

1948

# State of Utah v. Grant Cooper : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *State of Utah v. Cooper*, No. 7186 (Utah Supreme Court, 1948).  
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# **In the Supreme Court of the State of Utah**

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STATE OF UTAH,  
Plaintiff and Respondent,

vs.

GRANT COOPER,  
Defendant and Appellant.

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## **APPELLANT'S BRIEF**

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Appeal from the Fourth Judicial District Court of Utah  
County, Honorable William Stanley Dunford, Judge.

This is an appeal from the Fourth Judicial District  
Court of the State of Utah, In and For Utah County, and  
from the judgment and verdict of the Jury in the above  
entitled cause made and entered on the 4th day of Novem-  
ber, 1947, and from the judgment and sentence imposed  
upon the Defendant, Grant Cooper, and from the judgment  
of said District Court Judge, the Honorable William Stan-

ley Dunford, in denying the appellant's motion for a new trial.

The appellant will hereinafter be referred to as the defendant and the respondent will be referred to as the State.

### STATEMENT OF FACTS

The defendant, Grant Cooper, a married man, resided with his wife and three minor children at Orem, Utah County, Utah. Defendant is 41 years of age. Subsequent to the conviction of the defendant, he was divorced from his wife.

Upon complaint of Oliver Q. Elder, father of Doral Elder, dated May 3, 1947 (JR. 3) the defendant was arrested for the commission of an alleged felony. Omitting the formal parts, the complaint reads as follows:

"On this 3rd day of May, A. D. 1947, before me, W. Dean Loose, Judge of the above entitled court, personally appeared Oliver Q. Elder who, on being duly sworn by me on his oath, did say that Grant Cooper on or about the 18th day of April, A. D. 1947, at Utah County, State of Utah, did commit the crime of a felony, to-wit: Indecent Assault committed as follows, to-wit: that he, the said Grant Cooper, at the time and place aforesaid, then and there did wilfully and feloniously make an assault upon Doral Elder, a male child under the age of 14 years, to-wit: of an age of 11 years, and did then and there wilfully and feloniously take indecent liberties with the person of the said Doral Elder without committing the crime of rape, or the crime of assault with intent to commit rape on the said Doral Elder, contrary to the provisions of the statutes of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah."

Defendant requested a preliminary hearing and said hearing was had before the Honorable W. Dean Loose, Judge of the City Court of Provo City, Utah, sitting as committing magistrate, on the 10th day of June, A. D. 1947. Upon his arraignment defendant entered his plea of "Not Guilty" (JR. 31).

The defendant was bound over to the Fourth Judicial District Court for trial. On the 4th day of November, 1947, a verdict of "Guilty as Charged" was delivered by the Jury (JR. 24), and on or about the 19th day of November, 1947, the defendant was sentenced to the State Penitentiary by the Honorable William Stanley Dunford, Judge as afore-said, for a term of not in excess of 5 years (JR. 43).

On the 10th day of November, 1947, the defendant filed his Notice of Motion for New Trial (JR. 29) and filed supporting Affidavits (JR. 33 to 39). Motion for New Trial was heard by the Honorable William Stanley Dunford, Judge, on the 3rd day of January, 1947, and on the 5th day of January, 1947, the Court denied said motion (JR. 46).

Thereafter the defendant filed and served his Notice of Appeal (JR. 47); secured his Certificate of Probable Cause (JR. 40), and perfected his appeal to the Court.

At the Preliminary Hearing witnesses for the State, by their testimony, set the date of the alleged assault as having been on Friday, April 18, 1947. (R-47, 48). At the trial evidence was introduced by the State to the effect that Doral Elder, age 11, hereinafter called the complaining witness, and Ferrell Sorenson, aged 11, had, between 2:00 o'clock and 3:00 o'clock P. M., on a day during the month of April, 1947, the same being that school day when said boys had played truant from school, thought to have been

Tuesday, April 8, 1947, accompanied the defendant in his automobile to the Orem City Cemetery and that while at said cemetery the defendant told the boys that if they had "3 inches" they could drive his car. That the complaining witness had then opened his trousers and, according to the sole testimony of the complaining witness, the defendant thereupon placed his hand upon the private part of said complaining witness. Each boy testified that he had played truant from school and had not been at school at all that day, although it was a school day (R-29, 44, 60, 68). The witnesses further stated that while they were in the said cemetery they did not see any other person therein and that no one else was present in said cemetery at that time. After leaving the cemetery the defendant let the said boys out of his car by a store in Orem (R-53) where they waited for a while until the school bus came along and then went to their homes (R-54, 94). The school bus arrived at that particular place about 3:00 o'clock, P. M. each school day (R-140). Witness Ferrell Sorenson did not see the defendant "Play Nasty" with the complaining witness and did not know anything about the alleged assault until the complaining witness afterward told him about it (R-76, 77, 87). Witness Ferrell Sorenson testified, in this respect, identically at the preliminary hearing. Each above said boy stated on the witness stand that he was testifying to the truthfulness of certain facts because he had been told by his mother to so testify. (Doral Elder R-47, 48 and Ferrell Sorenson R-71).

