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The State of Utah v. Jay Richard Newton : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19065
JAY RICHARD NEWTON, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM THE JUDGMENT AND CONVICTION OF
AGGRAVATED ROBBERY, A FIRST DEGREE FELONY
RENDERED BY THE THIRD DISTRICT COURT IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE DENNIS FREDERICK, JUDGE,
PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19065
JAY RICHARD NEWTON, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of Aggravated Robbery, a First Degree Felony, in violation of Utah Code Annotated § 76-6-302, 1953 (as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dennis Frederick, Judge presiding.

DISPOSITION IN THE LOWER COURT

Appellant, Jay Richard Newton was found guilty by a unanimous jury of Aggravated Robbery, a First Degree Felony. He was sentenced to be committed to the Utah State Prison for indeterminate term as provided by law on February 16, 1983.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the judgment of the trial court.

STATEMENT OF FACTS

On May 6, 1981, Sandra Shepard was working in her capacity as a registered pharmacist at Salt Lake Drug East, located at 1519 South 1500 East (T. 3). On that day Ms. Shepard was alone in the store (T. 4), and was working in the pharmacy area (T. 18), which had a raised floor and counter in front of it (T. 7). All of the lights were on in the drugstore and it was daylight (T. 7).

At about 9:20 a.m., Ms. Shepard heard the door open and looked up. She saw a man enter the store (T. 16). She later identified this man as appellant (T. 13, 30). She went out of the pharmacy section to see what he wanted (T. 18). She had never seen him before (T. 14).

Appellant was within arm's length of Ms. Shepard and stood directly in front of her (T. 21). Appellant then shoved Ms. Shepard back into the pharmacy (T. 5, 6). He told her he wanted all of her drugs, pulled out a gun (T. 4), and shoved it in her face (T. 5).

He handed her a zippered case to put them in (T. 5, 6). It was a flat, dark brown attache type case made out of naugahyde (T. 6).

Appellant stood right next to Ms. Shepard and told her to hurry up. She began filling the case with drugs. Appellant wanted Dylotid, but she had none (T. 8). Ms. Shepard completed filling up the case (T. 7).

Appellant then took the money out of the cash register (about \$40-\$50 were taken (T. 9)), and started to leave. Appellant told Ms. Shepard to lay on the floor face down. He then ran out the front door (T. 9).

Ms. Shepard got up and called the police (T. 9). Upon the police's arrival approximately 15-20 minutes later (T. 22) Ms. Shepard gave the police the following description of the drugstore intruder: a white man with relatively long light brown hair. His height was 5'4"-5'5", and Shepard estimated his weight was 140 lbs. (T. 26). She told the police that the robber was wearing old, washed-out levis and had a jacket which was also made of washed-out levis (T. 4). The robber had left this jacket behind, and Ms. Shepard gave it to the police (T. 26).

Ms. Shepard was shown two sets of black and white photographs. The first array consisted of six or seven photos. Ms. Shepard identified no one from that group. When the second array was presented a week to two weeks after the robbery (T. 12), however, Ms. Shepard positively identified appellant as the man who had robbed her (T. 13).

Ms. Shepard subsequently identified appellant at the preliminary hearing and also on several occasions after that time in court (T. 30).

Appellant was found guilty of aggravated robbery (T. 53) by a unanimous jury (T. 54). He was committed to the Utah State Prison for an indeterminate term as provided by law.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS ON THE NATURE OF AND REQUIREMENTS FOR EYEWITNESS IDENTIFICATION EVIDENCE.

Appellant contends that the eyewitness identification provided by Ms. Shepard was inadequate. He complains that her description to the police was sketchy and general; that she was too frightened to direct her attention to the appellant rather than the gun; and that her opportunity to observe the robber was limited. Appellant maintains that the inadequacy of this identification mandated a jury instruction on how to weigh the identification evidence.¹ Appellant claims that if the instruction had been given, there would have been a reasonable likelihood that he would have been acquitted.

Appellant's conclusion, however, is in error in light of the evidence showing that Ms. Shepard had sufficient time to observe appellant during the course of the robbery under excellent lighting conditions (T. 7). Shepard was able to positively identify appellant on several occasions (T. 13, 30). A specific jury instruction on the nature of eyewitness

¹ Appellant requested two special jury instructions, both focusing on essentially the same elements. These instructions were based on instructions suggested by the court in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

identification was therefore not required and was properly denied by the court.

The test for the adequacy of eyewitness identification was explained in Neil v. Biggers, 409 U.S. 188 (1972), and was adopted by this Court in State v. McCumber, Utah 622 P.2d 353 (1980). The Biggers test determines the reliability of the identification by looking at the totality of the circumstances. Factors to consider in this analysis are the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the criminal, the level of certainty demonstrated during the identification procedure, and the time between the crime and the identification. When this test is applied to the instant case, it is clear that Ms. Shepard had no trouble in identifying appellant.

