1982

State of Utah v. Woodrow Willie John : Brief of Appellant

Utah Supreme Court

Lynn R. Brown; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent v. WOODROW WILLIE JOHN, Defendant-Appellant	: : : : : : : :	Case No. 18108

BRIEF OF APPELLANT

Appeal from a conviction for Attempted Rape, a Third Degree Felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for Attempted Rape, a Third Degree Felony, in violation of Utah Code Ann. §76-5-402 (1953 as amended), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Woodrow Willie John, was charged in an Information with Attempted Rape, a Third Degree Felony, in violation of Utah Code Ann. §76-5-402 (1953 as amended), and with Forcible Sexual Abuse, a Third Degree Felony, in violation of Utah Code Ann. §76-5-404 (1953 as amended). On the 15th day of October, 1981, the appellant was convicted by a jury of Attempted Rape. On the 26th day of October, 1981, the appellant was sentenced to incarceration in the Utah State Prison for an indeterminate term not to exceed five years.

RELIEF SOUGHT ON APPEAL

The appellant, Woodrow Willie John, seeks to have the judgment entered against him vacated, or reversed and remanded to the Third Judicial District Court for a new trial.

STATEMENT OF THE FACTS

At approximately 4:00 p.m. on July 9, 1981, Ruth Robinson was getting into her car in a parking lot near 200 West South Temple, Salt Lake City, Utah, when she was accosted by an individual who slid into the car with her. The individual made sexual advances on Mrs. Robinson, until he was interrupted by a young man walking through the parking lot who saw and heard the struggle going on in the car. The young man watched as the assailant exited the car and walked away, while Mrs. Robinson locked the doors and windows, started the car, and began pulling away in such a frenzied state that she almost had an accident. The young man stopped Mrs. Robinson, then asked two other individuals in the parking lot to summon the police, which they did. (T. 9-17, 52-55)

Later that evening, Mrs. Robinson was driven to the St. Mark's Half-Way House by a police officer. The appellant was brought out of the facility by a police officer, where Mrs. Robinson could see him. She could not make a positive identification, so the officer took her to within 4 or 5 feet of the appellant. She was still uncertain, and asked that the appellant say something. When the appellant used the word "lady", as had Mrs. Robinson's

assailant, she said she was sure this was the person. (T. 26-28, 90-91) Defense counsel moved to strike the in court identification of the appellant by Mrs. Robinson because it was tainted by the prior suggestive show-up. The motion was denied. (T. 101, 105)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE IDENTIFICATION TESTIMONY OF RUTH ROBINSON.

The United States Supreme Court recognized in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), the unreliability of unduly suggestive eyewitness identification procedures. The court indicated five factors important in assessing the likelihood of misidentification:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. 409 U.S. at 199

The authorities agree that eyewitness identification is a highly unreliable source of evidence at best,[1] and

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1. See Buckhout, "Eyewitness Testimony", 231 Scientific American 23 (1974); Buckhout, "Psychology and Eyewitness Testimony", 2 Law and Psych. Rev. 75 (1976); Doob & Kirshenbaum, "Bias in Police Line-ups--Partial Remembering", 1 J. of Police Science and Admin. 287 (1973), Loftus, "Reconstructing Memory: The Incredible Eyewitness", 15 Jurimetrics J. 188 (1975): Murray "The Criminal Line-Up at Home and Abroad", Utah 1, Rev. 610 (1966) n.2.

subsequent studies have shown that the reliability of eyewitness identification is poor even where all five of the Neil v. Biggers factors are optimal.[2] But in the present case, two of the five factors would indicate a high unreliability of Mrs. Robinson's identification of the appellant as her assailant. The five factors as applied to the present case are as follows:

1. Mrs. Robinson's opportunity to observe her assailant was very good, because she was with him for several minutes in broad daylight at a close proximity.

2. Mrs. Robinson's degree of attention to her assailant would have been very high, since the incident involved an attach on her person.

3. Mrs. Robinson's description of her assailant was a poor match with the appellant. She described her assailant as 250-300 pounds, more than 100 pounds heavier than the appellant's weight; she said her assailant was wearing a red T-shirt, while the appellant was found wearing a flannel shirt a short time later, and no evidence was introduced that the appellant even owned a red T-shirt; and Mrs. Robinson remembered her assailant

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2. See Uelman, "Testing the Assumptions of Neil v. Biggers: An Experiment in Eyewitness Identification", 16 Crim. Law Bulletin 358 (1980).

as wearing his hair differently than did the appellant. (T. 26, 44)

4. Mrs. Robinson was not at all certain as to her identification even after she viewed the appellant from a few feet away in a one-on-one show-up.

5. The time elapsed between the event and the identification was only a matter of hours.

It can be seen that, under the Neil v. Biggers analysis set forth by the United States Supreme Court, the present identification was very weak on two of five points. Furthermore, the identification was made under the most suggestive of circumstances possible--the witness was shown a person already in the custody of the police and, knowing him to be the only suspect in the case, could only make a very tentative initial identification, until the person happened to say the word "lady", a very common means of addressing adult females.

