1983

State of Utah v. George B. Archambeau : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18996
GEORGE B. ARCHAMBEAU,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA PRESIDING.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84111
Telephone: (801) 533-7606

Attorney for Plaintiff

TYRONE E. MEDLEY
311 South State Street, Ste 280
Salt Lake City, Utah 84111
Telephone (801) 531-1300

Attorney for Defendant

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DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84111
Telephone: (801) 533-7606

Attorney for Plaintiff

TYRONE E. MEDLEY
311 South State Street, Ste 280
Salt Lake City, Utah 84111
Telephone (801) 531-1300

Attorney for Defendant

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with aggravted robbery under Utah Code. Ann. § 76-6-302 (1982).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of aggravated robbery on September 16, 1982 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya presiding. On January 18, 1983, appellant was sentenced to an indeterminate term of five years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the verdict and judgment of the trial court.

STATEMENT OF THE FACTS

At 1:00 p.m. on February 5, 1981, a robber entered the south door of the Zion's First National Bank in Murray, Utah, near Fashion Place Mall. Dressed in denim blue overalls and a light blue windbreaker with a red ski mask pulled over his face (T. 15), the robber carried a sawed-off shotgun (T. 16) to the teller window of Julie terry (T. 16). The robber told the two clerks to lie on the floor and ordered Julie terry to give him the money (T. 16). Julie gave the robber approximately $6,000 (T. 24) while activating the bank's cameras (T. 14). After staying in the bank approximately two minutes (T. 32), the robber left by the south doors (T. 24-25).

Robert Cosaert entered the south doors of the bank just after 1:00 p.m. and encountered a man coming through the inner doors (T. 78-79). The man was dressed darkly with a ski mask that covered all but a six inch in diameter oblong area around his eyes, disclosing the robber's face from the bottom of his nose to just above the eyebrows (T. 80). Mr. Cosaert passed within thirteen or fourteen inches of the robber (T. 79-80) for a four or five second view of the eyes (T. 83). In a man's voice, the robber said "Excuse me" as he passed Mr. Cosaert (T. 83).

Mr. Cosaert had noticed that the robber was caucasion, had light-colored eyebrows, and light blue or grayish eyes (T. 81-82), with distinct crow's feet about his

eyes (T. 83). On April 3, 1981 (T. 130), Mr. Crosaert positively identified a photo of appellant from among six or seven photos displayed by Detective Robinson of the Murray City Police (T. 87-88). At trial, Mr. Cosaert stood at the same thirteen or fourteen inch distance while appellant wore a mask and noted the same features of height, weight, eye and eyebrow-color, and crow's feet around the eyes (T. 85-87).

Annette Cornia was working as a teller and went downstairs from the main lobby of the bank just before the robbery. (T. 106-107). As she descended the first two steps next to a large window, an individual walked pass the window on the sidewalk toward the south door of the bank. (T. 109, 118). The man had blond and wavy shoulder length hair and stood between 5'5" and 5'10" (T. 110). His head was not covered (T. 109-110) and Ms. Cornia recognized him as someone who had tried unsuccessfully to cash a check earlier in the week (T. 114, 120).

Ms. Cornia proceeded down to the basement, returning to the bank's lobby after approximately two minutes to discover that a robbery had occured (T. 113). She was convinced that she had seen the robber "because when I went down, there was no one in the bank and I couldn't have been down there for any amount of time, and when I came back there was no one there either." (T. 111). Ms. Cornia identified appellant as the man she had seen in the bank a week prior to the robbery (T. 121). At trial, Mr. Cornia stated that the

color of appellant's hair, the waive in the hair, and his facial profile matched that of the man who passed the window just before the robbery.

A search by warrant of appellant's residence produced a sawed-off rifle, a red and blue ski mask, panty-hose, a plane ticket in appellant's name from Salt Lake to Los Angeles to Honolulu for February of 1981 (T. 128), letters to and from Honolulu between appellant and girl friends, four bullets, along with a checkbook in appellant's name to Zion's First National Bank in Murray (T. 150).

