

1968

## State Of Utah v. Sylvester Scott : Brief of Appellant

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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THE STATE OF UTAH,  
*Plaintiff-Respondent,*

-vs.-

SYLVESTER SCOTT,  
*Defendant-Appellant.*

Case No.  
10876

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BRIEF OF APPELLANT

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Appeal from jury verdict of guilty in the  
Second District Court in and for Weber County,  
the Honorable John F. Wahlquist, presiding

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THE STATE OF UTAH,

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*Defendant-Appellant.*

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BRIEF OF APPELLANT

---

STATEMENT OF NATURE OF CASE

The appellant, Sylvester Scott, appeals from a conviction of second degree burglary rendered in Second District Court, Weber County, State of Utah.

DISPOSITION IN LOWER COURT

On the 14th day of December, 1966 Sylvester Scott, appellant, was found guilty of burglary in the second degree in Second Judicial District Court; whereupon, appellant, on the 19th day of December, 1966, appeared for sentencing before the Honorable John F. Wahlquist,

District Judge. Judge Wahlquist denied appellant probation and sentenced him to the Utah State Prison for the indeterminate term as provided by law.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction of second degree burglary and a setting aside of the sentence imposed and an order dismissing the conviction and sentence. In the alternative appellant seeks the granting of a new trial.

## STATEMENT OF FACTS

The appellant, Sylvester Scott, and one William Coleman were charged with second degree burglary for unlawfully entering the U and I Furniture Store in Ogden, Utah, with intent to commit larceny therein. Both were found guilty of the crime charged. (T-238, 240) From such a verdict, Sylvester Scott prosecutes this appeal.

According to Mr. Gary Bosworth, the Manager of the burglarized store, three television sets and one coffee table disappeared from the store between the evening of April 18, 1966 and the following afternoon. Sometime during the morning of April 18, 1966, Sylvester Scott, who had been to the store several times before (T-16)

entered the store, with some other fellows, for the purpose of negotiating a contract for a sectional couch. Although Mr. Scott seemed intent on buying the couch (T-34), such contract, although signed (T-34), was never consummated. (T-16)

While Mr. Scott was at the store, two men, who entered with Scott, went into the restroom located in an office in the store. (T-36) At the end of the business day on April 18, 1966, Mr. Bosworth locked the store, observing nothing to be missing. (T-71) However, the following afternoon about 3:30 p.m. the previously mentioned items were discovered to be missing and not until Wednesday, April 20, the day after the mentioned items turned up missing, did Mr. Bosworth discover that the bathroom window screen had been removed, (T-58) and that a footmark had been left on a crushed kleenex box, sitting atop the toilet tank. (T-57) Mr. Bosworth did, however, notice a mud print on the toilet seat lid the day before. (T-57) Such evidence regarding the footprints was corroborated by an Ogden police officer, James Wold. (T-134)

The only evidence connecting defendant with the burglary was that of one Copeland Griffin. Griffin, a key witness for the State, had signed an affidavit, (Defense exhibit 2 and repeated at T-212) implicating Scott and Coleman as the participants in the crime and designating the location of the stolen items. On the basis of

the information received from Griffin, a search warrant was obtained (T-137) and the police on May 4, 1966 (T-138) went to the home of one Carol Jean Craig and found a television and a coffee table. (T-138) These items were later identified by Mr. Bosworth at the police station as the items taken from his store.

At trial, Griffin testified (contrary to his affidavit as presented in Argument I, *infra*) that after refusing the defendants' request to haul some furniture, he went to the store in question and observed the defendants hauling furniture from the store to the car. (T-69, 70) The defendants then left and were seen again by Griffin down on 25th Street at Porters' and Waiters' in Ogden. (T-121)

Counsel for defense presented two witnesses, Carol Jean Craig and Annette House, as impeaching witnesses of Mr. Griffin. Mr. Griffin had asserted that he had never sold a television to any person (T-93, 98), but Miss Craig and Mrs. House both testified that they had purchased a TV from Mr. Copeland Griffin. (See T-178 and T-195 respectively) Each TV set purchased by the two defense witnesses was identified as one likely to have been stolen.

