

1957

State of Utah v. Max Floyd Stockton : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
State of Utah

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STATE OF UTAH,
Plaintiff and Respondent

vs.

MAX FLOYD STOCKTON,
Defendant and Appellant

BRIEF OF APPELLANT

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IN THE
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OF THE
State of Utah

STATE OF UTAH,
Plaintiff and Respondent

vs.

MAX FLOYD STOCKTON,
Defendant and Appellant

PRELIMINARY STATEMENT

Defendant appeals from the verdict of the jury finding defendant guilty of attempt to commit burglary in second degree.

The record on appeal is in two volumes one of which consists of the pleadings, minute entries and similar papers. All references to this volume are designated by the letter "R". The other volume which is separately numbered is a transcript of the testimony and proceedings at the trial. References to this volume are designated by the letter "T".

STATEMENT OF FACTS

The charge against defendant Stockton is "attempt to commit burglary in the second degree" in that on the 5th day of February, 1956, he then and there wilfully, unlawfully, feloniously and *burglariously* in the night time of said day forcibly attempted to break and enter a certain building located in Huntsville, Weber County, Utah, occupied by Jesperson's Mercantile with the intent to commit larceny therein. (R. 1).

The State's evidence showed that an unidentified person or persons attempted to gain illegal entry to Jesperson's Mercantile on the day in question. (T. 43, 45). That a car bearing a license number BY 782 was seen in the vicinity of the Jesperson's Mercantile at the time in question (T. 27) and that defendant Max Stockton was apprehended in the company with Robert Dean Carter and Lee Goddard in a car driven by Lee Goddard and bearing license number BY 782. (T. 35). That when the car was searched a padlock was found which was identified by State's witnesses as having been used in locking Jesperson's Mercantile. (T. 36, 43). That Deputy Sheriff A. R. Covieo claimed to have had a conversation with Lee Goddard out off the presence of defendant Stockton at the sheriff's office after the arrest of the three defendants in which conversation and at which time Goddard purportedly repeated the conversation to Covieo wherein Stockton, Carter and Goddard agreed that Carter and Goddard would take the blame for what had happened in Huntsville that night. (T. 84). In the late afternoon of February 4, 1956, Stockton, Carter and Goddard were seen in Huntsville, Utah. (T. 29. 30).

The evidence of defense was that Max Stockton on the night of February 4th, 1956, while walking across the street at Washington Boulevard and 25th Street in Ogden, Utah, was hailed by two acquaintances, Robert Dean Carter and Lee Goddard and was asked by Goddard if Stockton wanted to go for a ride with Carter and Goddard (T. 53). Stockton got in the car with Carter and Goddard, and Goddard drove the car up Ogden Canyon to Huntsville, Utah where Goddard stopped the car a half block from Jespersen's Mercantile. (T. 53, 74). Carter and Goddard got out of the car, Goddard took a suit case out of the car and Carter and Goddard walked out of the sight of Stockton. Defendant Stockton remained in the car. (T. 54). Defendant Stockton testified that he did not know where Carter and Goddard had gone nor what they had been doing while away from the car, (T. 75), but that upon leaving the car and Stockton, Goddard and Carter had mentioned going to see a girl, (T. 74, 75) and that they would be back in a little while. (T. 54).

After being away from Defendant Stockton for approximately fifteen minutes (T. 54) Carter and Goddard returned to the car and after driving around Huntsville for a short time during which an observer noted the license number on the car driven by Goddard the three defendants drove down Ogden Canyon and were apprehended in the canyon some miles away from the scene of the crime by A. R. Covieo, Chief Deputy of the Weber County Sheriff's office. In the car with the defendants was a suit case containing various tools (T. 37) and parts of a padlock that was later identified by State's witnesses as having been cut off a hasp on Jespersen's Mercantile.

Not one of the State's witnesses saw defendant Max Stockton at the scene of the crime nor could they identify him as having had any part in attempting to gain entry to Jespersen's Mercantile. (T. 17, 24, 28, 29). Defendant Stockton and Lee Goddard denied having the conversation reported by Deputy Covieo wherein the three defendants agreed that Carter and Goddard were to take the blame for what had happened in Huntsville that night. (T. 66, 68, 75, 76). Lee Goddard denied making such a statement to Deputy Covieo. (T. 66). Defendant Stockton denied having any knowledge of any attempt to break into the Jespersen's Mercantile or with having had any part in the planning or commission of the offense. (T. 74, 75, 76, 77). Goddard testified that the job was the result of the planning and effort of he and Carter, and that it was never discussed with Stockton and Stockton did not participate in any way in the commission of the crime. (T. 55, 56).

