1992

The State of Utah v. Benjamin Cecala : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
BENJAMIN CECALA,	:	Case No. 920592-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202, and theft, a third degree felony, in violation of Utah Code Ann. § 76-6-412(1)(d), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A Lewis, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. section 78-2a-3(2)(f) (1992), and Utah R. Crim. P. 26(2)(a), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are contained in the text of this brief or in Addendum A:

Utah Code Ann. § 76-6-202
Utah Code Ann. § 76-6-412(1)(d)
Utah R. Evid. 403

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Is it error for the initial intentions of a person to be proven by what he or she did at a point later in time, and was it improperly prejudicial and misleading for the trial court to admit such after-the-fact conduct in a case where the prosecution acknowledged that such evidence could [improperly] sway the jury?[1] See State v. Thurman, 203 Utah Adv. Rep. 18, 29 n.11 (Utah 1993) (while "an admissibility decision is the sum of several rulings, each of which may be reviewed under a separate standard[,] . . . the correctness standard is applied only to the trial court's ultimate conclusion to admit or exclude the proffered evidence. . . . To the foregoing extent, then, the statement in [State v.]Ramirez[, 817 P.2d 774 (Utah 1991),] that admissibility is always a question of law is correct").

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for burglary (count I), a second degree felony, in violation of Utah Code Ann. § 76-6-202, and theft (count II), a third degree felony, in violation of Utah Code Ann. § 76-6-412(1)(d). (R 100-01). Following the jury's verdict, dated May 5, 1992, (R 90-92), the Honorable Leslie A. Lewis sentenced Mr. Benjamin Cecala to an

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1 The issue stated another way is: "did the trial judge, who initially held that no probative value attached to Mr. Cecala's use of an alias, err in inconsistently finding probativeness in hearsay testimony which claimed that Cecala had also used a false name when such an allegation, even if true, occurred at a time after the time at which his intent was at issue?

indeterminate term of one-to-fifteen years in the Utah State Prison on the first count (together with a $10,000 fine + 25% surcharge), and a zero-to-five year term on the second count. The terms ran concurrently with commitment beginning forthwith. (R 100-01).

Following the trial court proceedings, privately obtained defense counsel (Mr. Steven McCaughey) moved to withdraw from the case. On October 27, 1992, the motion was granted and the Salt Lake Legal Defender Ass'n was appointed to represent Mr. Cecala on appeal. (R 105-11).

STATEMENT OF THE FACTS

On August 26, 1991, Johnny Torres, Reagan Bridgeforth, Clay Reid, and Benjamin Cecala were seen looking at a white (Ford) Bronco, marked with a "For Sale" sign and parked in front of Kim White's residence (615 North 1400 West). (R 291, 363). Johnny Torres testified that after a short period of time, he and one of the others walked up to the home to ask about the vehicle. (R 377). Torres knocked on the front door, received no answer, and returned with his companion to the area in front of the house. (R 377).

Johnny Torres then suggested burglarizing the residence since no one appeared to be home. (R 365). Bridgeforth and Reid readily agreed to the suggestion. Benjamin Cecala, however, said he wanted no part of it, a position acknowledged by Johnny Torres (who was ultimately convicted for his involvement in the burglary). (R 363, 365-67, 378, 381).

The parties dispute whether Cecala walked away at that time, (R 378-79), or whether he remained in front of the house.

(R 295). Disagreement also exists as to whether all four persons had initially walked together up to the house, (R 293), or whether Benjamin had waited by the Bronco. (R 377-78).

The parties do not dispute that Johnny Torres, Reagan Bridgeforth, and Clay Reid jumped a fence (wall) and burglarized the residence. (R 367, 376, 381). After obtaining approximately $500 in cash and some property, those three individuals were seen fleeing from the house as the police arrived. (R 334, 340, 385). Benjamin Cecala was found standing in a park, talking to some women. (R 354). Dean Evans, the officer who arrested Mr. Cecala, admitted that Benjamin was not seen running away from the scene. (R 358).

Rick Clausing, a neighbor who lived across the street from the White's residence, said that he watched Benjamin walk right by the approaching police officers (Keith Bankhead and Dean Evans), (R 302), and towards the nearby park. Clausing and Bankhead believed that Benjamin also walked towards an apartment complex and knocked on some doors, (R 300-02, 335), although James Hallock, an officer who had kept Mr. Cecala in sight for all but a few seconds, said he did not observe such conduct. (R 322).

Clausing acknowledged that he viewed the activities of Torres, Bridgeforth, Reid, and Cecala as suspicious. All four individuals are Hispanic; three of them appeared to be juveniles. (R 289). Benjamin was seen wearing dark or black clothing. Clausing told his wife to call the police. (R 299).

Unlike Johnny Torres, who knew first-hand of Benjamin's unwillingness to participate in the burglary, Rick Clausing based

his suspicions on what he thought he saw occurring. Clausing saw Benjamin turn and talk to the others every two or three minutes. (R 298). Cecala may have even looked around and "peeked" in the officer's direction. (R 330).

Clausing confessed, however, that he did not hear Benjamin make any noises or sounds when the police arrived. (R 307). Officer Bankhead similarly said nothing about any such occurrence in his police report. (R 343). James Hallock, the officer who arrived on the scene in the same patrol car as Bankhead, remained consistent on this fact, making no mention of a sound in his police report or in his testimony at trial. (R 311-26). In apparent contradiction of what had actually occurred, officer Bankhead claimed for the first time at trial that he heard a "howl" or an "owl" sound. (R 332). However, Bankhead acknowledged that he did not know who had made the sound and that any of the four persons could have made it. (R 339).

After the other three persons were seen running from the scene, Torres and Reid were immediately apprehended; Bridgeforth escaped; and Benjamin Cecala was arrested in the park.

SUMMARY OF THE ARGUMENT

The trial court erred in admitting evidence that Mr. Benjamin Cecala had used a false name. Whatever Benjamin may or may not have been thinking at the time his friends burglarized a home cannot be established by what Benjamin said or did after the fact.

The jury, however, may have viewed the improperly admitted testimony as reflective of Mr. Cecala's intent, or his knowledge, or his participation. In other words, the after the fact evidence may have misled or confused the jury when the proper focus should have been on what his intent was at the time the others committed the burglary. As the prosecutor acknowledged, the testimony in question affected the jury's determination of Mr. Cecala's "role."

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING "AFTER THE FACT" EVIDENCE, CONDUCT WHICH HAD NO BEARING ON A PERSON'S INTENT "BEFOREHAND" OR "DURING" THE INCIDENT, AND CONDUCT WHICH MISLED THE JURY IN ITS DELIBERATION

Excerpted below are relevant parts of Mr. Cecala's motion to exclude any references to a false name:

> MR. MCCAUGHEY [Counsel for Benjamin Cecala]: Your Honor, my understanding is the prosecution is going to call a witness who would testify that Mr. Cecala, when apprehended, gave a false name, a name that was not his.
>
> I have previously mentioned to the court before we started this trial that I had a motion in limine which I wanted the court to hear. The basis of that motion in limine, to exclude any reference to a false name given by Mr. Cecala, and the basis of that was that it's, any probative value that that evidence had, or has, is far outweighed by the prejudiciality that would be shown to the defendant.
>
> My understanding is that the court is going to deny that motion, at least as far as the initial false name that Mr. Cecala gave, but is going to sustain the motion as to any other false names. My position is that the court should keep everything out, because I think it's under Rule 403, the prejudiciality.
>
> THE COURT: Everything, or everything concern[ing] the alleged giving of the false name?

MR. MCCAUGHEY: Everything under the giving of the false name under Rule 403.

THE COURT: Let me clarify before Mr. Jones is given an opportunity to respond. You brought this to my attention this morning in chambers. Mr. Jones was present as well. You did not ask for a formal hearing at that time.

MR. MCCAUGHEY: That is correct.

