

1978

State of Utah v. Kenny Fred Vieregge : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLANT

Appeal from a verdict of guilty in the Third Judicial
District Court, in and for Salt Lake County, the Honorable
Ernest F. Baldwin, Jr., presiding.

G. L. FLETCHER
Salt Lake Legal Defender
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT B. HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

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Clerk, Supreme Court

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G. L. FLETCHER
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT B. HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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 KENNY FRED VIEREGGE, : Case No. 16401
 :
 Defendant-Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, KENNY FRED VIEREGGE, appeals from a conviction of burglary in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, KENNY FRED VIEREGGE, was found guilty by a jury. The Honorable Ernest F. Baldwin, Jr., Judge, presiding, in a trial concluding February 27, 1979. The defendant thereafter was committed to the Utah State Prison for the indeterminate term of 0 to 5 years.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a new trial on the issue of whether or not there was sufficient evidence to sustain a conviction.

STATEMENT OF THE FACTS

State presented witness David Bjorkman who testified that he was a resident of an apartment building in Holliday, Salt Lake County, and that he had a storage unit in a building in conjunction with that rented apartment. He testified that on November 11, 1978, he reported to the police that the storage unit which was his was left standing open and that certain items were missing, among them a Coleman campstove and a Coleman lantern and other camping gear. Kathleen Diamantine testified that in the early morning hours of November 11, the appellant came to her house in the company of three other individuals who were juveniles. She knew all four of these people. She observed them carrying in some camping equipment which they left at her house. She testified that the four individuals told her that the equipment had come from an apartment house in Holliday. She stated that the appellant had said that the police could not trace the evidence since none of the camping gear had serial numbers. Detective Wagaman, of the Salt Lake City Police Department, testified that he had found the described camping equipment at the home of Kathleen Diamantine. Detective Hayes, of the Salt Lake County Sheriff's Office, testified that he interviewed the appellant and upon the waiver of appellant's rights to remain

silent the appellant told him that it was his car which had been driven to an apartment complex in the Holliday area and that he had helped transport in the company of three juvenile individual's items of camping gear to Kathleen Diamantine's apartment in the avenues in Salt Lake. Defendant took the stand on his own behalf and testified that he and some juvenile friends of his had been on an errand to look for some sporting goods equipment for one of the juveniles and that they were supposed to pick the items of equipment up from a friends house. He testified that his friends directed him to a house in Holliday and that the three friends got out of the car and came back with camping equipment. He testified that he did not take any of the property into the house and that it was his companion's suggestion to leave the property at Kathleen Diamantine's house in the avenues. He testified that he did not know that they were going to steal the property until after they came back with the property and only then did he become involved because he did not want to tell on friends of his.

ARGUMENT

POINT I

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE.

This court has on several occasions stated the rules

concerning the granting of a new trial on the basis that the verdict was not supported by the evidence. In State v. Cooper, 114 Ut. 531, 201 P.2d 764, 770 (1949), this court stated:

The question of granting or denying a motion for a new trial is a matter largely within the discretion of the trial court. This court cannot substitute its discretion for that of the trial court. We do not ordinarily interfere with the rulings of the trial court in either granting or denying a new trial, and unless abuse of, or failure to exercise, discretion on the part of the trial judge is quite clearly shown, the ruling of the trial court will be sustained.

While in appellant's case there was no motion for a new trial, the above language would seem to indicate under what circumstances this court will grant a new trial even in the absence of a motion for a new trial. The court also stated:

The state's evidence is so inherently improbable as to be unworthy of belief so that upon objective analysis it appears that reasonable minds could not believe beyond a reasonable doubt that the defendant was guilty, the jury's verdict cannot stand. Conversely, if the state's evidence was such that reasonable minds could believe beyond a reasonable doubt the defendant was guilty, the verdict must be sustained. State v. Mills, 122 Ut. 306, 249 P.2d 211 (1952).

It is apparent from these various statements of the law that this court does have the power to order a new trial in appropriate cases. This court has said that:

We are not unmindful of the settled rule that it is the province of the jury to weigh the testimony and determine the facts. Nevertheless, we cannot escape the responsibility of judgment upon whether under

the evidence, a jury could, and reason, conclude the defendant's guilt was proved beyond a reasonable doubt. State v. Williams, 111 Ut. 379, 180 P.2d 551, 555 (1947).

In State v. Mills, 530 P.2d (1975), this court also discussed a challenge to the sufficiency of the evidence:

For a defendant to prevail upon a challenge to the sufficiency of the evidence to sustain his conviction, it must appear that viewing the evidence and all inferences that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt. 530 P.2d at 1272.

Clearly, each case must turn upon its own facts and circumstances to whether or not a new trial is warranted because the verdict was not supported by the evidence. In this case only witnesses who had seen the property before and after the crime was committed testified. None of the other participants as identified by the State in the action were subpoenaed by the State. The State presented evidence of an admission by the defendant-appellant; however, that statement was unrecorded and the police officer testified that some of the items that he testified to were clear in his own mind. The appellant took the stand in his own behalf and testified that this participation in the crime occurred only after the burglary had occurred thereby admitting to a crime of theft by receiving but not the crime of burglary. It is appellant's contention that the only conflict in the evidence was based on whether or not he actually new about

the crime until after it had occurred. Because the police officer did not record nor make any notes of the conversation which he had with the defendant and admitted that his memory on some of the items was not clear, the evidence presented at the trial is not sufficient to sustain a conviction and therefore this court should overturn that conviction and grant a new trial.

CONCLUSION

The appellant contends that the evidence presented by the State at trial is consistent with his own testimony that he did not know about the crime until after it occurred and that therefore he should not be found guilty of burglary. Appellant contends that since he did incriminate himself that what he testified to under oath is true and that a statement from the police officer was unclear and was not taken while the defendant was under oath, that there is in this case reasonable doubt as to the sufficiency of the evidence.

Respectfully submitted,

G. L. Fletcher
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant