

1960

State of Utah v. James William Warwick : Brief of Appellant

Utah Supreme Court

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9205

IN THE SUPREME COURT

OF THE
STATE OF UTAH

FILED
APR 13 1960

Clerk, Supreme Court, Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs

JAMES WILLIAM WARWICK,

Defendant and Appellant.

BRIEF OF APPELLANT

RICHARD W. CAMPBELL

Attorney for the Appellant

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent

VS

JAMES WILLIAM WARWICK,

Defendant and Appellant

BRIEF OF APPELLANT

RICHARD W. CAMPBELL
Attorney for the
Defendant and Appellant.

STATEMENT OF FACTS

On May 22, 1959, at 10:00 or 10:30 A.M.,
a body was discovered lying face down in the
Ogden River near Rushton Avenue (Tr. 13). This
body was subsequently identified as being that

police were notified and commenced a thorough investigation, including search of the area, photographs, measurements, post-mortem examination of the body and background investigation.

No progress was made in the investigation until on May 30, 1959, James Warwick reported his connection with the case to a police officer in the jail at Oakland, California (Tr. 93). At this time Warwick was in jail on a disturbing the peace and drunk charge; he was not under suspicion of implication in the death of Jonas McCall. On May 30, Warwick signed a statement (Ex. P) and as a result of this statement was brought to Weber County and charged with first degree murder in the death of Jonas McCall.

Evidence produced at the trial on behalf of the State in support of the charge was as follows:

Dr. Warren A. Bennett, Chief Pathologist at theDee Hospital, testified that he observed the body in the river at about 11:30 A.M. in

company with the police (Tr. 52). He thereafter conducted a post-mortem examination on the deceased at 2:25 P.M. on the 22nd day of May (Tr. 56). From the post-mortem, he testified that rigor mortis was fairly well developed; that a superficial abrasion was on the bridge of the nose; the right ear showed linear lacerations; there were four rough, irregular, linear wounds on the right back portion of the head, just behind the ear. (Tr. 59-60). In his opinion these wounds had been caused by a blunt instrument and there was no other evidence of recent trauma (Tr. 60). There were hemorrhages on the interior of the skull, both at the site of the wounds and also directly across from these, in the left front portion of the skull. There were two fractures of the skull in the area of the wounds (Tr. 61). He testified the blows that made the wounds in the head may or may not have caused unconsciousness (Tr. 79), and further that these wounds would not be adequate to cause sudden death. (Tr. 80). He testified

that the immediate cause of death was drowning (Tr. 81), and occurred after six hours and before 24 hours from the time of examination (Tr. 82). On cross examination Dr. Bennett admitted that the blows may or may not have caused ultimate death.

Testimony by detectives as to the scene of the crime showed the following:

The area is a hobo jungle, near the railroad tracks west of Ogden. It is frequently inhabited by transients, drunks, hoboes. (Tr. 28-29).

The bank of the river slopes up several feet from the waters edge to where it levels out in the surrounding area. In the flat area above the river, were found a small zipper bag, an overcoat, a hat and a blanket. The zipper bag was closed, and the contents were neatly packed therein (Tr. 125). There were blood stains on the 2 logs in the area, one on the ground and one on the overcoat, and no other bloodstains in the area of the body (Tr. 125, 130). No examination was made to determine if this was human blood (Tr. 236).

A thorough search of the area failed to reveal anything further of significance.

The State also produced in evidence (over defendant's repeated objections) the signed confession of the defendant, (Ex.P). This statement, in essence, admitted that defendant and deceased had met for the first time on the evening of May 21, 1959, in the area where the body was found; that deceased had attacked defendant; that after the fight started defendant had decided to kill deceased, and had repeatedly hit him with a heavy wrench (8 or 9 times); ^{had} thrown him into the river, face down; that defendant was half drunk at the time of the fight.

The State also produced one witness (Robert Coil) who testified that ~~defendant~~ and deceased knew each other prior to May 21, 1959.

