1964

State of Utah v. Robert Colvin : Brief of Appellant

Utah Supreme Court

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;
Robert Colvin; Appellant Pro Se;

IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent.

vs.

ROBERT COLVIN,
Defendant and Appellant.

Case No.
10080

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HON. ALDON J. ANDERSON, JUDGE

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant
Attorney General

Attorneys for Respondent

ROBERT COLVIN
Appellant,
Prop. Per.

Utah State Prison
Box 250
Draper,
Utah

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IN THE SUPREME COURT
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THE STATE OF UTAH, Plaintiff and Respondent. vs. ROBERT COLVIN, Defendant and Appellant.	Case No. 10080

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Reference in Appellant's Brief to the transcript of proceedings will be designated by the letters "TR" and the main record by the letter "R".

STATEMENT OF KIND OF CASE

On May 9, 1962, a judgment and sentence as provided by law was imposed upon appellant and one Virgil Lee Wood, a co-defendant, for the crime of robbery in violation of 76-51-1, Utah Code Annotated 1953 and for the crime of grand larceny in violation of 76-38-4, Utah Code Annotated 1953 (R. p. 49).

On May 9, 1962, a timely motion for new trial in behalf of both defendants was filed (R. p. 48). Thereafter, a joint appeal by both defendants was taken which, on May 7, 1963, Case No. 9734, by this Court was held to be prematurely filed and, on that ground, was remanded to the trial court for disposition of pending motions for new trial (Remittitur, No. 9734, R. p. 1).

On December 20, 1963, the trial court heard and denied said pending motions for new trial (R. p. 10, No. 10080).

The instant appeal was taken by appellant on January 20, 1964, solely in his own behalf and without benefit of counsel.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of conviction or, in the alternative, a new trial.

STATEMENT OF FACTS

At approximately 9:30 P.M., of Tuesday, on the 3rd day of April, 1962, Billy G. Mower and his wife, Vonda Mower, were seated in the front room of their home at 1367 Roberts Street, Salt Lake City, Utah (TR. pp. 5, 6).

Shortly after 7:00 P.M., Mr. Mower had received a phone call from an unidentified male person who inquired whether Mr. Mower was the collector of coins that worked at the cab company. Mower told the caller that he was whereupon the caller stated that he had a package or bundle of some that he would like to show Mower for purchase and, upon being informed that Mower was interested, the caller stated he would try and be at the Mower home by 9:00 P.M. (TR. p. 7).

Between 9:00 P.M. and 9:30

P.M., Mr. Mower was watching television. He had watched the Marshall Dillon show and recalled that it had ended and he had watched about five minutes of another program (TR. p. 8, 14-20) when a knock came on the door (TR. p. 8, 21).

Upon hearing the knock, Mr. Mower got up to answer the door. The porch light was turned on and, looking through the screen or storm door, he saw two men standing outside. Mr. Mower opened the door whereupon one of the two men inquired as to whether he was Mr. Mower. Mr. Mower replied that he was whereupon the man who had inquired came in and around Mower and into his front room. Mower identifies this man as being defendant Virgil Lee Wood and describes Wood as being five feet eleven, wearing a short zipper jacket, a cap, and carrying a package in the form of a brown paper sack with what appeared to be white adhesive tape wrapped around it (TR. pp. 9, 10).

Mr. Mower states that he observed the second man closely enough to notice that this man was shabbily dressed, had not shaved for about two days, that he was standing

to the right of Virgil Lee Wood, off to the left of the door just a bit, and standing right at the edge of the steps leading down from the porch. Mower could not identify this man as being appellant Robert Colvin (TR. p. 10, 12-24).

Mr. Mower states that Virgil Lee Wood stepped around him and he (Mower) turned around to see what was going on and found himself confronted with a sawed-off shotgun which was being pointed at his stomach and held by Wood (TR. p. 10, 27-30). Mr. Mower describes the sawed-off shotgun in close detail, describing it as being a large guage, the barrel being sawed off six to eight inches and the stock or butt of the gun being sawed off about five inches, that all the wood that was left on the stock was four or five inches, just enough for a hand, a little larger hand than his (Mower's) to fit around it, that the gun was taped with white adhesive tape and that Wood was holding it with the butt end against his (Wood's) stomach (TR. p. 11, 2-16).

Mr. Mower states that this was the only time he saw the gun and that, at this point, he was ordered to get his face down in the pillow on the couch, face down, and was

commanded not to look or he would get his brains blown out if he turned around (TR. p. 11, 24-30).

Vonda Mower, Mr. Mower states, during the course of the aforesaid events, was sitting next to the door, the couch coming out almost to the edge of the door, sitting there with her head back on the couch (TR. p. 12, 4-6).

Some conversation was had between the two intruders, Mr. Mower and Vonda Mower as to Mower being the boss of the cab company and as to the whereabouts of a large coin collection, Mr. Mower replying that he was only a dispatcher for the cab company and only being the owner of a small coin collection, describing the location of the coin collection in the next room and offering to supply the keys to the cabinet where the coin collection was kept and asking whether he could reach into his pocket and get the keys whereupon Vonda Mower told the two men that the keys were on the desk next to the cabinet (TR. p. 12, 10-26). Mower could not identify appellant as the second man involved in the robbery (TR. p. 17, 25) nor, despite the fact the porch light and kitchen light were both

on, neither could Venda Mower identify either Virgil Lee Wood or appellant (TR. p. 36, 26-30 and TR. p. 37, 1-4).

Subsequently, early in the morning of the 4th of April, 1962, about 1:00 A.M., at a police line-up, Venda Mower identified Virgil Lee Wood by his voice (TR. p. 37, 17-23).

However, again, this time applying the test of voice identification (TR. p. 37, 5-30 and TR. p. 38, 1-30), as well as face identification, Venda Mower failed to identify appellant.

Both Virgil Lee Wood and appellant were in aforesaid police line-up together (TR. p. 85, 22-30 and TR. p. 76, 6-10). Mr. Mower failed to identify appellant as being in said line-up (TR. p. 32, 16-20).

Virgil Lee Wood and appellant were arrested together about 1:00 A.M. on the 4th of April, 1962 (TR. p. 86, 30 and TR. p. 87, 1-6). See, also: (R. pp. 4, 5).

STATEMENT OF POINTS

I.

Failure of trial court to timely dispose of pending motions for new trial over period of nineteen (19) months violative of appellant's statutory and constitutional right to due process and equal protection of the law and constitutes gross error.

II.

The presumption of innocence requires the prosecution to prove guilt of an accused beyond a reasonable doubt and, absent direct evidence implicating appellant in robbery and grand larceny charged, an inference built upon an inference to bring conviction will not sustain such conviction.

ARGUMENT

POINT I

FAILURE OF TRIAL COURT TO TIMELY DISPOSE OF PENDING MOTIONS FOR NEW TRIAL OVER PERIOD OF NINETEEN (19) MONTHS VIOLATIVE OF APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND CONSTITUTES GROSS ERROR.

Judgment and sentence in the instant cause issued May 9, 1962 (R. p. 49). Timely motion for new trial was filed on May 9, 1962 (R. p. 48). Thereafter, appellant and his codefendant, Virgil Lee Wood, appealed jointly from their conviction (Case No. 9734). On May 7, 1963, this Court held said appeal to be premature and remanded said cause to the trial court with instructions to said court to consider and act on pending motions for new trial (R. p. 1, Remittitur). Despite this Court's order of May 7, 1963 - and only after appellant petitioned this Court for habeas corpus (See: Clerk's File, Utah Supreme Court) - the trial court elected not to consider and act upon said pending motions until December 20, 1963, at which time said pending motions for new trial were heard and denied (R. p. 10). Thereafter, the instant appeal was taken by appellant acting in his own behalf and without benefit of counsel.

Appellant respectfully submits that the whole record concerned with his timely motion for new trial, <u>said motion filed on May 9, 1962 and extending without disposition of motion by the trial court to December 20, 1963,</u>

is grossly violative of appellant's substantive and procedural rights, as follows:

Our statute, 77-38-4, Utah Code Annotated 1953, 'Application for, how and when made - Hearing-', is mandatory and not permissive, to wit:

> " The motion must be heard as soon as practicable, and the hearing thereof shall not be delayed longer than may be necessary." (Emphasis added).

Our statute, 77-39-1, Utah Code Annotated 1953, 'Who may appeal-', is mandatory and not permissive, to wit:

> " Either party in a criminal action may, except in cases appealed from a justices' court, appeal to the Supreme Court as prescribed in this chapter." (Emphasis added).

Our statute, 77-39-3, Utah Code Annotated 1953, 'By defendant, in what cases-', is mandatory and not permissive, to wit:

> " An appeal may be taken by the defendant:
>
> (1) From a final judgment of conviction.
>
> (2) From an order made, after judgment, affecting the substantial rights of the party."

Our statute, 77-62-9, Utah Code Annotated 1953, 'Power of board to parole prisoners - Duty of board to determine time when prisoner eligible for parole-', is mandatory and not permissive, to wit:

> "....In the case of all prisoners said board shall determine, within six months after the date of their commitment to prison, the date upon which they shall be eligible for consideration of parole; and all prisoners shall be promptly informed of the board's decision." (Emphasis added).

Our statute, 77-62-13, Utah Code Annotated 1953, 'Application for parole - Initiation - Duty with respect to prisoner's eligibility-', is mandatory and not permissive, to wit:

> " The release of a prisoner on parole shall be solely upon the initiative of the board of pardons, which shall consider each case as the prisoner becomes eligible under the provisions of section 77-62-9; provided, that such a policy does not deny the right of the prisoner to activate his own application, subject to the rules of the board of pardons. It shall be the duty of said board to maintain a record of the dates upon which the prisoner shall be eligible for parole as provided in section 77-62-9. On

" or before such date, in the case of each prisoner, it shall further be the duty of the board of pardons to consider the case of each such prisoner for parole and to cause to be brought before it all information regarding the prisoner referred to herein." (Emphasis added).

Appellant submits that the failure of the trial court to consider and act upon his timely motion for new trial, said motion filed May 9, 1962 and extending without disposition until December 20, 1963, effectively and unlawfully deprived him of his substantive and procedural rights under the due process and equal protection clauses guaranteed him under Article I, Sec't. 7 and Article I, Sec't 3 of the Utah Constitution and, as well, under Amendment XIV, Sec't 1 of the United States Constitution in that the failure or refusal of the trial court for 19 months to consider and act upon appellant's timely motion for new trial resulted in error so gross as to deprive appellant as to each of the statutory rights set forth hereinbefore, such gross error most certainly constituting reversible error.

POINT II

THE PRESUMPTION OF INNOCENCE REQUIRES THE PROSECUTION TO PROVE GUILT OF AN ACCUSED BEYOND A REASONABLE DOUBT AND, ABSENT DIRECT EVIDENCE IMPLICATING APPELLANT IN ROBBERY AND GRAND LARCENY CHARGED, AN INFERENCE BUILT UPON AN INFERENCE TO BRING CONVICTION WILL NOT SUSTAIN SUCH CONVICTION.

In the instant cause, Billy G. Mower and his wife, Vonda Mower, were the victims and sole eye-witnesses of the robbery and grand larceny for which appellant was tried, convicted and sentenced. Neither Billy G. Mower nor Vonda Mower could identify appellant as being one of the two persons who robbed them (TR. p. 10, 12-24); (TR. p. 17, 25); (TR. p. 36, 26-30 and TR. p. 37, 1-4).

Mr. Mower's testimony is particularly positive when he describes the second party to the robbery in considerable detail: how that person was dressed; that he was unshaven and that he had a two-day growth of beard; that person's exact position behind and at the side of the person Mr. Mower identifies as being Virgil Lee Wood; that person's exact position, in relation to the door, while standing on the porch; and that person's exact position as to just where he stood on the porch at the edge of

the steps leading down from the porch (TR. p. 10, 12-24).

The record discloses Mr. Mower was able to be this explicit because, before he opened the storm or screen door leading onto the porch where the two men who had knocked on the door were standing, before opening the door, Mr. Mower observed the two men standing there under the light of a porch light (TR. pp. 9, 10).

