

1963

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

DENNIS SHERMAN KINDER,

Defendant-Appellant.

FILED

MAR 1 - 1963

Clerk, Supreme Court, Utah

Case No. 9778

BRIEF OF RESPONDENT

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

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
STATEMENT OF FACTS	1
ARGUMENT	8
POINT I. THE APPELLANT CANNOT BE GRANTED A NEW TRIAL ON THE CLAIM OF NEWLY DISCOVERED EVIDENCE BECAUSE:	
A. NO MOTION OR PETITION HAS BEEN ADDRESSED TO THE TRIAL COURT.	8
B. THE EVIDENCE SHOULD BE WEIGHED BY THE TRIAL JUDGE WHO HEARD THE CASE AND HE, IN HIS DISCRETION, SHOULD FIRST DETERMINE WHETHER THE NEW TRIAL OR OTHER RELIEF SHOULD BE GRANTED.	11
C. THE EVIDENCE IN SUPPORT OF A NEW TRIAL WOULD NOT JUSTIFY SUCH AN ORDER.	12
POINT II. NO ERROR REQUIRING REVERSAL WAS CREATED BY THE PROSECUTOR'S CROSS-EXAMINATION.	13
CONCLUSION	26

AUTHORITIES CITED

30 Am. Jur., Judgments, Sec. 736	12
24 C.J.S., Criminal Law, Sec. 1460	12
24 C.J.S., Criminal Law, Sec. 1465	10, 11

CASES CITED

Anderson v. Thomas, 108 Utah 252, 159 P. 2d 142 (1945)	26 (ftnote 2)
Bolton v. State, 223 Ind. 308, 60 N.E. 2d 742	11
Ernst v. State, 181 Wis. 155, 193 NW 978	12
In re Bryan's Estate, 82 Utah 390, 25 P. 2d 602 (1933)	24
Jeter v. Commonwealth, 268 Ky. 285, 104 S.W. 2d 979..	12
Johnson v. State, 70 Okl. Cr. 270, 106 P. 2d 149	21
Neal v. Beckstead, 3 Utah 2d 403, 285 P. 2d 129 (1955)	11

TABLE OF CONTENTS—Continued

	Page
People v. Steele, 65 N.Y.S. 2d 214 (1946)	12
State v. Cooper, 114 Utah 531, 201 P. 2d 764 (1949)....	9
State v. Dickson, 12 Utah 2d 8, 361 P. 2d 412 (1961)....	18
State v. Harries, 118 Utah 260, 221 P. 2d 605 (1950) ..	20
State v. Hawkins, 81 Utah 16, 16 P. 2d 713	12
State v. Kappas, 100 Utah 274, 114 P. 2d 205 (1941) ..	19
State v. Mathews, 375 P. 2d 392 (Utah 1962)	18
State v. Murphy, 92 Utah 382, 68 P. 2d 188 (1937) ..22,	24
State v. Musser, 110 Utah 534, 175 P. 2d 725 (1947) ..	18
State v. Nell, 59 Utah 68, 202 Pac. 7 (1921) ..26 (ftnote 2)	
State v. Torgerson, 4 Utah 2d 52, 286 P. 2d 800 (1955)	21
State v. Trogstad, 98 Utah 565, 100 P. 2d (1940)	21
State v. Vance, 38 Utah 1, 110 Pac. 434 (1910)	23, 24
State v. Woodard, 108 Utah 390, 160 P. 2d 432 (1945)	11
Ward v. Turner, 12 Utah 2d 310, 366 P. 2d 72 (1961) ..	13

STATUTES CITED

UTAH CODE ANNOTATED 1953:

Section 77-38-3 (7)	8
Section 77-38-4	8, 9, 11
Section 77-42-1	26
Section 77-44-2	22
Article VIII, Section 4, Utah Constitution	10

TEXTS CITED

Abbott, Criminal Trial Practice, 4th Ed., Sec. 313	22
Abbott, Criminal Trial Practice, 4th Ed., Sec. 348	18
Degnan, Non-Rules Evidence Law: Cross-Examination, 6 Utah L. Rev., p. 323, 330 (1958)	23
McCormick, Evidence, Sec. 24, p. 47	24
McCormick, Evidence, Sec. 27	23
McCormick, Evidence, p. 101, et. seq.26 (ftnote 2)	
Model Code of Evidence, Rule 105 (h)	23
Wigmore, Evidence, 3rd, Col. II, Sec. 238	21
Wigmore, Evidence, 3rd Ed., Secs. 1886-1889	23

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vs.

