1983

State of Utah v. Wayne Sterling Pearson : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. ~~19053~~

WAYNE STERLING PEARSON, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID B. DEE, JUDGE PRESIDING.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Wayne Sterling Pearson, was charged by information with violations of the following provisions of Utah Code Ann. (1953), as amended: § 76-4-201, conspiracy to commit attempted burglary, attempted robbery, and attempted theft; § 76-4-101 and § 76-6-202, attempted burglary: § 76-4-101 and § 76-6-301, attempted robbery; § 76-4-101 and § 76-6-404, attempted theft.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury in the Third Judicial District, the Honorable David B. Dee, presiding. The only charges sent to the jury for determination were attempted burglary and attempted robbery. Appellant was convicted of those charges and sentenced to a term in the Utah State Prison of not more than 5 years for each offense, the sentence to run

concurrently with the sentence already being served for another offense.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order affirming the judgment of the lower court.

STATEMENT OF FACTS

On the morning of October 15, 1981, two juveniles, Brian Moss and Tony Sisneros, skipped school and headed for the corner of 15th South and 4th East, where they were to meet someone for the purpose of engaging in a burglary and/or robbery, (R. 577, 590-593). There they were picked up by Robert Smith, a co-defendant of appellant's, who had approached Brian Moss several weeks earlier about participating in a robbery involving money and jewelry (R. 982-988, 595-597). Moss had discussed the arrangement with his friend, Sisneros, who then agreed to participate in the planned robbery (R. 592).

After being picked up by Smith, the boys were driven to a gas station at 5th East and 21st South, where they were joined by appellant. During the ensuing conversation among the four, appellant asked the boys if they needed gloves. He then went to his car and returned with a roll of duct tape and gloves (R. 599-600, 1003-1004).

The four individuals left the gas station in Smith's car and drove to Moss's home. During the ride, there was some general conversation concerning the robbery and the need for a mask. Apparently, Moss was to find something at his home that could be used as a mask. One of the adults told him that a nylon stocking would be sufficient (R. 600-602).

When Moss rejoined the group after a brief stop at his house, appellant said he needed to stop at his brother's apartment at 28th South and 2nd East. During the drive, there was more general conversation about the robbery (R. 1014-1016). At the apartment, appellant left the group for a few minutes. While appellant was gone, Smith told the boys where to look and what to look for in the house they intended to burglarize. He also told the boys that if any trouble arose, apparently from the presence of the intended victim, they were to use the tape provided by appellant to secure the victims hands and feet. The gloves were to be used to avoid leaving fingerprints (R. 1017-1020).

After rejoining the others in the car, appellant asked if Smith had explained what the boys were to do. He then showed the boys a cap pistol which he said they were to use (R. 1022-1023). After this exchange, the car pulled away from the apartment, proceeding only a short distance down the street before it was stopped by a South Salt Lake Police officer (R. 1024).

While waiting to be questioned by the police, Moss observed appellant shoving something into a fan grate located in the latter's holding cell. Police subsequently recovered from the grate a business card upon which the name and addr of the intended victim were written (R. 1028-1031). Appellant's prints were found on that card (R. 378). Finally, although neither of them knew the name of the intended victim, Sisneros testified that they were to rob the home of an older woman (R. 611, 641-643).

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT OF ATTEMPTED BURGLARY AND ATTEMPTED ROBBERY.

The issue in the present case concerns the interpretation of Utah's attempt statute, Utah Code Ann. § 76-4-101 (1953), which provides in pertinent part:

> (1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.
>
> (2) For the purposes of this part, conduct does not constitute a substantial step unless it is stongly corroborative of the actor's intent to commit the offense.

Appellant argues that his conduct did not constitute a substantial step toward the commission of the offenses of attempted burglary and attempted robbery.

