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State of Utah v. Edward Manger : Brief of Appellant

Utah Supreme Court

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Hand
Case No. 8658

**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

MAY 10 1957

STATE OF UTAH,

Plaintiff and Respondent,

vs.

EDWARD MANGER,

Defendant and Appellant.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

**ELLIOTT LEE PRATT
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IN THE SUPREME COURT
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—vs.—

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Defendant and Appellant.

Case No. 8658

BRIEF OF APPELLANT

STATEMENT OF FACTS

The defendant, Edward Manger, has been charged with second degree burglary by Information, which reads as follows:

“That the said defendant on or about the 13th day of July, 1956, at and within San Juan County, State of Utah, broke and entered the store building of John Hunt, d/b/a Twin Rocks Trading Post, in the night time with intent to commit larceny therein.”

After pleading "not guilty," the defendant was tried before a jury in the Seventh Judicial District Court in San Juan County, State of Utah and was convicted of said crime.

At the trial, the defendant did not take the stand and did not offer any direct evidence in his behalf. The following facts developed from the evidence adduced by the prosecution.

Several months prior to July 12, 1956, the defendant had come to Bluff, Utah as a construction worker and had engaged jointly with several other workers in the construction work on a house in Bluff. (R. 141). Several days prior to July 12, 1956, the defendant had sold his interest in said construction contract for \$50.00 (R. 141).

During the three weeks prior to July 12, 1956, the defendant had lived in the old Aunt Jenny Barton house with James Bruce, Wyley Pittman, Carl Billingsly and Walter Roles (R. 50). This house was an old open house where everyone came and went freely — there were no locks. These men lived in this house, slept there and prepared their own meals.

John Hunt for the six years preceding July 12, 1956 had operated a store and tavern known as the Twin Rocks Trading Post situate in Bluff, Utah (R. 7). The Trading Post was divided into two parts, one a store and the other a tavern (R. 33, 34, 35, 36). Leah May Butts had assisted Mr. Hunt on many occasions in the operation of the Trading Post (R. 13, 171).

On July 12, 1956 at 7:00 o'clock P.M., Mr. Hunt locked up the store and about 8:30 o'clock P.M. left Leah May Butts in charge of the tavern while he went to Blanding, Utah (R. 168).

Leah May Butts took charge of the tavern until about midnight of July 12, 1956 and then closed it (R. 173), not noticing if anything was missing. Then in the company of the defendant and several others she went to a house for a party (R. 156, 171). While there and at about 12:30 or 1:00 o'clock A.M. of the morning of July 13, 1956, the defendant and two others went to the Aunt Jenny Barton house where the defendant obtained some food to take back to the party (R. 157, 174). The party disbanded about 2:00 o'clock after a short dice game and everyone went home. The defendant went to the Barton house (R. 175).

All of the residents of the Barton house went to bed about 9:30 P.M. on the evening of July 12, 1956 except the defendant, who had stayed at the tavern until closing and had then gone to the above mentioned party. Mr. Pittman, Mr. Bruce and Mr. Billingsly testified that late at night they had seen someone come into the Barton house and had seen this person move around in the house and then leave. They did not know who the person was (R. 110, 112, 138, 139, 146, 152).

The next morning, July 13, 1956 at about 6:00 o'clock A.M. the occupants of the house all arose (R. 148). That morning the sunrise was at 7:00 o'clock A.M. (R. 153).

About 8:30 A.M. of the morning of July 13, 1956, John Hunt arrived at the Trading Post and discovered a rip in the screen where someone had apparently entered the store. He further found upon entering the store that certain jewelry, cash and shirts were missing (R. 9, 47). At about 9:00 A.M. the defendant came into the tavern (R. 23, 106).

He notified Mr. Hall, Deputy Sheriff, (R. 10, 48) who in turn notified the Sheriff of San Juan County. The Sheriff and Mr. Hall immediately went to the Aunt Jenny Barton house to look for some of the property which apparently was missing (R. 49) and they found some half dollars and one or two wrist watches in what appeared to be the defendant's clothes hanging in the bedroom of said house (R. 132). The defendant denied ownership of the watches, but stated that the half dollars were his. Mr. James Bruce then produced a paper bag of small change which he found outside under a porch (R. 56). Mr. Bruce further produced a box of shirts which he found outside behind a chicken house (R. 59). After the Sheriff had left, Mr. Bruce went to a hole in the ceiling over the defendant's bed and produced a bag of jewelry, (R. 63, 109, 111, 112) and took it to the Deputy Sheriff.

