Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1969

William Coleman v. State of Utah : 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.Gerarld G. Gundry; Attorney for Defendant-Appellant

Recommended Citation
Brief of Appellant, *Coleman v. Utah*, No. 11722 (1969).
https://digitalcommons.law.byu.edu/uofu_sc2/4835

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. 11722

WILLIAM COLEMAN, :

Defendant-Appellant, :

BRIEF OF APPELLANT

An Appeal from the Jury Verdict
and Judgment of the District Court
of Weber County, the Honorable
Edward Sheya, Judge

GERALD G. GUNDRY
692 Kennecott Building
Salt Lake City, Utah 84111

Attorney for Defendant-
Appellant

VERNON B. ROMNEY
Attorney General
236 State Capitol Building
Salt Lake City, Utah

Attorney for Plaintiff-
Respondent

FILED

TABLE OF CONTENTS

STATEMENT OF NATURE OF CASE 1

DISPOSITION IN THE LOWER COURT 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 3

ARGUMENT

POINT I 10

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY TO DISREGARD THE OPINION OF ANY OF THE WITNESSES, THE OPINION OF THE DEFENDANT, OR THE OPINIONS OF THE COMPLAINING WITNESS, WRITTEN OR ORAL AS THIS DEPRIVED THE APPELLANT OF HIS RIGHT TO HAVE THE JURY FULLY AND FAIRLY CONSIDER EVERY FACTUAL MATTER SUPPORTED BY SUBSTANTIAL EVIDENCE RAISED IN HIS DEFENSE, AND CONSTITUTED A COMMENT ON THE EVIDENCE.

CONCLUSION 21

CASES CITED

Alabama Lumber vs. Keel, 125 Ala. 603, 28 So. 204 (1900) 15

Haight vs. Vallet, 89 Cal. 245, 26 P. 897 (1891) 17

Hartley vs. Salt Lake City, 41 Ut. 121, 124 P. 522 (1912) 14

Martin vs. Los Angeles Turf Club, 39 C.A. 338, 103 P.2d 188 (1940) 17

Mecham vs. Allan, 1 U.2d 79, 262 P.2d 285 (1953) 15

Morgan vs. Bingham Stage Lines Co., 75 Ut. 87, 283 Pac. 160 (1912) 14

People vs. Carmen, 36 C.2d 768, 228 P.2d 281 (1951) 16

People vs. Jeter, 60 C.2d 671, 388 P.2d 355 (1964) 16

People vs. Schader, 62 C.2d 716, 401 P.2d 665 (1965) 16

Rosander vs. Market Street Ry. Co., 89 C.A. 710, 265 Pac. 536 (1928) 17

Security Ben. Ass'n. vs. Small, 34 Ariz. 458, 272 Pac. 647 (1928) 19

State vs. Castillo, 23 U.2d 70, 457 P.2d 618 (1969) 17

State vs. Cobo, 90 Ut. 89, 60 P.2d 952 (1936) 21

State vs. Crank, 105 Ut. 332, 142 P.2d 178 (1943) 15

State vs. Eisenstein, 72 Ariz. 320, 235 P.2d 1011 (1951) 18

State vs. Green, 78 Ut. 580, 6 P.2d 177 (---) 15

State vs. Hanna, 81 Ut. 583, 21 P.2d 537 (1933) 15

State vs. Rosenbaum, 22 U.2d 159, 449 P.2d 999 (1969) 19

State vs. Selgado, 76 N.M. 187, 413 P.2d 469 (1966) 16

State vs. Smith, 90 Ut. 482, 62 P.2d 1110 (1936) 21

Weber vs. Snow, 102 Ut. 435, 132 P.2d 114 (1942) 14

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 11722
vs.	:	
WILLIAM COLEMAN,	:	
Defendant-Appellant,	:	

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

The appellant, William Coleman, appeals from his conviction of the crime of assault with a deadly weapon with intent to do bodily harm in violation of Utah Code Ann. Section 76-7-6 (1953), by a jury in the Second Judicial District Court in and for Weber County, State of Utah, the Honorable Edward Sheya presiding. The appellant was sentenced to the indeterminate term not to exceed five years imprisonment at the Utah State Prison.