DENNIS SHERMAN KINDER,

Defendant-Appellant.

} Case No. 9778

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Appellant has appealed from his conviction of robbery and grand larceny in the Third Judicial District Court, State of Utah.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being a fuller coverage of the evidence presented at trial.

On October 30, 1961, Daniel L. Kelly, an employee of the Al Harris Dairy Milk Depot in Salt Lake City, was robbed by a man carrying a small-blue-black gun of a larger caliber than a .22 (R-104) The robbery took place at about 8 o'clock p.m.

The robber wore a red bandana wrapped around the top part of his head, but the robber's face was exposed and he appeared to have been unshaven for about four days. (R-105) Mr. Kelly observed the robber for about 30 seconds during the holdup. The robber took about \$156.83 according to Mrs. Harris, the proprietor (R-144). After the robbery occurred, Mr. Kelly, an ex-convict, called the police. (R-93, 94). The police made a routine investigation (R-92-99). Mr. Kelly, after the robbery, identified a picture of a man, not the appellant, as being the robber. Thereafter, after being shown a picture of the appellant, he identified the appellant as the robber (R-110). At the time of trial, Mr. Kelly was confined in the Utah State Prison, and at the time of the robbery was an ex-convict (R-104, 108). Kelly, at the trial, identified the appellant as the robber. (R-107).

Lieutenant N. B. Hayward of the Salt Lake County Sheriff's Office testified that during an interrogation of the appellant in December, 1961, or January, 1962, the appellant admitted the Al Harris Dairy robbery (R-112).

The day before the robbery, Henry Piep, the appellant's half-brother, saw the appellant and helped him paint a truck in which the appellant intended to go to Arizona (R-115). He noted that the appellant had two small hand guns in his possession at that time. (R-116).

The appellant testified that he left Salt Lake City on the morning of October 30, 1961, for Arizona, and that at 8 o'clock p.m. he was about 100 miles from Flagstaff, Arizona (R-118). The appellant further testified that he rented a motel in Flagstaff at about 8 to 8:30 p.m. (R-119). He further stated that he arrived in Tucson, Arizona, the next morning at about 10:30 a.m. This would have been October 31, 1961. (R-119). On cross-examination, the prosecutor asked without objection the means by which appellant got to Arizona, and was told that appellant drove a 1955 Ford pickup truck (R-119). Appellant also testified that the truck was registered to Robert Reed, but that he did not know Mr. Reed's address (R-120). Testimony was given to the license plates on the car, and the persons who accompanied Kinder to Arizona. Kinder stated that upon arrival in Tucson he and his female companions registered at a motel, but denied that State's Exhibit 3 was a registration card bearing his signature (R-124). Kinder admitted having two pistols in his possession, one of which was a .32 caliber, and also he admitted a conviction for a felony (R-125). No objection to all the above testimony was registered. The only objection registered by counsel that the prosecution was exceeding the bounds of cross-examination was to the following question (R-126):

“Q. Prior to October 30th of 1961, when did you arrive in Salt Lake?”

Thereafter, no further objection was imposed, and on cross-examination, appellant stated that he obtained the pickup truck, in which he had previously testified to having travelled to Arizona in, in California and did not acquire it in Salt Lake City (R-127). Subsequently, the prosecutor again attempted to have the appellant admit Exhibit 3 was subscribed by him, which he refused to admit (R-128). Exhibit 3 was not admitted in evidence, but from the record would appear to be a motel signature card bearing the name R. Kinder, Jr., a vehicle description, and a date of November 1, 1961.

Thereafter, the prosecutor continued without objection (R-133):

“Q. (By Mr. Leary) Mr. Kinder, what was the color of the pickup that you drove out of Salt Lake?

