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The State of Utah v. George Albert Roybal : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19064
GEORGE ALBERT ROYBAL, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT AND CONVICTION OF AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19064
GEORGE ALBERT ROYBAL, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED

1. Did the trial court err in admitting the ruler and substitute knife into evidence?
2. Did the evidence of defendant's intoxication negate the required intent for aggravated assault?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES AND REGULATIONS

Utah Code Annotated § 76-2-306 (1953), as amended:

Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense . . .

Utah Code Annotated § 76-5-102 (1953), as amended:

Assault is (a) An attempt, with unlawful force or violence to do bodily injury to another; or
(b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another.

STATEMENT OF THE CASE

The defendant, George Albert Roybal, was charged by information with Aggravated Assault, a Felony of the Third Degree, in violation of § 76-5-103, Utah Code Ann. (1953), as amended.

After a trial by jury on February 24, 1983, in the Third Judicial District Court, in and for Salt Lake County, before the Honorable J. Dennis Frederick, Judge, presiding, the defendant was convicted of Aggravated Assault. On February 25, 1983, defendant was sentenced to an indeterminate term of zero to five years to be served at the Utah State Prison.

STATEMENT OF FACTS

At approximately 1:00 a.m. on December 29, 1982 (T. 19), Phillip Sebastian, a cab driver for Salt Lake Taxi Co. (T. 16), was directed by two of his customers to go to the Bottoms Up Lounge (T. 17). They told him to wait for them (T. 19). About fifteen minutes later, when the bar closed at 1:00 a.m., they came out with four other men (T. 19). Two men sat in the front with Mr. Sebastian, while the others sat in the back (T. 19).

Mr. Sebastian assumed they had been drinking (T. 48), but the two men in the front seat did not seem to be drunk (T. 50). One of the two men in the front was the defendant, George Albert Roybal, who sat next to Mr. Sebastian (T. 20, 21).

After taking the original passenger home (T. 23), Mr. Sebastian took the remaining back seat passenger back to the Bottoms Up. He was travelling on Sixth West Street going south (T. 27). As they came to the intersection at Sixth West and Third North, Roybal, the defendant, pulled out a Buck knife with an approximately 5" blade (T. 27, 28). This knife was never recovered. The other man in the front seat also had a knife, and pulled it right after the defendant did (T. 36).

Mr. Sebastian stopped as he saw the knife being pulled out. The defendant had turned his body a little to the left. He asked Mr. Sebastian if he wanted to die, if he was ready to die. The defendant acted very threatening (T. 31, 63). Mr. Sebastian told him, "Hey, don't do it. Take the car. Take all my money. Just don't cut me up." Sebastian held his hands up, palms forward (T. 33) and begged for his life (T. 64).

The defendant held the knife 6"-10" away from Mr. Sebastian's chest and switched the knife around (T. 32, 56). Mr. Sebastian's hand was pricked sometime during the incident, but he was uncertain whether the knife caused the injury. Still, Sebastian had not come in contact with anything else which could have caused it (T. 56).

Then the black man in the back started speaking. The defendant turned his head to listen. Mr. Sebastian took that opportunity to jump out (T. 33). He ran extremely fast up the street. He was afraid (T. 34). He ran up to a well-lighted house and pounded on the door (T. 34). A couple answered the door and let him in. The woman telephoned the police (T. 35). Mr. Sebastian described the assailants to the dispatcher. He told him there were two guys with knives.

Officer Bruce Jacobsen of the Salt Lake Police Department (T. 65) arrived at the house (where Mr. Sebastian had fled) 10-12 minutes later. The officer wanted Mr. Sebastian to look at two men he had apprehended a block away. One of these men was the defendant. In the officer's opinion, the defendant had been drinking, but was not intoxicated (T. 79, 80). The

defendant's coordination was fairly good. His speech was not impaired, and he understood what the officer was telling him (T, 101, 102).

The officer drove Mr. Sebastian to the site where the two men were apprehended (T. 38, 72). The defendant was sitting in a police car (T. 62), and the black man was outside of it. Mr. Sebastian was 20'-30' from the defendant. He had excellent visibility. There were bright lights on inside the defendant's car (T. 39).

Mr. Sebastian identified the defendant by pointing at him and saying, "That's the guy right there. You can haul him off and never let him out of jail" (T. 40).

After the police got all the information they needed from Mr. Sebastian, Sebastian took the cab back to the garage. The police, however, called Sebastian five to ten minutes later and informed him they had picked up the other men who they believed pulled the second knife. Mr. Sebastian could not identify him (T. 44).

At defendant's trial, the only major factual dispute concerned defendant's sobriety. Although both the arresting officer and Mr. Sebastian agreed that the defendant was not intoxicated (T. 50, 79, 80), defendant's companions testified that he was (T. 106, 119). Both of defendant's companions, however, were friends of his and had been convicted of several prior felonies (T. 103, 108, 111, 119, 124).

The only evidence concerning defendant's intoxicated state came from Officer Phil Terry, who was the booking officer

(T. 145). He identified the defendant (T. 151) and said that he thought that defendant was intoxicated. He said defendant was very boisterous, and was yelling at the officers. Mr. Terry recalled defendant had a difficult time standing still and ran words together (T. 153). The officer explained, however, that he was booking others at the time (T. 157).

The defendant also objected to the introduction into evidence of a substitute knife and a ruler (T. 12, 13, 45). The prosecution introduced these items for strictly demonstrative purposes (T. 12, 13).

SUMMARY OF ARGUMENTS

The trial court correctly allowed into evidence the substitute knife and ruler. This demonstrative evidence was helpful to the jury in understanding the circumstances surrounding the assault. Even if the evidence should not have been admitted, no prejudice occurred.

Defendant's argument that his intoxication negated the intent required for aggravated assault is without merit. Intoxication does not negate the general intent requirement of aggravated assault and there is no reason to exempt the facts of this case from that requirement.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED THE RULER AND
SUBSTITUTE KNIFE INTO EVIDENCE.

The victim testified that the defendant threatened him with a Buck knife having an approximately 5" blade (T. 29). The knife was not recovered after the assault. The State therefore

proffered a substitute knife and a ruler into evidence for demonstrative purposes only (T. 14, 45).

Defendant contends, however, that admission of these items into evidence was prejudicial, and that the cumulative effect of such evidence to the jurors, if not the individual ones, warrants a new trial. Defendant cites Rule 45 of the Utah Rules of Evidence in support of his contention, which provides the following balancing test:

Except as in these rules otherwise provided, the Judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice or of confusing the issues or of misleading a jury . . .

Defendant correctly points out that there must be an abuse of discretion to reverse a trial court's admission of evidence.

Martin v. Safeway Stores, Inc., Utah, 565 P.2d 1139 (1977).

There was not, and could not have been, an abuse of discretion in the instant case, however, since the use of the knife and the ruler as demonstrative evidence was in no way prejudicial.

Evidence is unfairly prejudicial if it has a tendency to influence the outcome of a trial by improper means, or if it appeals to the jury's sympathies, or arouses its sense of horror, provokes its instinct to punish, or otherwise causes the jury to base its decision on something other than established propositions of the case. Terry v. Zions Co-op Mercantile Institute, Utah, 605 P.2d 314 (1979).

Both the substitute Buck knife and a ruler did not rise to the level of prejudice previously described. The evidence of the knife and the length of the blade were central to the question of whether an aggravated assault occurred. The demonstrations regarding the length of the blade helped the jury to understand the seriousness of the threat involved, while the substitute knife was used by the victim to demonstrate how the defendant positioned the knife and its proximity to his chest. The jury drew the only logical and proper conclusion possible: that defendant was guilty of aggravated assault.

Replicas of physical evidence are usually admitted where the original item has been lost or destroyed, although the admissibility of the evidence is of course within the discretion of the trial judge. Reaves v. Horton, 518 P.2d 1380, affirmed in part, reversed in part, 516 P.2d 304 (Colo. App. 1973). Duplicates of originals may be used when the nature and properties of an article itself require consideration by a jury, or where, as with models, the model tends to explain how an event may have occurred. Rich v. Cooper, 380 P.2d 613 (Or. 1963). In the instant case, the duplicate knife and ruler were important in establishing how the assault took place and the level of threat involved. They helped the jury to understand why that particular kind of knife, along with the verbal threats, made the assault serious, and why the victim plead for his life and jumped out of the cab when the opportunity presented itself.

