1984

The State of Utah v. Efrain Rojos Haro : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent v. EFRAIN ROJOS HARO Defendant-Appellant	: : : : : :	Case No. 19069

BRIEF OF APPELLANT

Appeal from a conviction and judgment of two counts of Aggravated Assault, felonies in the Third Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

WILLIAM ALBRIGHT
Salt Lake Legal Defender Assn.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

DAVID WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

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STATEMENT OF THE NATURE OF THE CASE

The appellant, EFRAIN ROJOS HARO, appeals from the judgment and conviction after a jury trial in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding, of two counts of Aggravated Assault, felonies in the Third Degree.

DISPOSITION IN THE LOWER COURT

Appellant was convicted on January 6, 1983, and was sentenced to the Utah State Prison for the indeterminate terms of zero to five years to run consecutively.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his convictions of Aggravated Assault, or in the alternative, a new trial.

STATEMENT OF FACTS

On the 31st day of August, 1982, Mr. Phillip Tatum heard voices outside his apartment window (T. 6-7). He testified that he heard a number of voices, at least half a dozen (T. 13). However, he could not distinguish what language they were speaking nor the individuals speaking (T. 14, 17). After a moment or two, he heard an explosion and went to his window and saw Efrain Haro, his neighbor, standing over Carlos and Miguel Ibarra holding a pistol and yelling (T. 8). He then saw Mr. Haro run towards his apartment (T. 8). When Tatum came out, he saw Carlos Ibarra on th ground bleeding.

Mr. Tatum indicated that he knew Mr. Ibarra because his boy plays with Mr. Ibarra's boy (T. 8, 19). He further indicated that he had never had a conversation with either Carlos or Miguel Ibarra because they do not speak English (T. 21). The direct examination of Carlos Ibarra was conducted through a translator.

Mr. Carlos Ibarra through his interpreter said that on the night of August 31, 1982, he was home watching T.V. when he and his brother Miguel decided to go for a walk (T. 28-30).

Miguel and Carlos Ibarras' testimony was very simila They testified that they went for a walk late at night, and Mr. Haro came out from his apartment building, pointed a

gun at the midsection of Carlos Ibarra then down at his leg and shot. They further testified that he later pointed the gun at Miguel and said, "Do you want some too?" in Spanish (T. 37-70).

Defendant's testimony was that another individual named Mr. Romero had overheard the victims talking about getting Mr. Haro and led Mr. Haro to believe that they intended to come over and rob him, thus initiating the shooting. That witness was unavailable for trial (T. 74-100).

ARGUMENT

POINT I

TRIAL COURT ERRED IN NOT ALLOWING HEARSAY TESTIMONY OF DEFENDANT INTO THE RECORD UNDER THE EXCITED UTTERANCE EXCEPTION

The pertinent rule of evidence applicable at the time of trial was Rule 63 of the Utah Rules of Evidence:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: ...(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally -- A statement (a) which the judge finds was made while the defendant was perceiving the event or condition which the statement narrates, describes, or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception. . . .

This Court most recently construed the excited utterance exception in State v. McMillan, 588 P.2d 162, 163 (Utah 1978). In outlining the requirements of the exception

provided for in Rule 63(4), the Court quoted the Washington Supreme Court in Johnston v. Ohls, 457 P.2d 194 at 199 (Washington 1969):

> The crucial question in all cases is whether the statement was made while the declarant was under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or in the exercise of choice or judgment.

In order for such a statement to be under the influence of the exciting event, the statement need not be strictly contemporaneous. Wigmore on Evidence notes:

> It is to be observed that the statements need not be strictly contemporaneous with the exacting cause: they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.

John Wigmore, Evidence in Trial at Common Law, §1750 (6th ed. 1976).

This rationale was relied upon by the court in Johnston v. Ohls, in stating, "It is not necessary that the statement in question be made simultaneously with the event and some fluctuation in the time element is necessarily allowed." Id. at 199. See also May v. Wright, 381 P.2d 601 (Washington 1963).

In addition to affirming the fluctuation in time element of excited utterances, May v. Wright, 381 P.2d 601, has special significance in the instant case. The court in May v. Wright, 381 P.2d 601, noted:

> In the normal situation the trial court has exercised its discretion by either permitting or rejecting the admission of statements on

> the basis of their being excited utterances (often referred to by the label res gestae); and on appeal this court has exercised some deference to the exercise of discretion by the trial court in applying a flexible standard. In the instant case, however, the comments of the trial court do not indicate a reliance upon the concept of excited utterance in ruling upon the question of admissibility. So consideration and deference to an exercise of discretion by the trial court are not within the purview of this case.

Id. 381 P.2d at 603-04.

Subsequently, the court in May v. Wright found admissible certain excited utterances given to a police officer by the declarant twenty minutes after the exciting cause.

FAILURE TO ADMIT EVIDENCE WAS ERROR

In the present case the appellant contends that it was reversible error for the trial court to disallow the appellant, Mr. Haro, to testify as to the excited statements of Mr. Romero (T. 92).

The appellant testified that he and his neighbor, Mr. Romero, had been watching television in the appellant's apartment (T. 86). Appellant testified that Carlos Ibarra, whom the appellant wounded a few hours later, was peering into the appellant's apartment through the open front door (T. 90). Carlos Ibarra signaled to the appellant's friend, Mr. Romero, that he wanted to speak with him (T. 91). The appellant testified that Mr. Romero talked to Carlos Ibarra for around five minutes outside of the apartment (T. 92) Appellant then testified:

Q: Then what happened?