John Hunt did not know when a sack of money he had might have been taken since he had not seen it since prior to July 12 (R. 37). The sack contained half dollars (R. 10, 11). He further did not know whether or not the shirts or jewelry had been stolen or had been sold prior

to July 13, 1956 (R. 32). Mr. Hunt could not identify the watches as being his; but only that they appeared similar to those which he ordinarily sold (R. 12, 32, 33). The shirts, jewelry and watches were similar to those sold throughout the area. Mr. Hunt did not have an inventory of his merchandise either immediately prior to July 12 or immediately after July 13, and, therefore, was uncertain as to what was missing from his store (R. 27, 28). On the afternoon of July 13, 1956, the defendant was arrested and taken into custody and charged with the above mentioned crime.

STATEMENT OF POINTS ON APPEAL

POINT I.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO CONNECT THE DEFENDANT WITH THE CRIME CHARGED.

POINT II.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SHOW THE ENTERING OF THE TRADING POST DURING THE NIGHT TIME.

ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO CONNECT THE DEFENDANT WITH THE CRIME CHARGED.

In this case, the State can only rely upon the alleged possession of stolen goods by the defendant as a basis for conviction, since there is absolutely no other evidence

connecting the defendant with the crime charged. It is recognized, of course, that under Title 76-38-1, Utah Code Annotated, 1953, as amended, and under the case of *State vs. Thomas*, 244 Pac. 2nd 653 that possession of recently stolen property presents a prima facie case of burglary, provided that the other elements of burglary are present. However, it is stated and held in *State vs. Thomas*, that:

“According to the foregoing authorities in order for the defendant’s possession of recently stolen property to be sufficient to support a conviction of burglary, such possession must be recent, that is, not too remote in point of time from the crime, personal, exclusive, (although it may be joint if definite) distinct, conscious and such possession must be coupled with a lack of a satisfactory explanation or other incriminating circumstances or conduct as hereinbefore mentioned, and if these conditions are met, a case sufficient to sustain a conviction is made out.”

Furthermore, it is stated in *State vs. Kinsey*, 77 Utah 348:

“Further, the authorities also are to the effect that the possession must not only be personal, exclusive and unexplained, but also must be conscious or a conscious assertion of possession by the accused.” (Numerous cases cited thereafter.)

Here the only evidence of possession which we have is that several half dollars and one or two watches were found the morning after the alleged burglary in clothing which the defendant had previously worn, which clothing was hanging in a room of the Barton house commonly

used by all of the occupants. Furthermore, the defendant had been absent from the house for a part of the morning prior to the discovery of said half dollars and watches.

Under the above cases, the property must be shown to have been stolen. There is no evidence whatsoever that any half dollars were stolen from the Trading Post. As a matter of fact, the evidence concerning money had to do with a bag of money which the owner had not seen since prior to July 12, 1956. There was no evidence whatsoever to infer that any half dollars had been taken from said bag of money. Furthermore, the defendant, according to testimony of some of the witnesses, claimed he had won the money in a dice game. Therefore, the half dollars cannot be considered as stolen property under the evidence submitted to the jury.

The watches cannot be considered as stolen property inasmuch as John Hunt, the owner of the Trading Post, testified that he could not definitely identify the watches as being those which might have been stolen. He testified that the watches might have been sold prior to July 13, 1956. He further testified that he did not know what watches, if any, had been stolen, but he merely assumed that the watches in question had been taken from the Trading Post. He admitted, however, that such watches were commonly sold throughout the area by other stores. In this connection, the defendant, according to witnesses, denied ownership or claim of the watches.

Under the above cases, the possession must be exclusive. Here the money and watches were found in some

clothes which the defendant had previously worn. The clothes, however, were not being worn by the defendant and were merely hanging in a room wherein the defendant slept along with several other occupants of the Barton house. Testimony is clear that everyone had access to the entire house at will. The mere fact that the property was in the same room wherein the defendant slept has been held to be insufficient evidence of possession to uphold conviction under the above statute.

The case of *State v. Crawford*, 59 Utah 39, as cited and discussed in *State vs. Nichols*, 106 Utah 104, together with the case of *People vs. Hart*, 10 Utah 204, clearly hold that the mere showing that the property was in the same room as the defendant was insufficient to establish possession under this statute.

