

1990

The State of Utah v. Thayne Larry Walker : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|----------------------|---|-----------------|
| THE STATE OF UTAH, |) | |
| |) | |
| Plaintiff-Appellee, |) | Case No. 900545 |
| |) | |
| v. |) | |
| |) | |
| THAYNE LARRY WALKER, |) | Priority No. |
| |) | |
| Defendant-Appellant. |) | |
| |) | |

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. Section 76-6-302 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Scott Daniels, Judge presiding.

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LIST OF ALL PARTIES TO PROCEEDING

A complete list of all parties to this proceeding in the lower court is contained in the caption of the case upon appeal.

TABLE OF CONTENTS

| | Page |
|--|------|
| LIST OF ALL PARTIES TO PROCEEDING | i |
| TABLE OF CONTENTS | ii |
| TABLE OF CITATIONS AND AUTHORITIES | iii |
| STATEMENT OF JURISDICTION | 1 |
| STATEMENT OF THE ISSUES | 1 |
| STATUTES AND CONSTITUTIONAL PROVISIONS | 1 |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF FACTS | 2 |
| ARGUMENT | |
| POINT I | 3 |
| A. THE NATURE OF THE CRIME NEXUS TO VERACITY | |
| B. RECENTNESS OR REMOTENESS OF THE PRIOR CONVICTION | |
| C. SIMILARITY OF PRIOR CRIME TO CHARGED CRIME | |
| D. IMPORTANTANCE OF CREDIBILITY ISSUES IMPORTANTANCE OF ACCUSED'S TESTIMONY | |
| POINT IA | 11 |
| DEFENDANT'S FAILURE TO TESTIFY | |
| POINT II | 13 |
| MOTION TO SUPPRESS FIRST LINE-UP | |
| CONCLUSION | 17 |

TABLE OF CITATIONS AND AUTHORITIES

Cases

| | Page |
|--|------------|
| <u>State v. Banner</u> , 717 P.2d 1325 (Utah 1986) | 5,7,8,9,10 |
| <u>State v. Gentry</u> , 747 P.2d 1032 (Utah 1987) | 6,8,10,11 |
| <u>State v. Ramirez</u> , 157 Utah Adv. Rpts. 10 (1991) | 14,15,17 |
| <u>State v. Wight</u> , 765 P.2d 12 (Utah App. 1991) | 6 |

Statutory Provisions

| | |
|--|---|
| Utah Code Annotated Section 78-2-2(3)(I) | 1 |
|--|---|

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this court by Utah Code Ann. Section 78-2-2(3)(i).

STATEMENT OF THE ISSUES

1. Did the trial court commit error by denying appellant's motion to exclude from evidence the appellant's prior felony convictions?

2. Did the trial court deny appellant due process in failing to grant the appellant's motion to suppress the eyewitness identification of appellant by various witnesses?

3. Did the trial court commit error by refusing to grant appellant's motion for a mistrial on the basis of jury misconduct?

STATUTES AND CONSTITUTIONAL PROVISIONS

Section 76-6-302 (1953 as amended); Article I, Section 7 Utah Constitution

STATEMENT OF THE CASE

On July 12, 1990, a jury convicted appellant of aggravated robbery, a felony of the first degree, in violation of Utah Code Ann. Section 76-6-302. On October 5, 1990 the appellant was sentenced to serve a term of five years to life in the Utah State Prison and to an additional year firearm enhancement to run consecutively, (R.-00247)

On July 16, 1990 appellant was also convicted on the habitual criminal enhancement allegations. That sentenced merged with the aggravated robbery sentence.

(R.-00245)

STATEMENT OF FACTS

On August 18, 1989 a business known as Taco Bell was robbed by a man with a ski mask covering his face.

On August 22, 1989, four days after the Taco Bell robbery, four of the witnesses who testified at defendant's trial were shown a group of six photographs, of which defendant's photo was number four. The original description of the robber was a male with a mustache and blue eyes.

Trista Valdez testified that only two men in the photographs had blue eyes and these were the only two she considered. She identified number six, not the defendant.