Prior to Mr. Griffin's testifying against the defendants, counsel for each defendant challenged Griffin's competency to testify. (T-64, 65) By Defense Exhibit No.



1 and argument of counsel it was pointed out that Copeland Griffin, following a charge against him for grand larceny was found legally insane and committed to the Utah State Hospital in November, 1962. Mr. Griffin never stood trial on the charge of grand larceny, rather he was released from the Utah State Hospital after his condition had improved and pled guilty to the reduced charge of petty larceny. (Defense Exhibit No. 1) At no time was a determination made as to Griffin's return to sanity, and the sentencing court even asserted that Griffin could be returned to the State Hospital for further treatment at the hospital's request.

On the basis of Griffin's prior insanity history, defense counsel objected to Griffin's testifying. Such objection was based upon the fact that he was at one time adjudged incompetent to stand trial and no termination order of his insanity having at anytime been rendered, Griffin was therefore, incompetent to testify. (T-64, 67) The trial judge, after asking several questions of Griffin, relating to present circumstances, found him competent to testify; his sanity was to be a matter for jury consideration. (T-64, 67).

## ARGUMENT

### Point I

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING COPELAND GRIFFIN TO TESTIFY AT TRIAL WITHOUT DETERMINING HIS ABILITY TO COMPREHEND AN OATH AND TO RECALL AND RECOLLECT FACTS.

The fact that a person has been adjudicated insane will not, alone, disqualify him as a witness in a trial. *State v. Moorison*, 259 P.2d 1105 (Wash. 1953); *Watkins v. Watkins*, 245 P. 2d 434 (Okla. 1952). Further, it is generally held to be within the discretion of the trial judge to determine whether a person, who has been adjudicated insane is competent to testify. *State v. Moorison*, *supra*; *Watkins v. Watkins*, *supra*. However, if a person has been adjudicated insane, a presumption arises that he is totally incompetent as a witness. *State v. Pethoud*, 332 P. 2d 1092 (Wash. 1958) Because Copeland Griffin's insanity determination had never been revoked, it was necessary that his competency to testify be adequately established. Such was, however, never done.

Under Utah law "[a]ll persons, without exception, . . . who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses." Utah Code Ann. §78-24-1 (1953) However, by Utah Code Anotated 78-24-2 (1) (1953), "[t]hose who are of unsound mind at the time of their production for examination," cannot be witnesses. Augmenting the rules above cited, with respect to the ability of a witness of unsound mind to testify is *State v. Herring*, 188 S.W. 169 (Miss. 1916), in which the court at 174 asserted:

(a) That a person of unsound mind is competent as a witness, if (1) upon examination he be found to be of sufficient mental capacity to

understand the nature of an oath — that is, to know it is both a moral and a legal wrong to swear falsely, and that false swearing is a punishable crime in law, and (2) if he be possessed of sufficient mind and memory to observe, recollect, and narrate the things he saw or heard; (b) that lawful confinement in an asylum for the insane, or an adjudication as an insane person, creates a prima facie presumption of absolute incompetency as a witness; but (c) such presumption is rebuttable by the voir dire examination of the witness alone, or when aided by extrinsic evidence; and (d) the burden of rebutting the presumption of incompetency in case of confinement in an asylum or adjudication as an insane person is on him who offers the witness; but (e) that absent such confinement, or adjudication as an insane person, the burden of showing incompetency on account of unsoundness of mind is on him who objects on that ground.

Such rules have also been recognized in *State v. Pethoud*, 332 P.2d 1092 (Wash. 1958), and *State v. Moorison*, 259 P.2d 1105 (Wash. 1953).

From the record it is clear that Mr. Griffin was adjudicated insane and that such insanity determination was never terminated. (See Defense Exhibit No. 1) Wherefore, it was incumbent upon the trial judge to determine or upon the prosecutor to show, notwithstanding the insanity finding:

(1) that Griffin was capable of understanding the nature of an oath, that is, it is wrong to swear falsely

and (2) that he possessed sufficient mind to observe, recollect and narrate things he saw and heard.

