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IN THE SUPREME COURT

OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

vs. : Case No. 16845

BILLY JO MOYES, :

Defendant-Appellant. :

BRIEF OF APPELLANT

The appellant, Billy Jo Moyes, appeals from a conviction of aggravated robbery in the Third Judicial District Court, Salt Lake County, State of Utah.

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FILED

JUN 12 1981

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

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DISPOSITION IN THE LOWER COURT

The appellant, Billy Jo Moyes, was found guilty by a jury with the Honorable James S. Sawaya, Judge, presiding in a trial concluding August 30, 1979. The defendant thereafter was committed to the Utah State Prison for the indeterminate term of five years to life for said conviction.

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.

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STATEMENT OF FACTS

The State alleged that on April 1, 1979, the defendant committed two counts of aggravated robbery. The State further alleged that the first robbery occurred at a 7-Eleven store located at 4130 South Redwood Road where Janette A. Nye was the clerk on duty. The second robbery occurred approximately one half hour later at a 7-Eleven store where Dwight D. Camp was the clerk on duty. (T.p.10)

The State next alleged that Ms. Nye testified that a man entered the 7-Eleven on Redwood Road at approximately 2:05 a.m. on April 1, 1979. She testified that this man was tall with a full beard and mustache, dark eyes, a gap in his teeth, and was wearing a green fatigue jacket. (T. p. 20). She further testified that this man walked up to her with scissors in one hand and said "give me all the money." Ms. Nye then testified that she complied with this demand and gave the man the money in the register. After being ordered to place the money in a paper bag and complying with this demand, Ms. Nye was then ordered to open the safe. She told the man that she was unable to do so and was subsequently ordered into the cooler. After she walked into the cooler (which had a glass front) the man turned and walked out the front door of the store. Ms. Nye testified that the total amount of time elapsed was approximately three minutes. (T. 10

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Ms. Nye testified that, as soon as the man left the store, she walked out of the cooler and called the police.

The clerk on duty at the second 7-Eleven store robbed on April 1 was Dwight Camp. Mr. Camp testified that at approximately 2:35 a.m. on April 1, 1979, a man walked in and yelled "hey, fella" to Mr. Camp. Mr. Camp turned around and looked at the man. Mr. Camp testified at trial that this man was approximately six feet, five inches tall with a red bandanna over his face, dark hair, dark eyes, well built, and wearing a green Army field jacket. Mr. Camp further testified that this man was holding a pair of scissors in one hand. After Mr. Camp turned around, the man described immediately above told Mr. Camp to give him all the money. Mr. Camp gave this man the money he had been counting as well as the rest of the cash in the register. After being given the money, the man pulled down his bandanna and stared at Mr. Camp for a few seconds. The robber then turned toward the door and walked out.

Mr. Camp then testified that this man turned west towards a trailer park and disappeared on foot around the corner of the building. Mr. Camp testified that he immediately phoned the Sheriff's office, described what had happened and gave them a description of the man who had just robbed the store. (T. p.55-72).

The description of the man who robbed this

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second 7-Eleven went out to all the police officers on duty. A Deputy Sheriff was patrolling the area near 4000 West and 3100 South and observed a car run a stop sign at this intersection. The Deputy pulled the car over and heard the description of the robbery suspect the same time as the man in the car he had stopped put his arm and head out of the window flashing his driver's license. The Deputy noticing a similarity in the description, ordered the man out of his car. Another Deputy arrived as this was going on, noticed another man in the car and ordered them both out. After searching both men for weapons, one of the Deputies searched the car and retrieved several items, including scissors and a brown paper bag with money in it. The suspect, the appellant, was then booked into custody. (T. p.96-105).

The appellant testified at trial that he arrived at a party at 10:45 with a friend. He was drinking at the party and left the party at approximately 1:05 a.m. on April 1 with his friend. From there, the appellant testified that he went to the 7-Eleven at 1157 West 1300 South to buy a six-pack of beer. He described a conversation with the clerk at this 7-Eleven in which the appellant persuaded the clerk to sell him some beer although it was illegal to do so after 1:00 a.m. Appellant further testified that he went to the parking lot where he found a puppy which he picked up and took home to his daughter. (T. p.222-224).

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After talking with his wife for fifteen to twenty minutes, appellant's wife testified that she stated that they would need some dog food and suggested that he go to Harmon's to get some. Appellant and his friend left the house and proceeded to Harmon's to buy dog food. Appellant testified that he did not drive fast going to or leaving Harmon's because it was snowing. After buying several items at Harmon's, appellant and his friend left the store. He testified the shopping took approximately one half hour. (T. p.224-225).

After leaving the store, appellant testified that he proceeded down 40th West to 31st and turned right. He pumped his brakes to stop the car, but testified that he started to slide and accellerated in order to avoid sliding off the road. Appellant testified that soon after running this stop sign he noticed that a polic car was attempting to pull him over. He testified that he thought he was about to be arrested for drunk driving. (T. p.227-229).

Another officer arrived at the scene and ordered both men out of the car. One of the deputies searched the car and discovered scissors under the seat as well as a bag containing some money. At this point the appellant was taken into custody.

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POINT I

THE EVIDENCE AS A MATTER OF LAW IS INSUFFICIENT TO SUPPORT A CONVICTION OF AGGRAVATED ROBBERY BECAUSE TESTIMONY OF DEFENDANT AS WELL AS TESTIMONY ON HIS BEHALF AS TO HIS BEING ELSEWHERE WHEN THE CRIME WAS COMMITTED WAS SUFFICIENT TO RAISE A REASONABLE DOUBT AS TO HIS GUILT.