After observing the two men through the storm or screen door, Mr. Mower opened the door and, again, in his testimony, he was able to describe in detail the height and dress of the person whom he identifies as Virgil Lee Wood and, further, he describes Wood as carrying a package in the form of a brown paper sack with what appeared to be white adhesive tape wrapped around it (TR. pp. 9, 10) and, even when confronted with a sawed-off shotgun which was pointed at his stomach (TR. p. 10, 27-30), Mr. Mower managed to describe the shotgun itself in close detail, as well as the hand holding it, and the exact position in which the shotgun being pointed at him was being held (TR. p. 11, 2-16).

Bearing in mind that Mr. Mower testified he had observed the two men standing on the porch under the porch light which he had left on (TR. p. 9, 6-8), Mower described the man with Virgil Lee Wood as being shorter than Wood (TR. p. 12, 27) to the police first investigating the robbery. He definitely describes the man with Wood as being shorter (TR. p. 30, 27). The undisputed fact, however, is that appellant is the same height as Wood, being five feet eleven (TR. p. 85, 8-21).

Subsequently, at the police line-up in the early hours of the morning of the 4th of April, Mr. Mower failed to identify appellant as being one of the two men who robbed him (TR. p. 32, 4-19-20). But appellant was in that police line-up with Virgil Lee Wood (TR. p. 85, 27-30). Mr. Mower, however, testified that he didn't think appellant was in that line-up (TR. p. 32, 3-20).

Obviously, from the foregoing, appellant submits that the evidence is clear he could not possibly have been one of the two men who robbed Billy G. Mower and Vonda Mower at the point of a sawed-off shotgun.

Nor could nor did Vonda

Mower identify appellant as being one of the two men who robbed her and her husband, yet the room in which she saw both men and heard them talk was only semi-dark, the light in the kitchen being on (TR. p. 36, 13-20 and TR. p. 37, 3-4).

Not in the entire record on appeal is there one iota of direct evidence implicating appellant in the robbery and grand larceny for which he was convicted. There is circumstantial evidence in the nature of a finger print found on a brown paper sack (TR. 45, 1-26), the fingerprint being identified as appellant's fingerprint (TR. p. 51, 20-23) which leads to an inference or a presumption. Likewise leading to a further inference or presumption is appellant's testimony that he and Virgil Lee Wood had been in a bar together prior to the time of the robbery, and that, from approximately quarter to nine until being picked up by the police about 1:00 A.M., he was in the company of Wood. There is no evidence tending to implicate appellant as being an accessory or accomplice. The simple fact of record is that Billy G. Mower and Vonda Mower both failed to identify appellant as being one of the two men who carried a brown paper sack into their home and robbed them (TR. pp. 9, 10). There is

no other evidence.

This Court, in the light of the foregoing evidence, is respectfully invited to consider the rule of law relating to the presumption of innocence as it applies to appellant in the instant case where, as here, inference built upon inference led to a conviction. It is respectfully submitted that the prosecution failed to prove appellant's guilt beyond a reasonable doubt and, therefore, such conviction cannot be sustained

22A C.J.S., Criminal Law, Sec't. 581, relates that the presumption of innocence requires the prosecution to prove the guilt of an accused beyond a reasonable doubt. That the presumption of innocence is a conclusion drawn by the law in favor of an accused, by virtue whereof, when brought to court on a criminal charge, he must be acquitted, unless he is proved guilty. Presumption of innocence means that one accused of crime has the right to have the jury take such presumption to the jury room with them as the voice of the law, saying in effect: " You are not to guess or speculate as to this man's guilt. He is innocent, unless the evidence convinces you of his guilt to a moral

certainty."

U.S.- Dodson vs. United States, C.C.A., Va., 23 F. 2d 401, followed in Turner vs. United States, 25 F. 2d 1023.

The presumption of innocence is founded on the first principles of justice.....

N.J.- State vs. Cynkowski, 88 A. 2d 220, 19 N.J. Super. 243, affirmed 92 A. 2d 782, 10 N.J. 571.

and is intended, not to protect the guilty.....

Mont.- State vs. Hanlon, 100 P. 1035, 38 Mont. 557.

Neb.- Manfito vs. State, 287 NW 58, 63, 136 Neb. 658.

but to prevent, so far as human agencies can, the conviction of an innocent person.

