Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1984

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

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.David L. Wilkinson and J. Stephen Mikita; Attorneys for Respondent

Recommended Citation
Brief of Respondent, *Utah v. Moon*, No. 19058 (1984).
https://digitalcommons.law.byu.edu/uofu_sc2/4606

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST-DEGREE FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, THE HONORABLE J. ROBERT BULLOCK PRESIDING.

DAVID L WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

MICHAEL D. ESPLIN
P.O. Box L
Provo, Utah 84603

Attorney for Appellant

FILED
JUL 9 1984
Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST-DEGREE FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, THE HONORABLE J. ROBERT BULLOCK PRESIDING.

DAVID L WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

MICHAEL D. ESPLIN
P.O. Box I
Provo, Utah 84603

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CASES

Cases Cited (Continued)

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Aggravated Robbery, a first-degree felony in violation of Utah Code Ann., § 76-6-302 (1978) for the robbery of Smith's Food King in Payson, Utah, on December 18, 1982.

DISPOSITION IN THE LOWER COURT

Appellant was tried with his co-defendant before a jury on February 9 and 14, 1983, the Honorable J. Robert Bullock, presiding. The jury found appellant guilty of Aggravated Robbery on February 14, 1983.

Appellant made a motion for mistrial based on juror misconduct and prejudice. The motion was denied. Appellant also moved for Judgment N.O.V. based on insufficient evidence. This motion was also denied.

The trial court imposed sentence on February 14, 1983 of an indeterminate term of five years to life and an additional term of one year to run consecutively for use of a

firearm in commission of the crime.

RELIEF SOUGHT ON APEAL

Respondent seeks affirmance of the guilty verdict in the court below.

STATEMENT OF THE FACTS

On December 18, 1982 around 7:00 p.m., four men robbed the Smith's Food King in Payson, Utah (R. 154-156, 217-219, 255-258). Three of the men were tall and slender; in the six foot range, the fourth was about five feet seven inches in height (R. 169, 179). One of the men grabbed the store manager, threatened him with a knife and forced him to open the safe (R. 156, 158). Another of the men stood by the entrance to the store holding a double barrell bolt-action sawed-off shotgun and yelling for the others to hurry (R. 219, 222, 260). He wore a brown corduroy coat with a hood, levis and a Halloween mask that resembled an elderly man with a big nose and white hair (R. 196, 219, 243). He "seemed like he just towered" (R. 202).

The other three men wore ski masks (R. 223). One of the masks had an orange stripe around it (R. 223). Two of them wore blue ski-type parkas and another wore a green army fatigue coat (R. 223, 226). At least one of the men wore brown cotton gloves (R. 196, 198, 201).

One of them emptied the cash register while the safe was being opened (R. 223). He was carrying a crowbar which he used to strike one of the cashiers who had trouble opening her cash register (R. 240). He jammed the money into the pockets of his blue ski-parka and possibly into a bag (R. 209, 223, 241, 243, 258, 264). The third man also carried a crowbar which he used to threaten a customer to encourage the manager to hurry in opening the safe (R. 200).

Joe Hanna, the store manager, testified that all but the man with the knife were in the six foot range; from 5'11" to 6'2" (R. 182). He also stated that he was 5'7" tall himself (R. 179). Another witness testified that the only man who was short was the one who grabbed Joe whom she estimated was a head taller than Joe (R. 208, 212). A third witness stated that the two men by the safe were quite a bit taller than Joe (R. 233). Finally, Joe said that the man wearing the blue ski parka and taking the money from the tills was 6 feet or more (R. 159, 243, 258).

After gathering approximately $2,500-$3,000 from the cash registers and $1,200 from the safe, the men ran out of the store and got into an orange Ford pick-up truck without license plates (R. 167). They drove out of the store parking lot and up the street to a parking area outside an apartment building where they parked the truck and got into two other vehicles (R. 284, 298). One of these was an old red or purple colored Chevy and the other was an old, white Chevy Impala

(R. 298). Both cars drove north on Highway 91 (R. 298-299).

At about 7:39 p.m. Brent Shelby, a Highway Patrolman, saw a car matching the description of the maroon or purple car in the northbound lane of the freeway which he pulled over (R. 329-331, 333). There were two men in the car (R. 335). The driver was appellant, John Moon (R. 335). Inside the car were a brown ski mask with orange on it, a metal pry bar, a blue ski-type parka, a rubber Halloween mask with an old face and white hair, a sawed-off shotgun, a gold or brown corduroy coat, a light-colored corduroy coat with blue stripes and two pairs of brown gloves (R. 337-346). In the pocket of the blue ski parka was a large amount of money - $1,102.50 - approximately two fistsfull - in different denominations plus a roll of quarters (R. 339, 344, 367). All of the items except the light-colored corduroy coat and the cash were identified by witnesses as being or looking like the clothing and weapons used in the robbery (R. 162-163, 188, 196, 197, 200-202, 215, 220, 222, 224-226, 241, 257, 258). The red or purple car was identified as the one seen leaving the apartment building after the robbery (R. 298, 368).

