1984

State of Utah v. Jeffrey Mcintyre Roberts : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 19398
JEFFREY McINTYRE ROBERTS,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from the judgment and conviction rendered by the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable J. Robert Bullock, Judge, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for the offense of Theft by Deception, a Second Degree Felony, in violation of Utah Code Annotated §76-6-405(1) (1953 as amended) in the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable J. Robert Bullock, Judge, presiding.

DISPOSITION IN THE LOWER COURT

Appellant, Jeffrey McIntyre Roberts, was charged by Information with Theft by Deception, a Second Degree Felony, in violation of Utah Code Annotated §76-6-405(1) (1953 as amended). Trial was held on the 4th and 6th days of May, 1983. On the 6th day of May, appellant was convicted by a jury of the offense, as charged in the Information.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of guilt entered against him and an order of dismissal, or, in the alternative, a new trial.

STATEMENT OF FACTS

A substantial portion of the testimony offered at

trial was disputed by the parties. However, for purposes of this appeal, and the legal issue involved herein, appellant will recite, substantially, the facts as testified to by the State's witnesses.

The State's primary witness was Mr. David Rail. Rail testified that in 1978, he was employed as a life insurance agent in England. (Transcript Page 41; Record page 176) While there, he became acquainted with and sold a life insurance policy to the alleged victim, Miriam Marlowe, and her husband (Tr. 41; R. 76). In 1980, Rail left England and came to Utah where he continued with his life insurance business (Tr. 42; R. 177). In July of 1981, Miriam Marlowe's husband died in a swimming accident (Tr. 42; R. 177). Rail, pursuant to the provisions of the policy he had sold them, began processing the claim with Mrs. Marlowe as the named beneficiary in March of 1982 (Tr. 42; R. 177).

Rail testified that he discussed the availability of the Marlowe's insurance proceeds with Mr. John Walton sometime during March of 1982 (Tr. 44; R. 179). Mr. Walton was a friend of Rail who had an office in the same business complex as Rail (Tr. 44; R. 179). It was during one of these conversations that appellant was present and overheard the discussion concerning the availability of the Marlowe money (Tr. 44; R. 179).

A couple of days later, appellant approached Rail. According to Rail, appellant told him that he had a friend in the State Department who had access to substantial amounts of gold located in Brazil (Tr. 45; R. 180). Appellant also told

Rail that this friend could purchase the gold at $100.00 an ounce in Brazil and turn it over in this country for approximately $300.00 an ounce (Tr. 45; R. 180).

Based on these representations, Rail persuaded Marlowe to invest approximately $25,000.00[1] of her insurance proceeds with appellant (Tr. 46; R. 181). The total amount of proceeds payable to Marlowe was $38,000.00 (Tr. 46; Record 181). Appellant, during this period of time, had no direct contact or conversation with Marlowe. In fact, the two saw each other for the first time at trial (Tr. 108; R. 243).

Because Marlowe was residing in California in 1982 (Tr. 43; R. 178), Rail testified that he flew there in order to deliver the insurance proceeds to her (Tr. 46; R. 181). At that time, he obtained the $25,000.00 from her as well as $3,000.00 for a personal loan from her to him (Tr. 47; R. 182). Rail also testified that he later borrowed an additional $5,000.00 from Marlowe (Tr. 47; R. 182). At the time of trial, he had re-paid $500.00 of the $8,000.00 loan (Tr. 115; R. 250).

Rail then indicated at trial that Marlowe was to receive double her investment ($50,000.00) on the gold transaction and that he and appellant had agreed to split the remaining $25,000.00 between themselves (Tr. 48-49; R. 183-184).

At some point during the negotiations, Rail and appellant discussed the possibility of appellant putting up a

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[1]The exact amount invested towards the gold venture was $24,861.00. This is so because Rail and appellant needed $139.00 to cover the costs of closing, and took it out of Marlowe's $25,000.00. See State's Exhibits 1 and 2.

piece of real property he owned as security for Marlowe's investment (Tr. 52; R. 187). Eventually, appellant conveyed, by warranty deed, a piece of property he owned, to Marlowe (Tr. 79; R. 214). However, the property was encumbered by a tax lien (Tr. 54; R. 189). Also, appellant had a deed of trust on the property in the amount of almost $16,000.00, which was in default, but which all parties were aware of at the time of closing (Tr. 81; R. 216). Although the evidence is unclear as to the total amount of the tax lien on the property, Walton testified that he thought it was approximately $6,200.00 (Tr. 135; R. 270).

