1959

State of Utah v. Tommy Danks : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

—vs.—

TOMMY DANKS,

Appellant.

Case No. 9127

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Reference in respondent's brief to the transcript of proceedings will be designated by the letter "T" and to appellant's brief by the letter "B."

STATEMENT OF FACTS

Respondent substantially agrees with appellant's notation of the facts which were not in dispute but would question the characterization by appellant's Brief, of Mr. Newbold's condition as "highly intoxicated" and his drinking as "heavy."

STATEMENT OF POINTS

POINT I.

THERE WAS AMPLE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION.

POINT II.

STATE'S EXHIBIT "B" WAS PROPERLY RECEIVED IN EVIDENCE.

POINT III.

STATE'S EXHIBIT "C" WAS PROPERLY RECEIVED IN EVIDENCE.

ARGUMENT

POINT I.

THERE WAS AMPLE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION.

Appellant correctly states the law to be that when a jury has resolved inconsistent and conflicting testimony and made a determination of facts based thereon, it is not the province of an appellate court to alter such determination. *Cottrell v. Grand Union Tea Co.,* 5 U. 2d 187, 299 P.2d 622; *State v. Jarrett,* 112 Utah 335, 187 P.2d 547; *State v. Laub,* 102 Utah 402, 131 P.2d 805.

Appellant seeks to escape the weight of this rule by claiming the testimony of the State's witnesses, which conflicted with his own, was inherently improbable and hence provides a basis for this Court to re-examine such

evidence as to weight and reverse the jury verdict which was based thereon.

Respondent strongly denies that the evidence of the prosecution was inherently improbable and asserts no basis for reversal is thereby provided. Since the question of credibility necessarily involves an examination of sufficiency as well, respondent will treat the two together and show that the evidence of the State at trial was both fully probable and entirely sufficient to support appellant's conviction.

The narration of Mr. Newbold, the victim, supported by the testimony of Mr. McCollum and the Officers, detailed a plausible, credible series of events culminating in the crime of robbery. Mr. Newbold testified that while in appellant's apartment after an evening of drinking and socializing, appellant struck him, held him at knife point and forced him to give up his wallet whereupon, on appellant's orders, Mr. McCollum removed the money from the wallet and gave it to appellant. (T. 6). The testimony of Mr. McCollum substantiates the details of the robbery including his own actions. (T. 39, 40). Mr. Newbold further testified he was again forced to give up his wallet, whereupon appellant cut it in two. (T. 7). The knife and the mutilated wallet were placed in evidence. The police officers testified to Mr. Newbold's injured condition when he reported to them, (T. 56), to being given the wallet in its severed condition by Mr. Newbold (T. 50) and to finding the knife in the front room of appellant's apartment. (T. 51, 54, 55).

The test of inherent improbability of evidence has been well outlined in the case of *People v. Moreno,* 79 P.2d 390, 26 C.A. 2d 334 1937, wherein it was stated:

> "Unless the appellate court can say that the testimony is so obviously and inherently improbable as to leave the court no recourse without self-stultification, except to reverse the judgment, the reviewing court should not interfere with the verdict and the judgment. * * *"

The court goes on to say that contradictions and inconsistencies in the testimony of witnesses alone will not constitute inherent improbability.

It is with this in mind that appellant's claim of conflicts indicating inherent improbability must be examined.

Appellant first cites the conflict as to the amount of money Mr. Newbold had at the time of the robbery. Mr. Newbold testified he had between $30.00 and $40.00 when the crime occurred. (T. 7). He also testified that he began the evening with $35.00, that he asked his wife for an additional $20.00 (T. 9) and later borrowed $20.00 more from his employer. (T. 13-14).

Appellant places great stress on the fact Mr. Newbold is alleged to have stated he had only $5.00 left prior to getting $20.00 from his employer (B. 5), in an attempt to show he could not have then had $30.00 to $40.00 at the evening's end. However, although Mr. Newbold stated he may have made such a statement to a companion, Mr. Gray, he further testified that he in fact had more than $5.00 at that time. (T. 14). Is it "inherently improbable"

that the witness may not have wanted Mr. Gray to know his exact financial status for some reason? We think not.

