1983

State of Utah v. Richard I. Cintron : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 19149

RICHARD I. CINTRON, :

Defendant-Appellant. :

- -

BRIEF OF RESPONDENT

- -

APPEAL FROM CONVICTIONS FOR AGGRAVATED BURGLARY AND AGGRAVATED ROBBERY, FELONIES OF THE FIRST DEGREE, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Richard I. Cintron, appeals his convictions for Aggravated Burglary, a felony in the first degree, Utah Code Ann. § 76-6-203 (1978), and Aggravated Robbery, also a felony in the first degree, Utah Code Ann. § 76-6-302 (1978), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of both offenses in a jury trial held November 22, 23, and 24, 1982. Appellant was sentenced to serve five years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgments below.

STATEMENT OF THE FACTS

At approximately 3:00 a.m. on July 26, 1982, the victim, William Parker, who lived alone in his home at 11760 South State Street in Sandy, Utah, was awakened by his dog. Parker then heard the sound of the back screen door shutting and went to investigate (Tl. 12-14, 35). He turned on the kitchen lights, which consisted of three large, base 100-watt globe lights (Tl. 13, 38). The porch wall light outside next to the back door and the overhead light in the middle of the porch were also on (Tl. 36-37). Parker looked through the window sheers and saw a man, whom he identified as appellant, standing on the back porch (Tl. 14, 36).

Parker immediately recognized the man as the "Spanish-looking" young man who had come to his house on three occasions during the previous three days. Parker had first seen appellant early the morning of July 23, 1982, when appellant had come to Parker's house asking for gasoline (Tl. 15, 10, 143, 145-146). Parker had had no gasoline and had sent appellant to his sister's house, next door to his, approximately 150 yards to the north (Tl. 15, 142, 146). Parker had next seen appellant in the late afternoon of that same day, when appellant came by just to talk. Parker had last seen appellant at approximately 10:00 p.m. on July 25, 1982, when appellant knocked at Parker's

door, wanting Parker to let him come in and talk. Parker had refused (Tl. 16).

Because Parker recognized that it was appellant on his back porch the morning of July 26, 1982, he opened the door slightly and asked appellant what he wanted. Appellant said, "I am scared; I am scared," and tried to push his way into the house (Tl. 17, 36, 56). Parker held appellant out and asked what he was afraid of. Appellant replied, "This," and appellant's blond accomplice came into view and kicked the door open with both feet, knocking Parker to the floor (Tl. 18, 39-41, 55-58).

The blond man, who was holding a knife, rolled Parker over onto his stomach, stomped on Parker's back and head with his feet, and threatened to cut Parker's throat (Tl. 18-20, 40-42). When Parker's dog barked at the intruders, distracting them, Parker attempted to wrestle the knife away from the blond man, and as a result Parker's hand was severely cut (Tl. 20).

Appellant's accomplice then blindfolded Parker, and they took him into the bedroom, where they tied him upon the bed (Tl. 20-22, 41-42). During this time, Parker heard the blond man call appellant "Gary" several times, but later Parker heard the blond man call appellant "Rich" (Tl. 23, 45, 49-52). Parker testified that he heard just the one

word, "Rich," and "[t]hen something about going and getting something" (Tl. 50).

After the two men left, Parker untied himself, walked over to his sister's house, and told his brother-in-law, Wayne C. Dahl, to telephone the police and tell them he had been robbed (Tl. 23-24, 74-75). Dahl asked Parker who had robbed him. Parker answered, "Well, one of them is the same guy that run out of gas that night, come and got gas" (Tl. 24, 75).

Dahl remembered appellant as the one who had come for gasoline on the morning of July 23, 1982. After going to Parker's house, appellant had gone to Dahl's house to ask for gasoline (Tl. 15, 71, 142, 146). Dahl had given appellant a can of gasoline, and appellant had paid for the gasoline and left his driver's license with Dahl as security for the can. Dahl remembered that the name "Richard Cintron" appeared on the license and that his birthday was October 28, 1957. October 28th is the Dahls' wedding anniversary (Tl. 72-73, 142-143). Thus, when Dahl telephoned the police, he described the two men as Parker had described them to him and gave them appellant's name as one of the burglars (Tl. 76, 81-82).