Only defendant Stockton was charged and tried for this crime.

STATEMENT OF POINTS TO BE ARGUED

I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND FOR A DIRECTED VERDICT IN FAVOR OF THE DEFENDANT AT THE CONCLUSION OF THE STATE'S CASE.

II.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND FOR A DIRECTED VERDICT IN FAVOR OF THE DEFEND-

ANT AT THE CONCLUSION OF DEFENDANT'S CASE.

III.

THE COURT ERRED IN ADMITTING INTO EVIDENCE OVER THE OBJECTION OF DEFENDANT'S COUNSEL A CONVERSATION BETWEEN DEPUTY A. R. COVEIO AND ONE OF THE CO-DEFENDANTS OUT OF THE PRESENCE OF THE DEFENDANT AND WHICH RELATED TO THE COMMISSION OF THE CRIME.

IV.

THAT THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN DEFENDANT'S REQUESTED INSTRUCTIONS NUMBERED ONE TO SIX.

V.

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION.

ARGUMENT

1.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND FOR A DIRECTED VERDICT IN FAVOR OF THE DEFENDANT AT THE CONCLUSION OF THE STATE'S CASE.

The elemental law in a criminal case is contained in section 77-31-4 of the Utah Code Annotated 1953.

“The defendant in a criminal action is presumed to be innocent until the contrary is proved

and in case of a reasonable doubt his guilt is satisfactory shown is entitled to an acquittal."

This basic rule has been reiterated in the case law of our State. In *State vs. McCune*, 51. Pac. 818, 16 Utah 170, this Court has stated:

"In order to convict, the prosecution must prove its case and establish guilt beyond a reasonable doubt".

The defendant submits to this Court that at the conclusion of the state's case there was no evidence that defendant Max Stockton had attempted to commit burglary. The evidence merely showed that some unidentified person or persons had attempted to enter Jespersen's Mercantile at the time in question. That a car bearing license number BY 782 was seen in the vicinity and later stopped in Ogden Canyon and that the defendant was in that car in company with Dean Carter and Lee Goddard. A padlock was found in the car that was claimed to have been cut off the door of Jespersen's Mercantile.

There was nothing in the state's evidence to prove beyond a reasonable doubt that defendant Stockton was guilty of the crime charged. No one saw him at the scene of the crime. Although the state presented many witnesses, not a one claimed that he saw Max Stockton make any attempt to break and enter Jepperson's Mercantile. He was not apprehended with any stolen merchandise in his possession. No one claimed that the aforementioned padlock was in defendant's possession.

The glaring defect in the State's case was that it had completely failed to prove all of the elements of the crime charged as required by the law.

State vs. Prince, 65 Utah, 205, 284 Pac. 8, enumerates the elements of which an attempt consists.

(a) The intent to commit crime.

(b) The performance of some act towards the commission of the crime, and

(c) The failure to consummate its commission.

If these are the elements that constitute an attempt to commit crime. It would follow that if any of these elements were missing the crime had not been committed.

There is no evidence that defendant Stockton had the (a) intent to commit the crime or (b) performed some overt act towards the commission of the crime. Thus two of the three of the required elements of the crime charged are not proven by the State, and for this reason and for the reason that it was not proven beyond a reasonable doubt that the defendant committed the crime charged it was incumbent upon the Court to assume the responsibility of taking the case from the jury and granting defendant's motion to dismiss.

II.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND FOR DIRECTED VERDICT IN FAVOR OF DEFENDANT AT THE CONCLUSION OF THE DEFENDANT'S CASE.

At the conclusion of defendant's case defendant renewed a motion to dismiss and the motion was denied. (T. 87, 88).

The defendant testified that he was invited to go for a ride with Dean Carter and Lee Goddard, and in

company with these persons, with Lee Goddard driving, arrived in Huntsville, Utah, in the late hours of February 4th, 1956.

Goddard stopped the car a half block from the Street intersection that the Jesperson's Mercantile was located on.

Goddard and Carter got out of the car. Goddard took a small suit case from the car, and when defendant Stockton inquired as to where they were going, he was informed that they were going to see a girl. Defendant Stockton remained in the car alone for about thirty minutes. Goddard and Carter returned and drove the car away. Stockton testified that he did not realize that an unlawful act had been committed until the trio were apprehended by the Deputy Sheriff. Defendant Stockton testified that he had no part in planning the commission, and was not informed that Goddard and Carter were going to attempt to commit burglary at this time and place.

Lee Goddard as a witness for defendant Stockton readily admitted his own complicity in the crime, but denied that Stockton had any part whatsoever in its planning or commission, and further denied that Stockton had ever been informed of the plan of Carter and Goddard.

In the commission of all crimes under the laws of our State it is necessary that intent be shown to commit a crime. In *State vs. Prince*, Supra, it was stated that an intent to commit the act was the second element of an attempt to commit a crime. *State vs. McCune*, Supra, holds:

“When the intent is the gist of the offense that intent should be shown by such evidence as uncontradicted will authorize it to be presumed beyond a reasonable doubt.”

Defendant submits to this Court that in the first place the State has shown no evidence Stockton had the requisite intent to commit the crime, and in the second place the testimony of defendant Stockton and Lee Goddard absolutely negatives such an intent. *Upon such evidence it cannot be said the intent to commit the crime was uncontradicted to a point that it could be presumed beyond a reasonable doubt.*

As pointed out in *Underhill's Criminal Evidence*, 4th Edition on page 21.

“All the circumstances as proved must be consistent with each other and they ought to be taken together as proved. Being consistent with each other and taken together they must point surely and unerringly in the direction of guilt.”

The explanation made by both defendant Stockton and Lee Goddard abnegates any clear and convincing presumption that Stockton could be guilty beyond reasonable doubt. The evidence fails to point “surely and unerringly” in the direction of guilt. Stockton could have been and was along just for the ride. Who can say on the basis of the evidence that beyond reasonable doubt defendant Stockton was aware of the plans of Carter and Goddard, helped planned the burglary and aided in its commission. The State was without evidence to show this to the extent required by law. The testimony of defendant Stockton and Lee Goddard point the way to defendant's innocence.

III.

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE OVER THE OBJECTION OF DEFENDANT'S COUNSEL A CONVERSATION BETWEEN DEPUTY A. R. COVEIO AND ONE OF THE CO-DEFENDANTS OUT OF THE PRESENCE OF DEFENDANT AND WHICH RELATED TO THE COMMISSION OF THE CRIME CHARGED.

The conversation objected to is found on page 83 of the transcript commencing with line 19 and is as follows :

Q. Do you have any recollection with regard—did you have a conversation with Lee Goddard relative to his stating that they were willing to take the blame.

A. Yes sir.

Q. Will you tell us what that conversation was?

A. I talked with Lee Goddard about this burglary in Huntsville.

Mr. Handy: Just a moment may I voir dire the witness your honor.

The Court: Yes.

Voir dire examination by Mr. Handy:

Q. Was this conversation, Officer Covieo in the presence of Mr. Stockton.

A. No sir.

Mr. Handy: I object to it your honor as being hearsay.

Argument

The Court: I'll overrule the objection as an exception to the rule. You may testify.

(To witness) Now do you remember the last question?

A. Yes, I had a conversation with Lee Goddard pertaining to Max Stockton. Goddard told me just before—well just after I had stopped the car at the time he was getting out of the car he stated the conversation between Lee Goddard and Dean Carter and Max Stockton was, should Lee Goddard take the blame along with Dean Carter and leave Max Stockton out of it because of the seriousness of it and Max Stockton said yes, that he did want them to take the blame because of the seriousness of the trouble he was already in.

It must be noted here that the conversation objected to occurred at a time when the defendant and Carter and Goddard had been arrested and were in the custody of the Sheriff in the County jail. Such a statement would be hearsay and inadmissible in evidence against the defendant Stockton.

In *People vs. Roberts*, (California,) 254 Pac. 2nd 501, 504, the same issue was raised, the Court there held:

“The evidence of Syas’ (co-conspirator) contradictory extra judicial statements was admissible against *him*, both because it tended to prove that he had in fact associated with and worked for Roberts and because it tended to impeach Syas. *Such evidence however, would be inadmissible hearsay as to Roberts. (The defendant) (People vs. Gilliland, 1940) 39 Cal Appeal 2nd, 250, 262, 103 Pac. 2nd, 179:*

(*Fiswick vs. United States* (1946) 329 U. S. 211, 217, 67 S. Ct. 224, 91 L. Ed. 196. ("Confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of a criminal enterprise. It is rather a frustration of it) * * * * (A conspirators) admissions were therefore not admissable against his erstwhile fellow conspirators.)")

