

1962

State of Utah v. Dennis Sherman Kinder : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Barton & Klemm; Attorneys for Defendant-Appellant;

A. Pratt Kesler; Attorney for Plaintiff-Respondent;

Recommended Citation

Brief of Appellant, *State v. Kinder*, No. 9778 (Utah Supreme Court, 1962).
https://digitalcommons.law.byu.edu/uofu_sc1/4159

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED
DEC 26 1982

State of Utah,

— Clerk, Supreme Court, Utah —

Plaintiff-Respondent,

-vs-

No. 9778

Dennis Sherman Kinder,

Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Honorable Marcellus K. Snow, Judge

Barton & Klemm
304 El Paso Nat. Gas Co. Bldg.
Salt Lake City 11, Utah
Attorneys for
Defendant- Appellant

A. Pratt Kesler
Attorney General
Attorney for
Plaintiff-Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT	
POINT I.--	
SINCE THE TRIAL OF THE CASE, THE DEFENDANT HAS DISCOVERED NEW EVIDENCE WHICH IS MATERIAL TO HIS CASE AND TO THE COURT AND WHICH HE COULD NOT, WITHOUT REASONABLE DILIGENCE, HAVE DISCOVERED PRIOR TO THE TRIAL OR PRODUCED AT THE TIME OF THE TRIAL.....	5
POINT II.--	
THE TRIAL COURT ERRED IN PERMIT- TING THE PROSECUTION TO CROSS- EXAMINE THE DEFENDANT REGARDING MATTERS WHICH WERE NOT BROUGHT OUT ON DIRECT EXAMINATION.....	12
CONCLUSION.....	29

Cases Cited

State vs. Weaver, 78 U. 515, 6 P.2d 167.....	9
State vs. Moore, 41 U.247, 126 P.322...	9
State vs. Hawkins, 81 U. 16, 16 P.2d 13.....	9
State vs. Williams, 49 U. 336, 164 P. 253.....	9
State vs. Montgomery, 37 U. 515, 193 P. 815.....	9

State vs. Sirmay, 40 U. 525, 122 P.	
748.....	9
State vs. Cooper, 114 U. 531, 201	
P.2d 764.....	9
State vs. Edmunds, 27 U. 1, 73 P.886..	12
State vs. King, 27 U. 6, 73 P. 1045...	12
State vs. Torgerson, 4 U.2d 52, 286	
P.2d 800.....	18
State vs. Winget, 6 U.2d 243, 310 P.	
2d 738.....	18
State vs. Williams, 36 U. 273, 103 P.	
250.....	20
State vs. Dixon, 12 U.2d 8, 361 P.2d	
412.....	21
State vs. Murphy, 92 U. 382, 68 P.2d	
181.....	23
State vs. Johnson, 76 U. 84, 287 P.	
909.....	24
State vs. Vance, 38 U. 1, 110 P.434...	24
State vs. Thorne, 39 U. 208, 117 P.	
58.....	24
State vs. Bleazard, 103 U. 113, 133	
P.2d 1000.....	25
Jensen vs. S. H. Kress & Company, 87	
U. 434, 49 P.2d 958.....	26

Statutes Cited

77-38-3, Utah Code Annotated, 1953.....	9
77-44-2, Utah Code Annotated, 1953.....	22
77-44-5, Utah Code Annotated, 1953.....	23
Rule 43(b), Utah Rules of Civil	
Procedure.....	23

Texts Cited

Jones on Evidence, 5th Edition,	
Vol. 1, Sec. 162.....	16
6 Utah Law Review 323.....	27
98 C. J. S. 351, Section 474.....	28

IN THE SUPREME COURT
OF THE STATE OF UTAH

State of Utah,

Plaintiff-Respondent,

-vs-

No. 9778

Dennis Sherman Kinder,

Defendant-Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a criminal action in which the defendant was charged with robbery and grand larceny. Both charges arose out of the same occurrence which took place on October 30, 1961, at the Al Harris Dairy Milk Depot in Salt Lake City, Utah.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From

a vereict and judgment of guilty of robbery and grand larceny, defendant appeals.