After Parker had been treated for his wound, he returned to his home and discovered that his microwave oven

and five of his guns had been taken (Tl. 25). None of the stolen items have been recovered (Tl. 44).

Later that same day, July 26, 1982, Draper Chief of Police F. R. Long showed the victim a photo lineup consisting of photographs of six individuals, one of whom was appellant. Parker unhesitatingly pointed to appellant's photograph, saying, "That's the one." (Tl. 356).

Appellant was arrested August 26, 1982 (R. 16). He was tried by jury in the Third Judicial District Court of Salt Lake County on November 22, 23, and 24, 1982. Appellant presented a defense of alibi (R. 75, 92-93). The jury found appellant guilty of Aggravated Burglary and Aggravated Robbery.

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 convictions for Aggravated Burglary and 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. Brafford, Utah, 663 P.2d 68 (1983), quoting State v. Petree, Utah, 659 P.2d 443 (1983), brackets in original. 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, in a recent decision, 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 (Case No. 18559, filed 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.

Appellant conceded at trial that the victim's home had been burglarized and that the victim had been robbed.

Appellant claimed only that the victim was mistaken as to the identity of the perpetrators of the crimes (Tl. 10-11). The evidence pertaining to the victim's identification of appellant, however, established beyond a reasonable doubt that appellant participated in the crimes.

The victim, William Parker, immediately recognized appellant when he saw appellant on the back porch of his home on the morning of July 26, 1982. Parker had seen appellant three times during the previous three days (T2. 15-16). Parker had a clear view of appellant at the time of the burglary through the sheer curtain. Three large, base 100-watt globe lights were on in the kitchen, as were two porch lights, one on the outside porch wall in front of appellant and one on the ceiling of the porch above appellant (Tl. 14, 36-38). Parker was not wearing his glasses, but appellant stood only approximately three feet from him, and Parker testified that he has no difficulty seeing clearly at that distance. Parker only wears his glasses when he reads fine print or when his eyes are tired (T.1 6869).

Later, the day of the crimes, Parker unhesitatingly identified appellant in a photo lineup prepared by Draper Chief of Police, F. R. Long (Tl. 97-99). Parker also positively identified appellant in court (Tl. 17). Parker also testified at trial that he heard the blond

man once refer to appellant as "Rich" in connection with "something about going and getting something" (Tl. 23, 45, 49-50, 52).

His identification evidence was buttressed by the testimony of Wayne Dahl, the victim's brother-in-law. Dahl testified that Parker told him that one of the robbers was the person who had asked for gasoline three nights prior to the burglary (Tl. 24, 75). Dahl recalled appellant's name and birthdate from the driver's license appellant had left with him as security for the gasoline can (Tl. 72-73). Dahl also positively identified appellant at trial as the person who had purchased gasoline from him three nights prior to the burglary (Tl. 73).

Appellant did not deny that he asked Parker and Dahl for gasoline on July 23, 1982, but he did deny returning to Parker's residence at any time after that morning (T.2 142-146). Appellant claimed that he was drinking with friends during the time Parker was robbed (Tl. 128-135, 147-149, 152, 154-164). However, the prosecution rebutted appellant's alibi with the testimony of Dick Forbes, Investigator for the Salt Lake County Attorney's Office. Forbes testified that appellant's alibi witneses in an earlier conversation with him had been unable to account for appellant's whereabouts during the critical early

morning hours of July 26, 1982 (Tl. 173-177).[1]

By finding appellant guilty, the jury rejected appellant's alibi defense and accepted the victim's identification of appellant. The evidence was sufficient to support the jury's finding, and reasonable minds could not have entertained a reasonable doubt as to appellant's guilt. Therefore, the convictions should be affirmed.

POINT II

THE PROSECUTOR'S QUESTION CONCERNING APPELLANT'S PRIOR THEFT CONVICTION WAS PROPER.

The prosecutor asked appellant on cross-examination whether he had "ever been convicted of a theft offense" (Tl. 152). Appellant's objection to the question was overruled (Tl. 152). Appellant claims this was error.

Rule 21, Utah Rules of Evidence, provides: "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility, except as otherwise provided by statute."

