1984

The State of Utah v. Angelo Fernando Quevedo : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent :

-v- :

ANGELO FERNANDO QUEVEDO, : Case No. 19049

Defendant-Appellant :

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of Aggravated Robbery, Count I and Count II, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

The appellant, ANGELO FERNANDO QUEVEDO, was charged by Information with the crimes of Aggravated Robbery in Count I and Count II, First Degree Felonys in violation of Utah Code Ann. §76-6-302 (1953 as amended). Trial was held in the Third Judicial District Court on February 16 and 17, 1983, the Honorable Homer F. Wilkinson, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, ANGELO FERNANDO QUEVEDO, was tried and convicted in a jury trial of two Counts of Aggravated Robbery, A First Degree Felony in violation of Utah Code Ann. §76-6-302 (1953 as amended), and was sentenced to incarceration at the Utah State Prison for the undeterminate term provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks reveral of the conviction and judgement rendered below, and to be released forthwith upon a finding of insufficiency of the evidence. In the alternative, appellant seeks to have the case remanded for a new trial upon a finding of error on the subsequent Point.

STATEMENT OF FACTS

On December 5, 1983, at 9:00 in the evening, two masked men entered the Triangle Oil Company outlet at 2700 South 700 East in Salt Lake City, and with the aid of a pistol robbed the attendant of cash and his watch. (T. 14)

Some eighteen minutes later, the same two masked men robbed the attendant of a Chem Oil store located at 502 East 2100 South in Salt Lake City. The same weapon was used again. (T. 25) On the basis of a citizen's report a blue Chevrolet was observed with three individuals in the same area. (T. 41, 59) This vehicle attempted to elude the police, resulting in the suspect blue Chevrolet coming to a sudden stop and three individuals sprinting away. (T. 64) The two who exited the passenger side were apprehended and were convicted and sentenced for the robberies. (T. 201-205) These two individuals known as Joseph Vigil and Leonard Vigil refused, and still refuse, to name the individual who was driving the car. (T. 201

The driver exited the suspect blue Chevrolet on the driver's side and disappeared. (T. 79)

The police entered an apartment building located at 837 South 400 East, Salt Lake City, and talked to several people, one of whom was Linda Vigil in apartment 5A, questioning them as to whether they had seen a Tongan running through the building. (T. 234) Some time later, the police returned to apartment 5A and again spoke to Miss Vigil. She let them in and the following search revealed the petitioner in bed with Yolanda Vigil in a back bedroom. (T. 222)

At the trial the defense put on three witnesses. Joseph Vigil, one of the convicted robbers in this case testified that the third person, the driver, was not the defendant; and further, that the driver had not run toward the apartment house where the defendant was found. (T. 201-205)

Yolanda Pauline Vigil and Lisa Burkhard, who were in the apartment where the defendant was found testified that the appellant, Angelo Fernando Quevedo had been in the apartment for some time in bed with Yolanda Vigil. (T. 218, 231)

ARGUMENT

POINT I

THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO ESTABLISH THE GUILT OF THE APPELLANT BEYOND A REASONABLE DOUBT.

The driver exited the suspect blue Chevrolet on the driver's side and headed toward an apartment building located at 837 South 400 East, Salt Lake City. (T.)

The police entered the building and talked to several people, one of whom was Linda Vigil, questioning them as to whether they had seen a Tongan running through the building. (T. 234) Some time later, the police returned to apartment 5A and again spoke to Miss Vigil. She let them in and the following search revealed the petitioners in bed with Yolanda Vigil in a back bedroom. (T. 222)

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POINT I

THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO ESTABLISH THE GUILT OF THE APPELLANT BEYOND A REASONABLE DOUBT.

It is well settled that a reviewing court has the authority to review a case on sufficiency of the evidence. The standard for review was clearly stated in State v. Wilson, 565 P. 2d 66 (1977):

> In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence, it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime. 565 P. 2d 68. See Also State v. Fort, 572 P. 2d 1387.

In State v. Mills, 530 P. 2d 1272 (1975), this court also addressed when sufficiency of the evidence must be challenged:

> For a defendant to prevail upon a challenge to the sufficiency of the evidence to sustain his conviction, it must appear that viewing the evidence and all interferences that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt. 530 P. 2d at 1272.

This Court in the recent past has recognized the duty of a reviewing court to review a case on the sufficiency of the evidence where the issue is properly presented. Most recently this Court in State v. Petree, 659 P. 2d 443 (Utah 1983) stated:

> Considering that question . . . [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reversed the jury conviction for insufficient evidence only when the evidence so viewed is sufficiently inconclusive or inherently impallatable

> that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he was convicted. 659 P. 2d at 444.