Laureen Fite dated appellant during February of 1981 (T. 38). In February, appellant and Ms. Fite had a conversation concerning bank robberies (T. 40). Appellant showed Ms. Fite a picture of a stack of money taken at appellant's house (T. 44). On another accasion, appellant discussed the possibility of Ms. Fite obtaining overalls from her stepfather (T. 43). Ms. Fite remembered appellant saying "that we was going to rob this bank by Fashion Place Mall and after we robbed it we was going to go into Fashion Place Mall. We were going to take off the uniforms and pretend we were buying something . . . He said it had been robbed before, he and Paul." T. 43). Appellant described their previous robbery as having been committed by he and Paul in overalls with nylons and ski masks over their heads (T. 43). The deceased, Paul Watson, (T. 159) was described by three witnesses as having dark hair (T. 48, 147, 163) and brown eyes (T. 48).

Randy Sargent testified that his half-brother, Paul Watson, had call him in the early evening of February 5, 1981 and claimed that he had robbed a bank and taken about $5,000 (T. 159-160). However, Randy Sargent was not sure of which bank Paul claimed to have robbed (T. 162). Paul was later in Hawaii with appellant (T. 163).

Bill Guy Mourer worked as appellant's crew boss for Rocky Mountain Communications, a cable-TV line installer (T. 168-169). Mr. Mourer testified that appellant never left the job site on February 5, 1981 (T. 172) and offered appellant's time card with a date which had been changed from February 6 to February 5 (T. 173). Although Mr. Mourer remembered first hearing of appellant's arrest on April 1, 1981, (T. 173), he could not remember the exact date when he had corrected appellant's time card (T. 178).

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVICT APPELLANT.

Appellant contends that there was insufficient evidence presented to convict him of aggravated robbery because (A) appellant's alibi defense raised a reasonable doubt as to his presence at the robbery, and (B) the two eye-witness identifications are unreliable and insufficient to support a conviction. However, the existence of conflicting

evidence does not necessarily warrant reversal. Appellant's criticism of the eye-witness identifications goes to the credibility of their testimony rather than its admissibility. Viewing the evidence in the light most favorable to the jury verdict, the evidence was not so inherently improbable or inconclusive that reasonable minds could not have reasonably believed that appellant committed the robbery.

The standard of appellate review on insufficient evidence states that:

> We reverse a jury conviction for insufficient evidence only when the evidence [viewed in the light most favorable to the jury's verdict] is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt.

State v. Bradford, Utah, 663 P.2d 68, 69 (1983) (citing State v. Petree, Utah, 659 P.2d 443, 444 (1983)); State v. Linden, Utah, 657 P.2d 1364 (1983)(per curium).

Mr. Mourer's alibi testimony that appellant was on a job site at the time of the robbery does not necessitate such a reasonable doubt. In State v. Linden, Utah, 657 P.2d 1364 (1983), defendant presented three alibi witness placing defendant in California at the time of the Utah crime. Id. at 1365-66. Still, the conviction was affirmed on appeal because the evidence viewed in a light favorable to the verdict included three state witness who placed defendant in Utah near the time of the crime. Id

In the instant case, the state presented two witness, Mr. Cosaert (T. 77) and Ms. Cornia (T. 106), who described the robber and subsequently identified appellant. A girl friend, Laureen Fite, related conversations with appellant about bank robberies and plans to rob a bank (T. 40). A gun was found at appellant's residence that matched descriptions given at the bank by Jule Terry (T. 16) and which the jury could compare with bank photos of the robber and his gun (T. 49-50, R. 96). Evidence was presented of a trip by appellant to Hawaii soon after the robbery date (T. 138, 150). A ski mask and stocking were also found in appellant's residence (T. 128). In contrast, Mr. Mourer's memory was corroborated only by a time card with a changed date (T. 178). Mr. Mourere had not testified at the preliminary hearing (T. 180), and had an incentive to protect his job as a supervisor by exaggerating his constant supervision of appellant. Further, Mourer could not remember when he corrected appellant's time card (T. 178). Viewing the evidence in a light favorable to the verdict, Mr. Mourer's testimony was apparently not so credible to the jury that it must have raised a reasonable doubt in the minds of reasonable jurors. Nor was Mr. Mourer's testimony so credible as to make the state's evidence so comparatively inconclusive or inherently improbable as to raise a reasonable doubt. There was sufficeint evidence to support the conviction of appellant.

Appellant also contends that the identification by Ms. Cosaert and Ms. Cornia were given under conditions creating "a substantial likelihood of irreparable identification." (Appellant's brief at 5). However, the factors pointed out by appellant are not so extreme as to exclude their testimony, but merely reflect on its credibility and were openly and sufficiently brought to the jury's attention.

