

1991

Utah v. Turner : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT OF THE
STATE OF UTAH

:
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
STEVEN CRAIG TURNER, : 14591
Defendant-Appellant. :

:
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT AND CONVICTION
OF THE THIRD JUDICIAL DISTRICT COURT, IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE GORDON R. HALL, JUDGE

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FILED

JUN 3 - 1977

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
STEVEN CRAIG TURNER, : 14591
Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the judgment of the District Court of Salt Lake County, State of Utah, which found him guilty by a jury trial of violation of Utah Code Ann. § 76-6-302 (1953), as amended.

DISPOSITION IN LOWER COURT

On April 14 and 15, 1976, appellant was tried and convicted of aggravated robbery in violation of Utah Code Ann. § 76-6-302 (1953), as amended. He was sentenced to the Utah State Prison for an indeterminate term of five years to life in prison.

RELIEF SOUGHT ON APPEAL

Respondent petitions the Court to affirm the conviction of appellant by a jury in the lower court.

STATEMENT OF FACTS

On July 22, 1975, Jerry Graham was robbed at Dan's Foodtown at 70th South and Highland Drive, Salt Lake County, State of Utah. On July 22, 1975, appellant was arrested in connection with the robbery, identified by Mr. Graham as the assailant and on July 23, 1975, a complaint was filed accusing the appellant of aggravated robbery in violation of Utah Code Ann. § 76-6-302 (1953), as amended in 1975. Trial by jury was held on April 14 and 15, 1976. After presentation of all the evidence, the following six instructions, among others, were given to the jury:

"Instruction No. 8: Under the law of the State of Utah, robbery is the unlawful and intentional taking of personal property in the possession of another from his or her person, or immediate presence, against the will of that person, which taking is accomplished by means of force or fear.

A person commits an aggravated robbery, which is a first degree felony, if, in the course of committing a robbery, that person uses a deadly weapon. A deadly weapon means anything that in the manner of its use or intended use is likely to cause death or serious bodily injury.

Under the law, an act of using a deadly weapon is deemed to be 'in the course of committing a robbery,' as that phrase is used in these instructions, if the use of a deadly weapon occurs in an attempt to commit, or during the commission of a robbery.

One acts 'unlawfully' in the taking of personal property in the possession of another, as used in these instructions if the actor takes such property wrongfully, without rights or permission and with the deliberate intent to commit a crime.

Under the law, one acts intentionally or with intent with respect to the nature of his conduct or as a result of his conduct when it is his conscious objective or desire to engage in the conduct or to cause the result.

Intent with which an act is done denotes a state of mind and connotes purpose in so acting. Intent, being a state of mind, is not always susceptible of proof by direct and positive evidence and may ordinarily be inferred from acts, conduct, statements and circumstances."

"Instruction No. 9: You are instructed that a firearm is not a deadly weapon unless it is loaded. The Utah Code defines when a weapon is deemed to have been loaded in 76-10-502, but if from the evidence you have a reasonable doubt as to whether or not the gun testified to in this case was loaded, you must find the defendant not guilty of aggravated robbery and consider the lesser included offense of robbery."

"Instruction No. 10: You are instructed that for the purposes of this case, that a 'dangerous weapon' means any item that in

the manner of its use or intended use is capable of causing death or serious bodily injury. In construing whether an item, object or thing not commonly known as a dangerous weapon is a dangerous weapon, the character of the instrument, object or thing; the character of the wound produced, if any; and the manner in which the instrument, object, or thing was used shall be determinative.

'Firearms' means pistols, revolvers, sawed-off rifle and/or any device that could be used as a weapon from which is expelled a projective by any force."

"Instruction No. 11: You are instructed that facsimile is defined as: An exact and precise copy of anything. An exact reproduction, for example, the signature reproduced by rubber stamp."

"Instruction No. 12: You are further instructed that a facsimile of a firearm is any instrument that by its appearance resembles a firearm."

"Instruction No. 13: Before you can convict the defendant of the crime of aggravated robbery, as charged in the Information, you must find from the evidence beyond a reasonable doubt, all of the following elements of that crime:

1. That on or about the 22nd day of July, 1975, in Salt Lake County, State of Utah, the defendant, Steven Craig Turner, unlawfully and intentionally took money or property from Jerry Graham.

