

1957

## State of Utah v. Angelo Joe Tellay : Defendant's Brief

Utah Supreme Court

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Case No. 8731

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

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STATE OF UTAH

—vs.—

ANGELO JOE TELLAY,

*Defendant.*

Clerk, Supreme Court, Utah

DEFENDANT'S BRIEF

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## INDEX

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	5
ARGUMENT .....	5
CONCLUSION .....	11

## CASES CITED

Ashford v. State, 53 N.W. 1036.....	12
Black v. State, 18 Tex. App. 124.....	7
People v. Kennedy, 55 Cal. 201.....	9
People v. Rascon, 128 Cal. App. 2nd 118, 274 Pac. 2nd 899.....	10
People v. Smith, 128 Cal. App. 2nd 706, 275 Pac. 2nd 919.....	10
State v. Adamson, 125 Pac. 2nd 429.....	10
State v. Clark, 223 Pac. 2nd 184.....	10
State v. Cohn, 171 Kans. 344, 232 Pac. 2nd 470.....	9
State v. Crawford, 201 Pac. 1030.....	8
State v. Cowell, 12 Nev. 237.....	7
State v. Hendricks, 258 Pac. 2nd 242.....	10
State v. Hutchings, 84 Pac. 893.....	5
State v. Lawrence, 234 Pac. 2nd 600.....	10
State v. Meche, 42 La. Anno. 273.....	6
State v. Merritt, 247 Pac. 497.....	9
State v. Osmus, 276 Pac. 2nd 469.....	11
State v. Wells, 35 Utah 400, 100 Pac. 681.....	9
Sullivan v. State, 7 Okla. Crim. 307, 123 Pac. 569.....	8
White v. State, 113 S.W. 2nd 530.....	8

## AUTHORITIES CITED

American Anno. Cases, Vol. 1913C, 517.....	6
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IN THE SUPREME COURT  
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STATE OF UTAH

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STATE OF UTAH

—vs.—

ANGELO JOE TELLAY,

*Defendant.*

} Case No. 8731

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DEFENDANT'S BRIEF

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STATEMENT OF FACTS

Angelo Joe Tellay was convicted of the crime of burglary in the second degree on February 20th, 1957, in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, and sentenced to a term in the State Penitentiary by the Honorable Martin M. Larson, the Judge of said court, for a term of not less than one nor more than twenty years. The pertinent facts involved in this case may be stated as follows: That on June, the 10th, 1956, the defendant and his wife, Viola Tellay, called on a Mr. and Mrs. Rojas in the morning of said day, and continued to have a party on said day, during which time beer was drunk by Mr.

and Mrs. Tellay, and Mr. and Mrs. Rojas, and two other friends, a Mr. and Mrs. Magerrin. The party continued all day, which happened to be Sunday, and the evidence is that the only intoxicant that was consumed by the participants was beer. That the defendant, together with the other members of the party, had a buffet supper at the home of Mr. and Mrs. Rojas in the evening of said day, and thereafter went out to buy more beer. It appears that the defendant and his wife, Viola Tellay, had been arguing and quarreling in the afternoon and continued to do so while riding in the panel truck owned by Mr. Magerrin, who was driving the truck on the trip to buy more beer, and near the Star Brass Foundry, on 8th South and 4th West, the car stopped and the defendant and Mrs. Tellay got out. Mrs. Tellay stopped on the west side of said foundry on 4th West. Mrs. Tellay testified that when they got out of the car she ripped the shirt off her husband, the defendant herein, (R. 83, line 30) and continued to argue with him on the street, and a Mr. William Langford was sworn and testified for the State to the effect that on June 10th, 1956, he was employed by the American Fence Company as a salesman, and by the American Galvanizing Company as a night watchman, and that the location of the American Galvanizing is at 513 West 8th South; that he resides at 471 West 8th South, just east of the Star Brass Foundry; that on the night of June 10th, 1956, he had observed a person through the light shining through from the west side of the building, who was moving about inside said Star Brass Foundry, and he thereafter immediately called

