

1983

State of Utah v. Robert Reedy, Jr. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 18082
ROBERT REEDY, JR., :
Defendant-Appellant :

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION AND JUDGMENT OF AGGRAVATED
ROBBERY, A FELONY OF THE SECOND DEGREE IN THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE DAVID B. DEE,
JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 18082
ROBERT REEDY, JR., :
Defendant-Appellant :

BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE NATURE OF THE CASE

The appellant, Robert Reedy, Jr., appeals from a conviction following a jury trial of the crime of Aggravated Robbery, a felony of the First Degree .

DISPOSITION IN THE LOWER COURT

The appellant was charged with and convicted of Aggravated Robbery, a felony of the First Degree, in violation of Title 76, Chapter 6, § 302 of Utah Code Ann. (1978). Subsequently, the trial judge entered a judgment of conviction for the next lower category of offense, pursuant to the motion of appellant's counsel, and sentenced the appellant to serve an undeterminate term of one to fifteen years at the Utah

State Prison as provided by law for a felony of the Second Degree.¹

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the conviction and sentence rendered below affirmed.

STATEMENT OF FACTS

On June 28, 1980, Mr. John Palmer, an attendant at a service station located at 200 West, 1300 South, Salt Lake City, was robbed by two men. The robbery occurred during daylight hours, between 8:15 to 8:30 a.m. of that morning (T. 10). The two perpetrators first approached Mr. Palmer and asked for change so that they might use a Coke machine on the premises (T. 10). After using the machine, one of the perpetrators approached Palmer again and displayed a revolver (T. 10). This perpetrator, whom Palmer later described as having dark hair and a small moustache, demanded that Palmer give him all the station's money (T. 11). Palmer indicated he was face-to-face with this man, whom he later identified on a police photograph, for a period of "probably five to six minutes" (T. 15). Palmer picked this photograph out of six different photos shown to him twelve days after the crime (T. 15,16). When asked whether he was certain that the man

¹ Respondent has confirmed that the Third District Court file contains a Judgment and Commitment which reflects the proper sentence.

in the photograph was the perpetrator, Palmer replied that he was "one-hundred per cent sure" (T. 17).

Palmer was able to give a detailed description of the weapon used in the holdup, indicating that it was black, about eight inches long, and probably a .22 caliber pistol (T. 11,12). Also, while the robbery was going on, Palmer was able to remember that the second individual, who appeared with the gunman originally to get change, was over on the other side of the gas station looking through a glass sliding door (T. 13).

Finally, Palmer clearly recalled that both men ran to the other side of the gas station, jumped a fence, and ran through a parking lot as they fled the crime scene (T. 14). After this escape, Palmer had presence of mind to immediately call the police despite a threat made by the gunman to prevent Palmer from doing so (T.14).

The sole issue at trial, which occurred over one year after the robbery, was identification. Despite his identification of the perpetrator from the police photograph, Palmer was unable to make an in-court identification of the appellant as the perpetrator of this crime.

A Salt Lake City police officer, John Cook, testified that the photograph Palmer identified prior to the trial was a picture of the appellant, Robert Reedy (T. 38). The officer also testified that approximately one year before the trial Reedy had looked very similar to the photograph that had been taken (T. 39). Cook described a number of changes

that had occurred in the appellant's appearance between his arrest and trial. These changes in appearance included a weight loss and a difference in hair style (T. 40). One of the reasons Palmer could not identify the appellant in court as the man who robbed him was because of a hair style difference (T. 17).

The appellant requested at trial that the jury be given what has become known as a "Telfaire"² instruction on the danger of inaccurate identification of perpetrators by eyewitnesses. The trial judge refused to give this instruction, but instead gave one instruction which cautioned the jury that the appellant was entitled to a presumption of innocence and not to convict if they held reasonable doubt as to his guilt (J.I. #4, R. 33). Also, another instruction which told jury members that they were the exclusive judges of witness credibility and the weight to give evidence was given. This instruction cautioned jury members to consider the capacity of a witness to remember in assessing his testimony (J.I. #6, R. 35). Also, during trial, the appellant's counsel rigorously cross-examined Mr. Palmer, the key eyewitness, and pressed the issue of a possibly inaccurate identification during his final argument to the jury (T. 18-32, T. 63-75). Nevertheless, the appellant was convicted by the jury of aggravated robbery.

² See U.S. v. Telfaire, D.C. Circuit, 469 F.2d 552 (1972).