The defendant, at the close of the State's case, moved for dismissal of the charge of first degree murder (Tr. 260). After denial of the motion, the defendant took the stand and testified

in his own behalf. Defendant testified he arrived in Ogden about May 13, 1959. He had been in Ogden for a short time in 1956, and other than that was a stranger. Defendant is an alcoholic, and met an acquaintance, George Corcoran, who made arrangements for defendant to stay at the Alcoholic Rehabilitation Center (Tr. 275). Defendant moved into the Center May 17, 1959 (Tr. 165). He was unable to obtain work and spent the next few days doing odd jobs at the Center. He obtained work on May 21, and was paid \$8.00 late in the afternoon (Tr. 319). This was defendants first chance to start drinking, so he took his few belongings from the Rehabilitation Center, stole a wrench that he could resell (Ex. 0) and went down town. When he could find no employment at the Union Hall, he decided to catch a train and move on west (Tr. 279). He tried unsuccessfully to sell the wrench (Tr. 278) and then had a beer and two drinks of whiskey in a bar. He had eaten nothing since breakfast at

6 A.M. that day (Tr. 283). Then defendant arranged for the purchase of two bottles of Tokay wine, and drank one of the bottles with two other men. Next he obtained two more bottles of wine and went to the hobo jungle to wait for the train west. Sitting there, he drank another bottle of wine by himself. After an hour or so, McCall, whom defendant had never seen before, approached and they started to talk. Almost immediately, McCall asked defendant for some of his wine, and when defendant refused, McCall attacked defendant (Tr. 282). They fought, and defendant struck at McCall with the wrench as well as his fists. (Tr. 282-283). When the fight ended McCall was in the water, and defendant left the area as fast as possible. He caught a bus to Salt Lake City, stayed there overnight, sold the wrench, and during the next several days made his way to California on freight trains, drinking constantly.

He was arrested at his ex-wife's home in

Oakland, and placed in the Oakland jail on a charge of drunk and disturbing the peace. Two days later, he executed Exhibit P, then waited extradition back to Utah for trial.

**STATEMENT OF POINTS TO BE
ARGUED**

POINT I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CHARGE OF FIRST DEGREE MURDER AT THE CLOSE OF THE STATE'S CASE.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THE DEFENDANT.

POINT III.

IT WAS ERROR TO ADMIT INTO EVIDENCE DEFENDANT'S ORAL AND WRITTEN CONFESSIONS

POINT IV.

IT WAS ERROR TO BIND DEFENDANT OVER FROM THE PRELIMINARY HEARING TO THE DISTRICT COURT ON A CHARGE OF FIRST DEGREE MURDER.

POINT V.

IT WAS ERROR TO ADMIT THE TESTIMONY OF THE WITNESS ROBERT COLL.

POINT VI.

IT WAS ERROR TO GIVE INSTRUCTION #24: "TO THE JURY."

POINT VII.

IT WAS PREJUDICIAL FOR THE STATE TO "ASK DEFENDANT" REPEATELY IF HE HAD NOT BEEN ARRESTED FOR ASSAULT TO KILL.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CHARGE OF FIRST DEGREE MURDER AT THE CLOSE OF THE STATE'S CASE.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THE DEFENDANT.

These two points will be argued together because they present the same question, whether the evidence is sufficient to support a conviction of first degree murder. Defendant was convicted of the category of first degree murder set forth in Jury Instruction No. 8, wilfull, deliberate, premeditated and with malice aforethought. This court has often characterized the State of mind necessary under this statutory definition. In State v. Thompson, 110 Ut. 113, 170 Pac. 2d 153, the court said

"There must be a previously thought out intention to kill the person killed after a deliberate or cool weighing and consideration of such plan."

Again, in State v. Trujillo, 214 P. 2d 626,

this court said

*** * * the elements of deliberation and premeditation - elements that imply a cool weighing and consideration of a means of accomplishing * * **.

Mr. Justice Wolfe, in a concurring opinion in that case said

"The reasoning is that the elements of 'deliberate' and 'premeditated' not only negative the idea of hurried thoughtless action in the face of an unexpected situation, but reasonably imply some opportunity for careful thought and weighing of various considerations as well as the presence of some plan or design, though length of time available for deliberation is not the controlling element so much as is extent of the reflection, in which connection age and experience of defendant should be considered."

At the close of the State's case the total evidence of deliberation and premeditation lay in (1) the condition of the body, (2) the condition of the ground, (3) the testimony of witness Coil, and (4) the statement of the defendant.

(1) The body of deceased showed that he had been drinking (Tr. 88); that the deceased had been struck only four times with the wrench (Tr. 83); there was an abrasion on the nose, possibly administered by a fist.

(2) the condition of the ground was significant only in that it showed no evidence of a body having been dragged from the fight area to the rear.

(3) The testimony of witness Goll can be largely ignored, because (a) it was error to admit it, as will be hereinafter argued and (b) his credibility and observations were so impeached on cross-examination that the jury could not base any finding of premeditation thereon.

