

1984

State of Utah v. John Irwin Moon : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff/Respondent,	:	Case No. 19058
vs.	:	
	:	
JOHN IRWIN MOON,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM A VERDICT OF GUILTY ENTERED
IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY

MICHAEL D. ESPLIN
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, Utah 84603

Attorney for Defendant-Appellant

DAVID L. WILKINSON
UTAH ATTORNEY GENERAL
236 State Capitol
Salt Lake City, Utah 84111

Attorney for Plaintiff-Respondent

FILED

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43 East 200 North
P.O. Box "L"
Provo, Utah 84603

Attorney for Defendant-Appellant

DAVID L. WILKINSON
UTAH ATTORNEY GENERAL
236 State Capitol
Salt Lake City, Utah 84111

Attorney for Plaintiff-Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Defendant was charged with Aggravated Robbery, a first degree felony, in violation of 76-6-302, Utah Criminal Code, in that on or about the 18th day of December, 1982, in Utah County, Utah, he robbed Smith's Food King Market and in the course of said robbery, used a firearm or facsimile of a firearm.

DISPOSITION IN LOWER COURT

Defendant was tried by jury in the Fourth Judicial District Court of Utah County, the Honorable J. Robert Bullock, Judge, presiding, on the 9th and the 14th days of February, 1983. The jury found the defendant guilty as charged. The Court denied defendant's Motion for Mistrial upon the grounds of juror misconduct and prejudice. The Court also denied defendant's Motion for Judgment notwithstanding the verdict after the return of the jury.

Defendant was sentenced on the 14th day of February, 1983, to serve the statutory sentence with an additional year for the use of a firearm to be served consecutively to the first degree sentence.

RELIEF SOUGHT ON APPEAL

Appellant respectfully requests the Court reverse the verdict of 1 found by the jury.

STATEMENT OF FACTS

On December 18, 1982, four men wearing various disguises entered the Smith Food King store in Payson, Utah. One of the individuals carried a sawed-off shotgun. The individuals took approximately \$4,000.00 from the saf and checkstand tills. (R-163) The State called seven eyewitnesses to the occurrence consisting of employees and customers in the store who described the size, height and other characteristics of the four individuals involved in the robbery. Witnesses were also called who observed the perpetrators leave the scene and who followed to observe the robbers change vehicles. (R-282-285) A of the witnesses testified that four men were involved in the holdup. The four men arrived at the store in an orange pickup. (R-282) They drove to an apartment complex approximately one mile from the store. (R-292) The four individuals then got into two separate passenger vehicles, a red or purple one and a white one, and then left the area. (R-304)

None of the four individuals were identified by any of the witnesses to the crime or to the flight from the scene. The defendant Moon was driving a maroon vehicle in the company of a co-defendant David Sheppard. In the vehicle which was registered to Moon's father, was found \$1,000.00 in cash, a brown ski mask, a blue ski parka, and Halloween type mask, a sawed-off shotgun, and some brown gloves. The shotgun was on the floor of the vehicle and was partially hidden by the Halloween mask. (R-342)

Defendant David Sheppard, Appellant's co-defendant, decided to enter a plea of guilty at the close of the State's case. He then testified on behalf

the Appellant. Sheppard's testimony was that he had committed the robbery with three other individuals and that although they had used the Appellant's vehicle, he was not with them. Appellant presented an alibi defense in which he testified that he allowed the others to use his vehicle, but did not participate in the robbery.

ARGUMENT

POINT I

THE EVIDENCE SUBMITTED TO THE JURY WAS INSUFFICIENT FOR THE JURY TO FIND GUILT BEYOND A REASONABLE DOUBT.

