

1980

State of Utah v. Jerry Lee Velard : 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- : Case No.
JERRY LEE VELARDE, : 16915
Defendant-Appellant. :

:
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT AND SENTENCE
OF THE THIRD JUDICIAL DISTRICT COURT, IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ERNEST F. BALDWIN, JR.,
JUDGE, PRESIDING

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STATE OF UTAH

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STATE OF UTAH, :
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-vs- : Case No. 16915
JERRY LEE VELARDE, :
Defendant-Appellant. :

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BRIEF OF RESPONDENT
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STATEMENT OF THE NATURE OF THE CASE
DISPOSITION IN THE LOWER COURT
RELIEF SOUGHT ON APPEAL

Respondent takes no exception to the Appellant's
Brief under these headings and adopts it for its own state-
ment as to those matters.

STATEMENT OF THE FACTS

Appellant's Statement of the Facts is reasonably
accurate and complete with two exceptions:

Randy Lockwood's identification of the Appellant
was positive not "tentatively" (T. 7).

Dennis Quintana who aided the Appellant in

transporting the stolen property by cab from 874 East South Temple to 128 B Street had no doubt in his mind that the property in question was stolen even though he didn't question the other two about that (T. 88).

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE GUILTY VERDICTS.

It is well established in Utah that in order for a convicted defendant to succeed in challenging on appeal the sufficiency of evidence adduced at trial, he must establish that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained reasonable doubt that the defendant committed the crime. State v. Daniels, 584 P.2d 880 (Utah 1978); State v. Wilson, 565 P.2d 66 (Utah 1977); State v. Jones, 554 P.2d 1321 (Utah 1976). Those cases also establish that in considering a claim of insufficiency of the evidence on appeal, this Court must assume that the trier of fact believed those aspects of the evidence and drew such reasonable inferences therefrom as support the verdict.

Mere possession of recently stolen property, when not coupled with other culpatory or incriminating facts, does not alone justify a conviction.

In State v. Kinsey, 66 Utah 348, 295 Pac. 247

. . . [p]ossession of articles recently stolen, when coupled with circumstances of hiding or concealing them, or of disposing or attempting to dispose of them, or of making false or unreasonable or unsatisfactory explanations of the possession, may be sufficient to connect the possessor with the commission of the offense.

Id. at 249. Accord, State v. Thomas, 121 Utah 639, 244 P.2d 653 (1952).

In State v. Heath, 27 Utah 2d 13, 492 P.2d 978 (1972), the Court said:

. . . [i]n addition to the . . . possession by the defendant, there must be proof of corroborating circumstances tending to themselves to show guilt. Such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of the defendant which tend to show his guilt.

Id. at 979.

Appellant's Brief at page 11 admits "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." The trial lapse was only two hours at the outside (from 2:00 p.m. until 4:00 p.m. of the same day) (Tr. 17,27-29).

Appellant here makes no specific attack on the sufficiency of the evidence but only cites the cases of Cooper, Mills and Williams as authority that this Court may use to vacate the judgment entered in this cause and to

remand the case to the district court for a new trial. The State concedes that this Court has such power and the fact that there was no motion for a new trial would not present a barrier to such relief in a proper case. What the State does contend is that this is not a proper case for such relief.

In State v. Cooper, 114 Utah 531, 201 P.2d 764, 770 (1949), the Court pointed out in that portion of its opinion quoted by appellant that such relief is to be granted only when the right to it is "quite clearly shown." In this case such right is not shown at all, much less clearly shown.

In State v. Mills, 122 Utah 306, 249 P.2d 211 (1952), as appellant noted at page 8 of his brief, the legal test of insufficiency is "inherently improbable as to be unworthy of belief." Here the evidence was not only worthy of belief but there is in evidence the opinion of the appellant's companion that on the day in question there was no doubt in his mind that the subject property was stolen. This was Dennis Quintana who testified as follows:

Q. What happened then?

A. They left.

Q. Who is they?

A. Randy and Jerry.

Q. How long was this after Jerry got back?

A. Just a few minutes.

Q. Anybody else leave with them?
A. No.
Q. And where were you at this time?
A. In the living room.
Q. Okay, who was there with you?
A. Me and my friend and their friend, the owner of the apartment.
Q. And how long do you think they were gone at this time?
A. Fifteen, twenty minutes.
Q. Did they have anything with them when they came back the second time?
A. Yes. They had some stereo equipment and things.
Q. Can you be a little bit more specific in regards to stereo equipment and things?
A. They had speakers, reel to reel and some cameras. That is all I saw.
Q. Okay. Do you have any idea about what time this was?
A. I would say it was close to 1:00. I don't know, we didn't have a clock.
Q. So sometime in the early afternoon?
A. Yes.
Q. What happened then then after they came back to the apartment with this equipment?
A. Well, I was expecting a radio but, they came back with much more. I just kind of looked at them, you know, and they just sort of put everything down and looked it over.
Q. Did you have any conversation in regards--with them in regards to where this had come from?
A. Not really.
Q. Did you overhear them saying anything in regards to where it had come from?
A. Not that I recall.
Q. Did you ever ask them any questions about whether it was theirs or not?
A. No, I didn't.

