

1977

State of Utah v. Joseph Anselmo : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Bruce C. Lubeck; Attorney for Appellant Vernon B. Romney; Attorney for Respondent

Recommended Citation

Brief of Appellant, *Utah v. Anselmo*, No. 14578 (Utah Supreme Court, 1977).
https://digitalcommons.law.byu.edu/uofu_sc2/334

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
vs. : Case No. 14578
JOSEPH ANSELMO, :
Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty in the
Third Judicial District Court, in and for Salt Lake County,
State of Utha, the Honorable Gordon R. Hall, presiding.

BRUCE C. LUBECK
Twelve Exchange Place
Salt Lake City, Utah 84111
Attorney for Appellant

VERNON B. ROMNEY
Attorney General, State of Utah
236 State Capitol
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO REDUCE COUNT II OF THE INFORMA- TION AT THE END OF THE STATE'S CASE FROM THE CHARGE OF AGGRA- VATED SEXUAL ASSAULT AS CONTAINED IN THE INFORMATION TO THE LESSER INCLUDED OFFENSE OF SIMPLE RAPE BECAUSE THE STATE FAILED TO PROVE THE NECESSARY ELEMENTS OF AGGRA- VATED SEXUAL ASSAULT-----	6
POINT II. THE COURT BELOW ERRED IN FAILING TO GIVE APPELLANT'S PROPOSED INSTRUCTION DEALING WITH THE AMOUNT AND NATURE OF RESISTANCE REQUIRED IN A RAPE CASE-----	11
POINT III. THE COURT BELOW ERRED IN GIVING AN INSTRUCTION UNSUPPORTED BY THE EVIDENCE AND WHICH TENDED TO CONFUSE THE JURY-----	15
CONCLUSION-----	18

CASES CITED

	<u>Page</u>
People v. Moore, 43 Cal. 2d 513, 275 P2d 485 (1954)-----	16
State v. Beeny, 115 Utah 168, (1949)-----	12,14
State v. Chealey, 100 Utah 423, 116 P2d 377 (1941)-----	15
State v. Pacheco, 27 Utah 2d 45, 492 P.2d 1347 (1972)-----	17,18
State v. Rivenburg, 11 Utah 2d 95, 355 P.2d 639 (1960)-----	15
State v. Thompson, 110 Utah 113, 170 P.2d 153 (1946)-----	15

STATUTES CITED

Utah Code Annotated 76-1-601 (1953)-----	7,9
Utah Code Annotated 76-5-402 (1953)-----	6
Utah Code Annotated 76-5-405 (1953)-----	7,9,10
Utah Code Annotated 76-5-406 (1953)-----	6,7,9,10,14,15

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
vs. : Case No. 14578
JOSEPH ANSELMO, :
Defendant-Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Joseph Anselmo, appeals from a judgment of conviction and sentence thereon entered against him in the Third Judicial District Court for the crimes of kidnapping and aggravated sexual assault.

DISPOSITION IN THE LOWER COURT

Appellant Joseph Anselmo was convicted by a jury of the crimes of kidnapping and aggravated sexual assault on April 1, 1976, after a two-day trial. Sentence of the court

was pronounced on April 1, 1976, ordering Appellant to serve the indeterminant term as provided by law of 0 to 5 years for kidnapping and five years to life for aggravated sexual assault, the terms to run concurrently.

RELIEF SOUGHT ON APPEAL

Appellant Joseph Anselmo seeks reversal of the court below as to the judgment entered on the conviction of aggravated sexual assault. Appellant does not appeal from his conviction for the crime of kidnapping.

STATEMENT OF FACTS

On September 20, 1975, Laura Margaret Lund received a phone call from a past acquaintance and went to meet her at a Salt Lake City restaurant. (Tr. 29-31) Laura Margaret Lund met several people for the first time that night including Appellant Joseph Anselmo at his apartment on Fourth South in Salt Lake City. (Tr. 35) She testified that she talked with Appellant and he wanted her to be his "old lady" and she said she was not interested in such a proposition but that she would go to a party that night at a friend's house just as a friend. (Tr. 38,39)

She testified that after arriving at the home of "J.T." (Martin Hayes) approximately eight people were there engaging in drinking and listening to music. (Tr. 40-44)

Shortly thereafter Laura Margaret Lund testified that Anselmo took her to a side bedroom in the home and tried to kiss her and make other advances. There was a conversation about Laura Margaret Lund having said she wanted to go to the party as a friend only and then appellant said he had changed his mind about that. (Tr. 48) Laura Margaret Lund testified that she yelled that she wanted to leave and Anselmo hit her in the face with his fist and said she could not leave and she was to be his "old lady". (Tr. 50,51)