2. That said property or money was in the possession or immediate presence of Jerry Graham.

3. That the taking of said money or property from Jerry Graham was accomplished by means of force or fear.

4. That in the course of taking said money or property the defendant, Steven Craig Turner, used a deadly weapon consisting of a firearm or a facsimile of a firearm.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the defendant not guilty of aggravated robbery and then consider the lesser included offense of robbery in accordance with the following instruction."

Closing arguments were then heard and the jury began its deliberation. After the jury had left the courtroom time was granted by the bench to except to the instructions. The State indicated it had no objections. Appellant objected to the above recited instructions (T.123-124) on the grounds that the instructions were confusing and conflicting and further objected to the statute as being unconstitutionally vague.

POINT I

UTAH CODE ANN. § 76-6-302 (1953), AS AMENDED IN 1975, IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO APPELLANT IN THIS CASE.

Utah Code Ann. § 76-6-302 (1953), as amended, insofar as is pertinent to the case at bar, reads as follows:

"(1) A person commits aggravated robbery if in the course of committing robbery he:

(a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon."

The complaint under which appellant was charged and convicted reads:

"That the said Steven Craig Turner at the time and place aforesaid, robbed Jerry Graham, and in so doing, used a deadly weapon, to wit: a gun or facsimile thereof." (R.8).

Appellant contends that the court, in attempting to instruct the jury on the meaning of the word "facsimile," did so in a manner as to render Utah Code Ann. § 76-6-302 (1953), as amended, unconstitutionally vague as applied to appellant in this case. The Utah Supreme Court has spoken on more than one occasion to the matter of unconstitutional vagueness of statutory law. As has been the case for many years in Utah, there is a very strong presumption in favor of the validity of legislative enactments, and where possible, the Supreme Court must uphold the validity of an act rather than declare it unconstitutional. Tygreen v. Magna Water Co., et al., 119 Utah 274, 226 P.2d 127 (1950); Greaves

v. State, 528 P.2d 805 (1974). The feeling of the court has been that only where it is impossible to resolve doubts will an act be declared invalid for uncertainty or vagueness. Tygreen, supra; Nowers v. Oakden, 110 Utah 25, 169 P.2d 108 (1946). The test for uncertainty or vagueness was enunciated succinctly in State v. Packard, 122 Utah 369, 250 P.2d 561 (1952). The Court, in declaring the criminal statute involved unconstitutional, set forth guidelines to be followed:

"Concerning the question of uncertainty or vagueness of statutes, the authorities seem to be in accord that the test a statute must meet to be valid is: It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements; (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged, and (c) to be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it."

This test was adhered to and reaffirmed in Greaves v. States, supra.

In the case at bar, appellant seemingly is not challenging the validity of Section 76-6-302, per se, but is challenging the statute as applied to him in his trial after the trial judge, via jury instructions, defined the word "facsimile." It should be noted that appellant did

not offer an alternative definition to the one given by the court in Instruction 11. The Court, in defining "facsimile" in Instruction 11, apparently consulted Ballentine's Law Dictionary for reference, since as appellant states, there is very little in the way of legal dissertation on the precise meaning of the word per se, in a legal sense. This is understandable, however, for it would seem that the word "facsimile," speaking in a legal sense, is a non-technical rather than a technical word, and as such, there would be little occasion for legal interpretation. However, since the word appears in not only the challenged statute, but in the complaint, the trial judge correctly instructed the jury as to the meaning to be given such a "non-technical" word used in a "technical" (legal) sense. Failure to have done so could have resulted in error. McBride v. Woods, 124 Colo. 384, 391, 238 P.2d 183 (1951); Lucas v. Michigan C.R. Co., 98 Mich. 1, 56 N.W. 1039 (1893).

The word facsimile appears in Ballentine's Law Dictionary, Third Edition, as follows:

"Facsimile. An exact and precise copy of anything. An exact reproduction, for example, the signature reproduced by rubber stamp." 11 Am.Jur.2d B. & W. § 210.

This definition coincides verbatim with that given in Instruction No. 11.

In his brief, appellant gives us the benefit of other definitions and synonyms of the word in question. Websters New Unabridged Dictionary, Section Edition, gives the following definition:

"1. Act of making a copy, imitation.

2. An exact and detailed copy of anything, as of a book, document, painting, or statute. Syn. See duplicate." (Emphasis added.)

Funk and Wagnalls New Standard Dictionary of the English Language gives the following definition of "facsimile:"

"An exact copy or reproduction; a perfect imitation of a work of art, manuscript, engraving, coin, stamp, medal or other original; in a loose sense, an exact model or counterpart. Syn.: see Duplicate; model."

