1984

The State of Utah v. Calvin George Smith, Jr. : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. 19089

CALVIN GEORGE SMITH, :

Defendant-Appellant. :

APPEAL FROM JUDGMENT AND CONVICTION FOR AGGRAVATED ROBBERY, A FIRST-DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-2-202, 73-3-203(1), 76-6-302 (1978); AND FOR THEFT, A SECOND-DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-2-202, 76-3-203(2), 76-6-404 (1978), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE ERNEST F. BALDWIN, JUDGE, PRESIDING.

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STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19089
CALVIN GEORGE SMITH,	:	
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. §§ 76-2-202, 76-3-203(1), 76-6-302 (1978); and with theft, a second-degree felony, in violation of Utah Code Ann. §§ 76-2-202, 76-3-203(2), 76-6-404 (1978); for his role in the armed robbery of Mr. Alma G. Winn.

DISPOSITION IN THE LOWER COURT

Appellant was convicted of aggravated robbery and theft following a jury trial in the Third District Court, Salt Lake County, Utah, the Honorable Ernest F. Baldwin presiding. He was sentenced on March 4, 1983, to two concurrent terms of one to fifteen years in the Utah State Prison--to be served consecutively with a one-year term for using a firearm in the commission of the crimes. On March 8, 1983, appellant moved for a new trial. That motion was subsequently denied.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdict and judgment of the lower court, and of its denial of appellant's motion for a new trial.

STATEMENT OF FACTS

Alma Winn and his wife had been visited by various members of their family on New Year's Day, 1981 (Tl. 4). About 8:30 p.m., Mr. Winn took a relative home, returning to his own residence some twenty minutes later (Tl. 4-5). It was dark outside (Tl. 10-11).

He pulled into his unlighted garage, and as he got out of his car and proceeded toward the door to his home, he was confronted by two men (Tl. 5-6, 14-16). Although visibility in the garage was poor, Mr. Winn could see that the men were armed and masked (Tl. 6, 10-13). Mr. Winn, a retired military officer, was somewhat familiar with weapons (Tl. 11), and it was his opinion that the men were carrying dark-colored .38 caliber revolvers (Tl. 6, 11-12, 14, 17). Because the men were wearing gloves and had black nylon stockings pulled down over their heads and necks, Mr. Winn could not determine their race or national origin (Tl. 6, 11, 16).

The men pointed their guns at him, grabbed him, pulled him to the ground, jabbed him with their guns, and pushed him against the door to his home as he "struggled" with them (Tl. 6-7, 12, 14, 17-18). Mrs. Winn, over-heard the commotion, and came to the door to see what was going on; but because Mr. Winn was lying against the door, his wife was unable to open it more than

a few inches (Tl. 6-7). One of the men told the other to "[g]et his wallet and let's get the hell out of here" (Tl. 7-8, 18). The other one grabbed the wallet from Mr. Winn's back pocket and then the two assailants fled (Tl. 7-8, 12).

Mr. Winn followed his assailants out of the garage (Tl. 12). There was sufficient light from the nearby streetlights to permit him to see them run out to the road in front of his residence, turn west and run toward Redwood Road (which is about a quarter of a mile from the Winn residence), and cross the Jordan River bridge (Tl. 8-11). Mr. Winn returned to the house and phoned the police (Tl. 8-9, 12).

The police subsequently found nothing in the garage to establish the identities of the two assailants (Tl. 9).

Mr. Winn's wallet had contained identification and credit cards, $75 or $80 in cash, and an unendorsed $10,000 C.S.B. cashier's check made out to the Federal Reserve System (Tl. 10, 14-15).

Jay Sanchez was subsequently arrested during the summer of 1981 for his involvement in a South Jordan robbery with his cousin, Dickie Carrillo (Tl. 75-76). He was on parole at the time of the arrest (Tl. 76). After the arrest, the prosecutor offered to grant Sanchez transactional immunity for a number of crimes listed in the "grant of immunity" document, provided that he testify "fully and truthfully" regarding his and any other's participation in the crimes listed therein (R. 26; Tl. 22-24, 63-64, 70-79, 81). See also Grant of Immunity document (R. 57).

Near the end of the list of crimes was a "blanket immunity" provision, i.e., a provision where the blanks had not been filled in with the specifics of any particular crime (T. 57; Tl. 78). This provision allowed the State to grant Sanchez immunity for other unspecified crimes in which he was involved, should he later confess and testify to them (Tl. 78, 81). The Winn robbery was not specificaliy listed in the document; nor was there a clause therein which required Sanchez to implicate appellant or Mr. Fernandez (appellant's co-defendant) in any crime as a condition of him receiving immunity (Tl. 82-83; T3. 58). See also Grant of Immunity document (R. 57).

Pursuant to this immunity grant, and to a subsequent promise by the prosecutor that the Winn robbery would fall under the blanket provision, Sanchez confessed to and issued a sworn statement regarding the participation of appellant, Mr. Fernandez, Mr. Mitchell, and himself in the Winn robbery (Tl. 22-23, 63-64, 78-79, 81). See also Sworn Statement of November 4, 1981 (R. 57).

Based upon Sanchez's statement, appellant and the others implicated by Sanchez were subsequently arrested and charged with the aggravated robbery and theft of Mr. Winn and his property (R. 5, 46-49).

Mitchell, one of those implicated by Sanchez, testified at appellant's trial that after his arrest, he had contacted Detective Labrum of the Salt Lake County Sheriff's Office about the possibility of working out a deal in return for information on two robberies in which he had been involved--one of which was

the Winn robbery (Tl. 132-135). See also Letter to Prosecutor from Sheriff's Office, dated December 6, 1982 (R. 57). No agreement was reached as a result of this discussion (T. 135). However, on the evening before trial, Mitchell entered into a plea agreement with the prosecutor, wherein he pled guilty to robbery in the two robberies in which he had been involved in return for a dismissal of the charges of theft and possession of a firearm by a restricted person (Tl. 97-100, 103, 106, 116, 123, 129-130, 142). Mitchell was required under the agreement to testify "fully and truthfully" regarding his knowledge of the Winn robbery (Tl. 141-142).