The holding of the Oklahoma Courts is as follows:

Parnell vs. State, Oklahoma 250 Pac. 2nd, 474, 478, 479.

"We think it may be said as a general rule, the arrest of co-conspirators may be said to effectively preclude any further concerted actions and ordinarily puts an end to the conspiracy and accordingly any statement by a co-conspirator out of the presence of his other co-conspirators made after his arrest and confinement in jail would be hearsay and inadmissable."

Leeth vs. State, Oklahoma 230 Pac. 2nd. 942, 951.

"* * * * * statements made by a co-defendant after the termination of the conspiracy between the defendant and co-defendant, if any existed, are not admissable against defendant on trial, and where such statements are clearly prejudicial their admission is reversible error."

Ramsey vs. State 250 Pac. 936, *Schuh vs. State*, 280 Pacific 869. *Underhill on Criminal Evidence* 3rd Edition, Section 719, page 936.

Montana rule is the same and is found in *State vs. Keller* Montana 246 Pac. 2nd 817, 822.

The Utah Case of *State vs. Simpson* 236 Pac. 2nd 1077, 1078, in regard to a conversation of a co-defendant out of the presence of the defendant had this to say:

“There can be as there was here, a conspiracy between persons to engage jointly in *other* criminal offenses and if this fact is shown by *independent evidence*, the statements of any of the conspirators, made in furtherance of the common criminal purpose is unquestionably admissible against all.”

According to the above Utah case there must be *independent evidence* of *other* criminal offenses, and only if the statements were made in furtherance of the common criminal purpose are the statements admissible.

In the instant case any conspiracy was at an end inasmuch as all three defendants were arrested and incarcerated at the time the statements were alleged to have been made.

In *State vs. Simpson*, supra, the California case of *People vs. Suitor* 111 Pac. 2nd 23, 31, was quoted from in support of its holding and this statement is found in that case.

“Of course it must reasonably appear that such acts were committed in furtherance of the *common design of the conspiracy*.”

In the instant case it was denied by both defendants Stockton and his co-defendant Goddard that there was any common design to take the blame from Stockton and place it solely upon the shoulders of Carter and Goddard. The conversation in regard to this matter is even denied.

In *State vs. Erwin*, Utah 120 Pacific 2nd, 285, it was held:

“* * * * *extra judicial declarations of each conspirator may be used against his co-conspirator, but not to prove existence of the conspiracy.*”

That fact must be proved by other evidence. and in a conspiracy case each accomplice is a co-conspirator with all the others and thus the existence of the conspiracy may not be proved by the extra judicial declarations of a co-conspirator. Proof of the existence of the conspiracy is an essential element of the corpus delicti in the case and therefore may not be proved by the extra judicial declarations of an accomplice. See Wigmore on Evidence 2nd Edition 1048, 1078, 1079. Terry vs. United States 7 Fed. 2nd 28, State vs. Inlow 141 Pac. 530 (Utah), Looney vs. Bingham Dairy 75 Utah 53, 282 Pac. 1030, 73 A. L. R. 427.

Thus in the case at bar the existence of the conspiracy whether to burglarize the Huntsville Mercantile or to shift the blame for the offense is a matter that may not be proved by the extra judicial declarations of a co-conspirator and the conversation allegedly had between deputy Covieo and co-defendant Goddard after the apprehension and arrest of the three defendants and which was had out of the presence of the defendant Stockton, would be hearsay and inadmissable.

IV.

THAT THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN DEFENDANT'S REQUESTED INSTRUCTIONS NUMBERED ONE TO SIX.

Instruction No. 1 is as follows:

“You are instructed that if you find from the evidence that although defendant Max Floyd Stockton, drove to the scene of the crime with Lee Goddard and Dean Carter he did not directly

commit an act constituting a crime, nor did he aid or abet the commission of the crime, you will find the defendant not guilty.”