Although this point was never clarified at trial, the value of the property was somewhere between $38,000.00 to $50,000.00 according to Rail[2] (Tr. 89-90; R. 224-225). The parties agreed that the gold was to be delivered within 90 to 120 days, and at that time, upon delivery, the property would be conveyed back to appellant (Tr. 54; R. 189).

On April 15, 1982, Rail delivered the $25,000.00 to Empire Title Company and the transaction was completed (Tr. 59; R. 194).

In July of 1982, Rail discovered that the property appellant had conveyed had been foreclosed on and was the subject of a Sheriff's sale (Tr. 66; R. 201). On cross examinati

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[2]Mr. Rail testified at trial that he valued the property, conservatively, at $38,000.00 - $42,000.00 (Tr. 89; R. 224). However, he admitted later that when he applied for his loan on the property, he placed a value of $50,000.00 on the property (Tr. 90; R. 225). Appellant's trial exhibit No. 12 is an appraisal valuing the property at $45,000.00 and appellant's trial exhibit No. 19 values the property at $40,000.00.

Rail indicated that he personally borrowed $16,000.00 to purchase the property in order to preserve Marlowe's equity interest (Tr. 82, 101; R. 217, 236). However, Rail waited until after the Sheriff's sale to purchase the property.

Appellant ultimately failed to produce either the gold or the money as he had represented he would. At the time of trial, Marlowe was still the owner of record, since Rail had not yet recorded his own deed (Tr. 88; R. 223). Also, Marlowe had not, at the time of trial, yet received her money (Tr. 108; R. 243).

Thomas Hare, manager of Empire Land-Title Company, testified that he handled the closing on the transaction between Rail and appellant (Tr. 138; R. 273). He testified that he prepared a warranty deed. Also, he indicated that both parties knew of the existence of the trust deed which was in default (Tr. 40; R. 284). The State also produced Cheryl Marie Steele, who was employed by Tracy-Collins Bank (Tr. 154; R. 289). She testified that appellant deposited a cashier's check with her bank in the amount of $25,000.00 on April 16, 1982 (Tr. 156; R. 291).

John Trimpin was called by appellant's counsel as a defense witness. Appellant had earlier testified that Trimpin was his "gold connection" (Tr. 200; R. 335). However, Trimpin testified that, although appellant gave him $25,000.00, it was not for the purchase of gold (Tr. 265; R. 400). Instead, it was invested in a movie project that Trimpin was involved with in Salt Lake City (Tr. 265; R. 400). In addition, Trimpin

testified that he repaid this money to appellant in April of 1983 (Tr. 266; R. 401).

At the end of the State's case, counsel for appellant made a motion to dismiss the Information based on the insufficiency of the evidence as to one of the elements of Theft by Deception (Tr. 174; R. 309). The Court denied this motion (Tr. 174; R. 310).

At the close of the evidence, counsel for appellant requested his proposed Jury Instruction No. 2 be given which provided:

> [T]he crime of theft by deception is not established in the absence of evidence showing or tending to show, that the claimed victim has sustained a pecuniary loss by reason of the transaction involved. (Record page 56)

The court refused to give this proposed instruction and counsel for appellant took his exception for the record (Tr. 328; R. 463).

Finally, counsel for appellant requested the court to give his proposed Jury Instruction No. 5, which the court refused to do. That Instruction provided:

> Theft by deception does not occur, and you must return a verdict of not guilty, when there is only falsity as to matters having no pecuniary significance. (R. 59).

Counsel for appellant took his exception to the court's refusal to give this proposed instruction also (Tr. 328; R. 463).

ARGUMENT

POINT I

THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO ESTABLISH THE CRIME OF THEFT BY DECEPTION

This court has consistently held that when sufficiency of the evidence is questioned on appeal it will review the evidence and the reasonable inferences therefrom in the light most favorable to the jury's verdict. State v. Rebeterano, _____ P.2d _____ (April 30, 1984); State v. Garcia, 663 P.2d 60 (1983); State v. Petree, 659 P.2d 443 (1983); State v. Kerekes, 622 P.2d 1161 (1980). This court, with that principle in mind, has further held that a jury conviction will be reversed only when the evidence:

> 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. State v. Petree, supra at 444. Accord, eg., State v. Kerekes, supra, at 1168.

§76-6-405(1) provides that:

> A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

This statute was preceded by an earlier statute entitled "False

Pretenses."[3] This court has held that one of the elements necessary for conviction under the earlier statute is also required in order to obtain a conviction under the present §76-6-405(1). State v. Johnson, 663 P.2d 48; 506 (1983).