At trial, both Sanchez and Mitchell named appellant as an accomplice in the Winn robbery. Both testified to having known appellant at least a couple of months prior to the night of the robbery (Tl. 25, 101). Mitchell had met appellant through Fernandez (appellant's co-defendant), with whom Mitchell had been acquainted for several years (Tl. 101-102).

Sanchez's and Mitchell's testimony corroborated much of Mr. Winn's account of the events of the evening in question. Mitchell testified that appellant and Fernandez had arrived at Mitchell's apartment on the evening of January 1, 1981, around 6:00 p.m. (Tl. 106-107, 124, 138). The three men discussed the idea of "making money," i.e., committing some robberies (Tl. 108). After grabbing some nylon stockings which Mitchell kept at his apartment (Tl. 110, 114, 124), they all left in appellant's blue and brown Lincoln Continental to pick up Sanchez (Tl. 108-

109).[1] Appellant was driving the vehicle (Tl. 108-109).

They picked up Sanchez at his cousin's home around 7:00 or 7:30 p.m. (Tl. 29, 65). Sanchez brought a dark-colored .38 caliber revolver that he kept at Carrillo's (his cousin's) house (Tl. 29-30, 66-67, 109, 139).[2] Both Mitchell and Sanchez testified that around 8:30 or 9:00 p.m., Fernandez--who lived near Mr. Winn's residence--remarked that he "knew of this retired colonel that supposedly had a lot of money, maybe some gold or something" (Tl. 34, 52, 112). Fernandez gave directions, and appellant drove the men to Mr. Winn's residence (Tl. 34-35, 51, 112). Sanchez testified that they saw "the colonel" outside of his car, but inside his garage, as they passed by his home (Tl. 35, 53-54).[3] Appellant drove about 50 or 100 feet beyond the house, stopped on a bridge, and let Mitchell and Fernandez out of

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[1] Sanchez, was staying at a halfway house during that period, but had received a pass on January 1, 1981, allowing him to leave the facility to go to his cousin, Richard (Dickie) Carrillo's home for the evening (Tl, 21, 26-27).

Sanchez testified that he had been planning on meeting with appellant that night "to go out and make some money," i.e., to "[p]ull some robberies" (Tl. 28). According to Sanchez, appellant had recruited him in this venture (Tl. 64, 82-84). Sanchez noted that he had not intended to actually "do the robbery"; he was merely going along to provide the gun and to keep company with the others involved (Tl. 56, 64, 84).

[2] Sanchez admitted that he furnished the weapon used in the Winn robbery--the only weapon that he recalled being used that night (Tl. 45, 68). Mitchell verified that only one gun was used in the robbery (Tl. 115, 126).

[3] Mitchell testified that Mr. Winn had not yet arrived at home when he and Fernandez got out of appellant's car and approached the house (Tl. 125, 139-140). His recollection was that he and Fernandez had reached the porch and were about to knock on the front door when Mr. Winn pulled into the garage (Tl. 112-113, 125, 140).

the car (Tl. 35-36, 54). One of them, according to Sanchez, was carrying Sanchez's gun (Tl. 35). Both were carrying nylon masks (Tl. 35, 53, 55, 110).

After Mitchell and Fernandez departed, appellant and Sanchez proceeded westbound in the car, made a U-turn, and then started back toward the colonel's house (Tl. 36). As appellant and Sanchez were approaching the bridge on their return trip, they saw Mitchell and Fernandez running westbound toward them (Tl. 36, 68). Sanchez testified that Mitchell and Fernandez reported that the colonel had resisted the robbery and that, as he could recall, the robbery was unsuccessful (Tl. 37-38, 68-69).

Recounting the events of the robbery, Mitchell testified that he and Fernandez, both wearing nylon masks, entered the garage and confronted Mr. Winn (Tl. 112-114). They wrestled him to the ground, took his wallet from his back pocket, and left the garage (Tl. 113, 126). They then ran back to the car appellant was driving and reported that the colonel had "put up a little fight" (Tl. 141). The gun was returned to Sanchez (Tl. 115); and the wallet was opened, revealing some cash and a check (Tl. 114). The men then allegedly talked about the contents of the wallet and split up the cash among the four of them (Tl. 114, 126-127). Mitchell testified that he tore up the check and threw it out the window (Tl. 114, 127-128). The wallet was also thrown out the window (Tl. 126).

Sanchez recalled telling the others that he had to be back at the halfway house by 11:00 p.m. and that they should immediately return him to his cousin's house--which they did (Tl.

37-38). This recollection was verified by Mitchell's testimony (T1. 141).

Appellant testified at trial in his own defense. He admitted his acquaintance with Sanchez, Fernandez, and Mitchell (T2. 187-189, 206, 209-211, 213-215). He indicated that he had interacted socially with Sanchez and Fernandez on a number of occasions (T2. 187-189). Even though he did not consider Sanchez to be a good friend, he did admit to having sponsored Sanchez on one occasion while the latter was in the halfway house (T2. 189). Appellant said that he did consider Fernandez to be his friend (T2. 187-188). In fact, according to his and his step-mother's (Mrs. Smith's) testimonies, appellant and Fernandez were indeed together on the evening in question (T2. 154, 156-159, 163, 170-171, 201, 203-205, 216-217). Finally, appellant admitted to owning and having in his possession, on the night in question, a car fitting the description rendered by the State's witnesses (T2. 162-163, 190, 211, 217-218).

