2001

The State of Utah v. Larry Bell : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - -

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LARRY BELL,

Defendant-Appellant.

Case No. 14357

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BRIEF OF RESPONDENT

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Appeal from a jury verdict of guilty in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Gordon R. Hall, Judge presiding.

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IN THE SUPREME COURT OF THE

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crime of burglary in violation of Title 76, Chapter 6, Section 202, Utah Code Annotated (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was convicted of the crime of burglary by a jury in the Court of the Honorable Gordon R. Hall on November 4, 1975. Appellant was sentenced to serve the indeterminate term provided by law in the Utah State Prison, namely, zero to five years.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the conviction.

STATEMENT OF FACTS

Two girls were driving south on State Street in Salt Lake City shortly after midnight on May 9, 1975. Near a pawn shop at 1588 South State Street, the girls saw appellant who appeared to be hitchhiking (T.4). The girls pulled over and talked to appellant for a short time and then drove off (T.5). The girls drove on down State Street, turned around, and drove back past appellant. At this time, he was looking in the windows of the pawn shop (T.6). The girls drove north and turned again and proceeded south a second time. This time as they went by they saw appellant in front of the pawn shop with something in his hands. One of the girls said:

> "I seen him standing in front of Pahl's about the door, facing northeast; and he had something in his hands and was wrapping a cord around it.
>
> Q. Could you describe what that something was?
>
> A. It was black and it had silver around it. Looked like an eight track or, you know, a stereo of some kind." (T.6).

The girls also said that one of the store windows had been broken, and that a bag of golf clubs was hanging out of the break in the window (T.7). The girls continued south on State Street, turned around again and proceeded north. This time a police officer was at the pawn shop. He had answered a burglar alarm (T.35). The girls stopped and told the police officer about appellant (T.8). The officer arrested appellant a short distance away and brought him back. The girls identified him as the person they had previously observed (T.9).

Appellant testified that he noticed a disturbance at the pawn shop and came to see what was going on when an officer apprehended him (T.60). He claimed that he was not involved whatsoever in breaking the window or in any burglary (T.63). No stolen items were found in his possession or at his apartment (T.43).

The girls also testified that when they first saw appellant he had a plastic bag with something white in it and that he appeared to be very drunk (T.5,24,26), although they could smell no alcohol (T.33). Officer English testified that he thought appellant was intoxicated but that he could not smell alcohol. Later he found several empty glue tubes

in appellant's apartment. The officer then said he recognized the odor of glue coming from appellant (T.38). Appellant was later taken to the hospital for treatment of a possible overdose of glue fumes (T.44). Finally, Officer English testified that some of the broken window glass had glue on it and that a plastic bag was found directly below the broken window (T.40). Furthermore, Officer English testified that appellant had several particles or slivers of glass on his right coat sleeve (T.37).

During the trial, appellant made a motion to have instructions submitted to the jury concerning lesser included offenses such as attempted burglary, criminal mischief, or trespassing (T.71). The motion was denied.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR SUBMISSION OF INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

Appellant asks this Court to reverse his conviction because the trial court refused to instruct the jury on lesser included offenses of burglary. Respondent replies that the trial judge acted correctly. The law of burglary

in Utah was clearly broken. The conviction was supported by ample evidence, and there was no evidence to support any instructions as asked for by appellant.

Utah Code Ann. § 76-6-202 (Supp. 1975), provides:

> "(1) A person is guilty of burglary if he enters . . . a building or any portion of a building with intent to commit a felony or theft. . . ."

Entry is defined in Utah Code Ann. § 76-6-201 (Supp. 1975), as:

> "(4) 'Enter' means:
> (a) Intrusion of any part of the body; or
> (b) Intrusion of any physical object under control of the actor."

Thus, it is obvious that a man is guilty of burglary if he breaks a window of a building with intent to steal something from it. It does not matter how he breaks the window; whether it be by striking it with his arm or throwing a rock through it.

Respondent submits that there is ample evidence on which to convict appellant of burglary. He was seen in the vicinity, he was seen carrying something from the window, glue was found on the broken glass and slivers were found in his coat, and golf clubs were hanging out the window (T.6, 37,40).

Furthermore there is no intent problem. That issue was raised and denied in the trial court and has not been raised on appeal. There is ample evidence to support the intent to steal if that question had been raised.

As to the lesser included offenses, appellant has correctly cited the law. As he points out:

> ". . . the failure to present for the jury's consideration a party's theory by appropriate instructions constitutes reversible error." State v. Newton, 144 P.2d 290 (Utah 1943).

However:

> ". . . the defendant is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify giving such instructions." State v. Johnson, 185 P.2d 738, 743 (Utah 1947). (Emphasis added.)

That holding has been affirmed more recently by the Utah Supreme Court in the case of State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969).

In a later case, the test was modified somewhat. In State v. Gillian, 23 Utah 2d 372, 463 P.2d 811 (1970), the Court held that the lesser included offense should be offered if ". . . any reasonable view of the evidence

would support such a verdict." Id. at 812. (Emphasis added.)

The Court went on to say:

> ". . . in this situation where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offenses." 463 P.2d at 814.

As we examine the evidence it will become apparent that there is no "substantial" or "reasonable" evidence on which to base the requested instruction. "Attempt" is defined in Utah Code Ann. § 76-4-101 (Supp. 1975), as follows:

> "(1). . . a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step towards commission of the offense."

Therefore, in order to have an attempted burglary it would be necessary to have a man take a substantial step towards breaking the glass, but without breaking it or causing any other entry. Once the glass was broken an entry had to have been made and the crime can no longer be an attempt under the Utah statute. Someone broke that glass, and if that same person had the intent to steal, there was a burglary. An attempted burglary simply cannot be reasonably construed under any view of the evidence.

As for trespass, that term is defined in Utah Code Ann. § 76-6-206 (Supp. 1975):

> "(2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-6-203, or 76-6-204:
>
> (a) He enters or remains unlawfully on property and:
>
> (i) Intends to cause annoyance or injury . . .
>
> (ii) Intends to commit any crime, other than theft or a felony;
>
> (iii) Is reckless as to whether his presence will cause fear . . . ."

Appellant had not one shred of evidence that he entered the pawn shop with one of the above intents. He testified that he was not even there. Thus, he was basing his entire defense on mistaken identity. It was burglary or nothing, with no middle ground.

Finally, as to criminal mischief, that is defined in Utah Code Ann. § 76-6-106 (Supp. 1975):

> "(1) A person commits criminal mischief if:
>
> (a) . . . he damages or destroys property with the intention of defrauding an insurer; or
>
> (b) He intentionally and unlawfully tampers with the property of another and thereby:
>
> (i) Recklessly endangers human life; or
>
> (ii) Recklessly causes . . . a substantial interception or impairment of any public utility; or
>
> (c) He intentionally damages, defaces, or destroys the property of another."

Again, appellant put forth not the least shred of evidence which would support an instruction on this crime. He said he had nothing to do with it. This was a case of committing either burglary or nothing, and the jury found that appellant was guilty as charged.

CONCLUSION

Since, under the Utah statute, burglary is defined as the slightest entrance coupled with an intent to steal, it is obvious that a broken glass window makes out a prima facie case as far as "entrance" goes. If that entrance is coupled with an intent then burglary is committed. The crime has gone too far to be an attempt. It is impossible to support a lesser included offense instruction by any reasonable view of the evidence in this case. Appellant's conviction should be affirmed.

Respectfully submitted,

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