Laura Margaret Lund testified that after being hit by Appellant Anselmo her eyes were blackened and her face swollen. (Tr. 60, Exhibit 15, 16)

After being struck Laura Margaret Lund went to another room and shortly thereafter Appellant Anselmo came in and hit her with his fist again in the face and took her to the side room. (Tr. 52,53) In the side bedroom again a struggle ensued with Appellant Anselmo trying to

remove Laura Margaret Lund's clothing and she struggling to free herself. (Tr. 54,55) At that point Laura Margaret Lund testified that defendant got on his knees above her and held one hand at her throat and pulled his other fist back but said nothing. (Tr. 58) At that point she testified that she did not want to get hurt and she submitted to an act of sexual intercourse with appellant. (Tr. 58)

She slept in that room that night with appellant and the next day, November 21, Friday, she testified that she was taken to a back room by appellant and one Martin Hayes where she again testified that she was raped, after appellant said to her that she had better settle down or he would see that his man would take care of her. (Tr. 64, 65) When asked what he meant, Martin Hayes hit the wall with a hammer and said "That's what he means".

Laura Margaret Lund testified that she remained in the home until Monday evening, November 24, 1975. (Tr. 74) She testified that she sneaked out Monday evening and spoke with police officers two days later on November 26.

The complaining witness was examined by a physician on November 25 and he, Dr. George Hinckley, testified that she had bruises and abrasions about her

eyes (Tr. 126), but he could neither confirm nor deny an act of intercourse due to various factors. (Tr. 129, 131)

At the end of the State's case, appellant moved to reduce Count II of the information, charging aggravated sexual assault, to simple rape on the grounds that the State had not proved the necessary threats had been made to prove aggravated sexual assault, but that the matter should go to the jury only on the lesser included offense of simple rape. (Tr. 135-139) The motion was denied by the court. (Tr. 142)

Appellant Anselmo did not deny any acts of intercourse with Laura Margaret Lund but testified that his having hit her was over an argument concerning something other than whether she would submit to sex and he testified that he did not force her to commit any sex act. (Tr. 184-186)

The jury returned verdicts of simple kidnapping, a lesser included offense of aggravated kidnapping as charged in the information, and guilty of aggravated sexual assault as charged in Count II of the information. (Tr. 220, R. 491,412)

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO REDUCE COUNT II OF THE INFORMATION AT THE END OF THE STATE'S CASE FROM THE CHARGE OF AGGRAVATED SEXUAL ASSAULT AS CONTAINED IN THE INFORMATION TO THE LESSER INCLUDED OFFENSE OF SIMPLE RAPE BECAUSE THE STATE FAILED TO PROVE THE NECESSARY ELEMENTS OF AGGRAVATED SEXUAL ASSAULT.

Under our recent criminal code rape is defined in Utah Code Annotated, Section 76-5-402 as an act of sexual intercourse with a female not the actor's wife, without her consent. "Without her consent" is defined in Section 76-5-406 in several ways, the only ones which have relevance in this case being subsection 1 or subsection 2. Utah Code Annotated, Section 76-55-406 says an act of sexual intercourse is without consent when the actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution. So, if a person threatens another so as to overcome resistance in a person of ordinary resolution, any following act of sexual intercourse is without consent and if the victim is

not the wife of the perpetrator, it is an act of rape.

For an act of rape to rise to a first degree felony under Utah Code Annotated, Section 76-5-405, aggravated sexual assault, the actor, in the course of a rape, must either cause serious bodily injury or compel the submission to the rape by a "threat of kidnapping, death, or serious bodily injury to be inflicted imminently." That is, a threat must be one of kidnap, death, or serious bodily injury (defined in 76-1-601 as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death) to be taken out of the general category of threats [76-5-406 sub(2)] so as to negate consent and to rise to the level of a threat that is over and above that necessary to amount to a threat compelling submission to the rape and thus be an aggravated sexual assault.

Threats that overcome the resistance of a person of ordinary resolution, when used to accomplish sexual intercourse, can get one convicted of rape. Our legislature then indicated that to be convicted of the more serious

offense of aggravated sexual assault, a first degree felony, the threats that compel submission to the rape must be specific and not of a general type that would overcome the resistance of a person of ordinary resolution. That is, a specific threat of kidnapping, death, or serious bodily injury must be made. Clearly our legislature had in mind that in order to convict one of the more serious offense of aggravated sexual assault, a more serious threat than one that overcomes resistance of a person of ordinary resolution must be made.

In this case there was no evidence of a specific threat to kidnap Laura Margaret Lund, cause her death, or to inflict serious bodily injury upon her immediately.