Despite these admissions, appellant denied any participation in the Winn robbery (T2. 207, 211-213, 215). He and his step-mother testified that he was at home with his family and Fernandez on the evening of January 1, 1981 (T2. 158-159, 170-171, 203-205, 216-217). However, much of this testimony dealt with where appellant was the night <u>before</u> and during the earlier part of the day of the robbery (T2. 151-153, 162-163, 170, 172-173, 177-178, 182-184, 191-203).

During the remainder of New Year's Day and evening--

according to Mrs. Smith,[4]--the family, Fernandez, and appellant stayed at home watching television (T2. 157, 165). However, she could not remember what programs or football games, if any, they watched (T2. 165).[5]

Appellant also claimed that they "sat around" and watched television (T2. 204-205), and that neither he nor Fernandez left the apartment that night (T2. 205). Mrs. Smith testified that she did not recall seeing either of them leave the apartment that evening (T2. 159).

There is a question as to how late Mrs. Smith stayed up that evening and whether she would have seen them leave the apartment that night had they done so. She said that she went to bed about midnight (T2. 166), but later conceded that she had admitted four days earlier, in the county attorney's office, that she did not know when she had retired to bed on that particular evening (T2. 166-169).

Judge Baldwin instructed the jury on the law pertinent to the case (R. 144-182). Notably, the defense did not ask for a

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[4] In an apparent effort to portray Mrs. Smith as an unbiased, disinterested witness--despite her relationship with appellant as his step-mother--appellant and Mrs. Smith testified that they were not very fond of each other and that they did not consider themselves to be friends (T2. 150, 161, 178, 192-193, 208-209).

[5] She recalled Fernandez leaving for a time during the afternoon (T2. 157-158), but did not recall appellant leaving with him (T2. 157).

[6] Appellant testified that he and Fernandez left the apartment together about 4:00 or 5:00 p.m, that he took Fernandez home so that he could change his clothes, and that they then returned to the apartment to eat dinner and watch a college football game on television (T2. 203-204). He could not remember what game they saw home to watch (T2. 204).

men could not possibly reach verdict beyond reasonable doubt). For it is the exclusive function of the trier of fact to determine the defendant's guilt or innocence, the credibility of witnesses, and the weight to give conflicting evidence. State v. Linden, Utah, 657 P.2d 1364, 1366 (1983); State v. McCardell, Utah, 652 P.2d 942, 945; State v. Romero, Utah, 554 P.2d 216, 218 (1976). And it is appellant who, on appeal, bears the burden of establishing that the evidence was so inconclusive or insubstantial. State v. Kerekes, Utah, 622 P.2d 1161, 1168 (1980). Appellant has failed to meet this burden.

It must be noted at the outset that neither the mere failure of a victim to identify his assailants nor the absence of physical evidence at the scene of the crimes which links a defendant to those crimes is sufficient to render improper a jury verdict based upon other adequate direct or circumstantial evidence. The central issue in this case is whether the evidence which was presented by the State was sufficient to establish each of the elements of the offenses charged and thus sustain the jury's verdict.

Appellant was convicted as an accomplice, in violation of Utah Code Ann. § 76-2-202 (1978), in the aggravated robbery of Mr. Winn and the theft of the contents of his wallet. Section 76-2-202 provides:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

To convict appellant as an accomplice to the aggravated robbery of Mr. Winn, the jury had to find (1) that appellant solicited, requested, commanded, encouraged, or intentionally aided another person or persons to engage in the robbery; (2) that appellant did so intentionally or knowingly; and (3) that a deadly weapon, firearm, or facsimile of a firearm was used in the commission of the crime. Utah Code Ann. §§ 76-2-202, 76-6-302 (1978). See jury instructions nos. 13, 27, 28 (R. 155, 169-171). A robbery, as used above, is committed when (a) personal property is taken from another person, (b) that property is in the possession or the immediate presence of such other person at the time it is taken, (c) the property is taken contrary to the will of such other person, (d) the taking is accomplished by means of force or fear, (e) the taking is unlawful, and (f) the taking is intentional. Utah Code Ann. §§ 76-6-301(1) (1978). See jury instructions nos. 17-18 (R. 159-160).

To convict appellant as an accomplice to the theft of Mr. Winn's property, the jury had to find (1) that appellant solicited, requested, commanded, encouraged, or intentionally aided another person to obtain or exercise unauthorized control over the property of Mr. Winn; (2) that he did so intentionally, knowingly, or recklessly; (3) that the property did belong to Mr. Winn; (4) that appellant had the purpose at that time to deprive the owner of said property; (5) either that the value of said property exceeded $1,000 or that one of the actors in the

Furthermore, Mrs. Smith indicated that she was unsure of the time when she retired to bed that evening (T2. 166-169). After having stayed up until 1:30 or 2:30 a.m. the night before (T2. 177-178), she may well have gotten tired early in the evening on January 1. Under such circumstances, the jury could have reasonably inferred that Mrs. Smith retired to bed early that evening and was not awake when appellant left the apartment.

Finally, Mrs. Smith testified that appellant was present in the apartment when dinner was served, which allegedly occurred between 5:00 and 6:00 p.m. (T2. 158, 165). Even if Mrs. Smith were telling the truth, the jury could have reasonably believed that dinner was served around 5:00 p.m. and that appellant left the apartment sometime after dinner, arriving at Mitchell's apartment around 6:00 p.m., as testified to by Mitchell (T1. 106-107, 124, 138).

Appellant asserts, however, that there was evidence to show that he was at home when the robbery was taking place. He then cites State v. John, Utah, 586 P.2d 410 (1978), for the proposition that where there is any reasonable view of the credible evidence which is reconcilable with appellant's innocence, a reasonable doubt exists as to his guilt (emphasis added). But, in that same case, this Court also stated:

> [W]e emphasize that this does not mean just any view of any of the evidence, however unsubstantial or incredible, which a party to such a controversy may dream up.

