1970

State of Utah v. Thomas Devon Gee : Brief of Respondent

IN THE

SUPREME COU

OF THE

STATE OF UT

STATE OF UTAH,

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THOMAS DEVON

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of Utah, H

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

—vs.—

THOMAS DEVON GEE,
Defendant-Appellant.

Case No.
12284

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Thomas Devon Gee, appeals his jury conviction of First Degree Murder in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable D. Frank Wilkins, Judge, presiding.

DISPOSITION IN THE LOWER COURT

Thomas Devon Gee, appellant, was charged with First Degree Murder in violation of Sec. 76-30-1, *Utah Code Ann.* (1953) and tried before a jury in the Third Judicial District Court, in and for Salt Lake County, Utah, Judge D. Frank Wilkins, presiding. Appellant was convicted

of the charge and was sentenced to a term of life imprisonment at hard labor. Presiding Judge, D. Frank Wilkins, signed a certificate of probable cause for appeal on July 20, 1970.

RELIEF SOUGHT ON APPEAL

Respondent respectfully submits that the judgment of the lower court be affirmed.

Respondent accepts appellant's statement of facts, but for the sake of clarity would respectfully add the following:

Marilyn Peterson, the mother of the deceased child, Craig, first became acquainted with appellant no more than a month before October 5, 1969, the date of the fatal injuries. (R. 129). Subsequent to meeting appellant, Marilyn Peterson moved to a new location. Appellant was living with her and the deceased as of October 5, 1969. (R. 128-9). The evidence presented is void of any suspect injuries suffered by the deceased prior to Marilyn Peterson's acquaintance with appellant. The deceased was examined by Dr. Nicholson on September 8, 1969, and nothing unusual was noted. (R. 279). The well defined circular burn on deceased's foot was treated at the hospital on September 17, 1969 (R. 259). A cigarette lighter from appellant's automobile was entered into evidence as the kind of object that could cause such a clean burn.

The next injuries suffered by deceased were treated at the hospital on September 26, 1969. These injuries consisted of blistered toes from putting deceased's feet in

hot water. (R. 139-141). Additionally, the deceased suffered large bruises on the back of his legs while in appellant's care, several days prior to September 26th. (R. 135-137). Also, deceased suffered a loss of his front tooth, in the middle of September, while again in appellant's care. Craig Peterson, the deceased, was hospitalized from September 26th until about October 1, 1969. On October 5th while in appellant's care, Craig Peterson suffered injuries in the form of trauma to the head that resulted in death from a subdural hematoma. (R. 298-303).

On the night of the fatal injuries, while deceased was in the care of the appellant and while Marilyn Peterson was absent from the apartment, Margie Williams, a witness, visited the apartment where appellant was watching the deceased. She testified that she saw appellant carrying deceased down the stairs by his ears and that appellant slapped deceased and hit his head against the stair railing. (R. 324, R. 223).

Deceased was taken to the hospital shortly after his mother returned home. Craig Peterson died October 7, 1969.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS AND THE EVIDENCE PRESENTED WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF FIRST DEGREE MURDER.

The record clearly indicates that the appellant inflicted numerous injuries upon deceased within a very short time span of several weeks. In addition, testimony at trial by Margie Williams, testimony believed by the jury, very adequately indicates a deliberate and intentional malice on the part of appellant in inflicting very serious injuries on the deceased. The eye-witness testimony coupled with the prior infliction of serious injury can reasonably indicate premeditation and malice aforethought on the part of appellant.

Margie Williams testified as follows:

"DIRECT EXAMINATION BY MR. BANKS:

Q. Now, with reference to the night that the baby was taken to the hospital, when you walked around to the window, did you tell us everything that you saw or heard that night?

A. No.

Q. And can you tell us why you did not tell us everything?

A. Because my kids have been threatened.

Q. By whom?

A. Devon.

Q. And when did he threaten your children?

A. That night.

Q. All right. From the time you parked the car tell us again what you did?

A. I knocked on the back door and I couldn't get any answer, and I heard Craig crying,

'Don't, it hurts.' And so I went around to the side window thinking no one was there, that they had left him alone. At that time Devon was coming down the stairs holding the child's ears. When he came down the stairs, he slapped him across the face, and then took his head and hit him against the stair railing.

Q. What occurred after that?

A. I tried to get his attention. I knocked on the window. I thought that I was going to break it, and he seen me. He finally seen me. He told me if I said anything, he would kill my kids.

Q. And what did you do then?

A. I went home."
(R. 323-324)

§76-30-2, *Utah Code Ann.* (1953) sets forth the definition of malice that is required for the crime of murder. It states:

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. *It is implied when no considerable provation appears, or when the circumstances attending the killing show an abandoned and malignant heart.*" (Emphasis added)

The evidence in this case clearly shows, from the severity and nature of the injuries inflicted, that the requisite intent and malice was present in the mind of appellant.