Thus, before an accused can be convicted of theft by deception, the state must, in addition to the other elements, prove beyond a reasonable doubt that:

> an actual fraud must have to be perpetrated in the sense that something of value was obtained and the victim lost something of value. State v. Vatsis, 351 P.2d 96 (1960). See also, State v. Walton, Utah, 646 P.2d 689 (1982); State v. Morris, 85 Utah 210, 38 P.2d 1097 (1934); State v. Fisher, 79 Utah 115, 8 P.2d 589 (1932).

In further support for the requirement that the alleged victim must lose something of value, §76-6-405(2) itself provides that "[t]heft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, . . ."

Appellant submits that the rule adopted by this court is a sound one in that no deception, regardless of its intent,

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[3]This statute was §76-20-8, Utah Code Annotated (1953 as amended). It provided:

> "Obtaining money by false pretense.
>
> Every person who knowingly and designedly by false or fraudulent representations or pretenses, obtains from any other person any chosen action, money, goods, wares, chattels, effects or other valuable thing with intent to cheat or defraud any person of the same, if the value of the property so obtained does not exceed $50, is punishable as in cases of petit larceny, and when the property so obtained is of the value of more than $50, the person so offending is punishable as in cases of grand larceny.

should constitute theft unless someone has in fact lost something having pecuniary value. This is the majority view taken by the courts in this country.[4]

Recently, in State v. Johnson, 663 P.2d 48 (1983), this court dealt with the same issue which is present in the instant case. In Johnson, Patricia Johnson was employed as a rest home administrator. In 1977, her brother-in-law was hired to do the maintenance work at the home. The evidence at trial showed that the brother-in-law also had, at the time, a full-time job at Sears. His time cards at the rest home were punched by another employee on instruction from Patricia Johnson. The evidence further indicated that Patricia's husband, William, was also hired to help do the work but that all paychecks were issued in the brother-in-law's name only. Finally, witnesses testified that Patricia and William deposited each of the checks in their joint bank accounts and then disbursed one-third of each check to the brother-in-law.

This court, in reversing the convictions of Patricia and William, stated:

> [a]lthough the facts of the present case indicate that the defendants engaged in wrongful conduct of some sort, they are insufficient to satisfy an essential element of the crime of theft by deception, namely, the loss of something of value. Id at page 50.

Appellant submits that the instant case parallels Johnson. It is clear that appellant failed to produce the expected $75,000.00

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[4] See People v. McCoy, Michigan, 254 N.W.2d 829 (1977), wherein the court of appeals quotes 2 Wharton's Criminal Law & Procedure, §602 as the general rule that pecuniary loss to the victim must be shown before a conviction can be obtained.

from the sale of Brazilian gold. It is equally clear, based on the testimony of Cheryl Steele and John Trimpin, that appellant did not even attempt to purchase the gold. Thus, his conduct was wrongful. But, as this court stated in Johnson, this wrongful conduct itself is not sufficient to constitute theft by deception if the alleged victim, Miriam Marlowe, suffered no pecuniary loss.

The evidence in the instant case has shown that Rail, while acting as Marlowe's agent in the transaction, was concerned that her investment be secured. Thus, when the transaction took place, appellant conveyed property to Marlowe which had a value at somewhere between $38,000.00 to $50,000.00 according to Rail himself. At the same time, Rail knew of the default and tax lien, but nevertheless went through with the deal. Then, when the property was sold at the Sheriff's sale, Rail bought the property specifically as he says, to protect her interest. Therefore, at the time of trial, Marlowe, through either her warranty deed, or her agent, had a piece of property worth $38,000.00 to $50,000.00 minus $16,000.00 in encumbrances. This arguably leaves an equity interest somewhere in the neighborhood of $25,000.00. Also, because the evidence was so ambiguous at trial, this view is actually given in a light most favorable to the jury's verdict.

Because Rail was purporting to hold the property for Marlowe, the State failed to prove that she had actually lost something of value. The parties obviously agreed to use the property as security to protect Marlowe from losing her investment,

should appellant not perform, which he did not. Surely, if appellant had taken the money and not deeded the property to Marlowe as security, the State would easily carry its burden because she would have clearly lost $25,000.00.

However, based on the evidence, as it was introduced at trial (emphasis added), there is simply no way for anyone to determine whether she did, in fact, lose anything of value. Applying the standard enunciated in Petree, supra, it is clear that the evidence on this issue is sufficiently inconclusive that reasonable minds must have entertained a reasonable doubt as to appellant's guilt.