When Griffin was offered as a witness defense objected on the grounds of his adjudicated insanity. The judge then examined Griffin as follows at (T-66-67):

THE COURT: Cope, tell me where you are?

A. In Ogden.

THE COURT: Whereabouts in Ogden?

A. In the courthouse.

THE COURT: What are we doing?

A. Having court.

THE COURT: Who is on trial?

A. Sylvester Scott.

THE COURT: What is he charged with?

A. Who, him?

THE COURT: Mr. Scott.

A. Yes.

THE COURT: Yes.

A. Burglary.

THE COURT: What day of this week is it, do you know?

A. Tuesday.

THE COURT: Can you tell me about what time of day it is?

A. No, I can't.

THE COURT: Give me your best idea, what time do you think it is?

A. I would say about two-ten.

THE COURT: Can you see that clock in the back, up there, on the back wall? It's a pretty hard clock to see. Will you walk down there and tell me what time it is?

A. Yes.

THE COURT: Can you see it from here or do you want to walk down there?

A. Yes. (Walking closer to the clock).

THE COURT: What time is it?

A. Two-thirty.

MR. NEWHEY: Now then, for the Record, would the Court take judicial notice of the fact that the clock on wall doesn't show two-thirty.

THE COURT: Twenty-nine and a half.

MR. PHILLIPS: Would, Your Honor inquire of the date and year?

THE COURT: What year is it?

A. Sixty-six.

THE COURT: Do you happen to know the date?

A. No.

THE COURT: What month is it?

A. December.

THE COURT: Do you know the day of the month it is?

A. No, I don't

It will be readily apparent that the questions relate to Griffin's present situation only. No questions were asked Griffin which would reflect his ability to understand an oath nor to recollect accurately. The only reference bearing on Griffin's oath is at T-166 where the following takes place:

THE COURT: Qualify him as to memory as to yesterday's oath.

MR. NEWHEY: I will.

An examination of the record fails to disclose that Griffin was ever asked whether he understood the duty of an oath.

Although the trial judge has it within his discretion to determine whether a person adjudicated insane has sufficient capacity to testify, the trial judge abused that

discretion by failing to determine Griffin's capacity to understand an oath and recollect accurately.

That Griffin was incapable of either understanding an oath or recollecting past events accurately or both, is obvious from the numerous inconsistencies found in his statement. Griffin swore an affidavit to the police which led to the charging of the defendants with the crime of second degree burglary. Griffin's affidavit, which was never altered by Griffin (T-212) read as follows:

A. On about the 18th of April or the 19th, 1966, Binky Coleman and Sylvester Scott came to the home of my sister, Irene Turner' at about 30th and Wall. They asked me if I would haul some furniture from the store in South Ogden. I asked Scott how he got in the store. Sylvester told me that he had gone into the store before the store had closed and opened the window in the restroom. I told the two that I would not go with them, so they got another fellow to go with them. I took my girlfriend and we went out and parked it a little ways from the store and watched Binky and Sylvester go into the store and come out with a television and table.

The table was a long table and the television was a light colored one. I watched them for about 20 minutes. They took the things they had and went to Sylvester's home. They took the things into the basement of Sylvester's home. I saw this stuff at Sylvester's home the next day, Sylvester

had one of the televisions and the table using it upstairs. . . . (T-212) (A slight variance between Defense exhibit No. 2 and the record at T-212 should be noted.)

At trial Griffin's testimony varied substantially and importantly from his affidavit, as below listed:

1. Irene Turned was no Griffin's sister (T-78) but he asserted she was, both in his affidavit as well as on direct examination. (T-68, 212)
2. Griffin stated he never asked the defendants how they got into the store. (T-69)
3. He asserted he only saw two boys present at the store. (T-89), but his affidavit involved three.
4. The girlfriend who was supposed to have accompanied Griffin was identified as Daisy Mae Bush (T-217); however, when she was called, she denied having been with Griffin on the evening of the alleged burglary. (T-222) Also, an examination of Griffin's trial testimony seems to indicate he was alone at the time he allegedly observed the burglary. (See specifically T-95)
5. Griffin asserted that he never saw the fellows go in — only come out of the store. (T-89, 113, 119)



