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State of Utah v. Robert Buddy Washington : Brief of Appellant

Utah Supreme Court

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FILED

JAN - 3 1962

IN THE SUPREME COURT

Clerk, Supreme Court, Utah

of the

STATE OF UTAH

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STATE OF UTAH,

Plaintiff and Respondent,

Vs.

No. 9533

ROBERT BUDDY WASHINGTON,

Defendant and Appellant

* * * * *

Appeal from the Judgment of the Third District

Court for Salt Lake County

Hon. Ray Van Cott, Jr., Judge

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of May, 1961, by the Honorable Ray Van Cott, Jr., one of the Judges of the Third Judicial District for Salt Lake County, State of Utah, the defendant appeals.

RELIEF SOUGHT ON APPEAL

The defendant seeks reversal of the judgment and sentence and dismissal of the action.

STATEMENT OF FACTS.

Robert Buddy Washington was convicted of the crime of burglary in the second degree on the 11th day of May, 1961, in the District Court of the Third Judicial District for Salt Lake County, State of Utah, and sentenced to an indeterminate term in the Utah State Penitentiary as provided by law by the Honorable Ray Van Cott, Jr., the Judge of said Court, on the 23rd day of May, 1961.

The pertinent facts involved in the case are as follows:

Mr. G. C. Martin operates the Airwave Radio and T. V. Company at 338 West 1st South Street, Salt Lake City, Utah, (R.17). The business which Mr. Martin conducts consists of repair and maintenance of any and all

types of electronics equipment, phonographs, television and radio (R.18). On the 8th day of November, 1960, election day, a Mr. Merrick, a night watchman at the place of business, called Mr. Martin at about 9:30 or 9:45 P. M. and reported that his place of business had been broken into, and that he had better "come over". (R.19). When Mr. Martin arrived at the place of business two police cars were there, and the defendant having been apprehended by the night watchman (R.27) was sitting in one of the police cars. The night watchman had apprehended the defendant about fifteen feet north of the side walk passing in front of the building, and on the south side thereof with the record player in his arms (R.26). Merrick also found a brown cotton glove laying by the record player where it had been laid on the ground. Merrick called the police and officers Campbell, Phillis and Olson responded to the call (R.28). A window farthest north on the west side of the building, consisting of six panes of glass, had one pane broken out at the time Mr. Merrick encountered the defendant. The pane of glass which

had been broken out of the window was approximately 12 by 14 inches (R.30). Officer Campbell took the defendant into custody from Mr. Merritt (R.32). He found a brown glove in the defendant's pocket (R.32). These gloves were introduced into evidence and appeared to match. Officer Campbell picked up the phonograph (R.32). He picked up the glove by the phonograph. Mr. Martin identified this phonograph as Model 923-H8 belonging to the Layton Furniture Company (R.20). There was a saw inside the Martin place of business about ten or twelve feet from the window, which was broken out (R.22). Apparently nobody had ever seen the defendant inside the Airwave Television Building (R.30). The gloves found by the phonograph and in the defendant's pocket seemed to have picked up some sawdust, or material similar to sawdust on them (R-34). The only question raised by this appeal is that the evidence does not support a finding that the defendant was guilty, or could have been found guilty of burglary in the second degree.

STATEMENT OF POINTS FOR REVERSAL

1. THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE DEFENDANT WAS GUILTY OF BURGLARY IN THE SECOND DEGREE.

ARGUMENT.

There is no positive evidence that the defendant was at any time within the building housing the Air-wave Radio and T. V. Company at 338 West 1st South, Salt Lake City, Utah. The gist of the defendant's defense is that his presence outside the building alleged to have been burglarized, and the circumstances surrounding the broken window, and the phonograph in his arms, is not sufficient, taken together with the saddest findings on his gloves, to warrant a conviction of burglary in the second degree. There is no evidence other than circumstantial evidence that the building was ever entered, and no evidence connecting this defendant with the breaking of the window, or that there was any intent on his part to steal or commit other felony within the building. Unless an intent were

proven on his part to effectuate a larceny, or a felony within the building, which he is alleged to have entered, there could be no commission of the crime as charged. In Volume No. 1913-C, American Annotated Cases, Page 517, the following is found:

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

In Case of White V. State, a Texas Case, 1938, 113SW 2d, 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 innocence."

In State v. Clark, 223 Pc2d, 184-118, Utah, 517, this Court said:

"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 element."

In the case at bar there is no evidence that the defendant broke the window, or was within the building, or had any intent to commit a crime therein. Each of these elements, this court has said, must be proven beyond a reasonable doubt.

In State V. Darlene Osmuss, a Wyoming Case, 276 P. 2d. 469; 73 Wyo. 183, the State Supreme Court of Wyoming said:

"Speculation, suspicion, surmises and guesses have no evidential value."