It was error to refuse this instruction for the reason that there was evidence that defendant Stockton did not directly commit an act constituting a crime and did nothing to plan or aid in its commission or to put it in another way there is no evidence that defendant Stockton did any act that would constitute a crime nor is there any evidence that he planned or aided in the commission of this crime.

See 14 *American Jurisprudence*, Page 812, Section 63.

“A person is not liable for the acts of another merely because he is present when it is committed”.

Requested Instruction No. 2 is as follows:

“You are instructed that an attempt to commit a crime consists of three elements (a) the intent to commit the crime (b) the performance of same act towards the commission of the crime and (c) failure to consummate its commission, and if you find from the evidence that anyone or more of the above elements is missing from the case under consideration you will find the defendant not guilty.”

An attempt to commit a crime consists of three elements which are enumerated in the above instruction.

It is obvious that if any of the elements is missing that the crime would not be complete. The instruction requested was a correct instruction and was in conformity with law and the facts of the case. See *State vs. Prince* 75 Utah, 205, 284 Pac. 108.

Requested Instruction No. 3 is as follows:

“You are instructed that in order to constitute an attempt to commit a crime it is essential that the defendant with the intent of committing the particular crime do some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in the commission thereof. Therefore the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. The act must not be merely preparatory.

There was no evidence that defendant Stockton with an intent to commit the crime charged did an overt act towards its accomplishment. The instruction is a correct expression of the law to be applied to the facts in evidence. See 14 *American Jurisprudence*, Section 68, Page 816.

Requested Instruction No. 4 is as follows:

You are instructed that if an attempt to commit a crime be voluntarily and freely abandoned before the act is put in process of final execution there being no outside cause prompting such abandonment then this is a defense and if you find from the evidence that the defendant voluntarily abandoned an attempt to burglarize Jesperson's Mercantile in Huntsville, Utah, on February 5, 1956, then you will find the defendant not guilty.

The evidence presents the question of whether or not the attempt to commit the crime was in fact abandoned voluntarily before the act was put in process of final execution. The evidence shows clearly that if there was an abandonment it was voluntary. It is

obvious that any attempt to burglarize was abandoned because Carter and Goddard could not force an entry into the building.

The requested instruction was in conformity with the facts and applicable law. See *Wharton's Criminal Law*, Volume 1 Section 226, page 306.

Requested Instruction No. 6 is as follows:

You are instructed that in order for a person to be an accomplice he must in some manner knowingly and with criminal intent, aid, abet, assist or participate in the criminal act, and you are further instructed that the mere presence of the defendant at the scene of the crime combined with knowledge that crime is about to be committed or a mental approbation while the will contributes nothing to the doing of the act will not of itself constitute the defendant an accomplice.

None of the States witness could identify defendant Stockton as taking any part in the commission of the crime. The only evidence presented against defendant Stockton is that Stockton was in the car with Carter and Goddard when the car was stopped in Ogden Canyon some miles from the scene of the crime. The instruction was a correct presentation of the law as found in *State vs. Fertig*, Utah, 233 P2, 347, 349 and the evidence was such as to warrant the giving of the instruction and it was error not to do so.

V.

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION.

Point V should be considered in conjunction with Points I and II.

In the case at bar, the only evidence that connects the defendant Stockton with the commission of the crime charged is that he was in the company with Robert Dean Carter and Lee Goddard when their car was stopped in Ogden Canyon, some miles from the scene of the alleged crime and the alleged, uncorroborated, hearsay statements of an accomplice, that Stockton helped plan the crime.

In *State vs. Laub*, 131 Pac. 2nd, 805 four defendants Cannon, Laub, Reber and Pectol were convicted of grand larceny in that they killed and stole a beef belonging to Charles Foster.

The Facts showed that defendant Cannon was with the other defendants at the place near where the beef was slaughtered. That the other defendants were observed to have blood on their hands and clothing at or near the place. All of the defendants made false statements about their actions and the type of meat in their possession.