To constitute the crime of First Degree Murder a showing of of "wilful, deliberate, malicious and pre-meditated" killing is necessary. (§76-30-3, *Utah Code Ann.* (1953). The claim by appellant that no such showing was made by the evidence is without merit. Only enough time to reflect and consider the matter is required. See *State v. Warwick*, 11 U.2d 116, 355 P.2d 703 (1960), *State v. Schad*, 24 U.2d 255, 470 P.2d 246 (1970), and *State v. Neal*, 123 Utah 93, 254 P.2d 1053 (1953).

Further, the infliction of great bodily harm upon the person of the deceased child can reasonably be calculated to result in the death of the child. The testimony of Margie Williams, cited supra, abundantly indicates appellant's wilful and deliberate infliction of great bodily harm on the deceased. See *State v. Russell*, 106 Utah 116, 145 P. 2d 1003 (1944).

Appelllant further argues that this is not a proper case for application of §76-30-3, *Utah Code Ann.* (1953) wherein it states:

> ". . . or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life; . . ."

Admittedly, the usual application of this provision involves the situation where one perpetrates an act greatly dangerous to the lives of others, indiscriminately. However, where the act evidences a depraved mind and commission of an act greatly dangerous to the person of another, as in the instant case, provision should be made for such conduct to fall within the statute. Specifically, in the

Schad case, supra, this court affirmed a second degree felony murder conviction where the deceased died from a tightly bound neck while performing a mutual act of sodomy. The court said:

> "It is so obvious as not to require eludication that the act of sodomy committed in the manner shown here, with the deceased so bound that he choked to death, was an act *greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life.*" (Emphasis added.)

Thus, sufficient evidence was presented at trial to show that appellant wilfully and intentionally inflicted great bodily harm upon the infant deceased, which injury was reasonably calculated to cause death and that appellant evidenced a depraved mind in committing such injuries.

POINT II

APPELLANT WAS IN NO WAY PREJUDICED AT TRIAL BY THE ADMISSION INTO EVIDENCE OF COLORED PHOTOGRAPHS OF DECEASED.

A quick look at the photographs admitted into evidence sufficiently indicates that there was no prejudice nor inflammatory value derived therefrom.

In the first instance, admission of photographs into evidence is properly within the sound discretion of the trial court and the reviewing court should only interfere when manifest error is shown. In *State v. Renzo*, 21 U.2d 205, 443 P. 2d 392 (1968), this court stated at 399:

> "The fact that a picture may be gruesome is no reason for excluding it from evidence if it is otherwise competent and relevant. It is a matter of discretion with the trial judge to determine whether the probative value of the picture outweighs the possible adverse effect which might be produced upon being shown to the jury. 23 C.J.S. Criminal Law §852 (1)c. This discretion on the part of a trial judge to admit or reject evidence should not be interferred with by an appellate court unless manifest error is shown."

See also *State v. Johnson*, 25 Utah 2d 46, 475 P. 2d 543 1970; *State v. Jackson*, 22 Utah 2d 408, 454 P.2d 290 (1969); and *State v. Poe*, 21 Utah 2d 113, 441 P. 2d 512 (1968).

Clearly, a proper determination of the elements of the crime had to be decided by the jury.

The admission of photographs of the deceased's injuries gave probative value to the other testimony and evidence presented at trial. No inflammatory nor gruesome nature attended the photographs. Respondent submits, therefore, that no err be assigned for the reason that these photographs were admitted into evidence.

POINT III

NO ADDITIONAL CORROBORATING EVIDENCE WAS REQUIRED TO CONVICT APPELLANT AND THE STATE WITNESSES, MARILYN PETERSON AND MARGIE WILLIAMS, WERE NOT ACCOMPLICES.

A review of the record manifestly shows that Marilyn Peterson, the deceased's mother, was never in the presence

of the child when the injuries were inflicted. Moreover, each time an injury was brought to her attention, she made almost immediate arrangements to have the child treated by competent medical help at a hospital. Certainly this conduct is not that of an accomplice to the crime of murder.

Appellant fails to point out specific conduct that would qualify either Marilyn Peterson or Margie Williams as accomplices and therefore subject them to treatment as principles in the crime of murder as §76-1-44, *Utah Code Ann.* (1953) would require.

On October 5, 1969, the date of the fatal injuries, appellant was solely in the care of deceased.

Neither Marilyn Peterson nor Margie Williams have in any way been shown to "aid and abet" or to "have advised and encouraged" the commission of the fatal injuries upon Craig Peterson.

Respondent submits, then, that since the state's witnesses are not in fact, or in law, accomplices, that no corroborating evidence is required to prove the guilt of appellant.

POINT IV

A JUROR MAY NOT IMPEACH HIS OWN VERDICT AND THERE IS NO SUBSTANTIAL EVIDENCE PRESENTED TO SHOW THAT THE JURY CONDUCT WAS IN FACT IMPROPER AND PREJUDICIAL.