(T. 52)

Randy Orvin identified the defendant in the photo spread. (T. 96)

Lance Ewing identified the defendant in the photo spread. (T. 156)

Jerod Stern picked number two and number four in the photo spread. (T.199)

On September 15, 1989 a line up was conducted with seven participants. Defendant Walker was in position number four. (Ex. S-41) The four witnesses mentioned above

were instructed that if they recognized the person who robbed Taco Bell, to put the number in the box on the front of the card. They were instructed that if they believed they was the robber but were not certain, they were to write the number on the back of the card. (Line-up Transcript p. 12)

Trista Valdez wrote nothing on the front and number two on the back. (T. 13, 14) She did not pick the defendant. Jerod Stern wrote nothing on the front and number four on the back. Randy Orvin wrote nothing on the front and number four on the back. Lance Ewing wrote nothing on the front and number four on the back.

On December 12, 1989 a second line-up was conducted with eight men. Defendant Walker was number two. Jerod Stern, Trista Valdez and Lance Ewing were present. The witnesses were instructed that if they could make a positive identification they were to write the number in the box on front of the card. (Line-up Transcript, p. 13) All of the men had masks covering their faces. All were instructed to repeat the same statements. The witnesses were told that if they could make a probable or possible identification to write the number on the back of the card. (Line-up Transcript, p. 18)

Lance Ewing wrote a zero on the front and nothing on the back. Trista Valdez wrote nothing on the front and number seven on the back. Jerod Stern wrote

nothing on the front and number two on the back. (Line-up Transcript, p. 18)

The men in the line-up were then told to leave the room, remove their masks and come back in. A short recess was taken in which defendant Walker requested his attorney to object to the mask being removed. (Line-up Transcript, p. 19) No such objection was made by his attorney. The witnesses were told if they could not make a positive identification to put a zero on the front of the card. They were told that if they recognized someone to put that person's number on the back of the card. (Line-up Transcript, p. 21)

Trista Valdez put zero on the front of the card and number two on the back. Lance Ewing put zero on the front and nothing on the back. Jerod Stern put number two on the front and nothing on the back. (Line-up Transcript, p. 21).

On December 13, 1989 Trista Valdez and Jerod Stern testified at a preliminary hearing at which the defendant was present. Stern identified the defendant. (T. 208-209)

At the trial Trista Valdez was unable to positively identify the defendant as the robber. (T. 69) Randy Orvin identified the defendant at trial as the robber. (T. 90). Lance Ewing identified the defendant at trial as the robber. Jerod Stern identified the defendant at trial as the robber.

POINT I

The defendant filed a motion under U.R.E. 609 to preclude the state from presenting evidence at trial of prior convictions of the defendant. The court, on April 23, 1990 held a hearing on the motion and ruled that the 1982 robbery conviction and a 1981 deadly weapon conviction were admissible in evidence.

"It is punishable by more than a year imprisonment. It is less than 10 years old. Although it is somewhat prejudicial, it is same-the same kind of crime as this one, I find the prejudicial effect is not outweighed by the probative value. The robbery charge of December 1982 will be admitted. That's also true of the deadly weapon charge of February 1981. Again that's punishable by more than a year in prison. It is less than 10 years old and is admissible under 6009, as I understand it, unless I find that prejudicial effect outweighs the probative value, which I don't so in summary, those two convictions, the two felonies, will be admitted. (Motion Hearing T. 14-15).

In May of 1990 the defendant filed an objection¹ to the above ruling of the court and cited additional arguments in support of exclusion of the two felony convictions, especially the case of State v. Banner, 717 P.2d 1325 (Utah 1986). There was no change in the court's original ruling allowing the felony convictions.

-
1. The objection refers to "two 1988 robbery convictions" These two convictions, if they exist, were not considered by the court and were not mentioned in the court's ruling of April 23, 1990.

On July 12, 1990 after the state had rested and prior to the conclusion of the defendant's case in chief, the defendant, on advice of counsel, decided not to testify in his own behalf.

ARGUMENT

THE TWO PRIOR FELONY CONVICTIONS OF THE DEFENDANT WERE INADMISSIBLE UNDER UTAH RULE OF EVIDENCE 609

Rule 609(a) of the Utah Rules of Evidence

Provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (1) involved dishonesty or false statement, regardless of the punishment.