Defendant maintains, however, that the jury would believe that the substitute knife was actually the knife used in

the assault. Although there is a potential for misperceptions whenever substitute evidence is presented, these misperceptions did not exist in the instant case. The jury was fully aware that the knife was a substitute knife to be used for demonstrative purposes only and that the real knife was never recovered because of the length of time spent arguing about the length and width of the blade (T. 58, 59, 29, 30). If the real knife had been recovered, there would have been no need to have the ruler admitted into evidence. An example of a substitute weapon being admitted into evidence is found in Rich v. Cooper, supra. In Rich, the plaintiff sued a police officer for assault and battery allegedly committed during the arrest. The plaintiff sought to have a "sap" similar to the one the defendant had used upon him admitted into evidence. The defendant objected to the admissibility of the substitute evidence on the ground that it was not the sap he used. The trial court sustained the objection. On appeal, the court held that the plaintiff would be entitled to have the sap admitted into evidence on re-trial, unless material differences between the exhibit and the original were shown to exist.

Rich demonstrates that admissibility of a duplicate weapon into evidence outweighs the potential problem that the jury would assume the duplicate to be the actual weapon.

Rich also demonstrates that substitute evidence is considered relevant, contrary to the defendant's assertion that it is irrelevant and advances no material fact. However, the evidentiary substitution's probative value, discussed above, is

that it demonstrates the kind of knife used in the assault, and the manner in which it was used. Such information is crucial in establishing the elements of aggravated assault. Aggravated assault requires an assault (as defined in § 76-5-102, Utah Code Ann., 1953 (as amended)) plus the intentional causation of serious bodily injury or use of a deadly weapon. The kind of knife used and the length of the blade are important factors in determining whether the knife should be considered a deadly weapon pursuant to the statutory language.

Appellant cites Martin, supra, and Reiser v. Lohner, Utah, 641 P.2d 93 (1982) for the proposition that irrelevant evidence should not be admitted because it has no probative value and may create confusion. The State agrees with this principle, but maintains that it has no application here. The evidence was relevant, which makes it easy to differentiate the two cases cited above.

In Martin, the trial court excluded evidence of weather conditions at an airport twenty miles away from the scene of the accident at issue on the basis that its probative value was slight. In Reiser, supra, the court excluded evidence which did not cause the injury at issue.

Both of these cases discuss evidence that had no bearing on the issues and was thus properly excluded by the trial court. These fact situations are quite different from the instant case, where the evidence in question is critical to proving the elements of the charge and was properly admitted into evidence.

Defendant also claims that he was prejudiced when the jury was allowed to measure five inches on the ruler. He argues that the victim could not accurately describe the length of the blade. The victim, however, was quite certain of the length of the blade, and described it very precisely on several occasions. He first estimated the length of the blade to be about five inches long (T. 29), and then, using the ruler, narrowed the length down to 4 1/2" to 4 3/4" (T. 30). He stated once more that the blade was four to five inches long, and that it was well over four and under six inches (T. 59).

It would be difficult for any witness to be much more exact than was Mr. Sebastian. The defendant was not prejudiced by the measuring procedure because the jury only received a visual demonstration of what the victim's testimony had revealed. The jury did not speculate needlessly regarding the length of the blade. No speculation was possible because the jury was told almost exactly how long the blade was.

It is clear that neither the admission of the ruler nor the substitute knife was in error. This demonstrative evidence was important in assisting the jury's understanding of how the incident occurred. Defendant contends, however, that the admission of both pieces of evidence was error, and that even if the individual errors were not sufficient to warrant a new trial, the cumulative effect was. Defendant cites Gooden v. State, 617 P.2d 248 (Okla. Crim. App. 1980) to support the proposition that numerous irregularities may justify reversal. In Gooden, prejudicial questions were repeatedly asked despite repeated

sustained objections. The problems were compounded with prejudicial closing comments made by the prosecution.

The problem with defendant's contention, however, is that numerous errors did not occur in the instant case. The Wooden rule has therefore been inappropriately applied here. Moreover, any error that did occur was slight and would have not have changed the outcome of the case. Reversal will not result merely because there may have been error and reversal occurs only if the error is such that there was a reasonable likelihood that, in its absence, there would have been a result more favorable to the complaining party. Cerritos Trucking Co. v. Utah Venture No. 1, Utah, 645 P.2d 608 (1982). In the instant case, the result would have been the same, even if the evidence had not been admitted. The evidence of the knife and the length of the blade would have been admitted in any case.

The court properly admitted the ruler and the duplicate knife into evidence because it was helpful to the jury and was not prejudicial. Defendant's contentions are therefore without merit.

POINT II

THE EVIDENCE OF DEFENDANT'S INTOXICATION
DID NOT NEGATE THE REQUIRED INTENT FOR
AGGRAVATED ASSAULT.

