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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH Respondents	)	
vs.	)	Case No. ~~21718~~ 11903
STANLEY WAYNE BARAN Appellant	)	

BRIEF OF DEFENDANT-APPELLANT

Appeal from an Order of the District
Court of Salt Lake County,
Utah.
Honorable Gordon R. Hall, Judge.

DON L. BYBEE
1414 Walker Bank Bldg.
Salt Lake City, Utah.
Attorney for Petitioner.

FILED

Clerk, Supreme Court, Utah

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RELIEF SOUGHT ON APPEAL

The defendant asks that the finding of guilt be reversed and the complaint dismissed or in the alternative that the case be remanded for a new trial.

IN THE SUPREME COURT OF THE

STATE OF UTAH

---oooOooo---

THE STATE OF UTAH	:	
Respondents	:	
vs.	:	Case No. 21718
STANLEY WAYNE BARAN	:	
Appellant	:	

---oooOooo---

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The defendant, Stanley Wayne Baran, was charged with robbery in violation of title 76, chapter 51, section 1 Utah Code Annotated 1953, charging that on January 10, 1969, in Salt Lake County, State of Utah, he robbed Corey Sharp and Rebecca Luras. Defendant has filed this Appeal seeking to have the Court dismiss the charges against this defendant, or remand the case for a new trial.

DISPOSITION IN THE LOWER COURT

The petitioner-defendant was convicted by a jury on September 18, 1969, of robbery. Judge Gordon R. Hall heard the matter. Defendant was sentenced to serve six months in Farmington County Jail, to repay $500.00, and to remain on probation for two years. Approximately

one month of the jail sentence has been served.

FACTS

The petitioner-defendant was jointly charged with robbery in violation of 76-51-1 UCA in a complaint before James S. Sawaya, City Judge of Murray, alleging that Stanley Wayne Baran and Brian Frazier, on January 10, 1969 in Salt Lake County, robbed Corey Sharp and Rebecca Luras. Bail of $15,000 was reduced to $5,000. Defendant demurred to the complaint and a preliminary hearing was set for June 30, 1969. The demurrer alleging that the complaint failed to state a location, time or particulars sufficient to enable defendant to prepare a defense, was denied. On June 30, 1969, the court without hearing denied an application to change venue and

denied defendant a reporter. Testimony was received and the court on its own motion continued the case to July 1, 1969. On that date, further testimony was taken. Defendant recorded both days of testimony. The case was taken under advisement to July 2, 1969, on which date defendant was bound over to stand trial. Defendant's arraignment came before Judge D. Frank Wilkins on July 14, 1969. A motion to quash was filed and heard on July 18, 1969, but no transcript of that hearing was forwarded. The motion was denied and on July 21, 1969, defendant plead Not Guilty and filed a demand for speedy trial. On July 28, 1969, defendant filed Notice of Alibi. The case came on for trial August 18, 1969, and was continued, over vigorous protest of defendant, as defen-

dant wanted both trials held one after the other (Judge Hall heard the first felony charge which the jury returned a Not Guilty verdict on.) The case was reset September 18, 1970, and trial commenced that day. Defendant was prejudiced by the delay as he was without funds, a witness moved and was lost, the defendant was jailed unduly for a misdemeanor and could not assist in preparation of his defense. He was kept jailed and brought to the court in irons before the jury, and a guard kept present at all times, before the same judge who lost the first case.

The defense asked that the court rule in advance that no reference be made in the course of the trial to the fact that defendant had been a police officer formerly charged, due to the adverse

effect on the jury of extensive adverse pretrial publicity. The court was asked not to question the jurors on what they had read if such evidence were excluded (T83[10]). The court refused to rule on the former (T 82 [2]) and then advised the jury Mr. Baran was a police officer (T 87;20). Having so advised them, the court refused to enquire privately what each had read (T 88;12), (T 94;1) or if the neighbors knew of the divorce of defendant with its hard words (T 96; 1-30).