State v. John, Utah, 586 P.2d 410, 412 (1978). And again, in State v. Lamm, Utah, 606 P.2d 229, 232 (1980), this Court held that the "evidence relied upon by the jury need not refute contrary allegations made by the defendant, as long as the jury verdict is supported by substantial evidence," which it is in this case.

Furthermore, the jury was not required to even believe appellant or his step-mother:

> The jury were not obligated to accept as true defendant's own version of the evidence nor his self-exculpating statements as to his intentions and his conduct. They were entitled to use their own judgment as to what evidence they would believe and to draw any reasonable inferences therefrom.

State v. Gorlick, Utah, 605 P.2d 761, 762 (1979). Having evaluated the defense witnesses' demeanor and candor on the stand, having been aware of the witnesses' potential motives to fabricate their testimonies (i.e., their family relationship and appellant's desire to stay out of prison), and having observed Mrs Smith's faulty recollection of the events which transpired on the day in question, the jury did not act unreasonably in disregarding or giving less weight to the testimony rendered by those witnesses in making its determination. That being the case, there was substantial evidence to support the verdicts of guilty to the counts of aggravated robbery and theft.

Appellant also claims that the testimonies of two alleged accomplices were inherently unbelievable and were not corroborated by other evidence at trial.

The trustworthiness of or the weight to be given their testimony is clearly a matter for the jury. The fact that they had received some benefit from the State in return for their testimony is also but a factor which the jury could weigh in assessing credibility and did not make the witnesses' testimony per se unreliable. Moreover, neither the grant of immunity nor the plea bargain agreement necessarily gave these witnesses a "motive to lie"--especially given the fact that both agreements were conditioned upon them testifying fully and truthfully. (R. 26, 57; Tl. 22-24, 63-64, 70-79, 81, 141-142).[6] Certainly the State's witnesses had no greater "motive to lie" than did appellant and his step-mother.[7] Appellant claims Sanchez's criminal record indicates a "motive to lie". If this were so, certainly we could have a stand-off in this case since the record establishes that appellant too had a criminal record. Thus, the criminal records of all witnesses were useful for impeachment purposes on both sides, and the weight to be accorded the respective testimony is best left to the trier of fact.

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[6] Nor was there any apparent "motive to lie" based upon animosity between them and appellant. Appellant admitted that he knew both of the witnesses (T2. 187-189, 206, 209-211, 213-215), that he had interacted socially with at least Sanchez (T2. 189), and that he had in fact sponsored Sanchez on one occasion when the latter was in the halfway house (T2. 189). He made no indication that he was on "bad terms" with either of the witnesses.

[7] Despite to appellant's assertion that he and his step-mother were not on the best of terms, Mrs. Smith had not only known appellant about ten years when she testified at trial, she (1) was married to appellant's father and (2) was living in the same apartment as appellant in January of 1981 (T2. 161, 193).

In any event, this Court has held that a possible motive to lie on the part of a witness--even though that witness may have previously been involved in similar criminal activity--does not necessarily render his testimony so suspect as to leave a reasonable doubt as to a defendant's guilt. In State v. Wilson, Utah, 565 P.2d 66 (1977), the appellant there argued that the testimony of an undercover agent who purchased a balloon of heroin in a controlled buy was inherently unreliable because she was a former heroin user and she therefore had a motive to lie. Since the agent's testimony was considered indispensable to the appellant's conviction, the appellant argued that there must necessarily have been a reasonable doubt as to his guilt. Rejecting this reasoning, this Court observed:

> The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury. Consequently we are obliged to assume that the jury believed those aspects of the evidence, and drew those inferences that reasonably could be drawn therefrom, in the light favorable to the verdict.

State v. Wilson, Utah, 565 P.2d 66, 68 (1977). See State v. Eaton, Utah, 569 P.2d 1114, 1116-1117 (1977).

The jury in this case determined that the testimony rendered by Sanchez and Mitchell was credible. Therefore, unless appellant can show that the evidence was so lacking that "reasonable men could not possibly have reached a verdict beyond a reasonable doubt," State v. Logan, Utah, 563 P.2d 811, 813-814, (1977), the validity of the witnesses' testimonies and appellant's resulting conviction should be upheld.

Finally, the testimony of Sanchez and Mitchell was, indeed, corroborated by other evidence at trial. First, their own testimonies were highly corroborative of one another. With a few exceptions, they gave similar accounts of the events surrounding the robbery.[8] See State v. Bagley, Utah, --P.2d--, No. 19284, slip op. at 2 (April 26, 1984); State v. Watts, Utah, 675 P.2d 566, 568 (1983)(contradictory evidence at trial is not sufficient to disturb jury verdict).

Second, appellant completely overlooks the testimony given by the victim, Mr. Winn, which was largely corroborative of the testimonies of Sanchez and Mitchell--the only exception being the number of guns carried by Mr. Winn's assailants. That Mr. Winn could not make a positive identification of appellant is understandable, granted that appellant was allegedly driving the getaway car at the time of the robbery.