See also, State v. Linden, 657 P. 2d 1367 (Utah 1983); State v. McCardle, 652 P. 2d 942 (Utah 1982); State v. Howell, 649 P. 2d 91 (Utah 1982); State v. Kerekes, 622 P. 2d 1161 (Utah 1980).

In this case, appellant contends that there was sufficient evidence of him being elsewhere and thus a reasonable doubt is raised. In State v. Meacham, 455 P. 2d 156 (1969) the Court specifically addresses this:

> ... it is nevertheless the burden of the State to prove the defendant's guilt beyond a reasonable doubt; and if the evidence of the defendant's being elsewhere is sufficient to raise a reasonable doubt as to his being involved in the crime, he should be aquitted. 455 P. 2d at 158.

See also State v. Wilson, 565 P. 2d (1977) 66 at 68 which again addresses this issue:

> The burden is upon the State to prove his guilt beyond a reasonable doubt; and if the evidence with respect to any defense, e.g., in this instance alibi, is sufficient to raise a reasonable doubt as to the defendant's guilt, he should be acquitted.

Appellant contends that the evidence introduced by the State at trial is insufficient in light of the defense testimony which established that the defendant had been with his girlfriend prior to his arrest and not with the convicted robbers. (T. 201, 218, 231) From the testimony of Linda

Vigil, it was shown that in the melee during the pursuit the officers were searching for a Tongan. (T. 234)

Again, it is important to point out that this Court, in a recent case, held that it is sufficient for acquittal that the evidence or lack thereof creates a reasonable doubt as to any element of the crime. (State v. Torres, 619 P. 2d 695). Here, it is respectfully submitted by the appellant, through his defense testimony that he has met the standard of reasonable doubt.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE THE APPELLANT'S REQUESTED INSTRUCTION ON IDENTIFICATION TESTIMONY.

At trial defense counsel proferred the following Instruction to the Court. That Instruction provided in part:

> 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 observe the offender?
>
> Whether the witness had an adequate opportunity to observe the person at the time will be affected by such matters as how long or short a time was available to observe the offender, 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 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 or hear the defendant, as a factor bearing on the reliability of the identification.

(3) Finally, you must consider the credibility of each identification witness in the same way as any other witness; consider whether she is truthful, and consider whether she had the capacity and opportunity to make a reliable observation on the matter covered in her testimony.

The burden of proof on the State extends to every element of the offense and the identity of the perpetrator is such an element. The State must prove beyond a reasonable doubt that Angelo Fernando Quevedo was the perpetrator of the offense. If after examining the testimony you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

The trial court refused to give the instruction as requested and exception was taken. (T. 239)

The dangers inherent in eyewitness identification evidence have been the subject of discussion for many years. In an oft-quoted passage, the late Felix Frankfurter, former

United States Supreme Court Justice observed:

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure...
>
> Evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the lease to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury. Frankfurter, The Trial of Sacco and Vanzetti.

The unreliability of eyewitness identification has been well documented in the literature and law review articles have been written on the subject in recent years.[1] The commentators note that reasons for this unreliability are found in the problems that are associated with human perception and memory, both of which play a vital role in eyewitness identification. A lengthy discussion of these problems are found in a law review article dealing with

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1. Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977); Due Process Standards for the Admissibility of Eyewitness Identification Evidence, 26 Kan. L. Rev. 461 (1978); Eyewitness Identification Evidence: Flaws and Defenses, [illegible] Mo. K.C. L. Rev. 407 (1980); Ellis, Davies, Shepherd, Experimental Studies of Face Identification, J Nat. J. Crim. Def. [illegible] (1977); Note: Voice Identification in Criminal Cases Under Article 9 of the Federal Rules of Evidence, 49 Temp Law Quarterly at 873.

the problems of perception and memory which are associated with hearsay testimony.[2] With respect to these issues the author noted:

> At a basic level perception is determined by objective structural factors such as the nature of the stimulus, the impact of the stimulus in the sense organs according to various physical laws, the operation of afferent neural pathways from the sense organs to the brain, and the cortical projection or reconstruction of the stimulus. However, the neurological system operates to transduce physical energy into a sensation, it is clear that interpretation is required to transform sensation into meaning. (Emphasis Added)
>
> * * *
>
> In organizing raw sensory input, the central nervous system is not a photograph recorder. . . Injury, pathology, drugs, youth and senility can seriously impair the accuracy of these processes. 1970 Utah Law. Rev. at 9.

In United States v. Barber, 412 F. 2d 517 (3rd Cir. 1971), the court gave a similar description of the processes involved in human observation, perception and memory. It then went on to state, with respect to eyewitness identification:

> Eyewitness identification testimony, therefore, is an expression of a belief or impression by the witness. If there is a high degree of precision and certainty in his expression,

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2. Stewart, Perception, Memory and Hearsay; The Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah Law Rev. 1.

