

1967

State Of Utah v. Donald Hansen : Brief of Appellant

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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. Galen Ross; Attorney for Appellant

Recommended Citation

Brief of Appellant, *Utah v. Hansen*, No. 10999 (1967).
https://digitalcommons.law.byu.edu/uofu_sc2/4370

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 (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

STATE OF UTAH :

Plaintiff-Respondent :

-vs- :

Case No. ~~10999~~ 10999

WALD HANSEN :

Defendant-Appellant :

BRIEF OF APPELLANT

Appeal From the Judgment of the
Third District Court for Salt Lake City
Hon. Bryant H. Croft, Judge

GALEN ROSS

731 East South Temple
Salt Lake City, Utah

Attorney for Appellant

FILED

OCT 10 1967

Clerk, Supreme Court, Utah

PHIL L. HANSEN
Attorney General

Attorney for Respondent

TABLE OF CONTENTS

STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	2

POINT I.--

AN UNLOADED AUTOMATIC PISTOL IS NOT A DEADLY WEAPON WITHIN THE MEANING OF SECTION 76-51-3 UTAH CODE ANNOTATED, 1953, WHEN SUCH PISTOL COULD INFLICT HARM ONLY IF A CLIP CONTAINING LIVE AMMUNITION IS INSERTED INTO THE PISTOL AND A SHELL INJECTED INTO FIRING CHAMBER BY WORKING THE SLIDE...4

POINT II.--

THE TRIAL COURT ERRED IN REFUSING TO ALLOW TESTIMONY CONCERNING A PRIOR ACCIDENT WHICH CAUSED BRAIN DAMAGE TO THE DEFENDANT10

CONCLUSION	16
------------------	----

AUTHORITIES CITED

74 A. L. R. 1206.....	6
22 C. J. S. Sec. 638	15

CASES CITED

Evans v. Gainsford, 122 Utah 156, 247 P.2d 431(1952).....	15
Hopt v. Utah, 104 U. S. 631	11
People v. Miller, 4 Utah 412, 11 Pac. 514(1886).....	11
People v. Pearson, 150 C. A. 2d 811, 311 P.2d 142(1957).....	7
People v. Simpson, 134 C. A. 646, 25 P.2d 142(1933).....	7
People v. Swasey, 6 Utah 93, 21 Pac. 400(1889).....	11
People v. Sylva, 143 Cal. 62, 96 Pac. 814(1904)	6
Price v. United States, 156 Fed. 950(1907).....	6
State v. Evans, 83 Ariz. 364, 356 P. 2d 1106(1960).....	14
State v. Godfrey, 17 Or. 300, 70 Pac. 625(1889).....	6
State v. Harold, 45 Wash. 2d 505, 275 P.2d 895(1954).....	14
State v. Koch, 64 Wyo. 175, 189 P.2d 162(1948).....	14
State v. Neal, 123 Utah 93, 254 P.2d 1053(1953).....	10
State v. Nelson, 362 P.2d 224(1961).....	14
State v. Nemier, 106 Utah 307, 148 P.2d 327(1944).....	10
State v. Scott, 111 Utah 9, 175 P.2d 1016(1947).....	10
State v. Stanback, 78 Utah 350, 2 P.2d 1050, 79 A. L. R. 553.....	11
Territory v. Gomez, 14 Ariz. 139, 125 Pac. 102(1912).....	6

STATUTES CITED

1942-43 Utah Code Annotated 1953.....	11
1943-44 Utah Code Annotated 1953.....	12

TEXTS CITED

Hall, Intoxication and Criminal Responsibility	
57 Harv. L. Rev.1045-.....	11.
[Wharton's Criminal Law and Procedure(Anderson ed. 1957).	
§60.....	11.
§361.....	7.

IN THE SUPREME COURT OF THE STATE OF UTAH

The State of Utah :
Plaintiff-Respondent, :
-vs- : Case No. 20034
Donald Hansen :
Defendant-Appellant. :

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

The appellant has appealed from a conviction of Assault with a Deadly Weapon with the Intent to Commit Robbery upon jury trial in the Third Judicial District, Salt Lake County.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict of guilty to the crime charged, the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of his conviction as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

On October 23, 1966 at approximately 1:10 A.M., Appellant entered a Salt Lake City tavern, Club 451, operated by one, George Rukavina. As he entered the front door, he was seen by Mr. Rukavina to have had a pistol in his hand and was heard to say "don't move." R-5. Mr. Rukavina dropped to the floor and crawled behind the bar to his office. In the meantime, a bartender employed by Mr. Rukavina, Mr. Joe Palanco, grabbed the appellant and wrestled him to the ground. R-5, 22. Mr. Palanco took the pistol away from the appellant and gave it to Mr. Rukavina who in turn gave it to another employee, Mr. Evaristo Martinez. R-6

During the scuffle, the appellant wrestled his way to the entrance and out into the street where he was ultimately subdued by Mr. Palanco and Salt Lake Police Officer Christensen who had seen what he thought to be a fight and had stopped to investigate. R-45.