Ms. Shepard had ample opportunity to view the criminal at the time of the crime. The store was brightly lit (T. 7) and appellant was the only person in the store besides Ms. Shepard (T. 4), undisturbed by other customers. She stood within an arm's length of appellant (T. 21), and was able to observe him the entire time of the robbery (T. 22). Admittedly, Ms. Shepard was alarmed at the sight of the gun, but she did have an opportunity to observe appellant before he drew the gun (T. 5), and a sufficient time after to closely observe him. Ms. Shepard was therefore able to direct a considerable amount of her attention towards appellant.

Ms. Shepard's description of appellant did vary somewhat with his actual appearance but it was certainly understandable under the circumstances and was not so far removed from actuality to make it unlikely that appellant was the criminal. She described a white male with longish light brown hair, 5'5", and 140 lbs. (T. 26), or about the same height and weight as Ms. Shepard. The record is not clear on this point, although it appears that appellant is slightly taller and heavier than this initial description. On the day of the robbery, however, Ms. Shepard was wearing shoes with heels 2 1/2 - 3" inches high, (T. 32) which would help to explain the possible discrepancy. When Ms. Shepard said he was close to her own height, her height on that day was approximately 5'8" rather than 5'5".

Ms. Shepard's level of certainty is perhaps the most important part of her identification. Ms. Shepard consistently made positive identification of appellant in the photo array, at the preliminary hearing, and in court (T. 30). There was no doubt in her mind that appellant robbed her. Ms. Shepard may have been somewhat inexperienced at verbalizing descriptions since she is not trained in such a skill or used to giving them, but she was certainly able to recognize appellant as the robber of the drugstore.

The length of time between the crime and the photographic array was only a week to two weeks after the robbery (T. 28), a very short period of time.

The Biggers, supra analysis thus leaves no room for doubt that Ms. Shepard could have been mistaken in her identification. There is certainly no serious doubt present in Ms. Shepard's identification of appellant which is the type of case that the Telfaire, supra, instructions contemplated. Therefore, appellant was not entitled to this particular jury instruction. No reasonable doubt as to the credibility of the evidence existed.

Appellant repeatedly makes the point that eyewitness identification may sometimes be inaccurate. There is no doubt that this observation is true, but the fact remains that in this particular case, positive eyewitness identification was made with an absence of any evidence drawing these identifications into serious doubt.

Since there was no significant question about the accuracy of the identification, no special instruction is required. Even the cases that appellant relies on agree with this proposition. United States v. Barber, 412 F.2d 517, 527 (3rd. Cir. 1971) stated that:

If there is a high degree of precision and certainty in his expression, which is consisted with any prior statements and unshaken on cross-examination, the statement of the witness may be regarded as a statement of fact.

Under these circumstances, no identification instruction is required.

The court in State v. Warren, 635 P.2d 1263 (Kan. 1981) held that only where there is a serious question about the reliability of the identification should a cautionary instruction be given advising the jury as to the factors to be considered in weighing the credibility of the eyewitness identification testimony. This point was explained in a later Kansas case, State v. Brown, 638 P.2d 912 (Kan. 1982), where the court held that the eyewitness identification instruction was unnecessary. The court reasoned that even though eyewitness identification was a critical part of the case, there was no serious question about the reliability of the identification.

Appellant quotes United States v. Telfaire, supra, to illustrate the dangers of identification testimony. Yet the instruction given by the trial court in Telfaire was adequate and in no way prejudicial to the defendant. That instruction was similar to the instruction given in the instant case. It emphasized that the government had to prove beyond a reasonable doubt that defendant took property with intent to steal; and that defendant was present at the time when, and at the place where, the offense was committed. The government had to prove all the elements. The court said that it was "satisfied that the attention of the jury was significantly focused on the issue of identity." Telfaire at 556. The court also mentioned that the case presented none of the special difficulties often presented by identification

testimony. The same is true of the instant case.

Perhaps the most important reason for dismissing appellant's contention is that the jury instructions that were issued by the trial judge essentially focused on the critical factors contained in appellant's rejected instruction. The jury therefore was adequately instructed on the issue of the robber's identity and Ms. Shepard's credibility as a witness.

The instructions that were given informed the jury that the state had to prove that appellant committed all of the elements of the offense beyond a reasonable doubt (R. 101), that the jury decides the weight of the evidence (R. 105), and that it was not bound to believe what witnesses say (R. 105). The jury was further instructed that in evaluating the credibility of the witnesses that it could consider their deportment, the reasonableness of their statements, their frankness or candor, opportunity to know, ability to understand, and their capacity to remember (R. 106). The jury also was advised in making those determinations that it was to consider all the circumstances. Thus, the jury's attention was significantly directed towards the Telfaire - type of considerations with respect to the issue of the defendant's identity. If the purpose of appellant's requested instructions were adequately covered in the instructions that were actually given, appellant has no cause to complain. This Court in State v. McCumber, Utah, 622 P.2d 353, 359 (1980) made the following statement:

The principal point of defendant's proposed instruction dealt with the state's burden of proof and the factors to be considered in weighing the testimony of the eyewitness. All of the 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.