A. Brown.

Q. Solid brown?

A. No, sir.

Q. Well, tell me the colors of it, please.

A. It had a black top, very top.

Q. I can barely hear you.

A. I said the top, the very top was black.

Q. What else?

A. That's all.

Q. What was the other color of the truck?

A. Pardon?

Q. What were the other colors of the truck?

A. I told you, brown and black.

Q. What were the colors of the Weels?

A. Black, I guess.

Q. Well, didn't you paint this truck on the 30th with your stepbrother, Henry Piep?

A. Yes, sir, he helped me.

Q. What colors did you paint it?

A. I told you.

MR. McRAE: If the Court please, this witness has testified as to alibi and whether he painted this truck has no bearing on alibi.

THE COURT: Objection overruled.

Q. (By Mr. Leary) What colors did you paint it?

A. Black.

Q. Solid black?

A. No.

Q. Well, what parts did you paint then?

A. The top.

Q. Just the top of the cab?

A. Right.

Q. Nothing else?

A. No, sir, I don't think so.

Q. All right. And that was identically the

same color when you arrived in Tucson, is that correct?

A. Yes, sir."

The appellant was then questioned (R-139) relative to his arrival in Salt Lake, all without objection:

"Q. Were you on October 29th?

A. No, sir.

Q. And isn't it a fact that you did not arrive in Salt Lake until October 29th of 1961, Mr. Kinder?

A. I arrived in Salt Lake before that.

Q. Did you ever have a conversation with anyone concerning the date of your arrival in Salt Lake?

A. No, sir.

Q. Did you have a conversation with Officer Lyman of the Salt Lake City Police Department concerning the time of your arrival in Salt Lake?

A. No, sir. I'd like to refer back to that first question. The last question. I did have a conversation when I first arrived in Salt Lake.

Q. With whom?

A. With my older brother.

Q. Where did you stay when you were in Salt Lake?

A. I went to see my parents at first.

Q. Where did you stay when you arrived in Salt Lake, Mr. Kinder?

A. I told you, I went to see my parents first.

Q. Did you remain in a house in Salt Lake?

A. Yes, sir, I did.

Q. Where?

A. At 3150 South 9th East.

Q. And you stayed with your parents there?

A. For a while.

Q. How many days?

A. I don't recall.

Q. Was it one?

A. No, it was more than one."

Thereafter, the appellant objected that the matter was outside the scope of direct examination and the prosecutor abandoned the line of questioning (R-140).

Officer Donald Lyman testified that the appellant had told him he arrived in Salt Lake City on October 29, 1961, and that he acquired the pickup truck in Salt Lake City from a used car lot, and then painted the vehicle (R-149, 150). In no way did Officer Lyman or anyone say that the truck had been stolen.

Subsequent to appeal, appellant filed two affidavits set out in his brief, one from Kelly and the other from another inmate, in which Kelly said that Kinder was not the robber. The other prisoner's affidavit said he heard Kelly say the same thing.

No motion for new trial has been addressed to the trial court, nor any petition for coram nobis.

ARGUMENT

POINT I.

THE APPELLANT CANNOT BE GRANTED A NEW TRIAL ON THE CLAIM OF NEWLY DISCOVERED EVIDENCE BECAUSE:

A. NO MOTION OR PETITION HAS BEEN ADDRESSED TO THE TRIAL COURT.

B. THE EVIDENCE SHOULD BE WEIGHED BY THE TRIAL JUDGE WHO HEARD THE CASE AND HE, IN HIS DISCRETION, SHOULD FIRST DETERMINE WHETHER THE NEW TRIAL OR OTHER RELIEF SHOULD BE GRANTED.

C. THE EVIDENCE IN SUPPORT OF A NEW TRIAL WOULD NOT JUSTIFY SUCH AN ORDER.

A. It is submitted by the respondent that appellant may not, for the first time on appeal, raise the question of whether the claimed newly discovered evidence would warrant this court in granting a new trial. The Utah law on new trials is covered in Title 77, Chapter 38, Utah Code Annotated 1953. Section 77-38-3(7), U.C.A. 1953, provides that a new trial may be awarded:

“(7) When new evidence has been discovered, material to the defendant and which he could not with reasonable diligence have discovered and produced at the trial.”