ARGUMENT

POINT I.

THE TRIAL COURT'S REFUSAL TO GIVE THE APPELLANT'S REQUESTED JURY INSTRUCTION CONCERNING THE DANGERS AND INACCURACIES OF EYEWITNESS WAS PROPER.

A. THE INSTRUCTION WAS NOT REQUIRED UNDER THE LAW.³

In the case of State v. Malmrose, Utah, 649 P.2d 56 (1982), this Court held that it was not error for a trial court to fail to give a similar instruction on the potential inaccuracy of eyewitness identification testimony. In

3 Proposed Jury Instruction

Identification testimony is an expression of belief or impression by the witness. In this case its value depends on the opportunity the witness had to observe whether or not the defendant was the person who committed the aggravated robbery of John Glen Palmer on June 28, 1980, and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the person at the time will be affected by such matters as how long or short a time was available, how far or close the witness was from the offender, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(2) Are you satisfied that the identification made by that witness subsequent to the event was a product of his or her own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may

Malmrose, the defendant was convicted of forcible sexual abuse. The victim was attacked while she was jogging at Weber State College. Unlike the instant case, where an identification occurred within twelve days of the offense, the victim in Malmrose was unable to make any identification of the defendant until approximately three months had passed since the crime. Finally, she picked the defendant out of a photograph from a school yearbook.

Malmrose appealed his conviction on the basis that the trial court had improperly failed to give an instruction on the weight and credibility the jury should give to eyewitness testimony. This Court considered the proposition and held otherwise. In the majority opinion, Justice Howe stated:

also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

(3) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

The burden of proof on the State extends to every element of the offense and the identity of the perpetrator is such an element. The State must prove beyond a reasonable doubt that Robert Reedy, Jr., was the perpetrator of the offense in question in this case. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty (R. 66-67).

We have not heretofore held that such an instruction is required. We believe the giving of it should be left to the discretion of the trial court.

Such a position is sound; the trial judge is most able to assess the appropriateness of an instruction on a case by case basis. Justice Stewart's dissent in Malmrose indicated that such an instruction should have been given to the jury because (1) there were discrepancies in the victim's description of the defendant and his actual appearance; (2) there was a lengthy period of time between the assault and identification; (3) the photographic identification may have been suggestive because at first only two pictures were shown the victim; and (4) there was substantial corroboration of the defendant's alibi. A close analysis of the case at bar reveals that none of these factors is present. First, there was little or no discrepancy between the description of the defendant and his actual appearance when arrested. He had long, dark hair and was heavy-set. Second, his identification from a photograph occurred only twelve days after the crime. Third, six photographs instead of two were shown to the identifying eyewitness, Mr. Palmer. Appellant does not claim that this procedure was unnecessarily suggestive. Finally, appellant offered only a weak defense in the form of testimony concerning an alleged beard. In Malmrose, substantial corroboration of an alibi occurred from a number of witnesses.

A similar result has occurred in other cases. State v. McCumber, Utah, 622 P.2d 353 (1980). State v. Schaffer,

Utah, 638 P.2d 1185 (1981). In State v. McCumber, a man was convicted of sexual assault, burglary, and rape. Eyewitness identification was crucial because the victim had been attacked in the dark in her own bedroom. Defense counsel submitted a proposed jury instruction to the trial judge which was much like the instruction in this case, in that it dealt at length with the potential inaccuracy and credibility problems associated with eyewitness identification. The trial court refused the instruction and an appeal was made on this point to this Court. This Court then held the trial court committed no error by failing to give the instruction:

The principle points of defendant's proposed instruction dealt with the state's burden of proof and the factors to consider in weighing the testimony of an eyewitness. All of these factors to consider in weighing the testimony of an eyewitness. All of these factors were adequately dealt with in other instructions presented to the jury by the trial court. As a result, we cannot agree that the denial of the proposed instruction constituted reversible error.

622 P.2d at 359.

In State v. Schaffer, two men robbed a Salt Lake pizza parlor at approximately 10:30 p.m. on a summer night. The defendant in that case was convicted almost entirely on the basis of the testimony of two eyewitnesses. The circumstances of this identification in Schaffer were less ideal than in our case because the perpetrator in Schaffer was inside a pizza parlor at night as opposed to being outside a gas station in daylight at approximately 8:30 in the morning.

