

1963

State of Utah v. Frank Jerry Owens : Brief of Respondent

Utah Supreme Court

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APR 16 1964

IN THE SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

FRANK JERRY OWENS,

Defendant and Appellant.

FILED
APR 16 1964
Chief Justice, Supreme Court, Utah
Case No. 9998.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Second Judicial District Court in and for Weber County
Honorable John F. Wahlquist, Judge

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TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT:	
POINT I. THE TRIAL COURT DID NOT RECEIVE ANY EVIDENCE TENDING TO SHOW ANY ASSOCIATION OF THE DEFEND- ANT WITH ANY OTHER CRIMINALS; FURTHER, APPELLANT HAS NO BASIS TO CLAIM ANY ERROR RELATING TO THE IDENTITY OF THE APPELLANT BY WITNESSES FROM PHOTOGRAPHS.	2
POINT II. THE APPELLANT CANNOT CLAIM ERROR BECAUSE OF ANY FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY TO DISREGARD ANY INFEREN- TIAL ASSOCIATION OF THE APPEL- LANT WITH OTHER ALLEGED CRIMI- NALS.	10
CONCLUSION	11

AUTHORITIES CITED

<i>Abbott, Criminal Trial Practice</i> , 4th Ed., Sec. 348	3
Sec. 350	4
Sec. 351	4
Sec. 672	11
22A, C.J.S., <i>Criminal Law</i> , Sec. 725, p. 1011	5
Wigmore, <i>Evidence</i> , 3rd Ed., Sec. 1130	4

TABLE OF CONTENTS — Continued

CASES CITED	Page
Basoff v. State, 208 Md. 643, 119 A.2d 917	7
Judy v. State, 218 Md. 168, 146 A.2d 29	7
State v. Anderson, 108 Utah 130, 158 P.2d 127	11
State v. Bolds, 55 N.W.2d 534 (Iowa)	9
State v. Kelsey, 283 P.2d 982 (Wash.)	9
State v. Miller, 111 Utah 255, 177 P.2d 727 (1947)	10
State v. Moon, 20 Ida. 202, 117 Pac. 757	7
State v. Moore, 111 Utah 458, 183 P.2d 973	9
State v. Myers, 385 P.2d 609 (Utah 1963)	9
State v. McSloy, 127 Mont. 265, 261 P.2d 663	7
State v. Peterson, 121 Utah 229, 240 P.2d 504	11
State v. Rowley, 386 P.2d 126 (Utah 1963)	10
State v. Wilson, 38 Wash. 2d 593, 231 P.2d 288	7
State v. Woodall, 6 U.2d 8, 305 P.2d 473	11
People v. Aquirre, 332 P.2d 378 (Cal. 1958)	6
People v. Ford, 345 P.2d 573 (Cal. 1959)	6
People v. Gould, 7 Cal. Rptr. 273, 354 P.2d 865 (1960)	6, 8
People v. Robinson, 6 Utah 101, 21 Pac. 403	11
People v. Slobodion, 31 Cal. 2d 555, 191 P.2d 1 (1948)	5, 6
Williams v. State, 372 P.2d 462 (Nev. 1962)	7

STATUTES CITED

Utah Code Annotated 1953, 76-26-1	1
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

FRANK JERRY OWENS,

Defendant and Appellant.

Case No. 9998.

BRIEF OF RESPONDENT

NATURE OF CASE

The appellant appeals from a conviction for the crime of forgery in violation of 76-26-1, U.C.A. 1953, upon jury trial in the Second Judicial District Court, Weber County, Utah.

DISPOSITION IN LOWER COURT

On July 9, 1963, the appellant was tried and convicted of forgery, in violation of 76-26-1, U.C.A. 1953, by uttering and passing a forged money order. The case was tried by a jury which returned a verdict of guilty, and the trial court committed the appellant to the State Prison for the indeterminate period provided by law.

RELIEF SOUGHT ON APPEAL

The respondent submits that the trial court's judgment should be affirmed.

STATEMENT OF FACTS

The respondent will accept the appellant's statement of facts, except to the extent that they may appear differently or be added to in the argument portion of this brief.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT RECEIVE ANY EVIDENCE TENDING TO SHOW ANY ASSOCIATION OF THE DEFENDANT WITH ANY OTHER CRIMINALS; FURTHER, APPELLANT HAS NO BASIS TO CLAIM ANY ERROR RELATING TO THE IDENTITY OF THE APPELLANT BY WITNESSES FROM PHOTOGRAPHS.

The appellant contends in Point I of his brief that the jury had before it evidence of the accused's association with other known criminals. No testimony of any kind was received by the jury which in any way indicated that the appellant associated with criminals prior to or during the time of the commission of the offense. Consequently, the appellant's assertion is not quite correct.

