1984

The State of Utah v. John Ray Garcia : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent, vs. JOHN RAY GARCIA, Defendant-Appellant.	)	Case No. 18973

BRIEF OF APPELLANT

APPEAL FROM THE CONVICTION OF AGGRAVATED ASSAULT, 76-5-103, UTAH CODE ANNOTATED (1953 as amended). IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA, JUDGE PRESIDING.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the judgment and conviction of aggravated assault, a felony in the third degree, in violation of Utah Code Annotated 76-5-103 (1953 as amended).

DISPOSITION IN THE LOWER COURT

Appellant was tried by jury on September 20-21, 1982 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge presiding. The jury returned a verdict of guilty to the charge of aggravated assault, a third degree felony, in violation of 76-4-103 Utah Code Annotated (1953 as amended). Appellant was later sentenced as provided for a third degree felony and placed on probation. Present counsel was retained to perfect Appellant's appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have his conviction of aggravated assault reversed and remanded back to the lower court for dismissal; or in the alternative, with instruction to reduce the conviction to one of simple assault, a lesser included offense.

STATEMENT OF THE FACTS

On March 26, 1982, Chuck Pitts and other employees of O.C. Tanner Company met after work at Green Street in Trolley Square (T.16). After some socializing for two or three hours, Mr. Pitts and Loretta Martinez were driven to O.C. Tanner's parking lot at 1930 South State Street by Michelle Egan Berry (T.21). At that point, Mr. Pitts and Ms. Martinez got into Ms. Martinez' car for the purpose of giving Mr. Pitts a ride (T.21). As Ms. Martinez' car was being warmed up the appellant arrived in his car (T.22). After a brief discussion with appellant, Ms. Martinez drove Mr. Pitts to the Willows Condominium near 5600 South State (T.26). As Mr. Pitts exited the car, appellant arrived (T.28). A scuffle between Mr. Pitts and appellant ensued, and Mr. Pitts received a laceration of the left eyebrow which required medical attention (T.66). No weapon was found at the scene of the altercation (T.85). Appellant was subsequently arrested after turning himself in to the police (T89).

ARGUMENT

APPELLANT'S CONVICTION OF AGGRAVATED ASSAULT SHOULD BE REVERSED FOR INSUFFICIENT EVIDENCE.

It is provided by 76-5-103(1) of the Utah Code Annotated (153 as amended) that:

> A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and:
>
> a) He intentionally causes serious bodily injury to another; or
>
> b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.

The appellant asserts that the evidence as presented in the instant case was insufficient to support a conviction under the above-cited authority.

The general rule to be applied in cases claiming insufficient evidence to support the conviction is that reasonable minds must necessarily entertain a reasonable doubt that the defendant committed every element of the crime charged. State v. Wilson, 565 P. 2d 66 (Utah 1977).

This court recently summarized the standards to be applied in reviewing claims of insufficient evidence in State v. McCardell, 652 P. 2d 942 (Utah 1982):

> "This court will not lightly overturn the findings of a jury. We must view the evidence presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man would not possibly have reached a verdict beyond a reasonable doubt. We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it.

> Thus, intent to commit [a crime] ... may be found from proof of facts which it reasonably could be believed that such was defendant's intent." [Citations omitted] 652 P. 2d 945.

Notwithstanding the presumptions in favor of the jury's decision, the appellate court can review the sufficiency of the evidence to support the verdict. In State v. Petree, 659 P. 2d 443 (Utah 1983) this court stated:

> "The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits must be sufficient to prove the defendant guilty beyond a reasonable doubt." 659 P. 2d at 444-445.

There is no evidence to support a conviction under subsection (a) of the aggravated assault statute, which requires proof that the defendant had a specific intent to inflict serious bodily injury and that the victim suffered a serious permanent impairment or protracted loss or impairment of the function of a body organ. State in Interest of Besendorfer, 568 P. 2d 742 (Utah 1977). In the instant case, the victim testified that he sometimes had blurring as a result of eye fatigue (T.46). The attending physician, Dr. Bruce Argyle, testified the victim sustained a certain injury (T.66). He also stated that if a pipe were swung a certain way and it struck in a different location, death could be caused (T.71). There is

no evidence of substantial serious permanent disfigurement, serious protracted loss or impairment of a body organ, or substantial risk of death from the injury sustained.

Likewise, there is insufficient evidence to support a conviction under subsection (6) of the statute, which requires a deadly weapon or such means or force likely to produce death or serious bodily injury.

Initially, there is contradicting testimony as to whether any weapon was involved. The victim indicates that he saw the appellant with an instrument in his right hand (T.30). The attending physician testified that the injury was inconsistent with that caused by knuckles on a fist (T.67). He further stated that the injury showed a mild abrasion suggesting that the hitting object had some texture but not much (T.69). The injury was characterized as consistent with a blow by a cylindrical heavy object (T.69). Omar Leeman testified that Loretta Martinez told him by telephone that Mr. Pitts was struck with a pipe (T.162).

In opposition to this evidence, testimony was given by Loretta Martinez that no object was used (T.135). Another witness testified that no weapons were used (T.152). Investigating officers were unable to locate a weapon (T.85).

The crux of the argument by appellant centers around testimony regarding the disposition of the alleged weapon. The victim testified that as he fell to the ground he heard a distinct sound of a metallic object hitting the black top

not far from where he fell (T.34). If that is the case, then the metal weapon should have been found at the scene. The theory advanced by the State at trial was that the weapon was carried away. However, the witness Trujillo testified that when appellant stood up after the incident, it appeared as though his glasses were broken and that he carried two pieces of something in his hand (T.158). In order for the jurors to reasonably conclude that a weapon was used and then carried away, they would have to likewise conclude that the metal pipe which the victim saw and heard was broken into two pieces. This conclusion is inherently unreasonable.

Under the circumstances of this case and the evidence presented, there is insufficient evidence to support the appellant's conviction.

CONCLUSION

Based on the general insufficiency of the evidence, the appellant respectfully submits that the conviction for aggravated assault should be reversed, and remanded to the trial court for dismissal; or in the alternative, with instructions to enter conviction for the lesser included offense of simple assault.

Respectfully submitted this day of February, 1984.

STEPHEN R. McCAUGHEY
Attorney for Appellant

CERTIFICATE OF DELIVERY

I certify that on the 8th day of February, 1984, two copies of the foregoing were placed for delivery by messenger to David L. Wilkinson, Attorney General, 236 State Capitol, Salt Lake City, Utah.