A: Well, my neighbor came back and, you know, it looks like he was a little bit excited or something like that. And he just told me to--

Mr. Reese (prosecutor): I object, your Honor. Hearsay.

The Court: Sustained

(T. 92).

First, appellant contends that the statement given to him by Mr. Romero comes within the exception provided for by Rule 63(4)(b). The testimony by Mr. Haro clearly indicates that Mr. Romero was in a state of nervous excitement. The statements of Mr. Romero which the defendant tried to convey were also given immediately after Mr. Romero's encounter with Carlos Ibarra. The fact that the appellant felt it necessary to carry a weapon to defend himself after hearing what Mr. Romero told him (T. 98) corroborates the tense nature of the encounter between Mr. Romero and Carlos Ibarra. Further, the appellant's observation that Mr. Romero was excited is spontaneous and uncovered and re-enforces the veracity of the excited state of Mr. Romero. Given these considerations appellant contends he should have been allowed to testify as to the exact nature of Mr. Romero's remarks.

Second, the trial court failed to consider the offered testimony under the concept of an excited utterance. Therefore, deference to the discretion of the trial court

on this matter cannot be exercised since the trial court did not consider the matter.

The record is devoid of any indication that the trial court considered the facts and circumstances surrounding the offered testimony and then made a decision as to the reliability of the statement under the strictures of the standard given in State v. McMillan, 588 P.2d 162. Appellant contends that as a matter of statutory and case law, he was entitled to such a determination.

As a result of not considering the hearsay under the excited utterance exception, appellant contends his case was substantially prejudiced. Appellant was left without a basis on the record to support his testimony that he was afraid of being robbed or assaulted by Carlos Ibarra. The hearsay testimony goes to the heart of appellant's testimony that he reasonably acted in self defense. The record shows substantial evidence to allow the hearsay into the record under the excited utterance exception, but the court failed to make any such determination.

POINT II

THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT THE CONVICTION

Appellant contends that the evidence was insufficient to support the verdicts and that the case should be dismissed. The authority of a reviewing court to reverse a verdict on insufficiency of the evidence is well settled. The standard

of review was stated in State v. Petree, 659 P.2d 443 (Utah 1983) where it was stated:

> [W]e reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

Id. at 444.

See also State v. Linden, 657 P.2d 1367 (Utah 1983).

Specifically, the appellant contends the evidence was not sufficient to support a verdict of guilty under the terms of §76-5-103 Utah Code Ann. (1953 as amended):

> Aggravated assault--(1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:
>
> (a) He intentionally causes serious bodily injury to another; or
>
> (b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.

First, the evidence clearly indicates that the appell Mr. Haro, did not intentionally shoot Carlos Ibarra. While walking outside, the appellant testified that Carlos Ibarra and his brother, Miguel Ibarra, came up behind him (T. 100). Miguel Ibarra, according to the appellant, was carrying a pipe about two feet long (T. 108). Appellant, reacted to the confrontation, the pipe, and the threat he perceived, by shooting once at the ground (T. 100). Appellant's specific testimony during direct and cross examination shows that he did not intend to wound Carlos Ibarra (T. 100, 111).

Testimony of Carlos and Miguel Ibarra fails to indicate that they perceived the appellant's action as deliberate. The lack of any indication of deliberate and intentional action on the part of the appellant in the testimony of Carlos and Miguel Ibarra corroborates the appellant's testimony that he was just trying to stop them from approaching him (T. 111).

Second, no evidence was introduced to indicate that the use of force by the appellant was likely to produce death or serious bodily injury. The treating physician and paramedics did not testify nor did any medical expert establish the extent and nature of the wound. The police officer who testified at the trial stated he did not treat the wound (T. 73). The state failed to establish any medical evidence that the act in question was life threatening.

Viewing the evidence in a light most favorable to the verdict demonstrates that the evidence does not support the verdict. The state did not produce any evidence of intent to assault. The testimony of Carlos and Miguel Ibarra shows that the appellant did not confront them. Exactly how the confrontation occurred is not clear from their testimony. Appellant's testimony shows that he was surprised by the confrontation and given that he was concerned for his safety, his reaction was instinctive. The wound in the leg corroborates the appellant's intent to shoot at the ground.

The totality of the evidence "must cover the gap between the presumption of innocence and the proof of guilt."

Petree at 444-45. The total lack of any medical testimony introduced by the state and the aspects of the testimony of Carlos and Miguel Ibarra which corroborate the appellant's testimony show that the gap between innocence and guilt was not covered.

CONCLUSION

The trial court erred in not considering the offered testimony of the appellant under the excited utterance exception to the hearsay rule. As a result, the case of the appellant was substantially prejudiced since he could not testify as to why he was afraid for his life. The evidence clearly was so questionable that it cannot support a conclusion of intent to cause serious bodily injury and force likely to produce death or serious bodily injury. Under the standard adopted by this Court, the convictions should be reversed because reasonable minds must have entertained a reasonable doubt that appellant committed the crimes for which he stands convicted.

Respectfully submitted this 26 day of October, 1984.

William Albright

WILLIAM ALBRIGHT
Attorney for Appellant

DELIVERED a copy of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this 26 day of October, 1984.

Connie Lemmon