(4) The statement (Ex. P, of defendant showed that defendant and deceased had never met until a few minutes before the fight, that defendant was 'half-drunk'; that deceased attacked defendant suddenly; and that the intention to take the life of deceased was formed after the fight had started. Ignoring for a moment the discrepancies between the statement produced by the state and the physical facts produced by the state, it is submitted there is nothing in the statement or the physical facts, or both together, that will support a finding of

Even if the statement were to be given full credence by the jury (which it is not entitled to because of discrepancies and circumstances surrounding its execution) the statement itself supplies no deliberation, malice or premeditation. It completely negatives any opportunity of "cool blood" or weighing and considering of the act. It in fact shows the killing was done in a state of intoxication after sudden and unprovoked attack by the deceased, a total stranger.

A case similar in evidence to this is the case of State vs. Martinez, Wyoming, 342 P. 2nd 237. Here the only evidence of deliberation and premeditation was contained in the confession of the defendant. This confession showed he and the deceased had been carousing together the night before, had a lot to drink, exchanged heated words and the deceased had offered to fight the defendant. They returned to the bunkhouse, and each lay down in his own bunk for the evening.

The defendant did not sleep, but thought about it and decided that deceased was going to kill him in the night. Defendant got up out of bed, went to a nearby house and obtained a gun, returned and shot deceased in the head while he lay in his bunk. The Supreme Court of Wyoming said this confession must be considered in its entirety, and when so considered failed to show premeditated malice.

"We are fully cognizant of the rule that the exculpatory part of a confession need not be believed. (citing authorities) However, we think that if any essential element of the crime is negatived by the confession, then that essential element must be supported by other evidence before there can be a valid conviction. In Egan vs. State, 58 Wyoming 167, 128 P. 2nd 215, 225, approved in State vs. Helton, 73 Wyoming 92, 276 P. 2nd 434, we said, 'The admission of homicide must be considered in connection with any mitigating or exculpatory statements made in connection therewith.'"

The court accordingly held that first degree murder had not been shown, and returned the case to the District Court with directions to resentence the defendant to second degree murder.

After conclusion of the State's case and denial of defendant's motion to dismiss the charge of first degree murder, defendant took the stand in his own behalf. His testimony confirmed the attack by deceased, the fight, and his subsequent flight, but denied any intention to take the life of the decedent. He testified it was a fight, pure and simple, with blows being traded back and forth and when the fight ended McCall was in the water. His testimony supplied no evidence of premeditation, and negatived the intention to kill expressed in the statement. We recognize that in a case such as this, the jury is not bound to believe the version recounted by the defendant, who is the only witness. State vs. Russell, 106 Utah 116, 145 P. 2nd 1003. However, in order to convict the defendant, there must be other admissible evidence to supply the other elements; i.e. the mere fact that the jury does not believe the defendant does not in itself constitute evidence to sustain a conviction. Since there is no other

evidence of premeditation. the charge of first degree murder must fail.

We recognize the mere fact that this killing occurred as a result of a fight or scuffle, is not enough to rule out first degree, State vs Neal, 123 Vt. 93, 254 P. 2nd 1053. Our contention is that here there is no other evidence of premeditation: while in the Neal case and the Russell case other facts surrounding the killing supplied premeditation. People vs. Howard, Cal., 295 P. 333 is a case similar in facts. The State proved death by a hammer blow, and offered defendant's confession that he had hit the deceased with a hammer following a quarrel and an attack by deceased upon defendant. The court returned a conviction of first degree murder, saying:

"In the present case, the prosecution relied principally on the defendant's confession to prove his connection with the offense. If the confession be disregarded, the record is entirely destitute of evidence tending to establish the circumstances and conditions actually existing just prior to and at the

time of the attack on the retail store.
 As regarded the jury, the jury in
 examining and considering the evidence
 might properly reject a confession made by
 a defendant who had been charged
 the defendant with having been the aggressor
 in a quarrel which led up to the homicide
 there being no evidence from which it
 might reasonably be deduced that the killing
 was the result of a willful, deliberate, and
 premeditated intent to kill. We do not
 question the propriety of the jury's action
 in rejecting any portion of the defendant's
 evidence or confession which to it was
 unworthy of belief. However, if it be
 assumed that this was done in the present
 case, there is a dearth of evidence tending
 to show the conditions as they existed at
 the time of the homicide, and from which it
 might reasonably be held that the murder was,
 in fact, willful, premeditated, and intentional.
 In this regard, the State failed to satisfy
 the burden of proof."

Proof of a specific intent to kill does not

imply premeditation. State v. Stanback, 78 U.

26, 25 Pac. 2nd 1054. The State produced no

evidence sufficient to support the verdict of

first degree murder.

POINT III.