Defendant claims to have been very intoxicated at the time the incident took place. In support of this contention, defendant points out that the booking officer had made an entry on the booking sheet describing him as very intoxicated (T. 106, 119).

The overwhelming evidence, however, indicates that while defendant had been drinking, he was not intoxicated. The victim testified that defendant was not intoxicated. Officer Jacobsen likewise testified that he was not intoxicated (T. 79, 80), and that the defendant's coordination was fairly good. The officer further stated that defendant's speech was not impaired, and that the understood what the officer was telling him (T. 101, 102).

Because the defendant was not intoxicated at all, his argument that intoxication negated the required intent is without merit. Even assuming, arguendo, that he was intoxicated, however, defendant still had the required intent when he pulled a knife on Mr. Sebastian.

Section 76-2-306, Utah Code Ann., (1953), as amended provides that voluntary intoxication is a defense when "such intoxication negates the existence of the mental state which is an element of the offense." Where the charge is aggravated assault, caused by a deadly weapon or force likely to produce death or serious bodily injury, however, the intent required is merely a general intent. State v. Potter, Utah, 627 P.2d 75 (1981); State v. Howell, Utah, 554 P.2d 1326 (1976).

Intoxication does not negate general intent. In State v. Jamison, 110 Ariz. 245, 517 P.2d 1241 (1974), defendant was convicted of aggravated assault. On appeal, defendant contended that the crime of aggravated assault is a crime that requires specific as opposed to general intent. The court held:

General criminal intent is implied
from the act itself while specific

intent is not. In the instant case we believe that the crime of assault of a police officer is a crime of general intent. Id. at 1244.

The court went on further to state:

In general intent cases, once the commission of the crime has been shown th absence of general intent may be shown by the defendant, but this is the defendant's burden and voluntary intoxication will not negate general intent. Id. at 1244.

A similar result was reached by this court in State v. Howell, supra. In Howell, the court held that the section of the aggravated assault statute referring to the use of deadly weapons requires only a general intent. The court found this general intent to be met even though the defendant claimed he was too intoxicated to know what he was doing.

In People v. Rocha, 92 Cal.Rptr. 172, 479 P.2d 372 (1971), the defendant was convicted of assault with a deadly weapon and asserted as error that the crime of assault with a deadly weapon was a crime which required a specific intent. Therefore, his intoxication could be introduced to negate the element of intent. The court held that assault with a deadly weapon is a general intent crime. Therefore, intoxication could not negate such intent. The court stated:

[T]he criminal intent which is required for assault with a deadly weapon . . . is the general intent to willfully commit an act the direct, natural and probably consequences of which if successfully completed would be the injury to another. Given that intent it is immaterial whether or not the defendant intended to violate the law or knew that his conduct was unlawful. The intent to cause any

particular injury . . . to severely injury another, or to injure in the sense of inflicting bodily harm, is not necessary." Id. at 376, 377.

Defendant contends, however, that the facts of this case should require specific intent. He maintains that general intent should be required in cases where a deadly weapon is held by a defendant but never used to threaten the victim, as in Potter, supra. He distinguishes his own situation by stressing that he intentionally used a weapon and caused fear in his victim, thus warranting specific intent.

Appellant's contention, however, is groundless. This fact situation is comparable to that found in Howell, discussed supra. In Howell, the defendant had the intent to use a deadly weapon and to cause fear in his victim. The Howell defendant, in fact, went further than the defendant in the instant case and actually caused severe bodily harm to his victim. This Court held nevertheless that only general intent applied.

The general intent standard should remain for aggravated assault. As the court in Rocha, supra, stated:

{I}t would be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with deadly weapon or simple assault which are so frequently committed in just such a manner. Id. at 374.

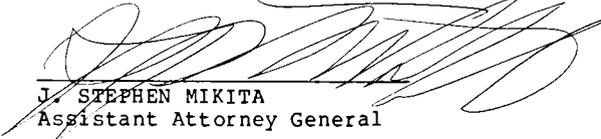
When appellant states in his brief that he intentionally assaulted his victim, he should not be allowed to go free because of his voluntary intoxication.

CONCLUSION

Based on the foregoing arguments, the judgment of the court below should be affirmed.

Respectfully submitted this 27th day of January, 1985.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid, to James A. Valdez, Attorney for Appellant, Salt Lake Legal Defender Assn., 333 South Second East, Salt Lake City, Utah 84111.