

1984

## The State of Utah v. Angelo Fernando Quevedo : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
 :  
 Plaintiff-Respondent, :  
 :  
 -v- : Case No. 19049  
 :  
 ANGELO FERNANDO QUEVEDO, :  
 :  
 Defendant-Appellant. :  
 :

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BRIEF OF RESPONDENT

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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ANGELO FERNANDO QUEVEDO, :  
Defendant-Appellant. :

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with two counts of aggravated robbery under Utah Code Ann., § 76-6-302 (1978).

DISPOSITION IN THE LOWER COURT

The appellant was tried before a jury and found guilty of two counts of aggravated robbery on February 17, 1983 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding. On February 23, 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 FACTS

On the evening of December 5, 1982, two aggravated robberies occurred just minutes apart in Salt Lake City (T. 13, 25). In both robberies, two masked men entered businesses and at gunpoint forced the employees to open cash registers and then lie face down on the floor while the men removed the money (T. 17, 19, 29, 30). A witness who saw the suspect vehicle leave the scene of one of the robberies notified the police that the car was headed up 5th East (T. 48).

Officer Ward, a Salt Lake City police officer, spotted the vehicle coming towards him, and as it went by he was able to get a good look at the driver (T. 61). Officer Ward, joined by officers in three other police cars, pursued the suspect vehicle until it pulled into a side street and collided with a chain link fence (T. 64, 78). The passengers and driver of the vehicle jumped out and fled (T. 78).

The passengers, Leonard and Joseph Vigil, who were later convicted of aggravated robbery, were immediately apprehended (T. 65, 81, 82). The driver, who avoided immediate apprehension, was recognized by Officer Halterman as appellant, whom he had known for three years (T. 77, 106, 108). Officer Fierro pursued appellant, coming within fifteen feet of him before appellant ran into an apartment complex (T. 115). Although Officer Fierro did not see which apartment appellant ran into, Fierro did hear a lower level apartment door slam (T. 115). After securing the apartment complex to

that escape was impossible, Fierro and other officers entered a lower level apartment occupied by Joyce Vigil, a sister to the two men just apprehended (T. 117). They found appellant in the back bedroom with his girlfriend, Yolanda Vigil (T. 119). As appellant was being taken out of the apartment, Joyce Vigil said, "well I don't know what he done. He just ran in here" (T. 191).

Four officers testified at trial that the driver of the vehicle was in fact appellant. Officer Ward saw appellant driving the suspect vehicle (T. 68); at the scene of the crash Officer Halterman recognized the driver as appellant (T. 77); Officer Fierro identified appellant as the man he pursued on foot (T. 114); and Officer DeWitt identified the jacket found with appellant as the one worn by the man he pursued into the apartment complex (T. 152).

In support of appellant's alibi defense, Yolanda Vigil and Lisa Burkhardt, Joseph Vigil's girlfriend, testified that appellant had spent the evening with Yolanda (T. 218, 221, 231, 234). Additionally, Joseph Vigil testified that appellant was not the driver of the suspect vehicle, but he would not say who the driver was (T. 202, 203).

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION.

Appellant contends that the evidence introduced by the state at trial was insufficient to support a conviction since the alibi testimony placing appellant with his girlfriend created a reasonable doubt as to his whereabouts during the commission of the crimes (See Appellant's Brief at 5, 6).

When reviewing an insufficiency of the evidence claim the Utah Supreme Court has applied the following standards:

This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury verdict, and will only interfere 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. Asay, Utah, 631 P.2d 861 (1981); State v. Lamm, Utah, 606 P.2d 229 (1980); State v. Gorlick, Utah, 605 P.2d 761 (1979); State v. Logan, Utah, 563 P.2d 811 (1977).

State v. McCardell, Utah, 652 P.2d 942, 945 (1982).

The independent identification by four police officers of appellant as the man who drove the suspect vehicle and then fled from it toward an apartment complex, and who minutes later was found in the bedroom of an apartment in that complex, certainly was sufficient evidence to support a finding that appellant was with the robbers, and not

elsewhere. It cannot be successfully argued that this evidence was so lacking or insubstantial that a reasonable person could not possibly have reached such a conclusion beyond a reasonable doubt.

Moreover, presentation of alibi testimony does not automatically create a reasonable doubt sufficient for acquittal. State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). Rather, "The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury." State v. Wilson, Utah, 565 P.2d 66, 68 (1977). The jury is not obligated to believe the evidence most favorable to the defendant rather than that presented in opposition by the state; and the existence of contradictory evidence or of conflicting inferences does not warrant upsetting the trial court's verdict. State v. Howell, Utah, 649 P.2d 91, 97 (1982).

Finally, appellant suggests that the evidence presented by the state was insufficient since one of the officers at the apartment complex was searching for a Tongan, not a Puerto Rican, appellant's nationality. However, this situation does not negatively impact on the sufficiency of the state's evidence. Officer DeWitt had heard over the police dispatch that the driver was male, with a large Afro, possibly Black or Tongan (T. 73). During the pursuit of the driver, Officer DeWitt could see that person was not Black and thus asked if anyone had seen a Tongan (T. 234). Since both Tongans and Puerto Ricans have dark complexions, DeWitt's

failure to attach the correct nationality to appellant is of little consequence when compared to the great weight of evidence presented by the state.

#### POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GIVE APPELLANT'S REQUESTED IDENTIFICATION INSTRUCTION WHEN A SIMILAR IDENTIFICATION INSTRUCTION WAS GIVEN.

Appellant contends that the trial court erred by refusing to give his requested "Telfaire" identification instruction. Twice in the past few months this Court has reviewed this issue and in both cases, State v. Archambeau, slip op. no. 18996 (decided March 26, 1984)(unpublished), and State v. Newton, Utah, \_\_\_P.2d\_\_\_, slip op. no. 19065 (decided April 23, 1984), the Court refused to require a "Telfaire" instruction when eyewitness identification is an issue. The matter is left to the trial court's discretion if the jury instructions adequately advise the jury on the law. The applicable standard of review, established in State v. Schaffer, Utah, 638 P.2d 1185 (1981), and reaffirmed in State v. Malmrose, Utah, 649 P.2d 56 (1982), Archambeau, and Newton, is: If the jury is "instructed that the burden was on the State to prove that the defendant was guilty beyond a reasonable doubt, that they were the exclusive judges of the credibility of the witnesses, and that in order to convict

they must find that defendant committed all of the elements constituting the offense," then a special identification instruction is not required. Newton, at 2.

As in Schaffer, the instructions used in this case informed the jury that the burden was on the state to prove appellant guilty beyond a reasonable doubt (R. 84, Instruction No. 7), that the jury acted as the exclusive judges of the credibility of the witnesses (R. 87, Instruction No. 10), and finally that the jury must believe beyond a reasonable doubt that appellant committed all of the elements of the offense before convicting him (R. 90, Instruction No. 13).

Moreover, Instruction No. 24 (See Appendix A), which was given, is almost identical to the proposed "Telfaire" instruction at issue in the Schaffer case. See Schaffer, 638 P.2d at 1187 n.1. It is merely a condensed version of the model identification instruction recommended in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). Both instructions indicate that identification is the key issue, that the state has the duty of proving identity beyond a reasonable doubt, and that the jury is to appraise the testimony of the eyewitnesses by considering: (1) the witness's capacity and opportunity to observe the offender, (2) whether the identification is a product of the witness's own recollection or knowledge, and (3) the consistency of the witness in recognizing the defendant as a participant in the offense. Although the "Telfaire" instruction is lengthier than

Instruction No. 24 and adds a reminder to the jury to consider the credibility of the witnesses, these differences are minor.

Therefore, appellant has no basis for complaining on appeal that the jury was not adequately instructed with respect to eyewitness identification testimony. Additionally, he has not shown that he was prejudiced by the trial court's refusal to give his requested Instruction No. 9 (See Appendix B), which simply is a more detailed version of the instruction actually given. That is, there is no reasonable likelihood the verdict would have been different had his requested instruction been given. See State v. Fontana, Utah, \_\_\_P.2d\_\_\_, slip op. no. 17796 at p.9 (decided March 2, 1984).

#### CONCLUSION

The evidence presented by the state, which included independent identification by four police officers of appellant as the man driving the suspect vehicle and minutes later apprehended by the officers, was certainly sufficient evidence to support appellant's conviction.

The trial court's refusal to use appellant's requested identification instruction was not an abuse of discretion; moreover, the instruction given adequately instructed the jury with respect to eyewitness identification testimony.

For these reasons, the state urges this Court to affirm the verdict and judgment of the trial court.

RESPECTFULLY submitted this 1st day of June, 1984.

DAVID L. WILKINSON  
Attorney General

*Dave B. Thompson*  
DAVE B. THOMPSON  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid, to Thomas A. Mitchell, Attorney for Appellant, 333 South Second East, Salt Lake City, Utah 84111, this 1st day in June, 1984.

*Kathleen Kellerberger*

APPENDIX A

One of the important issues in this case is the identification of the defendant as the perpetrator of the crime. The State has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. In appraising the identification testimony of the witnesses you should consider the following:

(a) Did the witnesses have the capacity and opportunity to observe the offender.

(b) Is the identification made by the witness a product of his own recollection or knowledge.

(c) Have the witnesses been consistent in recognizing the defendant as a participant in the offense.

If after considering these factors you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

## APPENDIX B

INSTRUCTION NO. 9

One of the important issues in this case is the identification of the defendant as the perpetrator of the crime. The State has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable 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 observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how near or close the witness was, 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 the witness after the offense was the product of his 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 him 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.

(3) You may take into account any occasions in which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with this identification at trial.

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

It is again to be emphasized that the burden of proof on the prosecutor extends to every element of the crime charged,

and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

*Sworn in substance HAW*

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<sup>10</sup> States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972)  
<sup>11</sup> States v. Barber, 442 F.2d 517 (3rd Cir. 1971)  
<sup>12</sup> v. Diaz, 384 N.Y.S. 2d 843 (N.Y. 1976)