It is well settled that a reviewing court has the authority to review a case on sufficiency of the evidence. The standard for review was clearly stated in State v. Wilson, 565 P.2d 66 (1977):

> In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence, it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime. 565 P.2d 68. See Also State v. Fort, 572 P.2d 1387.

In State v. Mills, 530 P.2d 1272 (1975), this court also addressed when sufficiency of the evidence must be challenged:

> 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.

In this case, appellant contends that there was sufficient evidence of him being elsewhere and thus a reasonable doubt is raised. In State v. Meacham, 455 P.2d 156 (1969) the court specifically addressed this:

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> ... it is nevertheless the burden of the State to prove the defendant's guilt beyond a reasonable doubt; and if the evidence of the defendant's being elsewhere is sufficient to raise a reasonable doubt as to his being involved in the crime, he should be acquitted. 456 P.2d at 158.

See also State v. Wilson, 565 P.2d (1977) 66 at 68 which again addresses this issue:

> The burden is upon the State to prove his guilt beyond a reasonable doubt; and if the evidence with respect to any defense, e.g., in this instance alibi, is sufficient to raise a reasonable doubt as to the defendant's guilt, he should be acquitted.

In this case, appellant contends that the evidence was not sufficient and that reasonable jurors could not have found him guilty. Defendant testified that he had gone to a party with a friend, left the party with the same friend and stopped at a 7-Eleven at 1:10 a.m. in order to buy some beer. This was corroborated by testimony from George Farnsworth, an employee of the 7-Eleven on California Avenue. After leaving the 7-Eleven with a stray puppy, the appellant went back to his home. The appellant's wife also testified that the appellant left shortly after 10:00 p.m. to go to a party with a friend and returned home with a puppy at approximately 1:30. Both the appellant and his wife further testified that they talked for about fifteen to twenty minutes and decided that the appellant should go out for dog food. Appellant left his house, went to a Harmon's grocery store, bought several items and was returning home when he

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was stopped by a police officer for running a stop sign.

Appellant contends that the physical evidence introduced by the state at trial is also insufficient because the defense testimony of appellant and his wife is sufficient to raise a reasonable doubt, which is the standard set out by State v. Wilson, supra. The appellant's wife testified that the scissors found under the seat belonged to her. She had placed the scissors under the seat of the car because she was going to a friend's house to do some sewing and wanted them out of the reach of her daughter. Appellant testified that the money found inside the paper bag in the car had been there for four or five days. He explained that the money was part of a check he'd cashed and the amount in the bag had been set aside for his wife's birthday.

Again, it is important to point out that this court, in a recent case, held that it is sufficient for acquittal that the evidence or lack thereof creates a reasonable doubt as to any element of the crime (State v. Torres, 619 P.2d 695). Here , it is obvious the appellant, through his testimony, has more than met the standard of a reasonable doubt.

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POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION AS A MATTER OF LAW BECAUSE THE IDENTIFICATION OF THE APPELLANT AS THE MAN WHO COMMITTED THE ROBBERIES WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

Appellant contends that his conviction in part was obtained from identification made by both Ms. Nye and Mr. Camp. Appellant further contends that testimony at trial raised a reasonable doubt as to whether he was the person who committed the robberies. The difficulties of accurate eyewitness identification are well known. Justice Brennan made this point quite clearly in United States v. Wade, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926):

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure." The case of Sacco and Vanyetti 30 (1927).
>
> 18 L.Ed. 2d at 1158.

Appellant introduced testimony at trial from Iwana Wall who testified that she had mistaken another man for the appellant on several occasions due to the remarkable similarity between the two men.

Another witness for the appellant, Jeryl Johnson,

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testified that he also saw a man whom he mistook for the appellant, but later realized was someone else. He further testified that his confusion about this person's identity took place at a distance of approximately two feet.

The man frequently mistaken for the appellant, James Curtis, also testified at trial. He testified that he had been mistaken for the appellant. He further testified that he is approximately the same height as the appellant as well as showing the jury that he has a gap in his front teeth.

It is appellant's contention that ample evidence was put on at trial which demonstrated the remarkable resemblance between the appellant and Mr. Curtis. It is appellant's further contention that, given this confusion over identity, a reasonable doubt exists as to whether or not appellant was the person who committed the robberies.

CONCLUSION

Appellant contends that the evidence presented by the State at trial is inconsistent with appellant's testimony as to his whereabouts when the robberies occurred. The evidence is thus insufficient to sustain a conviction for the crime of aggravated robbery.

Appellant further contends that the testimony of witnesses as to their confusion of appellant with someone else gives rise to a reasonable doubt that appellant

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was the one who committed the crimes. Thus, there is insufficient evidence and appellant contends that reasonable jurors could not have found that he was the one who committed the aggravated robberies.

Therefore, appellant asks that his conviction be reversed and judgment of acquittal be entered or, in the alternative, that he be granted a new trial.

DATED this ____ day of _____, 1981.

Respectfully submitted,

_____

G. L. FLETCHER
Attorney for Appellant

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MAILING CERTIFICATE

I hereby certifiy that I delivered a copy of the foregoing o the Attorney General's Office, 236 State Capitol Building, Salt Lake City, UT 84114 this _____ day of June, 1981.

_____

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