Nevertheless, this Court affirmed the conviction in Schaffer and held that error had not been committed. This Court said:

Defendant cites authorities stating that the giving of a specific jury instruction is desirable when identification is in issue. In view of the general instructions summarized above and in view of the witnesses' abundant opportunity to observe the robber when he was drinking beer, and when he was in the well lit kitchen area to order pizza, to empty the cash register, and to shut the witnesses in the cooler, the omission of the desirable identification instruction did not constitute reversible error.

638 P.2d at 1187.

Finally, the identification in the instant case was credible because the key eyewitness selected the appellant from six separate photographs of different individuals and because the witness observed appellant once when he gave appellant change, and later when he was robbed. Moreover, Mr. Palmer's recollection of a face-to-face daylight encounter evidences sharp perception and presence of mind retained throughout a harrowing experience. Respondent submits that any normal person would have exhibited some signs of severe tension and anxiety at the conclusion of Mr. Palmer's experience; as evidenced by his testimony, Mr. Palmer, commendably, was in control when it counted -- during the robbery. Cases from other jurisdictions are in accord with these precedents. In State v. Taylor, Arizona, 109, 267, 508 P.2d 731 (1973), the trial court refused to give a similar instruction on eyewitness identification to a jury in

a murder trial. The Arizona Supreme Court affirmed a murder conviction in this case. The Court stated that:

The requested instruction on identification would not have added anything to these general instructions given to the jury. The trial court's references to the presumption of innocence, the necessity of proving all material allegations and the credit to be given the eyewitnesses would certainly have meaning for the jury as applied to the testimony of the identity witnesses. The weight to be given such testimony of such witnesses is a matter for the determination of the jury or court trying the case.

We find no error in the failure of the trial court to give the requested instructions on identity.

508 P.2d at 738.

In State v. Ollison, Oregon, 519 P.2d 393 (1974), a robbery conviction was sustained by the Oregon Supreme Court. The conviction was largely obtained on the basis of eyewitness identification. Despite the refusal of the trial court to give a "Telfaire type" instruction to the jury on the problems of eyewitness identification, the conviction was affirmed. The Court stated:

While an instruction concerning identification would not have been inappropriate in this case, our review of the record indicates that the identity issue was significantly brought into focus and drawn to the attention of the jury -- both by questions directed to the witnesses and by the court's instructions. Therefore, the failure to give an instruction on identification was not prejudicial error.

519 P.2d at 396.

Many other cases have been decided with similar facts and have also held that no error resulted from a failure to instruct the jury at great detail as to the potential inaccuracy and credibility problems of eyewitness testimony.⁴

B. THE REQUESTED INSTRUCTION FAILED TO FIT THE FACTS OF THE CASE.

A review of the appellant's proposed jury instruction indicates that a number of its passages and sections are inappropriate here because they do not support the evidence adduced at trial. A defendant is not entitled to a jury instruction if it does not fit any reasonable version of the facts in the case. State v. Brown, Utah, 607 P.2d 261 (1980); State v. Castillo, Utah, 23 Utah 2d 70, 457 P.2d 618 (1969). It should be kept in mind that the only issue in this case was whether the identification of the appellant as one of the perpetrators of the crime was accurate or not.

Subsection two of appellant's proposed instruction was inappropriate because it asks the jury to scrutinize

⁴ State v. Davis, 649 S.W.2d 12 (1982) [Tennessee]. State v. Gravely, 299 S.E.2d 375 (1982) [West Virginia]. State v. Ammburg, 31 Wash. App. 696, 644 P.2d 717 (1982) [Washington]. People v. Martinez, Colo. app. 652 P.2d 174 (1981) [Colorado]. Sparks v. State, 604 P.2d 802 (1980) [Nevada]. Hawaii v. Padilla, 552 P.2d 357 (1976) [Hawaii].

whether the identification made by the witness was a product of his or her own recollection. This was not a problem because the witness, Mr. Palmer, chose the appellant's photograph out of a total of six different photographs. It was not argued that such an identification was unduly suggestive or not a product of the appellant's own recollection. Also, subsection two speaks of an identification of the defendant after he has been "presented to the eyewitness for identification." This is completely inappropriate because the identification of the defendant that occurred here was a photo-identification and not a line-up or show-up identification as this instruction suggests. The concluding paragraph speaks to burden of proof and reasonable doubt -- areas covered by other instructions given to the jury. In sum, the instruction was not properly drafted to fit the facts of the case.