RELIEF SOUGHT ON APPEAL

The defendant seeks reversal of the judgment and a new trial.

STATEMENT OF FACTS

On October 30, 1961, at about 8 P.M. an armed robber entered the Al Harris Dairy Milk Depot in Salt Lake City, Utah, and robbed Daniel L. Kelly, an employee, of \$156.83. The money belonged to the dairy company and was taken from the cash register. The robber wore a red bandana around the top of his head and had three or four days growth of beard on his face. After he departed, the police were called and made a routine investigation. During this investigation, Mr. Kelly identified a photograph of another person as being the robber, but later changed his mind

and identified a photograph of the defendant as the perpetrator of the crime.

During the trial of the case, Mr. Kelly identified the defendant as the person who took the money from him. Upon cross-examination, however, counsel brought out that the identification was somewhat doubtful.

The defendant took the stand at the trial and testified that he was in Arizona at the time the crime was committed. On cross-examination, the prosecutor was permitted, over counsel's objections, to bring out certain testimony about facts which were not mentioned on direct examination. This testimony was about a 1955 Ford pick-up truck in which the defendant drove to Arizona. The prosecutor was allowed to elicit facts about where the defendant obtained the truck and about certain changes that he made in the truck

before he left for Arizona. The State was later allowed by the court to show that the defendant had previously told a policeman a different story about the truck than what he told in court on the day of the trial.

After the crime was committed, the witness, Daniel Kelly, who was on parole from the Utah State Prison, was returned to the prison for parole violation. When the defendant was convicted, he was committed to the Utah State Prison for punishment. After he arrived at the prison, he talked to Mr. Kelly about the case and obtained an affidavit from him to the effect that the defendant was not the person who had robbed him. He also obtained an affidavit from Charles Glenis Anderson, another prisoner, who swears therein that Daniel Kelly told him the person who committed the crime had paid

him to testify at the trial.

ARGUMENT

Point 1. SINCE THE TRIAL OF THE CASE, THE DEFENDANT HAS DISCOVERED NEW EVIDENCE WHICH IS MATERIAL TO HIS CASE AND TO THE COURT AND WHICH HE COULD NOT, WITHOUT REASONABLE DILIGENCE, HAVE DISCOVERED PRIOR TO THE TRIAL OR PRODUCED AT THE TIME OF THE TRIAL.

After the defendant was committed to the Utah State Prison for punishment, he talked to the witness, Daniel Kelly, who had been returned to the prison for parole violation between the time of the alleged robbery and the trial of the case. After discussing the matter with Mr. Kelly, he obtained an affidavit which has been filed with the court in the above matter. The affidavit reads as follows:

"County of Salt Lake) : ss
State of Utah)

Comew now, DANIEL KELLY, being first duly sworn, deposes and says:

That I, DANIEL KELLY,
of my own free will and so that the
whole truth shall be made known to
all concerned, do hereby certify in

this affidavit that the testimony I heretofore gave on my sworn oath to tell the truth, the whole truth, and nothing but the truth in and at the trial of DENNIS KINDER, the said DENNIS KINDER then and there being tried in court for the crime of robbing the AL HARRIS DAIRY located at Salt Lake City, in the State of Utah, said trial being had on the 13th day of June, 1962, was erroneous in that I, DANIEL KELLY, did mistakenly identify DENNIS KINDER as the person who robbed me at the time of the said robbery and I have since found out to my own satisfaction that DENNIS KINDER, who was convicted of robbing me, was not the person who did rob me and of the fact DENNIS KINDER did not rob me I am now certain and, to this fact I do now swear without fear of perjuring myself; and, further, in regards to my previous trial testimony identifying DENNIS KINDER as being the person who robbed me, I then so testified that he **could** have been the person but I did not testify that he was the person and that he did not rob me I now know beyond a reasonable doubt; and, therefore, this affidavit is made to clear DENNIS KINDER of any connection whatsoever with the crime for which he was charged, tried and convicted; and, wherefore, I, DANIEL KELLY, now state that I am only sorry that I was forced to testify at DENNIS KINDER'S trial, but I had no choice under

the circumstances I found myself facing at that particular time.