Appellant also ignores the corroborative value of some of his own admissions at trial. See State v. Romero, Utah, 554 P.2d 216, 219 (1976); State v. Mattivi, 39 Utah 334, 117 P. 31 (1911) (defendant who takes the stand cannot escape the consequences of any fact testified to by him). Appellant admitted that he was acquainted with Sanchez, Mitchell, and Fernandez (T2. 187-189, 206, 209-211, 213-215). Furthermore, he

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[8] Their testimonies differed in only three minor respects: (1) whether or not a stop was made at another residence before the one was made at the Winn residence, (2) whether or not the colonel was at home when the men first arrived at his residence, and (3) some of what occurred in the appellant's car following the robbery (T1. 30-33, 35, 37-38, 53-54, 65, 68-70, 112-114, 125-128, 139-140).

admitted that he was with Fernandez on the evening of the robbery (T2. 154, 156-159, 163, 170-171, 201, 203-205, 216-217). He also admitted that he owned and had in his possession, in January of 1981, a car matching the description rendered by the State's witnesses (T1. 26, 30, 108-109; T2. 162-163, 190, 211, 217-218). Certainly it was more than coincidental that Sanchez and Mitchell--particularly when the latter was not well-acquainted with appellant (T2. 209, 214-215)--would each know that appellant and Fernandez were together and had access to a blue and brown Lincoln on the evening of January 1, 1981.

There was other evidence, then, to corroborate the testimonies of each of State's challenged witnesses. However, such corroboration was not necessary. As noted by this Court in 1978:

> It has long been held in this state that the credibility of the witnesses is for the trier of fact; and there is no rule governing how many witnesses are needed or that the testimony be corroborated by other evidence before the trier of fact can decide how to determine the weight of the testimony.
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> * * *
>
> As to the quality of the testimony given, it is settled that it must be so improbable that it is completely unbelievable before it is insufficient to uphold a conviction.

State v. Middelstadt, Utah, 579 P.2d 908, 910, 911 (1978). Since 1979, these rules of law have also applied to the testimony of an accomplice. See State v. Berg, Utah, 613 P.2d 125 n.2 (1980). An "accomplice," such as Sanchez and Mitchell in the present case, is "one who participates in a crime in such a way that he could be charged and tried for the same offense." State v. Comish, Utah, 560 P.2d 1134, 1136 (1977), and cases cited therein; Utah Code Ann. § 76-2-202 (1978).

Utah law provides that "[a] conviction may be had on the uncorroborated testimony of an accomplice." Utah Code Ann. § 77-17-7(1) (1982). It further provides:

> In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction shall be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain or improbable.

Utah Code Ann. § 77-17-7(2) (1982). In this case, such a cautionary instruction was given. See jury instruction no. 13 (R. 155). The jury was also instructed to take into account the bias, motive, or interest in result of each of the witnesses, as well as their deportment, frankness, and candor. See jury instruction no. 8 (R. 150).

Nevertheless, as the exclusive trier of fact, the jury chose to believe the testimony of at least one of the accomplices. Viewing the evidence in the light favorable to the jury verdict, State v. Gorlick, Utah, 605 P.2d 761, 762 (1979), that determination and appellant's resulting conviction should be upheld.

POINT II

THE TRIAL JUDGE WAS JUSTIFIED IN CORRECTING DEFENSE COUNSEL'S IMPROPER REMARKS; FURTHERMORE, APPELLANT HAS NOT SHOWN THAT THE JUDGE'S COMMENT WAS PREJUDICIAL, NOR HAS HE PROPERLY PRESERVED THE ISSUE FOR APPELLATE REVIEW.

Appellant complains of a comment made by the trial judge during defense counsel's closing argument. Counsel had been asserting

that the State had failed to meet its burden of proof because it had not called two other individuals as witnesses who were known to have participated in a robbery with Sanchez on one occasion in the past. Counsel suggested that the "missing witnesses" might have been the real accomplices in the Winn robbery and not appellant (T3. 35-36). Judge Baldwin stopped counsel, stating that those "witnesses" were not necessary to the disposition of this case, that the State was therefore not required to bring them into court to testify, that the jury should disregard counsel's comments suggesting that the State did bear such a burden of proof, and that the defense had just as much of a right as did the State to call those witnesses (T3. 36).

Appellant claims that this comment violated his constitutional right to remain silent; that it impermissibly shifted to appellant, in the eyes of the jurors, the burden of producing evidence; and that it prevented defense counsel from presenting a vital theory of appellant's case to the jury.

First, inasmuch, as defense counsel's line of argument was improper, the judge was justified in commenting to the jury as he did. The law is clear that there are occasions when a judge, as governor of the trial, must step in and restrain counsel from making improper remarks to a jury:

> It is the duty of the trial court to correct mistakes of law made by counsel in argument to the jury, and, on its own motion, to interrupt and admonish counsel when he exceeds the bounds of legitimate argument.

75 Am. Jur. 2d, Trial § 117 (1974) (footnotes omitted). See 75 Am. Jur. 2d, Trial § 318 (1974); Annot., 62 A.L.R.2d 166, 251-

253 (1958 & Supp. 1984); State v. Gilbert, 99 N.M. 316, 319, 657 P.2d 1165, 1168 (1982) ("The trial court has broad discretion in controlling argument to the jury. If no abuse of this discretion or prejudice to the defendant is evident, error does not result."). Judge Baldwin properly stopped appellant's closing argument because it misstated the State's legal burden of proof.

Judge Baldwin stated that the State bore no burden in producing witnesses not known to have seen or been involved in the case at hand (T3. 36). See State v. Middelstadt, Utah, 579 P.2d 908, 910 (1978) (there is no rule governing the number of witnesses needed before the trier of fact can determine the weight of a witness' testimony). The jury in this case already had the testimonies of Sanchez and Mitchell.

Nonetheless, counsel argued to the jury that, inasmuch as Carrillo and Johnson had been involved once in a robbery with Sanchez, they were likely involved with Sanchez and Mitchell in the Winn robbery (T3. 34-37). Therefore, he argued, the State should have produced them as witnesses (T3. 36). This reasoning is nonsensical.