Case law produces a definition for the word "imitation" in the case of People v. Delgado, 146 N.Y.S.2d 350, 356; 1 Misc.2d 821 (1955):

"The word 'imitation' when applied to pistols and revolvers means so nearly resembling the genuine as to mislead, with the apparent object of producing, and likely to produce, upon the minds of those against whom it is to be used, the belief that the imitation weapon is capable of producing all the injurious consequences to the victim as the use of the genuine article itself." (Emphasis added.)

Now that an "arsenal" of definitions of the word "facsimile" has been established, both in a non-legal (Websters; Funk and Wagnalls) and legal sense (Ballentine's, Black), what is the meaning of "facsimile"? What did the legislature have in mind when enacting Section 76-6-302, specifically using the phrase ". . . (a) uses a firearm or a facsimile of a firearm. . . ." (Emphasis added.) Certainly any of the definitions mentioned, including the one given by the trial judge in Instruction No. 11, would suffice. The test to use in the interpretation of a word or phrase in a statute has been set forth by the Utah Supreme Court in State v. Packard, supra, at 375:

"The limitations of language are such that neither absolute exactitude of expression nor complete precision of meaning are to be expected, and such standard cannot be required. On the other hand there is no disagreement among the courts that where a rule is set up, the violation of which subjects one to criminal punishment, the restrictions upon conduct should be described with sufficient certainty, so that persons of ordinary intelligence, desiring to obey the law, may know how to govern themselves in conformity with it, and that no one should be compelled at the peril of life, liberty or property, to speculate as to the meaning of penal statutes."

This test was reiterated by the Supreme Court of Utah once again in Greaves v. State, supra at 807. Speaking to a complaint that the criminal statute involved was void for vagueness, the court said:

" . . . the presumption of validity hereinabovestated, gives rise to the rule that a statute will not be declared unconstitutional for that reason (vagueness) if under any sensible interpretation of its language it can be given practical effect. The requirement is that it must be sufficiently clear and definite to inform persons of ordinary intelligence what their conduct must be to conform to its requirements and to advise one accused of violating it what constitutes the offense with which he is charged." (Emphasis added.)

In the Greaves case, supra at 806, the Court also laid down the test to be used in the judicial determination of the constitutionality of statutes:

"In regard to the judicial determination of the constitutionality of statutes there are certain principles relating to statutory construction, to be taken into consideration. Because the duty rests upon the court to determine the scope of the powers of all three branches of government, they have a special responsibility to exercise a high degree of caution and restraint to keep themselves within the limitations of the judicial power in order not to infringe upon the prerogatives of the executive or the legislative branches. In harmony with that policy it is the well-established rule that legislative enactments are endowed with a strong presumption of validity; and that they should not be

declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework; and that a statute will not be stricken down as being unconstitutional unless it appears to be so beyond a reasonable doubt." (Emphasis added.)

There are several questions to be answered in determining as to whether this "reasonable doubt test" and the test enunciated in State v. Packard, supra, have been met. Is there really a reasonable doubt in the minds of men of ordinary intelligence as to what the legislature meant when it enacted a law (Utah Code Ann. § 76-6-302 (1953), as amended in 1975) prohibiting the use of a "firearm or a facsimile of a firearm" in the commission of a robbery? Was there a reasonable doubt in appellant's mind, when he committed this robbery, as to what conduct was prohibited by the statute? Was there really a reasonable doubt in the minds of the jury members as to what the meaning of the word "facsimile" and the phrase "facsimile of a firearm" meant? Respondent respectfully submits that the answers to the questions propounded are succinctly in the negative.

It would seem after careful reading of the various definitions of "facsimile," and after reading

People v. Delgado, supra, that the word "facsimile" is synonymous with "imitation," "duplicate," "resemblance," etc., and that this is what the legislature had in mind when enacting the statute, as did the court when giving Instruction Nos. 11 and 12. It would also seem appropriate to conclude that appellant was put on fair notice that if he committed a robbery by use of an actual firearm or something that resembled or was the imitation of a firearm he would have to answer to the people of the State of Utah for violation of Utah Code Ann. § 76-6-302 (1953), as amended in 1975.