the police (R. 36, line 30), and soon thereafter called Mr. George Thomas McGrath, Vice-President of the Star Brass Foundry & Refining Company, who went immediately to said Foundry. Mr. McGrath himself testified that his company had just purchased some metal from Hill Field Air Base, which was at that time inside the foundry, and its value would be between \$2500.00 and \$3000.00, (R. 13 lines 11 to 13 inclusive). That the metals purchased from the Hill Field Air Base were brass castings, weighing about 20 pounds each, and that there were 500 of them purchased. (R. 24, 29 to R. 25, 4). In response to the telephone call placed by Langford, police officer Clarence Leonard Stenstrud, and his colleague, Officer Leo Johnson, drove to the Star Brass Foundry and found a woman standing under the tree at the north west corner of said foundry, who was later identified as Viola Tellay, the wife of the defendant; that a noise was heard inside of the foundry building, and that the defendant came out of a broken window in the presence of the officers, and was put under arrest. There is no evidence that the defendant took any property within the Star Brass Foundry. Mr. McGrath, the Vice-President of said Foundry, testified that nothing was taken from their building (R. 25, 24 to 30).

At the time the defendant was arrested, several police officers had arrived on the scene, including two plain clothes officers. There is some evidence produced by the state to the effect that the lock on the west door of the foundry building had been broken (R. 21, lines 24 to 29 inclusive). An information was filed against the defend-

ant on the 13th day of July, 1956, charging him with burglary in the second degree, as follows: "That on or about the 10th day of June, 1956, the said Angelo Joe Tellay, entered the building of the Star Brass Foundry & Refining Company, a Corporation, in the night time, with the intent to commit larceny therein." To which information the defendant entered a plea of not guilty.

There is evidence to the effect that the defendant had been drinking beer all day long on the day of the alleged offense, and was under the influence of alcohol. (R. 84, 30; R. 85, 1 and 2). There is evidence to the effect that the defendant and his wife were going to Denver, Colorado, and that the party held at Roja's residence was a farewell party, given in their behalf (R. 82: 17, 18). There is evidence to the effect, on behalf of the state, that a crow bar, or pry bar, was found within the Star Brass Foundry building, and was entered into evidence (R. 23; 20-30). The defendant objected to the introduction of said bar on the grounds that it had not been properly identified, (R. 81, lines 13 to 20 inclusive). A motion was made on behalf of the defense to dismiss the action on the grounds that the state had failed to prove the crime of burglary (R. 81-5 to 11 inclusive, and R. 97, 24 to 26 inclusive), which motion was denied by the court (R.97, line 27). The defendant also moved for a directed verdict (R.97, lines 28 to R. 98-4 inclusive). The motion was denied by the court (R. 98, 5).

At the trial held on February 20th, 1957, a verdict was returned by the jury finding the defendant guilty of

the crime of burglary in the 2nd degree, as charged in the information (R. 119A). A motion for a new trial on behalf of the defendant was made by his counsel and filed on February 25th, 1957, on the grounds (1) "That said verdict is not supported by, and is contrary to the law on the evidence." (2) "That the court had misdirected the jury in the matters of law, erred in the decisions of questions of law arising during the course of the trial, and allowed acts (facts) in the cause prejudicial to the rights of the defendant." On said day, to wit: February 25th, 1957, the court denied the defendant's motion for a new trial, (R. 121) from which motion the defendant prosecutes this appeal.

## STATEMENT OF POINTS

### POINT I.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF THE CRIME OF BURGLARY IN THE SECOND DEGREE AS A MATTER OF LAW.

## ARGUMENT

### POINT I.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF THE CRIME OF BURGLARY IN THE SECOND DEGREE AS A MATTER OF LAW.

In *State v. Hutchings*, 84 Pac. 893, this court said:

"Under the law it was incumbent upon the jury to acquit the defendant, if the evidence relied upon could be reconciled upon any reasonable hypothesis consistent with the innocence of the



defendant. Especially is this rule applicable, where as here, it is sought to convict the accused wholly upon circumstantial evidence, and where the circumstances leave the mind in grave doubt as to the commission of the offense; there being no direct proof of the corpus delicti."

The gist of the defendant's defense is that his presence in the building, alleged to have been burglarized, taken alone, is not sufficient to warrant a conviction of burglary in the second degree, especially in view of the fact the defendant had been drinking beer all day long, at the time of the alleged offense and was not in full control of his mental faculties. Unless there was an intent on the part of the defendant to commit larceny within the building in which he is alleged to have entered, there could be no commission of the crime as charged.

In Volume No. 1913C, American Annotated Cases, Page 517, the following is found:

"It is an essential element of the crime of burglary that breaking and entering should be accompanied with an intent to steal or to commit some felony."