Counsel alleged at trial that Sanchez had participated in some forty felonies (T1. 63, 73-74, 80-81); Carrillo and Johnson were known accomplices in only one of those alleged felonies (T1. 75-76, 90-94). Assuming that there were 40 felonies, under defense counsel's reasoning, anyone who may have participated in the other 39 felonies should also have been called by the State as witnesses to "clear themselves." Under

this theory, perhaps all known and possible acquaintances of Sanchez should have been brought into court. Perhaps Sanchez was working with "new blood" on the Winn robbery. Under such reasoning, appellant could continually suggest "possible others" who might have been involved ad infinitum.

The State was only required to meet its burden of proving the elements of the theft and aggravated robbery charges beyond a reasonable doubt. Because this burden was incorrectly stated by the defense to the jury, Judge Baldwin was justified in intervening and correcting counsel's error.

In 1979, after citing a similar exchange between the trial judge and defense counsel during the latter's closing argument, this Court stated:

> Defendant claims that the court's comments misstated the law so as to mislead the jury [and] that to not permit the defense to argue that the state has failed to prove an element of the offense is to effectively direct a verdict in favor of the state. . . .
>
> * * *
>
> To have allowed defense counsel's arguments to go unchallenged, the jurors would have been led to believe that the state had failed to prove one of the elements of the crime. The court judiciously corrected any confusion which may have arisen.

State v. Piepenburg, Utah, 602 P.2d 702, 707-708 (1979). Likewise, Judge Baldwin judiciously corrected any confusion which defense counsel's remarks may have created in the minds of the jurors in this case. His comment, then, was proper.

However, not only did defense counsel's comments misstate the State's legal burden of proof, they suggested the propriety of the "missing witness" inference in a situation

where, even under appellant's case law, such an inference could not properly be drawn to the jurors' attention. Admittedly, the "missing witness" inference has been judicially recognized for nearly a century. See Graves v. United States, 150 U.S. 118, 121 (1894). That inference has been summarized as follows:

> [I]f a party has it peculiarly within his powers to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it permits an inference that the testimony, if produced, would have been unfavorable.

United States v. Young, 463 F.2d 934, 939 (D.C. Cir. 1972). Recently, however, this inference has undergone greater judicial scrutiny and caution in its application, the primary reasons being (1) that comment on the inference can easily be misleading, (2) that its invocation at the end of the trial may unnecessarily surprise the other party who was unaware that it might be invoked, and (3) that the record is often inadequate to support its invocation. Comment, "Drawing an Inference from the Failure to Produce a Knowledgeable Witness," 61 Calif. L. Rev. 1422, 1426, 1428-1429 (1973).

The D.C. Circuit has determined that "comment by counsel . . . as to absent witnesses is prohibited if either of the conditions [for its invocation] is lacking, that the witness was peculiarly within the power of the party to produce, and that his testimony would elucidate the transaction." United States v. Young, 463 F.2d 934, 939-940 (D.C. Cir. 1972). Likewise, the Seventh Circuit (which earlier had decided the Mahone case relied upon by appellant) held last year that

> before a party can properly argue to the jury the possibility of drawing such an inference from the absence of a witness, the party must establish that the missing witness was peculiarly within the adversary's power to produce by showing either that the witness is physically available only to the opponent or that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party.

Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1353 (7th Cir. 1983)(emphasis added).

Under this standard, defense counsel was precluded from arguing the "missing witness" theory to the jury. The record does not show that Carrillo and Johnson were peculiarly within the power of the State to produce as witnesses. It did not show that they were involved in any way (e.g., as an informer) with the development of the State's case. See United States v. Mahone, 537 F.2d 922, 926-927 (7th Cir.), cert. denied, 429 U.S. 1025 (1976); Burgess v. United States, 440 F.2d 226, 232 (D.C. Cir. 1970). Nor does appellant point to any evidence in the record to support a claim that their testimonies would be noncumulative or superior to the testimony rendered by Sanchez and Mitchell. United States v. Mahone, 537 F.2d 922, 926 (7th Cir.), cert. denied, 429 U.S. 1025 (1976); Brown v. United States, 414 F.2d 1165, 1166-1167 n.2 (D.C. Cir. 1969).

Appellant argues, however, that Carrillo and Johnson were unavailable to the defense in a pragmatic sense, alleging that "[s]ince the prupose [sic] of having Carrillo and Johnson testify would have been to clear the appellant by incriminating themselves, it is not reasonable to believe that either missing

witness would have testified for the defense." Even if this were the case, defense counsel would have been precluded from alluding to the inference since only one of the two requirements or conditions of the inference would have been established. United States v. Young, 463 F.2d 934, 939-940 (D.C. Cir. 1972).

Furthermore, appellant has failed to even establish this form of unavailability under Utah law, which requires that appellant first subpoena the missing witnesses to the witness stand and give them a chance to assert their privileges against self-incrimination before he may consider them as "unavailable." In State v. White, Utah, 671 P.2d 191 (1983), this Court--referring to a missing witness in the case--observed:

> There is no merit to the appellant's contention that defense counsel could not call Latham to testify because she knew Latham would invoke his Fifth Amendment privilege. . . Using the exercise of a privilege as evidence is readily distinguishable from using it to demonstrate a declarant's unavailability. The latter, far from being prohibited, may be required. Without subpoenaing Latham and interviewing him. . . ., defense counsel had no means of establishing whether he would assert his privilege or not.
>
> * * *
>
> [A]n attorney's knowledge that a witness intends to assert his Fifth Amendment privilege against self-incrimination does not bar calling that witness for the purpose of showing his unavailability.

State v. White, Utah, 671 P.2d 191, 193-194 (1983).

In this case, appellant's counsel asserts that a decision was made to not use Carrillo and Johnson as witnesses. Although the above passage may be read as not necessarily requiring that the witnesses be called by the complaining party

to show their unavailability, it does make it clear that something ought to have been done to show that unavailability. The record does not show that anything of this nature was done in the present case. Therefore, appellant has failed to satisfy the first prong of the Mahone test, that the witnesses were peculiarly within the power of the State to produce. Judge Baldwin wisely barred defense counsel from improperly arguing the "missing witness" inference to the jury.