A reading of the appellant's brief results in the conclusion that the appellant is in fact complaining that the trial jury received evidence of a pre-trial identification of the appellant as the person who uttered Exhibit A, the forged money order. The identification of the appellant as the culprit was made by Kenneth Bramwell, the operator of Bramwell's Market in Ogden, Utah, from "mug" photographs of the appellant and other persons (R. 11). The photographs were presented to Mr. Bramwell by Officer Warner Bruestle of the Ogden City Police Department prior to trial, in an effort to have Mr. Bramwell identify the person who gave him the forged money order (R. 38). Mr. Bramwell identified the appellant from the photo-

graphs presented (R. 11) and the trial court heard the testimony of Mr. Bramwell to the effect that he made a previous identification of the appellant from the photographs (R. 11, 38).

Subsequently, Mr. Bramwell was cross-examined intensively by defense counsel concerning the identification of the appellant as being the individual responsible for passing the forged money order.

At the time of opening statements, counsel for the appellant indicated that he would rely for a defense on the contention that the appellant was not the individual who had committed the crime, and had been improperly identified by the victims. Defense counsel endeavored to show that the prior identification of the appellant as the culprit by Mr. Bramwell from the photographs given him by the Ogden Police, was a confused and inaccurate identification. No objection at anytime was raised by the appellant to the use of the photographs nor to their admission (R. 40).

It is submitted that whatever claim of error the appellant might have had to the use of the photographs at trial has not been preserved on appeal since the appellant took no objection. Abbott, Criminal Trial Practice, 4th Ed., Sec. 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. Likewise where no objection is made to cross-examination, neither the propriety thereof, nor the competency of the testimony brought out thereby may be questioned on appeal.”

The appellant failed to make any objection to the receipt of any evidence relating to his identification from the mug shots, nor was any objection raised to receiving the pictures in evidence to allow the jury to see the nature of

the identification. Abbott, Criminal Trial Practice, Sec. 350, notes:

“The proper time to object to the introduction of evidence is when it becomes apparent that error will be committed by receiving evidence which is not admissible, as when the evidence is offered * * *.”

Section 351 also notes:

“Any objection to the admissibility of evidence is waived by failure to object thereto. If defendant fails to object to evidence when first offered, he waives its incompetency. * * *”

Further, it should be noted that no effort was ever made by the appellant to have the evidence stricken or to have the jury instructed as to its limited use. As a consequence, it is submitted that since the appellant made no effort to void the error he now seeks to take advantage of on appeal, he may not, therefore, claim prejudice.

Secondly, it is submitted that the receipt of the evidence was proper. Wigmore, Evidence, 3rd Ed., Sec. 1130, notes:

“Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness’ act of pointing out the accused (or other person) then and there in the court-room, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person’s identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him.

The psychology of the situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper (on the principle of § 1129, ante) to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness’ mind, he recognized and declared the present accused to be the person. * * *”

Although it must be admitted that there are jurisdictions which have ruled to the contrary, it would appear

that the majority of courts have allowed the use of such evidence. In 22A, C.J.S., Criminal Law, Sec. 725, p. 1011, it is stated:

"Other decisions, however, broadly hold that evidence of extrajudicial identification is admissible, as an exception to the hearsay rule, and that a witness may testify as to another person's identification of a person, thing, or place. So, it has been held that testimony as to the mere fact that another person identified, described, or pointed out something is not inadmissible as hearsay; and a witness may testify to another's description of a person or place for the mere purpose of explaining action taken in connection therewith. Also, a witness may testify to a statement made to a person resulting in his failure to make an identification."

In *People v. Slobodion*, 31 Cal. 2d 555, 191 P.2d 1 (1948), the California Supreme Court had occasion to consider whether or not evidence of a previous identification of the accused as the culprit could be received in evidence to bolster a subsequent identification at trial. Mr. Justice Traynor commented:

"Defendant contends that the admission of evidence pertaining to certain nonjudicial identification of defendant was erroneous. The prosecutrix testified that she identified defendant in a police lineup, and a police officer testified that he was present when the prosecutrix made the identification. Here again, defendant made no objection to the introduction of the testimony of which he now complains, but even if he had this evidence of previous nonjudicial identification would have been admissible.

'Ordinarily when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out the accused (or other person), then and there in the courtroom, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him.

The psychology of the situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper * * * to prove that at a former time, when the suggestions of others could not have intervened to create a

fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person was then so placed among others that all probability of suggestion (by seeing him hand-cuffed, for example) is still further removed, the evidence becomes stronger. The typical illustration is that of the identification of an accused person at the time of arrest. * * * ' IV Wigmore on Evidence, 3d Ed., p. 208.