In the instant case, the two felony convictions were found admissible under subsection one.

In State v. Wight, 765 P.2d 12 (Utah App. 1988) the Court of Appeals defined the standard of review applicable in this case as follows:

"In reviewing evidentiary rulings, we 'will not reverse the trial court's ruling on evidentiary issues unless it is manifest that the court so abused its discretion that there is a likelihood that injustice resulted.'" State v. Gentry, 747 P.2d 1032, 1035 (Utah 1987). Wight at 16.

It is defendant's position that the ruling of the trial court was clearly erroneous and the effect of the ruling in essentially coercing the defendant into relinquishing his right to testify in his own behalf, created a great likelihood that injustice resulted.

In State v. Banner, supra, this court delineated the factors to be considered in evaluating the admissibility of evidence under subsection one of Rule 609. Those factors are:

- (1) the nature of the crime, as bearing on the character for veracity of the witness.
- (2) the recentness or remoteness of the prior conviction...
- (3) the similarity of the prior crime to the charge crime, insofar as a close resemblance may lead the jury to punish the accused as a bad person.
- (4) the importance or credibility issues in determining the truth in a prosecution trial without decisive non-testimonial evidence...
- (5) the importance of the accused's testimony as perhaps warranting the exclusion of convictions probative of the accused's character for veracity...

In arriving at a ruling on the admissibility of the 1982 deadly weapon conviction, it does not appear that the court weighed any of the Banner factors. The court dealt only with the more than one year issue and whether the probative value outweighed the prejudicial effect.

If the court had conducted an inquiry into the factors set forth in Banner, supra, it seems clear that both of the prior convictions should have been ruled inadmissible.

A.

THE NATURE OF THE CRIME - NEXUS TO VERACITY.

In Banner, supra, the court held that the crime of assault with intent to commit rape did not inherently reflect on defendant's character for truth and veracity. In State v. Gentry, 747 P.2d 1032 (Utah 1987) the court held:

"The crime of rape does not inherently reflect on defendant's character for truth and veracity... likewise, the convictions for escape should have been excluded because of... the complete lack of connection between the crime of escape and defendant's veracity." at

Under Banner and Gentry, supra, the convictions of robbery and deadly weapon have a complete lack of connection to the defendant's veracity.

B.

RECENTNESS OR REMOTENESS OF THE PRIOR CONVICTION.

In this case, the two convictions were eight and nine years old at the time of trial. In Banner, supra, the court stated:

"Particularly significant in our balancing process is the remoteness of the prior convictions...the convictions at the time of defendant's trial were between eight and nine plus years old." at 1335 .

In Gentry, supra, the court stated:

"The rape conviction was ten years old at the time of this trial. The conviction's remoteness is a measure of its negligible probative value." at B07 .

C.

THE SIMILARITY OF THE PRIOR CRIME TO THE CHARGED CRIME, INSOFAR AS A CLOSE RESEMBLANCE MAY LEAD THE JURY TO PUNISH THE ACCUSED AS A BAD PERSON.

In this case, the defendant was convicted of aggravated robbery, with the use of a gun. The two felonies admitted are almost identical, i.e. robbery and possession of a dangerous weapon, to the crime charged.

In Banner, supra, wherein the defendant was charged with sodomy on a child and sexual abuse of a child, the court stated:

"The convictions were for assault with intent to commit rape. Such convictions would be extremely prejudicial and tend to inflame the jury in any case dealing with sexual crimes..." at 1335 .

The defendant would submit that the two convictions in his case were even more similar than were the Banner convictions and therefore more prejudicial.

D.

THE IMPORTANCE OF CREDIBILITY ISSUES IN DETERMINING THE TRUTH IN A PROSECUTION TRIED WITHOUT DECISIVE NON-TESTIMONIAL EVIDENCE.

AND

THE IMPORTANCE OF THE ACCUSED'S TESTIMONY, AS PERHAPS WARRANTING THE EXCLUSION OF CONVICTIONS PROBATIVE OF THE ACCUSED'S CHARACTER FOR VERACITY.