Whether or not the defendant had been within the building, or had broken out the window, leaves many reasonable hypotheses which may be resolved against his guilt as having committed burglary in the second degree.

In the Case of People vs. Smith, 275 P.2d, 919, 128 California Appeals 2d, 706, the Court holds:

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

In the case of State V. Hendricks, 258 P. 2d, 453, 123, Utah, 267, this court said:

"It is elementary that in criminal cases the State has the burden of proving every essential element of the crime beyond a reasonable doubt both as to proof of the State's case, and as to the matters of defense."

In State Vs. Lawrence, 234 Pacific 2d, 600, 120 Utah 323, this Court stated:

"The plea of not guilty by the defendant in prosecution for grand larceny of an 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, both as to the proof of the State's case, and as to matters of defense, all matters necessary to entitle the defendant to acquittal is that there exists reasonable doubt as to his guilt."

In Sullivan v. State, 7, Oklahoma Criminal, 307: 123 P. 569, the Supreme Court of that State 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, 201, 1030, 59 Utah, 39,
this Court said:

"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."

It appears to the writer that there are many reasonable hypotheses consistent with innocence in this case. The defendant's own story; the fact that he was not seen in the building; the fact that no intent has been proven to commit burglary; the fact that no one saw him break the window, or connect him with the crime with the exception that he had the phonograph, which purportedly at one time had been in the building. In above cited case, (State V. Crawford) this court stated:

"The identity of property in possession of the accused must be established beyond a reasonable doubt in the prosecution for burglary, where the prosecution relies principally upon the possession of recently stolen property, the identity of such property must be established beyond a reasonable doubt."

In State vs. Wells, 100 P 681, 35 Utah 400, this

Court held:

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

In the case of State vs. Cohn, 232P 2d, 470,471

Kansas, 344, the Supreme Court of that State said:

"Where the State relies on circumstantial evidence to establish the guilt of a defendant, evidence must be so strong that every reasonable hypothesis except the guilt of the defendant is excluded."

It is the contention of the defendant herein that no intent on the part of the defendant was proved to commit larceny or other felony within the building since his presence in the building was never proved by the State to make out a conviction of burglary in the second degree. In the same connection the State Supreme Court of Nevada stated in State vs. Cowell, 12 Nevada, 337:(No Pac. Citation)

"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 do so with intent to commit some one of the crimes specified. It is just as essential to prove the 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 Black V. State, 118, Texas Appeals, 124, the

Court held:

"Evidence that a felony was actually committed is evidence that the house was broken and entered with the 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 the fact; not, indeed, by express and positive testimony, but the best evidence of which the case is susceptible. That a breaking and entry of a house may include the entry without a violation of our statute against burglary and needs no argument to prove or demonstrate. It might be easily suggested that many breakings and entry into houses do occur in which no intent to commit either a felony or a crime, or a theft, never entered into the mind of the party making the entry."

In the Case of People V. Thomas Hart, 37 P.330,10

Utah, 204, this court held:

"The fact of recent possession of stolen property was appurtenant in proper fact to go to the jury, as the circumstance in the case, and if accompanied with such evidence as his denial of possession, is giving false, incredible, contradictory accounts of acquiring it, his attempting to conceal it, or to destroy marks upon it; his fleeing upon being accused; or being so near the place where the property was stolen, or the building entered, is to create criminating circumstances against him, such and other like circumstances, when shown in connection with the possession, the larceny, or house breaking may raise a strong presumption of guilt in the exclusive possessor. In this case there is a

total lack of any corroborating circumstances, and we think there was not sufficient evidence before the jury to justify a verdict in this case."

This holding is summarized in the headnote No. 3.

"On a trial for housebreaking the fact that a pistol taken from the house broken into is found in the defendant's possession 6 hours later is in itself insufficient to warrant the conviction."

The defendant contends here that the fact that he had in his possession property presumed to have been stolen from within the building of the Airwave Radio and Television Company is insufficient to warrant a conviction. That he never entered the building with an intent to steal the property, or that he ever broke into it in the absence of direct positive evidence to the contrary.

CONCLUSION.

It is respectfully submitted by the defendant that his mere presence outside of the building of the Airwave Radio and Television Company does not constitute sufficient evidence to warrant the jury finding him guilty of entering, with intention to commit larceny or other crime to the exclusion of every other

reasonable hypothesis. No proof has ever been made positive that the defendant ever entered the building; that an intent on his part to commit larceny or other felony within the building has not been proved by the State. The State's evidence fails to prove by positive and convincing evidence that a burglary by this defendant was committed as charged in the information. The defendant should be given every benefit and intendment of the law that his presence outside the building constituted merely a civil trespass as to the property alleged to have been stolen, and the state has failed to prove an intent on his part to appropriate it to his own use. The defendant therefore prays this court that it dismiss the action, or grant him a new trial.

Respectfully submitted,

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