Apparently appellant would have this Court take the view that "facsimile of a firearm" be construed through the eyes of the criminal, rather than through the eyes of the victim or the eyes of the jury. As was so adequately expressed in People v. Delgado, supra, the purpose of the use of an "imitation" or "facsimile of a pistol" is ". . . to produce, upon the minds of those against whom it is to be used, the belief that the imitation weapon is capable of producing all the injurious consequences to the victim as the use of the genuine article itself." Certainly this is the thought the legislature had in mind when drafting Section 76-6-302.

Certainly the evidence in the case at bar bears out the fact that the victim believed the appellant to have been armed with a pistol, whether or not the object was in fact a pistol (T.10 and T. 22).

"Q. Now, you indicated you saw about an inch and a half of a gun pointing out of a shirt, is that what you stated?

A. Yes, sir.

Q. Would you explain to me what you mean pointing out of his shirt?

A. He had his hand under the barrell, was just up under his shirt. All I could see of the shirt down over it was an inch and a half of the barrell.

Q. Sure it wasn't a piece of pipe?

A. I don't believe it to be, no."

Clearly it can be seen that the victim believed the object pointing out of appellant's shirt to be a gun of some sort. Whether or not it was actually a gun or not is immaterial. The important criteria, according to the statute, is that the object must have in fact been a firearm (pistol) or so closely resemble a firearm (facsimile of a pistol) as to induce belief on behalf of the victim

that the object was in fact a firearm. This does not seem as complicated as appellant would have this Court believe. If appellant's theory is followed, those persons such as appellant who desire to participate in activity such as robbery will now be able to reap the lucrative fruits of an aggravated robbery while only being required to pay the price of a simple lesser included offense of robbery, by the use of something which, though it resembled a firearm, was not the precise, exact, dimension by dimension replica of the firearm appellant had in mind. Certainly this is not the thinking behind the statute, and certainly such an interpretation could not and was not given to Instructions 11 and 12, either individually or collectively.

Instruction 11, when read with Instruction 12, does not open up a "vast area of definition and interpretation," but merely gives the jury the definition to be followed while exercising its function, i.e., to determine whether or not the object used in the robbery, based upon the evidence given, was in fact a firearm or a facsimile thereof. If in fact the jury found appellant guilty of aggravated robbery on the theory that a facsimile of a firearm was used, the jury was required to find as fact that the instrument used so exactly and precisely resembled a firearm so as to actually be mistaken for such a weapon. This is in essence what Instructions 11 and 12, when read together, mean.

Appellant's contention that Instructions 12 and 9, when read together, compound the vagueness of the statute is wholly without foundation. A careful examination of Utah Code Ann. § 76-6-302 (1953), as amended in 1975, reveals that there are several modes by which aggravated robbery can be committed. One is by use of a firearm, another by use of a facsimile or an imitation of a firearm. The complaint charges that the crime was committed by the use of a deadly weapon, to wit: a gun

or facsimile thereof. Instruction 9 sets out the requirements to be met in order for a gun to be classified as a deadly weapon, should the jury find that as a matter of fact that a real gun was used. Instruction 12 sets forth the definition of a "facsimile of a firearm", which instruction of course would be used should the jury find that a real gun was not used. Thus, Instructions 9 and 12 are absolutely necessary in order for the jury to make a finding based on the evidence set forth and the statute under which appellant was charged. No conflict or vagueness exists; if anything, a marvelous job of clarification.

Appellant concludes his argument in Point I of his brief by submitting that the object used could have been "a three-inch piece of rubber tubing painted grey, grey plastic tubing or any number of things that are neither deadly or dangerous and still appellant could have been convicted of aggravated robbery." According to the terms of Utah Code Ann. § 76-6-302 (1953), as amended in 1975, if "three-inch rubber tubing painted grey", or "grey plastic tubing" was so designed as to give one, particularly Mr. Jerry Graham, the victim, the belief or fear that an actual gun was being directed at him, and if the jury found as a matter of fact that

such tubing so closely resembled an actual firearm as to give the very appearance of one, then appellant could have been convicted of aggravated robbery, and rightly so. On the other hand, the jury may have found that a real firearm was used, and that it was loaded. If so, appellant could have been convicted of aggravated robbery, and rightly so. In either case, Instructions 9, 11, and 12 were all very necessary for the jury deliberation. The jury had many decisions to make, among which were to find as a matter of fact whether or not the object used was a firearm, whether or not it was loaded if it was a firearm, if the object was not a firearm, did it so closely resemble a firearm by its exactness and resemblance so as to give the victim the appearance of being an actual firearm. These matters are all within the province of the jury, and as such the jury must be instructed thereon. People v. McKinney, 111 Cal. App. 2d 690, 245 P.2d 24 (1952); State v. Chisholm, 7 Wash. App. 279, 499 P.2d 81 (1972); Hutton v. People, 156 Colo. 334, 398 P.2d 973 (1965); State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969). Each of the above cases dealt with the issue of whether or not it was the function of the jury to determine whether

or not an object used was an actual firearm or an imitation, whether or not such firearm, if real, was loaded, and whether or not the object used was a dangerous or deadly weapon within the confines of the statutes involved.