It seems appropriate to discuss factors four and five together in this particular case. The reason being

that they essentially merge together.

In this case the decisive evidence was the various eyewitnesses identification testimony. There was essentially no decisive non-testimonial evidence. In addition there were no convictions probative of the defendant's character for veracity to exclude. What is left then of factors four and five, are (1) the importance of credibility issues in determining the truth; and (2) the importance of the accused's testimony.

The teachings of Banner and Gentry are equally applicable to this case where the only credible evidence to offer against the eyewitnesses testimony would have been the testimony of Thayne Walker.

In Banner, supra, the court noted:

"Finally, the accused's testimony and the importance of credibility in this case were critical in determining which version of the facts was correct since the prosecutor's case included no decisive non-testimonial evidence." at 1335 .

In Gentry, supra, the court observed:

"Finally, the State relied upon the testimonial evidence offered by the victim to establish the defendant's guilt. Defendant's testimony would have been probative regarding the victim's credibility and possibly influential in the trial's outcome." at 1037-38.

In summary, it is the position of the defendant that based on the balancing test prescribed by

Banner, supra, the prior convictions should have been excluded.

POINT IA

THE DEFENDANT'S FAILURE TO TESTIFY SHOULD NOT BE CONSIDERED A WAIVER OF THE RULE 609 ISSUE.

It seems clear that the law in Utah as set forth in Gentry, supra, is that in order to preserve a defendant's objection to a Rule 609 ruling, a defendant must in fact testify.

However, in this case, appellant Walker would submit that such a failure should not be deemed a waiver.- Walker's position is that his decision to not testify was a result of a combination of inaccurate advice by both his counsel and the trial judge.

At the end of the defendant's case in chief, the following discussion took place between the court, counsel and the defendant:

Judge Daniels: And other than that do you have any other witnesses?

Ms. Bowman: I don't believe we do, your Honor. And I should indicate that Mr. Donaldson and I and Thayne have talked at length about his right to testify and indicated to him that he has an absolute right to testify. We both advised him not to testify based upon what's come in and what we have argued. And I believe he's willing to accept and follow that advice. He

certainly was concerned about testifying to preserve the 609 issue. And that's a concern as ours as well, but I think that given your ruling on the 609 issue that would be very, very risky.

Judge Daniels: All right. You understand then, Mr. Walker, you do have a right to testify.

Mr. Walker: Yes, I do.

Judge Daniels: And you also have a right not to testify. And you have the choice to make and you have chosen not to under the circumstances; is that right?

Mr. Walker: Right.

Judge Daniels: Now, I understand, and I guess the record should clearly reflect, that one of the reasons that you've made that decision is because of my ruling on the question of whether prior convictions could be brought up. And your attorneys, of course, have objected to my ruling on that and established on the record at considerable length, and also in a motion to reconsider, that you object to that. And I understand that your decision is based, in part, on that ruling and that's preserved for appeal.

Does that sufficiently cover that, Ms. Bowman?

Ms. Bowman: I guess I should add, its our opinion that the case law would probably require him to testify

to be able to appeal that. The name of the case is escaping me at the moment, but that's how we talked to him about that issue. And they've been wrong on that. But we don't know-- but that's what we believe.

Judge Daniels: You've discussed that with him and based upon all the factors and based upon the advice of your attorneys you decide not to testify, is that right, Mr. Walker?

Mr. Walker: That's right.

Based on the court's statement indicating that the defendant had preserved his 609 ruling objection for appeal and on counsel's questionable and confusing statement of the law in Utah, it is clear that the defendant did not knowingly and intelligently waive his right to testify in his own behalf.

POINT II

On February 12, 1990 the defendant filed a motion to suppress the results of the first lineup. The thrust of the motion was that the defendant was prejudiced by being placed in the same number spot (4) as he was in the photo spread. (R.-00017) On February 16, 1990 the court in a minute entry, based on the arguments of counsel, denied the motion. (R.-00018)

On March 19, 1990 the defendant, pro se, filed a motion to suppress the results of the photo spread

and the two lineups. This motion was based on the theory that the three identification procedures were unnecessarily suggestive and a violation of the defendant's due process rights. The motion also attacked the reliability of the procedures and resulting identification.