On page 518 of the same report the following is found:

"Burglary consists of an intent, which must be executed, to break in the night time into a dwelling house; and further, concurrent intent, which may be executed or not, to commit therein some crime which is in law a felony."

Bishop on Criminal Law quoted in *State v. Meche*, (42 Louisiana Annotated 273)

“In these, and other like cases, the particular, or ulterior, intent must be proved, in addition to the more general one, in order to make out the offense, and nothing will answer as a substitute.”

It is the contention of the defendant herein that no intent on the part of the defendant was proved by the State to make out a conviction since his unexplained presence in the building could not affirm that he was within the building for the purpose of committing the crime of larceny as charged in the information.

In *Black v. State* (18 Texas Appeals 124) the court stated:

“Evidence that a felony was actually committed is evidence that the house was broken and entered with intent to commit that offense, was the rule at common law. With us, however, the intent in burglary, is the essence of the offense, and fact; not, in deed, by expressed and positive testimony, but the best evidence of which the case is susceptible. That a breaking and entry of a house may and could occur without a violation of our statute against burglary needs no argument to prove or demonstrate. It might easily be suggested that many breakings and entry into houses occur and do occur in which no intent to commit either a felony or a crime of theft ever entered the mind of the party making the entry.”

*State v. Cowell* (12 Nevada 337), holds:

“It should be born in mind that in order to constitute the crime of burglary, the defendant must not only enter some one of the structures mentioned in the statutes at the time and in the

manner therein stated, but he must enter with intent to commit some one of the crimes specified. It is just as essential to prove intent as it is the entry. If both are not proven to the satisfaction of the jury beyond a reasonable doubt there can be no conviction. The *Quo Animo* constitutes an indispensable part of this crime, just as *scienter* does in forgery and counterfeiting; and the rule of evidence governing proof of each is the same."

In the case of *White v. State*, a Texas case, 1938, 113 S. W. 2nd, 530, the court stated:

"To sustain a conviction on circumstantial evidence, circumstances must be such as to establish the guilt of the accused beyond a reasonable doubt and must exclude every reasonable hypothesis consistent with his innocence."

In *Sullivan v. State*, (7 Oklahoma Criminal, 307; 123 Pacific, 569), the court held:

"In an indictment or information charging burglary, it is necessary for the allegation of intent to be set out fully, in order to describe the crime, and the acts necessary to constitute the crime. It is not sufficient to say the accused intended to steal or intended to commit a felony therein."

In *State v. Crawford*, a Utah case, November 7th, 1921, 201 Pacific, 1030, this court held:

"The defendant must be accorded the benefit of every reasonable doubt, and, in cases solely dependent on circumstantial evidence, the circumstances must be such as to exclude every reasonable hypothesis except that of guilt."

In *People v. Kennedy*, (55 Calif. 201) the Supreme Court of California held:

“The intent must be proved, just as any other fact of the case must be proved, by positive evidence, or by positive evidence of fact, from which the intent can be inferred.”

In *State v. Merritt*, (Utah case, June 9th, 1926, 247 Pacific, 497) this court held:

“To warrant conviction, circumstantial evidence must convince the jury beyond a reasonable doubt that all facts and circumstances are true, and are incompatible with any reasonable hypothesis other than the guilt of the accused.”

In *State v. Wells* (100 Pacific 681, 35 Utah 400) this court held:

“In circumstantial evidence, circumstances must be proved which not only agree with, and concur to show, defendant’s guilt, but are inconsistent with any other reasonable conclusion.”

In *State v. Adamson*, 125 Pacific 2nd 429, on page 430 of the Report this court said:

“A criminal case requires proof of each element of the crime by evidence that convinces one beyond all reasonable doubts of the existence of each such element.”

In *State v. Cohn*, 232 Pacific 2nd 470, 171 Kansas 344, the Kansas Supreme Court stated as follows:

“Where the state relies on circumstantial evidence to establish guilt of defendant, evidence

must be so strong that every reasonable hypothesis except the guilt of the defendant is excluded.”

In the case of *State v. Clark*, 223 Pacific 2nd 184, this court stated:

“A criminal case requires proof of each element of the crime by evidence that convinces one beyond all reasonable doubt of the existence of each such element.”