It is the law of this jurisdiction that a juror may not

impeach his own verdict. *State v. Priestly*, 97 Utah 158, 91 P. 2d 447 (1939) and *State v. Rivenburgh*, 11 Utah 2d 95, 355 P. 2d 689 (1960).

In the *Priestly case*, all eight of the jurors signed affidavits to the effect that the verdict of guilty was a compromise in that no agreement was reached until all jurors agreed to recommend leniency, thereby believing that a fine instead of a prison sentence would be imposed on defendant.

The court affirmed the conviction and stated at 449:

> "It is the settled law in this jurisdiction that jurors cannot impeach their verdict except in the instances expressly made exceptions by legislative enactment."

For cases holding a juror may not impeach his own verdict in circumstances similar to the facts in the instant case see, *State v. Bedwell*, 77 Idaho 57, 286 P.2d 641 (1955), and *State v. Hockett*, 172 Kansas 1, 238 P.2d 539 (1952).

The applicable statutory grounds for a new trial are enumerated in § 77-38-3, *Utah Code Ann.* (1953). The statute provides:

> "77-38-3. Grounds—When a verdict or decision has been rendered against the defendant, the court *may*, upon his application, grant a new trial *in the following cases only*:
>
> . . .
>
> (3) When the jury have separated without leave of the court after retiring to deliberate upon their

verdict, or have been guilty of any misconduct by which a fair and due consideration of the cause may have been prevented.

(4) When the verdict has been determined by lot or by any means other than a fair expression of opinion on the part of all the jurors.

(5) When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the coure of the trial, or has done or allowed any act in the cause prejudicial to the substantial rights of the defendant.

(6) When the verdict or decision is contrary to law or the evidence. . . ." (Emphasis added.)

Here the jury was specifically instructed to disregard defendant's failure to testify in the case. Instruction 22 provided in pertinent part:

". . .

So, in this case the mere fact that this defendant has not availed himself of the privilege which the law gives him should not prejudice him in any way. It should not be considered as any indication either of his guilt or of his innocence. The failure of the defendant to testify is not even a circumstance against him and no presumption of guilt can be indulged in the minds of the jury by reason of such failure on his part."

Thus, the jury was adequately instructed on this matter. It should be assumed that the jury properly upheld their oath as a juror to be impartial and apply the law as the court directs.

The court in *State v. Athorn*, 46 N.J. 247, 216 A.2d 369 (1966), very ably discusses the issue before this court. It says,

> "If verdicts could be easily set aside as a result of an investigation into secret jury deliberations, disappointed litigants would be encouraged to tamper with jurors, to harrass them and to employ fraudulent practices in an effort to induce them to repudiate their decisions. *Moreover, an open invitation would be extended to any disgruntled juror who might choose to destroy a verdict to which he had previously assented.*
>
> The secrecy surrounding jury deliberations is necessary not only to prevent the unsettling of verdicts after they have been recorded, but also as an aid to the deliberative process itself. Each juror should be encouraged to state his thoughts freely, good or bad, so that they may be weighed by the other jurors." (Emphasis added.)

Therefore, only in the most compelling circumstances, involving the substantial rights of the defendant, should a juror be allowed to impeach his own verdict. In the instant case the testimony of the juror, Donna Johnson, is somewhat contradictory.

She states:

"BY MR. BANKS:

Q. Of course, when you say this was considered by other members of the jury, there was just conversation in the jury room, is that correct?

A. Yes.

Q. So that you don't know whether or not they took this into consideration within their own minds in determining his guilt or innocence?

A. Well, I know how they—most of them talked in the jury room to each other, and—

Q. But what I mean, that it's your conclusion based on what was said, is that correct, in the jury room?

A. Yes.

MR. BANKS: That's all. Oh! one other thing.

Q. (By Mr. Banks.) Excluding your consideration of his not taking the stand, it was, was it not, that based on the other evidence that was presented, it was your conclusion that he did commit this crime?

MR. RUSSELL: I would object to the question.

THE COURT: Overruled.

MR. BANKS: Did you understand my question?

THE WITNESS: No, I'm not sure I did. Would you repeat it, please?

Q. (By Mr. Banks) All of the other evidence that was presented to the court and jury, based on that, it was your conclusion that he did commit this crime; isn't that correct?

A. Yes. To begin with—

MR. BANKS: That's all."

Thus, even taking the jurors' own testimony, the fact that defendant did not testify is not clearly the grounds for his conviction. The most that can be assumed is that

this juror, considered the issue and that the other jurors mentioned it.

Upon these facts, no error has been shown sufficient to justify a new trial or to indicate that appellant was prejudiced thereby. No error should be found and no basis is provided for a finding that the conduct falls within the legislative exceptions of §77-38-3, *Utah Code Ann.* (1953).

Furthermore, any cumulative effect of non-prejudicial error as may be found in the circumstances of the instant case would not warrant a reversal and remand for a new trial.

CONCLUSION

Respondent submits, that based upon the argument and authority provided herein, this court should affirm appellant's conviction.

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