

1980

State of Utah v. Jerry Lee Velard : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
JERRY LEE VELARDE,
Defendant-Appellant.

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Case No. 16915

BRIEF OF APPELLANT

* * * * *

Appeal from the Judgment and Sentence of the Third Judicial
District Court of Salt Lake County, State of Utah
The Honorable Ernest F. Baldwin, District Court Judge

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TABLE OF CONTENTS

STATEMENT OF THE CASE	1
DISPOSITION IN LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS.	2
ARGUMENT	
Point I : APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE VER- DICT WAS NOT SUPPORTED BY THE EVIDENCE.	7
Point II: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUS- ING TO CHARGE THE JURY WITH A REQUESTED REASONABLE ALTER- NATIVE HYPOTHESIS INSTRUCTION. . .	9
CONCLUSION.	10

TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>Page(s)</u>
<u>Anders v. California</u> , 386 U.S. 738, 18 L. Ed. 2d 93, 87 S. Ct. 1396 (1967)	2
<u>State v. Cooper</u> , 114 U. 531, 201 P. 2d 764, 770 (1949)	7
<u>State v. Mills</u> , 122 U. 306, 249 P. 2d 211 (1952)	8
<u>State v. Williams</u> , 111 U. 379, 180 P. 2d 551 (1947)	8
<u>State v. Garcia</u> , 11 U. 2d 67, 355 P. 2d 57 (1960)	9
<u>State v. Erwin</u> , 101 U. 365, 120 P. 2d 285 (1941)	10
<u>State v. Lamm</u> , 606 P. 2d 229 (Utah 1980)	10

Statutes Cited

§ 76-6-202 U.C.A. (1953 as amended)	1
§ 76-6-408 U.C.A. (1953 as amended)	1
§76-6-412(1)(b)(i) (1953 as amended)	1

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	:	
Defendant-Appellant.	:	
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BRIEF OF APPELLANT

* * * * *

STATEMENT OF THE CASE

This case was a criminal action brought by the State of Utah against defendant-appellant, Jerry Lee Velarde, charging him with burglary of a dwelling, a felony in the Second Degree in violation of 76-6-202, Utah Code Annot. 1953, as amended, and receiving stolen property, a felony of the Third Degree in violation of §§76-6-408(1) and 76-6-412(1)(b)(i), Utah Code Annot. 1953, as amended.

DISPOSITION IN LOWER COURT

On January 15, 1980, in the District Court in the Third Judicial District, Salt Lake County, Utah, the jury found Appellant guilty of burglary, as charged, and guilty of theft by receiving a Third Degree felony, a lesser included offense to the offense charged. Thereafter, Appellant was sentenced to the Utah State Prison for the

indeterminate term of one to fifteen years as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing his conviction and quashing the Information filed herein, or in the alternative, remanding the case to the Third Judicial District Court for a new trial. Counsel for Appellant desires to withdraw as counsel of record for Appellant; however, this appeal is presented pursuant to the directions contained in Anders vs. California, 386 U.S. 738, 18 L. Ed. 2d 93, 87 S. Ct. 1396 (1967), as applied to Utah counsel by this Honorable Court.

STATEMENT OF FACTS

The information charged Appellant, Jerry Lee Velarde, with burglarizing the apartment of Judith Hottensen and William Brown. Appellant was also charged with theft by receiving involving the property obtained in the burglary. In support of its charges, the State introduced the following witnesses and evidence.

Randy Lockwood testified that on July 7, 1979, he was driving a cab for the Ute Cab Company when he picked up a fare at the corner of 9th East and South Temple. The fare consisted of three men, one of which he identified as co-defendant, Randy Ruben Velarde, and one tentatively identified as Appellant, Jerry Lee Velarde. According to the witness' testimony, the three men were carrying garbage bags and grocery bags containing some type of heavy, hard object with square edges. The witness transported

the three men to 128 B Street, Salt Lake City, Utah. On cross-examination, the witness testified that he only had conversations with co-defendant, Randy Ruben Velarde (T. p. 3-4, and 9-13).

Judith Hottensen testified that she resided at 874 East South Temple with William Brown during the week of July 7, 1979. According to the witness, she left home at 2 o'clock p.m. to return again at approximately 4 o'clock p.m. and upon her return, finding the apartment door open and one window open. A cursory inspection of the apartment indicated that various items of personal property were missing, including a tape-deck, two stereo speakers, two cameras, two camera lenses and two silver rings. Approximately two hours after her return home and filing a report with the Salt Lake City Police Department, the witness had occasion to observe and identify the missing items in an apartment located at 128 B Street, Salt Lake City. At this juncture defense counsel stipulated that the value of the property thus described by the witness had a value of more than \$250.00 but less than \$1,000.00 (T. p. 23).