> which is consistent with any prior statements and unshaken on cross-examination, the statement of the witness may be regarded as a statement of fact. If certainty is lacking, the expression is deemed to possess an evidentiary quality of inferior rank. Thus, where the circumstances surrounding the criminal act gave limited opportunity for observation or utilization of the sensory perception, or where uncertainty is expressed by the witness himself, or exposed by a past history of the witness' statements or demonstrated by cross-examination, the statement of identity should be considered as only an expression of opinion and should be accompanied by appropriate instructions as to its sufficiency and weight. To be sure, the courts have been generous in the admission of eyewitness identification in order to permit the jury to make its own assessment. The emphasis has been on inclusion of evidence, rather than exclusion; on credibility, rather than admissibility. [footnotes omitted] (Emphasis added) 412 F. 2d at 527.

In the instant case, the identification evidence is based upon the unreliable representations of officers due to the heat of the chase, and in less than ideal lighting.

The Supreme Court of Kansas in State v. Warren, 635 P. 2d 1263 (Kan. 1981), discussed the problems which are associated with the use of identification evidence. The court then took note of the particular problems that arise in the courtroom with that evidence.

> In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it. The trouble is that many judges have assumed that an "eyeball" witness, who

> identifies the accused as the criminal, is the most reliable of witnesses, and, if there are any questions about the identification, the jurors, in their wisdom, are fully capable of determining the credibility of the witness without special instructions from the court. Yet cases of mistaken identification are not infrequent and the problem of misidentification has not been alleviated.
>
> The Kansas procedure does provide certain safeguards to prevent the conviction of an innocent accused on the basis of unreliable eyewitness identification. Our trial courts have the power to suppress eyewitness testimony, if the eyewitness identification procedure rendered the testimony unreliable. Cross-examination and argument by defense counsel afford some protection. Unfortunately, these procedures have not solved the problem. Able defense counsel have attempted to combat unreliable eyewitness identification by two additional methods: They have called to the witness stand expert witnesses in the field of psychology to testify as to the various factors which may cause eyewitness identification to be unreliable. They have also requested the trial court to give a cautionary instruction stating the factors to be considered by the jury in weighing the credibility of eyewitness testimony. 635 P. 2d at 1241.

In Warren, the trial court refused to allow the defense to take either of these actions. The defendant's expert on eyewitness identification, was not allowed to testify and the court refused to give the same instruction as appellant requested in the instant case. After a lengthy discussion on the use of expert testimony to solve the problems associated with the eyewitness testimony, the Kansas Court stated:

> After considering these cases and the literature on the subject, we have concluded that requiring trial courts to admit this type of expert evidence is not the answer to the problem. We believe that the problem can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony. Such an instruction, coupled with vigorous cross-examination and persuasive argument by defense counsel dealing realistically with the shortcomings and trouble spots of the identification process, should protect the rights of the defendant and at the same time enable the courts to avoid the problems involved in the admission of expert testimony on this subject. 635 P. 2d 1243.

The instruction that the Kansas Court held should be given was that framed by the United States Court of Appeal for the District of Columbia in United States v. Telfaire, 469 F. 2d 552 (D.C. Cir., 1972).[3] The Telfaire court described the need for such an instruction stating:

> The presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise. In pursuance of that objective, we have pointed out the importance of and need for special instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt. This need was voiced in 1942 in McKenzie v. United States, [126 F. 2d 533] and it has

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3. This same instruction was cited with approval by Justice Stewart in his dissenting opinion in State v. Malmrose, 649 P. 2d 56 at 63 (Utah 1982), and as requested by appellant in this case.

been given vitality in our opinions of recent years -- following the Supreme Court's 1966 Wade-Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967) Stovall v. Denno, 388 U.S. 293 trilogy focusing on the very real danger of mistaken identification as a threat to justice. We refer to our post-Wade opinions in Gregory v. United States, 369 F. 2d 185 (1966) and Macklin v. United States, 409 F. 2d 174 (1969). These opinions sought to take into account the traditional recognition that identification testimony presents special problems of reliability by stressing the importance of an identification instruction even in cases meeting the constitutional threshold of admissibility. [footnotes omitted] 469 F. 2d at 555.