/s/ Daniel Kelly
DANIEL KELLY, Affiant

Subscribed and sworn to before me
this 24th day of August, 1962.

/s/ James W. Johnson
NOTARY PUBLIC,
Salt Lake County,
State of Utah

My Commission Expires:
September 20, 1963"

The defendant also obtained an affidavit from Charles Glenis Anderson, another prisoner, and this affidavit has also been filed with the court. It reads as follows:

"County of Salt Lake) : ss
State of Utah)

Comes now, CHARLES
GLENIS ANDERSON, being first duly
sworn, deposes and says:

That I, CHARLES GLENIS ANDERSON, of my own free will and so that the whole truth shall be made known to all concerned, do hereby certify in this affidavit that DANIEL L. KELLY did personally and voluntarily admit to me and tell me that DENNIS KINDER was innocent of the robbery of the AL HARRIS MILK DEPOT located

in Salt Lake City, in the State of Utah, and that he, DANIEL KELLY, was paid to testify at the trial of DENNIS KINDER by some person or persons not made known to me, and further, DANIEL L. KELLY did state to me that the aforesaid person or persons who had paid him to so testify was or were guilty of robbing the AL HARRIS MILK DEPOT and not DENNIS KINDER.

/s/ Charles G. Anderson
CHARLES GLENIS ANDERSON
Affiant

Subscribed and sworn to before me
this 24th day of August, 1962.

/s/ James W. Johnson
NOTARY PUBLIC
Salt Lake County
State of Utah

My Commission Expires:
September 20, 1963"

From past Utah Supreme Court decisions it appears that both of the following requirements must be met before newly discovered evidence can be grounds for a new trial:

1. The evidence could not with reasonable diligence have been discovered and produced at the trial.

77-38-3, Utah Code Annotated, 1953.
State vs. Weaver, 78 U. 515, 6 P.2d
167.
State vs. Moore, 41 U. 247, 126 P.
322.
State vs. Hawkins, 81 U. 16, 16
P.2d 13.
State vs. Williams, 49 U. 336,
164 P. 253.

2. The evidence must be of such a character or import as to justify a conclusion that upon a new trial the jury would bring a verdict which is different from the one that was rendered at the first trial.

State vs. Montgomery, 37 U. 515,
193 P. 815.
State vs. Sirmay, 40 U. 525, 122
P. 748.
State vs. Weaver, 78 U. 515, 6 P.2d
167.
State vs. Cooper, 114 U. 531, 201
P.2d 764.
State vs. Hawkins, 81 U. 16, 16 P.2d
13.

It is obvious from the circumstances under which the affidavits were obtained that they were unavailable until after the trial of the case. After his conviction, the defendant was committed to the

Utah State Prison for punishment. When he arrived there, he found that Mr. Daniel Kelly, the robbery victim and identifying witness for the prosecution, had been returned to the prison for parole violation between the time of the robbery and the time of the trial. The defendant did not become acquainted with the other witness, Charles Glenis Anderson, until he arrived at the prison. Therefore, the evidence brought forth in this case was not available to the defendant until after the trial and satisfies the first requirement listed above.

In regards to the second requirement, the content of both affidavits tend to change, discredit and repudiate the most important testimony at the trial--the identification of the defendant as the perpetrator of the crime. The testimony of Daniel Kelly (transcript, page 14,

lines 7, 8) indicates that he and the robber were alone in the store at the time that the robbery took place. There were no other witnesses to the occurrence and the State's case was based almost entirely on the identification of the defendant by Mr. Kelly. Any change in that testimony in a subsequent trial of this case would certainly lead to an opposite verdict by the jury. In fact, without such identification, it appears that the court would dismiss the case after the State had presented its evidence.