C. THE JURY INSTRUCTIONS WHICH WERE
ACTUALLY GIVEN, TAKEN AS A WHOLE,
ADEQUATELY INSTRUCTED THE JURY.

Jury instructions are to be considered as a whole and are to be reconciled whenever possible. State v. Schaffer, supra. State v. Coffey, Utah, 564 P.2d 777 (1977). Taylor v. Johnson, Utah, 18 Utah 2d 16, 414 P.2d 575 (1966). A number of jury instructions actually given to the jury in the instant case did deal with the issues of witness identification.

For example, Instruction No. 4 instructed the jury members that in order to convict they must find that the State had proven the defendant guilty beyond a reasonable doubt (J.I. #4, R. 33). More significantly, instruction No. 6 told the jury that:

You are the exclusive judges of the credibility of the witnesses and the weight of their testimony. In so judging you can take into consideration any interest a witness may have in a lawsuit and any bias or probable motive, or lack thereof, to testify as they do, if any is shown. You may also consider the deportment of witnesses upon the witness stand the reasonableness or lack thereof of their statements, their frankness or the want of it, their ability to understand, their capacity to remember and whether any witness contradicted himself or herself, and then determine therefrom, in accordance with your honest convictions what weight and credibility you should give to the testimony of each witness, measured by reason and common sense and the rules set forth in these instructions."

(J.I. #6, R. 35) (emphasis added).

In view of the rule that jury instructions are to be considered together, the "presumption of innocence" language and the "reasonable doubt" language from the fourth instruction should be considered together with the "capacity to remember" and "weight of testimony" language of the sixth instruction. When this occurs, it becomes clear that the jury was properly instructed concerning any potential problems with eyewitness testimony accuracy.

Additionally, these issues were also raised by appellant's counsel, both through his rigorous

cross-examination of the key eyewitness at the trial, and through his final argument to the jury which stressed the issue of mistaken eyewitness identification at great length (T. 18-32; T. 63-75).

D. APPELLANT'S PROPOSED INSTRUCTION,
MODELED AFTER THE TELFAIRE CASE JURY
INSTRUCTION, IS TOO STRONG AND IS
BIASED AGAINST THE STATE.

Appellant's proposed instruction in this case is lengthy and complex. In fact, other courts have held that such an instruction, modeled after the instruction in the Telfaire case, is too lengthy and complicated to give to a jury. For example, in State v. Abernathy, 31 Wash. App. 635, 644 P.2d 691 (1982), it was stated that:

We conclude the court properly refused the complex witness identification instruction based on U.S. v. Telfaire.

Id. at 693

This point was made again by the Washington Court of Appeals in State v. Jordan, 17 Wash. App. 542, 564 P.2d 340 (1977):

We believe that the instruction is impermissibly slanted to the degree that it should not be given in Washington. Witness credibility is more properly tested by examination and cross-examination in the forum of the trial court. Closing argument affords counsel the appropriate means to point any weaknesses in eyewitness identification.

Id. at 341

CONCLUSION

The appellant was convicted of aggravated robbery following a jury trial in the Third Judicial District. He fully exercised his right to cross-examine the eyewitness and the other key witnesses in the case. The cross-examination was rigorous and thorough. In his final argument to the jury, appellant's counsel focused on the dangers of eyewitness testimony. Finally, instructions were given to the jury which urged the members of that panel to consider the weight to be given to the various witnesses and their testimony. This instruction, while not so detailed as the appellant's proposed instruction, adequately raised the issue of inaccurate eyewitness identification, particularly when considered in connection with another jury instruction.

The identification of the appellant by the State's key eyewitness was credible because of (1) his selection of the appellant from six photographs of different individuals; (2) his observation of appellant in broad daylight, first when he gave appellant change and later when he was robbed; (3) his detailed description of the crime and the location of the two perpetrators during its occurrence; and (4) his identification of the appellant's photo, which occurred less than two weeks after the crime.


This Court has not held that it is error to refuse a "Telfaire type" instruction of jury identification and it should not do so in this case. When the cross-examination,

final argument, and the actual jury instructions are considered together, respondent asserts that the the issue of mistaken identification was adequately and poperly presented to the jury.

The conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of August, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed three true and correct copies of the foregoing Brief of Respondent, postage prepaid, to G. Fred Metos, Salt Lake Legal Defender Association, Attorney for Appellant, 333 South Second East, Salt Lake City, Utah 84111, on this 8th day of August, 1983.