Laura Margaret Lund testified that she had been hit in the face by appellant with his fists and later that same night appellant pulled back his fist as if to hit her while holding her with the other hand. (Tr. 58) That is clearly a threat, one that may well overcome the resistance of a person of ordinary resolution and thus any following act would be without her consent. However, appellant contends that it is clearly not a threat of kidnapping or

death. As the term "serious bodily injury" is defined it is also equally clearly not a threat of imminent serious bodily injury; that is, permanent disfigurement or a substantial risk of death. This becomes clear when comparing Utah Code Annotated, 76-5-405 (2) with 76-5-405, the aggravated sexual assault statute. What the aggravated sexual assault statute has in mind in terms of threats is serious threats with weapons of a very violent potential, not threats to inflict injury by hand. Any threat of violence by bare hand would probably qualify as a threat within 76-5-406(2), one that overcomes resistance, but the aggravated sexual assault statute must mean some conduct that is more severe than a threat to do injury by bare hand. Bodily injury is defined in 76-1-601 as physical pain or injury and the legislature could have put that term in sub-paragraphs (a)(ii) of 76-5-405 but it shows a term instead that includes within its definition an injury that could have a substantial risk of death. Appellant contends that a threat under the aggravated sexual assault statute must be much more severe than one that was shown in this case, that is, a threat to hit someone in the face with a

bare hand.

To contend otherwise would be to contend there is no such thing as simple rape, because whenever an act of sexual intercourse occurred with a female not the wife of the actor and any kind of threat occurred, that would amount to aggravated sexual assault if the term "threat" within 76-5-405(a)(ii) is extended to mean a threat to do something with one's bare hands.

As such, the State failed to prove a threat within the aggravated sexual assault statute but instead only proved a threat which would fit within 76-5-406 (2) and so appellant should not have had the jury consider his guilt on the charge of aggravated sexual assault but instead only on the lesser included offense of rape.

Of course, aggravated sexual assault can occur when in the course of the rape the actor causes serious bodily injury to the victim. As discussed above, appellant contends that the defined term "serious bodily injury" requires much more severe injury than was evidenced in this case. In this case Laura Margaret Lund suffered black eyes and a bruise behind her left ear. (Tr. 60, 126, Exhibit 15, 16). The term "bodily injury" covers that sort of injury

and the term serious bodily injury is reserved for those injuries which create a substantial risk of death. Therefore, the State having failed to show that Appellant Anselmo caused serious bodily injury or compelled submission to an act of sexual intercourse by threat of kidnapping, death, or serious bodily injury to be inflicted imminently, the case should not have gone to the jury on that charge and the court below erred in so allowing the jury to consider the charge of aggravated sexual assault and so appellant is entitled to a reversal of his conviction as to Count II of the information.

POINT II

THE COURT BELOW ERRED IN FAILING TO
GIVE APPELLANT'S PROPOSED INSTRUCTION
DEALING WITH THE AMOUNT AND NATURE OF
RESISTANCE REQUIRED IN A RAPE CASE.

In as much as Laura Margaret Lund testified that her only actual physical resistance consisted of some "struggling" (Tr. 57), appellant requested an instruction on the necessity of resistance on the part of the prosecutrix. (R. 473) That instruction requested was as follows:

You are instructed that the woman must resist the force of violence or threats of immediate or serious bodily harm directed at her to the extent that seems reasonable under the circumstances. Mere passive resistance is not sufficient. Resistance must be by acts and not by mere words. If a woman objects verbally to the act of intercourse, but by her conduct consents to it, the element of lack of consent has not been shown beyond a reasonable doubt and you must acquit the defendant. Further, if her opposition appears after a period of apparent consensual behavior, that opposition to amount to resistance sufficient to constitute the lack of consent element of the offense, must be such that a reasonable man under the circumstances would have no question but that consent was being withheld. If you do not find such resistance beyond a reasonable doubt, you must acquit.

The court failed to give Appellant Anselmo's proposed instruction No. 10 and he duly objected. (Tr. 218)

In State v. Beeny, 115 Utah 168 (1949) this court reversed a conviction for rape where the jury during deliberations returned with a question concerning a similar instruction as proffered in appellant's case. In that case the pertinent portion of the instruction given by the trial court and approved by this court was as follows:

....that said Pearle _____ resisted the said act of sexual intercourse, but her resistance was overcome by force or violence exerted by said defendant.

You are instructed that the word resistance as used in these instructions, does not require that the said Pearle _____ should have made the uttermost resistance. The law requires that the woman do what her age, strength, the surrounding facts and all attending circumstances make it reasonable for her to do in order to manifest opposition to the act of sexual intercourse. Any objections in words, or such objections coupled with some resistance are not enough to make the acts of the accused or either of them constitute rape. The resistance required by the law is such resistance as the said Pearle _____ was capable of making at the time and under the circumstances there existing.