Utah's attempt statute is an adaptation of the Model Penal Code's definition of attempt. See Model Penal Code § 5.01. Thus, it is important to focus on interpretations given to Model Penal Code-type statutes, and not to rely heavily on common law distinctions between attempts and mere preparation, as appellant does. Common law definitions of criminal behavior are not applicable in Utah, and where there is a conflict between the common law and this state's criminal code, the statutes are to be construed liberally. State v. Maestas, Utah, 652 P.2d 903, 904 (1982).

The Model Penal Code's attempt statute was motivated by considerations of prevention. The drafters saw the need for a compromise position between the punishment of any suspect behavior and the curtailment of police action until the substantive crime had been committed. Their treatment of attempt was seen as "drawing the line further away from the final act," making the crime more one of purpose substantiated by an act strongly corroborative of that purpose. Model Penal Code § 5.01 (Tent. Draft No. 10, 1960). The emphasis is on what the actor has already done and not what remains to be done. Misner, "The New Attempt Laws: Unsuspected Threat to the Fourth Amendment," 33 Stan. L. Rev. 201, 211 (1981). Actions which likely would fall on the preparation side under

the common law could easily establish an attempt under the Model Penal Code: e.g., the gathering of materials to commit a crime, or the possession of certain instruments with the intent to use them in the commission of a burglary. Id. at 211, 221.

Thus, for purposes of attempt under Utah's statute, analysis must focus less on the nature of the defendant's activity standing alone and more upon whether that activity substantiates the intent to commit a crime. The behavior need not be incompatible with innocence; it need only be necessary to the consummation of the crime and such that a reasonable observer, looking at the behavior in context, could conclude beyond a reasonable doubt that it was undertaken with the purpose of violating the law. United States v. Manley, 632 F.2d 978, 987 (2d Cir. 1980).

> Whether conduct represents a substantial step toward the fulfillment of a criminal design is a determination so dependent on the factual context of each case that, of necessity, there can be no litmus test to guide the reviewing courts.

Manley, 632 F.2d at 988. The actual dividing line between preparation and perpetration (i.e., the determination of when an actor's conduct no longer constitutes preparation and becomes a substantial step toward the commission of the offense) is far from clear. Therefore, a review of several cases construing statutes following the Model Penal Code

format will be helpful in determining whether appellant's conduct constituted a substantial step toward the commission of burglary and robbery.[1]

In State v. Workman, 90 Wash. 2d 443, 584 P.2d 382 (1978), the defendant had spent the evening drinking at a bar with some friends. On the way home, he and a friend decided to hold up a gas station. They parked in an alley behind the gas station and took a gun from the trunk. They also had a gunny sack and stocking cap to be used as masks. They then hid in some bushes. At about 2:30 a.m., the gas station attendant decided to take a brief stroll. He caught sight of one of the defendants behind the phone booth. The attendant became suspicious and called the police. About this time the defendant and his friend decided not to continue, although they were unaware that the police had been called. As they were abandoning their hiding place, the police arrested them.

The court sustained an attempted robbery conviction and held that a substantial step differed from the concept of an overt act in that it need only corroborate the actor's intent. Where the preparation ended and the attempt began was held to be a determination for the trier of fact based on the facts and circumstances of the individual case. The court

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[1] It should be noted that some courts construing Model Penal Code-type statutes have reached rather extreme results on the question of what constitutes a substantial step. Compare Braham v. State, Alaska, 571 P.2d 631 (1977), with People v. Clerk, 68 Ill. App. 3d 1021, 386 N.E. 2d 630 (1979).

stated that this standard was directed to the defendant's actions, which demonstrated a firm purpose to commit a crime. This also allowed the police to intervene to prevent a crime when there was incriminating conduct.

United States v. Jackson, 435 F.Supp 434 (E.D.N.Y. 1976), aff'd 560 F.2d 112, cert. denied 434 U.S. 941 (1977), involved an interpretation of an attempt statute requiring the same elements as the Utah statute. The defendant had entered into a conspiracy to rob a bank. The conspirators assembled a sawed-off shotgun, shells, masks and handcuffs. They also covered their car's licence plates with cardboard. The plan called for the conspirators to arrive at the bank early Monday morning so they could enter with the bank manager and relieve him of the weekend deposits. They arrived too late to effect this plan and postponed the attempt for a week. In the meantime, one of the conspirators was arrested on an unrelated charge and told the police of the robbery plan.