Utah.- State vs. Sullivan, 307 P. 2d 212, 6 Utah 2d 110, certiorari denied Sullivan vs. State of Utah, 78 S. Ct. 74, 355 U.S. 848, 2 L. Ed. 2d 57.

16 C.J., Criminal Law, p. 535, note 51.

Presumption of innocence is a rule of law by which the necessity for evidence may be determined,

Ill.- People vs. Grant, 144 NE 813, 313 Ill. 69.

People vs. Isenhart, 259 Ill. App. 9.

Miss.- Carr vs. State, 4 So. 2d 887, 192 Miss. 15.

its only function being to cast on the state the burden of proving the guilt of an accused beyond all reasonable doubt.

Conn.- State vs. Hayes, 18 A. 2d 895, 127 Conn. 543.

State vs. Gardner, 151 A. 349, 112 Conn. 121.

State vs. Colonese, 143 A. 561, 108 Conn. 454.

Fla.- McKenna vs. State, 161 So. 561, 119 Fla. 576.

Miss.- Carr vs. State, supra, wherein it was held:

" The presumption of innocence, as a procedural aid, compels the state to assume and maintain the burden of proving guilt, which burden never shifts to accused."

The presumption of innocence requires that all doubts be resolved in favor of the accused,

Neb.- Schluter vs. State, 37 NW 2d 396, 151 Neb. 284.

Behrens vs. State, 1 NW 2d 289, 140 Neb. 671.

Wash. State vs. Levy, 113 P. 2d 306, 8 Wash. 2d 630, wherein it was held:

" In a criminal case, reasonable doubts on questions of law as well as on questions of fact must be resolved in favor of accused."

and it has been held that the presumption is sufficient to turn the scale in favor of accused where the case is doubtful.

Calif.- People vs. Hill, 175 P. 2d 45, 77 C.A. 2d 287.

Ind.- State vs. Reichert, 80 NE 2d 289, 226 Ind. 358.

Va.- Holland vs. Commonwealth, 55 SE 2d 437, 190 Va. 32.

Thomas vs. Commonwealth, 46 SE 2d 388, 187 Va. 265.

Smith vs. Commonwealth, 40 SE 2d 273, 185 Va. 866.

Sutherland vs. Commonwealth, 198 SE 452, 171 Va. 485.

Ala.- Burk vs. State, 114 So. 72, 216 Ala. 655, wherein it was held:

" Presumption of innocence is sufficient in itself to authorize acquittal."

The court and jury must resolve the facts and evidence on the theory of innocence rather than guilt if that can reason-

ably done.

Calif.- People vs. Lowe, 286 P. 697, 209 C. 199.

Neb.- Bourne vs. State, 216 NW 173, 116 Neb. 141.

Del.- State vs. Buckingham, 134 A. 2d 568, 11 Terry 469, wherein it was held:

" Defendants in criminal cases based on circumstantial evidence alone are entitled to have their presumption of innocence sustained as a matter of law when the inference of innocence is a reasonable one under the evidence."

Thus, where the facts or evidence is equally susceptible of different interpretations, the presumption requires the adoption of the interpretation which does not incriminate accused.

" (1). Where facts and all reasonable deductions from evidence present two theories, one theory of guilt and the other theory of innocence, the justice and humanity of law compel acceptance of theory consistent with innocence."

Ga.- Barnwell vs. State, 11 SE 2d 138, 100 Ga. App. 285.

Scroggs vs. State, 93 SE 2d 583, 94 Ga. App. 28.

Patrick vs. State, 44 SE 2d 297, 75 Ga. App. 687.

Ga.- Davis vs. State, 78 SE 866, 13 Ga. App. 142.

(2). Action that is consonant with innocence as well as guilt should be interpreted in light of innocence."

N.Y.- In re Rosen, 54 N.Y.S. 2d 632.

(3). If evidence is susceptible of two constructions or interpretations, each of which appears to be reasonable, and one of which points to guilt of accused, and other to his innocence, jury have duty to adopt interpretation which will admit of his innocence and reject that which points to his guilt."

Calif.- People vs. Watson, 299 P. 2d 243.

People vs. Roberts, 254 P. 2d 501, 40 C. 2d 483.

People vs. Malcolm, 269 P. 2d 694, 124 C.A. 2d Supp. 902.

