* and *McCarthy* in that the overwhelming weight of evidence points to the appellant's guilt of the greater offense. The appellant had smashed a hole in the market's roof and had apparently brought along instruments with which to accoplish that task. The court might at this juncture profitably note *People v. Henderson,,* 138 Cal. App.2d 505, 292 P.2d 267 (1956), wherein the California court suggests that "burglarious intent could be inferred from the forcible and unlawful entry alone." 292 P.2d at 269. Furthermore, appellant was apprehended while trying to force a door through which he could carry his booty of cigarettes, having failed in still other attempts to pry open two cash registers or to find other more valuable items in the store manager's desk. On these facts, the court below would have been indulging the most tenuous of prescumptions to consider that the appellant had other than felonious intentions.

The only remaining question is whether the jury,

on taking a reasonable view of the evidence, would have been able to find the appellant innocent of burglary and guilty of unlawful entry because of the conflicting evidence on appellant's mental competence at the time of the crime. The state introduced evidence that, if believed by the jury, would have led to the conclusion that the appellant, although acting strange, had sufficient ability to formulate burglarious intent. The defense, on the other hand, introduced evidence that, if believed, would have established that the appellant was *completely irresponsible*. In short, the jury was presented with one of two choices: appellant was either guilty or innocent of second degree burglary. Given the fact that appellant made no attempt to show that grounds existed for reaching some intermediate conclusion, the trial court was correct in refusing to complicate the jury's choice by dangling another, unexplored alternative before it. *Cf. State v. Gillian, supra,* Ellet, J., dissenting.

CONCLUSION

For the reasons stated above, the court below properly refused to give appellant's requested instructions. Respondent therefore respectfully requests that the verdict and judgment of the Third Judicial District Court be affirmed.

Respectfully submitted,

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