William Brown testified that he also lived at 874 East South Temple, Apartment #8, during the week of July 7, 1979. Upon the witness' return home at approximately 4:30 p.m., he found the above described personal property missing and later that day did, in fact, observe and identify his property then located at an apartment located on B Street (T. p. 28-29). The witness also testified

that prior to that date in question, he had previously seen Randy Ruben Velarde in the area of the apartment building located at 874 East, South Temple, Salt Lake City (T. p. 30-31).

The State called Blaine Hollis, a Salt Lake City Police Officer, who responded to a call at 874 East South Temple on July, 7, 1979. He testified that pursuant to his investigation and contact with the Ute Cab Company, he proceeded to 128 B Street with Officer Lietz when, in response to his knock at the door, the witness met the co-defendant, Randy Ruben Velarde. The officer testified that when the door was opened by Randy Ruben Velarde the officer observed a stereo speaker and stereo tape-deck in the apartment (T. p. 37). The officer testified that Randy Ruben Velarde admitted to him that this was Randy Velarde's apartment. Thereafter the officer spoke to Dennis Quintana, a subsequent State witness, and during this conversation the officer heard noise from inside the apartment (T. p. 38-39). Thereafter when Randy Velarde came out to talk to the officer again the officer observed that the stereo speaker, garbage sack and tape-deck previously observed by the witness were no longer visible. Randy Velarde consented to the officer entering the apartment to "look around" whereupon the officer found a tape-deck in the living room and Appellant, Jerry Lee Velarde, sleeping on a bed (T. p. 40). On the bed with Jerry Velarde was a stereo speaker and beside the bed was the tape-deck (T.

p. 40). Upon the arrival of back-up units, the officers found additional personal property, except cameras, previously described by witnesses Hottensen and Brown. Thereafter the co-defendant, Randy Velarde, pointed out the location of two cameras behind a kitchen drawer in the apartment.

Upon cross-examination the officer testified that the appellant, Jerry Lee Velarde, was difficult to wake-up and that the appellant had no conversations with the officer (T. p. 51-52).

The State also called Dennis Quintana who testified that he met Randy Velarde on July 6, 1979, on State Street in Salt Lake City. That after the meeting he, in the company of some other individuals, went with Randy Velarde to an apartment located at approximately 874 East, South Temple and spent the night there. Approximately 9 o'clock the next morning, Jerry Velarde arrived at the apartment where they all watched television. Sometime that afternoon Jerry Velarde left the apartment to borrow a radio and returned empty-handed in a few minutes. Thereafter both Defendants, Randy Velarde and Jerry Velarde, left the apartment for fifteen or twenty minutes and returned with stereo equipment and other items (T. p. 65-68). The witness testified that approximately two hours later the witness and both defendants left the apartment carrying the personal property to a cab and were transported to an apartment in Salt Lake City. The witness also testified that there was some general

conversation between the defendants concerning sale and/or prices available for the equipment (T. p. 73-73).

On cross-examination, the witness admitted that although he had been charged with the same crimes as the defendants, he had made a plea arrangement with the County Attorney's Office to allow the witness to plead guilty to a Class A Misdemeanor in exchange for his testimony (T. p. 82-83, and 89).

Defendant Randy Ruben Velarde testified in his own defense, stating that after various meanderings about Salt Lake City he arrived back at the apartment located at 874 East South Temple, at 1:15 p.m., July 7, 1979, to find his brother, Jerry Lee Velarde, as well as the witness Dennis Quintana and others. Upon the witness' return he again left the apartment on errands at 2:00 p.m. to return at 3:30 p.m. that same day. He testified that he had left at the same time as Jerry Velarde, his brother and co-defendant, but that they parted ways immediately upon exiting the apartment. Upon the witness' return, the witness noticed a taxi cab and a taxi cab driver engaged in conversation with Jerry Velarde. Thereafter, the witness went into the apartment, to get some beer and returned to the taxi cab. The witness testified that he did not handle anything other than the beer contained in a grocery bag. His testimony concerning events at the apartment located at 128 B Street are similarly exculpatory of himself and inculpatory of the witness Quintana and co-

defendant, Jerry Lee Velarde. Randy Velarde did testify that he consented to a search of the apartment and that he had hidden the cameras in/or behind a kitchen drawer (T. p. 103-105).

On cross-examination Randy Velarde denied any knowledge about movement of property inside the apartment during the time the police were conducting their initial investigation.

Finally, Emilia Hernandez testified for defendant, Randy Velarde, stating that she had seen Randy Velarde two times on the date in question and that during those times Randy Velarde made long distance telephone calls using the witness's telephone (T. p. 120-124).

The jury returned a verdict of guilty on both counts and Appellant was sentenced to serve concurrent terms at the Utah State Prison.

ARGUMENT

Point I

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

This court has on a number of occasions stated the rules concerning the allowance of new trials on the basis that the verdict was not supported by the evidence. For example in State v. Cooper, 114 U. 531, 201 P. 2d 764, 770 (1949), this court stated as follows:

"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, but there were Motions to Dismiss, the above language would seem to indicate that under some circumstances this court will grant a new trial even in the absence of a motion therefore. The legal test to be applied was delineated in State v. Mills, 122 U. 306, 249 P. 2d 211 (1952):

"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."