The standard in assessing whether a police identification procedure denies the accused due process considers whether "under a totality of the circumstances, they are so unnecessarily suggestive and conducive to irreparable mistake of identification as to deny the accused a fair trial." State v. McCumber, Utah, 622 P.2d 353, 357 (1980). Appellant offers no evidence or argument that the photo array shown to Mr. Cosart was suggestive. Instead, appellant contends that the observations by Cosart and Cornia were so brief and limited as to justify suppression of their testimony.

On the contrary, the rape victim in McCumber saw her assailant's face only briefly in a darkened room immediately after she had been awakened from sleep. Id. Noting this limited observation, the court still admitted her testimony:

> Such factors, however, although they may weaken the probative impact of the evidence offered, do not mandate suppression of the evidence in the name of due process without some showing that the identification procedures were themselves impermissibly suggestive.

Id.

Both Mr. Cosaert and Ms. Cornia made their observations at short distances, in full sunlight, with direct attention. Mr.Crosaet's identification was restricted to facial features observed through the opening of the robber's mask and the robber's height and weight. Ms. Cornia's identification was specific in describing hair color, hair wave and facial profile. Her detailed recognition was partially aided by a recognition of appellant from a previous encounter. There was sufficiently detailed observation by the two eyewitnesses to warrant the presentation of their testimony.

The length of their observations and whether either or both witnesses saw someone other than appellant goes to the probative value of their testimony and an ultimate issue of fact.

Viewing the evidence in a light most favorable to the verdict, the evidence as a whole was sufficient to support appellant's conviction. It was not so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt as to appellant's guilt. Petree, supra at 444.

POINT II

THE TRIAL COURT"S REFUSAL TO GIVE APPELLANT'S SUGGESTED TELFAIRE INSTRUCTION WAS PROPER AND WITHING THE COURT'S SOUND DISCRETION.

Appellant's suggested (T. 225) jury instruction on the purported vagaries of eyewitness identification (R. 140) paraphrases much of the jury instruction recommended in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). However, the trial courts refusal to give appellant's instruction was within its discretion and not prejudicial to appellant. Utah case law rejects the contention that a Telfaire-type instruction is mandatory in cases where eyewitness testimony may be determinative. Viewing the instructions as a whole, the jury was adequately instructed on the elements of the offense, the state's burden of proof, and the jury's role in assessing the credibility of witnesses. Given the available corroborative evidence, the weakness of appellant's alibi evidence, the conditions of observation, the number of eyewitnesses (2) and the consistency of their identifications, no Telfaire - type instruction was required. Even if there was error in failing to give the Telfaire instruction, any error was harmless beyond a reasonable doubt given the facts of the instant case.

Utah has refused to adopt a rigid rule requiring a Telfair isntruction in all cases where eyewitness testimony may be dispositive of a defendant's alibi. State v. Schaffer,

Utah, 638 P.2d 1185 (1981). Jury instruciton should be considered as a whole. State v. Caffey, Utah, 564 P.2d 777 (1977); Taylor v. Johnson, 18 Utah 2d 16, 20 414 P.2d 575 (1966). Schaffer upheld the trial court's refusal to give a Telfaire instruction where the jury was adequately instructed that (1) the state must proveeach element of the offense beyon a reasonble doubt, (2) the jury is the exclusive judge of the credibility of the witnesses, and (3) the jury must find that the state has proved beyond a reasonalbe doubt each element of the charged offense. Schaffer at 1187. Utah's refusal to adopt a rigid rule mandating the Telfaire instruction in all cases follows the plurality portion among federal district.[1] See, State v. Malmrose, Utah, 649 P.2d 56 (1982) (dicta at 61: "We have ot heretofore held that such an instruction is required. We believe the giving of it should be left to the discretion of the trial court.").

Jury instruction #3 adequatley explains the State's burden to prove essential allegations beyond a reasonable doubt (R. 98). Further instructions define reasonable doubt

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[1] See, e.g., Cullen v. United States, 408 F.2d 1178, 1181 (8th Cir. 1969); McGee v. United States, 402 F.2d 129, 131-132 (6th Cir.), cert. den., 449 U.S. 855, 101 S.Ct. 151, 66 L. Ed.2d 69 (1980) (ID instruction within discretion of trial court and need be given only when there is a danger of misidentification due to lack of corroborative evidence.); United States v. Masterson, 529 F.2d 30, 32 (9th Cir. 1976); United States v. Montelbano, 605 F.2d 56, 59-60 (2nd Cir. 1979). But cf., United States v. Barber, 442 F.2d 517, 528 (3rd Cir. 1971); United States v. Levi, 405 F.2d 380 (4th Cir. 1968); Jones v. United States, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966); United States v. Hodges, 515 F.2d 650 (7th Cir. 1975).