The case against the Appellant was entirely circumstantial. There were no eyewitnesses who could place defendant Moon at the scene of the crime, in fact, the testimony of the eyewitnesses was exculpatory in that none of the general descriptions of the eyewitnesses as to the general physical characteristics of the robbers fits the defendant. Appellant was 6 ft. 3 inches tall and weighed 185 lbs.. He had blue eyes and wore a size extra large jacket. (R-463) The first witness for the State, Joe Hanna, testified that the men who robbed the store were all under 6 ft. tall, 6 ft. 1 inch at the most. (R-182) The second witness, Jackie Howard, testified that the three men she observed to be involved in the robbery were short with the exception of the one she placed by the door to the store holding the gun. She indicated that the man with the gun was taller, from 6 ft. to 6 ft. 4 inches tall. (R-205, 212) This witness also testified that one of the men weighed approximately 250 lbs..

Another State witness, a Mrs. Cox, testified that the individuals who were involved in the robbery were all under six ft.. She also described the eyes of one of the men as being dark in color, not blue. (R-263, 272) She described the robber who had dark eyes as wearing a blue ski parka similar to State's

Exhibit 5. Mrs. Cox also indicated that the individual in the blue ski parka was 5 ft. 8 inches tall. (R-262, 266) Mrs. Cox also specifically recalled the color of the tennis shoes worn by the individual described above and when shown Exhibit 7, tennis shoes worn by the defendant at the time of his arrest, specifically testified that those were not the shoes worn by the man with the blue coat and dark eyes. (R-266)

All of the witnesses saw no more than four individuals involved in the robbery. In fact, State's witness Angela Stanton, who was parked in the parking lot saw the men run from a pickup truck into the store and then four or five minutes later, run back out. She testified that there were four men, three in the front and one in the back. (R-281, 283)

The State introduced several items of evidence found in Appellant's car at the time he was arrested in the company of David Sheppard, to wit: Exhibit 1, a ski mask on the passenger side of the car covering a sawed-off shotgun; Exhibit 2, a sawed-off shotgun lying in front of the passenger side of the vehicle partially covered by the Halloween mask; Exhibit 3, pry bar found in between the driver's and passenger side on the seat of the car; Exhibit 4, blue parka found on the seat of the vehicle toward the driver's side. This coat had approximately \$1,000.00 in cash in one of the pockets. This money was alleged by the State to be a part of the approximately \$4,000.00 taken in the robbery; Exhibit 5, white tennis shoes belonging to Appellant; Exhibit 6, brown coat found in the rear of the car; Exhibit 7, Levis worn by David Sheppard; Exhibit 8, blue tennis shoes; Exhibit 9, pair of brown gloves taken from vehicle; Exhibit 10, pair of brown gloves taken from vehicle; Exhibit 11, \$126.39 taken from Appellant from his wallet; Exhibit 12, \$1,102.50 taken from the pocket of the blue parka, Exhibit 5; and, Exhibit 13 and 14, photographs of Appellant

vehicle

Appellant introduced defendant's Exhibit 18, a gray/white parka size extra large, identified by Appellant to belong to him and Exhibit 19, a box of hair sample slides taken from the various objects found in Appellant's car and prepared and analyzed by the Utah State Crime Laboratory.

The Appellant called his former co-defendant, David Sheppard to testify on behalf of the Appellant after Sheppard had entered a plea of guilty at the close of the State's case. Sheppard testified that he had been involved in the robbery of the Smith's Food King in Payson. He indicated that he had been the man with the sawed-off shotgun described by the various witnesses. He indicated that he had been wearing Exhibit 8, the brown coat which he testified belonged to one of the robbers named Benjamin. He identified Exhibit 5, the blue parka, as belonging to him and indicated he wore the brown coat because it had a hood on it. (R-396, 397) Sheppard testified that the robbery was committed by himself, the fellow named Benjamin and two others, Joe and Brant. (R 399) He further stated that he did not know the Appellant prior to the robbery, having seen him for the first time after the robbery in Springville when Appellant's car was dropped off to him at which time he had been told by Benjamin that Appellant Moon would be going back to Salt Lake City and would give Sheppard a ride. (R-400) He identified Benjamin as carrying a crow bar and wearing the blue parka during the robbery in addition to the ski mask, Exhibit 1. He identified Joe as being the heavy set man who grabbed the manager, Joe Hana. Sheppard identified Brant as the man who went to checkstand No. 1. Sheppard testified that after the robbery, they jumped into the truck, three in the front and Sheppard in the back. (R-401, 403) He testified that he and Benjamin got into Moon's vehicle after the four left the area of the store and the other two got into another vehicle. Sheppard

