1973

the State of Utah v. Ersell Harris : Brief of Appellant

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

ERSELL HARRIS,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty [illegible] District Court, in and for Salt Lake [illegible] able Joseph G. Jeppson, presiding.

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IN THE

SUPREME COURT

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STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

ERSELL HARRIS,
Defendant-Appellant.

Case No. 12998

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment and sentence entered against the appellant in the Third Judicial District Court, in and for Salt Lake County, convicting him of Fraudulent Use of a Credit Card.

DISPOSITION IN THE LOWER COURT

Appellant was tried to a jury and convicted of the crime of Fraudulent Use of a Credit Card on November 30. 1970. On January 5, 1971, Judge Joseph G. Jeppson committed appellant to the Utah State Prison for an indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court and a remand for a new trial, or in the alternative resentencing of appellant on the lesser included misdemeanor.

STATEMENT OF FACTS

Trial in the above-entitled matter was held on November 22, 1970. The State's witness Robert Rose testified that he was owner and operator of the Image (T. 102) and that on January 21, 1970, the defendant entered his shop (T. 104) in the company of Evelyn Davis (T. 104). Mr. Rose testified that Evelyn Davis used the credit card at that time in the women's part of his shop (T. 108), she then asked the defendant if there was anything he wanted (T. 108) and the defendant replied that he liked a suit in the window (T. 108). Mr. Rose testified that Evelyn Davis told the defendant to try it on (T. 109), that the suit fit (T. 109) and that Evelyn Davis said "We will take it" (T. 109). Mr. Rose testified that he then asked both of them how they were going to handle it (T. 110) and Evelyn Davis replied that the purchase would be on a credit card (T. 110).

The witness testified that Evelyn Davis handed him the credit card (T. 111) and upon request showed him additional forms of identification (T. 111). During this time the defendant was standing at Evelyn Davis' side (T. 111). Mr. Rose prepared a draft marked exhibit 2 (T. 112) and Evelyn Davis signed it with the name Lewis Flowers (T. 117). Mr. Rose deposited the Bankameri-

card draft signed by Evelyn Davis on January 26, 1970 (T. 120, 121). The amount of the purchase including sales tax was $146.30 (T. 118). Mr. Rose testified that the value of the suit was $140.00 retail and between $70.00 and $75.00 at cost (T. 120).

Mr. Rose testified that his store had had dealings with Evelyn Davis prior to the date of the offense (T. 127).

The State witness, Christine Richards testified that on a date prior to the date of the offense (T. 132) she had been in the employ of the Image (T. 132) and sold a black woman a pants suit (T. 133) which had been charged upon the Bankamericard identified as Plaintiff's Exhibit 1 (T. 133).

The State's witness, Mr. Allen J. Hunsaker, testified that he was an assistant manager in the central operations department for First Security Bank (T. 140). He further testified that the Image made a deposit of $272.94 on January 26 (T. 141) which included the $146.30 draft in the name "Flowers" (T. 144). The bank notified Mrs. Flowers through the mails of the $146.30 charge (T. 151) and that in this case he did not know whether or not she had paid it (T. 151). The witness testified that in the event Mrs. Flowers did not pay the charge they would charge it back to the Image (T. 151, 152), but that in this instance he did not know if this had been done or not (T. 151).

Mrs. Louise Flowers testified for the State that Ex-

hibit 1 had been her credit card (T. 154), that she had lost her purse with her card in it (T. 153) and that she had not given anyone else permission to use the card (T. 151).

Mr. William Denning testified that on January 26 he was working at Mode-O-Day (T. 157), and that Evelyn Davis again used the credit card marked Exhibit 1 (T. 158) and that at that time she was accompanied by the defendant (T. 159).

The defendant took the stand and testified that on January 21 he took Evelyn Davis downtown (T. 170) and she bought him a suit at the Image (T. 173).

Counsel stipulated to take their exceptions to the instructions while the jury was deliberating (T. 204). The defendant's counsel took exception to instruction 5A (T. 206).

Defendant's counsel pointed out that the information charged the defendant with obtaining "goods having a value in excess of $100.00" (T. 206). Defendant's counsel further pointed out that the information charged the defendant with obtaining "goods having a value in excess of $100.00" (T. 206). Defendant's counsel further pointed out that the statute, §76-20-8.1, Utah Code Annotated, (1953) requires "value or cost" in excess of $100.00 (T. 206). Defendant's counsel further complained that "by putting in the word 'retail' in paragraph five, the jury is left without the opportunity to make a determina-

tion on the evidence as to the value of the item in question" (T. 206).

Defendant's counsel further pointed out that the evidence was that "the cost to the merchant was $70.00" (T 206). The defendant's counsel further stated that "the question of value is crucial in this instance whereby $100.00 is the line of demarcation between a misdemeanor penalty and a felony penalty where the value of the goods could be found to be under $100.00" (T. 207).

Defendant's counsel called the court's attention to its requested instruction 5A (T-page between 31 and 32) which used solely value as charged in the information and as made unlawful in the statute (T. 207). Defendant's proposed instruction 5A further allowed the jury the opportunity of finding the defendant guilty of the lesser included misdemeanor which the State's instruction did not allow (T. 23) (T-page between 21 and 32).