The defense challenged the jury panel which consisted of middle aged, caucasions, selected at that time from the tax rolls. (Note: the court has since changed the method of selection, taking them from the voting rolls). The jury panel consisted of 16 persons

of whom one lived six houses away from defendant's estranged wife, eight of whom had been previously robbed, some as many as three times, and two of that eight who had read all about defendant's other case in the papers. The court refused to grant a hearing on the panel. Three persons who were in these catag- ories survived the challenges. One wan- ted to be excused for business and had to be challenged when the court would not, and thus the composition of the panel ended up with considerable bias against defendant, as one other had been on a recent case with the prosecutor, and 1 indicated an affirmative to bias and was not excused (T 90;13) and the court cut defense off repeatedly. (T 93;4), (T 94;9), (T87;21) (T 81;11) etc.

The State's witnesses testified that on January 10, 1969, at 10 P. M., 2 persons, one of whom was Gerald Rose, came into a service station at 11th East and 17th South in Salt Lake County and took with gun and crowbar cash receipts of about $300 to $550 and $2 from a wallet. Mr. Harwood saw 2 men enter and scoop money up and another pick them up in a 1963 Ford and followed until he was fired upon. (Exhibit 4) None of them identified defendant as being there. Mr. Lewis had his car stolen from Trailways Bus Depot at 9:10 P.M. and recovered it later with a stolen transistor and hole shot in the rear window. The prosecutor then put in evidence of a burgulary not related to this offense (T 132;17) and the court refused a mistrial (T133:6). Mr. Lewis testified defendant worked one day at this station 2 weeks before the robbery and the Judge refused to instruct on stricken evidence on cash register operations.

Clare Rose then testified that at 11 P. M. on January 10, 1969, Gerald, Frazier, and defendant were at her home, defendant handed Gerry money and said "You're in it." and threatened her life and that of her children. The Court refused to allow a recording of prior testimony to impeach, alledging poor quality, although the recording is clear enough. Police Officer Paul Rogers testified that on January 10, 1969 at 11P.M. Stan Baran was with him at the Police Station (T 299:19). Evidence of items taken in the robbery and found at the Rose home was stipulated. (Exhibit 1, 2, and 3.)

The only testimony linking defendant to the robbery came from a 2-time convicted felon, Gerald Rose who was identified by witnesses at the crime and granted immunity from 2 new felonies for implicating a policeman whom he did not like.

The prosecution withheld evidence of the immunity from the jury (T 188: 15). He placed Defendant and another person against whom the prosecutor elected not to proceed after he denied being in the robbery and produced an alibi. (T 282:30) Rose testified that at 7 P.M. he picked both up on South Temple and they took an hour to drive for gas at North Beck Street (T 211:25) at 8 P.M. and while looking for a car to steal went to three (3) places to steal waiting at a cafe at 9 P.M. and then over 1/2 hour waiting thereafter at a theatre; and on (T 217:25) dropped Rose's car off at 9; and at 9:10 the car of Mr. Lewis' was stolen. Defendant and four witnesses testified as to his alibi and the jury chose not to believe them or the supposed co-defendant Frazier and his alibi.

The prosecutor was then allowed to place an

exotic dancer on the stand who said Defendant spok

of knowing something of the case, but Prosecution

withheld from Defendant and the jury a recorded conv

sation whereby Defendant communicated his suspicio

of Rose to the police before his arrest. (See motion

for new trial.)

STATEMENT OF POINTS AND ARGUMENT

POINT 1

THE ONLY EVIDENCE CONNECTING DEFENDANT TO THE ROBBERY WAS A STATEMENT OF AN ACCOMPLICE WHICH STATEMENT WAS NOT CORROBORATED.