The Supreme Court of Utah has considered at least two previous cases in which the principal witnesses to the identity of the defendant have stated in affidavits that they were mistaken in the identity of the accused and that they were convinced that another person was guilty of the crime charged.

See State vs. Edmunds, 27 U. 1, 73 P. 886, and State vs. King, 27 U. 6, 73 P. 1045. In both of these cases, the appellant court reversed the decisions of the trial court for its failure to grant a new trial. By these cases the court has declared that where the witness admits that he was mistaken and that the identification was wrongful, then a new trial should be granted. The discovery of new evidence in our case makes it necessary for the court to set aside the verdict of the jury and to grant a new trial in this matter.

Point 2. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO CROSS-EXAMINE THE DEFENDANT REGARDING MATTERS WHICH WERE NOT BROUGHT OUT ON DIRECT EXAMINATION.

The evidence brought out by the prosecution on cross-examination was improper for two reasons:

1. It was irrelevant because it tended to show evidence that the defendant

had stolen the truck in which he had driven to Arizona. This was a crime for which he had not been charged and for which he was not being tried.

2. The questions posed by the prosecutor were outside the scope of proper cross-examination and should have been excluded by the court.

As a preliminary to the discussion of these two allegations it should be pointed out that the testimony of the defendant on direct examination was carefully limited to the facts and circumstances which established his whereabouts at the time the robbery occurred. They refer exclusively to his alibi. On cross-examination the prosecutor was allowed to cross-examine the

defendant about a 1955 Ford pick-up truck which he drove to Arizona. He was subsequently allowed to question him about where he acquired the truck (page 40, lines 16-27), the colors of the truck (page 46, line 23 to Page 47, line 9), how he painted the truck (page 47, lines 10-30) and about an unrelated conversation with a policeman about the truck (page 50, lines 11-17). On rebuttal, the court permitted the prosecutor to call as a witness a police officer to contradict the defendant's testimony and to testify about a conversation which he had with the defendant regarding where he had acquired the truck (page 60, line 3 to page 62, line 3) and how he had painted the vehicle (page 62, lines 1-6).

Now let us turn our attention to the question of whether or not the evidence which the prosecutor brought out on cross-examination was relevant to the issues. When one reads the testimony of officer Donald Lyman (pages 59-63) regarding his interrogation of the defendant about the 1955 Ford pick-up truck, it becomes obvious that the truck was stolen by the accused a day or two before the robbery. This must have been even more obvious to the jury at the trial. This was a direct (successful) attempt on the part of the prosecution to bring in evidence to show that the defendant had committed another crime--that of stealing an automobile--prior to and apart from the crime for which he was being charged. In

allowing the prosecution to bring such evidence to the attention of the jury, the judge committed prejudicial error. A summary of the law in this field is set forth in 1 Jones on Evidence 290, 5th Edition, 1958, Section 162 on Relevancy. The text thereof is as follows:

"CRIMES OTHER THAN OFFENSE CHARGES.--Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defendant is guilty of the offense for which he is being tried. Otherwise stated, it is not proper to show by proof of previous bad conduct that he has a propensity for committing crime, and because he committed other crimes on previous occasions he probably committed the crime in question."

"Although it has been treated as a rule of relevancy, and is here so classified, the rule is recognized, not because the evidence of previous offenses is irrele-

vant, but for other more plausible reasons. One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged."

"It is a sound rule of public policy and therefore exclusionary in the sense that it keeps out relevant evidence for justifiable reasons. Besides the highly prejudicial character of such evidence there are the considerations that a defendant is entitled to be tried only for the crime charged against him, that he is entitled to notice and the right to prepare his defense to any charges brought against him free from surprise, that the evidence of collateral crimes would tend to confuse the jury and divert them from the real issues, that bad character cannot be proved by evidence of specific acts, and that the state is not entitled to attack the character of the accused until he has offered evidence of his good character."