The appeals court then went on to hold the following:

...we have considered the fact that trial courts are often required to determine the admissibility of eyewitness testimony where issues of unreliability are raised. As pointed out by Chief Justice Schroeder in State v. Ponds, 227 Kan. 627, 608 P. 2d 946, in testing the reliability of identification testimony, the five factors mentioned in Neil v. Biggers [490 U.S. 188 (1972)] should be considered by the trial court. If these five factors should be considered in determining the admissibility of the testimony, it would seem even more appropriate to require the jury to consider the same factors in weighing the credibility of the eyewitness identification testimony. Otherwise the jury might reasonably conclude that the admission of the evidence the trial court vouched for its reliability. We think it clear that, in order to prevent potential injustice, some standards must be provided the jury so that the credibility of eyewitness identification testimony can be intelligently and fairly weighed. The giving of such an instruction will take only a couple of minutes in trial time and will be well

> worth it, if some future injustices can be avoided. [ ] P. 2d at 1244 [Emphasis by court]

For these same reasons a number of other jurisdictions have found that the model instruction from United States v. Telfaire, supra, should be given when warranted by circumstances of a particular case.[4]

This court has addressed this issue several times. While this court has not held in the past that such an instruction was required, it has never held that the giving of such an instruction would be error. State v. Malmrose, 649 P. 2d 56 (Utah 1982); State v. Schaffer, 638 P. 2d 1185 (Utah 1981). In State v. McCumber, 622 P. 2d 353 (Utah 1980), the issue of the refusal to give an instruction on eyewitness identification was raised; with respect to that issue this court stated:

> A criminal defendant is entitled to have a jury instructed on his theory of the case if there is any substantial evidence to justify such an instruction. Where, however, the requested instruction is denied, no prejudicial error occurs if it appears that the giving of the requested instruction would not have affected the outcome of the trial. Moreover, a defendant is not entitled to an instruction which is redundant or repetitive of principles enunciated in other instructions given

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4. The Telfaire instruction specifically has been either recommended or approved for use in numerous jurisdictions as reflected by the following cases: United States v. Holly 502 F. 2d [illegible] (4th Cir. 1974); United States v. Hodges, 515 F. 2d 650 (7th Cir. 1975); State v. Benjamin, 363 A. 2d 762 (Conn. 1976); State v. Galia, 514 P. 2d 1354 (Or. App. 1973), Cert. den. 417 U.S. 917 (1974).

> to the jury. The principal points of defendant's proposed instruction dealt with the State's burden of proof and the factors to consider in weighing the testimony of an eyewitness. All of these factors were adequately dealt with in other instructions presented to the jury by the trial court. As a result, we cannot agree that the denial of the proposed instruction constituted reversible error. [footnote omitted] 622 P. 2d at 359.

In the instant case, it is important to note that the general instruction on the presumption of innocence and burden of proof do not alleviate the prejudice in refusing to instruct the jury with respect to the inherent dangers of eyewitness and voice identification. This court has held that a jury need not ". . . go through such a tortuous process when that result could have been achieved by giving the defendant's requested instruction, or one of that substance." State v. Torres, 619 P. 2d 694, 696 (Utah 1980).

The giving of an instruction similar to that requested by the appellant would achieve in a straight forward manner the necessary function of informing the jury upon the dangers inherent in identification testimony. Further, such an instruction would have fairly stated the theory of the defense. It would appear that the giving of such an instruction would be neither illegal, unconstitutional or unfair, rather policy and fairness dictate giving such an instruction.

The circumstances surrounding the identification at the time of the arrest and chase made for a highly

unreliable identification. Further, the use of identification testimony under these circumstances give rise to a large amount of uncertainty. Even if this court were not to hold that a Telfaire type instruction must be given in all cases, it was certainly necessary in this case.

In the instant case, and in similar cases where the instruction is not given, the defense is placed in the position of mixing elements of argument with sound principles of law and policy as though the whole were argument. Basic fundamentals of the nature of identification testimony, as with other instructions on the law are to be applied to the facts in argument. It is the role of the judge to separate argument from legal principle, as is done in cases where alibi or other legal issues are raised. If the defense attorney is required to place those principles before the jury as part of argument without an instruction, the jury cannot, and will not separate the two.

A criminal conviction must be reversed if there is a reasonable likelihood that the verdict would be different if the requested instruction had been given. State v. Mitcheson, 560 P. 2d 1120 (Utah 1977). Appellant respectfully submits that had the jury had the opportunity to consider the evidence in light of this instruction, a different result would have been obtained.

CONCLUSION

The conviction of the appellant was accomplished through the testimony of several officers who, at different times, described different individuals as the appellant. Based upon the prejudicial failure to give appellant's Instruction and insufficiency of the evidence as discussed above, appellant respectfully requests the above requested relief.

RESPECTFULLY SUBMITTED this 27 day of March, 1984.

THOMAS A. MITCHELL
Attorney for Appellant

DELIVERED a copy of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this 27 day of March, 1984.