On May 16, 1990 the appellant, through his attorneys, filed another motion to suppress the results of the identification procedures. The basis of the motion was that the procedures employed were unduly suggestive in violation of Article I Section 7 of the Utah Constitution. (R.-00050) On May 22, 1990 the court, in a minute entry, based on the arguments of counsel and the defendant, denied the motion to suppress.

The trial court made no factual findings and the only legal conclusions were that the motions be denied.

It is the contention of the appellant that he was denied due process when the prosecution was allowed to introduce the identification of him as the gunman. It is appellant's contention that the circumstances surrounding the identification rendered it totally unreliable. The defendant further contends that (1) the trial court did not conduct an analysis of the circumstances of the identification as is required by State v. Ramirez, 157 Utah Adv. Rpts. 10 (1991) and (2) such an analysis of the procedures employed and the

totality of the circumstances would show the defendant was deprived of due process of law.

Ramirez, supra, sets forth several factors to be considered by the trial court in determining the reliability and fairness of the identification process and the consequent admissibility issue. Those factors and the applicability to this case are as follows:

A. Opportunity of the witness to view the actor during the event.

In this case the incident to place in the time frame of a few minutes. However, the key circumstance is that the actor's face was covered by a mask with only a mustache partially showing out of the side of the mask. (T. 87) In addition, the actor had a gun. The three witnesses who viewed the actor, viewed him from a distance of one or one-half feet (Ewing T. 150), five feet (Stern T. 191 and six to seven feet (Orvin T. 87).

B. Degree of attention to the gunman

Although all of the witnesses indicated their attention was focused on the gunman, the gunman had his face covered with a mask the whole time.

C. Whether the witness had the capacity to observe the actor during the event.

The only factor which would have affected the witnesses' capacity was the fright and heightened degree of stress.

D. Was the witnesses' identification made spontaneously, did it remain consistent thereafter, or was it a product of suggestion.

Although the witnesses did not see the gunman's face, they describe him as having blue eyes and a mustache. In the photographic array only two of the photos had blue eyes, one of these being the defendant.

Approximately one month after the robbery the witnesses observed a lineup involving seven men with masks. The defendant was the only man from the photo spread participating in the lineup. None of the witnesses could positively identify any of the seven as being the robber. (Ex. S-3-56)

Approximately two months after the first lineup another lineup was held with eight men. Again the defendant was the only man from the photo spread. With the mask on, none of the three witnesses could positively identify the defendant. (Ex. S-10-5-13) Only one, Jarold Stern indicated the defendant as possibly being the robber. (Ex. S-13) After the masks were removed only Stern was able to positively identify the defendant. (Ex. S-14) Valdez indicated on the back of the card that the defendant was someone she recognized. (Ex. S-12)

It is defendant's contention that (1) having only two men with blue eyes in the photographic array limited the reliable choices of the witnesses and (2) that it was suggestive in the extreme to have two lineups, each with

the defendant being the only man from the photo array in each lineup. It seems logical that if a witness sees the same man each time, to the exclusion of others, that man is the one the witness will identify. Defendant submits that is what happened in this case.

It is noteworthy that even with the suggestiveness delineated above, the witness identification did not remain consistent. Randy Orvin identified the defendant at the photo spread (T.96) but was unable to identify the defendant at the September 15 lineup. Jerod Stern picked the defendant and another man in the photo spread but was unable to positively identify the defendant in either lineup, even with the defendant's mask removed.

Based on the standards set forth in Ramirez, supra, the defendant will submit that the trial court erred in admitting the identification of the defendant for the reason that it was a product of a violation of Walker's right to due process of law under Article I Section 7 of the Utah Constitution.

CONCLUSION

Based on the arguments set forth above it is the position of the defendant that the trial court committed error by ruling that the two prior felony convictions were admissible and further committed error in allowing the eyewitness identification of the defendant to be introduced into evidence. The defendant

requests that the court reverse his conviction and remand the matter for a new trial.

DATED this day of November, 1991.

STEPHEN R. McCAUGHEY
Attorney for Defendant-Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the above and foregoing to the office of the Attorney General for the State of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114 this day of November, 1991.