1972

State of Utah v. Walter Parnell Ross : Brief of Appellant

In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
-vs-
WALTER PARNELL ROSS,
Defendant-Appellant.

C

BRIEF OF APPELLANT

Appeal from jury verdict of guilty in
District Court in and for Salt Lake County,
orable Bryant H. Croft, presiding.

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In The Supreme Court of the State of Utah

STATE OF UTAH,
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WALTER PARNELL ROSS,
Defendant-Appellant.

Case No. 12545

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Walter Parnell Ross, appeals from a conviction of murder in the second degree in the Third District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Walter Parnell Ross, was found guilty by a jury of murder in the second degree on December 30, 1970, and was thereafter sentenced to the Utah State Prison on January 8, 1971, for the term prescribed by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and a new trial.

STATEMENT OF FACTS

On June 20, 1970, appellant killed his wife Juanita Celio Ross in their apartment in Salt Lake City. Appellant did not deny that his actions were responsible for his wife's death, but he contended he killed her accidentally and in the heat of passion. (R. 265).

Appellant told the following details to Officer Ledford and also at trial. Appellant and his wife went to a movie on June 19, 1970, and returned home at about 11:00 or 11:30 p.m. (R. 105, 257). Appellant's wife was a prostitute (R. 253), and she had a date at about 1:00 a.m. on June 20, 1970, and so appellant left her around midnight. (R. 257). Upon returning home, appellant found evidence that his wife had been using drugs. (R. 23, 259). He asked her about what she was doing, and about where the drug kit was, (R. 259). His wife and he argued and she refused to tell him and so he hit her and slapped her. (R. 233, 234, 259). Appellant hit his wife on the head with a table leg. He testified that the leg was already broken off and was on the dresser and was used to hold open a window. (R. 259). Officer Ledford testified that appellant told him that he broke the leg off the table. (R. 234).

Appellant told Officer Ledford and also testified at trial that he was mad at his wife for using dope be-

cause the two of them were attempting to get their child back from Welfare. (R. 234, 261). Appellant's wife had been an addict for some time, and their marriage had been on and off, with the wife leaving on occasions for parts unknown. (R. 254). About a week before June 20th, his wife returned and the two agreed that she would give up drugs and prostitution and they would try to make a life for themselves and their child (R. 256). In that time she had not used any drugs to appellant's knowledge. (R. 256). Appellant told Officer Ledford and testified at trial that the reason he got so mad was because of the above facts: he wanted the child back and was upset to find out that his wife was using dope. During the week before the incident on June 20, 1970, the appellant and his wife had gone to the Welfare Department, where a caseworker told them they would have a chance of getting their child back if Juanita Ross would give up drugs and prostitution and make a home for the child. (R. 256). Thus, appellant said he got mad, a struggle and a fight ensued and he hit his wife with his fists and the table leg because she wouldn't tell him where the drugs were. (R. 234, 259). Finally she told him about the kit, and at that point he realized what he had done as he saw blood and saw that his wife was hurt. (R. 260, 265). He then went across the street to call the police (R. 234, 265), who arrived at about 5:17 a.m. (R. 93). When Officer Conger arrived, he saw appellant's wife in the bed and she appeared to him to be dead. (R. 94). Appellant told Officer Ledford that he did not know what time

this struggle took place, but that he believed it was between 2:30 a.m. and 5:00 a.m. (R. 238).

The time of death was fixed by Dr. James T. Weston as sometime between 1:30 a.m. and 4:30 a.m. on June 20, 1970. (R. 320). This was based on the testimony of one of Dr. Weston's medical field investigators who saw the victim at 7:30 a.m. (R. 320). There was testimony by neighbors that noises were heard at 1:30 a.m. (R. 108) and sometime between 2:00 a.m. and 5:00 a.m. (R. 112).