Later Mr. Rukavina found a clip containing seven live rounds of ammunition on the floor in the area where the scuffling had taken place. R-10. This clip proved to be of the type used in appellant's pistol. The pistol itself contained no

such clip when it was taken from appellant. R-45. On examination by the officer, the pistol was found not to have any shell in the chamber and due to the absence of the clip it was incapable of firing.

Testimony was taken regarding the ease with which the clip could be released from the pistol. R-47. No testimony is found in the record of anyone seeing the appellant release the clip, nor that the clip was ever in the pistol on the night in question. R-55. Further, there is no mention at all that a round was ever in the firing position.

On the day and night in question, appellant consumed large amounts of alcohol at various taverns in Salt Lake County in the company of William Sorensen. R-51-56. The appellant accompanied Mr. and Mrs. Sorenson from their home in Granger via other taverns to the Market Inn where they had a business appointment. R-71.

Mrs. Sorenson testified that appellant took the gun with him when he left the car to enter the Market Lounge because he wanted to sell it. She further testified that the appellant did try to sell it to two other patrons of the Market Inn. R-72. While Mr. and Mrs. Sorenson were conducting their business,

the appellant left the Market Inn. Mrs. Sorenson testified that she thought he was going to lie down in the car. R-73. He apparently wandered some three doors up the street to Club 451 where the incident in question took place.

The appellant testified that he had no recollection of leaving the Market Inn and only remembers being taken to the hospital to have a head wound sown up, which he had sustained in the scuffle. R-84.

At trial, the appellant was asked on direct examination whether he had an accident in 1957. R-78. An objection by the prosecution to the materiality and closeness of relation was sustained by the trial judge. Appellant's proffer of proof indicated that the appellant was involved in an accident where he fell down the stairs and suffered a severe concussion and a clot on the brain. Further, that since the operation, the appellant had exhibited abnormal reactions to liquor, in that he suffered blackouts and irrational conduct. R-95.

ARGUMENT

POINT I

AN UNLOADED AUTOMATIC PISTOL IS NOT A
DEADLY WEAPON WITHIN THE MEANING OF

OF SECTION 76-51-3 UTAH CODE ANNOTATED, 1953, WHEN SUCH PISTOL COULD INFLICT HARM ONLY IF A CLIP CONTAINING LIVE AMMUNITION IS INSERTED INTO A PISTOL AND A SHELL INJECTED INTO THE FIRING CHAMBER BY WORKING THE SLIDE.

The appellant submits that the trial court erred in refusing to give Defendant's Instruction No. 4 which is a true statement of the law as it applies to this case. The court further erred in giving Court's Instruction No. 13.

Defendant's requested instruction number 4 provides as follows:

"You are instructed that before you can find the defendant guilty of the crime of Assault with a Deadly Weapon with the Intent to Commit Robbery, you must find beyond a reasonable that defendant did in fact use a deadly weapon.

You are further instructed that an unloaded gun is not a deadly weapon. The State must prove beyond a reasonable doubt that the gun held by Don Hansen in this case was loaded at the time. If it is reasonable to believe that the gun was not loaded, you should acquit the defendant."

The final paragraph of the Court's Instruction No. 13

Provides:

"A deadly weapon, as that term is used in these instructions, means a weapon which in the particular manner used is then and there capable of producing death or great bodily harm. A loaded gun capable of being fired, or a gun capable of being fired and which can then and there be immediately loaded within a matter of moments is a deadly weapon."

The Defendant's Instruction No. 4 is a true statement of the law and the Court's Instruction No. 13, which was given, is not a true statement; hence, it is misleading and prejudiced.

The general rule is that an unloaded gun, used only as a firearm and not as a bludgeon, is not a deadly weapon within the contemplation of statutes punishing as aggravated assaults, assaults with a deadly weapon. People v. Sylva, 143 Cal.62, 76 Pac.814(1904); Price v. U. S., 156 Fed.950(1807); State v. Godfrey, 17 Or. 300, 11 Am.St. Rep. 83, 20 Pac. 625(1889); Territory v. Gomez, 14 Ariz. 139, 125 Pac. 102(1912); 74 ALR 1206 (Cases are collected and cited.)

The traditional definition of assault with a deadly weapon is as follows:

"to constitute the crime of assault with a deadly or dangerous weapon, there must be an unlawful attempt with a deadly weapon, deadly or dangerous as a matter of law, or capable of being used in a dangerous manner

to inflict bodily injury, coupled with the present actual ability to do so. (Emphasis added) I Wharton's Criminal Law and Procedure § 361, 720 (Anderson ed. 1957)."