The foregoing rule stated by Wigmore is not accepted in all jurisdictions, but the weight of recent authority is in accord with his views. * * *

In a case very similar to the instant one, *People v. Ford*, 345 P.2d 573 (Cal. 1959), a protest was made that the jury was allowed to receive evidence of a previous identification of the accused by a witness from "mug" shots. The court commented on this objection and found it unmeritorious, stating:

"Authorities bearing directly on this point involve for the most part identification prior to court appearance by way of police show-up or of his person at a place other than the police station. Appellant's real objection seems to be the manner in which the prior identification was proved, by the introduction into evidence of the 'mug' photograph, which he claims imputed to him a prior criminal record. Generally, if evidence be material and relevant to an issue in a criminal trial, even though it tends to be prejudicial, it is nevertheless admissible when its probative value outweighs the possible prejudicial effect (*People v. Cheary*, 48 Cal. 2d 301, 309 P.2d 431) ; and a determination thereof lies within the sound discretion of the trial court * * *."

In *People v. Aquirre*, 332 P.2d 478 (Cal. 1958), the court, citing the *Slobodian* case, supra, affirmed the use of prior identification from pictures and a lineup.

Most recently, in *People v. Gould*, 7 Cal. Rptr. 273, 354 P.2d 865 (1960), the California Supreme Court again considered the question of the admissibility of an extrajudicial identification of the accused by a witness. The identifica-

tion by the witness was made from a photograph. Mr. Justice Traynor, again speaking for the court, stated:

“Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial (*People v. Slobodion*, 31 Cal. 2d 555, 560, 191 P.2d 1), but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached (*People v. Hardenbrook*, 48 Cal. 2d 345, 351, 309 P.2d 424; *People v. Kynette*, 15 Cal. 2d 731, 753–754, 104 P.2d 794), evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness’ mind. *People v. Slobodion*, 31 Cal. 2d 555, 559–560, 191 P.2d 1; *United States v. Forzano*, 2 Cir., 190 F.2d 687, 689; see *People v. Hood*, 140 Cal. App. 2d 585, 588, 295 P.2d 525; *People v. Bennett*, 119 Cal. App. 2d 224, 226, 259 P.2d 476; 4 Wigmore, *Evidence* (3d ed. 1940) § 1130, p. 208. The failure of the witness to repeat the extra-judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extra-judicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination. See *Judy v. State*, 218 Md. 168, 174–175, 146 A.2d 29, 32–33; McCormick, *Evidence* § 39, p. 74; Morgan, *Hearsay Dangers*, 62 Harv. L. Rev. 177, 192–193; 3 Wigmore, *Evidence* (3d ed. 1940) § 1018, pp. 687–688. See also *State v. Wilson*, 38 Wash. 2d 593, 617–618, 231 P.2d 288, 300–301; *People v. Spinello*, 303 N.Y. 193, 201–202, 101 N.E.2d 457, 460–461.”

Numerous other decisions appear to have followed these cases. *Judy v. State*, 218 Md. 168, 146 A.2d 29; *Basoff v. State*, 208 Md. 643, 119 A.2d 917; *State v. McSloy*, 127 Mont. 265, 261 P.2d 663; *State v. Moon*, 20 Ida. 202, 117 Pac. 757; *State v. Wilson*, 38 Wash. 2d 593, 231 P.2d 288; *Williams v. State*, 372 P.2d 462 (Nev. 1962).

It should be noted that the objection raised by the appellant for the first time on appeal is not accurately directed

to this point. Consequently, since numerous decisions from other courts have allowed the introduction of such evidence, it can hardly be said that a basis for reversible error exists. Further, it should be noted that the picture contained in Exhibits B, 1 through 8, by which the appellant was identified, does not have any police identification number on the picture, nor indicate that it was taken in connection with criminal circumstances.

The appellant himself introduced into evidence Exhibit D for the purposes of attacking the previous identification. That photograph, introduced by the appellant, does contain attendant nomenclature connecting the appellant with a criminal investigation. Since this was introduced by the appellant, he is hardly in a position to claim error from some other less prejudicial action of the prosecution.

The appellant argues that the identification of the appellant by a mug shot and the receipt of other pictures of individuals not identified, but possibly the subject of inquiry because of criminal activities, is raised to the level of prejudice by the fact that on cross-examination of the Ogden City Police Officer, Mr. Bruestle, he indicated that the accused was being investigated for other matters.