DISPOSITION IN THE LOWER COURT

The appellant was charged in an information filed on December 6, 1968 charging the appellant with assault with intent to commit murder alleging that he assaulted Linda Martin, with intent to murder. The appellant was arraigned on December 9, 1968 and entered a plea of not guilty to the information on December 16, 1968. The jury trial in the instant case commenced on April 15, 1969 in Ogden, Utah, and concluded on April 18, 1969. The jury found the appellant guilty of assault with a deadly weapon with intent to do bodily harm, a lesser included offense in the initial charge. Judge Edward Sheya entered a judgment upon this verdict and on the 8th day of May, 1969, sentenced the appellant to a term not to exceed five years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The appellant requests that the conviction be reversed, and a new trial granted.

STATEMENT OF FACTS

For the purposes of this brief the transcript of the testimony will be referred to as "T". The record of the proceedings, as certified by the Weber County Clerk, will be referred to as "R". It was stipulated by counsel that on the 19th day of September, 1968, the appellant fired two shots from a .22 caliber pistol at the prosecuting witness, Linda Martin; the bullets entered her body. The complaining witness, Linda Martin, and the appellant had been seeing each other socially for some time and Miss Martin desired to discontinue this relationship. The shooting took place on the steps of the Pingree School in Ogden, Utah. The appellant testified that he had been drinking during the day and that he had removed a .22 caliber automatic pistol from his automobile which had been abandoned on the highway (T. 193, and T. 200). The appellant

further testified that during a struggle, which took place on the steps of the Pingree School, the gun in his possession accidentally discharged inflicting the injuries on Miss Martin. Appellant stated he had no intention of killing anyone (T. 298), and that he was in love with the complaining witness on the night of the shooting, (T. 300).

In connection with the defense presented by the appellant, Trooper Newell G. Knight, testified on behalf of the appellant. Trooper Knight, a trooper connected with the training division of the Utah State Highway Patrol, testified to his qualifications as an expert in the field of alcohol and its effect on the human body and mind. Trooper Knight stated that he was able to compute what he believed to be the appellant's level of blood alcohol as a result of the stated quantities of beverages consumed by the appellant. Trooper Knight stated in his opinion that

the appellant, at the time and date in question, would have a blood alcohol level, "Probably in the area of between point one five and point one eight per cent." (T. 240) Trooper Knight further testified that in his opinion with that level of alcohol, appellant would be impaired. (T. 242) He stated further that with the use of certain tests the appellant's mental and motor abilities "would be measurably impaired to the point that we could measure the impairity." The following dialogue took place between appellant's counsel and Trooper Knight:

> "Q. Now talking about this same man again, his physical impairedness. How would that affect his ability to handle a gun?
>
> A. Well, the physical impairment to be physically impaired means a number of things. One, your reactions are different, you can either be slowed down or speeded up. The person would be more unsafe with a gun as a person would be more unsafe to drive. How much he would be impaired it is hard to

say. When a person is impaired the, the fine motor reflexes that we have become impaired. To have a man write a sentence, for example, at very low levels of alcohol he may become very, scrawling in his writing. So I think that to measure this impairment the fine muscle sense and the muscle tone is, he is very definitely impaired and I think a man would be impaired to handle any type of gun, whether it is a car or gun or whatever it is." (T. 244)

The counsel for the appellant at trial also called Mr. Roscoe E. Grover to the stand on behalf of the appellant to testify as a gunsmith. Mr. Grover stated that he had been a gunsmith, as a sideline, for approximately 29 years and testified that it is possible that a semi-automatic weapon, similar to the one in question, can, through wear, maladjustment, or alteration, malfunction in a manner causing it to continue to fire if the trigger is pulled just once. Mr. Grover further testified, in his opinion, as a gunsmith, that notwithstanding the safety devices

on most small semi-automatic pistols it is possible that the firearm can be discharged unintentionally under certain conditions of malfunction. (T. 256, 257)