Respondent submits that the Instructions given by the trial court did not change the meaning of the statute so as to leave it vague or uncertain, but merely explained the various elements of the offense with which appellant was charged and further defined certain "technical" (legally speaking) words which were necessary to arrive at a just verdict, based upon the evidence presented. Specifically, Instruction 11 defined "facsimile" as taken from a reliable legal source; the term "facsimile" was used in Instruction 12, thus the need for Instruction 11. Based upon Instruction 11, Instruction 12 could read: "You are further instructed that an exact or precise copy, or imitation of a firearm is any instrument that by its appearance resembles a firearm." Thus the need for both instructions - they compliment one another. They must be read together and taken as a whole, as was expressed by this court in State v. Guerts, 11 Utah 2d 345 at 352, 359 P.2d 12 (1961):

"This also can be said, adroit counsel may dissent an instruction, and by attempting to hang the whole case on separate parts thereof, make a plausible argument that error was committed. But when the instructions are considered as a whole, and in light of the evidence and the particular charges lodged against the defendant, as they should be, there is no doubt that the jury was clearly and accurately advised of specific charges. . . ."

Such is the case at bar. Appellant has in reality attempted to "dissent" each instruction separately, concluding that there are contradictions therein, while at the same time proceeding under the guise of argument that the Instructions, when read together, are such as to render the statute vague. When read together, the Instructions make clear the evidence needed in order for appellant to be convicted under Utah Code Ann. § 76-6-302 (1953), as amended in 1975. The statute is clear as to the conduct prohibited, both to the citizen of ordinary intelligence who desires to obey the law, and to the citizen of ordinary intelligence who desires to disobey the law. Proof of a reasonable doubt has not been submitted to show that the statute was vague as applied to plaintiff. Greaves v. State, supra.

POINT II

THE INSTRUCTIONS GIVEN BY THE DISTRICT COURT
ARE NOT CONFLICTING AND CONTRADICTORY.

Appellant alleges conflict between Instructions 8 and 10 in that Instruction 8 defines a "deadly weapon" in terms of its likelihood of causing death or serious bodily injury, while Instruction 10 defines a "dangerous weapon" in terms of its capability of causing death or serious bodily injury. Two points should be noted: (1) a weapon which is likely to cause death or serious bodily injury could not fit into such a category if it did not possess the capability of inflicting such a serious degree of damage; (2) appellant submitted Instruction 10 for use by the court. In so doing, he cannot now complain about the confusing use of his Instruction. People v. Darby, 114 Cal. App. 2d 412, 250 P.2d 743 (1952); State v. Stewart, 161 Mont. 501, 507 P.2d 1050 (1973); State v. Miller, 111 Utah 255, 117 P.2d 727 (1947). In Miller, supra, the defendant, in a prosecution for rape, requested an instruction using the phrase "carnal knowledge". He then complained about the confusing use of the phrase in the instruction given. The court dismissed this point of appeal with the following comment: "Furthermore, we do not believe appellant is in a position to complain about the use of

words, as it was at his invitation." Such was the case in State v. Stewart, supra, where the defendant offered an instruction, which was accepted by the court and given. The defendant then claimed error in giving of the instruction. The court flatly dismissed such an argument by simply declaring, "Prepared instruction No. 9 was given. Defendant cannot claim error when one of his offered instructions is given". Such is the case at bar. Appellant offered Instruction No. 10, and he cannot claim error because of an allegation of conflict with Instruction 8. Be that as it may, there is no conflict between the two instructions, as logic infers in the earlier explanation.