Dr. Edward F. Wilson testified that he performed the postmortem examination and discovered multiple external injuries. (R. 116). These were described by him in detail. (R. 116, 120). His opinion was that death was caused by a combination of the loss of blood due to a lacerated liver and lack of oxygen due to the compression of the bone and muscles of the neck. (R. 123). He had no opinion as to the time of death. (R. 140). His findings were consistent with strangulation by hand (R. 136) and he testified that the laceration of the liver could come from a direct blow to that area of the body or from the body being forced against something. (R. 130).

ARGUMENT

POINT I

THE COURT BELOW ERRED IN NOT GRANTING APPELLANT'S MOTION TO DISMISS THE SECOND DEGREE MURDER

CHARGE AND IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE EVIDENCE WAS NOT SUFFICIENT TO SHOW THE MALICE NECESSARY FOR SECOND DEGREE MURDER.

At the close of the state's case, appellant moved to dismiss the second degree murder charge because the state's evidence itself showed the actions of appellant were in the heat of passion and that no malice was made out. (R. 239, 240, 241). The motion was denied. (R. 248). Appellant also moved for a new trial (R. 65) based in part on the same grounds. That motion also was denied.

Analyzing the facts of this case, not according to appellant's theory of the evidence as was condemned by this court in *State v. Canfield,* 18 Utah 2d 292, 422 P.2d 196 (1967), but in the light most favorable to the verdict it can be seen by comparing these facts with clear statements of what constitutes murder and voluntary manslaughter that the court erred in denying appellant's above motions.

This court has set forth on several occasions what is necessary to constitute murder. In *State v. Russell,* 106 Utah 116, 145 P.2d 1003 (1944), this court said that murder is, of course, the killing of a human being with malice aforethought:

> It is the *malice* which is required to have been thought out before hand, and not the killing. . . .

> In order to have the necessary *malice* to commit murder (not necessarily murder in the first degree) the killing must be unlawful, it must result from or be caused by an act . . . committed with one or the following intentions: (1) An intention or desire previously formed to kill or cause great bodily injury; or (2) An intention or design previously formed to do or act . . . knowing that the reasonable and natural consequences thereof would be likely to cause death or great bodily injury. . . . All that is necessary is that such acts which constitute malice be previously planned and designed and thought out beforehand. 145 P.2d at 1007.

Later this court in *State v. Thompson,* 110 Utah 113, 170 P. 2d 153 (1946) said:

> Thus, there can be no murder, either in the first or second degree, without a planned, designed, or thought out beforehand intention to kill or cause great bodily injury or to do an act knowing that the natural and probable consequences thereof would be to cause death or great bodily injury. . . . Anything less does not have the necessary "Malice aforethought". 170 P. 2d at 159.

Again in *State v. Trujillo,* 117 Utah 237, 214 P 2d 626 (1950), this court said, 214 P. 2d at 631:

> Malice, as applied to murder . . . is the wish to kill or to do great bodily harm, or do an act knowing that its reasonable and natural consequence would be death or great bodily harm. Thus, when murder is defined as the killing of a human being with malice aforethought it is the unlawful killing of a human being after giving thought beforehand to the desire to kill, or to cause great bodily injury or to do any act knowing that its reasonable and natural consequences would be death or great bodily harm. This is common law murder, or murder in the second degree under our code.

From these cases, it is abundantly clear that to be murder there must be malice, a specific intent thought out beforehand, to kill or cause great bodily injury, or a specific, planned out act knowing its probable consequences would be death or great bodily harm.

This court has also on numerous occasions set forth clearly what constitutes voluntary manslaughter. One of the clearest statements was in concurring Justice Wade's opinion in *State v. Trujillo, supra,* 214 P 2d at 637:

> In voluntary manslaughter there must be an intention to kill or to do great bodily harm or to do an act knowing the natural and probable consequences thereof will be death or great bodily harm, but there is no requirement that

> such intention be formed or the action planned or thought out before hand. On the contrary, it must be a sudden quarrel or in the heat of passion. In other words, the homicide in voluntary manslaughter must be the result of a sudden quarrel or great emotional upset so that the killing or the act causing the death, though intentional, was not the result of reasoning and controlled action but of sudden quarrel or violent emotion which deprives the killer of control over his actions.