N.J.- State vs. Brezina, 133 A. 2d 366, 45 N.J. Super. 596.

Where acts or circumstances are attributable to either an innocent or a criminal cause, the innocent hypothesis will be adopted.

Ill.- People vs. Benson, 166 NE 2d 80, 19 Ill. 2d 50.

People vs. Potter, 125 NE 2d 510, 5 Ill. 2d 365.

People vs. Crego, 70 NE 2d 578, 395 Ill. 451.

Ill.- People vs. Lynn, 52 NE 2d 166, 385 Ill. 165.

People vs. Burgard, 36 NE 2d 558, 377 Ill. 322.

People vs. Altiers, 138 NE 2d 61, 11 Ill. App. 2d 489.

The presumption of innocence requires that one be presumed to have acted with the least guilty intent consistent with his conduct.

Ga.- Dorsey vs. State, 34 SE 135, 108 Ga. 477.

Horton vs. State, 41 SE 2d 278, 74 Ga. App. 723.

Borders vs. State, 6 SE 2d 795, 61 Ga. App. 573.

A statute or rule of law placing on accused the burden of proof or of coming forward with evidence as to a particular issue does not deprive him of the presumption of innocence.

U.S.- United States vs. Fleischman, App. D.C., 70 S. Ct. 739, 339 U.S. 349, 94 L. Ed. 906, rehearing denied 70 S. Ct. 1017, 339 U.S. 991, 94 L. Ed. 1391.

The presumption of innocence is not destroyed by the fact that accused was in the company of the one who committed the

offense.

Ala.- Knitzer vs. State, 199 So. 745, 746, 29 Ala. App. 597.

Iowa.- State vs. Farr, 33 Iowa 553.

An incriminating circumstance from which guilt may be inferred must not rest on conjecture, and it is not permissible to pile conjecture on conjecture.

Calif.- People vs. Flores, 137 P. 2d 767, 58 C.A. 2d 764.

Suspicion is not evidence which will overcome presumption of innocence.

U.S.- Morei vs. United States, C.C.A. Ohio, 127 F. 2d 827.

Ky.- Patton vs. Commonwealth, 160 SW 2d 180, 289 Ky. 771.

The law will not permit the drawing of an inference from a supposed fact of whose existence there is no direct proof.

22 C.J., Evidence, Sec't. 8, p. 65, note 20.

An inference of fact should not be drawn from premises which are uncertain, but the facts upon which an inference may legitimately rest must, it is said, be established by direct evidence as if they were the very facts in issue. It follows that one presumption can-

not be based on another presumption.

22 C.J., Evidence, Sec't. 27 (2), note 70, 71, 72.

Utah.- Busse vs. Murray Meat, etc., Co., 45 Utah 596, 147 P. 626.

Utah Foundry, etc., Co. vs. Utah Gas, etc., Co., 42 Utah 533, 131 P. 1173.

" A presumption which the jury is to make is not a circumstance in proof, and is not, of itself, a legitimate foundation for a second presumption."

Ill.- Morris vs. Indianapolis, etc., R. Co., 10 Ill. A. 389, 395.

" To hold that the fact thus inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the region of barest conjecture."

Mo.- Moore vs. Missouri Pac. R. Co., 28 Mo. A. 622.

Diel vs. Missouri Pac. R. Co., 37 Mo. A. 454.

An accused must be proved guilty beyond a reasonable doubt of the crime charged, and facts which would warrant a suspicion, however strong, do not overcome the presumption of innocence.

Ala.- Turner vs. State, 35 So. 2d 624, 33 Ala. App. 607.

Ala.- Coffey vs. State, 12 So. 2d 863, 31 Ala. App. 120

CONCLUSION

Appellant respectfully submits that the prosecution, in the light of the foregoing, has failed to prove appellant's guilt of the robbery and grand larceny charged beyond a reasonable doubt and it is respectfully submitted that the best interests of justice will be served by reversal of the judgment of conviction or, in the alternative, that appellant's cause be remanded for new trial.

Respectfully submitted,

ROBERT COLVIN
Defendant and Appellant,
Prop. Per.

Address:

Utah State Prison
Box 250
Draper, Utah