stated he took the gun, the Halloween mask, and his coat with him. He also indicated the money had been split up and he received approximately \$1,000.00 plus \$100.00 which he was supposed to give to Moon for the use of the car. (R-403, 404, 409)

Sheppard stated Benjamin drove the car over back roads to Springville to the 7-11 store where Appellant showed up a minute or so after they had arrived. He had no conversation with Moon about the robbery, only casual conversation during which Moon indicated that he needed to stop by his mother's home in Orem before going to Salt Lake. (R-429, 430)

Defendant next called Alan Steve Garrett, a criminalist at the Weber State Crime Lab who had collected hair samples from the various items of evidence from Appellant's car and compared the unknown samples from the evidence with known samples from the Appellant and David Sheppard. Mr. Garrett also compared fingerprints found on the various items of evidence with known prints from Sheppard and Moon. All tests were done at the request of the State. The witness testified that although he was able to identify and positively match some of the sample hairs from Sheppard with those from items of evidence, he found no such matches in the case of Appellant's hair samples. The hair from Sheppard's samples matched hair taken from the brown corduroy coat and the Halloween mask which Sheppard had testified he had been wearing at the time of the robbery. (R-443, 447) Garrett indicated that there were no prints taken from the items of evidence which matched the fingerprints of the Appellant. (R-441)

The Appellant testified that he had come down to Orem, Utah from Salt Lake to visit his parents the night before the robbery. He indicated that he had previously agreed to let a fellow named Benjamin use his vehicle to get some money and some money from an individual who had burned him in a drug deal in return

the money or some of the drug. He was to leave his car at the 7-11 in
Springville and it would be returned in about a half hour. (R-459, 460)
Appellant stated that he was watching from across the street when the car returned
to the 7-11. He indicated it was dark at that time so he could not see who was
driving when the car pulled in. He testified that he noticed some cloth items in
the vehicle but did not pay particular attention to them and could not see them
because it was dark inside the vehicle. He testified to seeing Sheppard in the
car and to a conversation concerning a ride to Salt Lake. He indicated to
Sheppard that he had to stop at his mother's home prior to going to Salt Lake.
He stated that Sheppard never mentioned anything about the robbery, the money, or
the gun prior to their being stopped as he exited the freeway to go to his folks'
home. (R-461, 462)

The Appellant gave the same explanation to the arresting officers when
questioned after being stopped and placed under arrest. (R-387, 388)

From the foregoing, it is apparent that the State never produced any
direct evidence which placed Appellant at the scene of the robbery or any
evidence that he participated in the planing of it. To the contrary, the
evidence of the State excludes Appellant from the descriptions given by the
various witnesses to the commission of the crime. This Court, when faced with
cases based upon circumstantial evidence, has stated that the evidence must be
looked upon with caution, and every reasonable hypothesis except the guilt of the
defendant must be excluded. State v. John, 586 P.2d 410 (1978). See also
State v. Schad, 470 P.2d 246 (1970) and State v. Romero, 554 P.2d 216
(1976). In the present case, the only direct evidence concerning the identity of
the men involved in the robbery was given by David Sheppard. His testimony was
uncontroverted by any evidence offered by the State, and, in fact, was

corroborated by the other testimony and physical evidence received by the

Sheppard's testimony concerning the items of disguise which he claimed to be wearing was borne out by the evidence of hair comparisons made by Mr. Galt. Sheppard's hair matched samples found on the brown coat and inside the old Halloween mask. There was approximately \$4,000.00 taken in the robbery and \$1,000.00 found in the Moon vehicle in the coat belonging to Sheppard. The coat, Exhibit 5, was size Large, as opposed to Moon's coat, size Extra Large. It would seem a logical inference from the evidence that if both Moon and Sheppard had been involved in the robbery there would be two shares of the proceeds, i.e., \$2,000, instead of only one share in the vehicle. Appellant had a little over \$100.00 on his person when arrested.

