

1978

State of Utah v. Kenny Fred Vieregge : 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-

KENNY FRED VIEREGGE,

Defendant-Appellant.

BRIEF OF

APPEAL FROM A VERDICT
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
HONORABLE JAMES

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IN THE SUPREME COURT OF THE
STATE OF UTAH

: STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 16401
KENNY FRED VIEREGGE, :
Defendant-Appellant. :

: -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Burglary, a felony of the third degree, in violation of Section 76-6-202, Utah Code Annotated (1953, as amended).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty as charged on February 28, 1979, in the Third Judicial District Court, the Honorable Ernest F. Baldwin, Judge, presiding. The Trial Court entered judgment on the verdict and sentenced appellant to an indeterminate period of from 0 to 5 years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order from this Court affirming the verdict of the jury and the judgment and sentence of the court below.

STATEMENT OF THE FACTS

Respondent accepts appellant's statement of the facts with the following exceptions:

Mrs. Diamantine testified that appellant stated that if they were caught with camping equipment the cops would have to prove it and that camping equipment has no serial numbers so the cops couldn't prove anything (T. 84).

Detective Hayes testified that appellant had indicated that appellant had entered the building where the theft took place (T. 110).

Appellant did not testify that they were looking for "sporting goods equipment for one of the juveniles . . ." (Appellant's Brief p.3), but rather that they were to borrow a bike (T. 125).

ARGUMENT

POINT I

THE EVIDENCE PRESENTED IS SUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT OF THE COURT BELOW.

This Court has recently restated the principle of law to be applied in a case where sufficiency of the evidence

is the major issue. State v. Lamm, 606 P.2d 229 (Utah 1980), provides that:

The sole issue presented by this appeal is that of the sufficiency of the evidence. It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of this Court to substitute its judgment for that of the factfinder. This Court should only interfere where the evidence is so lacking and in substantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

Id. at 231. That case cited numerous other cases as standing for the same proposition. Id. at 231 (Footnote 2). Respondent submits that the cases cited by appellant stand for the same proposition.

Appellant was convicted of burglary in violation of Section 76-6-202, Utah Code Annotated (1953, as amended) which provides as follows:

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Further, Section 76-2-202, Utah Code Annotated (1953, as amended) provides:

Every person, acting with the mental

state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

The jury was instructed in the instant case that they must find the existence of the above elements, including the possibility of intentional aiding, beyond a reasonable doubt in order to convict appellant of the crime charged. (Instruction 12, R. 27).

It seems clear that the jury could have found from the testimony of Detective Hayes that appellant actually entered the building (T. 10), and from the testimony of Mrs. Diamantine that appellant had the requisite intent to commit theft (T. 84).

Even if the jury chose to believe appellant's claim that he didn't actually enter the building, they could still reasonably find that he intentionally aided the three juveniles in the commission of the crime.

CONCLUSION

Respondent submits that by applying the principles consistently outlined by this Court regarding the evidence necessary to support a jury's verdict, it becomes apparent that the evidence here is not so lacking and insubstantial that reasonable men could not possibly have reached a guilty

verdict beyond a reasonable doubt.

Respectfully submitted,

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