STATUTORY REQUIREMENT

The law in Utah is very clear with regards to the requirement that a defendant not be convicted on the uncorroborated testimony of an accomplice. A law has been on the books since Utah's territorial days which clearly states this requirement. In its present form it reads:

> CONVICTION ON TESTIMONY OF ACCOMPLIC:- A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the committing of the offence; and the corroboration shall not be sufficient, if it merely shows the commission of

the offence or the circumstances thereof. 77-31-18 UCA (1953)

DEVELOPMENT OF CASE LAW

Despite the clarity of the statute, a great body of case law has developed in Utah and other states with regards to the exact requirements of corroboration in such matters. In an effort to aid Utah courts in determining what is sufficient corroboration, the Utah Supreme Court has adopted some tests which, although they have originated in other courts, have been used over the years as guidelines in Utah. In 1931, the Utah Supreme Court described both of these tests:

> "The corroborative evidence need not be sufficient in itself to sustain a conviction but it must in and of itself tend to implicate and connect the accused with the commission of the crime charged and not be consistent with his innocence. It is insufficient if it merely casts a grave suspicion

> on the accused." State vs. Laris 78 Utah 183, 2 P.2d. 243 (1931)

In this same case, the Court adopted another test, citing with approval the test used in Welden vs. State, 10 Tex. App. 400:-

> "Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witnesses with the view to ascertain if there be inculpatory evidence - evidence tending to connect the defendant with the offence. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is not corroboration, though it may be corroborated in regard to any number of facts sworn to by him." ID

In a further effort to clarify this area of law, various Supreme Court decisions have added additional explanatory matter. For example, in 1927 the Supreme Court in Utah held that:-

"The corroborative evidence required

by the statute need not be sufficient in itself to support a conviction but it must implicate the accused in the offence and not be consistent with his innocence. It is insufficient if it merely casts a grave suspicion on the accused." State v. Lay, 38 Utah 143, 10 Pac. 987 (Emphasis added).

In California it was held that the corroborative evidence was not sufficient if it required further interpretation and direction to give it value. People v. Brady 382 P. 2d. 591, 59C. 2d. 855, 51 Cal. Rptr. 471, 96 ALR 2nd 1178.

As noted previously, despite apparent clarity of the statute involved, a great body of case law has developed, touching on the requirement of corroborative testimony. The problem in most cases seems to be whether the alleged corroborative testimony was sufficient. The defendant in most cases contends that there was no corroborative evidence at all or if there was any such corroborative

evidence, was insufficient. A Utah case held that:-

> "While it is a question for the jury to determine whether the corroborative evidence is sufficient, in connection with the testimony of the accomplice to justify conviction, yet unless there is corroborative evidence of the material fact tending to connect the defendant with the commission of the crime, the court should direct the verdict for the defendant." State v. Somers 97 Utah 132, 90P. 2d. 273 (1939).

In many cases, the prosecutor has attempted to corroborate the testimony of the accomplice and has, in fact, corroborated his testimony with regard to much of the accomplice's story. However, as pointed out in State vs. Somers, supra, the corroborative evidence must be of a material fact, an element of the crime. It must tend to connect the defendant with the commission of the crime and not merely corroborate certain points of the accom-

plice's story.

As pointed out in the _State vs. Laras_, _supra_, the corroborative evidence must tend to implicate the defendant with the crime charged, not merely some criminal act or some suspicious behaviour. As the Court said, it is insufficient if the corroborative evidence merely casts a grave suspicion on the accused. The courts have required that this corroborative evidence actually _connect_ the accused with the crime in question. It is not sufficient if the evidence relates to some other criminal act or even an apparently similar criminal act, but it must relate to the crime in question, the crime charged. Repeating again the second test cited by the court in _State v. Laras_, the corroborative evidence should be looked at completely apart from the testimony

of the accomplice, and the connection with the defendant to the crime charged must be solely on the basis of this corroborative evidence. If the defendant's action, in light of the alleged corroborative testimony can be seen to be consistent with his innocence, the courts have held that this corroborative evidence is not sufficient and have required a directed verdict in favor of him.

INSUFFICIENT CORROBORATIVE EVIDENCE

In State v. Butterfield, cited supra, the alleged corroborative evidence was the finding of stolen property in the defendant's house. However, because the defendant's brother was also charged with the crime, and since the court assumed that they both lived in the same house, the finding of the stolen property was consistent with the defendant's inno-

cence and was not sufficient to convict

him of the crime.