IT WAS ERROR TO ADMIT INTO EVIDENCE DEFENDANT'S
 ORAL AND WRITTEN CONFESSIONS

The State introduced into evidence defendant's

oral confession to Inspector [redacted] upon

the following evidence: (a) defendant was held in Oakland jail under a suicide watch, (Tr. 92), (b) Inspector Good had defendant brought into the interview room, said he had been told defendant had admitted a killing, (c) introduced himself as a member of the police department. Then over defendant's objection that no foundation showing the confession to be voluntary had been made, the court allowed the witness to recount the oral confession. In the case of State v. Crank, 105 Ut. 332, 142 P.2d 178, this court set forth the rules for admission of a confession:

"In laying a foundation for offering the writing, if a written confession, or the conversation, if an oral confession, the State will of course be required to show the time and place of the conversation or the writing and signing of the instrument, and also what is generally called a prima facie showing that it was the free and voluntary act of the accused."

In a concurring opinion, it is said

"That the State has the burden of persuading the court that the confession was voluntary by a preponderance of all the evidence on that question."

Again in the same case, the court approves a ruling

that the confession will be received unless attacked by evidence of an improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the court of the admissibility.

Other evidence elicited about the confession included (a) defendant was not advised of his right to consult an attorney, (Tr. 113); (b) defendant and Inspector Good discussed this for perhaps one-half hour, and then Good wrote the confession out in his own hand; (c) No other persons were present while the statement was taken, although a stenographer and other officers were available (Tr. 109); (d) defendant is sightless in one eye, and has weak vision in the other, and his eyes tire rapidly if he reads without glasses (Tr. 191-192); (e) defendant did not have his glasses when Exhibit P was given to him to read, and although he looked at the statement, defendant testified he did not read it (Tr. 289).

Exhibit P is very difficult to read for a person with normal vision. Inspector Good testified he read the statement to defendant, but he also testified it was read to defendant on June 10, 1959, which testimony was flatly contradicted by Lt. Stephens, a witness at the June 10 signature. (Tr. 228). We submit the court should scrutinize the language of the statement carefully - that defendant hit McCall 8 or 9 times with the wrench in addition to the first blow (McCall was struck 4 blows with the wrench, not 9 or 10); that defendant hit McCall while he was lying 'helpless' on the ground; the exact moment when defendant decided to finish the life of McCall; the reference 3 times in one paragraph to the doing of an act to make certain of McCall's death.

The mere fact that a confession was not induced by any promise or threat will not necessarily render it admissible as voluntary. Whether a confession is voluntary depends on the facts of the particular case, and factors which should be

the statement, which defendant appeared to do, and said "is that about true. Is that the way the thing is?" (Preliminary hearing Transcript Page 57), to which defendant said "Yes". No evidence was offered concerning the conditions under which the statement had been executed eleven days earlier, and at this time the statement was not read to the defendant. Over defendant's strenuous objections, the statement was admitted.

No other evidence was shown to substantiate the charge of first degree murder (the conversations Lt. Stephens subsequently had with defendant showed no premeditation or intentional killing.)

Thus, if the statement had been excluded, the court would have had no evidence before it to prove commission of the offense of first degree murder. The State must offer proof that the offense charged was in fact committed. In Application of Rolls (Nev), 288 Pac. 2nd 450, the defendant was charged with mayhem, and the proof adduced at the preliminary stage showed that defendants, in a fist fight, caused the opponent the loss of an eye. The Court

held that an intent to main was a necessary element of the offense charged, and since there was no evidence of such an intent, the defendants must be discharged at the preliminary stage.

The "sufficient cause", requirement of our statute, 77-15-19, U.C.A. 1953, relates to the connection of the defendant with the offense, not to proof that the offense has in fact been committed.

People v. Asta, 60 N.W. 2nd 472. There the court said:

"The matter of 'probable cause', as the expression is used in the statute, has reference to the connection of the defendants with the alleged offense rather than to the corpus delicti, that is, to the fact that the crime charged has been committed by some person or persons."

Showing the commission of a homicide, and nothing further, does not provide proof of first degree murder. *People v. Howard supra.* As to the admissibility of the statement, we cite the arguments contained in Point III, *supra*; and the added circumstance that at the preliminary hearing, no evidence was given concerning the taking of the statement. The most that can be said is that on

June 10, defendant was afforded an opportunity to read the statement and thereafter signed it.

POINT V.

IT WAS ERROR TO ADMIT INTO EVIDENCE THE TESTIMONY OF THE WITNESS ROBERT COIL.

The testimony of this witness was extremely important, because by his testimony the State attempted to show that defendant and McCall had associated at least two days before the death, and further that they had argued over money and scuffled the day before the death. If believed, this would, of course, be cogent evidence of premeditation, and also refute defendant's testimony that he and McCall had never met.

