1971

State of Utah v. Wallace Dunnivan : Brief of Respondent

IN THE

SUPREME CO

OF THE

STATE OF U

STATE OF UTAH,

Plaintiff-

vs.

WALLACE DUNNIVAN,

Defend

BRIEF OF

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, *Plaintiff-Respondent* vs. WALLACE DUNNIVAN, *Defendant-Appellant.*	Case No. 12355

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal brought by defendant-appellant, Wallace Dunnivan, from a conviction of assault with a deadly weapon with intent to do bodily harm.

DISPOSITION IN LOWER COURT

The appellant, Wallace Dunnivan, was convicted of assault with a deadly weapon with intent to do bodily harm pursuant to Utah Code Ann. § 76-7-6 (1953) at a jury trial in the District Court of the Fourth Judicial District, the Honorable Maurice Harding, Judge, presiding. The appellant was sentenced to an indeterminate term of not more than five years in the state prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the judgment and conviction of the district court that the defendant was guilty of assault with a deadly weapon with intent to do bodily harm.

STATEMENT OF FACTS

The defendant Wallace Dunnivan and Peggy Dunnivan had previously been married, but at the time of the incident of October 3, 1970, they were divorced. Mr. Dunnivan had been living with his former wife periodically for the past sixteen months since his return from a term in prison. Mr. Dunnivan admitted that he had beaten his former wife on one occasion since he had recently been living with her.

Mrs. Dunnivan, receiving money in the form of a welfare check, was left responsible for paying the bills and expenses of the household. She had allowed her car to be repossessed by a bank for being behind in her payments. On October 2, 1970, she allowed her truck to be repossessed by a bank also. The defendant was angered by the repossessions to the point that he testified, "Now I was mad. Naturally I was mad as I could be" (T. 99).

Defendant had an argument with his former wife about the repossessions. The day after this argument the defendant returned to Mrs. Dunnivan's home in the evening to get some money from his former wife. When asked what

he wanted the money for, he stated, "I want you to go down and get me a hundred dollars so I can take me and my girl friend out and go drinking" (T. 23). He got extremely mad and told Mrs. Dunnivan that he hated her, that he thought she was stupid and that if she did not get a hundred dollars for him he would kill her (T. 13, 23). He also stated that he never hated anybody more than he hated his former wife and that he never wanted to kill anybody more than she (T. 12, 24).

Mrs. Dunnivan then left the house with some friends who had brought the defendant to the house so that she might cash a check to get the money. Mrs. Dunnivan called her father and returned with her father and two policemen to her home.

While Mrs. Dunnivan was gone, the defendant found both parts to a shotgun that were kept in the house and put the gun together. He also loaded the weapon with a shell and kept watch for Mrs. Dunnivan's return (T. 61, 62, 67). He told his children to go to bed and that no matter what happened, that he loved them (T. 62).

When Mrs. Dunnivan returned with her father, Mr. Davis, and the two police officers, Mr. Dunnivan was asked by Mr. Davis if he had threatened his daughter. Mr. Dunnivan answered, "Yes, I threatened to kill her, and I will do it," or "Yes, and I will do it," acknowledging that he had threatened her and renewing his threat or intent to kill her (T. 73, 75, 85, 86).

The defendant then picked up the loaded shotgun and

aimed it in the direction of Mrs. Dunnivan. Mrs. Dunnivan testified that he had his finger on the trigger and that she was "mighty gosh-awful scared" (T. 38, 43). Mr. Davis quickly grabbed the gun from the defendant and forced the weapon to the table.

Mrs. Dunnivan testified that she was aware the shotgun was in the house but the two parts were always kept in separate places. She stated that to her knowledge the shotgun parts were still in their separate places as short as a week prior to the day the shotgun was used in threatening her.

Defendant testified that he found the shotgun put together in a drawer low enough to be reached by the children in the home. He testified that he became extremely angry upon finding the shotgun within the reach of his children (T. 104).

After the actions of Mr. Davis of disarming the defendant on October 3, 1970, the police officers took the defendant into custody and also examined the shotgun. It was found to be loaded. The complaint was signed by one of the police officers who witnessed the incident, Officer Hazel (T. 49, 90, 91).

ARGUMENT

POINT I.

THE TRIAL COURT WAS CORRECT IN FINDING THAT THE EVIDENCE PRESENTED TO THE COURT WAS SUFFICIENT TO ALLOW A JURY TO FIND THE DEFENDANT GUILTY.

A. The trial court properly denied the defendant's motion to dismiss the case.

At the end of the presentation of the evidence by the State, defendant's attorney made a motion to dismiss the case (T. 91). At that point in the trial the following facts (taken in a light most favorable to the defendant) appeared to be uncontroverted.

