1984

# The State of Utah v. Cary L. Lenzing : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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| THE STATE OF UTAH, | : | |
| Plaintiff/Respondent, | : | |
| -v- | : | |
| CARY L. LENZING, | : | Case No. 19091 |
| Defendant/Appellant. | : | |

BRIEF OF APPELLANT

Appeal from a judgment and conviction of Attempted Criminal Homicide, a Second Degree Felony; Aggravated Robbery, a First Degree Felony; and Carrying a Concealed Dangerous Weapon, a Class B Misdemenaor, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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## BRIEF OF APPELLANT

### STATEMENT OF THE NATURE OF THE CASE

The Appellant, CARY L. LENZING, appeals from the conviction and judgment of Attempted Criminal Homicide, a Second Degree Felony; Aggravated Robbery, a First Degree Felony; and Carrying a Concealed Dangerous Weapon, a Class B Misdemeanor, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

### DISPOSITION IN THE LOWER COURT

The Appellant, CARY L. LENZING, was tried and convicted of Attempted Criminal Homicide, a Second Degree Felony; Aggravated Robbery, a First Degree Felony; and Carrying a Concealed Dangerous Weapon, a Class B Misdemeanor; on March 2, 1983. Appellant was sentenced that same day to the indeterminate term of not less than 1 nor more than 15 years at the Utah State Prison for the crime of

Attempted Criminal Homicide; the indeterminate term of not less than 5 years nor more than life at the Utah State Prison for the crime of Aggravated Robbery; and the indeterminate term of five 0 to 6 months at the Utah State Prison for the crime of Carrying a Concealed Dangerous Weapon. Such sentences to run concurrently.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reverals of the judgment rendered by the Court below.

## STATEMENT OF THE FACTS

On November 9, 1982, at approximately 7:25 p.m., South Salt Lake City Police Personnel were dispatched to a transient camp area located near the railroad tracks at 3000 South 500 West, South Salt Lake City, Utah, where a transient named William S. Southwick advised police that he and another transient, who were returning to their hobo camp from Salt Lake City, after having sold blood, found another transient, Jack P. Hillard, lying on the ground bleeding. Mr. Hillard was attended to by paramedics and then transferred to the emergency room at St. Mark's Hospital. Officer Lee Lindsy, South Salt Lake Police Department, made an inspection of the area surrounding Mr. Hillard's camp. At approximately 3350 South 300 West, Officer Lindsy observed another hobo camp and made contact with the Appellant and two other transient individuals. While questing identification from them the Officer observed a green pack on an aluminum frame which he had been advised by Mr. Hillard's friend appeared to be missing from his and the victim's camp. The

about the ownership of the pack, the Appellant, without the [illegible] of Miranda warnings, advised the Officer that the pack belonged to him. Officer Lindsy then noticed what appeared to be blood on the coat of the Appellant and a knife being carried on his belt underneath the waist-length jacket. The Appellant was placed under arrest and the knife, back pack, and clothing of the Appellant were placed into evidence. The Appellant, as well as the other members of his camp, appeared to have been extremely intoxicated; Mr. Brown, another transient, being so intoxicated that he passed out after providing the officers with identification. Also taken into custody was the third member of Appellant's camp, a Mr. Stevens, who stated that the blood on the Appellant's coat came from a dog bite which had been sustained by the Appellant earlier in the day.

At trial, Mr. Hillard testified that drinking, as well as selling blood, was a way of life of transient persons, and that he and Appellant, as well as other residents of the hobo camp were drinking heavily on that day. He testified that he recalled the Appellant and the Appellant's friends being together in his camp and that he was, without provocation, attacked and stabbed by the Appellant.

## ARGUMENT

### POINT I

THERE WAS INSUFFICIENT EVIDENCE SUBMITTED BY THE STATE TO SUSTAIN A CONVICTION OF ATTEMPTED CRIMINAL HOMICIDE WHERE THE EVIDENCE OF VOLUNTARY INTOXICATION OF THE APPELLANT WAS SO PERVASIVE AS TO NEGATE THE REQUIRED STATUTOPY INTENT FOR THAT OFFENSE.

Utah Code Annotated, §76-2-306 (1953 as amended) states, in pertinent part, "voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense . . ." This court has stated that, "voluntary intoxication of a sufficient degree may destroy a person's ability to form the necessary specific intent to commit a particular crime requiring a specific intent." (citation omitted.) State v. Bertul, 664 P.2d 1181, 1183 (Ut. 1983). In that case the court found that the appellant was not so intoxicated as to negate his intent to break into the pharmacy and steal drugs.

In State v. Wood, 648 P.2d 71 (Ut. 1982), a murder case, this court considered whether the trial court had erred in restricting the intoxication evidence to the day of the crime and a few hours prior thereto and refusing to give an intoxication instruction. The court stated that, "intoxication per se is not a defense to a criminal charge," Id. at 89, but that if the crime charged requires specific intent, the intoxication may negate the intent. Therefore in a homicide case, "[i]f intoxication is so great as to negate the existence of a necessary specific intent for first degree murder the crime is reduced to second degree murder." (citations omitted) Id. at 90.

