

1989

State of Utah v. Thomas D. Montes : Brief of Appellant

Utah Court of Appeals

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Joel D. Berrett; Attorney for Appellant.

R. Paul Van Dam; Attorney General; Dan R. Larsen; Assistant Attorney General; Attorneys for Appellee.

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UTAH COURT OF APPEALS
BRIEF

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890336-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
Plaintiff-Appellant,)	
vs.)	Case No. 890336-CA
THOMAS D. MONTES,)	
Defendant-Respondent.)	

BRIEF OF APPELLANT

Appeal from the Judgment of the
Eighth Judicial District Court, Duchesne County
Honorable Dennis Draney

R. PAUL VAN DAM
ATTORNEY GENERAL
236 State Capitol
Salt Lake City, Utah 84114

JOEL D. BERRETT
P.O. Box 262
Roosevelt, Utah 84066

Attorney for
Plaintiff-Respondent

Attorney for
Defendant-Appellant

Argument Priority Classification No. 2

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COURT OF APPEALS

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LIST OF PARTIES

The only parties to this litigation are contained in the caption of the case including the State of Utah and Thomas D. Montes.

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STATEMENT OF JURISDICTION

This court has jurisdiction of this appeal under Utah Code Section 78-2a-3(2)(f) since this is an appeal from a District Court in a criminal case not involving a first degree or capital felony.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the evidence presented by the state sufficient to sustain the convictions of defendant?
2. Was defendant deprived of effective assistance of counsel at trial?

CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Code Section 76-1-501(1)

A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

Amendment VI to the United States Constitution

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Article I, Section 12, of the Constitution of the

State of Utah

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel

STATEMENT OF THE CASE

In this case, the defendant, was convicted of burglary, a third degree felony and theft, a second degree felony at a trial conducted before a jury on February 24, 1989. The court later sentenced the defendant to a term of one to fifteen years on the burglary charge and a term of zero to five years on the theft charge all to be served at the Utah State Prison.

STATEMENT OF FACTS

The events testified to at trial began on November 15, 1987. Monica Lawson testified on behalf of the state that on that date the defendant and Lyle Hendricks picked up her and her sister and drove around Roosevelt, Utah and the surrounding area for several hours. The men were driving a blue Samurai. Tr. p. 46. During the time she and her sister were with the men, they stopped at the corner where Sathers Jewelry, (hereinafter Sathers) is located, got out of the car, went over to the store and looked in the window. Upon returning to the car, she heard the men remark that "it's too easy, a piece of cake." Tr. p. 46, 47, 48. Ms. Lawson stated that this occurred at between 9:00 and 9:30 that evening. Tr. p. 51. She also testified that the men took

her home at approximately 10:30 that evening. Tr. p. 46.

Another witness for the state was Tom Jones. He testified that he saw a blue Samurai parked at Circle K and at Maverick during the evening of November 15, 1987. Tr. p. 58-59. There were two guys and two girls in the car. The only person he recognized in the car was Monica Lawson. At approximately 10:00 o'clock that evening, while stopped at the stop light in front of Sathers, he saw the blue Samurai parked by the alley back of Sathers and two unidentified guys standing in front looking through the window. When the light changed the two men ran from Sathers toward the Samurai. Tr. p. 60-61.

Angela Conger, a witness for the state, testified that at approximately 10:45 on the evening of November 15, 1987, that the defendant and Lyle Hendricks came to her apartment to see her boy friend. She stated that they had jewelry in some bags and on some trays and rings on some trays and that they sorted them out and put the jewelry in paper sacks. She testified that they left, came back with a little bit more jewelry and left again and she didn't see them anymore. Tr. p. 67-68.

Kim Olsen, a former police officer and witness for the state testified that the burglary was discovered at 3:03 a.m., on November 16, 1987. Tr. p. 23, Robert Sather, the owner of the business which was burglarized, testified that although he was not certain of the exact value of merchandise taken, it was worth more than One Thousand Dollars (\$1,000.00). Tr. p. 38-39.

Monica Lawson, during her testimony, also stated that she was acquainted with the defendant's brother, Davey Montes, and saw him the next day at school. She stated that she asked Davey if it had been his brother who had committed the robbery and that he had said yes and showed her a few rings. Tr. p. 50. Jeanna Hackford, another witness for the state, testified that Davey told her that his brother and another person were involved. Tr. p. 106.

The defendant's witnesses included Lyle Hendricks who testified that the defendant was not involved in the crimes. Tr. p. 85. The defendant's brother, Davey, and his father, David, both testified that the defendant came home about 10:30 on the evening of November 15, 1987 and did not leave again until approximately 3:00 the next morning. Tr. p, 94, 97. Davey also denied having rings in his possession at school or telling Monica Lawson or Jeanna Hackford that the defendant was involved. Tr. p. 100-101

SUMMARY OF ARGUMENTS

The court should overturn the theft and burglary convictions of defendant because of insufficiency of evidence.

Counsel at trial did not object to the hearsay statements offered by Monica Lawson and by calling Davey Montes as witness allowed the prosecution to call Jeanna Hackford who testified of other out of court statements of Davey Montes which implicated defendant thereby denying the defendant effective assistance of counsel.