THE COURT: Mr. Jones, your response?

MR. JONES: Well, Judge, I just think that the evidence concerning the defendant giving a false name is certainly consistent with the element of guilt by the defendant. You have a situation where the officers are called, some of them take off and run, the defendant doesn't run away, but he appears to be peeking around the corner. He walks away from the officers.

I just think his lying to the officer about who he is and his identity is certainly something that the jury should be able to consider in the case in trying to determine his role, if any, in this particular crime.

THE COURT: So you're saying it goes to an assessment of his intent?

MR. JONES: Yes, I think so.

THE COURT: And his participation?

MR. JONES: And knowledge of the crime.

THE COURT: Mr. Jones, it's my understanding from the side bar conference that you had alluded to three false names that were given to law enforcement by the defendant; is that correct?

MR. JONES: Well, I'm not sure all three are false, but originally he gives the name of Salvador Sanchez, and then the officers discover that's not his name, and when they confront him with that he then gives them the name of Bennie Medina, and they come back and say, "That's not your name," and he finally gives them the name of Benjamin Cecala. So I guess there are three changes in his name.

THE COURT: There doesn't appear to be much question that the first name is not the defendant's correct name; is that right, Mr. McCaughey?

MR. MCCAUGHEY: That's right. He goes by the second, too, because I think Medina, he uses both Medina and Cecala. Because his father's name is Medina but his mother's name is now Cecala.

THE COURT: That appears consistent with what I would have ruled in any event, and now it becomes even clearer, and that is, Mr. Jones, I am going to allow you to go into the giving of a false name, to wit, the first name that was given.

I am going to ask you to direct your witnesses not to allude to the other names having been given by the defendant, or referring to him in any way as aliases or anything else. I don't think that that is probative. I think the single giving of a name that is contrary to the accurate name is probative.

I think that whatever prejudicial effect it has, if any, is far outweighed by the probative value of the same. I can't see any prejudicial effect, I can see a clear probative value to this, and particularly I think we're not looking at a prejudicial effect, if it's limited in the manner I indicated.

Mr. Jones, I'll ask you to clearly discuss that over the break with your witnesses.

MR. JONES: All right, I will.

THE COURT: Is there anything further, Mr. McCaughey?

MR. MCCAUGHEY: My only argument, just so the records' clear, I think the prejudice we have is the fact that a person charged with a crime and is on trial is shown to have lied to the police officers. And I think that is prejudicial. I mean the court may not think it's overwhelming prejudicial, but I do think some prejudice results from the jury hearing that he lied to a police officer.

THE COURT: I think your point is well taken. What I'm saying is the prejudicial effect, if any, is outweighed by the probative value. And to the extent that this gets to the defendant's credibility, I think it becomes highly relevant and probative. So you've articulated yet another basis for my ruling.

> But as to the the alleged aliases, they are not to come in. And you know, it's kind of like the old Groucho Marx "You Bet Your Life" show here the little birdie comes down. I don't want to hear it. If I see the bird coming down with the witness referring to this, I'm going to be mad.
>
> So talk to your witnesses and make it very clear to them just what they can say and just what they cannot say. Tell them if there's any doubt in their mind about what's appropriate an what is not, they're to stop and ask for an opportunity to confer with you, Mr. Jones. I don't want to run the risk of a mistrial at this juncture.

(R 345-49).

Despite the prosecutor's argument that a lie (after the fact to an investigating officer) goes to an assessment of "intent," "knowledge," and "participation," (R 346-47), the Utah Supreme Court has found to the contrary. In State v. Bolsinger, 699 P.2d 1214 (Utah 1985), the Court concluded that such after the fact conduct was not relevant to John Bolsinger's state of mind at the time of the alleged occurrence.

In Bolsinger, the State charged John Bolsinger with the depraved indifference murder of Kaysie Sorensen. The two apparently had been drinking on the night in question and later engaged in consensual sexual intercourse. In an unusual variation of the act (the details of which are not important to the case at bar), Kaysie died by strangulation.