Appellant claims that the judge's comment did severe damage to his case at trial. He contends that it prevented him from effectively presenting the theory of his case to the jury, that it shifted to appellant the burden of producing witnesses, and that it infringed upon his constitutional right to remain silent. These claims are not borne out by the record.

Even if there were some support for these claims, "[t]he burden of showing error is on the party who seeks to upset the judgment." State v. Jones, Utah, 657 P.2d 1263, 1266-1267 (1982). The standard which appellant must meet in showing such error was recently summarized by this court as follows:

> Rule 30 of the Utah Rules of Criminal Procedure directs that "[a]ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." § 77-35-30. We have interpreted this rule to mean that error is reversible only if a review of the record persuades the court that without the error there was "a reasonable likelihood of a more favorable result for the defendant." State v. Hutchison, Utah, 655 P.2d 635, 637 (1982).

State v. Fontana, Utah, --P.2d--, No. 17796, slip op. at 9 (March 2, 1984). See State v. Urias, Utah, 609 P.2d 1326, 1329

(1980); State v. Pierre, Utah, 572 P.2d 1338, 1352 (1977), reh'g denied, State v. Andrews, 576 P.2d 857, cert denied, 439 U.S. 882 (1978); State v. Eaton, Utah, 569 P.2d 1114, 1117 (1977). Appellant has not shown that the alleged error in this case was so substantial or prejudicial that there would have been a different result in its absence.

Appellant cites a number of cases to support his position that he had a right to present the theory of his case to the jury in a clear and understandable way. He then alleges that Judge Baldwin erroneously prevented him from exercising that right during closing argument.

Appellant has misstated these cases, all of which deal with when and how jury instructions are to be presented by the court. Moreover, they merely stand for the proposition that, where there is evidence sufficient to justify a proposed jury instruction on a given issue, the trial court has a duty to adequately instruct the jury on that issue. See State v. Stone, Utah, 629 P.2d 442, 446 (1981); State v. Potter, Utah, 627 P.2d 75, 78 (1981); State v. Eagle, Utah, 611 P.2d 1211, 1213 (1980); State v. Brown, Utah, 607 P.2d 261, 265-266 (1980).

In this case, the defense had not even submitted an instruction to the court pertaining to the "missing witness" inference. Assuming that counsel had even thought of the issue prior to closing argument, he made a tactical decision to wait until after the jury had been instructed and the State had argued its case to bring up the absence of Carrillo and Johnson. Appellant now challenges the judge's comment which, he claims,

prevented him from effectively presenting this theory of his case. Certainly, if this had been the theory of his case, he would have at least asked for an instruction in that regard.

It is true that Sanchez was asked on cross-examination whether Carrillo and Johnson were involved in the Winn robbery (Tl. 68, 80). But asking those questions and receiving Sanchez's negative responses were hardly sufficient to make it appear "obvious from the testimony" that the "missing witness" issue comprised the issue (or even an issue) of appellant's case--particularly when those questions and responses comprised a total of less than one page of the 200-plus pages of testimony rendered at trial (Tl. 68, 80).

In sum, Judge Baldwin prevented appellant from using the surprise tactic of introducing a new issue at the end of the trial.

Appellant also argues that the judge's comment shifted the burden of production to him, making it appear to the jury that he had a duty to call witnesses. It is undisputed that the State bears the burden of proving appellant guilty and that appellant has no duty to call witnesses that might exculpate himself. Utah Code Ann. §§ 76-1-501, 77-1-6(2)(c) (1978); State v. Starks, Utah, 627 P.2d 88, 92 (1981); State v. Housekeeper, Utah, 588 P.2d 139, 140 (1978). However, it is also clear that the judge's comment did not depict an affirmative duty on appellant to call Carrillo and Johnson as witnesses.

Judge Baldwin stated, in pertinent part:

> I am going to tell the jury you had as much right to bring them in as anybody and they

> were not necessary . . . . [T]he State had no burden as relates to them in this case and the defendant had all of the rights of the State to bring them in.

(T3. 36)(emphasis added). Judge Baldwin spoke of rights, not duties. He was merely indicating that the defense could have called Carrillo and Johnson as witnesses had it believed that their testimonies were important or essential to a proper disposition of this case.

Section 77-1-6(2)(c) indicates that a defendant may not be compelled to give evidence against himself, not that he has no right to give such evidence. Here, Judge Baldwin was merely clarifying the respective rights and duties of the parties: the State had no duty to call the two witnesses, and the defense was not precluded from doing such had it so desired. Certainly, it was not prejudicial error for the judge to make a curative or ameliorative statement to the jury in an effort to neutralize the improper remarks made by defense counsel in his closing argument.

Finally, appellant claims that as an offshoot of the defendant's constitutional right to remain silent, a decision was made not to use particular witnesses; and that the court erred in commenting on this decision, which comment tended to impair his right not to produce witnesses. First, appellant's cases are not on point. They address solely the issue of prosecutorial comment and judicial instruction regarding a defendant's decision to invoke his constitutional privilege against self-incrimination and not testify at trial. They say nothing of an "offshoot" of that right--a constitutional right

to not produce witnesses. Furthermore, appellant does not show how this comment "clearly tended to impair" that alleged right.

Assuming that the right does follow from the privilege against self-incrimination,[9] appellant is estopped from alleging error regarding the judge's comment because (1) he waived his privilege against self-incrimination when he took the stand and testified; and (2) by his counsel's remarks during closing argument about the so-called missing witnesses, he opened himself up to either judicial comment or prosecutorial rebuttal.