The conviction of defendant Cannon was reversed on the grounds that there was insufficient evidence to sustain the conviction, and in so doing the Court said:

“While the State’s evidence is circumstantial such evidence may be just as conclusive or even more so than direct evidence, but the prosecution still has the burden of proving beyond a reasonable doubt that the defendant is guilty or stated another way the prosecution must not only show by a preponderance of evidence an offense was committed and that the alleged facts and circumstances are true, *but they must also be such facts and circumstances as are incompatible upon any reasonable hypothesis other than defendant’s guilt.*

People vs. Scott, 10 Utah 217, 37 Pac. 335, See also *State vs. Burch*, 100 Utah, 414, 115 Pac. 2nd 911, *State vs. Crawford*, 59 Utah 39, 201 Pac. 2nd 1030. As pointed out in *Underhills Criminal Evidence* 4th edition, page 21, all the circumstances as proved must be consistent with each other and they are to be taken together as proved. Being consistent with each other and taken together they must point surely and unerringly in the direction of guilt * * * * *” Hence *if two reasonable hypothesis are pointed out by the evidence and one of them points to the defendant’s innocence it would then be difficult to see how any jury could be convinced beyond a reasonable doubt of the defendant’s guilt.*

* * * * * He (Cannon) was not with the other three defendants when they came from the woods, he did not have any blood on him nor did he stay with the other defendants so that the court or jury could infer that he helped bring the carcass to the truck. The uncontradicted evidence is that he went with the Trumans to help them load wood and did not rejoin the other defendants until they were ready to leave for home. The only evidence which points to his guilt is that he made false statements about trading pine nuts for the meat in Nevada and he took part of the meat. This is not sufficient to uphold his conviction. *This is not a charge of conspiracy and there is no evidence that he in any way aided in or planned the commission of the crime.* The conviction of Cannon is not sustained by the evidence and must be reversed.”

If the evidence in the above case was insufficient to sustain the conviction of defendant Cannon, who was seen with the other defendants at the scene of the crime, and who was found in possession of some of

the stolen meat, and who made false statements about possession of part of the stolen meat, how could it be said in the case before the court that the evidence was sufficient to sustain the conviction of defendant Stockton when he *was not seen* at the scene of the crime, but was only found in the presence of the other two co-defendants some miles from the scene of the crime. In addition to the above evidence against Stockton, it must be pointed out that the State attempted to prove defendant Stockton's complicity in the crime by the alleged conversation with Goddard with Deputy Covieo, which has been dealt with above, and which cannot be said to add sufficient evidence toward the conviction. This also, is not a charge of conspiracy and there is no evidence that he in any way aided in, or planned the commission of the crime. The conviction should be reversed because it is not sustained by the evidence.

In addition to the above argument, it should be pointed out that it could have been only on the basis of the alleged conversation between Goddard and Deputy Covieo that the jury convicted defendant Stockton.

Utah Code Ann. 1953, 77-31-18

A conviction shall not be had on the testimony of an accomplice, *unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense*; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

If the co-defendant Goddard, did have the conversation with Deputy Covieo that the officer claimed and

if such a conversation is admissable in evidence against the defendant, was there 'other evidence' corroborating this testimony which in itself and without the aid of, tends to connect the defendant Stockton with the commission of the offense? The only other evidence was the fact that Stockton was with the other defendants.

State vs. Spencer, Utah, 49 P. 302 states that there must be corroboration of such material facts as constitute the necessary elements of the crime charged. Can it be said that the fact that Stockton was with Carter and Goddard was a material fact constituting a necessary element of the crime? Not according to *State vs. Prince*, supra. See also *State vs. Collett*, Utah, 58 P. 684.

State vs. Coroles Utah, 277 P. 203 holds that unless the corroborative evidence implicates the accused in the offense charged and is inconsistent with his innocence that it is the duty of the trial court to direct a verdict for the defendant. See also *State vs. Cox*, Utah 277 P. 972.

State vs. Butterfield, Utah, 261 P. 804 holds that the corroborative evidence is insufficient if it merely casts a grave suspicion on the accused. See also *State vs. Simpson*, Utah, 236 P2 1077.

Obviously, the fact that defendant Stockton was found in the company with Carter and Goddard could do no more than cast a grave suspicion upon Stockton and the testimony of Goddard implicating Stockton has not been corroborated and the evidence against the defendant is insufficient to sustain the conviction.

CONCLUSION

The conviction of the defendant Stockton should be reversed for the reason that the evidence is insufficient to sustain the conviction; that the Court erred in admitting into evidence hearsay evidence in the form of a conversation between Deputy A. R. Covieo and one of the co-defendants, which conversation was had out of the presence of the defendant and which related to the commission of the crime charged, and that the failure of the Court to give to the jury defendant's requested instructions numbered one to six, withheld from the jury the correct law to be applied to the facts in evidence.

Respectfully submitted
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