The same Section further notes that the trial court shall have a hearing on an application for a new trial. See also 77-38-4, Utah Code Annotated 1953. The statute therefore contemplates that an application for a new trial must be directed to the trial

court. In, *State v. Cooper*, 114 Utah 531, 201 P. 2d (1949) the Court quoted the following with approval:

“ ‘It is a matter now too well settled to admit of any serious dispute * * * *that the question of granting or denying a motion for new trial is a matter largely within the discretion of the trial court.* * * * This rule applies whether the motion is based upon insufficiency of the evidence or upon newly discovered evidence. * * * This court cannot substitute its discretion for that of the *trial court.* * * * We do not ordinarily interfere with rulings of the *trial court* in either granting or denying a motion for new trial, and unless abuse of, or failure to exercise, discretion on the part of the *trial judge* is quite clearly shown, the ruling of the *trial judge* will be sustained.

‘The granting or denial of a motion for *new trial* on the ground of newly discovered evidence is a matter within the *trial court’s discretion*, which is conclusive unless abuse of discretion is shown.’ ”

Consequently, it would appear that the decisions of this Court have contemplated that an application for a new trial be addressed to the trial court. The Legislature has also provided by implication since 77-38-4, Utah Code Annotated 1953, provides:

“The application for a new trial must be made upon written notice of motion designating the grounds upon which it is made, and must be served and filed within five days after the rendition of the verdict or decision. * * *.”

If the matter is to be heard within five days of the trial, which was not done in this case, the obvious conclusion is that the matter should be directed to the trial court. The general rule is noted in 24 C.J.S., Criminal Law, § 1465:

“As a general rule, and in the absence of some statutory provisions placing the power elsewhere, the jurisdiction to grant a new trial, and to entertain an application therefor, rests in the court in which the trial was had, even though a motion for a new trial is not essential to a review by an appellate court; and, ordinarily, no other court can exercise jurisdiction in this respect. * * *.”

and at page 230, 24 C.J.S., supra:

“*An appellate court* has ordinarily no power to entertain a motion for a new trial in a court of first instance subject to its appellate jurisdiction, and under constitutional and statutory provisions it has been held that a particular appellate court had no power to entertain an application for new trial. Neither, under constitutional provisions specifying that the jurisdiction of an appellate court shall be appellate only, may such court direct the trial judge in a court of original jurisdiction to entertain a motion for new trial. * * *.”

In this regard, it should be noted that Article VIII, Section 4, of the Utah Constitution provides that except for the extraordinary writs, the jurisdiction of the Utah Supreme Court will be appellate only. Consequently, since the claim of newly dis-

covered evidence has never been passed on by the trial court, this court may not review the evidence.

B. Even were the evidence presented by the affidavits filed by the appellant deemed convincing, that evidence should be weighed by the trial judge that heard the evidence. Thus, 24 C.J.S., Criminal Law, p. 228 notes:

“As a general rule, the judge who presided at the trial is the proper judge to hear and determine a motion for a new trial. The ends of justice would generally thus be better served.”

Since the trial judge that heard the case is still available, and since he had an opportunity to weigh the evidence first hand, view the demeanor of the witness, and appraise their credibility, he would be the person best suited to ascertain whether or not the present allegations of Mr. Kelly are true or whether his change of mind is based on a change of circumstances.

Nor, is the appellant's position prejudiced by the fact that he failed to make a motion for new trial within five days as required by 77-38-4, Utah Code Annotated 1953, since he may, of course, proceed by coram nobis, *State v. Woodard*, 108 Utah 390, 160 P. 2d 432 (1945); *Neal v. Beckstead*, 3 Utah 2d 403, 285 P. 2d 129 (1955); and the same rule, that the petition should be directed to the trial judge and court that heard the case, is applicable. *Bolton v. State*, 223 Ind. 308, 60 N.E. 2d 742;

Ernst v. State, 181 Wis. 155, 193 NW 978; 30 Am. Jur., Judgments, Sec. 736.

C. It is submitted finally that the evidence contained in the affidavits is not sufficient to warrant this court or any other court granting relief, via coram nobis or new trial. The affidavit of Charles G. Anderson is merely an impeaching statement and will not support a motion for new trial. *State v. Hawkins*, 81 Utah 16, 16 P. 2d 713; *Jeter v. Commonwealth*, 268 Ky. 285, 104 S.W. 2d 979; 24 C.J.S. Criminal Law, Sec. 1460.