ARGUMENT

Defendant desires to appeal this case. Counsel for defendant files this brief, pursuant to Anders and Clayton as he believes the appeal to be frivolous.

I. THE CONVICTION OF THE DEFENDANT SHOULD BE REVERSED SINCE THE EVIDENCE INTRODUCED BY THE STATE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

It is fundamental that the state carries the burden of proving beyond a reasonable doubt each element of an offense. State v. Hill , 727 P. 2d 221 (Utah 1986). In regard to a claim of insufficiency of evidence, the court in State v. Lairby , 699 P. 2d 1187 (Utah 1984) stated,

We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

To be found guilty of burglary the defendant must enter the premises of the victim and do so with the intent to commit a theft. Utah Code Section 76-6-202. State v. Sisneros , 631 P. 2d 856 (Utah).

In the present case, someone entered Sathers and committed theft. However, there was no evidence that the defendant personally burglarized Sathers or encouraged others to do so. The evidence only showed that a car similar to the one in which the defendant was earlier riding was seen parked near the alley behind Sathers and that two

men who were standing in front of Sathers ran from the front of the jewelry store toward the car. There was no testimony that these individuals reached the car or got into the car.

In State vs. Bingham, 684 P. 2d 43 (Utah 1984) the conviction of the defendant was upheld when he was seen leaving the driveway of a home while carrying a camera. The defendant later crossed the street, entered a car and drove past the witness. It was later determined that a camera had been stolen from the home the driveway of which the defendant was seen leaving. At trial, the witness was able to positively identify the defendant as the person who had exited the driveway of the victims home. In the instant case, no identification was made of the persons who were seen in the vicinity of Sathers, only that they were two men.

In State v Showaker , 721 P. 2d 892 (Utah 1986), the defendant was convicted of burglary and arson. The only evidence connecting the defendant to the crime was that he had recently been fired from the business where the fire occurred and had threatened to burn the place down if he were fired. His fingerprints were also found on a drum placed outside the building. The court held the evidence sufficient in that case. In the present case, while the defendant got out and looked at Sathers and had discussion that it was too easy and a piece of cake, there is no evidence putting the defendant at the scene of the crime except for the evidence referred to above.

Since there is no evidence of who committed the

burglary in the instant case, it cannot be said that the defendant either personally did it or encouraged others to do it for him. Hill , supra.

To sustain a conviction of theft, the state must prove that the defendant obtained or exercised unlawful control over the property of another with a purpose to deprive him thereof. Utah Code Section 76-6-404. State v Davis , 689 P. 2d 5 (Utah 1984). It is undisputed that Sathers sustained a loss of property in excess of \$1,000.00 on the night in question. While there was testimony that the defendant was in possession of some jewelry in some bags and on some trays and some rings on some trays, there was no evidence to suggest that the rings and jewelry were in fact the same as that taken from Sathers.

In reviewing the record, the evidence presented by the state in regard to the burglary and theft convictions was so lacking and unsubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt.

II. BECAUSE COUNSEL FOR DEFENDANT FAILED TO OBJECT TO HEARSAY OFFERED AT TRIAL, DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

In order to succeed on this claim, defendant must prove that specific, identified acts or omissions fall outside the wide range of professionally competent assistance. State v. Frame , 723 P. 2d 401 (Utah 1986).

As previously noted, Monica Lawson testified at trial regarding the out of court statements of Davey Montes, a brother of the defendant, which implicated the defendant in the crimes charged. The testimony by Monica Lawson was given prior to Davey Montes becoming a witness and was hearsay. Rule 801, Utah Rules of Evidence. As such, counsel's failure to object to the hearsay was error. State v. Probert , 719 P. 2d 783 (Montana 1986). The out of court statements were offered for the truth of the matter asserted and should have been excluded upon proper objection. People v. Marino , 233 Cal. Rptr. 863 (Cal. App. 1987).

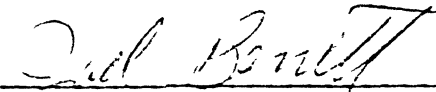
Any deficiency by trial counsel must be prejudicial to defendant. To be found sufficiently prejudicial, defendant must affirmatively show that a reasonable probability exists that but for counsel's error the result would have been different. Reasonable probability is that sufficient to undermine confidence in the reliability of the verdict. The defendant must satisfy his burden of showing that he suffered unfair prejudice as a result of the alleged deficiencies. Frame , supra. Prejudice means that without counsel's error there was a reasonable likelihood that there would have been a different result. Lairby , supra.

Without the out of court statements of Davey Montes being admitted into evidence, the defendant argues that the remaining evidence was insufficient to obtain guilty verdicts from the jury.

CONCLUSION

Based on the arguments submitted, the defendant urges this court to reverse the judgment previously entered by the District Court in this matter.

DATED this 16 day of November, 1989.



Joel D. Berrett
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of November, 1989, I mailed a true and correct copy of the foregoing BRIEF OF APPELLANT, by depositing the same, postage prepaid, in the United States Post Office, Roosevelt, Utah 84066, to the following:

Thomas D. Montes
P.O. Box 250
Draper, Utah 86020

R. Paul Van Dam
Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Secretary