(Instruction #7, R. 101); stress the jury's role as the exclusive judge of the credibility of witnesses and the weight of the evidence (Instruction #8, R. 102); and emphasize the State's burden of proving each element of aggravated robbery beyond a reasonable doubt (Instruction #12, R. 106). Instruction #18 (R. 112) explicitly requires the State to prove beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime.[2] Instruction # 19 (R. 113) raises defendant's alibi defense and relates it to the reasonable doubt standard.[3] Instruction #20 (R. 114) states clearly that the defendant must present only enough evidence of his alibi to raise a reasonable doubt of his guilt and defendant need not prove his alibi by a preponderance or greater evidence.[4]

Appellant's requested Telfaire instruction (R. 140) would be redundant on the issues of burden of proof and jury responsibility for assessing the credibility of the witness's testimony.[5] Appellant is not entitled to a jury instruction that is repetitive or redundant, or "if it appears that the giving of the requested instruction would not have affected the outcome of the trial." State v. McCumber, Utah, 622 P.2d 353, 359 (1980).

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2 See Appendix A of Respondent's Brief.

3 See Appendix A of Respondent's Brief.

4 Id.

5 See Appendix B of Respondent's Brief.

During exaimination of the witnesses, there was adequate attention focused on the proximity and length of observation, the lighting conditions, the certainity of the identifications, and the length of time between observation and identification. Further, the State presented corroborative testimony of conversations between appellant and a girlfriend about robbing banks (T. 43) and a photograph seen by the girlfriend depicting appellant with a stack of money (T. 44). The State also introduced an airline ticket to Hawaii in appellant's name as well as a ski mask, stocking and gun found at appellant's residence (T. 153) that the jury could compare with bank photos of the robber (T. 20-24).

Contrary to the confusing evidence in State v. Malmrose, Utah, 649 P.2d 56 (1982), there are no discrepancies in the instant case between the identification and earlier descriptions by eyewitnesses. This case involves two calm, objective witnesses whose observations occurred in daylight in contrast to the Malmrose identification by one sexuallly assaulted victim at night. Appellant makes no argument of suggestive photo arrays as did the Malmrose defendant. Further, appellant's weak alibi witness also contrasts with the substantial corroboration of the alibi in Malmrose.

This case does not so delicately hinge on the vagaries of eyewitness identifiction that a Telfaire instruction must have been given to insure a fair trial. The purported hazards of eyewitness testimony are not acutely

present in these identifications. Ms. Cornia recognized appellant from a previous encounter. The observations by each witness were in good light, at close distances, and form only part of a case that includes substantial corroborative evidence.

No benefit would have followed from instructing the jury on the nuances of visual perceptions, or esoteric distinctions on types of memory. No Telfaire instruction was needed. Even if appellant's instruction should have been given, any error in failing to give it would be harmless beyond a reasonable doubt in that giving the requested instruction would not have affected the verdict in light of the overwhelming evidence against appellant. State v. McCumber, Utah, 622 P.2d 353 (1980); State v. Bell, Utah, 563 P.2d 186 (1977).

POINT III

APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant had a right to the effective assistance of counsel under the United States and Utah Constitutions. U.S. Const. art. VI and XIV, Utah Const. art 1 § 12. Appellant contends that he was denied effective assistance of counsel because counsel failed to subpoena additional witnesses to testify (a) as to appellant's alibi, and (b) as to statements by the deceased Paul Watson admitting Watson's commission of

the February 5 robbery. However, appellant fails to carry his burden of establishing the ineffectiveness of counsel. Counsel's failure to call additional witnesses was within counsel's legitimate legal judgment of trial tactics or strategy.

Appellant's right to the effective assistance of counsel entitles him to "the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interest of the accused and present such defenses as are available under the law and consistent with the ethcs of the profession." Codianna v. Mooris, Utah, 660 P.ed 1101 (1983) (quoting State v. McNicol, Utah, 554 P.ed 203, 204, (1976)). Appellant has the burden of establishing inadequate representation by proof that is "a demonstrable reality and not a speculative matter." State v. Malmrose, Utah, 649 P.2d 56, 58 (1982). Legitimate exercise of judgment as to trial tactics or strategy is not ineffective counsel even if the judgment appears unwise in retrospect. Codianna at 1109. Finally, "it must appear that any deficiency in the performance of counsel was prejudicial." Id. Error is prejudicial only if appellant shows a "reasonable likelihood that there would have been a different result" without counsel's error. State v. Gray, 601 P.2d 918, 920 (1979).