At page 6 of his brief, appellant stresses that Mr. Gray's testimony "established the fact" that Newbold had no money in his wallet and only $5.00 in change prior to acquiring $20.00 from his employer, and refers to pages 77-78 of the transcript. Examination of these pages reveals first that the time Gray saw Newbold's wallet was long after the employer incident and that Gray's testimony was as follows:

> "A. * * * And Bill had his billfold out on the table with all his papers scattered out there.
>
> Q. What do you mean by 'papers'?
>
> A. Well his driver's license and stuff. All the papers that was in the wallet was scattered out there on the table and he was looking for some money. And this was just, I would say, about—oh, 30 seconds before I left. And being I was sober, I just naturally glanced at him as he was looking at the papers, and I couldn't see any.
>
> Q. Any what?
>
> A. Any money at all. And so I *figured* the only money he had left was the dollar and whatever change he had in his pocket." (Emphasis added). (Tr. 78).

Gray goes on to again make a reference to the $5.00 shown him earlier prior to the employer's $20.00 loan. (T. 78).

The incident with the wallet did not take place just before Newbold saw his employer but was con-

siderably later as Gray also testified that the $20.00 loan occurred between 6:30 and 8:00, (T. 74-75), and that he left Newbold "about 20 minutes to 12.00" (T. 79).

The above testimony is totally inadequate to establish the amount of money Newbold possessed near midnight. There was clear uncontested evidence that he had a total of $75.00 early in the evening, and the fact that Gray "couldn't see any" about 12 P.M. does not prove it was not there. State's Exhibit A, Newbold's wallet, is a multisectional one with two separate compartments for currency, one with a zipper, and four other compartments where folded currency could be placed. All these would effectively hide currency from sight. Also Newbold could have had undetermined amounts of money on his person in pockets of clothing which could later have been transferred to the wallet. This too would have been hidden from Gray's sight.

The last item of testimony appellant claims conflicts with Newbold's estimate of his financial status is that of Dennis McCollum wherein he stated the Newbold wallet had no money in it. (T. 45). However, pages 39-40 of the transcript reveal McCollum testified that on appellant's orders Newbold took his wallet out and threw it on the floor and that also on appellant's orders he, McCollum, took $30.00 from the wallet and gave it to appellant. Newbold also testified (T. 6-7) that appellant ordered the wallet taken out and thrown on the floor a second time after the money had been removed.

With this background McCollum's testimony at page T. 45 does not reveal as to which time the witness has reference, in his own mind, when he stated there was no money in the wallet.

Appellant's second contention of conflict creating inherent improbability concerns certain discrepancies concerning the robbery itself between Newbold's testimony at trial, his statement to the police and his testimony at the preliminary hearing and a clarification on cross-examination of his testimony as to actually seeing his money removed from the wallet prior to seeing it handed to appellant. To this appellant adds his own denial of the testimony against him and offers his explanation of the occurrences of that evening.

It is beyond doubt that some discrepancy did exist and that appellant and his wife offered testimony directly in conflict with that of the State's witnesses. However, it has been held, as noted above, that discrepancies and conflicts in the testimony of a witness are matters which affect the credibility of that witness and the weight to be given his testimony, and are properly matters for the jury's determination. *State v. Jarrett, State v. Laub, supra.*

It is clear that discrepancies in testimony and conflicting testimony from various witnesses fall far short of the test outlined in the Moreno case and are not sufficient to disturb the findings of a jury who was present, heard each witness and was hence able to evaluate the testimony given. The jury in the instant

case was undoubtedly aware of these discrepancies and conflicts and was properly instructed thereon by the Court in Instruction No. 9 (T. 115 and 116). The jury then resolved the conflicts, believing the State's witnesses and not believing those of appellant. It must be remembered that every lawsuit is, by its very nature, fraught with conflicting testimony, and there must always be determination as to which is true.

It is clear that appellant has also failed to meet the test of sufficiency set out by this Court in *State v. Sullivan,* 6 U.2d 110, 307 P.2d 212:

> "* * * 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 * * *."

POINT II.

STATE'S EXHIBIT "B" WAS PROPERLY RECEIVED IN EVIDENCE.