State v. Somers, cited supra:

> "While it has been held that this corroborative evidence may be slight *** and may be established by circumstantial other than direct evidence ***, yet the evidence must do more than create a mere suspicion as to the defendant's guilt.. It must tend to connect the defendant with the commission of the offence *** and it is not sufficient corroboration to establish a motive merely." ID at 274.

In this arson case, the evidence

showed that the defendant was with the

accomplice:

> "On the evening in question at or near the time the fire started, and in the vicinity of the building. In the present case, this evidence is entirely consistent with the defendant's innocence ***. Somers does not deny he was with Elgin (the accomplice) on the evening of the alleged arson, in fact, he admits that the two were together for some time during the evening, but his story which is corroborated by other witnesses, is that he left Elgin at about 9:30 p.m. and went up town, where he was with others some time before the fire alarm sounded: State v.

Somers 90 Pac. 2nd at 274.

The Court here held that evidence of highly suspicious activity on the part of the defendant, together with the testimony of the accomplice, was insufficient to convict him of the crime. The same case notes even further - quoting again from the case:-

> "Appellant's conduct while he was in jail in threatening anyone who might testify against him might arouse suspicion that he had had something to do with the fire, but mere suspicion is not sufficient to corroborate an accomplice. And this circumstance is consistent with the desire to prevent Grames, who was in jail with him, from threatened false testimony of the latter." ID at 274.

In a recent Arizona case, it was held that there was insufficient corroborative evidence when the testimony showed that the defendant and two accomplices left together on the night of the burglary in question and returned together later in the same evening. Further testimony

by a gas station attendant showed that the two accomplices who were known to him, plus a third whom he did not know, stopped at a station at the night of the burglary, and additional testimony of the owner of the burglarized store that the defendant had previously worked at the store and was thus familiar with the layout and operation of the store did not adequately connect the defendant with the commission of the crime and were insufficient to corroborate the testimony of the two accomplices. State v. Goldthorpe 96 Ariz. 350, 395 P. 2nd 708 (1964)

Mere suspicion was not enough in the 1968 Utah case where the Sheriff's testimony tended to establish that footprints found near the scene of the crime had pointed toes and subsequent testimony of an accomplice that the defendant had

been wearing shoes with pointed toes. These facts were not found sufficient to corroborate the testimony of an accomplice. State v. Olsen 21 Utah 2nd 128, 441 P. 2nd 707 (1968).

An Oklahoma case held that evidence sufficient to merely show the commission of the crime was insufficient corroboration. Rodriques v. State, Okla. 406 P. 2nd. 506.

In California it was held that evidence showing the opportunity of the defendant to commit the offence was not sufficient evidence to corroborate the testimony of an accomplice. People v. Thurmond, 170 C.A. 2nd 121, 338 P. 2nd 472.

SUFFICIENT CORROBORATIVE EVIDENCE

It will be helpful to examine several examples of what was sufficient

evidence to corroborate the testimony of an accomplice. The finding of stolen goods on the defendant's property has generally held to be sufficient corroborative evidence. In State v. Vigil, 123 Utah 495, 260 P. 2nd 539 (1953) the defendant's testimony had been that a certain suitcase was his. The suitcase was later proved to have been stolen. This evidence was sufficient corroboration to the testimony of an accomplice. In a 1942 case, State v. Erwin, 101 Utah 365, 120 P. 2nd 285 (1942) in which the Mayor of Salt Lake and several city officials were charged with conspiracy to accept a bribe, the Utah Supreme Court held that corroborative evidence may consist in the admissions of the accused.

In State v. Bruner, 106 Utah 49, 146 P. 2nd. 302 (1944) the finding of

stolen goods on defendant was held to be sufficient corroborative evidence even though the defendant testified that he merely recovered the goods for the purpose of returning them to the owner.

In a 1963 Utah case, it was held that the defendant's admission of being in the area of the crime, the finding of a shotgun and nylon stocking allegedly worn on the head of the defendant and his accomplice along the route, together with independent testimony by a witness in another state that the defendant had admitted to him that he shot a man in Utah, under identical circumstances, were held to be sufficient corroboration to the testimony of an accomplice. State v. Cazda, 14 Utah 2nd 266, 382 P. 2nd 407 (1963).