As appellant pointed out, the McCumber opinion does not disclose which instruction was actually given to the jury, so no direct comparison of the instruction of McCumber can be made with those of the instant case to test for their adequacy. However, another Utah case, State v. Schaffer, Utah, 638 P.2d 1185, 1187 (1981) was more explicit. In Schaffer, defendant wanted the same type of instruction as the appellant wanted in the instant case. In discussing the instructions that were actually given, the Court made this observation:

Here, the jury was instructed that the burden was on the State to prove defendant 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. Taking these instructions as a whole, as is proper . . . we find that they adequately advised the jury on the law pertaining to this case.

In the instant case, these same instructions were given. This leads to the conclusion that, as in Schaffer, the trial court sufficiently advised the jury of both the appropriate law that should apply to the facts of the case and the factors

involved in reviewing the evidence adduced at trial.

Appellant points to the fact that the Telfaire instruction has been adopted in many jurisdictions. This is true, but it is also true that a significant number of state courts follow the rule that a trial court may in its discretion refuse to give a requested instruction when the other instructions given adequately and correctly state the applicable law and alert the jury to its responsibilities as factfinder.

Moreover, whether to give the specific instruction lies within the judge's discretion. State v Malmrose, Utah, 649 P.2d 56 (1982). The discretion was not abused when there was no need for the instructions since they were covered in substance by the instruction given. People v. Estorga, 612 P.2d 520 (Colo. 1980). There were no unusual circumstances in the prosecution that would indicate an abuse of discretion.

The court in State v. Rovles, 598 P.2d 1249, 1252 (Or. App. 1979) made the following statement concerning the discretion which accompanies the giving of eyewitness identification instructions:

"Generally, the decision as to whether to give an instruction on the reliability of eyewitness identification will depend on the trial judge's perception of its desirability in each case. Here it was not an abuse of the trial judge's discretion to refuse to give it. In fact, except in unusual circumstances, it should not be given.

Following the Rovles rationale, there were no unusual

circumstances in the case at bar which compelled the giving a Telfaire instruction.

Appellant contends that this Court has never said the instruction is improper and should never be given. The instructions will not be considered improper if the court below adequately states the law as applied to the case at hand, merely because a requested instruction constitutes a correct statement of the law, does not mean that it should be given. It will do more harm than good if it is redundant. A defendant is not entitled to an instruction which is redundant or repetitive of principles enunciated in other instructions. State v. McCumber, supra. Repetition of instruction under various forms should be discouraged Clews v. People, 377 P.2d 125 (Colo. 1962).

Appellant also maintain that this court has implied that under certain circumstances these instructions would be proper. The only time the giving of the instructions would be proper (and which apparently has yet to occur) would be when no other instructions adequately covering the issue were given.

Appellant further states that he is entitled to have his theory of the case presented to the jury in the form of written instructions. This statement is true. Appellant has nothing to complain of on this coun, however, because the instructions which were issued informed the jury of appellant's theory. This Court in State v. Schaffer, supra,

was confronted with a similar argument. The Court responded thusly:

Defendant also complains of the trial court's failure to give his proposed instruction on identification testimony. Defendant maintains that identification was the only issue in his case, and cites Utah authority to the effect that a defendant is entitled to have the jury instructed on his theory of the case. Here, the jury was instructed that the burden was on the state to prove defendant 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. Taking these instructions as a whole, as is proper, we find that they adequately advised the jury on the law pertaining to this case.

The same analysis applies to the instant case.

Furthermore, no prejudicial error occurs if the giving of the requested instruction would not have affected the outcome of the trial, State v. McCumber, supra; State v. Bell, Utah, 563 P.2d 186 (1977). Appellant has not demonstrated that the outcome of the trial would have been different if the instruction had been given. Therefore, even if the instruction should have been given, no reversible error occurred.

CONCLUSION

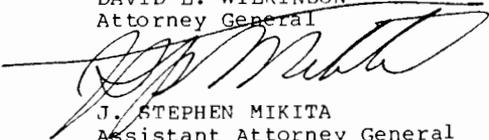
The trial court properly denied appellant's requested instructions on eyewitness identification. Although not per se improper, the proposed instructions were nevertheless redundant of those instructions which were given to jury and therefore totally unnecessary. The instructions the jury received adequately advised them of the potential problems of eyewitness identification.

Those jurisdictions that routinely allow the Telfaire type of instructions which appellant requested maintain that such instruction are not needed when identification is not a serious question in the case. Here, the witness, Ms. Shepard, had the time and opportunity to view appellant during the course of the drugstore robbery and her consistent positive identifications of appellant as the person who robbed the drugstore was not contradicted.

Finally, any error that may have occurred from the failure to give the instruction was harmless. The judgment of the trial court should therefore be affirmed.

RESPECTFULLY submitted this 22 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, postage prepaid to Bardley P. Rich, 44 Exchange Place, Salt Lake City, Utah 84111, this ~~23rd~~ day of November, 1983.

Nathaniel D. Kullerberger