Upon direct examination, Coil identified the defendant, and then said he 'resembles' the man with McCall. This was the extent of his identification, and he refused to say definitely that Warwick was the man he saw. Further, he testified that McCall was about 5 feet 10 or 11 inches (Tr. 198) and

Warwick about 5 feet 6 inches, so that McCall was 4 or 5 inches taller than defendant. Actually, McCall was 5 feet 5 inches (Tr. 84) and Warwick is 5 feet 10½ inches (Tr. 295). Coil's employer testified Coil had very poor powers of observation. (Tr. 253-254). The identification was made by a police officer showing Coil a picture of McCall, and also a picture of Warwick, with no other pictures available. Although Coil was interviewed by police immediately after the death, he made no mention of the alleged altercation until over 4 months later.

We realize that generally an identification short of absolute certainty is admissible, with any doubt going only to its weight. However, in this case the entire evidence of premeditation rests on the identification of Coil. Under these circumstances, it becomes more than another piece of evidence for the jury to weigh and consider, it becomes the State's entire case of first degree

murder. It could never be said that this evidence is sufficient to establish beyond a reasonable doubt that defendant was with McCall prior to their meeting on the banks of the Ogden River. In the case of Phillips v. State, 297 S.W. 2d 135, the only evidence identifying accused was "This man looks like one of the men that came into my place." which is almost identical with the identification of Coil. This identification was held insufficient and the conviction reversed.

It is submitted the evidence should not have been admitted over defendant's objection, that the hearsay evidence as to what was said should (Tr. 195) not have been admitted because it was not established that defendant was present at the time. Further, it is submitted that this evidence is totally insufficient to sustain a conviction of first degree murder by premeditation.

POINT VI.

IT WAS ERROR TO GIVE INSTRUCTION #24a TO THE JURY.

Instruction 24 A reads as follows:

"The right of a self-defense, although justifying the infliction of injuries upon an assailant under certain circumstances, does not justify a continuance of the attack upon the assailant after he has been disabled and rendered incapable of inflicting further bodily injuries.

"Thus where a person is attacked under circumstances which justify his exercise of the right of self-defense, and thereafter he uses such force upon his attacker as to render the latter incapable of inflicting further injuries, the law of self-defense then ceases to be operative in the former's favor. If, under such circumstances, the person originally attacked thereafter inflicts further injury upon his attacker, such injury is not justified but is unlawful, and if further injury proximately causes the death of the original attacker, the person inflicting it is guilty of a felonious homicide even though his use of force was lawful up to the time that he rendered his assailant incapable of inflicting bodily injury upon him."

Defendant excepted to the giving of this instruction (Tr. 361). We do not contend the instruction erroneous, but merely that it is incomplete. In other words, the State sought to show further attack on McCall after he was hors de combat, and this instruction correctly gave the

theory was that Warwick lawfully defended himself and his property, and made no further attack after McCall was through fighting. However, Warwick left McCall possibly unconscious and in a position of great danger (the river) without trying to help. Once the fight was over (if defendant lawfully resisted) he had no duty to rescue McCall from his position of peril.

Therefore, if the court instructs as to the duty to refrain from further attack when the fight is over, it should have completed the instruction and presented defendant's theory, namely, that defendant had no duty to go to McCall's aid.

POINT VII

IT WAS PREJUDICIAL FOR THE STATE TO ASK DEFENDANT IF HE HAD BEEN ARRESTED FOR ASSAULT TO KILL.

On cross examination of defendant, he was twice asked (Tr. 315-317) if it was not true that he had been arrested in Oakland some 7 days after he left Ogden on a charge of 'Assault to Kill'.

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Both times he answered in the negative. He had
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previously testified that he had been arrested for being drunk at his ex-wife's house.

Thereafter, on rebuttal, the state called Lt. Stephens, and attempted to prove through his testimony that the charge had been assault to kill. Lt. Stephens did not have a copy of the arrest sheet, nor had he ever seen the original (Tr. 327). All the witness had was a copy of an investigation report apparently made out by an Oakland police officer. This was not admissible evidence, and was properly excluded by the court (Tr. 330); but by forcing defendant to object to the line of questioning put to the witness, the State succeeded in getting to the jury the impression that defendant had in fact been arrested for assault to kill, even though his testimony to the contrary was unrebutted.

This would not appear prejudicial, but we submit that since it was so close in time to the McCall fight, the jury might well have considered

CONCLUSION

Defendant respectfully submits that the conviction of James William Warwick is not sustained by the evidence, and should be set aside.

Respectfully submitted,

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