Certainly, it cannot be questioned that this court has the power to order a new trial in appropriate cases. Such was the application of the law in State v. Williams, 111 U. 379, 180 P. 2d 551 (1947) wherein this court concluded at 180 P. 2d 555 as follows:

"Under such state of the record, may the verdict of guilty be permitted to stand? We think not. 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 can not escape the responsibility of passing judgment upon whether under the evidence the jury could, in reason, conclude that the defendant's guilt was proved beyond a reasonable doubt."

Every case in which it is alleged that the verdict is not supported by the evidence must turn on the facts and circumstances presented at trial. Appellant contends that in the case presently before the court, according to the exhaustive Statement of Facts stated herein, the verdict was not supported by the evidence and that Appellant should be granted a new trial.

Point II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO CHARGE THE JURY WITH A REQUESTED REASONABLE ALTERNATIVE HYPOTHESIS INSTRUCTION.

At trial Appellant requested the court to give the following jury instruction:

"To warrant you in convicting a defendant, the the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after the case you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant you should acquit him."

The court refused to give this instruction which embodies what is known as "Hodge's Rule" on the ground that such instruction is required only in cases where all of the evidence of defendant's guilt is circumstantial. Proper exception to the court's failure to give this instruction was made by defense counsel. (Supplemental Transcript 3-4).

The court's statement of the law is correct, that is, the "reasonable Hypothesis" instruction is applicable only to circumstantial cases. See e.g. State v. Garcia, 11 U. 2d 67, 355 P. 2d 57 (1960), wherein this court stated:

". . . it is universally recognized that there is no jury question without substantial evidence indicating defendant's guilt beyond a reasonable doubt. This requires evidence from which the jury could reasonably find defendant guilty of all material issues of fact beyond a reasonable doubt. In applying this rule, usually with reference to the jury instructions, we have held that where the only proof of material fact or one which is a necessary element of defendant's guilt consisted of circumstantial evidence, such circumstances must reasonable preclude every reasonable hypothesis of defendant's innocence. (Quoting State v. Erwin, 101 U. 365, 120 P. 2d 285 (1941) and numerous others herein omitted).

More recently in State v. Lamm, 606 P2d 229 (Utah, 1980) this court again addressed an appeal based in part upon "Hodge's Rule". Therein the court stated:

"The rule often applied in a circumstantial case that requires the exclusion of every reasonable hypothesis other than guilt is in reality nothing more than another matter of stating the burden of proof applicable in all criminal cases, vis, beyond a reasonable doubt. The key word in either concept is that of "reasonable". " 606 P. 2d at 232.

The case presently before the court differs from Lamm, supra, in one significant respect, to wit: in Lamm the defendant attempted to give a "reasonable" explanation of his actions to the jury whereas the instant appellant chose to stand mute. Consequently, whereas in Lamm the defendant's explanation is required to meet the reasonableness test, in the present case Appellant was deprived of the opportunity to effectively propose and/or argue to the jury any sort of alternative hypothesis. Mere instructions concerning the burden of proof are insufficient.

The pivotal issue appears to be whether the evidence of burglary adduced against appellant was entirely circumstantial. Both Dennis Quintana and Co-defendant, Randy Velarde, testified that Appellant left the apartment sometime in the early afternoon. Dennis Quintana stated that both Appellant and Co-defendant returned with goods in their possession whereas the co-defendant testified that when he returned a cab was waiting in the driveway and Appellant was in the process of carrying the property in question to the cab. The victims could only add that the burglary apparently occurred sometime between 2:00 p.m. and 4:00 p.m. in the afternoon of July 7, 1979. It is undisputed that subsequently the property was found in the presence of or in the possession of Dennis Quintana, Randy Velarde or Appellant, Jerry Lee Velarde or some combination of these three individuals. There was no direct testimony whatsoever concerning the participants in the burglary, only disclaimers and exculpatory statements by two of the three alleged participants.

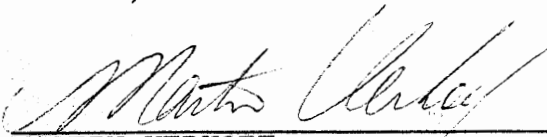
In light of the foregoing, Appellant submits that the court committed reversible error in failing to give the "Hodge's Rule" instruction as requested.

CONCLUSION

Counsel for Appellant respectfully requests permission to withdraw, believing the appeal is without meritorious grounds. The foregoing brief discusses the law applicable to the only points that arguably could be presented

on appeal. Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that a true and correct copy
of the foregoing document in the case, State of Utah vs.
Jerry Lee Velarde, was mailed prepaid to the Attorney General
of Utah, State Capital Building, Salt Lake City, Utah 84111
on this 12 day of September, 1980.