Appellant's claim of error is speculative rather than a demonstrable reality. Counsel for appellant called appellant's boss, Bill Guy Mourer, to testify as to appellant's alibi that he was at work during the robbery. (T. 167). There is no evidence in the record that other

members of the work crew were locatable for subpoena, would have corroborated Mourer's testimony, or would have been as credible as the boss. Similarly, there is no evidence in the record that additional witnesses other than Randy Sargent heard confessions of the deceased Paul Watson, that the jury would have believed such witnesses, or even that the jury would have been more inclined to believe Watson's statements than the evidence presented against appellant.

Appellant's decision not to subpoena additional witnesses was within counsel's legitimate judgment of trial strategy even if such witnesses were available. The expense of additional subpoenas, the time needed to present their testimony, or counsel's assessment of their credibility may have effected counsel's strategy. Even if hindsight questions that strategy because the jury rejected appellant's alibi and/or failed to believe that Paul Watson committed the robbery, unwise choices of strategy do not constitute ineffective counsel. McMann v. Richardson, 397 U.S. 759 (1970).

Finally, any deficiency in the performance of counsel ws not prejudicial in the sense of there being a reasonable likelihood of a different result without the error. The testimony of additional witnesses would still have been weighed against the State's evidence of two eyewitnesses, statements by appellant to his girlfriend and her testimony regarding a photograph of money, a trip by appellant to Hawaii

shortly after the robbery, and physical evidence found at appellant's residence that the jury could compare with bank photos. There is no likelihood of a different result given the strength of the State's case.

CONCLUSION

The evidence presented at trial was sufficient to convict appellant. Two witnesses at the bank identified appellant. There was also corroborative physical evidence introduced, as well as testimony concerning conversations between appellant and his girlfriend about bank robberies committed by appellant. Appellant's sole alibi witness was simply not as credible as the sufficient evidence against appellant.

The trial court's refusal to give appellant's suggested instruction or eyewitness identification testimony was proper and within the court's sound discretion. The Telfaire instruction is not required under Utah case law and not needed in the instant case.

Appellant was not denied effective assistance of counsel. Counsel's failure to call additional witnesses was within his proper judgment of trial strategy and tactics. Any supposed harm from such failure is purely speculative.

This Court should affirm appellant's conviction of aggravated robbery.

RESPECTFULLY SUBMITTED this 16 day of November, 1983.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius

EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief of Respondent, postage prepaid, to Tyrone E. Medley, 311 South State Street, Ste 280, Salt Lake City, Utah 84111, the 10th day of November, 1983.

Kathleen D Kellersberger

INSTRUCTION NO. 18

One of the questions raised in this case was the identification of the defendant as the perpetrator of the crime. The identity of the defendant is an element of the offense and the State has the burden of proving identity beyond a reasonable doubt. This means that you, the jury, must be satisfied, beyond a reasonable doubt, of the accuracy of the identification of the defendant before you may find him guilty of any offense. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime then you must find the defendant not guilty.

INSTRUCTION NO. 19

The defendant has raised the defense of alibi. The defendant in this case has introduced evidence tending to show that he was not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.

INSTRUCTION NO. 20

You are instructed that the laws of Utah do not require a defendant to establish the defense of alibi by a preponderance or greater weight of evidence. The laws of Utah require the defendant to bring forward some evidence which tends to show that he was not present at the time and place of the commission of the alleged offense. If the defendant has done this, and if such evidence when considered in connection with all other evidence in this case raises a reasonable doubt as to the defendant's guilt you must acquire him of the offense charged in the Information.

INSTRUCTION NO. 14

Identification testimony is an expression of belief or impression by the witness. In this case its value depends on the opportunity the witness had to observe whether or not the defendant was the person who took personal property in the possession of Julie Terry on February 5, 1981, and to make a realiable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to bserve the offender?

Whether the witness had an adequate opportunity to obser the person at the time will be affected by such matters as how long or short a time was available, how far or close the witness was from the offender how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(2) Are you satisfied that the identification made by that witness subsequent to the event was a product of his or her own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to her for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

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not given
JB