Kelly's affidavit must be taken in consideration of the fact that it states that he made a *mistake* in his identity and changed his mind. the affidavit is generally equivocal, and it should be remembered that Kelly, Anderson and Kinder are all confined together in prison. In *People v. Steele*, 65 N.Y.S. 2d 214 (1946) the New York court recognized the perjurious and concocted recantations of a state's witness would not be such newly discovered evidence as would justify setting aside a judgment on coram nobis. The court noted that recantations must be viewed in consideration of the circumstances in which they were made.

In the instant case, there is still substantial evidence connecting the appellant to the crime. First, his half brother testified to seeing him in possession of guns the day before the robbery. Second, appel-

lant admitted the possession of two pistols. Third, appellant admitted the crime to police officers. Fourth, appellant just happened to leave for Arizona at a time close to the time of the robbery, after changing the color of his vehicle. The above facts when viewed against Kelly's guarded and equivocal affidavit, and the fact that the affidavit was made at the Prison where both were serving, make it manifest that the "newly discovered evidence" is not of such a nature that, had the jury had such evidence in addition to that presented, appellant would probably have been acquitted. *Ward v. Turner*, 12 Utah 2d 310, 366 P. 2d 72 (1961).

POINT II.

NO ERROR REQUIRING REVERSAL WAS CREATED BY THE PROSECUTOR'S CROSS-EXAMINATION.

In the appellant's second point he contends that the trial court committed error in the cross-examination of the appellant (1) because the evidence elicited tended to prove the commission of another crime, and (2) the cross-examination exceeded the scope of direct examination.

As to both points, it is submitted that the appellant can make no claim for relief because he waived these objections at trial. On cross-examination, the prosecutor asked the appellant how he got to Tucson, Arizona, the type of vehicle he used, who

the vehicle was registered to, whether the vehicle was registered in Utah, and the State in which the license plates were issued which it carried (R-119, 120, 121). No objection was made to any of this testimony.

Thereafter, the prosecutor cross-examined the appellant as to his activities while in Tucson and what he did upon arrival. The first objection of counsel on scope of cross-examination, or any other objection relevant to the claim on appeal is when counsel objected to a question as to when the appellant arrived in Salt Lake City prior to October 30, 1961, the day appellant said he left for Arizona (R-126). The objection was expressly limited to contention that the time appellant arrived in Salt Lake City had no "bearing" on the case. The prosecutor indicated it was preliminary inquiry concerning the vehicle, which point appellant had previously testified concerning and without objection (R-126). The objection was overruled (R-127). Thereafter, the following questions were asked again without further objection (R-127):

"Q. (By Mr. Leary) When did you arrive in Salt Lake prior to October 30th of 1961?

A. I don't remember the exact date.

Q. How did you come to Salt Lake?

A. How did I come to Salt Lake?

Q. Yes. In what type of vehicle?

- A. You mean prior to this date?
- Q. Yes.
- A. I come by car.
- Q. You didn't have a pickup truck until you got to Salt Lake, is that right?
- A. No, sir.
- Q. How many days prior to October 30th did you acquire the 1955 Ford Pickup truck that you were talking about?
- A. In the time I went back to — in the time from when I went to California and back.
- Q. Well, let me ask it this way. You stated that this vehicle belonged to Robert Reed?
- A. Yes, sir.
- Q. And you don't know his address.
- A. No, sir, I don't know his address.
- Q. All right. Did you acquire this vehicle in Salt Lake City, the Ford pickup truck?
- A. No, sir.
- Q. Did you ever state to anyone that you had?
- A. No, sir.
- Q. Now, it was in this same pickup truck that you drove to Tucson, is that correct?
- A. Yes, sir.
- Q. All right. Now Mr. Kinder, I'll show you again State's proposed Exhibit No. 3 and I'll ask you to examine the exhibit again and tell me whether or not any of the writing that appears thereon was written by you?
- A. No."

Subsequently, after attempts by the prosecutor to get appellant to admit Exhibit 3, the motel card, was in his handwriting, the prosecutor continued without objection (R-133) :

“Q. (By Mr. Leary) Mr. Kinder, what was the color of the pickup that you drove out of Salt Lake?

