

1986

Utah v. Juan Dios Cantu : Brief of Respondent

Utah Supreme Court

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UTAH
DOCUMENT

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, DOCKET NO. 860052

Plaintiff-Respondent, : Case No. 860052

-v- :

JUAN DIOS CANTU, : Priority No. 2

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM CONVICTIONS OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, AGGRAVATED BURGLARY, A FIRST DEGREE FELONY, AND AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, UTAH, THE HONORABLE RAYMOND S. UNO, JUDGE, PRESIDING.

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Clerk, Supreme Ct.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860052
-v-	:	
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 860052
-v- :
JUAN DIOS CANTU, : Category No. 2
Defendant-Appellant. :

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Did the trial court properly deny defendant's motion for a mistrial which was premised on the allegation that the prosecutor was guilty of purposeful racial discrimination when he struck a person with a Hispanic surname from the jury?
2. Was there sufficient evidence to support defendant's convictions?
3. Did defendant preserve an objection to the charge of aggravated robbery being submitted to the jury?
4. Did defendant preserve an objection to the aiding and abetting instruction given to the jury?
5. Did the trial court properly deny defendant's motions to arrest judgment and to modify the judgment?

STATEMENT OF THE CASE

Defendant, Juan Dios Cantu, was charged with aggravated robbery, a first degree felony, under UTAH CODE ANN. § 76-6-302 (1978), aggravated burglary, a first degree felony, under UTAH CODE ANN. § 76-6-203 (1978), and aggravated assault, a third degree felony, under UTAH CODE ANN. § 76-5-103 (1978) (R. 17-18).

A jury found him guilty as charged (R. 32-34). The trial court sentenced defendant to the Utah State Prison for concurrent terms of five years to life on the first degree felonies and zero to five years on the third degree felony; it also ordered him to pay restitution (R. 139-40A).

STATEMENT OF FACTS

According to the State's chief witness, Adelia Pippy, a 68-year-old woman, the following occurred on December 22, 1984 at her home in Salt Lake City. Sometime between 3:30 and 4:00 a.m., a man pulled her from her bed to a point approximately eight inches from his face. He then called her "an old son of a bitch," hit her head with a club, knifed her in the shoulder, and asked her where her gold and silver was. There appeared to be another man standing nearby. With the aid of outside lights that illuminated her bedroom, Ms. Pippy "got a very good look" at her assailant (R. 383-86).

After clubbing, knifing, and pushing Pippy back onto her bed, the assailant told her not to move and turned on a nearby radio. Pippy lay in bed for approximately one hour before getting up and discovering that the men were gone and that the front door and window were open. She determined that a number of items were missing from her house, including a television, two clocks, several coats, a wallet, Christmas gifts, and some porcelain pieces. She also discovered a coat containing items belonging to defendant draped over a chair in the kitchen. (R. 396-420).

Upon contacting the police, Pippy described her assailant to them as dark complected. From a photo lineup shown to her by the police, she positively identified defendant as her assailant. However, at an actual lineup in which defendant participated, Pippy did not pick out defendant. She explained at trial that, although she recognized defendant as her assailant during the lineup, she believed that she was not to choose someone unless she was "100 percent" certain; at the time, she was only "99 and [44/100] percent" sure (R. 423-25). Police investigators did find defendant's fingerprints on several items in Pippy's home (R. 526-34, 590-98).

At trial, Pippy positively identified defendant as her assailant. On cross-examination, she remembered that her assailant had hair to about the bottom of his ears, but she did not recall him having a noticeable moustache or beard. When shown the photo lineup by defense counsel, she appeared to incorrectly identify Exhibit 24 as her assailant. However, on redirect examination, she reaffirmed her identification of Exhibit 22, a picture of defendant, as the man who attacked her (R. 456-57, 512).

Defendant took the stand and testified that on December 22, 1984 he had long hair, a moustache, and a long beard. According to him, in the early morning hours of that day, he had pried open a window at Ms. Pippy's home, crawled through it, and opened the front door to let in two companions. Once inside, he took a coat from the closet. However, when he heard a person snoring in an adjacent room, he and his companions left.

Defendant denied assaulting Pippy while he was in her home, claiming that he had been there only the one time that night with the intent to obtain a warmer coat. He indicated that, after leaving Pippy's house, one of his companions and another male adult, neither of whom had beards, talked about returning to the house (R. 735-65).

SUMMARY OF ARGUMENT

Because defendant failed to make a prima facie showing of purposeful discrimination by the prosecutor in his use of a peremptory challenge, no constitutional violation occurred when the trial court denied defendant's motion for a mistrial.