The California court has extended the rule somewhat in holding that an automatic pistol which has six shells in the clip but none in the firing chamber and which was in firing order, but which could be readied by pulling a slide back and allowing it to go forward again, constituted a deadly weapon within the meaning of the Penal Code. People v. Pearson, 150 C. A. 2d 811, 311 P. 2d 142(1957). In so holding the court found that the case fell within the rule initially laid down in People v. Simpson, 134 C. A. 646, 25 P. 2d 142(1933). Therein the court held that a rifle containing live rounds in the magazine and none in the firing chamber, but such live rounds could be quickly injected into the chamber by merely cocking a lever, was such a deadly weapon. The underlying rationale is that such firearm should not be considered unloaded when it "instantly" could be transferred into such a loaded weapon by mere operation of a lever. The court reasoned that to hold otherwise would be to assert that a pistol with an automatic revolving cylinder filled with loaded cartridges does not constitute a deadly weapon although mere pressure of a finger on the trigger releases a safety pin and adjusts a cartridge

in position to be discharged.

In the instant case, the pistol could not be transferred "instantly" into a deadly weapon. A clip or magazine containing live ammunition had to be manually inserted into the handle of the weapon, the slide safety released, and the slide pulled back by holding the pistol in one hand and pulling with the other, then releasing the slide which under power supplied by a spring inserts a shell into the firing chamber and cocks the pistol.

It is submitted that the present case does not fit within the extention of the general rule laid down by the California courts. Rather because of the added functions to be performed with this weapon before the weapon would be capable of causing harm or injury, this case must fall within the general rule that an unloaded firearm is not a deadly weapon within the meaning of the definition of the crime of assault with a deadly weapon. Further, a ruling that the weapon in this case was such a deadly weapon would be to ignore the traditional definition of the crime, and in effect would be to rule that one may have the present actual ability to inflict harm when the weapon with which he was alleged to have committed an assault had to be loaded before any harm could be done with it. This is contrary

to the plain meaning of the definition of the crime and contrary to the general rule that an unloaded firearm is not a deadly weapon.

It might be argued by the State that there is little difference between the instant case and those giving rise to the California decisions in that the operation to be performed before the weapon could be operative could be performed in a relatively short period of time. Thus the court's instruction no. 13 saying that a weapon which can be loaded within a matter of moments is a deadly weapon would fall within the California rule and would be a proper instruction. Yet, how long is a moment? It should be noted that the California Court held only that when an unloaded firearm could be instantly transformed into a loaded gun capable of doing great bodily harm could it be considered a deadly weapon. Under the expanded rationale inherent in the court's instruction almost any modern firearm could be considered a deadly weapon since almost any firearm can be loaded by manually inserting a live cartridge into the firing chamber within a matter of moments. Such a holding would completely obliterate the general rule that an unloaded firearm is not a

deadly weapon and would in effect do away with the requirement that there be the present actual ability to carry out the threat as a requisite element of the crime charged.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW TESTIMONY CONCERNING A PRIOR ACCIDENT WHICH CAUSED BRAIN DAMAGE TO DEFENDANT.

The Utah court has held as a general rule that evidence of any fact which rationally tends to prove any material issue is admissible unless forbidden by some specific rule, and it should be received if offered for an admissible purpose although it would be inadmissible for some other purpose. State v. Neal, 123 Utah 93, 254 P. 2d 1053(1953); State v. Nemier, 106 Utah 307, 148 P. 2d 327(1944); State v. Scott, 111 Utah 9, 175 P. 2d 1016(1947).

All of the above cited cases resulted when the particular defendant challenged the admissibility of particular State's evidence. The above rule was used to justify admission of evidence for the State. There seems to be no logical reason why the defendant should not be allowed to invoke the same rule when

presenting evidence in his own behalf.

Ordinarily, intent is an essential element of a crime. People v. Miller, 4 Utah 412, 11 Pac. 514(1886); People v. Swasey, 6 Utah 93, 21 Pac. 400(1889); I Wharton's, Criminal Law and Procedure § 60, 135 (Anderson ed. 1957). Depending on the crime charged the accused must have at least intended to do the act which the legislature has deemed a crime.

The fact of intoxication does not in itself affect the capacity of a person to commit a crime nor his legal responsibility therefor. Hopt v. Utah, 104 U. S. 631; Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045. However, when an element of the offense is a specific mental state, and the fact that the defendant was intoxicated negates such a mental state, the defendant's intoxication is a defense. State v. Stenback, 78 Utah 350, 2 P. 2d 1050, 79 ALR 878.

Utah has codified this rule in Section 76-1-22 Utah Code Annotated, 1953 which provides as follows:

Effect of intoxication.--No act committed by a person while in a state of voluntary intoxication is less criminal

by reason of his having been in such a condition. But whenever the actual existance of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act.