At the conclusion of the state's rebuttal case, the court instructed the jury, in Instruction No. 7 (R. 17), as follows:

> "Our law provides that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." This means that such a condition, if shown by the evidence to have existed in the defendant at the time when allegedly he committed the crime charged, is not of itself a defense. It may throw light on the occurence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct.
>
> However, when the existence of any particular motive, purpose or intent is a necessary element to

> constitute a particular kind or degree of crime, the jury, in determining whether or not such motive, purpose or intent existed in the mind of the accused, must take into consideration the evidence offered to prove that the accused was intoxicated at the time when the crime allegedly was committed.
>
> This fact requires an inquiry into the state of mind under which the defendant committed the act charged, if he did commit it. In pursuing that inquiry, it is proper to consider whether he was intoxicated at the time of the alleged offense. The weight to be given the evidence on that question and the significance to attach to it, in relation to all the other evidence, are exclusively within your province."

The court had previously instructed the jury in Instruction No. 5 (R. 17) that:

> "You are instructed that you are not to be governed by the opinion of any of the witnesses nor by the opinion of the defendant nor the complaining witness, whether written or oral, as to what happened on the evening of September 19, 1968, but that you are to determine the happenings or occurences of that evening solely by all of the facts and circumstances which have been introduced in evidence before you."

Defense counsel objected to the giving of Instruction No. 5 in the following exchange:

> "MR. RENCHER: What number jury instruction was it on opinion?
>
> MR. SHARP: Five I believe.
>
> THE COURT: I think that if you understood that instruction you would have no objection to it. I tell them to base their verdict upon all of the circumstances and facts in the case, you see. I simply say that they are not to be governed by the opinion of any witness, but that they should base their verdict upon all the facts and circumstances of the case. I don't believe that you will find that is in error if you read it carefully.
>
> MR. RENCHER: Your Honor, I respect the situation of the court and ask permission to enter an exception in the record concerning Instruction No. 5.
>
> THE COURT: You may have your exception.
>
> MR. RENCHER: Thank you, Your Honor. Defendant excepts to Instruction No. 5 for the reason that opinion evidence was ruled admissible and entered into evidence in this case and therefore, should be considered

by the jury. Thank you, Your Honor." (T. 327, 328)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY TO DISREGARD THE OPINION OF ANY OF THE WITNESSES, THE OPINION OF THE DEFENDANT, OR THE OPINIONS OF THE COMPLAINING WITNESS, WRITTEN OR ORAL AS THIS DEPRIVED THE APPELLANT OF HIS RIGHT TO HAVE THE JURY FULLY AND FAIRLY CONSIDER EVERY FACTUAL MATTER SUPPORTED BY SUBSTANTIAL EVIDENCE RAISED IN HIS DEFENSE, AND CONSTITUTED A COMMENT ON THE EVIDENCE.

Without question the origin of jury Instruction No. 5 (R. 17) may be found in the discussion between court and counsel dealing with a letter sent by the complaining witness, Linda Martin to the appellant subsequent to the shooting and prior to the trial. This letter appears in the record at Page 19 as defendant's Exhibit 1 (the envelope) and defendant's Exhibit 2 (the letter). The letter, in effect, states that the

complaining witness was confused as to the events of the night in question, and that she felt the shooting was an accident.

The court out of the hearing of the jury made the following statement shortly prior to the admission of the letter in question:

> "Talking from his (the district attorney's) standpoint whether the objection should be made to the letter or whether it shouldn't be allowed in as long as they (jurors) already know practically what it contains and have heard the conversation which contains the same type that is in the letter, but I am going to instruct on that. I am going to make proper instruction, what I think are proper instructions, at any rate. If the letter is admitted, and I think in view of the telephone conversation there should be instructions made also. As to the weight to be given to any opinion that she may have expressed."

It was the courts concern over the complaining witnesses opinion as to whether or not the shooting was accidental, that led the trial judge into formulating jury Instruction No. 5,

which goes substantially beyond anything contemplated at the time of the admission of defendants Exhibits 1 and 2.