The State presented sufficient evidence to support defendant's convictions of the crimes charged.

Defendant waived any objection to the charge of aggravated robbery being submitted to the jury; moreover, his assignment of error is contrary to well established judicial interpretations of "immediate presence."

By failing to make a timely objection to Instruction No. 28 at trial, he is precluded from having his challenge to that instruction considered on appeal.

Defendant fails to demonstrate that the trial court abused its discretion when it denied his post-trial motions to arrest judgment and to modify the judgment.

ARGUMENT

POINT I

BECAUSE DEFENDANT FAILED TO MAKE A PRIMA
FACIE SHOWING OF PURPOSEFUL DISCRIMINATION
BY THE PROSECUTOR IN HIS USE OF A PEREMPTORY
CHALLENGE, NO CONSTITUTIONAL VIOLATION
OCCURRED WHEN THE TRIAL COURT DENIED
DEFENDANT'S MOTION FOR A MISTRIAL.

At the time the jury was selected for defendant's trial, the prosecutor exercised one of his four peremptory challenges on a prospective juror named John Lopez whose ancestry was Hispanic (R. 31, 345). See Utah R. Crim. P. 18(d) (UTAH CODE ANN. § 77-35-18(d) (1982)). Relying primarily on Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986), defendant argues that the trial court erred when it refused to require the prosecutor to give his reasons for striking a juror who was the same race as defendant, and when it denied his motion for a mistrial. He then concludes that, because "the prosecutor struck without legitimate cause the only Hispanic," defendant's "right under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the Utah Constitution to a trial by an impartial jury was violated." Br. of App. at 11. He asks this Court to reverse his convictions for this alleged error.

First, it is necessary to do something defendant has failed to do -- i.e., clearly identify the constitutional basis for his argument. Although he briefly discusses cases that analyze the peremptory challenge issue in terms of the fair cross-section requirement contained in the federal and state constitutions, e.g. Commonwealth v. Soares, 377 Mass. 461, 387

N.E.2d 499 (1979); People v. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978), his clear focus on the Batson decision, which is not premised on the sixth amendment but rather on the Equal Protection Clause contained in the fourteenth amendment, 106 S.Ct. at 1716 n. 4, suggests that he is actually making an equal protection argument based on the fourteenth amendment. Thus, his reference to the sixth amendment and article I, section 12 should be ignored as perhaps the result of a less than careful reading of Batson. And because defendant has not cited or discussed the equal protection provision in the Utah Constitution, UTAH CONST. art. I, § 24, the Court should only address the federal equal protection issue he presents.¹ See State v. Dorsey, Utah Sup.Ct. No. 20124, slip op. at 3 n. 2 (filed December 31, 1986). Cf. State v. Gilmore, 103 N.J. 508, ___ A.2d ___ (1986) (resolving Batson claim on state constitutional ground).

Second, defendant assumes, without discussion, that the Batson holding applies retroactively to his case. The United States Supreme Court has already held that Batson does not apply retroactively to final convictions that are collaterally attacked in a federal habeas corpus proceeding, Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986); and the majority, and better reasoned, view is that Batson does not apply to cases pending on

¹ Defendant's citation to UTAH CONST. art. I, § 12 is not pertinent, in that Batson, a federal equal protection case, is the centerpiece of his argument. Soares and Wheeler are decisions expressly grounded on state constitutional law. Furthermore, defendant provides no independent analysis of the state provision.

direct appeal and that the standard enunciated in Swain v. Alabama, 380 U.S. 202 (1965), should be applied to those cases. E.g. Simpson v. Commonwealth of Massachusetts, 795 F.2d 216 (1st Cir. 1986); People v. Taylor, 146 Ill.App.3d 45, 99 Ill.Dec. 688, 496 N.E.2d 263, 265-66 (Ill.App. 1986); State v. McClinton, 492 So.2d 162, 165 n. 2 (La.App. 1986); State v. Hawkins, 347 S.E.2d 98 (S.C. 1986); State v. Jackson, 343 S.E.2d 814, 821-26 (N.C. 1986). But see Wise v. State, 179 Ga.App. 115, 346 S.E.2d 393 (1986) (which appears to give Batson retroactive application on direct appeal). Indeed, although the majority opinion was silent on the question, four of the justices in Batson concluded that it should not have retroactive application. 106 S.Ct. at 1725 (White, J., concurring); 106 S.Ct. at 1731 (O'Connor, J., concurring); 106 S.Ct. at 1740 (Burger, C.J., with Rehnquist, J., dissenting). It appears the question will be finally decided in two cases where certiorari was recently granted -- Griffith v. Kentucky, ___ U.S. ___, 106 S.Ct. 2274 (1986); and Brown v. United States, 770 F.2d 912, cert. granted, ___ U.S. ___, 106 S.Ct. 2275 (1986). By the time this Court issues an opinion in the instant case, it may well have the benefit of a ruling on the retroactivity issue from the Supreme Court; however, until the Supreme Court rules, the Swain standard concerning a prosecutor's use of peremptory challenges, which Batson overruled, should be applied here.