The Utah Supreme Court has followed this view. The rule set forth by the cases is that evidence of other crimes is not admissible unless such evidence has probative value towards proving a material issue. See State vs. Torgerson, 4 U.2d 52, 286 P.2d 800.

In a concurring opinion written by Justice Lester A. Wade in the case of State vs. Winget, 6 U.2d 243, 310 P.2d 738, there appears a very comprehensive and instructive outline of the laws of the State of Utah in regards to the question of relevancy. It is stated as follows:

"The following is a brief review of the rules above referred to: Except where otherwise provided by Rules of Evidence all relevant evidence is admissible.

Relevant evidence means evidence having a tendency in reason to prove or disprove any material facts in issue. However, evidence that a person committed a crime upon one occasion is inadmissible to prove his disposition, bad character, or propensity to commit crime as the basis for an inference that he committed the crime for which he is on trial, but such evidence when relevant is admissible to prove some other material facts including the absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity. The reason for excluding such evidence is that the danger of prejudice outweighs the probative value of such evidence. This is said to be an application of the rule against the initial introduction of evidence of bad character by the prosecution. However, it is generally recognized that the judge may in his discretion exclude such evidence if he finds that its probative value is substantially outweighed by the risk that the admission will cause undue consumption of time, create substantial danger of undue prejudice or of

confusing the issues or misleading the jury or unfairly and harmfully surprise the defendant who has not had reasonable opportunity to anticipate that such evidence would be offered."

An earlier Utah case which follows this doctrine is State vs. Williams, 36 U 273, 103 P 250. In that case the court reversed the verdict of the jury and stated that the evidence allowed by the judge was absolutely inadmissible. The court explained that where a defendant is on trial for a particular crime, evidence that he on some other occasion had committed a separate and distinct crime wholly disconnected from the crime charged in the indictment is never admissible unless there is some logical connection between the two from which it can be said that

proof of one tends to establish the other.

In summary on this point, we would like to quote from the case of State vs. Dixon, 12 U.2d 8, 361 P.2d 412. This is the last case to be decided by the Utah Supreme Court on this question. In this case the court said:

"It is the sound and salutary policy of the law to indulge everyone, including in convicted felons, with the presumption of innocence, and to require the State to obtain and present sufficient and creditible evidence to convince the jury of the defendant's guilt of the crime charged beyond a reasonable doubt. If this were not so, serious and perhaps insuperable obstacles to reformation and rehabilitation would exist for a man who once acquired a bad reputation."

In allowing the prosecution

to bring in evidence which tended to establish that the defendant had committed another crime which was separate and apart from the crime charged in the information, the trial court committed prejudicial error and the verdict of the jury should be set aside and the case remanded to the District Court for a new trial.

Now let us consider the allegation that the questions posed by the prosecutor were outside the scope of proper cross-examination. This allegation involves the same or similar evidence as that referred to in allegation number 1.

In Utah Code Annotated, 1953, 77-44-2, we find the following:

"RULES OF EVIDENCE IN CIVIL
APPLICABLE TO CRIMINAL
CASES--EXCEPTIONS.--The

rules of evidence in civil actions shall be applicable also to criminal actions, except as otherwise provided in this Code."

In Section 77-44-5, the Utah law further states as follows:

"~~CROSS-EXAMINATION~~ OF DEFENDANT--FAILURE TO TESTIFY NOT TO PREJUDICE.-- If a defendant offers himself as a witness, he may be cross-examined by the counsel for the state the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him or be used against him on the trial or proceeding."