Before all of the State's evidence was introduced, appellant's co-defendant, David Shepherd, changed his plea to guilty (R. 320). Later, Mr. Shepherd took the stand in appellant's behalf (R. 393). Shepherd testified that he was the robber who held the gun, the appellant was not one of the robbers and that his three accomplices were named Benjamin,

Brandt and Joe (R. 394, 398, 399, 400). According to Shepherd, after the robbery, he and Benjamin drove back roads to Springville taking about 10-15 minutes to return appellant's car to him (R. 400, 403, 424, 426). Shepherd said he never met appellant until after the robbery, when appellant gave Shepherd a ride in the car that Shepherd and Benjamin returned to appellant (R. 400). Shepherd was unable to provide the last names of any of his accomplices stating that he knew only Benjamin and Brandt prior to the robbery (R. 395, 398, 399, 408).

Appellant testified that Benjamin asked to borrow appellant's car to hold up a drug dealer who "burned" him (R. 458). He said he never knew Benjamin and never saw him, but that he left the car for him in a parking lot because Benjamin was a friend of a friend (R. 457, 458, 459). When appellant picked up his car, he said Shepherd was sitting in it and rode with him (R. 461). Appellant stated he was travelling to Orem at a normal rate of speed when the police stopped him (R. 462, 472). Shepherd never mentioned the robbery to him and appellant didn't look at the items that were found in the car (R. 462). Appellant was supposed to receive some money or some "pot" for the use of his car (R. 458) but did not know how much (R. 467). Appellant also stated that he is 6 feet 3 inches tall (R. 463).

A criminalist from the Weber State Crime Lab examined several items for hair matching that of appellant

(R. 441, 443). He found no hair on any item that appeared to be from appellant (R. 446). He testified that it was possible for a person to come into contact with something and shed no hairs on it (R. 449) and that a ski mask worn for five, ten, or fifteen minutes might not retain hair from the wearer (R. 452). Hair found on the brown corduroy coat and the brown and orange ski mask was similar to Shepherd's hair (R. 446).

In rebuttal, Kirk Mittelman, a police officer, testified that he travelled the most expeditious route from the offramp, where appellant was stopped, to Springville and then to the apartment building in Payson stopping at the Smith's Food King (R. 479-480). The officer travelled at normal rates of speed; 60 mph on the freeway and between 30-40 mph through Payson and Springville (R. 481). No time was allowed for any stops along the route (R. 479). The travel time was 26 minutes (R. 485).

Mittelman also drove from Smith's to the apartment building and then on the freeway to the point where appellant was arrested (R. 486). No time was allowed for stop overs and a normal rate of speed was observed (R. 486-487). The total travel time for this route was 18 minutes 30 seconds (R. 487).

ARGUMENT

POINT I

THE EVIDENCE INTRODUCED AT TRIAL WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.

Appellant claims that the evidence presented at trial was insufficient to support his conviction for Aggravated Robbery. In considering a challenge to the sufficiency of the evidence supporting a conviction, this Court has always applied the following standard of review.

> 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. Bingham, Utah, No. 18774, slip op. at 4 (June 13, 1984) State v. Petree, Utah, 659 P.2d 443 (1983). In State v. Kerekes, Utah, 622 P.2d 1161 (1980), the Court also stated:

> It is the defendant's burden to establish that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime charged.

Id. at 1168, emphasis added. In addition, this Court reaffirmed its deference to conclusions reached by the jury in matters solely within its province:

> It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of the Court to substitute its judgment for that of the fact-finder.

State v. Jolley, Utah No. 18559, slip op. at 2 (July 6, 1983), quoting State v. Lamm, Utah, 606 P.2d 229, 231 (1980).

Appellant has not met his burden of establishing that the evidence against him was so inconclusive or insubstantial that reasonable minds must have entertained a reasonable doubt as to his guilt. He argues that, because the evidence was circumstantial and he offered an explanation of the fact that he was arrested while driving one of the cars used to escape from the robbery, the jury was required to believe his exculpatory evidence, which the state did not directly controvert. He further argues that none of the witnesses could identify him nor did they guess his exact height. Therefore, he urges this court to overturn the jury's verdict.

That the evidence was circumstantial is not alone sufficient grounds for reversal. The evidence must also be sufficiently inconclusive or inherently improbable that reasonable minds could not have found guilt beyond a reasonable doubt. Petree, 659 P.2d at 443. The evidence in this case supports the jury's verdict and shows that appellant along with David Shepherd and two others robbed the Smith's Food King on December 18, 1982.