In addition to the foregoing facts, it should be noted that the defendant had been absent from the house during the morning prior to the discovery of this property and that James Bruce and some of the other occupants were in and out of the house prior to discovery of the property. Furthermore, it should be noted that the clothes were searched prior to the discovery of the watches by the Sheriff, indicating that even more people had access to the clothes than just the Deputy Sheriff and the Sheriff.

The shirts and the bag of money were discovered outside of the house by James Bruce. The sack of jewels was discovered in the house by James Bruce. Certainly Mr. Bruce, together with all other occupants of the house had as much control and as much alleged possession of

these items as did the defendant. It cannot be reasonably said that the defendant had exclusive control of these items.

Under the foregoing facts, it is readily apparent that many persons had possession of the property equal to that allegedly held by the defendant. In order that circumstantial evidence would be sufficient to sustain a conviction, there must be a higher degree of certainty than exists in this case. As stated in the case of *State vs. Crawford*, 59 Utah 39:

“Circumstantial evidence must exclude every reasonable hypothesis except that of defendant’s guilt. Defendant must be accorded the benefit of every reasonable doubt, and in cases dependent solely upon circumstantial evidence, the circumstances must be such as to exclude every reasonable hypothesis except that of guilt.”

POINT II.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SHOW THE ENTERING OF THE TRADING POST DURING THE NIGHT TIME.

The essential element of burglary in the second degree is that the breaking and entering was made during the night time. Our statute title 76-9-7 Utah Code Annotated defines night time as:

“The period of time between sunset and sunrise.”

The State must show by affirmative evidence that the defendant entered the Trading Post with intent to com-

mit a larceny between sunset and sunrise. In the case of *State vs. Miller*, 24 Utah 312, the offense was allegedly committed between 9:30 P.M. and 6:30 A.M. However, the sun had risen at 4:38 A.M., approximately two hours before the crime had been discovered. The Court held in that case that the State had not affirmatively shown that the crime had been committed prior to sun rise since there was a two hour period after sun rise after which the defendant could have committed the crime.

Again in the case of *State vs. Rice*, 144 Pac. 1014 (Kansas) the Court in considering a conviction under a statute similar to our Utah statute on burglary, states:

“A careful examination of the record fails to disclose any testimony which would warrant the jury in finding that the burglary was committed in the night time. There is no evidence in the record to show when the burglary was committed. The offense of burglary in the daytime being the lesser of the two offenses, the presumption in favor of the Appellant is that the burglary was committed in the day time.”

We, of course, recognize as is indicated in the case of *State vs. Richards*, 29 Utah 310, that the proof of entering during the night time may be circumstantial. However there still must be affirmative proof that there was such an entering.

In the subject case, John Hunt locked up the store at 7:00 o'clock on July 12, 1956. The store was separated from the tavern and access to the store could be had from the rear without going through the tavern. Mr.

Hunt then did not open the store again until 8:30 the following morning, at least 1½ hours after sun rise. There is no evidence whatsoever to indicate that the defendant entered the store at any particular time between 7:00 o'clock P.M. and 8:30 o'clock A.M. the following morning. There is no evidence giving rise to an inference that the defendant entered the store during the night time since the only time that the defendant was not in the company of other people was from about 2:00 o'clock A.M. until morning. In the Richards case, there was other evidence indicating that the defendant might reasonably have been in the vicinity of the commission of the crime during the night time. That is not the case here.

Furthermore, with reference to most, if not all of the items allegedly missing the owner, John Hunt, testified that he didn't know whether or not the items were in the store on July 12, 1956. In other words, there is no definite proof that these items were stolen during the period from 7:00 o'clock P.M. July 12, 1956 to 8:30 A.M. July 13, 1956.

The State has totally failed to adduce any evidence from which an inference could be reasonably made as circumstantial evidence that the defendant entered the Trading Post during the night time.

Even assuming that the defendant had possession of the stolen goods and thus is presumed to have committed a larceny, there are no other facts as required under the case of *State vs. Thomas* to establish the

crime of burglary and the presumption arising out of possession of the stolen goods fails to establish a prima facie case for a conviction under our burglary statute.

THEREFORE, Appellant maintains that the Court erred in submitting the case to the jury under the facts adduced by the State and that the verdict of "guilty" should be reversed and a directed verdict of "not guilty" should be entered in this matter.

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