In the case of State vs. Murphy, 92 U.382, 68 P.2d 181, the Utah court stated the law regarding the scope of cross-examination of witnesses as follows:

"Under this section, (77-44-2) the scope of cross-examination of witnesses in criminal actions would be governed by the same rules as apply in civil actions."

Under Rule 43(b) of the Utah

Rules of Civil Procedure, the witness may be cross-examined by the adversary party only upon the subject matter of his examination in chief. However, this principle of law was not inaugurated with the Utah Rules of Civil Procedure. This practice was followed by many cases prior to the adoption of these rules. See the following cases:

State vs. Johnson, 76 U.
84, 287 P. 909.

State vs. Williams, 36 U.
273, 103 P. 250.

State vs. Vance, 38 U. 1,
110 P. 434.

State vs. Thorne, 39 U.208,
117 P. 58.

The aforementioned case of State vs. Vance deserves particular attention by the court because the issue was similar to the one in the instant case. In that matter the defendant was charged

and convicted of murdering his wife by beating and poisoning. The court reversed the verdict of the jury because it held that any cross-examination of the defendant about the beating was held improper when the defendant denied that he had poisoned his wife.

The court said:

"But where, as in the case at bar, the witness limits his statements to negating or explaining mere isolated facts, or merely states what occurred at a particular time and place, then what took place at such time and place ordinarily constitutes the subject matter upon which the witness testified, and the cross-examination should be limited to that subject."

In the case of State vs. Bleazard, 103 U. 113, 133 P.2d 1000, which was decided in 1943, the court again said that cross-examination is limited in scope

by matters brought out on direct examination and the like.

In an early civil case, the court seems to expound the same doctrine. The following statement is found in the case of Jensen vs. S. H. Kress & Company, 87 U. 434, 49 P.2d 958, which was decided in 1935.

"~~Cross~~-examination is the detective of the courtroom.. It may be used to examine as to the credibility of the witness as a vehicle for transmitting the testimony, granted it is not too remote or the law of diminishing return from such cross-examination has not set in. But in every case it must either tend to modify, contradict, explain, deny or elaborate testimony of the witness in chief, or something which has been previously brought out on corss-examination, which itself was proper cross-examination."

The above cases and many others are carefully discussed and the Utah

rule on cross-examination is adequately stated in an excellent article by Ronan E. Degnan which is entitled "Non-Rules Evidence Law: Cross-Examination." This article is found in 6 Utah Law Review 323.

Since the adoption of the new rules of evidence, the law has been crystalized in this field. It is clear that the cross-examiner, even in criminal cases, cannot go beyond the subject matter testified to on direct. In a broader sense, the cross-examiner may bring out anything which tends to modify, contradict, explain, deny or elaborate the testimony of the witness in chief. In the case now before the court, the evidence as to where the

defendant had obtained the pick-up truck in which he drove to Arizona does not fall into any of these catagories. It is obvious that this testimony was new, different and apart from that brought out on direct examination. This was very damaging to the defendant's case. The only possible explanation for such evidence could be that the prosecution was trying to impeach or discredit the witness. Even under that theory, the testimony was too extensive and the questions too broad. In 98 C. J. S. 351, Section 474 on Witnesses, the law on impeachment is stated as follows:

"TO IMPEACH OR DISCREDIT WITNESS-A party has the right to introduce evidence directly attacking the credibility of the witness for his adversary;

but ordinarily a witness
~~may not~~ be impeached on
collateral matters not
relevant to the issues
to be tried."

CONCLUSION

The defendant should be
granted a new trial for two
reasons. First, since the trial
of the case the defendant has
discovered new evidence which is
material to his case. Second,
the evidence that was presented
by prosecution to the jury on
cross-examination of the defend-
ant and through his rebuttal
witness was improper and prejud-
icial.

RESPECTFULLY SUBMITTED,

BARTON AND KLEMM

BY


H. RALPH KLEMM

304 El Paso Gas Co. Bldg.
Salt Lake City 11, Utah
Attorney for Defendant-
Appellant