(Tr. 68-69.)

Q. Okay. Did you ask them any questions concerning where this had come from, or what they were going to do with it?
A. No, I didn't ask no questions.
Q. Okay. Did you overhear any conversation with them in regards to where it had come from, or what they were planning on doing with this equipment?

A. Well, they had planned on selling it.

Q. Okay. Well, now, you said they planned on selling it. Let me go back. What did you hear that made you believe that?

A. Well, they were estimating how much they could get for the individual pieces.

MR. HANSEN: Your Honor, I am going to object, Your Honor, and ask that be stricken from the record unless a proper foundation has been laid as to who said what.

THE COURT: Let's lay a foundation, Mr. Fuchs, or we will strike it all.

Q. Where were you when you heard this conversation, where were you all when they were talking about this?

A. We were at the apartment on South Temple.

Q. Okay, on South Temple still? Okay. And who was present?

A. I was, Randy was there, Jerry was there, and my girlfriend, Cindy was there.

Q. Okay. Now, in regards to what they said about selling, what specifically did you hear in regards to these matters and who was specifically involved in this conversation? Who was the conversation between that you overheard?

THE COURT: That is the fourth question. One at a time. Let's rephrase them one at a time. Who was present period.

Q. Who was present?

THE COURT: We have that.

Q. Okay. Then, who was the conversation between?

THE COURT: What time was it to the best of his recollection in relation to when they came back with it.

Q. What time was it to the best of your recollection when they came back?

THE COURT: That is how much longer after they brought it back, or in relation to when you left there?

A. About two hours.

Q. Okay, so this was just before you left in the cab?

A. Yes.

Q. And who had this conversation?

A. Jerry and Randy.

Q. And this conversation was specifically between those two?

A. Yes.

Q. And what was it exactly that you overheard?

A. I overheard comments.

MR. VERHOEF: Your Honor, if I could ask the witness to respond by saying who said what as opposed to just a general conversation.

THE COURT: Well, he can ask him-- tell us who said what.

A. I couldn't tell you who said what. I can just tell you the comments that I heard.

THE COURT: Those two together?

A. Right.

Q. Would you go ahead and tell us what you heard?

A. Just they were just trying to name prices on what they would get for individual items that they had.

Q. Do you remember any specific prices that they talked about?

A. They would say could sell a camera for like a hundred dollars.

(Tr. 72-74.)

Q. Now, it was this time you thought in your own mind this property had been stolen?

A. Yes.

Q. You hadn't known these people at all prior to this night?

A. Correct.

Q. Yet you didn't ask any questions in regards to where this property had come from?

A. It wasn't necessary.

Q. But, you knew in your own mind it had been stolen?

A. Correct. Therefore, it wasn't necessary to ask questions.

Q. And, you all made just one trip down to the cab?

A. Yes.

Q. Do you remember who carried what?

A. I remember I carried a speaker.

In State v. Williams, 111 Utah 379, 180 P.2d 551 (1947), where a judgment in a rape case involving a 13 year old subnormal girl whose mental age was between 8 and 10 and who had frequent epileptic seizures was reversed and the case remanded, the State's evidence was of a totally different quality than in this case. There the Court said immediately following the quote from Appellant's Brief at page 8:

This is not to say that merely by reason of the fact that the circumstances surrounding an alleged assault of this nature created a reasonable doubt in the mind of this court that the offense was in fact committed, we will set aside a verdict. The total picture presented by the record here considered must be kept in mind in evaluating the result here reached. We have before us not merely a happening which must be considered not in harmony with general experience, coupled with the doubtful testimonial capacity of the only witness to the principal fact in issue, but the further fact that such witness was suffering from an affliction which itself might account both for her physical condition and for her story of the improbable attack.

Id. at 555.

The facts with respect to the credibility of the State's key witnesses in these two cases are so totally dissimilar as to be virtually useless as a guiding precedent in the instant case.

Appellant has failed to demonstrate that reasonable minds must have entertained reasonable doubt about his guilt.

Jones, supra.

POINT II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING TO CHARGE THE JURY WITH A REQUESTED, REASONABLE ALTERNATIVE HYPOTHESIS INSTRUCTION.

Respondent respectfully submits that there are three main situations with respect to the principle of law that no conviction can be upheld when one of the material issues is established by circumstantial evidence unless "such circumstance must reasonably preclude any reasonable hypothesis of defendant's innocence." State v. Garcia, 355 P.2d 57 (Utah, 1960) at 60. First, when the defendant offers evidence which the jury might find provides a reasonable hypothesis consistent with defendant's innocence. Second, when that evidence is "so conclusive that a reasonable hypothesis of innocence has been proved that a contrary holding would be beyond the bounds of reason." Garcia at 60. Third, when no evidence of such a reasonable hypothesis is presented. Appellant submits that the facts in this case place it within the third category above.