In the instant case, the appellant was charged with assault with a deadly weapon with the intent to commit robbery contrary to Section 76-51-3 Utah Code Annotated, 1953. This crime by its statutory terms requires that the accused have the specific intent to commit robbery. Thus, the crime charged is within the preview of the quoted statute on the effect of intoxication.

At trial the defendant was asked on direct examination whether he had an accident in 1957. The prosecutor objected to the question on the grounds of materiality and closeness of relation. The defendant's proffer of proof asserts that he fell down stairs in 1957 suffering a severe concussion and a clot on the brain. Although an operation was performed to correct the damage, the defendant has suffered reoccurring physical problems including an abnormal reaction to liquor. This is

manifested by blackouts and irrational conduct. The trial judge sustained the objection.

It is submitted that the instant case falls within the general rule requiring that evidence be admitted if it rationally tends to prove any material issue. The defendant testified at trial that he could not remember anything from the time he was in the Market Inn until he awoke in the police car on the way to the hospital. Any experienced trial judge can recall time and time again, in the face of overwhelming evidence, that the accused cannot remember what happened. Normally the credence of such statements is rightly viewed with skepticism. This case, however, is not the normal case. In this case, the defendant had suffered a physical injury to his brain which affected his reaction to liquor in that he has a past history of blackouts and irrational conduct. This evidence lends credence to the defendant's testimony relating to lack of memory.

Surely a defendant should not be foreclosed from presenting evidence that will give credence to an otherwise incredulous claim because the trial judge is prone to disbelieve the claim. This matter is properly a matter for the jury. The

trial judge asked during the defendant's proffer of proof what sort of irrational things were claimed to have been done by the defendant in the periods of blackout. R-96. On reply that he had gotten into fights, and further, that he had had problems with his wife, namely, that he had struck her thus necessitating a divorce on her part, the court commented, "I think half the divorces I've heard involve that sort of conduct between husband and wife?" Such a comment indicates that the court may have been predisposed as to evidence relating to the defendant's claim.

One stated ground for objection by the prosecutor is that the 1957 accident was "not closely enough related." It has been held by most courts that an objection for remoteness goes to the weight rather than the admissibility of the evidence and the question of exclusion of the evidence for remoteness is a matter largely within the discretion of the trial judge. State v. Evans, 88 Ariz. 364, 356 P. 2d 1106(1960); State v. Harold, 45 Wash. 2d 505, 275 P. 2d 895(1954); State v. Koch, 61 Wyo. 175, 189 P. 2d 162(1948); State v. Nelson, 362 P. 2d 224(1961). Although the particular case was a civil case for assault and battery rather than criminal, the Utah court fol-

lowed the above stated rule in Evans v. Gainsford, 122 Utah 156, 247 P. 2d 431 (1952).

It is stated as a general rule in regard to exclusion for remoteness,

"Remoteness is a matter of degree. Its essence is such a want of open and visible connection between the evidentiary and principle facts that, all things considered, the former is not worthy or safe to be admitted in proof of the latter. . . . To be admissible, evidence must not be so remote in time as to be immaterial." 22 C. J. S. § 638, 987.

In the instant case, the accident happened in 1957.

However, the defendant had suffered from the affects of the accident up until the time of the alleged crime. One of such affects was the abnormal reaction to the consumption of liquor. Although evidence of intoxication was admitted, evidence of this defendant's abnormal reaction was not.

It has been argued that the proffered evidence is material and as such should have been admitted. Under the general rule that evidence is admissible which rationally tends to prove any material issue, the evidence should have been admitted even though it might have been inadmissible for another reason. How-

ever, the remoteness rule is expressed in terms of the lack of materiality. An exclusion by the trial judge for remoteness is also a determination that the evidence is immaterial. Therefore, we must examine this latter possibility.

The defendant's accident and the resultant physical effects on him when under the influence of alcohol are material to his defense under the crime charged even though the accident happened in 1957, some ten years earlier. Such evidence goes to the lack of specific intent. If the defendant still suffers from adverse effects of the 1957 accident, evidence thereof should be admissible regardless of when the accident occurred. Since the effects of the injury tends to be probative on the issue of specific intent, evidence of the accident should have been admissible under the general rule requiring the admission of any fact that rationally tends to prove any material issue. Therefore, the sustaining of the objection is reversible error.

CONCLUSION

The Appellant has not been accorded a full and fair trial, and the issue raised on appeal afford a basis for reversal. The failure of the trial judge to admit evidence favorable

to the defense and his refusal to instruct the jury as to the true and correct law prejudiced the case of the Appellant. The defendant is entitled to the relief sought on appeal.

Respectfully submitted,

Galen Ross
MITSUNAGA AND ROSS
731 East South Temple
Salt Lake City, Utah