1997

State of Utah v. Grant Dion Barnes : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff / Appellee	)	Case No. 970035-CA
	)	
v.	)	
	)	
GRANT DION BARNES,	)	Priority No. 2
	)	
Defendant / Appellant.	)	**ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT

Appeal from Judgment of conviction of burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202, and theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404, and commitment to the Utah State Prison, in the Second Judicial District Court in and for Davis County, the Honorable Glen R. Dawson presiding.

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ARGUMENT

I. BECAUSE THE EVIDENCE AT TRIAL WAS SO INCONCLUSIVE THAT IT WAS BASED ON REMOTE AND SPECULATIVE POSSIBILITIES OF GUILT, REASONABLE MINDS MUST HAVE ENTERTAINED A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME.

An appellate court will reverse on the basis of insufficiency of the evidence "when the evidence is so inconclusive or so inherently improbable that 'reasonable minds must have entertained a reasonable doubt' that the defendant committed the crime." *State v. Goddard*, 871 P.2d 540, 543 (Utah 1994) (quotation omitted); *accord State v. Warden*, 813 P.2d 1146, 1151 (Utah 1991); *State v. Strain*, 885 P.2d 810, 819 (Utah Ct. App. 1994). In reviewing an issue concerning insufficiency of the evidence, the reviewing court's function is to insure that there is "sufficient competent evidence" regarding each element of the charge to support a finding that the defendant, beyond a reasonable doubt,[1] committed the crime. *See Warden*, 813 P.2d at 1150.

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[1]*See* Utah Code Ann. § 76-1-501(1), providing that "[a] defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In the absence of such proof, the defendant shall be acquitted."

In its Brief, the State argues that Defendant failed to meet the marshaling requirement by omitting stipulations of the parties that were entered into both prior to and during trial (*See* Brief of Appellee, p. 8). When viewed more closely, however, the stipulations referred to by the State are basically of a foundational nature and are substantially repetitive of the list of evidence marshaled by Defendant on pages fifteen and sixteen of his Brief.

One particular stipulation emphasized by the State in the course of the foregoing argument is the parties' stipulation that neither Defendant Murphy nor Defendant "had permission to be in Mason Moving and Storage on the evening of the 22nd of June." (*See* R. 85-86, Bench Trial Transcript). The State argues that this stipulation, together with other surrounding circumstances set forth on pages eleven and twelve of Appellee's Brief, "clearly establish that at least one person in Murphy's vehicle unlawfully entered Mesa's building that night." Such an argument indicates at least some recognition by the State that while the evidence at trial and the reasonable inferences drawn therefrom show, albeit inconclusively, that there was a burglary and theft, it fails to conclusively prove beyond a reasonable doubt that Defendant burglarized the building and exercised unauthorized control over the vending machine and coin changer. By focusing on the superfluous and tangential stipulation about whether or not Murphy and Defendant had permission to be in the building, the State attempts to divert attention from the real issue

of whether there was sufficient competent evidence on each element to support Defendant's conviction.

The State gives short shrift to the fact that there is no physical evidence, whatsoever, connecting Defendant, to the alleged burglary or theft. At trial, the investigating officer, Officer Arnold, testified that he found no fingerprints upon checking both the inside and outside of the door frame or door that allegedly had been pried open in the course of the burglary (Bench Trial Transcript, R. 83, lines 7-14). Moreover, Officer Arnold did not check either the vending machine or the coin changer for fingerprints (Bench Trial Transcript, R. 83, lines 17-21). In light of this complete lack of physical evidence, the failure of any witness to place Defendant in any location other than as a passenger in Murphy's automobile, and the uncontroverted testimony by Murphy that Defendant neither assisted (Bench Trial Transcript, R. 96-97; R. 110, lines 8-10) nor knew anything of the crime (Bench Trial Transcript, R. 94-95) until Murphy explained it to him in the course of the chase from North Salt Lake to Salt Lake City proper (Bench Trial Transcript, R. 97, lines 14-16, 23-25), should cause this Court to reach a definite and firm conviction that a mistake has been made. *See State v. Featherson*, 781 P.2d 424, 431-32 (Utah 1989).

The State argues in its Brief that "Defendant's unlawful presence in the building is reasonably drawn from the testimony concerning whether the vending and change machines . . . could be carried by one person." (*See* Brief of Appellee, p. 12). The

testimony at trial indicates otherwise. Officer Beckstrand's uncontroverted testimony at trial was that the vending machine and coin changer could be lifted by oneself (Bench Trial Transcript, R. 70-73; R. 75, lines 7-14). Even the owner of the units, who, unlike Mr. Murphy, is not an experienced mover, testified that, while being very awkward and difficult, it is possible to move the "units" by yourself (Bench Trial Transcript, R. 89, lines 6-12). The inference that Mr. Murphy could and did lift the units by himself and put them in the back of his car is especially reasonable in light of the undisputed evidence that Mr. Murphy, at the time of trial, had worked loading and unloading moving trucks for approximately eleven years (Bench Trial Transcript, R. 93, lines 11-14).