Mrs. Dunnivan had allowed a car and a truck to be repossessed (T. 18). Mr. Dunnivan had argued with Mrs. Dunnivan about the repossessions on Friday, October 2nd (T. 18). On Saturday, October 3rd, Mr. Dunnivan returned home in the evening and tried to get a hundred dollars from Mrs. Dunnivan so he could go out with his girl friend (T. 23, 66). An argument took place where Mr. Dunnivan said that if she did not get the hundred dollars for him he would kill her (T. 13, 61). While Mrs. Dunnivan left to get the money, Mr. Dunnivan made the children go into their bedroom after which the twelve-year-old daughter Merlene saw Mr. Dunnigan get both parts of the shotgun and the shells and put the gun together and load it (T. 61).

Mr. Dunnivan waited in the kitchen for Mrs. Dunnivan to return. When Mrs. Dunnivan arrived with Mr. Davis, her father, and the two police officers, Mr. Dunnivan was asked by Mr. Davis if he had threatened his daughter. Mr. Dunnivan answered "Yes" (T. 34, 51, 73, 85) and proceeded to pick up the shotgun and aim it in the direction of Mrs. Dunnivan (T. 37).

In spite of other evidence that was eventually pre-

sented in the course of the proceedings both favorable and unfavorable to the defendant, the facts recited above appear to be uncontroverted at the time the motion to dismiss the case was presented by defendant's counsel. Even reading these facts in the most favorable light to the defendant, there was a showing of considerable evidence that (1) there were threats showing an intent to do bodily harm; (2) there was a direct act towards the commission of a battery when Mr. Dunnivan raised the shotgun and pointed it at Mrs. Dunnivan; and (3) the loaded shotgun provided the actual present ability to accomplish the intended harm.

The evidence presented in the trial court specifically meets the requirements for assault with a deadly weapon with intent to do bodily harm. In Utah Code Ann. § 76-6-1 (1953), assault is defined as "An unlawful attempt coupled with a present ability to commit a violent injury on the person of another." To this definition of assault Utah Code Ann. § 76-7-6 (1953) adds the specific intent element of intent to do bodily harm and also the requirement of use of a deadly weapon.

In *State* v. *Barkas*, 91 Utah 574, 65 P. 2d 1130 (1937) the specific elements of the offense are set forth as "(1) An assault; (2) use of a deadly weapon; and (3) an intent to do bodily harm." *Id.* at 580, 65 P. 2d 1133. A look at cases further defining the elements of the offense reveal that an unlawful attempt is made out whenever any act done towards commission of a battery is shown. In *State* v. *Prince*, 75 Utah 205, 284 P. 108 (1930), the court in affirming a conviction for the crime of extortion said that

there was no error in instructing the jury that a verbal threat to commit extortion would be sufficient to constitute "any act done" in the lesser offense of attempted extortion.

Certainly the threats of defendant, Dunnivan, and his actions in pointing the gun at Mrs. Dunnivan were sufficient to constitute "any act done" towards committing a battery.

Case law also shows that present ability should be found in the case before us where the defendant used as a deadly weapon a loaded shotgun. In a California case, *People* v. *Simpson*, 134 Cal. App. 646, 25 P. 2d 1008 (1933), the court said:

> "We are of the opinion an automatic repeating rifle which contains loaded cartridges in its magazine may constitute a deadly weapon with which one may have the present ability to commit violent injury upon another person, by firing the weapon at him, although it is first necessary to transfer a loaded shell to the firing chamber by operating a lever." *Id.* at 651, 25 P. 2d 1010. See also *People* v. *Pearson*, 150 Cal. App. 2d 811, 311 P. 2d 142 (1957).

The defendant Dunnivan had a loaded shotgun which merely needed to be cocked before firing. The threat made using this shotgun was made by a deadly weapon and actual present ability was clearly shown.

B. The evidence received in the court below was sufficient to allow a jury to find the defendant guilty.

The jury, as the ultimate trier of facts, had a reasonable basis upon which to base their determination of guilty.

The jury alone was allowed to determine the weight to be given the testimony of each witness. In addition to the above-listed "uncontroverted facts" that were present at the time defendant's counsel moved for dismissal, the following facts were presented by testimony which could have been accepted as a valid basis for the "guilty" determination made by the jury.

Mr. Dunnivan got extremely mad when he learned that Mrs. Dunnivan had allowed her car and truck to be repossessed (T. 99). He threatened to kill Mrs. Dunnivan, stating that he never wanted to kill anybody more than she (T. 13, 24). He told her if she did not get the hundred dollars he wanted he would kill her (T. 13, 24, 61). After Mrs. Dunnivan left, Mr. Dunnivan continued to pursue his threat of killing his former wife as evidenced by his putting the shotgun together and loading it, and by his telling the children that no matter what happened he loved them (T. 61, 62).