Although Marlowe did not, of course, receive that which she had anticipated, a double return on her investment, this fact also does not sustain a conviction for theft by deception. This court has held that:

> The mere fact that a party to a transaction may not have received all he bargained for does not give rise to civil liability. For stronger reasons the crime of obtaining money by false pretenses is not established in the absence of evidence showing, or tending to show, that the claimed victim has sustained a pecuniary or property loss by reason of the transaction relied upon. State v. Morris, 85 Utah 210, 216, 38 P.2d 1097, 1100 (1934).

It is true that Marlowe did not receive her anticipated profits. However, it is also apparent that she did, unless her agent David Rail violated his duty to her, receive a property with an equity value of approximately $25,000.00 in return for her investment. She received exactly what the parties intended for her to receive should appellant fail to obtain the gold.

Because the State has failed to prove beyond a reasonable doubt that appellant has committed the offense of Theft by Deception, it is respectfully requested that this court reverse the judgment of the district court and order the court to dismiss the Information.

POINT II

THE TRIAL COURT'S FAILURE TO GIVE APPELLANT'S PROPOSED INSTRUCTION REQUIRING PECUNIARY LOSS TO THE ALLEGED VICTIM AS AN ELEMENT OF THEFT BY DECEPTION CONSTITUTED REVERSIBLE ERROR.

Again, appellant's proposed Instruction No. 2 provided:

> [T]he crime of theft by deception is not established in the absence of evidence showing, or tending to show, that the claimed victim has sustained a pecuniary or property loss by reason of the transaction relied upon.

Regardless of this court's disposition with relation to Point I of this brief, it is appellant's position that the district court's refusal to instruct the jury as to the pecuniary loss element constitutes clear reversible error. State v. Laine, (Utah), 618 P.2d 33 (1980) is directly on point. In Laine, this court stated that the general rule is:

> [a]n accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error. Id. at 35. Accord e.g., State v. Jones, 657 P.2d 1263, 1267 (1982); Dougherty v. State, 471 P.2d 212, 213 (Nev. 1970); State v. Miller, 565 P.2d 228 (Kan. 1977); Thomas v. State, 527 P.2d 528 (Alaska 1974); State v. Puga, 510 P.2d 1075 (N.M.App. 1973); 23A C.J.S. Criminal Law 51193.

Based on the rule espoused by Johnson, supra, and the other cases cited hereinabove, it is clear that the requirement of showing pecuniary loss is an element of theft by deception.

Because the trial court refused to give this instruction to the jury, Laine requires that the verdict and judgment be reversed and a new trial be ordered.

It should be noted that the district court did instruct the jury as to most of the elements of theft by deception in the court's Intruction No. 3. However, the key element was not included therein (R. 69). Nor was it included in any of the other instructions. As the court stated in Laine, this is not sufficient:

> In holding the instructions here to be fatally defective, we do not mean to imply that all of the elements of the charged crime must necessarily be contained in one instruction, though the better practice is, we think, to do so. So long as the jury is informed what each element is and that each must be proven beyond a reasonable doubt, the instructions taken as a whole may be adequate even though the essential elements are found in more than one instruction. Id. at 635.

The district court also refused to give appellant's requested Instruction No. 3, which provided:

> [t]heft by deception does not occur, and you must return a verdict of not guilty, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.
>
> "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

This instruction is a verbatim quote of §76-6-405(2). Because the primary issue in this case concerned whether Miriam Marlowe sustained a pecuniary loss, the court's refusal to give this instruction also constitutes reversible error. Not only does Laine require such a finding, but, Johnson, supra, cited

405(2) specifically in its discussion of the pecuniary damage element.

405(2) is almost identical to appellant's proposed Instruction No. 2 and both are correct statements of the law on theft by deception. Further, they both concern an essential element of the crime charged here. Based on that fact and the holding in Laine, appellant respectfully requests this court to reverse the district court judgment and order a new trial.

CONCLUSION

Appellant respectfully submits that, based on the errors committed by the trial court in this matter, appellant is entitled to a reversal and order of dismissal based on the lack of evidence as to an element of Theft by Deception. In the alternative, should this court disagree, appellant respectfully requests this court to reverse and remand this case for a new trial based on the fact that the jury was not properly instructed as to the law.

DATED this 19 day of July, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1984, I mailed/delivered a true and correct copy of the foregoing Brief of Appellant to David L. Wilkinson, Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114.