It should be noted, first, that the trial court sustained an objection to the evidence and strictly admonished the jury to disregard the same. This court cannot presume that the jury did not follow the admonition. In *People v. Gould*, supra, the court noted:

“ * * * It must be assumed that ordinarily admonitions to the jury are heeded. *People v. Foote*, 48 Cal. 2d 20, 23, 306 P.2d 803; *People v. Tarantino*, 45 Cal. 2d 590, 597–598, 290 P.2d 505; *People v. Dabb*, 32 Cal. 2d 491, 499, 197 P.2d 1. A trial court’s decision that an error or impropriety can be cured by admonition will not be reversed unless exceptional circumstances make it improbable that the jury obeyed the admonition. * * * ”

See also *State v. Moore*, 111 Utah 458, 183 P.2d 973; *State v. Kelsey*, 283 P.2d 982 (Wash.) ; *State v. Bolds*, 55 N.W.2d 534 (Iowa).

Secondly, it should be noted that the answer was a reasonable response to a question elicited by the appellant on cross-examination. In *State v. Myers*, 385 P.2d 609 (Utah 1963), the appellant contended that he was prejudiced by a similar response of a police officer made to a question asked of the officer by counsel during cross-examination. This court refused to find prejudice, and stated:

“Inasmuch as it was his own attorney who asked the questions which brought forth the answers on cross-examination, he is in no position to complain of them.”

There is no merit to the appellant's contention on this point. There is no evidence of record which would tend to indicate that the pictures used to assist in the identification of the appellant were brought to the attention of the jury in such a way as would lead the jury to believe that the appellant was intimately associated with persons of questionable repute. The question of prior identification was important to the prosecution as the issue of identification was the sole issue in the trial. Since such evidence is normally admissible, it can hardly be said that the appellant was prejudiced by the receipt of the evidence where there was no substantial indication which could lead the jury to believe that the photographs of the other persons, also displayed to Mr. Bramwell, were associates of the accused. This is obvious from the fact that no objection of any kind was made in the trial court.

POINT II.

THE APPELLANT CANNOT CLAIM ERROR BECAUSE OF ANY FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY TO DISREGARD ANY INFERENTIAL ASSOCIATION OF THE APPELLANT WITH OTHER ALLEGED CRIMINALS.

The appellant's contention that the trial court created some prejudice by failing to instruct the jury to disregard any inference of association of the accused with other criminals is without merit. No request for any such instruction was made. The trial court expressly asked counsel for both the State and the appellant whether they had any additional requests for instruction (R. 54). Both the State and the appellant indicated that they had no additional requested instructions. Since the appellant requested no additional instructions, he is in no position to claim error from the failure of the trial court to give an instruction.

In *State v. Rowley*, 386 P.2d 126 (Utah 1963), this court stated:

“ * * * No instruction was tendered by appellants in reference to a polygraph test and no exception was taken on the failure to give such an instruction. The general rule is that unless the party requests an instruction on a special matter, he cannot predicate error upon the court's failure to charge. We see no reason to deviate from this rule and so adhere in rejecting appellants' second contention.”

In *State v. Miller*, 111 Utah 255, 177 P.2d 727 (1947), this court was presented with a claim that the trial court committed error for failing to instruct on the limited purpose of the use of the defendant's confession. No request for such an instruction had been made. The court noted:

“This requirement that the court instruct ‘upon the law applicable to the case’ does not place upon the court alone the burden of making up instructions which cover every question which may have arisen in the case.

The general rule is that unless the party requests an instruction on a special matter he cannot predicate error upon the court's failure to charge. * * * The tenor of the cases we have considered, and here cite, support our holding that this case cannot be returned for a new trial because of the court's failure to give a proper instruction limiting the use of Miller's confession when no such instruction was requested. * * *

This has long been the rule of law in this jurisdiction. *State v. Anderson*, 108 Utah 130, 158 P.2d 127; *People v. Robinson*, 6 Utah 101, 21 Pac. 403; *State v. Woodall*, 6 U.2d 8, 305 P.2d 473; *State v. Peterson*, 121 Utah 229, 240 P.2d 504.

Additionally, where no exception was taken to failure to instruct on the effect of such evidence, no error can be claimed. *State v. Ferguson*, 83 Utah 357, 28 P.2d 175 (1934); Abbott, Criminal Trial Practice, 4th Ed., Sec. 672.

Consequently, appellant Owens is without a meritorious claim on this point.

CONCLUSION

An analysis of the contentions of the appellant, when viewed against the record of the case, indicate that he has no basis upon which to claim a new trial. The evidence of his guilt is compelling and the appellant made no effort to exclude the evidence now claimed to be objectionable. The primary issue in the case was the identification of the appellant and it, therefore, became directly material to receive the evidence of previous identification. The fact that pictures of other individuals who may have some criminal involvement were given to the jury could hardly be deemed prejudicial where there was no showing that these persons were in anyway associated with or connected with

the appellant other than to provide a diversity of faces from which to test the victim's identification of the culprit.

There is no merit to this appeal. The court should affirm.

Respectfully submitted

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