Testimony as to the actual words spoken when Mr. Davis confronted Mr. Dunnivan varied some from witness to witness. However, all agree that Mr. Dunnivan said "yes" that he had threatened Mrs. Dunnivan, and most witnesses agreed that he also renewed that threat in their presence (T. 34, 51, 73, 85, 106, 109). Mr. Dunnivan then picked up the loaded gun and pointed it at Mrs. Dunnivan (T. 37). Mr. Dunnivan had his finger on the trigger (T. 38).

The evidence and testimony available for the jury to weigh and determine clearly supported their decision in

establishing guilt. The law in the State of Utah is that "It is the sole and exclusive province of the jury to determine the facts in all criminal cases, whether the evidence offered by the state is weak or strong, is in conflict or is not controverted." *State* v. *Green,* 77 Utah 580, 589, 6 P. 2d 177, 181 (1931). The jury also had a decided advantage over the present court in weighing the sufficiency of evidence because of some extensive evidence presented visually in the courtroom as the witnesses testified as to the events that took place. Certainly the jury's impressions and determinations should be followed in light of the limitation we have in only being able to read the transcript.

POINT II.

JURY INSTRUCTION NO. 8 CORRECTLY STATED THE LAW AND WAS PROPERLY SUBMITTED TO THE JURY.

Appellant quotes at length from *Criminal Law Review,* which is published in London and circulated throughout the British Commonwealth in support of the proposition that the standard for provocation should be based upon the defendant's own temperament. This British article does not properly represent the law as has been applied here in the United States' jurisdictions. It in fact does not properly represent the legal position of the British system as evidenced by British cases discussing the issue. *Bedder* v. *Director of Public Prosecutions,* 2 ALL E. R. 801 (1954).

The test for considerable provocation in assault is the same test to be applied in other criminal offenses where

provocation is allowed to act as a defense. This can be shown in the case of *People* v. *Albori,* 97 Cal. App. 537, 275 P. 1017 (1929) where the test for provocation was spelled out in an assault case and later followed in other types of criminal cases. Of the reasonable man test in provocation, *Albori* states:

> "A person may have a lively apprehension that he is in imminent danger, and believes that his apprehension is based on sufficient cause and supported by reasonable grounds; that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances, he does so at his peril, because *the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts,* but prescribes a standard of its own, which is not only, did the person acting on the appearances himself believe that he was in deadly peril of his life or of receiving great bodily harm, but *would a reasonable man, situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger?"* (Emphasis added.) *Id.* at 544, 275 P. 1020.

Albori was cited and followed in *People* v. *Fisher,* 86 Cal. App. 2d 24, 194 P. 2d 116 (1948), where the defendant was convicted of assault with a deadly weapon. It was also followed in *People* v. *Dawson,* 88 Cal. App. 2d 85, 198 P. 2d 338 (1948), where the provocation defense was brought up and defined in the context of justifiable homicide.

This line of California cases clearly states the reasonable man test and properly applies that test to all criminal

offenses where the defense of provocation becomes relevant.

Cases in the federal courts have also recognized the reasonable man test as being proper for considering the extent of provocation required to establish the defense. *Bishop* v. *United States,* 107 F. 2d 297 (App. D. C. 1939) considered the following test in provocation relating to a homicide:

> "The test of sufficiency of such provocation is that which would cause an ordinary man, a reasonable man, or an average man, to become so aroused. . . . [I]t must be such provocation as would have like effect upon the mind of a reasonable or average man, causing him to lose self-control." *Id.* at 302.

The same court considered the question of provocation again in *Hart* v. *United States,* 130 F. 2d 456 (App. D. C. 1942). Therein they state the holding in *Bishop* and follow the same test.

The Utah case law conforms to the same tests that have been applied in these other jurisdictions. In an early case, *State* v. *Kakarikos,* 45 Utah 470, 146 P. 750 (1915), an instruction was given relating to the matter of self-defense, which stressed the "reasonableness" of such defense.

> ". . . [I]t must appear to the reasonable satisfaction of the jury from the whole of the evidence that the defendant at the time of the shooting had reasonable cause to believe, that Regis was then about to kill the defendant, or do him great bodily harm, and that the defendant had reasonable cause to believe, and did believe that there was immediate danger . . ." *Id.* at 485, 146 P. 756.

A later Utah case discussing the provocation defense as it applies to sudden combats states as its guiding principle:

> ". . . [D]id the combat together with all the facts and circumstances that immediately preceded and those that surrounded it provoke, enrage, annoy, and confuse a reasonable man to such a degree that he might be excused from the results of his acts." *State* v. *Johnson*, 112 Utah 130, 140, 185 P. 2d 738, 743 (1947).

It is clear from these Utah cases, the federal jurisdiction and other state jurisdictions that the test to be applied when considering whether there was a sufficient amount of provocation to establish a defense, is that of the reasonable man. Therefore, Instruction No. 8 correctly stated the law.