A. Brown.

Q. Solid brown?

A. No, sir.

Q. Well, tell me the colors of it, please.

A. It had a black top, very top.

Q. I can barely hear you.

A. I said the top, the very top was black.

Q. What else?

A. That's all.

Q. What was the other color of the truck?

A. Pardon?

Q. What were the other colors of the truck?

A. I told you, brown and black.

Q. What were the colors of the wheels?

A. Black, I guess.

Q. Well, didn't you paint this truck on the 30th with your stepbrother, Henry Piep?

A. Yes, sir. He helped me.

Q. What colors did you paint it?

A. I told you.

MR. McRAE: If the Court please, this witness has testified as to alibi and whether he painted this truck has no bearing on alibi.

THE COURT: Objection overruled.

Q. (By Mr. Leary) What colors did you paint it?

A. Black.

Q. Solid black?

A. No.

Q. Well, what parts did you paint them?

A. The top.

Q. Just the top of the cab?

A. Right.

Q. Nothing else?

A. No, sir, I don't think so.

Q. All right. And that was the identically the same color when you arrived in Tucson, is that correct?

A. Yes, sir.

Q. When you registered in the motel?

A. What motel?"

The only objection registered to the last quoted matter was to materiality not to scope. Finally, (R-138, 139) the same questions as to the appellant's arrival in Salt Lake were asked and answers taken without objection. Based on the above, it is submitted that appellant waived any claim he may have had by (1) not making his objection on the correct grounds,

State v. Musser, 110 Utah 534, 175 P. 2d 725 (1947); *State v. Mathews*, 375 P. 2d 392 (Utah 1962), and (2) by initially allowing evidence to come in without objection with reference to the vehicle and not continuing his objections of the time of arrival in Salt Lake. Abbott, *Criminal Trial Practice*, 4th Ed., § 348 notes:

“It is a general rule that, in order to take advantage of the admission of evidence by the trial court as error and to secure a reversal of its judgment upon appeal, the evidence must be objected to in the trial court. * * *”

Secondly, it is submitted that the evidence in no way tends to show that the appellant committed any other crime except by the most flexible imagination. It is obvious from the record that the prosecutor was endeavoring to lay a sufficient foundation connecting the appellant with the motel registration card, Exhibit 3, by which he would destroy the appellant's alibi. No where in the record does it appear that the prosecutor asked the appellant whether he bought or stole the vehicle, nor were any prejudicial remarks made that could be deemed accusatory as was the case in *State v. Dickson*, 12 Utah 2d 8, 361 P. 2d 412 (1961). The means by which appellant travelled to Arizona, the motel registration and the circumstances surrounding his leaving Salt Lake were all directly relevant to the validity

of his claim of alibi. Since no tangible evidence was before the jury except strained supposition that would allow them to conclude that appellant stole the vehicle in which he travelled to Arizona, and since defense counsel made no objection or side bar assertion to the court that such was what the prosecutor was endeavoring to show, and finally, since the prosecutor's obvious intention was to lay a foundation for Exhibit 3 with which to impeach the appellant as to the time he left Salt Lake, no reasonable basis to claim that the prosecutor attempted to prove another crime is supportable.

Third, it is submitted that even if the prosecutor had shown that appellant stole the vehicle with which he went to Arizona, such would be admissible. The facts would show that the day before the robbery, the appellant possessed two hand guns, one of which was similar to that used in the robbery, that the appellant changed the color of the vehicle he used, the next day or so, in going to Arizona. This evidence, if coupled with a showing that the appellant stole the vehicle the day or so before the robbery, would tend to show a plan or design for committing the crime and then fleeing the state. In, *State v. Kappas*, 100 Utah 274, 114, P. 2d 205 (1941) this court approved a showing that the defendant had stolen other sheep than those with which he was charged with stealing. The court said:

“On the question of proof of other offenses, the rule is that a defendant, on trial for a certain offense, must be convicted if at all by evidence showing he is guilty of that offense alone, and proof of his commission of other unconnected crimes must be excluded. Exceptions to the rule are found in such situations as those in which the prosecution is permitted to prove the identification of the accused, motive, intent, plan, or knowledge. * * * And it is also competent to show that the offense charged was part of a common scheme which may include one or more other offenses. * * *”

