

1987

Utah v. Duran : Brief of Respondent

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

870054

STATE OF UTAH,

:

Plaintiff-Respondent, : Case No. 870054-CA

v.

:

MICHAEL LUPE DURAN,

:

Category No. 2

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF THEFT, A SECOND
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 76-6-404 IN THE SECOND JUDICIAL DISTRICT
COURT, IN AND FOR WEBER COUNTY, STATE OF
UTAH, THE HONORABLE RONALD O. HYDE, JUDGE,
PRESIDING.

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 87U054-CA
v. :
MICHAEL LUPE DURAN, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 87U054-CA
v. :
MICHAEL LUPE DURAN, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

JURISDICTION

This appeal is from a conviction for the offense of theft, a second degree felony, after a trial in the Second Judicial District Court. This court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1986).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The defendant is appealing a conviction of second degree theft on the grounds that the evidence presented at trial was insufficient to support a finding of guilty.

STATEMENT OF THE CASE

Defendant, Michael Lupe Duran, was charged with theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended). After a jury trial, defendant was found guilty as charged. Defendant was sentenced by Judge Ronald O. Hyde on January 8, 1987, to the Utah State Prison for a term of one to fifteen years.

This appeal is a companion case to State v. Stewart, case no. 870213-CA, also pending on appeal. The issue raised in both appeals relating to the sufficiency of evidence are identical.

STATEMENT OF FACTS

On October 29, 1986, Marty Taylor's home was broken into (R. 4-6). Eight guns were stolen, along with jewelry and \$200.00 in cash (R. 6-7). On that same day, Taylor contacted Rodney Bennett, an employee at Mountain Oil, to watch for the stolen property. Taylor described the rifles to Bennett (R. 27). Mr. Taylor approached Mr. Bennett because sometimes stolen property is sold around Mountain Oil (R. 13).

On October 30, 1987, at about 4:00 o'clock p.m. Kenny Nevarez, a friend of defendant's, came into Mountain Oil trying to sell rifles to Mr. Bennett (R. 28-29). When Mr. Bennett asked Mr. Nevarez about the prices Mr. Nevarez said he would have to check on the price from the other fellows (R. 29). Bennett and Nevarez went around the back of the station to Stewart's car, where defendant and Stewart were, the trunk was opened and Mr. Nevarez showed Mr. Bennett the rifles (R. 30-31). Mr. Bennett recognized the rifles as the ones stolen from Mr. Taylor (R. 30-31). Defendant got out of the car (R. 32) and was with Nevarez when the time and terms of the sale were set up (R. 32).

After they left, Mr. Bennett contacted Mr. Taylor about seeing the guns and the sale (R. 38). Mr. Taylor contacted the police (R. 14). The police then set up a plan to arrest the suspects when they tried to sell the rifles that night at 10:00 o'clock (R. 59).

At 6:00 o'clock, defendant returned to Mountain Oil. He asked Mr. Bennett if it was dark enough now. Bennett told him to come back at 10:00 o'clock (R. 40).

At 10:00 o'clock defendant returned in Stewart's car to Mountain Oil and went into the station to get Mr. Bennett (R. 41). Mr. Bennett introduced two narcotics agents, Kelly Call and Mitch Beckstead, as friends who were interested in buying the rifles (R. 41). The four then went outside to the rear of the station, Stewart was waiting behind the wheel of the car, and popped open the trunk from the inside (R. 155). Agent Call renegotiated a deal with defendant which included using marijuana as payment for the rifles (R. 113).

Defendant argues that Nevarez asked them to take the rifles to Mountain Oil the first time (R. 119). Defendant claims that he accidentally showed up at Mountain Oil at 10:00 o'clock that night (R. 122). Defendant denies having renegotiating a deal with the agent Call (R. 125).

SUMMARY OF ARGUMENT

The evidence was sufficient to convict defendant of theft. Defendant had the opportunity to present evidence and cross examine witnesses. It then became the function of the jury to weigh the evidence and credibility of the witnesses in rendering a verdict.

ARGUMENT

POINT_I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION.

Defendant asserts that the evidence produced at trial was insufficient for the jury to convict him.

This Court has adopted the following standard of review when considering a challenge of the sufficiency of the evidence:

The standard for determining sufficiency of the evidence is that the evidence be "so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime." State v. Romero, 554 P.2d 216, 219 (Utah 1976). In determining whether evidence is sufficient, the Court will review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Kerekes, 622 P.2d 1161, 1168 (Utah 1980). Unless there is a clear showing of lack of evidence, the jury verdict will be upheld. State v. Logan, 563 P.2d 811, 814 (Utah 1977).

State v. Gabaldon, 735 P.2d 410, 412 (Utah 1987). As noted in State v. Booker, 709 P.2d 342 (Utah 1985):

In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses" State v. Lamm, Utah, 606 P.2d 229, 231 (1980); accord State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.

Id. at 345 (citation omitted). And, even if the Court views the evidence as less than wholly conclusive, or if contradictory evidence or conflicting inferences exist, the verdict should be upheld. State v. Howell, 649 P.2d 91, 97 (Utah 1982). In short, "on conflicting evidence the Court is obliged to accept the version of the facts which supports the verdict." State v. Isaacson, 704 P.2d 555, 556 (Utah 1985) (citing State v. Howell, 649 P.2d at 93).

Defendant's insufficiency argument is little more than a request for this Court to engage in de novo review of the weight of the evidence and the credibility of the witnesses, and then to substitute its judgment for that of the jury. As is evident from the authority cited above, this Court and the Utah Supreme Court have stated that they will not review a criminal case in that fashion.

Defendant argues that Nevarez gave the rifles to defendant but that he was accidentally involved in the sale of the rifles. In testimony given by Rodney Bennett, defendant's agreement was necessary in setting the price and time of the sale. The narcotic agents, Mitch Beckstead and Kelly Call, testified that defendant was willing to change the terms of the deal without asking Nevarez. While defendant testified otherwise the jury was not required to believe his testimony. "The court could reasonably believe the officer's testimony (and not defense testimony). . . ." State v. Carlson, 635 P.2d 72, 74-75 (Utah 1981). Finally, Joe Bunn identified the car defendant was in when arrested as the car in front of Marty Taylor's home at the time of the theft.

The evidence is sufficient to affirm defendant's conviction of theft. The facts in State v. Newbold, 581 P.2d 991 (Utah 1972), which defendant relied upon for a sufficiency standard, are very similar to the case before the court. The stolen goods were found in defendant's possession, he had control over them and he tried to sell them. In Newbold the court found the evidence sufficient for conviction.

Defendant argues that there is insufficient evidence to prove that he was the one who broke into Mr. Taylor's house. He was not convicted of burglary, but of theft. Utah Code Ann. § 76-6-404 (1953 as amended) requires that the defendant "obtains or exercises unauthorized control over the property of another with intent to deprive him thereof". Defendant was exercising unauthorized control. The testimony by Bennett was that he had control over the disposition of the weapons and was involved in transporting them to Mountain Oil both times. Defendant meant to deprive Marty Taylor of the rifles. He was selling them to the narcotic agents.

CONCLUSION

Based upon the foregoing argument, the State respectfully requests the Court to affirm defendant's conviction.

DATED this 30 day of November, 1987.

DAVID L. WILKINSON
Attorney General


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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Deirdra A. Gorman, Public Defender Assoc., 205 26th Street, Suite 13, Ogden, Utah 84401, this 30 day of November, 1987.