The portion of the jury instruction relating to "abandoned or malignant heart" was properly submitted to the jury. The transcript of the lower court proceedings does show that there was evidence that might show the existence of an "abandoned or malignant heart". Mr. Dunnivan stated on different occasions how upset he was with his wife. He said:

> "Now I was mad. Naturally I was mad as could be" (T. 99).
>
> * * *
>
> "I am so mad now that I am fixing to blow my stack . . . I was so mad I couldn't see straight, and I set there at the table and waited until she got

through, until she got back" (T. 104).

When these statements are read in light of the fact that Mr. Dunnivan told his children that no matter what happened, he still loved them, there is very real evidence that Mr. Dunnivan's assault was not a chance happening but a calculated plan (T. 62). The evidence is clear that he threatened his wife and continued on a course of conduct during her absence to accomplish the threat upon her return (T. 63, 62).

Because of the existence of these facts, the trial court did not err in instructing the jury regarding an "abandoned or malignant heart". Even without a clear showing of evidence related to this possible element of the crime of assault with intent to do bodily harm, there existed enough evidence to satisfy the jury determination of guilty under the basic elements of the crime. Even if not supported by evidence, the abandoned or malignant heart portion of the instruction would not prejudice the defendant and would constitute nothing more than harmless error. Jury Instruction No. 8 was therefore properly submitted to the jury and did not prejudice the defendant in any way.

POINT III.

THE JURY WAS PROPERLY INSTRUCTED AS TO THE PRESUMPTION OF INNOCENCE THAT MUST BE APPLIED TO ALL CRIMINAL DEFENDANTS.

The Record from the lower court contains the jury

instructions in their entirety. A reading of Instruction 18 indicates that the jury was properly instructed as to the presumption of innocence (R. 26).

> "A person charged with a crime is presumed to be innocent until he is proved guilty beyond a reasonable doubt. The presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but is a substantial, essential part of the law and is binding upon the jury. This presumption is a humane provision of the law, intended, so far as human agency is capable, to guard against the danger of an innocent person being unjustly punished.
>
> "The presumption of innocence must continue to prevail in the minds of the jury unless and until the jury is satisfied beyond a reasonable doubt of the guilt of the defendant. And in case of a reasonable doubt as to the defendant's guilt, he is entitled to an acquittal" (R. 26).

The proper standards regarding the presumption of innocence were correctly stated in this instruction, so that the jury might properly be guided in reaching a just result.

Appellant contends that the instructions relating to the presumption of innocence should have been incorporated in Instruction No. 13, which describes the relationship between "assault with intent to do bodily harm" and "simple assault" (R. 21). Such a contention is without merit when considering the import of Instruction No. 23 (R. 31). It states:

> "These instructions, though numbered separately, are to be considered and construed as one connected whole. Each instruction should be read and

> understood in reference to and as a part of the entire charge and not as though any one sentence or instruction separately were intended to state the whole law of the case upon any particular point. Moreover, the order in which the instructions are given has no significance as to their relative importance" (R. 31).

The impact of this instruction is that the jury must consider the complete jury instructions as an integrated whole, relating each instruction to the other instructions given. Specifically, the jury must consider the presumption of innocence instructions as relating to the instructions designating the relevant crime, or elements of the crime. The instruction properly stated the presumption of innocence and how it must apply. As such, there was no prejudice resulting from the jury instructions.

The trial court judge properly instructed the jury as to the lesser included offense of simple assault. *State* v. *Barkas*, 91 Utah 574, 65 P. 2d 1130 (1937) requires that when there is a prosecution for assault with a deadly weapon the jury should also be instructed as to the crime of simple assault. See also *State* v. *Gillian*, 23 Utah 2d 372, 463 P. 2d 811 (1970). It is a necessary element of the greater offense. The defendant Dunnivan cannot claim prejudice for having the lesser offense instructions submitted to the jury because they act to give the defendant the benefit of the doubt if the greater offense is not clearly established. The jury found the defendant Dunnivan guilty of the greater offense and the defendant should not now be allowed to claim prejudice after the jury was properly

instructed as to the different offenses and has determined the defendant to be guilty of the greater offense.

Instruction No. 13 was correctly submitted to the jury and carried with it the necessary presumption of innocence as incorporated from the jury instructions as a whole.

CONCLUSION

The evidence presented in the trial court was sufficient for the jury to find the defendant guilty. There was ample evidence for the jury to be instructed on the "abandoned and malignant heart" portion of the assault with intent to do bodily harm statute. The jury was properly instructed as to the standard for provocation and as to the presumption of innocence and where it should apply.

For these reasons, the respondent would ask that the conviction in the lower court be affirmed.

Respectfully submitted,

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