6. Griffin stated that he did not know where Sylvester Scott was living in April or May (T-73), yet he was adamant in his affidavit that the defendants went to Scott's home, and placed the things in his basement.
7. Further, at trial, Griffin claimed that when the defendants left, he turned around to follow them, but did not see them again for twenty-five to thirty minutes. When he again saw the defendants, they were coming out of Porters' and Waiters' on 25th and Wall street and the car involved in the burglary was parked on 25th. (T-121) After seeing the defendants and the car on 25th Street, Griffin went home. (T-122) Consequently, Griffin never saw the defendants place the items in any basement. It should also be noted that Griffin never saw the defendants around the suspect car, but concluded the defendants must have committed the burglary because of the way the defendants wore their hats, and also, because the car was present. (T-123) Griffin corrected his testimony at T-131 and indicated he also recognized the defendants at the store.
8. Griffin testified that he saw the TV and coffee table at Carol Craigs home three or four days (T-101), or several days (T-71) after the burglary. Wherefore, Griffin did not see the items at Scott's place the next day, as alleged in his affidavit. To claim Griffin may have mistaken the home of Carol Jean Craig for that of Sylvester Scotts', to attempt a reconciliation of his affidavit with trial testimony, will not hold; then Griffin, at trial, indicated Scott may have

been living on Childs, (T-73) yet Carol Jean Craig was identified by him as living at 32nd and Wall Avenue. (7-71)

An examination of the inconsistencies between Griffin's story as told on May 4, 1966, about two weeks after the burglary, and his testimony at trial on December 13, 1966 (T-1) evidences either that Griffin was incapable of observing and accurately recollecting past events or that he did not understand the nature and importance of an oath to testify truthfully, or both. Certainly some inconsistent statements on the part of a witness may be excusable due to lapse of time, but Griffin's testimony at trial was so substantially diverse from his affidavit that time alone would be no excuse.

Without question, Griffin, with or without his mental condition, could not recollect the events involved and/or did not know the meaning of an oath to tell the truth. Because Griffin had been adjudicated insane, without being rendered sane at the time of trial, under law he was presumed totally incompetent as a witness, and the burden was upon the prosecution to rebut such presumption, or upon the judge to examine Griffin as to his ability to know and understand an oath and to observe, recollect and narrate the things he saw or heard. *State v. Herring, supra* at 188; see *State v. Pethoud, supra*.

The court's allowing Griffin to testify following a meager examination of the witness, which examination

involved only his present awareness, was error, and an abuse of discretion. Since Griffin had been adjudicated insane the trial court should have examined Griffin to determine his capacity to understand an oath and to recollect, not simply have asked questions relative to his present capacity.

## ARGUMENT

### Point II

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LAW OF ACCOMPLICE AS SET FORTH IN UTAH CODE ANNOTATED §77-31-18 IN THAT THE EVIDENCE WAS SUFFICIENT TO WARRANT SAID INSTRUCTION.

Utah Law relating to the testimony of an accomplice is under §77-31-18 Utah Code Ann. (1953), as follows:

A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

The evidence produced at trial by the defense, if believed, could have established that Griffin was an accomplice in the crime allegedly committed by the defendants, and his testimony would then have necessitated

corroboration to convict the defendants. Utah Code Ann. §77-31-18 (1953).

At trial Griffin asserted that although he refused to help the defendants haul the furniture from U & I Furniture Store, (T-69) he nevertheless, watched the defendants remove the furniture from the store, and therefore knew that a crime was being committed. (T-69, 70) Allegedly the crime occurred in the morning of the 19th of April. (T-17, 19, 71) Yet, according to the testimony of Carole Jean (Moore) Craig, Copeland Griffin appeared at her home and offered to sell her a television set, a coffee table and a carpet on April 19, or 20. (T-177, 178) The TV set was later identified as the one taken from the U & I Furniture Store between the 18th and 19th of April. (Cf. T-138 where James Wold discovered the TV at Carole Jean Craig's Home after swearing a warrant on Griffin's affidavit.) (T-136-138) Also Mr. Bosworth identified that TV at the station (T-20) and matched the serial number at trial. (T-53, 54) Further, according to Annette House, she also bought a TV from Griffin about two months later, (T-195) which TV also resembled, according to Bosworth, one taken from the store. (T-221)