For present purposes, however, the Bolsinger Court made an important distinction between what happened before or during the act and what occurred afterwards. After the strangulation, John Bolsinger "dumped the contents of [Kaysie's] purse and left the

apartment with the stereo." Bolsinger, 699 P.2d at 1216. In addition, "[a]t trial [Bolsinger] explained that he had lied to the police in his taped confession." Id. at 1216. Nevertheless, our supreme court held:

> The evidence here simply does not support a finding of depravity in the conduct of the defendant that caused the death of Kaysie. The jury may well have been swayed by the reprehensible conduct of the defendant subsequent to her death. But that conduct is not before us for review. The evidence is undisputed that Kaysie was dead when defendant rose from the bed. He himself covered her face with a sheet, a universal gesture acknowledging death. At that moment the conduct which subjected him to a charge of criminal homicide came to an end.

Bolsinger, 699 P.2d at 1220-21 (emphasis added by the Court).

The Court did not view Bolsinger's after the fact conduct or his admitted lie as probative to determining what his intent was at the time of the incident. Id. at 1220-21. In fact, the Court held that the State had failed to prove the requisite mens rea for the second degree depraved indifference murder charge.[2] 699 P.2d at 1220-21.

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2 While the Court held that there was insufficient evidence for the depraved indifference murder charge (mens rea not proven), State v. Bolsinger, 699 P.2d 1214, 1219, 1221 (Utah 1985) (Howe, J., joined by Durham, J.); id. (Stewart, J., concurring [on this point] and dissenting [in principle on the decided disposition]), the Court found sufficient evidence of intent for a manslaughter conviction. Id. at 1219 (Bolsinger "was aware of, but consciously disregarded, a substantial and unjustifiable risk . . ."). However, in analyzing the element of intent under either depraved murder or manslaughter, Bolsinger's after the fact conduct proved irrelevant to his mens rea at the time of the offense. See id. at 1215-21 (the Court did not even infer intent from the evidence).

Even if a false name was in fact given here by Mr. Cecala, such conduct was far less "reprehensible" than defendant Bolsinger's actions. Conduct after the fact may be challenged separately, but, as the Bolsinger Court determined, such conduct should not be used to improperly sway the jury. It is irrelevant to determining what a person had intended at the time of the alleged occurrence. Cf. State v. Talbot, 792 P.2d 489, 495 n.13 (Utah App. 1991) (another after the fact consideration, "flight," is an inadequate basis for creating an articulable suspicion for a stop").

Nor did the Bolsinger court view the defendant's admitted lies or his taking of Kaysie's property as being important to a credibility determination. However, the opinion did note that such evidence "may well have swayed" the jury. See Bolsinger, 699 P.2d at 1221. The inherent prejudice could not be ignored.

Similarly, here, the prejudicial effect of the improperly admitted evidence is perhaps best acknowledged by the prosecutor himself. As the prosecutor suggested and as the trial court hinted, there was a reasonable likelihood that Mr. Cecala's use of a false name could have been used by the jury to determine his intent, his participation, and his knowledge in the matter (thereby confusing the issues and misleading the jury):

> MR. JONES [the prosecutor]: . . . I just think his lying to the officer about who he is and his identity is certainly something that the jury should be able to consider in the case in trying to determine his role, if any, in this particular crime.
>
> THE COURT: So you're saying it goes to an assessment of his intent?

MR. JONES: Yes, I think so.

THE COURT: And his participation?

MR. JONES: And knowledge of the crime.

(R 346-47).

The above concessions appear ample in terms of the prejudicial effect that the after the fact evidence had on the jury. Utah R. Evid. 403. In addition, however, the evidence as a whole was tenuous at best. The parties do not dispute that Benjamin Cecala did not enter the residence. Mr. Cecala also possessed none of the property in question. The only issue is whether he acted as a "lookout" for the others.