Witnesses said that three of the robbers were tall and slender-built (R. 169) and the shorter man was over 5 feet 7 inches, possibly a "head" taller than that (R. 179, 208, 212). One of the taller men, wearing a blue ski parka and brown cotton gloves, removed the money from the cash registers and stuffed it into his pocket (R. 196, 223, 243, 258). Three of the men wore ski masks and the fourth wore a Halloween mask (R. 196, 223). One man held a sawed-off shotgun and another carried a tire iron or crowbar (R. 222, 240).

Appellant was discovered driving one of the cars used to escape from the scene of the robbery (R. 298, 335) within 30-40 minutes of the time that the robbery began (R. 155, 330) and within 24 minutes of the time the robbery was first reported to the police (R. 327). Inside the car were numerous items identified by witnesses as clothing and weapons used by the robbers (R. 337-346, 162-163, 188, 196, 197, 200-202, 215, 220, 222, 224-225, 226, 241, 257, 258). One of these items was a blue ski parka with $1,102.50 in a pocket (R. 339, 344, 367). Also among these items were a crowbar, a sawed-off shotgun, a ski mask, a Halloween mask and brown cotton gloves (R. 337-346).

Appellant and his co-defendant, David Shepherd, explained that these items were placed into the car by Shepherd and a person named Benjamin who borrowed the car from Appellant (R. 400, 458). Appellant claimed he did not know Benjamin or see him but that he lent Benjamin the car because

he was a friend of a friend (R. 457-459). He further said that Benjamin had the car for about 30 minutes (R. 460) and that it was returned to him at about 7:10-7:15 p.m. (R. 460, 472). Appellant also claimed he did not see any of the items that were found in the car although he was sitting on the blue ski parka (R. 343, 462, 464).

Appellant argues that the jury was required to believe his testimony and that of Shepherd which exculpated appellant. The jury is not required to believe exculpatory evidence presented by the defense, but may choose to discount it completely. State v. Gorlick, Utah, 605 P.2d 761, 762 (1979); State v. Howell, Utah, 649 P.2d 91, 97 (1982). Appellant emphasizes that to warrant conviction, circumstantial evidence must exclude every reasonable hypothesis except guilt. The evidence adduced need not, however, exclude every hypothesis, "however unsubstantial or incredible, which a party to such a controversy may dream up." State v. Tanner, Utah, 675 P.2d 539, 550 (1983); quoting State v. John, Utah, 586 P.2d 410 (1978). Furthermore, the jury has the exclusive function to weigh all of the evidence and determine the credibility of witnesses. State v. Jolley, No. 18559, slip op. at 2. The jury was free, therefore, to conclude that the story presented by the defense was unbelievable.

Appellant's explanation of the events of December 18, 1982 is simply not believable. It is unlikely that there

was sufficient time for appellant's car to be returned to him and then driven back out onto the freeway between the time that the robbery was reported and the time that appellant was stopped. The total driving time between these two points is approximately 26 minutes allowing no time for stop-overs and driving at a normal rate of speed (R. 479, 481, 485) which appellant and Shepherd both testified was the rate at which the car was driven (R. 431, 472). Even if the robbery ended at 7:15 p.m. when it was first reported to the police, only 24 minutes had elapsed when appellant was seen driving along the freeway at 7:39 p.m.

The better explanation is that appellant participated in the robbery and that a short time was taken after the robbery in the apartments' parking area dividing the money. That would allow sufficient time for the 18 1/2 minute drive at a normal pace from the robbery to the offramp where appellant was stopped (R. 486-487).

Appellant also asserts that the fact none of the witnesses was able to accurately estimate his exact height further supports his version of the facts. However, most of the witnesses, although there was some conflicting testimony, agreed that three of the four robbers were tall and at least in the 6-foot range. The man wearing the dark blue ski parka, ski mask, brown gloves and carrying a crowbar (all of which were found in appellant's car) was described as being 6 feet or more in height (R. 159, 243, 258). Appellant said he is 6

feet 3 inches (R. 463).

Furthermore, it is not reasonable to believe that appellant would lend his car to a person he did not know and never saw in exchange for an unspecified amount of money or drugs for use in a hold-up of a drug dealer. Nor is it reasonable that appellant would re-enter his car after it was used for such a purpose and not notice the items left behind by the borrower, es-ecially a coat that he was sitting on or even a Halloween mask on the seat between appellant and his passenger (R. 341, 343,344).

Finally, appellant urges that none of the items found in the car held either his fingerprints or strands of his hair. This he claims is conclusive evidence that he did not participate in the robbery. To the contrary, however, if appellant was the tall man in the blue ski jacket and brown gloves, his fingerprints would not appear on the crowbar because the gloves would have prevented their transfer. Furthermore, appellant's own expert witness testified that a ski mask could be worn for up to 15 minutes without the wearer shedding even one hair on it (R. 452). Thus, the fact that none of appellant's hair was found on any of the items is not conclusive proof that those items were never worn by appellant.