Appellant Anselmo contends that in this case where there was clearly at least a battery committed by Appellant Anselmo upon Laura Margaret Lund but nowhere in the record is any real resistance shown by her except verbally that the proffered instruction was necessary to inform the jury that earnest resistance was required.

The court defined aggravated sexual assault in Instruction 23 (R. 437) and the crime of rape in Instruction 24 (R. 438) In order to determine the meaning of those terms

the jury was of course required to refer to the definition "without consent" in Instruction No. 25 (R. 439). In Instruction No. 25 the court told the jury that an act of sexual intercourse is without consent of the victim when, among other things, the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances. That sub-paragraph is of course taken from the definition in U.C.A. 76-5-406 (1). In Instruction 26 (R. 440) the court attempted to discuss what amount of resistance is required. However, under the facts of this case where the slight resistance offered was merely verbal an instruction such as that approved in State v. Beeny, supra, is more appropriate than the court's Instruction No. 26. (R. 440) Such instruction as the court gave would be appropriate where there was testimony that there was physical resistance overcome by force but Laura Margaret Lund nowhere in her testimony indicated that she physically resisted. As such the court committed error which affected the substantial rights of Appellant Anselmo requiring a reversal of his conviction for aggravated sexual assault.

POINT III

THE COURT BELOW ERRED IN GIVING AN INSTRUCTION UNSUPPORTED BY THE EVIDENCE AND WHICH TENDED TO CONFUSE THE JURY.

The court in Instruction No. 25 (R. 439) defined the term "without consent" in three sub-paragraphs, the first two of which did have applicability to the facts of this case.

Paragraph 3 stated "the victim has not consented and the actor knows that the victim is unconscious, unaware that the act is occurring, or physically unable to resist." That subsection is taken from 76-5-406(3) as one of the possible ways in which an act of sexual intercourse can be without the consent of the victim. However, in this case, there was absolutely no evidence that the victim was unconscious or unaware of what was occurring or physically unable to resist.

It is clear that a court is not to give instructions on abstract principles of law not supported by the evidence. See, for example, State v. Chealey, 100 U 423, 116 P.2d 377 (1941); State v. Rivenburg 11 U.2d 95, 355 P.2d 639 (1960). In State v. Thompson, 110 U. 113, 170 P.2d

153 (1946), this court stated the rule above and went on to say, 170 P.2d 162:

[the court is not] to instruct on any question which is not involved the case under the evidence. We think that it cannot be too strongly emphasized that the court should apply the law to the facts as they appear from the evidence, and should instruct only on the law which has a bearing on the facts.

Appellant contends that Instruction No. 25 which was objected to by appellant (Tr. 219) should not have been given because there was no evidence to support that portion of the instruction. An instruction which has no support on the record, even though it may be a correct statement of an abstract proposition of law, is improper when there is no support for it in the evidence and it is grounds for reversal if it is calculated to mislead the jury. People v. Moore, 43 Cal. 2d 513, 275 P.2d 485 (1954). Appellant Anselmo contends that in light of the circumstances of this case the giving of this portion of the instruction misled the jury and was prejudicial and reversible error.

The last phrase of sub-paragraph 3 in Instruction

No. 25, "or physically unable to resist" clearly has in mind the situation related to the first phrases of that paragraph. That is, when a victim is unable to move or unconscious or under the influence of drugs or in some manner unaware of what is occurring after having been knocked unconscious or for some other reason totally physically unable to resist such an instruction would be appropriate. However, in this case, the jury could have easily been misled to believe that Laura Margaret Lund was physically unable to resist because she had been hit in the face by Appellant Anselmo. In State v. Pacheco, 27 U.2d 45, 492 P.2d 1347 (1972), this court reversed a conviction for grand larceny and gave the defendant a new trial saying that it was impossible for this court to "Prejudicate whether the jury convicted defendant of larceny or aiding and abetting, under the record in this case". So also in this case this court cannot say whether the jury found either that Laura Margaret Lund submitted because her resistance was overcome by force or whether she submitted to sexual intercourse because of threats or whether the jury mistakenly believed that she was physically unable

to resist as that term was set forth in Instruction No. 25. There was simply no evidence to support the giving of that portion of Instruction No. 25 and it is impossible for this court to say that the jury did not rely on that portion of the instruction and for the reasons advanced in Pacheco, supra, Appellant Anselmo is entitled to a new trial.

CONCLUSION

For the reasons above stated, that the court erred in submitting the case to the jury on the offense of aggravated sexual assault as charged in Count II of the information, and erred in the giving of certain instructions, appellant respectfully submits that the case should be remanded for a new trial as to the judgment entered on Count II of the information.

Respectfully submitted,

BRUCE C. LUBECK
Attorney for Appellant