In State v. Simpson, 120 Utah 596,

236 P. 2nd 1077 (1951) the defendant was convicted on testimony of an accomplice which was corroborated by evidence of flight and attempted concealment from a police officer, as well as attempts to sell the stolen merchandise.

EXAMPLES FROM OTHER JURISDICTIONS

To recite the various fact situations discussed by the courts of other jurisdictions would take several volumes. However, it will not be out of place to examine a few of these, since most of the Western States have basically the same law as Utah.

In an Oregon case, it was held that evidence tending to show that the defendant's automobile was found stuck in a mud hole next to a stolen safe and that a set of foot-tracks was found leading from the defendant's car to a

place where a coin box from the safe was found, was sufficient corroboration for the testimony of an accomplice. State v. Cheek, 240 Or. 323 41 P. 2nd 27.

In an Alaska case, the evidence of the defendant's fingerprints found in the building, was sufficient corroboration for the testimony of an accomplice. Braham v. State, Alaska, 376 P. 2nd 714.

In Arizona, it was held that evidence showing flight by the defendant, his apprehension, as well as possession of the stolen property, was sufficient corroborative evidence. State v. Turner 94 Ariz. 49, 383 P. 2nd 866. And in another Arizona case, evidence showing the fact that the truck of the defendant was at the scene of the crime as well as evidence that the defendant had transported stolen goods, was sufficient

corroboration for the testimony of an accomplice. <u>State v. Cope</u> 438 P. 2nd 442 7 Ariz. App. 295.

In California, sufficient corroborative evidence was found in the defendant's admissions to a police officer, his attempt to make a false alibi, and his flight from a policeman. <u>People v. Santo</u>, 43 C. 2nd 319, 273 P. 2nd 249. Possession of the probable instrument of the crime was found to be sufficient corroborative evidence to warrant conviction on the testimony of an accomplice in <u>People v. Keen</u>, 128 CA 2nd 520, 275 P. 2nd 804. And the California Courts have held that evidence that the defendant knew the value of furs stolen and that he surreptisiouly sold them at a lesser price, was sufficient corroborative evidence in <u>People v. Shofstall</u> 56 CA 2nd 121 132 P. 2nd 48.

SUMMARY

The law in Utah is clear that conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence. Courts in Utah have enlarged upon this statutory test and have held that the corroborative evidence must connect the accused with the crime charged; that the corroborative evidence must do more than create a mere suspicion as to the guilt of the defendant. The corroborative evidence must be looked at apart from the testimony of the accomplice, and when so looked at, must not be consistent with the defendant's innocence. If the corroborative testimony does not connect the defendant with at least some material element of the crime charged and if it is consistent with the innocence of the defendant, Utah courts have required that

direct verdict be granted in favor of the defendant and as the evidence in this case did not rise to the required level, it was error not to direct a verdict for Defendant.

POINT 2

THE COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING PROSECUTION TO INTRODUCE EVIDENCE OF DEFENDANT'S PRIOR GUILTY FINDING IN A MISDEMEANOR CASE AND OF OTHER CRIMES.

It is a well established rule that in a criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes at other times is incompetent and inadmissable for the purpose of showing the commission of the crime charged (29 Am Jur 2d 366; Evidence, Sec. 320, and cases cited therein.)

The cited text states the philosophy to be prevention of a conviction by inference that one who committs other crimes is likely to have committed that charged. This rule has been adopted in Utah.

(People v. Couglin, 13 Utah 58, 44 P. 94; State v. Gillies, 40 Utah 541, 123 P. 93; State v. Bowen, 43 Utah 111, 134 P. 623; State v. McGowen, 66 Utah 223, 241 P. 314; State v. Gregorious, 81 Utah 33, 16 P. 2d 893; State v. Anderton, 81 Utah 320, 17 P. 2d 917; State v. Peterson, 83 Utah 74, 27 P. 2d 20; State v. Kappes, 100 Utah 274, 114 P. 2d 205; State v. Nemier, 106 Utah 307, 148 P. 2d 327; and State v. McHenry, 7 Utah 2d 289, 323 P. 2d 710). There are exceptions to show a general scheme where one involves proving the other, to establish identity, to prove constitutive elements of the crime on trial, none of which are material here.