From this evidence the jury could conclude that appellant was guilty beyond a reasonble doubt. The evidence was not sufficiently inconclusive or so inherently improbable

that reasonble minds must have entertained a reasonable doubt. Petree, 659 P.2d at 443. The jury verdict should, therefore, be affirmed.

POINT II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL.

After the jury retired to deliberate their verdict in this case appellant moved for a mistrial based on juror prejudice (R. 524). The motion was grounded on an alleged statement made by one juror to another juror that was overheard by Craig Snyder, an attorney who was observing the trial. The statement was allegedly made during a recess that occurred prior to the testimony of the last two or three witnesses but after defendant Shepherd changed his plea to guilty and testified in appellant's behalf (R. 525). There was no evidence that the statement was heard by more than the two jurors observed by Mr. Snyder. Nor did Mr. Snyder testify as to the identity of the jurors or the exact words used. The statement was offered by defense counsel to the court as follows: "Well, we only have to hear one more confession and then we are through." (R. 524).

On appeal, appellant argues that the trial court erred in denying his motion for a mistrial because the statement showed that the juror had determined appellant's guilt before hearing all of the evidence. Refusal to grant

the mistrial, he asserts, requires reversal of his conviction.

In the context of civil trials this Court noted:

> Experience teaches that just as sure as human beings are involved, untoward happenings of various kinds will continue to occur during trials. It is the responsibility of the trial court to rule upon questions which arise concerning whether any such occurrence has prevented a party from having a fair trial; and to take whatever corrective measure [deemed] necessary, including the granting of a mistrial where that is required.

Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121, 124 (1965). This Court went on to say that the trial court's decision to deny a motion for mistrial should not be disturbed unless there was a clear abuse of discretion.

Other states have applied the same standard to criminal trials. See, e.g. State v. Kerr, 14 Wash. App. 584, 544 P.2d 38 (1975) (Granting or denying mistrial founded on jury misconduct discretionary); State v. Jakeway, 558 P.2d 113 (Kan. 1976) (no abuse of discretion in denial of mistrial motion where juror misconduct alleged); Sorce v. State, 497 P.2d 902 (Nev. 1972). The Sorce court said that a trial court might grant a mistrial where it reasonably appears that one or more jurors were biased and would not engage in honest deliberation. Where there was nothing to indicate that a juror's statements had any effect on the deliberations of the jury, however, refusal to grant a mistrial was not an abuse of

discretion. The juror in Sorce told other jurors that she thought the defense attorneys were concerned because her husband signed the indictment upon which the defendant was held for trial. The juror was replaced with an alternate and the appellate court held that because there was no showing of coercion of the jury or prejudice to the defendant or that the statement had any effect on jury deliberations, discretion was not abused. Sorce, 497 P.2d at 904.

In the instant case it does not reasonably appear that the two jurors allegedly involved were so biased that they would not engage in honest deliberation. There is no evidence indicating that the statement had any effect on the jury's deliberations. The juror's alleged comment could be interpreted to mean that the jury's services would no longer be needed if the other defendant also changed his plea to guilty. It did not necessarily mean that the juror assumed appellant was guilty. This is especially true in light of the jury instructions which required the jury to base its verdict on the evidence adduced at trial, to weigh the evidence fairly, impartially and conscientiously, to decide the case individually after consultation among themselves and not to presume guilt based on the charge but to presume innocence until satisfied beyond a reasonable doubt of guilt. See, Jury Instructions No. 4, 10, 11, 13, 14 (R. 95, 100, 101, 103, 104). Because there is no evidence that the jury was prejudiced by the alleged comment, it was not an abuse of

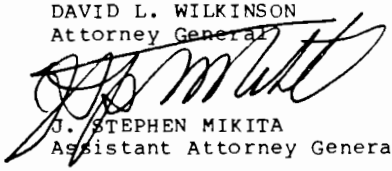
discretion to deny appellant's motion for a mistrial. The verdict of the jury should, therefore, be affirmed.

CONCLUSION

The evidence adduced at trial, though circumstantial, when viewed in the light most favorable to the verdict was sufficient for the jury to find appellant guilty beyond a reasonable doubt. Further, appellant was not entitled to a mistrial because there is no evidence that the jury's deliberations were tainted by prejudice nor evidence that any of the jurors was so biased that they could not engage in honest deliberations. For these reasons, the judgment of the court below should be affirmed.

RESPECTFULLY submitted this 9th day of July, 1984

DAVID L. WILKINSON
Attorney General



J. STEPHEN MIKITA
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Michael Esplin, attorney for appellant, P.O. Box L, Provo, Utah, 84603, this 11th day of July, 1984.

Kathleen Draper Billstein