For similar statements, see also *State v. Cobo,* 90 Utah 89, 60 P 2d 952 (1936); *State v. Gallegos,* 16 Utah 2d 102, 396 P 2d 414 (1964). In the crime of voluntary manslaughter, the intent is the same as in murder, as discussed above, but the intent is not formed beforehand, not planned out in advance, but is the result of a sudden quarrel or heat of passion. The difference between murder in the second degree and voluntary manslaughter is the presence or absence of a planned thought out design or intention.

Looking at the facts as presented to the jury and in the light most favorable to the State, there was no evidence that there was a planned thought out intent or design. There was evidence of a sudden quarrel and that appellant acted in the heat of passion. In fact, the only evidence was that appellant acted on a sudden quarrel.

The extent of the injuries and the method used (strangulation, beating) are not determinative as to

the intent. One can commit voluntary manslaughter by any means, if it fits within the above stated rule of being an intent that was not thought out beforehand but was in the heat of passion. Thus, once there is the sudden quarrel or heat of passion, and the killer, as a result thereof, forms the intent to kill or knows his acts will cause death or great bodily injury, the crime is voluntary manslaughter no matter how the killing is accomplished, and no matter how brutal the slaying, so long as such killing results from the sudden quarrel or heat of passion. The jury could not believe otherwise than that there was a sudden quarrel. Apart from appellant's testimony as to what happened, the state introduced evidence that appellant came home, was provoked, had a quarrel, and a struggle ensued. Since this was the only evidence with respect to appellant's intent, the evidence could not support a verdict greater than guilty of voluntary manslaughter.

There are, of course, two types of malice. Utah Code Annotated **76-30-2 (1953)**, 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 provocation appears, or when the circumstances attending the killings show an abandoned and negligent heart.

The above analysis deals most specifically with express malice, negating the "deliberate intention." As to the

implied malice, "abandoned and negligent heart" . . . "seems to mean conduct by the use of a weapon or other appliance likely to have produced death or by the brutal and bloodthirsty use of such instrumentality." *State v. Chalmers*, 160 Ariz. 70, 411 P 2d 448, 452 (966). Appellant hit his wife with his fists numerous times and once with a table leg to his recollection. Dr. Wilson testified that there were two lacerations on the head, but that they could have come from a fall, that those head injuries could have caused a loss of consciousness but there was no serious internal brain injury from the wounds. (R. 126, 128). Thus, even though the external injuries were quite extensive, they were of a superficial nature and do not evidence a brutal and savage attack with an instrument likely to produce death. The repeated blows by the hands do not, of course, ordinarily make out implied malice. See *State v. Cobo*, 90 Utah, 97, 60 P 2d 952 (1936); *Smith v. People*, 142 Colo. 523, 351 P 2d 487 (1960).

The evidence shows that appellant's wife was hit by hand numerous times causing superficial wounds; her liver was lacerated, which injury could have come from a direct blow or by a fall; and there was evidence of strangulation by hand. All of this, appellant submits, is consistent with a struggle or fight upon a sudden quarrel and in the heat of passion. Considering the size of the two disputants (appellant about 6' tall, 220 lbs. (R. 266) and his wife about 5' tall, 90-95 lbs. (R. 115)) it is consistent that appellant could cause injuries he didn't intend by applying even slight force. That is, in

the heat of passion and upon a sudden quarrel, appellant could have done things that caused death, yet still not evidenced an abandoned and malignent heart because the injuries would not have to be the result of a violent and blood-thirsty use of an instrumentality, but they could come simply from the difference in size and strength of appellant and his wife. Under such circumstances it cannot be said that because the victim had numerous superficial wounds, the perpetrator displayed an abandoned and malignent heart. As such, there was no evidence of malice, either express or implied.

For these reasons, appellant contends that the evidence did not show the necessary malice, either express or implied, to constitute murder in the second degree. Therefore, the court below erred in denying appellant's motion for a new trial and in denying his motion to dismiss the second degree murder charge and reduce it to voluntary manslaughter.