The Utah Supreme Court has expressed its own concern with suggestive identification procedures. In State v. Ervin, 22 Utah 2d 216, 451 P.2d 372 (Utah 1969), the court stated:

> We are in accord with the idea that a line-up should be neither so devised nor manipulated as to impel or to be unduly suggestive as to identification. Ideally it should be regarded as having a dual purpose. On the one hand: to help in searching out and identifying those guilty of crime. On the other, the equally important corollary: to protect those who are suspected of crime but who are innocent. To best serve both purposes the procedure should be handled with caution not to place blame on the innocent, and yet not so laden with difficulties nor burdened with super-cautions as to make it impractical as a method of identifying the guilty. 451 P.2d at 374-75

And finally, in an apparent effort to serve the "dual purpose" of the line-up procedure, the Legislature drafted Chapter 8 of the Utah Code of Criminal Procedure in 1980, outlining the circumstances and procedures for conducting line-ups. An arrested suspect may be required by a peace officer to appear in a line-up -- otherwise, a magistrate's order is required upon a finding of probable cause.[3] Section 77-8-2 assures the suspect of the right to have counsel present at the line-up, and Section 77-8-4 requires the entire procedure to be recorded, allowing the suspect access to such records. And, perhaps most importantly in the present case, Section 77-8-3 forbids peace officers from "attempt[ing] to influence the identification of any particular suspect."

None of the statutory requirements of Chapter 8 were followed in the present instance. The appellant was not arrested and in custody at the time of the show-up, nor had any magistrate's order issued. No counsel was present, the appellant had no opportunity to procure counsel, nor was he even made aware of any such right. No record was made of the proceedings. And finally, the entire purpose of bringing Mrs. Robinson to the St. Mark's facility was to get her to confirm the officer's choice of the appellant as her assailant. The police literally pointed out the man they wanted Mrs. Robinson to identify.

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3. Utah Code Ann. §77-8-1 (1953 as amended)

The requirements of Chapter 8 are clear, and the failure to comply with them in the present instance is equally clear. The opportunity to comply with Chapter 8 was also present -- there were no special or exigent circumstances requiring an immediate identification.

If compliance with Chapter 8 is not required in the present instance, it is difficult to imagine a circumstance where the police could not circumvent Chapter 8 in the same manner as in the case at bar. Whenever the police wished to conduct a suggestive show-up, avoiding the admittedly more burdensome but more reliable Chapter 8 procedure, they could merely bring the purported eyewitness along when they make the arrest, and have the witness "identify" the individual before the arrest is made. Such a reading of Chapter 8 would make its provisions meaningless, and effective only as a suggestion -- i.e., the police may comply with Chapter 8 only if they so choose.

Since the police chose not to comply with Chapter 8 in the case at bar, and have shown no exigency requiring non-compliance, the appellant's motion to strike the identification testimony of Mrs. Robinson was improperly denied by the trial court. The lower court's decision should be reversed.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

The evidence presented by the State was insufficient to support the verdict rendered. The standard for reviewing a challenge to the sufficiency of the evidence was stated by this Court in State v. Mills, 530 P.2d 1272, 1272 (Utah 1975):

> 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 reasonbly 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. To set aside a verdict it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly must have entertained reasonable doubt that defendant committed the crime.

Applying this standard to the present case, the identification of the appellant by Mrs. Robinson was "so inconclusive [and] unsatisfactory that reasonable minds . . . must have entertained reasonable doubt" as to whether or not the appellant was Mrs. Robinson's assailant.

The inherent unreliability of eyewitness testimony must be taken into consideration. Reasonable persons do not unduly rely on unreliable evidence. The fact that Mrs. Robinson's testimony failed to comply with two of the five Neil v. Biggers criteria adds to its unreliability.

The failure of Mrs. Robinson's description of her assailant to match the physical size of the appellant, together with her uncertainty as to her visual identification of the appellant, her undue reliance on the appellant's use of the word "lady", and the complete absence of physical evidence identifying the

appellant as the assailant, all would lead a reasonable juror to entertain reasonable doubts as to the identification. For this reason the conviction should be vacated.

CONCLUSION

The trial court erred in refusing to strike Ruth Robinson's identificatin testimony, because of the use of unnecessarily suggestive identification procedures by the police, in violation of the appellant's due process rights under the Constitution and in violation of Chapter 8 of the Utah Code of Criminal Procedure. Furthermore, the eyewitness identification of the appellant by Ruth Robinson was so fraught with unreliability and uncertainty that a reasonable juror could not have found the appellant guilty beyond a reasonable doubt. The case should be reversed and remanded for a new trial.

DATED this 27 day of September, 1982.

Lynn R Brown

LYNN R. BROWN
Attorney for Appellant

Delivered a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this _____ day of September, 1982.

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