*State v. Lawrence*, 234 Pacific 2nd 600, where this court held:

“A plea of not guilty by defendant in prosecution for grand larceny of automobile, passed on the state the burden of proving every essential element of the offense by evidence sufficient to convince the jury beyond a reasonable doubt.”

“In criminal cases, the state has the burden of proving every essential element of the crime beyond a reasonable doubt, and both as to proof of the state’s case, and as to matters of defense, all that is necessary to entitle the defendant to acquittal is that there exists reasonable doubt as to his guilt.”

*State v. Hendricks*, 258 Pacific 2nd 452, a Utah case, holds:

“Rule that all that is necessary to entitle a defendant to an acquittal is that there exists a reasonable doubt as to his guilt, applies whether the defendant offers any evidence or not.”

In *People v. Smith*, 275 Pacific 2nd 919, 128 Calif. Appeals 2nd 706, also *People v. Rascon*, 274 Pacific 2nd 899, 128 California Appeals 2nd 118, the court holds:

“Evidence that merely raises suspicion, no matter how strong, of guilt of the person charged with a crime is not sufficient to sustain a verdict and judgment against him.”

In *State v. Darlene Osmus*, a Wyoming case, 276 Pacific 2nd 469:

“Speculation, suspicion, surmises and guesses have no evidentiary value.”

### CONCLUSION

It is contended by the defendant that the mere fact that he was seen emerging from a broken window of the Star Brass Foundry and Refining Company building, located at 8th South and 4th West, on the night of June 10th, 1956 is not sufficient to warrant the jury finding that he was within the building and had gone into the building with the intention to commit larceny as charged in the information, but on the other hand the rule of law applicable to the circumstances involved that the jury may well have found upon a reasonable hypothesis that he was in there for some innocent purpose other than that of committing larceny. There is no evidence that anything was taken from the building, no evidence that anything was stolen, or missed in the inventory. At most the only thing that the defendant could be guilty of is a simple trespass, and the evidence does not warrant the jury in finding under these circumstances, that he entered the building with the intention to commit larceny, and thereby exclude every other hypothesis as to his innocence.

It appears at most, that, under the instructions given by the court, the jury concluded that the defendant had entered the building of the said Star Brass Foundry & Refining Company on said night to commit larceny based on mere suspicion, speculation and guess as to why he had entered the building, and the jury could have reasonably found that he entered for some innocent purpose other than that charged in the information. His mere unexplained presence within the building and his emergence from the building in the presence of the police officers does not warrant the jury in excluding every other hypothesis of his innocence, and finding that he had only entered the building for the purpose of committing the larceny.

In the case of *Ashford v. State*, a Nebraska case, 53 Northwestern 1036, on page 1037 of the report the court states:

“Again there is no evidence as to the intent with which the breaking and entering was done. It is charged in the information that they were made with the intent to steal and carry away the goods and chattels of Jettie Reynolds. That such was the purpose will not be presumed from the mere fact of breaking and entering into the building. It is conceded that nothing was stolen therefrom by the defendant. Had there been, then, from that fact, it might be inferred that the object and purpose of the accused was larceny, since the presumption is that every sane person is presumed to have intended that which his acts indicate his intentions to have been.”

It is respectfully submitted therefore by the defendant that his mere presence within the building and emergence from the building through a broken window does not constitute sufficient evidence to warrant the jury finding him guilty of entering therein with intent to commit larceny to the exclusion of every other reasonable hypothesis. Since nothing was taken from the building his mere presence within the same cannot conclusively be relied upon as to an intention to enter therein to steal, commit theft or larceny. For what purpose the defendant entered the building cannot be presumed upon these facts alone as one with the intent to commit larceny. There may be other reasonable hypothesis for the jury to find the defendant entered with innocent purposes, perhaps to seclude himself from his quarreling and arguing wife, or because he was under the influence of intoxicants, and was not capable of formulating any felonious intent, or to seclude himself from the rest of the party with whom he was with, or for the purpose of using a toilet. It is the contention that his presence in the building with the intent to commit larceny therein has not been proved by the State. That state's case wholly fails in this regard as gathered from the facts and circumstances of this case. He should be given every benefit and intendment of the law that his presence within the building constituted merely a simple civil trespass, and that the state has failed to prove an intent to break in



and enter the building with the intent to commit larceny therein as charged in the information.

Respectfully submitted,

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