POINT II

THE COURT BELOW ERRED IN ADMITTING CERTAIN COLORED SLIDES BECAUSE THEIR PREJUDICIAL NATURE OUTWEIGHED THEIR PROBATIVE VALUE.

Dr. Edward F. Wilson, testifying as to cause of death, described in detail the numerous external superficial wounds on appellant's wife. (R. 10, 120.) These consisted of abrasions (scratches), contusions (bruises)

and lacerations (cutting of the skin). (R. 124, 125). The cause of death was stated. (A. 123). The State then introduced colored slides that were taken of the victim and the surrounding area. Appellant objected to some of these as being prejudicial and inflammatory. Over objection, these slides were admitted into evidence. Appellant objected to Exhibits 3-A (R. 165), 3-C (R. 165), 2-A, 2-B, 2-C, 2-D, and 2-E. (R. 171). All were received. Then, the slides, including the ones objected to, were shown on a slide projector over objections of appellant that this simply accentuated the prejudicial aspect of the slides. (R. 172, 173).

In *State v. Poe,* 21 Utah 2d 113, 441 P 2d 512 (1968), this court stated the general rules as to the admissibility of photographs of homicide victims:

> Initially it is within the sound discretion of the trial court to determine whether the inflammatory nature of such slides is outweighed by their probative value with respect to a fact in issue. If the latter they may be admitted even though gruesome.

In *Poe,* this court concluded that the color slides taken during the autopsy had no probative value, as the identity of the victim and the cause of death had already been established. All material facts that could have conceivably been adduced from viewing the slides had been established by prior testimony. Thus, this court ruled that the pictures should not have been admitted into evi-

dence. In *State v. Renzo,* 21 Utah 2d 205, 443 P 2d 392 (1968), the same argument was made as in *Poe.* This court held that, though cumulative, the photos served to corroborate other testimony and were admissable for that purpose. See also, upholding the admissability of photographs, *State v. Jackson,* 22 Utah 2d 408, 454 P 2d 290 (1969). See generally 73 A.L.R. 2d 769.

Appellant contends that the challenged slides should have been excluded for several reasons. Firstly, simply because they were gruesome. Justice Henriod, concurring in *State v. Renzo, supra,* stated that the slides were excluded in *Poe* because of their gruesomeness. The color accentuated the gruesomeness. Secondly, the slides were cumulative of Dr. Wilson's testimony. He described in much detail the extent of the external injuries, taking almost five pages of the record (R. 110-120). As discussed in Point I, the formation of the intent was the key issue determining whether the crime was murder in the second degree or voluntary manslaughter. The extent of the beating and injuries, as discussed, had no bearing on that issue and thus the jury did not need to see in such detail all the injuries. Further, the number of slides was excessive. There were seven slides of the victim taken from different angles showing the injuries. Some were slightly different, but the same injuries were shown in several of the slides. If the purpose of the slides was to corroborate the testimony of Dr. Wilson it was not necessary to show the same injuries, in such detail, with such frequency. Further, the appellant admitted fighting with, struggling

with, and hitting his wife. This court pointed out in *State v. Renzo* that by pleading not guilty, the defendant put on the State the burden of proving every element of the crime. However, in this case, while appellant pleaded not guilty, he did admit in his opening statement to the jury that what he did in the room that night, hitting his wife and so on, and causing her death. (R. 90, 91). With this element present, it was not necessary that the jury see all the injuries. It would have been enough for them to hear about them from Dr. Wilson.

Thus, appellant contends that because the slides were gruesome, cumulative, their number was excessive, and because appellant admitted the attack, the slides had so little probative value that their extremely inflammatory nature outweighed it, thus the slides should not have been admitted. The slides were prejudicial, as in *Poe,* and appellant is entitled to a new trial without the admission of the challenged colored slides.

CONCLUSION

For the reasons above stated, that the evidence was not sufficient to support the verdict, and that the court below erred in admitting certain colored slides, appellant respectfully submits that the case be reversed and remanded for a new trial.

Respectfully submitted,

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