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State of Utah v. Edward Manger : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

EDWARD MANGER,
Defendant and Appellant.

Case No.
8658

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

On the afternoon of July 13, 1956, the defendant was arrested, taken into custody and charged with the crime of burglary in the second degree by an Information which read:

> "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 nighttime, 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 the crime charged.

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

The defendant was an itinerant construction worker and had come to Bluff, Utah several months prior to July 12, 1956. He had engaged jointly with other workers in remodeling a house in Bluff (R. 141). Several days prior to July 12, 1956, the defendant sold his interest in this construction contract for $50.00 (R. 141) being paid by check (R. 142).

For three weeks prior to July 12, 1956, the defendant had lived in the old Aunt Jenny Barton house with James Bruce, Wyley Pittman, Earl Billingsly and Walter Roles (R. 50). This house was an old open house where everyone came and went freely. The four men lived in this house, slept there and prepared their own meals.

John Hunt had for six years prior to July 12, 1956, operated a store and tavern known as the Twin Rocks Trading Post 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 p. m., Mr. Hunt locked the store and about 8:30 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, closing and locking it about midnight of July 12, 1956 (R. 171). Then, in the company of the defendant and several others, she went to a house for a party (R. 156, 171). While at this house, and at about 12:30 or 1:00 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). After the defendant returned to the party there was a short dice game in which less than $1.00 changed hands (R. 158, 166, 175, 176), and in which no merchandise was involved (R. 150). The defendant had $50.00 in currency but did not participate in the dice game because he had no change (R. 158, 159). The party disbanded about 2:00 a. m.

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 in 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 could not definitely identify the person who was there (R. 110, 112, 138, 139, 146, 152). This person had, however, moved around and stood upon the bed of the defendant (R. 117, 118).

On the morning of July 13, 1956, all of the occupants of the house, with the exception of the defendant, arose at about 6:00 a. m. (R. 119, 148). The defendant was

observed to be in his bed at this time (R. 119). That morning the sunrise was at 7:00 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 entered his 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).

Mr. Hunt notified Deputy Sheriff Hall of the theft (R. 10, 48) who in turn notified the sheriff of San Juan County. The Sheriff and Deputy Hall immediately went to the Aunt Jenny Barton house to look for some of the missing property (R. 49) and found "quite an amount of half dollars" (R. 52) and two wrist watches in the defendant's clothing (R. 53, 55) near his bed (R. 132). The defendant denied ownership of one of the watches (R. 56), but stated that the half dollars and the one watch were his (R. 53). The defendant told Deputy Hall that he had won the half dollars and the one wrist watch in the dice game at the party the night before (R. 53). During a subsequent search, Mr. James Bruce found a paper bag of small change outside under a porch (R. 56), and a box of shirts behind a chicken house (R. 59). After the sheriff and his deputy left, Mr. Bruce who had observed someone standing on defendant's bed during the night (R. 118) 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 definitely when a sack of money he had might have been taken, but had observed it

prior to July 12, 1956 (R. 37). The sack contained half dollars (R. 10, 11). Mr. Hunt could not definitely identify the watches as being his, but only that they appeared similar to those which he ordinarily sold (R. 12, 32, 33). He did identify some of the shirts and jewelry by the attached cost marks (R. 22). The shirts, jewelry and watches were all similar to those sold throughout the area. However, no evidence was introduced which would indicate that any other store in the area selling such merchandise had been robbed.

STATEMENT OF POINTS

POINT I.

VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT, IT WAS SUFFICIENT AS A MATTER OF LAW TO CONNECT THE DEFENDANT WITH THE CRIME CHARGED.

POINT II.

VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT, IT IS SUFFICIENT AS A MATTER OF LAW TO SHOW ENTRY DURING THE NIGHTTIME.

ARGUMENT

POINT I.

VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT,

IT WAS SUFFICIENT AS A MATTER OF LAW TO CONNECT THE DEFENDANT WITH THE CRIME CHARGED.

On appeals based on the ground that the evidence was insufficient to support the jury verdict, appellate courts will not attempt to determine the weight of the evidence presented at trial. This has always been the function of the jury. In the recent and similar Utah case of *State* v. *Sullivan,* 6 Utah 2d 110, 307 P. 2d 212, 214, this court stated that:

> "The very essence of trial by jury is that the jury are the exclusive judges of the weight of the evidence, the credibility of the witnesses and the facts to be found therefrom."