The Appellant in the case at bar was charged and convicted of Attempted Criminal Homicide, specifically that he "intentionally or knowingly attempted to cause the death of Jack P. Hillard" (Information). The crime with which the Appellant was charged and convicted required specific intent. There was evidence presented

trial to indicate that the Appellant was so intoxicated at the time of the incident that he could not have formed the required intent. When he arrived at Hillard's camp, he was carrying a bottle which was practically empty (T.55). There was testimony that the Appellant's partner was so drunk that he had to lie down and go to sleep (T.58). One of the Officers investigating the incident testified that the Appellant had an odor of alcohol about him, and that in his experience, transients who live in the area where the incident occurred frequently drink a great deal (T.120-121). There was also testimony that after being stabbed twice, Mr. Hillard said to the Appellant, "What are you trying to do, kill me?" (T.68). The Appellant made no answer. This cannot be viewed as the reasonable response of a sober individual.

Voluntary intoxication does not excuse criminal behavior but may negate "the existence of the state of mind required for the commission of the crime, (and) the act or omission which otherwise would constitute an offense is purged of its criminality." State v. Potter, 627 P.2d 75, 70 (Ut. 1981). In this case, the evidence indicates that the Appellant was not able to form the requisite intent to murder the victim necessary to meet the statutory requirements of Attempted Criminal Homicide. Based on this inability to form the intent necessary to commit Attempted Criminal Homicide, the Appellant's conviction cannot stand.

## POINT II

THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUSTAIN THE VERDICT OF GUILTY OF AGGRAVATED ROBBERY.

The Appellant was convicted of Aggravated Robbery in travention of Utah Code Annotated, §76-6-302 (1953 as amende That statute reads:

> (1) A person commits aggravated robbery if in the course of committing robbery, he:
> (a) Uses a firearm or a facsimile of a firearm, knife or a deadly weapon; or
> (b) Causes serious bodily injury upon another
> (2) Aggravated robbery is a felony of the first degree.
> (3) For the purposes of this part, an act shall be deemed to be 'in the course of committing a robbery' if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

The robbery statute, Utah Code Annotated, §76-6-301 (1953 as ar states; "Robbery is the unlawful and intentional taking of pers property in the possession of another from his person, or imme presence, against his will, accomplished by means of force or fe

The elements that must be proved, then, for Aggravated Robbery are: 1) that there was an intentional taking of persona property; 2) that the property was in the victim's possession that the taking was from the victim's person or immediate prese 4) that the taking was against the will of the owner; 5) that t taking was accomplished by means of force or fear; and 6) that during the course of committing the robbery, the person uses a arm, knife, deadly weapon, or facisimile thereof, or causes se bodily injury upon another. The evidence presented at trial d not establish each of these necessary elements.

Assuming, arguendo, that the green backpack found in possession of the Appellant belonged to Mr. Hillard and that Appellant had, in fact, taken the backpack and assuming furth that the Appellant stabbed Mr. Hillard, these events do not

simple robbery much less Aggravated Robbery. No evi-
presented during trial to indicate when the backpack
en or that the taking and the stabbing were in any way
ed.

Evidence showed that Mr. Hillard had a green backpack
he kept inside his shandy (T.74).. Mr. Hillard testified
he did not see the Appellant take his backpack (T.76). Mr.
Wadsworth, Hillard's partner, testified that he had seen the
the morning of the incident before he left to sell his
plasma, and that he realized that it was missing after the stabb-
ing incident (T.91). He was not present, however, when the
stabbing took place and could not testify as to when the pack
might have been taken (T.89). Additionally, there was no testi-
mony that any blood was found on the backpack. Blood was found
on the Appellant's jacket and on his knife (T.238), and it
would be reasonable to assume that if the backpack had been taken
after the stabbing, there would have been blood found on that
as well.

While Utah's statute does not require that the force
necessary to constitute a robbery either precede or be contem-
aneous with the taking of the property, as do some states,
State v. Aldershaf, 556 P.2d 371 (Kan. 1976), and Smith v.
, 378 P.2d 790 (Okla. Crim. App. 1963)), there still must
relationship between the taking and the use of force or
In the present case, no relationship between the two
ences was established. If robbery was not established,
ed Robbery could not have been.

The standard for reversing a conviction due to insufficiency of evidence was most recently articulated by this court in State v. Petree, 659 P.2d 443 (Ut. 1982). In that case, the court overturned a second degree murder conviction saying:

> We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.
> Id. at 444.

In this case, there was testimony that the Appellant stabbed Mr. Hillard. There was testimony that Mr. Hillard owned a green backpack. There was also testimony that the Appellant had the backpack in his possession after the stabbing. There was no evidence however, regarding when the backpack was taken or that the taking and the stabbing were in any way related.

Because the State failed to establish even the required elements of robbery, Aggravated Robbery could not have been proved. The evidence does not show the required link between the use of force and the taking and so a conviction for robbery could not stand. Absent a showing that there was a robbery, the conviction for Aggravated Robbery cannot stand.

## CONCLUSION

Evidence presented at trial indicated that at the time that the stabbing took place the Appellant was intoxicated. As Attempted Criminal Homicide is a crime requiring specific intent the Appellant contends that at the time of the stabbing he was

so intoxicated to be able to form the required intent and so should not have been convicted of attempted criminal homicide. The evidence was also insufficient to sustain the Appellant's conviction for Aggravated Robbery. No evidence was presented by the State which connected the disappearance of the backpack to the stabbing. Without some link, there can be no robbery, and clearly no Aggravated Robbery, and this conviction cannot stand.

RESPECTFULLY SUBMITTED this 21st day of May, 1984.

Brooke C. Wells

BROOKE C. WELLS
Attorney for Appellant

DELIVERED two copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, this 21 day of May, 1984.