A logical conclusion from the evidence given is that if Griffin did not actually carry the furniture out of the store, he did in fact know that the furniture had been stolen, and knowing such did thereafter receive such property to sell the same, and such receipt was immedi-

ately after the commission of the crime. Wherefore, upon the evidence presentd, it would not be unreasonable to conclude that Griffin in fact was an accomplice to the burglary in that he was present when the crime was being committed, was aware of its commission, and aided and abetted in it commission by disposing of the fruits of the crime. His testimony, being the only evidence which connected the defendants to the burglary, would not, under §77-31-18 support a conviction of the defendant, Scott.

A Utah Case, which might seem contrary to the position claimed by defendant is that of *State v. Bowman*, 92 Utah 540, 70 P.2d 458 (1937). However since the evidence showed tha Griffin was in recent possession of the stolen goods with personal knowledge of the alleged crime, appellant contends that this case is distinguishable from that of *State v. Bowman*, *supra* as explained below.

In the *Bowman case*, *supra*, defendant appealed his conviction of burglary. One Hartman, after pleading guilty himself, testified against Bowman alleging they both were involved in the crime. Following the burglary the defendants contacted on Werz, and asked him to store some boxed merchandise for them. Werz' testimony was used to corroborate that of the accomplice Hartman. The question of whether Werz was an accomplice whose testimony needed corroboration, was left to the jury. On Appeal defendant claimed the trial court should have ruled as a matter of law Werz was an accom-

plice. In rejecting the defendant's position the court specifically points out that the testimony did not show Werz in fact knew a crime had been committed when he accepted the stolen property.

Appellant submits that Utah has adopted the position that an accessory after the fact is not an accomplice, (*State v. Bowman*, supra at 546, 70 P.2d at 461); rather, an accomplice, whose testimony needs corroboration under §77-31-18 Utah Code Ann. (1953), is one who is culpably implicated in the commission of the crime of which the defendant is accused, (*State v. Bowman*, supra at 548 70 P.2d at 461), or one who could be charged as a principal with the defendant on trial. *State v. Davie*, 121 Utah 184, 186, 240 P.2d 263, 264 (1952). Appellant, however, contends that because the evidence shows Griffin was closely related to the crime, the jury should have been given the duty to determine under proper instructions whether Griffin was an accomplice or principal, and if the affirmative be found, that a conviction could be rendered only if his testimony were independently corroborated.

Appellant realizes that no instruction regarding an accomplice was either made or requested, and such failure may be adequate grounds to reject the present argument. *State v. Hall*, 112 U. 272, 186 P.2d 970 (1947). However, it is proper for an appellate court to correct errors at trial with respect to instructions. Cf. *State v. Waid*, 92 Utah 297, 309, 67 P.2d 647, 652 (1937). Further,

the case above cited of *State v. Hall* is distinguishable from the instant case on the basis that in the *Hall* case the court found sufficient corroborating evidence existed to convict the defendant. In the instant case before the court, the only testimony offered by the State, other than that of Griffin's was that offered by Mr. Bosworth, the U & I manager and James Wold, the Ogden policeman. An examination of the testimony of both men indicates only that a crime had been committed; only Griffin's testimony implicates the defendants. Corroboation which merely shows that a crime has been committed or the circumstances thereof is insufficient as corroborating evidence. Utah Code Ann. 77-31-18 (1953).

Because the freedom of defendant is involved in this case, the appellant asserts that it was the duty of the trial court to instruct the jury with regard to the law of accomplice and permit the jury to pass upon whether the state's witness was in fact an accomplice whose testimony of necessity had to be corroborated. Such failure constituted error prejudicial to the defendant.

## CONCLUSION

For the reasons heretofore stated, appellant respectfully submits that the conviction and sentence for burglary in the second degree rendered against him should be reversed and dismissed. Alternatively, appellant would submit that a new trial should be granted.

Respectfully submitted,

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