Further, if Sheppard was the tall individual by the door with the sawed-off shotgun as he testified, none of the descriptions of the eyewitnesses fit Appellant. The only tall man described by witnesses was by the door with the gun. The others were all under 6 ft.. Additionally, the descriptions and locations in the store of the various robbers as described by Sheppard matches the general descriptions and locations described by the witnesses.

Based upon the foregoing, Appellant respectfully submits there is not sufficient evidence upon which to find defendant guilty beyond a reasonable doubt. There is a reasonable hypothesis based upon the evidence which is consistent with the innocence of the defendant.

POINT II

THE COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR MISTRIAL
BASED UPON JUROR MISCONDUCT.

The Constitution of the United States by virtue of VI Amendment and

Constitution of the State of Utah, Articles I, Section 12, guarantees the Appellant a fair trial by an impartial jury. Encompassed within that right is the right to have the jury withhold judgment until the entire evidence in a case has been presented and the jurors have been instructed on the law and retire to deliberate among themselves. The jury in this case had been so advised by the Court several times during the trial. In fact they had been expressly warned not to form any opinions prior to having heard all of the evidence. (R-134, 315) In the present case, during one of the recesses, an attorney observing the trial indicated to defense counsel that during the recess following David Sheppard's testimony one of the jurors stated to another, "Well, looks like we only have to hear one more confession and then we'll be through." Defense counsel made the foregoing known to the Court by way of a chambers conference at which time counsel moved for a mistrial. The Court denied the motion but gave counsel permission to make the motion on the record at the close of the case. After the jury had left to deliberate, Appellant's counsel formally stated the motion and again moved for mistrial upon the grounds that the statement of the juror demonstrated that the juror had already reached a conclusion as to the guilt of the defendant without having heard a substantial portion of the defense. (R 524, 525)

The Appellant has a right to expect his case will be heard by jurors who are willing to keep an open mind until they have heard all of the evidence in the case and have been instructed by the Court concerning the law to be applied to that evidence. If there is any question concerning whether or not the defendant is going to be able to receive a fair consideration of his case, the Court should take steps to insure this basic right. The Court in the present case denied the motion for mistrial and took no action to insure that all of the jurors would

give defendant's case a fair consideration.

Based on the foregoing, it is respectfully submitted that Appellant should have been granted a mistrial.

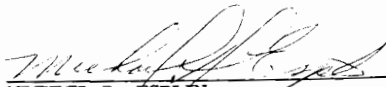
CONCLUSION

The Appellant's conviction for the crime of Aggravated Robbery should be reversed in that there was not sufficient evidence upon which to base a finding of guilt beyond a reasonable doubt, especially in view of the direct exculpatory testimony from one who admitted involvement. There was no evidence as to anything which Sheppard could expect to gain from giving false testimony concerning the nature and extent of Appellant's involvement in the crime.

Alternatively, the trial Court should have granted Appellant's Motion for Mistrial for the failure of at least one juror to keep an open mind until the evidence was fully presented and the jury instructed by the Court.

Based upon the foregoing, Appellant respectfully requests that his conviction in this matter be reversed.

DATED this 11th day of April, 1984.


MICHAEL D. ESPLIN
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, Utah 84603

DELIVERY CERTIFICATE

I hereby certify that I delivered two copies of the foregoing Brief of Appellant to the Utah Attorney General, DAVID L. WILKINSON, at 236 State Capitol Salt Lake City, Utah 84111 this 11th day of April, 1984.