In, *State v. Harries*, 118 Utah 260, 221 P. 2d 605 (1950), the appellant was convicted of receiving a bribe. Evidence of other offenses, selling liquor to private clubs, was admitted to show a common scheme or design. This court noted:

“It is asserted by the defendant that evidence of other offenses, particularly with reference to the sale of liquor to other clubs, was inadmissible as to tended to convict defendant of crimes with which he was not charged. Evidence of other offenses is admissible when such evidence has a tendency directly to establish the particular crime. In addition, evidence of other like crimes is usually competent to prove a specific crime when it tends to establish motive, intent, the absence of mistake or accident, or a common scheme or plan embracing the commission of two or more crimes so related to each other than proof of one tends to establish the others. Any pertinent fact which throws light upon the subject under judicial consideration, the accused’s guilt or

innocence of the crime for which he is charged, is admissible. Such fact is not to be excluded merely because it may also prove or tend to prove that the accused has committed another similar crime. Relevant and material evidence does not become irrelevant or immaterial merely because it points to other offenses."

See also *State v. Trogstad*, 98 Utah 565, 100 P. 2d (1940).

Wigmore, *Evidence*, 3rd., Col. II, § 238 comments: "Any act, which under the circumstances and according to experience as naturally interpreted and applied would indicate a probable design, is relevant and admissible."

The evidence of stealing a vehicle, and painting it, would clearly indicate preparation for flight after the anticipated commission of the robbery. *Johnson v. State*, 70 Okl. Cr. 270, 106 P. 2d 149. As Wigmore notes, this is primarily a matter of the trial court's discretion, and here where there is a logical connection between the two offenses the "probative value" of such evidence is apparent and no claim of error is supportable. *State v. Torgerson*, 4 Utah 2d 52, 286 P. 2d 800 (1955).

Fourth, it is submitted that the evidence introduced did not exceed the proper bounds of the scope of direct examination, even if it is deemed there was no waiver of the issue. In the instant case, the appellant contended by way of alibi that at the time of the commission of the crime alleged

he was on his way to Arizona. The appellant did not clearly object to any of the testimony relating to ownership of the vehicle, and on page 127 of the record, it is noted that the prosecutor went into the date of acquisition of the vehicle. This was after an objection (R-126) which was directed to the scope of examination and relevancy. See Page 14, *infra*.

The objection made was the only objection as to scope of examination. It is submitted that the examination was proper. It is noted that by virtue of Section 77-44-2, Utah Code Annotated 1953, the rules of evidence relating to scope of cross-examination are those generally applicable in civil cases. *State v. Murphy*, 92 Utah 382, 68 P. 2d 188 (1937). Therefore, error would only be claimable if the information sought as to the time of acquisition of the vehicle was beyond the reasonable scope of cross-examination permissible from the direct examination. It is submitted that it was an appropriate exercise of the trial court's discretion. The general rule in this area is noted in Abbott, *Criminal Trial Practice*, 4th Ed., § 313:

“By the English rule which is followed in several of the states a witness who has sworn and gives some evidence, however formal or unimportant, may be cross-examined in relation to all matters involved in the issues. But a stricter rule, sometimes called by way of distinction the ‘American rule.’ obtains in the

Federal and very many of the state courts. Under this rule the cross-examination of a witness is limited to an inquiry as to the facts and circumstances connected with the matters stated in his direct examination. In the application of this rule much is left to the discretion of the trial court.

Under the usual interpretation of this rule a cross-examination always may include whatever tends to qualify or explain the direct testimony of a witness and to develop and unfold the whole transaction about which he has only been partially interrogated."

The weight of recent opinion as to the proper rule to be promulgated favors wide latitude. McCormick, *Evidence*, § 27; Wigmore, *Evidence*, 3rd Ed., §§ 1886-1889; Degnan, *Non-Rules Evidence Law: Cross-Examination*, 6 *Utah L. Rev.*, p. 323, 330 (1958), Model Code of Evidence, Rule 105(h). Although the Utah court has not adopted the English rule, it will appear from an analysis of the more recent cases from this court on the subject that the more restrictive rule is not necessarily the applicable standard, but rather one of reasonable discretion is appropos. The appellant's principal reliance is placed on the case of *State v. Vance*, 38 Utah 1, 110 Pac. 434 (1910).¹ This case is clearly distinguishable from the instant one since the defendant limited his testimony to the poisoning of his wife, whereas the prosecutor was allowed to go

¹ This case has been soundly criticized. Degnan op. cit., p. 335.

into instances of beatings given by defendant to his wife. The instant case is no where near so flagrant. Further, the *Vance* case was burdened by some misapprehensions of constitutional problems, again not raised or directly present here.