The following Monday, the defendants drove up and down the street in front of the bank several times. One of the group left the car, looked into the bank and then rejoined the group in the car. They made several more passes in front of the bank, but after becoming suspicious that they were under surveillance, decided to abandon the plan. While driving away, they were pursued by the police and susbsequently arrested for attempted bank robbery.

The court found that gathering the materials for the commission of the crime, recruiting people to assist, and covering the license plates with cardboard were all substantial steps which constituted an attempt. The court specifically rejected the argument that the defendant had to near completion of the bank robbery. Nor was it necessary that there be any substantial progress toward that end. Any endeavor which was corroborative of the actor's intent was sufficient to satisfy the legal requirements for attempt. "The fact that further major steps must be taken before the crime can be completed does not preclude a finding that the steps already taken are substantial." 435 F. Supp. at 438.

As demonstrated by the cited authority and case law, the essence of an attempt is the existence of an intent to commit a crime, coupled with conduct strongly corroborative of that intent. Once the intent has been established, even slight acts that corroborate that intent constitute a substantial step. State v. Dale, Ariz., 590 P.2d 1379 (1979). Appellant does not contend that he lacked the intent to commit a burglary and/or robbery. His appeal is based solely on the sufficiency of his actions to constitute a substantial step. Accordingly, the inquiry is limited to whether his conduct was strongly corroborative of his intent.

The trier of fact determines what constitutes a substantial step. State v. Workman, 584 P.2d at 386. It is well established that an appellate court will only overturn a verdict challenged on insufficiency of the evidence "when the

evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt." State v. McCardle, Utah, 652 P.2d 942,945 (1982). It is the exclusive function of the jury to weigh the credibility of the witnesses and the weight of the evidence; that an appellate court might view the evidence as less than wholly conclusive is not sufficient to overturn a verdict on appeal. State v. Howell, Utah, 649 P.2d 91, 97 (1982).

As the evidence at trial demonstrated, appellant provided the duct tape and gloves which co-defendant Smith explained to the juveniles, Moss and Sisneros, were to be used to commit the burglary and/or robbery; the duct tape to tie up the victim, if necessary, and the gloves to avoid leaving fingerprints. Appellant also provided the cap pistol for use in the crime. Finally, appellant was stopped by the police in a vehicle containing his co-defendant Smith, the two juveniles recruited to participate in the burglary and/or robbery, and items to be used in the commission of the crime. Just like the conduct in Workman, 584 P.2d 382 (attempted robbery of a gas station), and in Jackson, 435 F. Supp. 434 (attempted bank robbery), appellant's conduct was sufficient to constitute a substantial step and support his conviction for attempted burglary and robbery. Certainly, the evidence was not so lacking and insubstantial that the jury could not conclude beyond a reasonable doubt that appellant had taken a substantial step toward the commission of the crimes charged.

CONCLUSION

This appeal requires an interpretation of UCA § 4-101 (1953). The statute should be analyzed by the standards of the Model Penal Code requiring a substantial step and not the common law distinctions between preparation and attempt. A substantial step requires only that the actor's conduct be strongly corroborative of his intent as determined by the circumstances of the case. The focus is not upon what has or has not been accomplished toward the commission of the offense, but on whether the actions corroborate intent Zickefoose v. State, Indiana, 388 N.E.2d 507 (1979).

Appellant intended to participate in a burglary and/or robbery and his actions were designed to achieve that purpose. In short, his conduct constituted a substantial step and thus his conviction should be sustained.

RESPECTFULLY submitted this 16th day of November, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief of Respondent, postage prepaid, to Joseph C. Fratto, Jr., Attorney for Appellant, 431 South 300 East #101, Salt Lake City, Utah 84111, this 16th day of November, 1983.

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