In Swain, the Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates

the Equal Protection Clause." 380 U.S. at 203-04. As summarized by the Batson Court:

To preserve the peremptory nature of the prosecutor's challenge, the Court in Swain declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. Id. at 221-222, 85 S.Ct. at 836-37.

The Court went on to observe, however, that a state may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." Id. at 224, 85 S.Ct. at 838. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. Ibid. For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." Id., at 223, 85 S.Ct. at 837. Evidence offered by the defendant in Swain did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. Id., at 224-228, 85 S.Ct. at 838-40.

106 S.Ct. at 1720. Defendant's constitutional claim should be analyzed under this standard.

In the trial court, there was no dispute that defendant was a Hispanic. However, the situation was not so clear with respect to prospective juror Lopez. When defendant's counsel asked Lopez and another venireperson to raise their hand if they considered themselves a member of a racial minority such as "Aleut Eskimo, American Indian, Asian, Hispanic or black," neither raised a hand (R. 345). It was not until defense counsel specifically questioned Lopez about possible Hispanic ancestry that he acknowledged having that background (R. 345). This suggests that, even though Lopez had a Hispanic surname, he did not identify closely with Hispanics as a distinctive group in the community. Cf. People v. Harris, 36 Cal. 3d 36, 201 Cal. Rptr. 782, 679 P.2d 433, 440-41 (1984) (recognizing that Hispanics share with other members of their group a common perspective arising from their life experience in the group). Nevertheless, for purposes of his claim that there was a clear inference of racial discrimination when the prosecutor peremptorily challenged Lopez, defendant asserts without qualification that Lopez was a Hispanic and implicitly concludes that he therefore shared the unique perspective of the Hispanic group in the community.

In addition to the exclusion of Lopez by the prosecution, defendant offered the trial court further evidence of the prosecutor's alleged discriminatory use of a peremptory challenge in the form of testimony from several defense attorneys. Those attorneys generally testified that very few

minority persons actually served on a jury in the numerous criminal trials they had handled, and that minorities were regularly removed by Salt Lake County prosecutors through the exercise of peremptory challenges (R. 274-87, 466-79).

For the very same reason that the defendant did not prevail in Swain, defendant should not prevail here. In short, he offered no proof to the trial court of the circumstances under which prosecutors were responsible for striking minorities beyond the facts of his own case -- i.e., proof that would demonstrate a systematic exercise of peremptory challenges by the State to exclude minorities from juries on account of race. Admittedly, this is a heavy burden of proof, but many lower courts have interpreted Swain as requiring a defendant to present evidence of repeated striking of minorities over a number of cases before an equal protection violation could be established. See Batson, 106 S.Ct. at 1720. Significantly, in Batson the Supreme Court did not question the reasoning of those lower court decisions, and appeared to overrule Swain because it set forth this now unacceptable evidentiary formulation for assessing a prima facie case under the Equal Protection Clause. Id. at 1721-25.

Furthermore, the circumstances of the prosecutor's single peremptory strike of a person with a Hispanic surname in defendant's case did not give rise to a clear inference of purposeful discrimination based on race. As previously noted, Mr. Lopez's initial reluctance to call himself a Hispanic suggests a lack of identity with the perspective of that minority group even though he had a Hispanic surname -- a factor that

tends to indicate that the prosecutor may have had reasons other than Lopez's Hispanic ancestry for striking him from the jury. Indeed, this circumstance concerning Lopez might very well prevent defendant from making out a prima facie case of purposeful discrimination under the more lenient standard adopted in Batson, 106 S.Ct. at 1722-23, under which a defendant, in order to establish a prima facie case, must show: (1) "that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race;" and (2) that the facts and circumstances "raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." Even under Batson, removal of a minority from the jury does not, by itself, raise an inference of racial discrimination. Phillips v. State, 496 N.E.2d at 89.

In conclusion, Batson should not be applied retroactively to defendant's case. Because defendant failed to carry the burden set forth in Swain, the trial court properly refused to require the prosecutor to explain his striking of Lopez and correctly denied defendant's motion for a mistrial.