In, *State v. Murphy*, supra, this court stated:

“* * * reviewing court ought to be very careful, and should hesitate long before reversing judgments upon the ground that the trial court either restricted or enlarged the scope of cross-examination.”

The court further noted that generally the scope of cross-examination was a matter within the sound discretion of the trial court. See also McCormick, *Evidence*, § 24, p. 47:

“Accordingly the earlier and even many of the recent cases in jurisdictions adopting the restrictive rule in any of its forms, emphasize the power of the trial judge to allow deviations in his discretion. It has been said, indeed, that both the courts following the wide-open and those adopting the restrictive practice ‘recognize the discretionary power of the trial court to allow variations from the customary order and decline ordinarily to consider as an error any variation sanctioned by the trial court.’”

The case of *In re Bryan's Estate*, 82 Utah 390, 25 P. 2d 602 (1933). This court said as to the latitude of cross-examination, p. 403, Utah Reports:

“* * * The rule permits great latitude on cross-examination when the defense is not some-

thing consisting entirely of new material, but is a denial of the allegations made by the contestant and where by cross-examination the proponent seeks to disprove the very case the witness has made for the party calling him.

* * *

Clearly, where the issue is one of alibi, as in the instant case, which amounts to a general denial of the crime rather than some affirmative defense, the Bryans Estate rule allowing great latitude should be allowed. The inquiry as to the time of acquisition of the vehicle was directly of concern to explain and rebut the appellant's alibi since it was connected to the question of the means used by the appellant to get to his place of claimed alibi. Further, since Exhibit 3 would appear to have refuted that alibi and impeached the accused, it was necessary to establish that the vehicle registered on Exhibit 3 was the same one as was owned or possessed by appellant, and consequently, the time and place of acquisition was directly connected with the overall claim of alibi. It is submitted that such inquiry was properly a matter within the sound discretion of the trial judge.

Finally, it is submitted that the limited inquiry as to the time of acquisition of the vehicle, even if excessive as to scope of examination, was not prejudicial to the appellant in view of his admissions of guilt, his proximity and connection with the crime

and the tools of commission of the crime, and the obvious perjury of the appellant viza vis Exhibit 3. The Legislature has stated that a case will not be reversed except for substantial errors effecting the rights of an accused. Error will not be presumed. Sec. 77-42-1, U.C.A. 1953. Clearly, such a situation of harmless error is the best that can be made out here.²

CONCLUSION

The appellant has approached the wrong court in his effort to seek a new trial, and therefore has no right to such an order from this court. Appellant's contention on proof of other crimes is not well taken since (1) it was waived; (2) it did in fact not prove other crimes and (3) even if it did, it was relevant to show a design and preparation for the crime. Secondly, the evidentiary claim on exceeding the scope of direct examination is not well taken since (1) it was waived; (2) the proper bounds of cross-examination was not exceeded and

² Appellant has also contended that the evidence allowed for impeachment on a collateral matter, apparently contending that the rebuttal of appellant's testimony on the acquisition of the vehicle was of such a nature. The rebuttal testimony would only be impeachment on a collateral matter if such matter was neither relevant nor material to the case. McCormick, *Evidence*, p. 101 et seq; *Anderson v. Thomas*, 108 Utah 252, 159 P. 2d 142 (1945); *State v. Nell*, 59 Utah 68, 202 Pac. 7 (1921). The trial judge's opinion in this area is directly persuasive of this issue. He said:

"Well, the court has ruled previously and the court feels that the truck is integrally wrapped up in the alibi situation; that is, the vehicle with which, according to the defendant's testimony, he went from Salt Lake City to Tucson."

(3) if the bounds of the trial court's discretion was exceeded, it was not prejudicial.

Respectfully submitted,

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