Appellant's reliance on Garcia is misplaced. Garcia in dicta approved on a so-called "Hodge Rule" instruction (without denominating it as such) when one of the material facts essential to the offense is established by circumstantial evidence. Garcia was a direct evidence case. It certainly

does not stand for the proposition that failure to give an instruction of the requested type is error when the evidence of the offense is circumstantial but the defendant has not presented any evidence from which the jury could find innocence upon the basis of a reasonable hypothesis based on the record (situation third above).

The only other authority advanced by appellant in his brief on this point is State v. Lamm, 606 P.2d 229 (Utah, 1980). That case did not involve any requested jury instruction. It could not therefore stand for the proposition that failure to give the requested instruction is error under these facts. In fact, respondent urges this Court to apply the principle that the Hodge's Rule is in "reality nothing more than another manner of stating the burden of proof applicable in all criminal cases, viz, beyond a reasonable doubt." (at 232). There is no contention here that the jury was not correctly instructed as to that burden. The record shows it was (R.128).

The Lamm case in equating the above principle with the instruction as to proof beyond a reasonable doubt said: "The key word in either concept is that of 'reasonable'."

As noted above the appellant did not establish any reasonable hypothesis in the record. Likewise, none is set

forth in his brief. In short no reasonable hypothesis of innocence exists in this case and hence the court's refusal to give the requested instruction was not error.

Appellant impliedly concedes that the receiving stolen property was not based on circumstantial evidence as to any of its elements. See Appellant's Brief, page 11, where the attack on the refusal to instruct as requested refers only to the burglary charge. This is important because the requested instruction would have been improper if the offense tried related only to receiving stolen property. Appellant respectfully submits that the trial judge properly exercised his discretion in not giving the subject instruction as he may have correctly concluded that it would be unduly confusing to the jury to be asked to apply that instruction as to the one offense charged and not as to the other. Such caution was particularly appropriate in light of cautionary note as to such instructions in Garcia, p. 60. This requires care to use language which the jury would understand and which would not merely lend to their confusion.

Even if this Court determines that failure to give such an instruction was error under the facts of this case, appellant submits it was harmless error. There could

be no doubt but that the appellant and his brother received stolen property. It is no mystery as to where, when and from whom the property was stolen. The only significant factual questions are whether the property with which they were caught red handed and concerning which they were planning to sell (see Tr.73,74) was stolen by both of them or by which one if not by both. The jury found a reasonable doubt as to appellant's brother's guilt upon the basis of his testimony. It is inescapable from the evidence in this case and from logic that one or both of the defendants committed the burglary. The issue was not whether either defendant was guilty or innocent of the burglary but only which brother was guilty if both were not. Any error in the instructions in connection with the conviction of a guilty burglar was harmless error now that the other brother was found not guilty.

This Court has never held, and should not now, that the requested instruction must be given in a circumstantial case (and especially not when a direct evidence offense is tried in the same proceeding), when the reasonable hypothesis of innocence is not established in the record. To require that such be established as a condition for requiring it being given would not per se require a defendant to testify and expose himself

to self incrimination on cross examination as a reasonable hypothesis in many cases could be established by other witnesses or other evidence. In the event it cannot be established otherwise, however, respondent submits it would not be unfair for the defendant to choose between testifying and receiving the benefit of that instruction or to remain silent and not have such an instruction. In the latter situation, as in this case, the defendant would have the benefit of the beyond a reasonable doubt instruction and could argue that any hypothesis, however fanciful or unsubstantiated in the record, should be sufficient in the juror's mind to return a verdict of not guilty.

In the case of McWilliams v. State, 294 So.2d 454 (Court of Criminal Appeals of Alabama, 1974), the appellant requested "Charge No. 15--I charge you, members of the jury, that you must find the defendant not guilty if the conduct of the defendant upon a reasonable hypothesis is consistent with defendant's innocence." The trial court refused the instruction. Said appellate court said on this point:

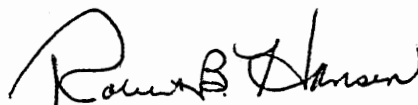
While refused charge fifteen was held to be a proper charge in Gregory v. State, 140 Ala. 11, 27 So. 259, the more recent Appellate Court opinions are committed to the view that the refusal of this charge is not error since said charge is not hypothesized on the evidence. Foster v. State, 37 Ala.App. 213, 66 So.2d 204 and authorities therein cited.

The above case was cited favorable and applied in the later case of Wiggins v. State, 347 So.2d 543 (Ala. Cr. App. 1977).

CONCLUSION

Appellant has not established a sound legal basis to overturn the judgment of guilt of burglary and receiving stolen property. Those judgments should therefor be affirmed.

Respectfully submitted,



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CERTIFICATE OF MAILING

This is to certify that I mailed two true and correct copies of the foregoing Brief of Respondent to Mr. Martin Verhoef, Attorney for Appellant, 431 South 300 East, Suite 104, Salt Lake City, Utah 84111, this 15th day of December, 1980.