Appellant specifically stated there was no objection to this exhibit at the time it was introduced in evidence, (T. 69) and failure to do so at that time precludes raising such issue on appeal. 3 Am. Jur. 29 states:

> "Where a party has the option to object or not as he sees fit, the failure to exercise the option when the opportunity therefor presents itself must, in fairness to the court and to the adverse party, be held either to constitute a waiver of the right to object, or to raise an estoppel against the subsequent exercise thereof."

And at page 89 it states:

> "In order to present to the appellate court the question of the propriety of the admission of evidence it is necessary that there should have been an objection thereto. * * *"

Even assuming the point to be properly raised, an investigation of the record reveals that on page 37 of the transcript the following testimony of Mr. Newbold is recorded, first during re-direct examination by the State, and second during a re-cross examination by the defense attorney.

"REDIRECT EXAMINATION.

Q. Do you know where that knife was at that time Mr. Newbold?

A. At the time I threw the wallet out there?

Q. Yes.

A. In my ribs.

RECROSS EXAMINATION.

Q. You have seen this knife? Have you seen it since?

A. Yes.

Q. Since this happened?

A. Yes.

Q. You were shown and asked if this was the knife, and you said it was?

A. Yes.

Q. When was this?

A. At the preliminary hearing.

Q. That's the first time you'd seen it since the night this happened?
A. Yes, sir."

Mr. McCollum testified (T. 40) as follows:

"Q. Have you seen either the wallet or the knife since the happening of the event * * * ?
A. Yes.
Q. Where?
A. At the preliminary hearing.
Q. Which item did you see? Or did you see them both?
A. I seen them both."

Finally, Officer Butcher testified he took the knife, Exhibit B, from the front room of appellant's home at the time of the arrest, a few hours after the robbery, and that it remained in police custody until the preliminary hearing. (T. 54, 55).

This testimony was fully sufficient to identify the knife as that used in the crime, and the exhibit was properly received in evidence.

POINT III.

STATE'S EXHIBIT "C" WAS PROPERLY RECEIVED IN EVIDENCE.

Appellant first contends State's Exhibit C, the partially severed ten dollar bill, was not properly identified in that only the officer who discovered the bill in the possession of appellant's wife and took it into custody made the identification.

We submit that no more complete identification was possible or necessary. The officer testified the bill was in fact the one he found among the contents of Mrs. Danks' purse on the night in question and went on to describe the circumstances of its discovery (T. 49, 50). It is, of course, most difficult to identify with certainty a specific piece of currency; however, the officer was able to recognize this one because "It was almost severed in two." (T. 49). The ten dollar bill, having been fully identified, was properly received in evidence, its probative value for the jury to determine.

While the fact that the wife of a party accused of robbery did have some currency with her of the same denomination as part of that taken is in no way conclusive and may well be explained away, it does have some probative weight, as would a showing that she had no such currency have some probative weight with an opposite effect. Determination of the implications and value of such evidence are properly a jury function.

Appellant cites the case of *People v. Morgan,* 321 P.2d 873, 157 C.A.2d 756, to support his claim that failure to tie the currency directly to him was a fatal flaw in the State's case, and he was prejudiced thereby. In the Morgan case, a narcotics sale conviction, the only items of demonstrative evidence, the heroin packets, were never connected to the defendant in any way and further the procurer of the evidence did not testify at all, hence the finding that a fatal gap existed in the State's case, as there was no direct connection of the defendant with the crime. That situation is clearly

distinguishable from the instant case where the jury heard two eye witnesses, saw the knife, and heard testimony as to the victim's condition. The State did not rely solely on the ten dollar bill to support its case, and the admission of the currency was proper and without prejudicial effect upon appellant.

Even assuming, arguendo, that the admission had technically been error, it cannot be said to have been prejudicial when view in the light of the mass of evidence against the appellant.

> "A judgment will not be reversed because of the erroneous admission of evidence, where it did not, or probably did not, affect the result, conclusion, judgment, or verdict or could not have done so, ***." (5A C.J.S. 945).

CONCLUSION

Appellant's charge that the evidence was so inherently improbable as to be unbelievable is based only on discrepancies and conflicting testimony which the jury, fulfilling their traditional function, have laid to rest. Their determination, fully supported, as it is by substantial evidence, should not be disturbed.

Further the admission of State's Exhibits "B" and "C" was, in all respects proper and free of error. Appellant's conviction should therefore be affirmed.

Respectfully submitted,

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