The crimes elicited by prosecution include dismissal as an officer on a prior charge resulting in a conviction of destruction of property a misdemeanor, theft of a radio, taking of pennies, conspiring to rob a theatre and a cafe, stealing a car, etc..

POINT 3

DEFENDANT WAS DENIED A FAIR AND IMPARTIAL TRIAL.

An accused is guaranteed a fair and impartial trial by the Constitution of Utah (Art. I, Sec. 12). To convict him otherwise is a violation of that constitutional right.

Defendant points to the following characteristics:

1. The Court assisted in prosecution of the case where no assistance was needed by advising the jury that Defendant was a discharged police officer, making the motion to exclude defense witnesses, inadequate questioning of the jury, failure to remand for preliminary hearing, failure to try the case when originally set, holding defendant in jail during and before the trial thus making him unable to assist in his defense and making him impecunious, and then had him brought to court in handcuffs, failure to require the State to identify its witnesses even

on the day of trial, failure to try the jury panel question, failure to dismiss jurors challenged, failure to instruct the jury of defendants presumption of innocence at the outset of the trial, permitted prosecution to lead witnesses and make speeches to the jury and cut defense off, allowed prosecution to cross examine its own witness Harwood, refused to assist in securing the presence of a police officer for rebuttal the last day of trial, hurried the conclusion of the case and arguments, and refused a continuance to get 2 witnesses in order to get to a ball game. The Court failed to grant a mistrial for non-related crime evidence, refused to permit a recording of preliminary hearing testimony to be played to the jury, refused to admit the repair slip on defendant's car, refused a retrial and to sign a certificate of probable cause, and required Mr. Holloway to produce in court evidence to substantiate his testimony and required defense to recall

him and refused to instruct as requested.

Hardly any one of these errors alone would justify a new trial, but taken together and with the Court's repremanding of defense counsel and defense witnesses, the jury could not help but have been influenced and prejudiced against defendant; and it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error complained of. Pacific Digest, Criminal Law, Key 1162; People v. Wardell, 334 P. 2d 641, 167 C. A. 2d 560 (1959).

POINT 4

THE COURT COMMITTED PREJUDICIAL ERROR IN ITS SELECTION, VOIR DIRE, AND INSTRUCTION OF THE JURY.

As may be observed in the statement of fact and transcript the Court failed to try the jury panel question as required by the Utah Law. The jury was not a representative group as 8 of them had been robbed, one was a neighbor of defendant's

estranged wife, 2 of them had read all about defendant's prior case and possibly this one and one expressed a bias and another wanted to get back to his business.

The Court refused to inquire privately of the jury as to their knowledge. The law does not set out such a procedure nor deny such a right to defendant.

The jury was not advised (according to the record) of defendant's presumption of innocence at the outset of the case.

The instruction on an accomplice's testimony does not set out tests by which a jury could be expected to judge whether there is corroboration as would defendant's requested instruction.

CONCLUSION

The defendant submits that the Supreme Court should reverse the conviction of guilty and dismiss the complaint as there is no evidence to link him to the crime of Gerald Rose except Gerald Rose.

In the alternative defendant feels strongly enough in his innocence and that the errors of the trial denied him a fair trial, that he is willing to risk 5 to 20 years in prison against his 6 month sentence for another trial.

Respectfully submitted,

DON L. BYBEE
1414 Walker Bank Building
Salt Lake City, Utah
Attorney for
Defendant-Appellant

This is to stipulate that Defendant delivered 2 copies of the above brief to the Attorney General on April 30, 1970, and that Defendant may file said brief a day after the final date without prejudice.

For Vernon Romney
Attorney General