Instruction No. 5 does not deal solely with the problem of the complaining witness's subsequent opinion of the events on the night of September 19, 1968 but extends to opinions of any witnesses, opinions of the defendant and of the complaining witness, whether written or oral, as to what happened during the evening of September 19, 1968. The appellant urges that such a broad-brushed treatment of opinion evidence, particularly in view of testimony offered for the defense, effectively eviscerates the defense position and denies to the appellant the benefit of the testimony of Trooper Knight and Roscoe E. Grover. These gentlemen were both testifying from opinion. There is nothing in the record to indicate that either of these defense witnesses had any personal connection

whatsoever with the principals involved in the shooting or any personal proximity to or connection with the events of the evening of September 19, 1968.

Unquestionably, with the proper qualification and after proper foundation has been laid at trial, the appellant is entitled to present opinion evidence, as it bears on the level of his intoxication and opinion evidence bearing upon the mechanical malfunctions of hand guns. It is interesting to note that although the jury is instructed in Instruction No. 5 not to be governed by the opinion of Trooper Knight, an individual with extensive experience in dealing with the physiological effects of alcohol, they are instructed in Instruction No. 7 to take into consideration evidence offered to prove that the accused was intoxicated at the time the crime allegedly was committed.

This paradox created by the unjustified language of Instruction No. 5, viewed in light the defendant's right to present defenses to these charges leads to one conclusion, the trial court committed reversible error.

The effect of such an instruction is to withhold from the consideration of the jury evidence on behalf of the defendant and to effectively comment upon the evidence as prohibited by the laws of the State of Utah. The court in giving instructions must not resolve conflicts in evidence for the jurors or indicate what particular testimony a trial court may believe correctly states the facts. Weber vs. Snow, 102 Ut. 435, 132 P.2d 114 (1942); State vs. Hanna, 81 Ut. 583, 21 P.2d 537 (1933); Hartley vs. Salt Lake City, 41 Ut. 121, 124 Pac. 522 (1912); Morgan vs. Bingham Stage Lines Co., 75 Ut. 87, 283 Pac. 160 (1929). Further,

to instruct on or explain the evidentiary value of some facts to the exclusion of others, unless such facts require explanation, would tend to emphasize particular evidence. This has been held to constitute a comment on the evidence by the court. Mecham vs. Allan, 1 Ut. 2d 79, 262 P. 2d, 285 (1953). As stated in State vs. Crank, 105 Ut. 332, 142 P. 2d 178 (1943):

> "In this state it is exclusively the province of the jury to pass upon the evidence, and the court may not make any comment thereon. State vs. Green, 78 Ut. 580, 6 P. 2d 177.

Likewise, the court should not give instructions which tend to eliminate an issue properly before the jury on which evidence has been received. Alabama Lumber vs. Keel, 125 Ala. 603, 28 So. 204 (1900). The California Supreme Court in People vs. Schader stated that the failure to instruct a jury on the basis

of defendants evidence constitutes prejudicial error. 62 C.2d, 716, 401 P.2d 665 (1965).

Other California cases with similar holdings are People vs. Jeter, 60 C.2d 671, 388 P.2d 355 (1964); People vs. Carmen, 36 C.2d 768, 228 P.2d 281 (1951).

It should be noted that the jury instructions are intended to enlighten the jury and call attention to specific issues which must be determined by them and, contrary to Instruction No. 5 given in the case at Bar, instructions should contain only statements of law to be applied in this determination. State vs. Selgado, 76 N.M. 187, 413 P.2d 469 (1966). This Court has stated that the defendant is entitled to have the jury instructed on his theory of the case, providing there is substantial evidence to justify the instruction. This is true notwithstanding a material conflict with the states

proof and notwithstanding whether or not the jury may entertain a reasonable doubt as to the defenses raised. State vs. Castillo, 23 Ut. 2d 70, 457 P. 2d. 618 (1969).

