

1978

State of Utah v. Kenneth P. Sharp : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

KENNETH P. SHARP, :

Defendant-Appellant. :

BRIEF OF

APPEAL FROM THE
COURT OF
ROBBERY AND
IN THE
THIRD JUDICIAL
FOR SALT LAKE
UTAH, THE

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 15913
KENNETH V. SHARP, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged and convicted of the offense of Aggravated Robbery and Aggravated Burglary, in violation of Utah Criminal Code §§ 76-6-302 and § 76-6-203, respectively. Both offenses are Felonies of the first degree.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of the offenses of Aggravated Robbery and Aggravated Burlary by a jury in the District Court of the Third Judicial District, the Honorable Dean E. Conder, judge presiding.

RELIEF SOUGHT ON APPEAL

Appellant seeks affirmation of the judgment of the lower court.

STATEMENT OF FACTS

Elsa and Charles Allison maintain the Allison Kennels which are located at the same address as their residence (T. 211-212). When the appellant unlawfully entered their residence on August 23rd, both of the Allisons were home. Upon hearing a commotion in the living room, Mr. Allison emerged from the bedroom to find his wife and the appellant in that room (T. 214). Mr. Allison testified that the appellant was armed with a firearm (T. 214). The appellant ordered the Allisons to lay down on the floor facedown, and threatened to shoot them if they did not do so (T. 216).

At about this time, another man, Wadell, entered the room, asked where the keys to the Kennel were, and said that he wanted the Wadell dogs. Before leaving for the Kennel, Wadell helped the appellant tie up the Allisons (T. 218, 243).

The appellant again threatened to use his firearm (T. 218) if the Allisons didn't tell him where their money was. At this time, money was taken from Mrs. Allison's purse, which was located in the living room. The appellant ransacked the bedroom and took a gun; some jewelry, and some money from Mr. Allison's trousers (T. 246, 218, 220).

After the appellant and Wadell left the home, Mr. Allison got free, untied his wife, and she called the police (T. 223-224). The Allisons gave a description of the appellant to the police when they arrived (T. 224-225), and later identified the appellant in photographs supplied by the police, as the perpetrators of the crime (T. 224, 225, 248).

ARGUMENT

POINT I.

THE EVIDENCE IS SUFFICIENT TO
SUPPORT THE VERDICT OF THE
COURT BELOW.

The fundamental rule governing a claim of insufficient evidence on appeal is that the evidence and all inferences fairly to be drawn therefrom must be viewed in the light most favorable to the jury's verdict. State v. Wilson, 565 P. 2d 66 (Utah 1977).

In order to find guilt in an Aggravated Robbery charge under Utah Code Ann. § 76-6-302, as amended, 1973, the jury must find that the accused unlawfully and intentionally took money or property from one in possession or in immediate presence of such property. Additionally, it must be determined that the taking was accomplished by force or fear and that a firearm was used in the course of committing the robbery.

Under Utah Code Ann. § 76-6-203, as amended, 1973, the accused is guilty of Aggravated Burglary if the jury finds that he entered the dwelling unlawfully, with the intent to commit a theft wherein he obtained control over the property of another with the intent to deprive. He must also be in possession of a firearm.

The evidence in the record and the inferences fairly drawn therefrom, viewed in the light most favorable to and supportive of the verdict are as follows:

The appellant entered the Allison residence without their consent intending to deprive them of whatever valuable possessions he could find in the home.

The appellant did find and take money and jewelry from the possession or immediate presence of the Allisons with the intent to deprive them of these possessions.

In the course of committing the crime, the appellant was in possession of a shotgun and, in fact, used it to threaten the Allisons.

In his brief, the appellant cites the United States Supreme Court decision of U.S. v. Wade, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S. Ct. 1926, (1967) to support his contention that the Allisons did not have enough time to fix the identity of

the appellant in order to later identify him as the perpetrator of the crime. U.S. v. Wade, however, is concerned primarily with the manner in which lineups for identification are conducted and the risk of improper suggestion in identifying witnesses entailed in such lineups. The instant case, however, does not raise the issue that the Allison's may have been influenced in their identification of the appellant as the man who robbed them.

State v. Middelstat, 579 P. 2d 908 at 909 (1978), a recent decision by this court involving a challenge to the sufficiency of the evidence, stated that before it can be said that the evidence is insufficient to uphold a conviction, it must be shown that the quality of the testimony given is "so improbable that it is completely unbelievable."

The only evidence offered by the appellant to impeach the credibility of the Allison's was, in itself, subject to suspect. The appellant proffered the testimony of the appellant's mother and Wadell's brother. Arguably, both of these witnesses had an interest in the outcome of the trial due to their relationship with the appellant, but, the question of who to believe was a factual question for the trier of fact. The jury was entitled to believe or disbelieve the witnesses. In the case of State v. Wilson, 565 P. 2d 66, (Utah, 1977), this Court held:

"The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury. Consequently, we are obliged to assume that the jury believed those aspects of the evidence, and drew those inferences that reasonably could be drawn therefrom, in the light favorable to the verdict." Id. at 68.

It was reasonable for the jury to conclude that the Allisons were telling the truth in view of the evidence put before them, and to believe the accuracy of the identification. The jury had the advantage of having all the facts before them and of hearing and evaluating firsthand the testimony and demeanor of the witnesses.

CONCLUSION

The attack on the Allisons' identification of Kenneth Sharp is not supported by the weight of the evidence received at trial. Both victims had ample opportunity to see the offenders. They remembered and related peculiarities in Sharp's appearance that established his identification without a doubt.

Respondent respectfully submits that the appellant has failed to show that the evidence at trial was insufficient

to justify a conviction. Respondent, therefore, respectfully requests that this Court affirm the verdict and judgment of the lower court.

Respectfully submitted,

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