The neighbor, Rick Clausing, believed that Benjamin turned and talked to the others every two or three minutes as he stood in front of the house. (R 298). Officer Bankhead thought he saw Cecala "peeking" in his direction when the officers approached. (R 330). However, neither action constituted criminal conduct and such behavior was merely reflective of someone who had just been told that others were going to commit a burglary. Cf. State v. Trujillo, 739 P.2d 85, 89 (Utah App. 1987) (in a case where "suspicious" conduct did not justify a stop, this Court reasoned in part, "The subsequent 'nervous' conduct on the part of the [suspect] when approached by Officer Beesley is consistent with innocent as well as with criminal behavior").

Officer Bankhead testified for the first time at trial that he heard a "howl" or an "owl" sound, (R 332), although Bankhead

acknowledged that he did not know who made the sound and that any of the four suspects could have made it. (R 339). Curiously, though, in his police report officer Bankhead never mentioned such a sound, (R 343), and both the other officer on the scene (James Hallock, who arrived at the same time and in the same patrol car as Bankhead,) and the neighbor who lived across the street (Rick Clausing) said nothing about the alleged noise. (R 307, 311-26).

In any event, even if the sound occurred, officer Bankhead's own testimony reflected that the State did not carry its burden of establishing which of the four persons, if any, made the noise. (R 339); In re Winship, 397 U.S. 358 (1970).

Although Torres may have told Cecala about the burglary, Benjamin's actions reflected nothing more than a desire to avoid the police. If, as Rick Clausing believed, (R 300-02), Benjamin went first to the neighboring apartments (a belief not shared by officer Hallock despite keeping Mr. Cecala in his sight for all but a few seconds, [R 322]), the fact remains that thereafter Benjamin walked right by the approaching officers towards the park. (R 302). The arresting officer did not see Benjamin running or fleeing from the scene, but only observed him standing and talking to some women in the park. (R 358). Cf. Wong Sun v. United States, 371 U.S. 471 (1963) (acting surprised or avoiding the police does not amount to "specific and articulable facts"); State v. Talbot, 792 P.2d 489, 494 (Utah App. 1991) (quoting McClain v. State, 408 So.2d 721, 722 (Fla. Dist. Ct. App. 1982) (Defendant's "behavior which, taken for

its most insidious implications, indicated only that he wanted to avoid police, and could not give rise to a reasonable suspicion that he was engaged in criminal activity")); Talbot, 792 P.2d at 489 (flight is an inadequate basis for creating a reasonable suspicion).

Benjamin Cecala may have known what was about to occur but the evidence as a whole revealed nothing more than his initial association with the other three individuals. But see State v. Munsen, 821 P.2d 13, 15 (Utah App. 1991) ("The mere fact that [a suspect] was with [another] does not necessarily conjoin her actions with his"); State v. Salas, 830 P.2d 1386 (Utah App. 1991). While the four persons may have associated initially together in front of the house, Benjamin Cecala's conduct after being told about the burglary reflected his desire not to be involved; he was nervous because of what he had been told; and he was simply unwilling to converse with the police. Under the present circumstances, the improperly admitted evidence cannot be considered harmless.

CONCLUSION

Mr. Benjamin Cecala respectfully requests that this Court reverse his conviction and remand the case for a new trial.

SUBMITTED this 19th day of May, 1993.

Ron S. Fujino

RONALD S. FUJINO
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 19th day of May, 1993.

Ron S. Fujino

RONALD S. FUJINO

DELIVERED by _____

this _____ day of May, 1993.

_____

ADDENDUM A

treble damages against receiver of stolen property.

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

(i) value of the property or services exceeds $1,000;

(ii) property stolen is a firearm or an operable motor vehicle;

(iii) actor is armed with a deadly weapon at the time of the theft; or

(iv) property is stolen from the person of another;

(b) as a felony of the third degree if the:

(i) value of the property or services is more than $250 but not more than $1,000;

(ii) actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or

(iii) property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry;

(c) as a class A misdemeanor if the value of the property stolen was more than $100 but does not exceed $250; or

(d) as a class B misdemeanor if the value of the property stolen was $100 or less.

76-6-202. Burglary.

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.