Defendant acknowledges that the trial court did not believe co-defendant Murphy's version of the events. Further, Defendant acknowledges that issues of credibility are left to the trier of fact. *Cf. State v. Booker*, 709 P.2d 342, 345 (Utah 1985). However, credibility issues aside, the evidence in the instant case is sufficiently inconclusive or inherently improbable that the trier of fact must have entertained a reasonable doubt about Defendant's guilt.[2]

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[2]The State assails Defendant's citation of *State v. Workman*, 852 P.2d 981 (Utah 1993), on the grounds that it does not represent a plurality opinion by the Utah Supreme Court. By so arguing, the State fails to recognize that the proposition for which *Workman* is cited, *i.e.*, that "a guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt", is inherently consistent with the principles set forth in *State v. Span*, 819 P.2d 329, 332 (Utah 1991) (quoting *State v. Nickles*, 728 P.2d 123, 127 (Utah 1991)).

Finally, the State cites *State v. Porter*, 705 P.2d 1174, 1177 (Utah 1985), for the proposition that the requisite intent to commit burglary in the instant case can be inferred from circumstantial evidence of the manner of entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation. According to the Utah Supreme Court's qualifying language set forth in *Porter*, such an inference can be made "[w]here the breaking and entering are *clearly established and not controverted* . . . ." *Id.* (Emphasis added). Unlike the defendant in *Porter*, who was seen by the apartment manager breaking into an apartment across the hall and who was found by the police in the course of committing the burglary, *see id. at 1176*, there were no witnesses in the instant case who placed Defendant in any location other than the passenger seat of Murphy's car. In sum, the breaking and entering at issue in the instant case were not clearly established and uncontroverted and therefore intent cannot be inferred. Furthermore, even if the breaking and entering were clearly established and uncontroverted, the manner of entry, the time of day, the character and contents of the building, the person's

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Furthermore, the concurring opinion authored by Justice Howe, in which Justices Hall, C.J., and Zimmerman join, does not specifically disagree with the aforementioned proposition for which *Workman* is cited but instead criticizes an unrelated analysis particular to the photograph at issue therein.

actions after entry,[3] the totality of the surrounding circumstances, and the intruder's explanation all weight heavily in favor of the evidentiary failure to prove beyond a reasonable doubt that Defendant had the requisite intent as a principal or as a party to commit the alleged burglary.

Even when the evidence supporting the conviction of burglary and theft is viewed is a light most favorable to the trial court's verdict, it is insufficient to support the conviction inasmuch as the totality of the circumstances and evidence lead one to formulate a definite and firm conviction that a mistake was made by the trial court. Reversal for insufficiency of the evidence is therefore appropriate in the instant case.

CONCLUSION

In light of the foregoing, Defendant respectfully asks that this Court reverse his convictions of burglary and theft and remand for a new trial or further proceedings consistent with this Court's instructions as stated in its opinion.

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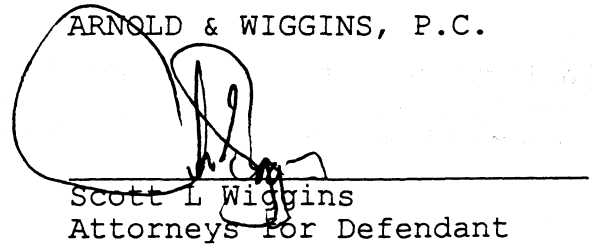
[3]The State cites *State v. Bales*, 675 P.2d 573, 575 (Utah 1983), for the proposition that flight after commission of a crime may be considered by the fact finder in deciding the question of guilt or innocence. However, the State fails to mention that while such a matter may be appropriately considered by the trier of fact, it should be cautioned and tempered by considerations "that there may be reasons for flight fully consistent with innocence and that even if consciousness of guilt is inferred from flight it does not necessarily reflect actual guilt of the crime charged." *Id.*

STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument because oral argument will materially enhance the decisional process due to the significant issues in the instant appeal dealing with sufficiency of evidence issues and the level of evidence required for burglary and theft convictions. Such matters are of continuing public interest and, in light of the facts presented by the instant appeal, involve issues requiring further development in the area of criminal law case development for the benefit of bar and public. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value and direction in future cases.

RESPECTFULLY SUBMITTED this 29th day of October, 1997.

ARNOLD & WIGGINS, P.C.



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CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed two (2) true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid, to the following, on this 29th day of October, 1997.

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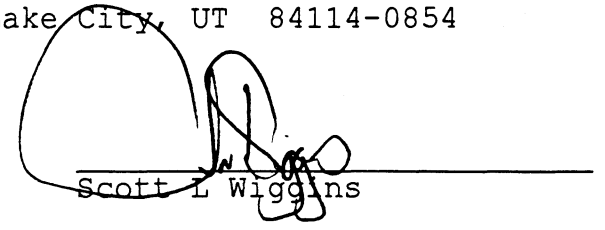

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ADDENDUM

No Addendum is necessary pursuant to Utah Rule of Appellate Procedure 24(a)(11).