In *People* v. *Henderson,* 292 P. 2d 267, 269, the California court expressed the following view:

> "The court on appeal 'will not attempt to determine the weight of evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are estbalished by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of insufficiency of the evidence,' it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the

> evidence, and then determine whether such facts are sufficient to support the verdict. If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

It is a fundamental rule that the reviewing court will consider the evidence and inferences fairly drawn therefrom in the light most favorable to the jury verdict, and will only upset that verdict if reasonable minds could entertain substantial doubts about the verdict after viewing the evidence in this manner. As stated in *State* v. *Sullivan,* supra:

> "The defendants essay to demonstrate that the evidence leaves such doubt as to their identification as the culprits in this crime that they were entitled to a dismissal. For them to prevail on that proposition it must appear that, *viewing the evidence and all fair inferences reasonably to be drawn therefrom in the light most favorable to the jury's verdict,* reasonable minds could not believe them guilty beyond a reasonable doubt, *but would necessarily entertain some substantial doubt of their guilt.*" [Emphasis added.]
>
> (See *Glasser* v. *U. S.,* 315 U. S. 60, 80.)

Viewing the evidence in the instant case in the light most favorable to the jury's verdict, the following points emerge:

(1) Uncontradicted testimony was given showing that during the night of July 12-13, 1956, the Twin Rocks Trading Post was robbed (R. 9, 47).

(2) Uncontradicted testimony was given showing that a search in and around the defendant's abode on the morning of July 13, 1956, disclosed a great deal of property similar to that stolen from the Twin Rocks Trading Post. Some of this property was definitely identified by the owner of the Trading Post by means of price marks (R. 22).

(3) Uncontradicted testimony was given indicating that two watches and "quite an amount of half dollars" were found in the clothing of the defendant near his bed (R. 52, 53, 55).

(4) Uncontradicted testimony was given showing that the defendant claimed ownership of the half dollars and one of the watches found in his clothing (R. 53).

(5) Uncontradicted testimony was given showing that defendant told an investigating officer that he had won the half dollars and one of the watches in a dice game the night before (R. 53).

(6) Two witnesses gave uncontradicted testimony that less than $1.00 had been wagered in this dice game (R. 158, 166, 175, 176).

(7) One witness gave uncontradicted testimony that no merchandise had changed hands during the course of this dice game (R. 150).

(8) Uncontradicted testimony was given indicating that the defendant did not participate in the dice game because he had no change (R. 156, 159).

(9) It is shown by the record that the defendant did not take the witness stand nor did he introduce any evidence in his own behalf.

Utah Code Annotated, 1953, 76-38-1, provides that the possession of recently stolen property presents a prima facie case of burglary providing that the other elements are present. In connection with this statute, the appellant, on page 6 of his brief, made the following quotation from the Utah case of *State* v. *Thomas*, 59 Utah 39:

> "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 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."

In this regard, appellant makes great point of the fact that the owner could not positively identify the half dollars or, by serial number, the watches found in the defendant's possession. It is true that the owner, Mr. Hunt, was a cautious witness, but he did testify that a money bag which contained half dollars had been stolen (R. 10, 11) and that he carried the particular brand of watches found in defendant's possession in his stock. He further testified that watches of this particular brand had been stolen (R. 12, 32, 33). Viewing the evidence presented in the light most favorable to the verdict, there is strong circumstantial evidence from which the jury could have reasonably inferred that the half dollars and watches had been stolen from Mr. Hunt. See *State* v. *Little*, 5 Utah 2d 42, 289 P. 2d 289.

Appellant erroneously contends that the defendant did not have the requisite possession of the half dollars and the watch. On page 7 of appellant's brief, the following statement appears:

> "In this connection, the defendant, according to witnesses, denied ownership or claim of the watches."

However, the following uncontradicted testimony appears in the record showing that the defendant claimed possession to the half dollars and one of the watches:

> "Q. Tell us what you did?
>
> "A. Your Honor, I asked him if those were his clothes.
>
> "THE COURT: Well, you have never been asked that yet. You ask him—Well all right, go ahead.
>
> "MR. FRANDSEN: I figured to ask him, but not right at this point. Tell us what you did.
>
> "A. Well I went to looking through these clothes. And discovered quite an amount of half dollars and a wrist watch.
>
> "Q. Will you describe this wrist watch?
>
> "A. Well it was a new watch, a Timex watch. A new wrist watch, and he was standing there with me, the Defendant?
>
> "Q. Now what did you do with this wrist watch and this coin that you found in these clothes?
>
> "A. I asked the Defendant if they were his.
>
> "Q. What did he say?
>
> "A. He says they were.