Appellant further argues that Instructions 8, 9, 10, 12, and 13 are all conflicting and leave the jury with at least five possible methods of convicting, all contradictory. Such is not the case when the Instructions, which should be considered together, are considered as a whole. State v. Hendricks, 123 Utah 267,, 258 P.2d 453 (1951). Instruction 8 sets forth the elements necessary to prove in order to convict of robbery or aggravated robbery. It specifies that a deadly weapon must be used to convict of aggravated robbery and further defines what a deadly weapon consists

of. Instruction 9 sets forth the conditions under which a firearm is to be considered a deadly weapon. This instruction is necessary because the appellant is charged in the complaint with using a firearm or facsimile thereof in the commission of the robbery. The statute under which he is charged also makes use of the term "firearm". There too, is evidence in the case on which the jury could conclude that a genuine firearm was used. If so determined, they must face the question as to whether or not the firearm was loaded, thus deciding, within their province, whether or not the firearm would be classified as a deadly weapon. Thus the need for Instruction 9.

Instruction 10 was offered by appellant, thus no error can be claimed, despite the fact there is none as alleged.

Instructions 11 and 12 are needed since appellant is charged with committing the robbery with a firearm or facsimile thereof. The Instructions, as mentioned previously, explain the definition of "facsimile of a firearm."

Instruction 13 sets forth the elements of the crime which must be proven before a conviction can be found. The final element, which is the subject of this

appeal, states:

"4. That in the course of taking said money or property the defendant, Steven Craig Turner, used a deadly weapon consisting of a firearm or a facsimile of a firearm."

This Instruction apprises the jury of the fact that before they can find appellant guilty of aggravated robbery, they must first find one of two things: (1) that Steven Craig Turner, the appellant, used a deadly weapon consisting of a firearm (in which case, according to Instruction 9, the firearm must be found to be loaded); or (2) that Steven Craig Turner used a facsimile of a firearm (thus the need for Instructions 11 and 12). This is precisely what the statute prohibits, and is precisely what the appellant is charged with.

It is true that the language in paragraph 2 of Instruction 8, in which it is said that one committing robbery by the use of a deadly weapon commits aggravated robbery, is narrower than that used in the statute; for the statute precludes not only the use of a deadly weapon, but the use of a firearm or a facsimile of a firearm, a knife or facsimile of a knife. However, Instructions 9, 11, and 12 cover the meaning of firearm and facsimile of a firearm.

Thus, it can be seen that, when taken and read together as a whole, the Instructions present to the jury, a group of citizens of ordinary intelligence, the necessary criteria and meaning to be given various terms in their judging of the evidence. Each instruction is needed. Each is legally sound, individually and collectively. They do not go beyond the evidence presented. Nowhere has appellant shown that a different result could have been obtained had other instructions been given or those given refused. State v. Anderson, 100 Utah 468, 475, 116 P.2d 398 (1941).

The complaint charged appellant with committing robbery by either using a deadly weapon consisting of a firearm; or, committing robbery by using a facsimile of a firearm. Two different theories were charged. There was sufficient evidence to support either theory, and as such, the jury was entitled to instructions on both theories as long as the evidence was supportive and as long as the instructions clearly distinguished both theories. State v. Golladay, 78 Wash. 2d 121, 470 P.2d 191 (1970). The court stated in Golladay at 201:

"Thus, a defendant may be charged with committing a single crime in two or more ways and proof of one will uphold the indictment or information. But before the jury can be instructed on and allowed to consider the various ways of committing the crime alleged, there must be sufficient evidence to support the instructions. Moreover, the instructions must clearly distinguish the alternative theories and require the necessity for a unanimous verdict on either of the alternatives. When such is the case, the prosecutor need not be forced to elect, for fear that half of the jury will find the defendant guilty on one theory and half on another theory."

The State of Utah alleged that the appellant committed robbery, and in so doing used a deadly weapon consisting of a firearm, or, in the alternative, used a facsimile of a firearm, which would not be a deadly weapon; however, Utah Code Ann. § 76-6-302 (1953), as amended in 1975, does not require that a deadly weapon be used in order for one to be convicted of aggravated robbery. The requirement is met if a facsimile of a firearm is used. The requirement is met if a genuine firearm is used. The complaint is clear in that it alleges that either a deadly weapon, specifically a gun, was used; or, in the alternative, a facsimile of a deadly weapon, consisting, specifically, of a facsimile of a gun.

Appellant was put on notice as to what conduct was prohibited. He chose to violate that conduct. The jury so found. No error prejudicial to the appellant can be found.

CONCLUSION

For the reasons stated, respondent respectfully requests that this Honorable Court affirm the conviction rendered in the lower court.

Respectfully submitted,

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