ARGUMENT

POINT I.

THE JURY INSTRUCTION GIVEN BY THE COURT USED RETAIL VALUE RATHER THAN SIMPLY VALUE AS CONTAINED IN THE INFORMATION, THE STATUTE AND THE DEFENSE'S REQUESTED INSTRUCTION. FURTHER THE JURY INSTRUCTIONS GIVEN BY THE COURT DID NOT INCLUDE AN INSTRUCTION ON THE LESSER INCLUDED FRAUDULENT USE

AS REQUESTED BY THE DEFENSE AND INCLUDED IN THEIR PROPOSED INSTRUCTION 5A. THE COURT BY THE INSTRUCTIONS THEY GAVE ELIMINATED FROM THE JURY THE POSSIBILITY OF THEIR FINDING THE DEFENDANT GUILTY OF THE LESSER INCLUDED FRAUDULENT USE PREJUDICING THE DEFENDANT'S POSITION TO SUCH AN EXTENT THAT THE TRIAL RESULTS MUST BE CORRECTED BY THE UTAH SUPREME COURT.

In *State* v. *Pappacostas*, 407 P. 2d 576, 17 Utah 2d 197 (1965) the Supreme Court of the State of Utah stated "the determination of the facts should be scrupulously left to the jury."

In *Morris* v. *State*, 491 P. 2d 784 (1971) the Oklahoma Supreme Court stated, "in a larceny prosecution the value of the property stolen must be proven as a fact and it is to be determined by the jury."

In *People* v. *Lyarraga*, 264 P. 2d 953, 122 C. A. 2d 436 (1954) and *State* v. *Melrose*, 470 P. 2d 552, 2 Wash. App. 824 (1970) Washington and California also found value determination as to petit or grand theft a question for the jury.

In *State* v. *Sorrell*, 388 P. 2d 429, 95 Ariz. 220 (1964), the court considered a case similar to the case at bar. In that case testimony had been given as to both retail and

wholesale value. The Arizona Court held that such prices fix the range within which the jury may find fair market value.

In California the code covering theft, West's Annotated Penal Code, §484, provides: "In determining the value of the property obtained for the purposes of this section, the reasonable and fair market value shall be the test." In *People* v. *Renfro*, 58 Cal. Rptr. 832, 250 C. A. 2d 921 (1967) the court found replacement cost to be the fair market value. The newly revised Utah Penal Code, §76-6-101 (4), Utah Code Annotated (1953), seems to define value as the lesser of market value or cost of replacement. In using such a definition the offense in the case at bar would be a misdemeanor based upon the victim's statement that his wholesale cost on the item taken was $70.00.

In *State* v. *Close*, 499 P. 2d 287, 28 Utah 2d 144 (1972) our Supreme Court considered the question of the court's instruction on lesser included offenses. The Court stated, "The well established general rule, that the jury should be instructed on lesser included offenses when such a conviction would be warranted by any reasonable view of the evidence, is in accord with and supported by our statutory law. §77-33-6, Utah Code Annotated (1953), provides that 'The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.' " The Court listed ample Utah law on the question and

then went on to find that the court must instruct on the lesser included offense even in the absence of objection. In the case at bar there was a request for such an instruction.

Earlier in *State* v. *Gilliam*, 463 P. 2d 811, 23 Utah 2d 372 (1970) our Supreme Court overruled a first degree murder conviction where instructions for lesser included offenses had not been given, finding that the defendant is entitled to have the jury instructed on lesser included offenses "if any reasonable view of the evidence would support such a verdict."

California held likewise in *People* v. *Dewberry*, 334 P. 2d 852, 51 C. 2d 548 (1959). The California Supreme Court Justice Traynor writing the opinion held "That when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." Idaho held likewise in *Cassey* v. *State*, 429 P. 2d 836, 91 Idaho 706 (1967).

California's West Annotated Penal Code §1097 states "When reasonable doubt as to degree he can be convicted only of the lowest: When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lower of such degree only." Idaho has a similar statute, Idaho Code, §19-2105.

In *State* v. *Fair*, 456 P. 2d 168, 23 Utah 2d 34 (1966) and *State* v. *Tapp*, 490 P. 2d 334, 26 Utah 2d 392 (1971) our Supreme Court resolved questions as to applicable sentence in favor of the defendants, stating in Tapp "That in case of doubt or uncertainty as to the degree of the crime, the defendant in a criminal case is entitled to the lesser." The defendant in a criminal case in Utah is given every benefit of the doubt as to finding of guilt, degree of offense and sentence given upon conviction. In the case at bar the court, by refusing to give the defendant's requested jury instruction 5A, did not avail the defendant of an opportunity to receive a benefit of doubt.

CONCLUSION

Clearly under the law the appellant in the case at bar was entitled at very least to 1) having the question of value submitted to the jury without being limited to "retail value" and 2) having the jury instructed as to the lesser included misdemeanor offense in the event the jury should find value to be less than $100.00. Since this was not done the appellant's conviction must be reversed or in the alternative the case must be remanded to the trial court with instructions to resentence the appellant under the lesser included misdemeanor.

Respectfully submitted,

JACK W. KUNKLER
Attorney for Appellant