"Q. Now did you ask him anything about the clothes, the trousers you found them in?

"A. I did.

"Q. What did you ask him?

"A. I asked if those were his clothes.

"Q. What did he say?

"A. He said they were."

(R. 52, 53.)

Further, the appellant, on page 8 of his brief, cites the Utah cases of *State* v. *Crawford,* 59 Utah 39; *State* v. *Nichols,* 106 Utah 104, and *State* v. *Hart,* 10 Utah 204, for the proposition that the mere showing that stolen property was in the same room with the defendant is insufficient to establish possession within the meaning of 76-38-1, U. C. A. 1953. In this regard, it must be noted that the half dollars and watches were not only in the same room with the defendant but were in clothing admittedly his, and that he claimed ownership of the money and of one of the watches.

Appellant makes the following statement on page 7 of his brief:

> "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."

While it is true that the defendant made this claim, there is, as pointed out previously, uncontradicted testimony in the record indicating that less than $1.00 changed hands in the dice game, that no merchandise was involved and

that the defendant did not directly participate in the dice game because he had no change.

Thus it appears in the instant case that there is strong circumstantial evidence from which the jury could reasonably infer that the half dollars and the watch claimed by and in the possession of the defendant were stolen from the Twin Rocks Trading Post. The possession was not remote in time, it was personal and exclusive, and was coupled with a totally unsatisfactory explanation concerning the source of the money and the watch. Viewing the evidence in the light most favorable to the jury verdict, it is sufficient as a matter of law to connect the defendant with the crime charged.

POINT II.

VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT, IT IS SUFFICIENT AS A MATTER OF LAW TO SHOW ENTRY DURING THE NIGHTTIME.

Testimony introduced by witnesses indicates that the store part of the Trading Post was locked at 7:00 p. m. on the evening of July 12, 1956, and that the owner was in the tavern until about 8:30 p. m. that evening. Mrs. Leah Mae Butts and patrons were in the tavern continuously until about 12:00 p. m. At this time Mrs. Butts walked through the store part of the Trading Post to turn off an outside light. She did not notice anything out of the ordinary, although the next morning pennies were scattered over the floor of the store. The theft was discovered at

about 8:30 a. m. the morning of July 13, 1956. There is sufficient evidence from which the jury could have reasonably found that the theft occurred between 12:00 p. m. of July 12, 1956 and 8:30 a. m. of July 13, 1956.

Defendant's whereabouts can be definitely established between 12:00 p. m. of July 12, 1956 and 2:00 a. m. of July 13, 1956. The defendant was observed to be in bed at about 6:00 a. m. on July 13, 1956 and was still in the Barton House when the other occupants departed for work at about 7:00 a. m.

This court announced in *State* v. *Richards,* 29 Utah 310, that the element of entry during the nighttime could be proved by circumstantial evidence. The rule could hardly be otherwise because as this court observed in *State* v. *Sullivan,* supra:

> "It is to be borne in mind that most crimes, and particularly burglary, are committed with whatever stealth and cunning the perpetrator can devise to escape detection and identification. All law enforcement officers and those victimized can do is to make such observations and piece together such evidence as they are able to obtain and, if it warrants doing so, present it to the courts and the juries."

There is sufficient evidence from which the jury could have reasonably inferred that defendant committed the burglary between 2:00 a. m. and 6:00 a. m. of July 13, 1956. The other three occupants of the Aunt Jenny Barton House gave consistent testimony that someone obviously familiar with the house had moved around with a flashlight during the period between 2:00 a. m. and 6:00 a. m. of July 13, 1956. This person was observed to have stood upon the

defendant's bed. A sack of jewelry was discovered in a hole in the ceiling above defendant's bed the next morning. The three witnesses variously estimated the time of this movement at 3 or 3:30 a. m. (R. 102), between 3 and 4:00 a. m. (R. 117), and 3:15 a. m. (witness observed his watch) (R. 145).

Viewing the evidence in the light most favorable to the verdict, there was adequate cricumstantial evidence from which the jury could reasonably infer that the defendant committed the burglary between 2:00 a. m. and 6:00 a. m. of July 13, 1956.

CONCLUSION

It is respectfully submitted that the evidence is sufficient to support the jury verdict and that it should be upheld.

Respectfully submitted,

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