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1 Appellant objected to the State's calling Forbes as an alibi rebuttal witness because he had not been so listed in strict conformity with Utah Code Ann. § 77-14-2 (1982). The objection was overruled because the State had, in response to appellant's discovery motion, provided appellant with a copy of Forbe's report of the alibi statements made to him. Forbes' name appeared on the report. The court ruled that such constituted constructive compliance with the rule (Tl. 169-171).

By implication, this rule permits the use of evidence of a crime that does involve dishonesty, regardless of classification, for the purpose of impairing a witness's credibility. Theft is a crime involving dishonesty. State v. Johnson, 666 P.2d 950 (Wash. Ct. App. 1983); State v. Carden, 650 P.2d 97 (Or. Ct. App. 1982). Therefore, it was not error for the prosecutor to question appellant concerning his prior theft conviction.

As noted by appellant in his brief, Rule 21 by it terms does not apply where a statute provides otherwise. Utah Code Ann. § 78-24-9 (1953), provides that "a witness must answer as to the fact of his previous conviction of felony." Thus, a witness is required to answer questions concerning prior felony convictions, including questions concerning felony convictions not involving dishonesty or false statement, evidence of which would otherwise be inadmissible under Rule 21. While this statute, when read in connection with Rule 21, does not permit questions concerning misdemeanor convictions for crimes which did not involve dishonesty, it does not preclude questions concerning misdemeanor convictions for crimes such as theft which do. Thus, the question was proper.

POINT III

APPELLANT WAS NOT PREJUDICED BY THE CLOSING ARGUMENT OF COUNSEL FOR CO-DEFENDANT.

In closing argument, Jo Carol Nesset-Sale, counsel for co-defendant Joseph Price, commented on the strength of the State's case against appellant and suggested that his accomplice was alibi witness James McCall and not her client (T2. 35-37). Appellant objected to this line of argument, but did not move for mistrial or severance. The objection was overruled because the court ruled it could not restrain counsel from arguing the evidence (T2. 35). Appellant contends this was error.

"Great latitude is accorded counsel in presenting his closing argument. He is allowed to summarize and discuss the evidence adduced and to draw reasonable inferences therefrom, with a view toward assisting the jury to analyze and evaluate the evidence." 3 WHARTON'S CRIMINAL PROCEDURE § 523 (1975) (emphasis added). In the case at bar, counsel for codefendant Price merely discusssed the evidence against appellant and argued that it could be reasonably inferred from the evidence that appellant's blond accomplice was alibi witness McCall and not her client. Thus, this line of argument was within the permissible scope of closing argument.

Furthermore, appellant was not prejudiced by the mere fact that counsel for co-defendant implied that appellant was guilty because the remarks could not reasonably have affected the verdict. See., e.g.,

State v. Lewis, 430 N.E.2d 1346 (Ill. 1981); Dean v. State, 430 S.2d 491 (Fla. Dist. Ct. App. 1983). The evidence of appellant's identity was overwhelming, such that there is no reasonable likelihood that the verdict would have been different absent co-counsel's comments. State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974). Also, because co-defendant Price was also found guilty, it is obvious that the jury was not persuaded by the argument. Thus, appellant was in no way prejudiced.

Workman v. Henrie, 71 Utah 400, 266 Pac. 1033 (1928), cited by appellant, is not on point. In Workman counsel commented that he had personal knowledge of the credibility of certain witnesses. In the instant case, counsel for co-defendant did not claim personal knowledge as to any matter but merely discussed the evidence and the reasonable inferences which could be drawn therefrom. Therefore, the argument of counsel for the co-defendant was permissible.

CONCLUSION

The evidence supported appellant's convictions. Appellant's identity as one of the burglars was established beyond a reasonable doubt. The victim's identification of appellant was certain and consistent. No other issue was disputed at trial.

It was not improper for the prosecutor to

question appellant concerning his prior theft conviction because theft is a crime involving dishonesty. Also, the arguments of counsel for appellant's co-defendant were not improper. Furthermore, appellant was not prejudiced by counsel for the co-defendant arguing the evidence because there is no reasonable likelihood that the result of the trial would have been different absent such remarks.

Therefore, the convictions should be affirmed.

Respectfully submitted this 31st day of October, 1983.

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CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing Brief of Respondent to the following this 3rd day of November, 1983:

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