POINT II

DEFENDANT'S INSUFFICIENCY OF EVIDENCE CLAIM IS WITHOUT MERIT

When considering a challenge to the sufficiency of the evidence, this Court has applied the following standard of review:

This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in

the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt. We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it.

State v. McCardell, 652 P.2d 942, 945 (Utah 1982) (citations omitted). 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 1264, 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).

The evidence presented by the State at trial is summarized in this brief's statement of facts. Under the foregoing standards of review, that evidence, although not overwhelming, was sufficient to support defendant's convictions. 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. In brief, he asks the Court to believe his story and disbelieve the testimony of the State's chief witness, Ms. Pippy. As is evident from the authority cited above, the Court has repeatedly stated that it will not review a criminal case in that fashion.

Finally, certain portions of defendant's argument on this point require a brief response in order to clarify the situation at trial. First, defendant contends that the photo lineup shown to the victim was impermissibly suggestive and therefore the identification of defendant made from it was not reliable evidence. This contention should not even be considered, in that defendant never made that objection, either before or during trial, to the admission of testimony concerning the lineup. See Utah R. Crim. P. 12(b)(2) & (d) (UTAH CODE ANN. § 77-35-12(b)(2) & (d) (1982)); Utah R. Evid. 103(a)(1); State v. Heaps, 711 P.2d 257, 259-60 (Utah 1985). In the absence of a timely objection to that evidence, defendant may not now argue that the evidence was insufficient to support his conviction because it was infirm.

Second, defendant's attacks on the eyewitness identification testimony given by the victim are made without disclosure to the Court that defendant's requested cautionary eyewitness identification instruction, patterned after the one recommended in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), was given to the jury before it began its deliberations (see Instruction No. 29, R. 69; Defendant's Requested Instruction

No. 5, R. 87). Cf. State v. Long, 721 P.2d 483 (Utah 1986).

Therefore, the jurors had specific instructions on the factors to consider in determining the accuracy of the victim's identification of defendant as the perpetrator of the crimes charged. It is for the jury, and not for this Court, to assess the victim's testimony and to weigh whatever inconsistencies were apparent in it. Unless the testimony is wholly improbable, the Court will not disturb the judgment reached in the trial court. State v. Lairby, 699 P.2d 1187, 1206 (Utah 1984). Given the existence of corroborating physical evidence (e.g., the presence of defendant's coat and his fingerprints in the victim's house), the victim's testimony cannot be fairly characterized as wholly improbable.

Third, defendant's references to State's Exhibits 22 and 24 (photographs that were part of the photo lineup shown to the victim) (Addendum F to defendant's brief) and to a transcript of the lineup attended by the victim (Addendum A to defendant's brief) are inappropriate, in that none of those items has been made a part of the record on appeal. This Court has consistently refused to review materials not included in the record on appeal. E.g. Lairby, 699 P.2d at 1192, 1202-03.

POINT III

DEFENDANT WAIVED ANY OBJECTION TO THE
CHARGE OF AGGRAVATED ROBBERY GOING TO
THE JURY; MOREOVER, THIS ASSIGNMENT
OF ERROR LACKS MERIT.

Defendant argues that the trial court erred in allowing the charge of aggravated robbery to go to the jury because the State presented no evidence "that anything was taken from the

person of the victim or from her immediate presence by means of force or fear." Br. of App. at 23. However, defendant waived this argument by failing to make a timely objection at trial. He made no objection at trial to the instructions on robbery being submitted to the jury (R. 809). In fact, he requested an instruction on robbery (see Defendant's Requested Instruction No. 15, R. 98) which, as noted by defense counsel (R. 808), was similar to the ones requested by the State and given by the court (see State's Requested Instruction No. 6, R. 110; Instruction No. 13; R. 51). He also did not object to the additional instruction on "immediate presence" the court gave the jury after it had retired to deliberate (R. 873-74). Under these circumstances, defendant waived any objection to the jury being instructed on aggravated robbery. State v. Noren, 704 P.2d 568, 571 (Utah 1985) (citing State v. Kazda, 545 P.2d 190 (Utah 1976)); Utah R. Crim. P. 19(c) (UTAH CODE ANN. § 77-35-19(c) (1982)). Although he did raise the issue in a post-trial motion, that did not preserve the issue for appeal. State v. Erickson, 722 P.2d 756, 759 (Utah 1986).