Along with the reasonable and necessary holdings that the defendant is entitled to instructions on his theory of the case and that the instructions must be used for the enlightenment and guidance of the jury, and not as a limitation or comment upon defendants evidence, courts have held that juries are properly instructed that they have no right to arbitrarily disregard the opinions of experts, but are not obligated to follow them if these opinions are unreasonable or not worthy of their credance. Martin vs. Los Angeles Turf Club, 39 C. A. 338, 103 P. 2d 188 (1940); Haight vs. Vallet, 89 Cal. 245, 26 P. 897 (1891); Rosander vs. Market Street Ry. Co. 89 C. A. 710, 265 P. 536 (1928).

The neighboring state of Arizona has in the case of State vs. Eisenstein, approved an instruction dealing with the opinions of witnesses which stated:

> "The rules of evidence ordinarily do not permit the opinions of witnesses to be received as evidence. An exception to this rule exists in the case of expert witnesses, and also in the case of non-expert witnesses relative to the question of sanity or insanity. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. Likewise, non-expert witnesses may give their opinions on questions of sanity or insanity. You should consider such opinions and should weigh the reasons, if any, given therefor. You are not bound, however, by any such opinions. You may give them the weight to which you deem them entitled, whether that be great or slight, and you may reject them, if in your judgment the reasons given therefor are unsound." (72 Ariz. 320, 235 P.2d 1011 at 1018).

Compare, however, Security Ben. Ass'n. vs. Small, 34 Ariz. 458, 272 P. 647 (1928) wherein the Arizona Supreme Court held the trial court should not disparage the testimony of experts or instruct them in the manner of determining the weight of the expert testimony. To do so, the court said, would be to violate the Arizona Constitutional Provision which provides that Judges shall not charge juries with respect to matters of fact nor comment thereon, but simply declare the law.

As recently as 1969, this Court in State vs. Rosenbaum, 22 Ut. 2d, 159, 449 P. 2d 999, found prejudicial error had been committed when a trial court, in instructing on how they must consider the defendants alibi evidence, indicated that caution should be used. Justice Ellett speaking for a unanimous court, stated that it was prejudicial error for the court to

indicate to the jury that they should apply a different standard for determining the weight of evidence regarding alibi from that which they were to apply to any other evidence in the case. Likewise, appellant urges that it is prejudicial error for the court to take from the consideration of the jury the opinion stated by the defense witnesses and by the prosecuting witness. Fundamental fairness requires that the defendant be entitled to present evidence, opinion or otherwise, if admissible, to repudiate or explain the charges brought against him by the state; and this evidence should stand on the same footing as the other evidence in the case. Appellant suggests that, at the most, the trial court should have instructed the jury to regard the opinion evidence, but to regard the backgrounds of the witnesses and the basis of their opinions in giving weight to such testimony.

It might be argued that trial counsel for the appellant should have submitted such an instruction, however, this court has held that in matters which effect fundamental rights of the defendant the appellate court will take cognizance of the error notwithstanding the absence of a proferred, proper instruction. State vs. Cobo, 90 Ut. 89, 60 P.2d 952 (1936); State vs. Smith, 90 Ut. 482, 62 P.2d 1110 (1936).

CONCLUSION

A fair reading of the record indicates an intention on the part of the trial judge to limit the effect of opinion statements made by the complaining witness in a letter written to the appellant, admitted into evidence by the appellant after great difficulty. This intention was manifest in jury Instruction No. 5 which in its sweeping language takes from the consideration of the jury not only that rather unimportant statement of the complaining witness

but literally strikes from their consideration the testimony, on behalf of the appellant, of Trooper Knight, an expert in alcohol studies; and Roscoe Grover, an expert gunsmith. Such an instruction when read with Instruction No. 7, is confusing; such an instruction when considered against the defense presented by the appellant constitutes a great limitation on the evidence presented; and such an instruction when considered in light of Utah law is a comment, and probably the ultimate judicial comment, upon evidence presented by appellant. This, we urge, is prejudicial, reversible error. The judgment should be reversed and the appellant granted a new trial.

Respectfully submitted,

Gerald G. Gundry
Attorney for Defendant-Appellant

692 Kennecott Building
Salt Lake City, Utah 84111