The privilege against self-incrimination is waived when a defendant takes the stand and offers his own testimony; he then is like any other witness at trial. State v. Green, Utah, 578 P.2d 512, 514 (1978); State v. Anderson, 27 Utah 2d 276, 279, 495 P.2d 804, 806 (1972); State v. Adams, 26 Utah 2d 377, 380-381, 489 P.2d 1191, 1193 (1971). Speaking of the privilege against self-incrimination, this Court observed in 1964:

> The defense could either claim the privilege or waive it, whichever it thought would be to

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[9] The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . ." U.S. Const. amend V (emphasis added). The broader language of the Utah constitutional provision, codified in Utah Code Ann. § 77-1-6(2)(c) (1978), perhaps more appropriately encompasses the right argued for by appellant (if it does), where it says that an "accused shall not be compelled to give evidence against himself." Utah Const. art I, § 12 (emphasis added). Even then, appellant does not show that the testimony of the missing witnesses would have been "against himself;" indeed, he indicates that should they have testified, they would have allegedly incriminated themselves and exculpated appellant. Appellant has illogically tried to convert a personal choice to not call Carrillo and Johnson as witnesses (persons who allegedly would have helped his case) into a constitutionally-protected right.

> its best advantage. But it could not engage in halfway measures by waiving the privilege and obtaining the benefit of having [the defendant] testify and still claim some of the protection refusal to testify affords. . . .[I]f the privilege is claimed it should be scrupulously protected. But when it is waived, it is done away with just as though it did not exist . . . .

State v. Brown, 16 Utah 2d 57, 59, 395 P.2d 727, 728-729 (1964). In this case, appellant took the stand and offered testimony (T2. 186-218). Since he had waived his privilege, he had none upon which the trial judge could comment. Therefore, no error was committed.

Furthermore, appellant opened himself up for attack when his counsel improperly brought up the "missing witness" issue at trial. In an analogous situation, this Court has determined that comment upon issues, which might otherwise be inappropriate, may be proper when the defendant (or his counsel) opens himself up to attack by his own comments in that regard:

> It is of note that the trial court viewed the prosecution's remarks to be harmless error, if error at all, as defense counsel had opened the subject, and the prosecution was clearly entitled to some rebuttal . . . . It was unwise and hazardous for defense counsel to make comments as he did on defendant's failure to testify, as it triggered the mechanism or rebuttal by the prosecution, and hence, may have invited error . . . . [T]he court was wholly within its discretion in ruling as it did.

State v. Eagle, Utah, 611 P.2d 1211, 1214 (1980).

In this case, it was the judge, and not the prosecution, which made the comment to correct any "invited error" made by defense counsel (T3. 36). Nonetheless, the same reasoning applies. Judge Baldwin did not take it upon himself

comment on appellant's failure to call Carrillo and Johnson without provocation; the judge was correcting errors made by defense counsel when he improperly commented on the State's alleged failure to call them as witnesses. Having opened up the discussion on the issue, and having done so in such a way as might confuse the jury, appellant was not substantially prejudiced by the judge's curative comment. Hence, no constitutional rights were violated.

Even assuming that error was somehow committed by the judge's comment, appellant has not properly preserved the issue for appellate review. In State v. Steggell, Utah, 660 P.2d 252, 254 (1983), this Court held:

> In the absence of exceptional circumstances, this Court has long refused to review matters raised for the first time on appeal where no timely and proper objection was made in the trial court.

Id. (defendant had failed to make any objection to the court's comments at the time they were made or during the course of the trial, and then raised the issue for the first time on appeal). See Utah Code Ann. § 77-35-12(d) (1982); State v. John, Utah, 667 P.2d 32, 33 (1983); Jaramillo v. Turner, 24 Utah 2d 19, 21, 465 P.2d 343, 344 (1970); State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912, 913 (1965). And in State v. Malmrose, Utah, 649 P.2d 56, 58 (1982), this Court stated that where no objection is made at trial, assignments of error are only to be considered to the extent that they bear upon an ineffective assistance of counsel claim. Appellant claims no exceptional circumstances in his brief to warrant appellate consideration of

an issue that was waived through the lack of a timely objection at trial. Neither does appellant's issue relate to an ineffective assistance of counsel claim. Appellant should not now be able to claim prejudice with respect to the court's comment.

Furthermore, defense counsel never objected to the judge's comment during the trial. Appellant did file a motion for a new trial based upon the comment; however, the motion was filed five days after appellant had been sentenced, and over a month after he had been convicted (R. 185-186, 201-202, 205-206, 209-211). That motion was subsequently argued and denied (R. 219). Under this Court's ruling in State v. Hales, Utah, 652 P.2d 1290 (1982), this motion came too late to cure appellant's untimely objection to the judge's comment. In that case, this Court observed:

> In State v. Zimmerman, 78 Utah at 130, 1 P.2d at 964, this Court held that a defendant's objection to a remark made by a judge to the jury before completion of their deliberation "must be made before verdict, otherwise it may not be reviewed on appeal." This principle applies here . . . . In the instant case, defendant's failure to lodge a timely objection that would have allowed the court to mitigate any damage done by the prosecutor's comments precludes our review of the alleged error.

State v. Hales, Utah, 652 P.2d 1290, 1292 (1982) (emphasis in original). Likewise, appellant should be precluded from raising on appeal the trial judge's comment in this case.

CONCLUSION

For the foregoing reasons, appellant's convictions for theft and aggravated robbery should be affirmed, as should the lower court's denial of appellant's motion for a new trial.

RESPECTFULLY submitted this 4th day of October, 1984.

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CERTIFICIATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief postage prepaid to James A. Valdez, attorney for appellant, 333 South Second East, Salt Lake City, Utah 84111, this 5th day of October, 1984.

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