Moreover, defendant's argument lacks merit. The evidence presented most certainly proved the element of taking property from the person or immediate presence of the victim by force or fear. As noted in Torcia, Wharton's Criminal Law § 473 at 51-52 (14th ed. 1981):

For the purpose of robbery, property is deemed to be within a victim's "presence" when it is within his control. As one court has put it: "A thing is in the presence of a person, in respect to robbery, which is so within his reach,

inspection, observation or control, that he could, if not overcome with violence or prevented by fear, retain his possession of it." In accordance with this test, property is deemed to be in a victim's presence even though it is located in another room of the house, or in another building on his premises.

A defendant is guilty of robbery when, after putting a victim in fear, he drives away his cattle, or when, after forcing a victim to open his desk or safe, he takes papers therefrom.

A defendant is likewise guilty of robbery when, by the use of force or threatened force, he compels a victim to leave the room or place where the money or property is located and then, in the victim's absence, takes the money or property.
[Footnotes omitted.]

See also State v. Ulibarri, 668 P.2d 568 (Utah 1983); Perkins and Boyce, Criminal Law 346-47 (3d ed. 1982).

POINT IV

DEFENDANT WAIVED THE OBJECTION TO
INSTRUCTION NO. 28 HE RAISES ON APPEAL

At trial, when given the opportunity to take exceptions to the jury instructions, defense counsel stated:

Your Honor, the defense would take exception only to those given which are party's [sic] instructions, including elements of each of the offenses as well as the separate culpability definition of parties. I think they're the only exceptions that we would take.

(R. 649). On appeal, defendant contends that the trial court erred in giving Instruction No. 28 (R. 68), an aiding and abetting instruction drawn from UTAH CODE ANN. § 76-2-202 (1978), because there was no evidence to support such an instruction.

Utah R. Crim. P. 19(c) provides:

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice. [Emphasis added.]

Defense counsel's stated objection does not contain any reference to lack of evidence as a basis for opposing an aiding and abetting instruction. Therefore, under Rule 19(c), defendant is precluded from raising that objection to Instruction No. 28 for the first time on appeal. See Noren, 704 P.2d at 571; Kazda 545 P.2d at 192-92. Nothing suggests that manifest injustice would occur if the alleged instructional error is not reviewed by the Court because of waiver. Cf. State v. Lesley, 672 P.2d 79, 81 (Utah 1983)

POINT V

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S POST-TRIAL MOTIONS TO ARREST JUDGMENT AND TO MODIFY THE JUDGMENT.

Defendant claims that the trial court erred in not granting either of his post-trial motions -- one to arrest judgment and the other to modify the judgment. However, in taking this position, defendant fails to demonstrate that the court abused its discretion.

Utah R. Crim. P. 23 (UTAH CODE ANN. § 77-35-23 (1982)) provides:

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or

admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

The obvious purpose of that rule is to protect a defendant from an incorrect jury verdict when the evidence did not establish that an offense had been committed, or when there is evidence that due to mental illness the defendant was unable to form the mental state required for commission of the crime or was incompetent to stand trial. Defendant made neither of these showings in the trial court (R. 880-909), and he does not do so here. Therefore, the trial court properly denied his motion to arrest judgment. See State v. Lairby, 699 P.2d at 1203.

Defendant's further assignment of error regarding the court's refusal to modify the judgment from guilty to guilty and mentally ill may be disposed of summarily. First, prior to the return of verdicts in his case, defendant never raised an issue about defendant's possible mental illness or requested an instruction on guilty and mentally ill verdicts. See Utah R. Crim. P. 21 (UTAH CODE ANN. § 77-35-21 (1982)). Second, his claim of error is really an attack on the court's decision to sentence defendant pursuant to the guilty verdicts returned rather than sentencing him in accordance with the provisions of Utah R. Crim. P. 21.5 (UTAH CODE ANN. § 77-35-21.5 (Supp. 1986)) relating to a guilty and mentally ill verdict. Because the court imposed sentences that were within the limits prescribed by law

and there is no showing that it abused its discretion in doing so, this Court should not disturb the sentencing decision. State v. Peterson, 681 P.2d 1210, 1219 (Utah 1984); State v. McKenna, 45 Utah Adv. Rep. 9, 11, ____ P.2d ____, ____ (1986); State v. Shelby, 45 Utah Adv. Rep. 11, ____ P.2d ____ (1986).

CONCLUSION

Based upon the foregoing arguments, defendant's convictions should be affirmed.

RESPECTFULLY submitted this 8th day of January, 1987.

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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 Jo Carol Nasset-Sale, attorney for appellant, 333 South 200 East, Salt Lake City, Utah 84111 this 8th day of January, 1987.

David B. Thompson