Neither the complaining witness or the Sorenson boy voluntarily told his parents about the alleged assault and did not report it to anyone at the time it allegedly occurred. The complaining witness told his mother about the pur-

ported cemetery episode only after she had caught him and another child "Playing Nasty" (R. 21). Witness Mrs. Sorenson, mother of Farrell Sorenson, although a next door neighbor and very close friend of the Elder family, did not even know of the alleged assault until about May 3, 1947, after the defendant had been arrested (R. 94).

The official records of the school attended by the complaining witness and by Ferrell Sorenson disclosed that neither of said boys missed school on the 8th day of April or on the 18th day of April and further disclosed that Doral Elder had not missed a single day of school during the entire month of April, 1947, nor had he missed a day of school from January to the close of school in 1947 (R-137). The Principal of said school stated that he was the teacher in charge of the sixth grade; that each of the above named boys was in his class; that he personally, orally, called the roll each morning and afternoon and that the pupils answered "Here," "Present," or gave some comparable response, if present, and that he looked to see whether the person whose name was being called gave the response. He further testified that each said boy was in school at the times mentioned above (R-138, 139, 154, 157, 158).

No one saw Doral Elder and Ferrell Sorenson in the company of the defendant. Witness Mrs. Elder saw the defendant's car on a Tuesday with some young occupants therein but she did not recognize the children as being her son and his companion (R. 17, 18, 254). The complaining witness and Ferrell Sorenson had been in defendant's car several times in April according to their testimony (R-55, 73). The defendant recalled having given the complaining witness, Ferrell Sorenson and Byron Walters a ride in his car on a Saturday morning in the month of April (R. 216)

and stated that such occasion was the only time in 1947, that said boys had been with him in his car. Witness Byron Walters testified that about a month before school let out Doral Elder, Ferrell Sorenson and himself had hailed the defendant and ridden in defendant's car and that such occasion was a Saturday forenoon and that as nearly as the witness could determine it was on April 19, 1947 (R-178).

Prior to the bringing of the instant charge the wife of the defendant had made many accusations against him to others. The accusations had been to the effect that the defendant was guilty of improper relations with boys and girls (R-186). Mrs. Cooper had complained of the defendant to Scott Wilkins, Marshal of Orem City. Her charges had not been specific or definite. As a result of her accusations Marshal Wilkins commenced an investigation which lasted one year and culminated with the bringing of the instant charge (R-98). Marshal Wilkins, without knowing anything about the instant charge, contacted Mr. Elder and Mr. Sorenson and asked them to ask their sons if the defendant bothered them (R. 101). Marshal Wilkins asked many little boys whether they had been molested by the defendant (R-193). He also asked many adults concerning the sex practices of the defendant (R-194). The defendant went to the Provo City Police as soon as he found that Marshal Wilkins was asking children if he bothered them, which was in November, 1946. He told the desk sergeant on duty at said police station about the charges that were being made against him by the Orem Marshal. The Provo Police took no action at all (R. 218, 219).

The defendant denied that he had ever touched the

private parts of Doral Elder of any other young boy. Defendant admitted that during the several years that he had known and had been working with Doral Elder and other neighborhood boys he had on several occasions answered questions relative to sex matters (R-200, 201, 202, 203). The defendant is employed, has a supervisory job, and has about 35 men under his supervision. Defendant had taken an active interest in youth activities for about 20 years prior to the bringing of this charge and had served as a scoutmaster and in various other capacities (R-206). At the time this charge was brought the defendant was a troop committeeman at Orem, Utah, and had been in that position for some two years. The defendant denied that he had been to the Orem City Cemetery as claimed and denied that he had been to said cemetery at all in 1947.

The reputation in the community for truth and veracity of Doral Elder was bad (R-145), whereas the reputation in the community for truth and honesty of the defendant, as well as his reputation for morality, was good (R-173).

Other facts, together with the Record citation therefor, are set out in connection with the argument herein.

## ASSIGNMENTS OF ERROR

1. The Court erred in admitting testimony of a witness, not the complaining witness, relating to purported indecent assaults by the defendant upon the person of said witness and not connected with or relevant to the instant charge.

2. The court erred in failing and refusing to give the Jury the cautionary instruction, or its equivalent, as re-



quested by defendant's request No. 1, which reads as follows:

"The jury must bear in mind that in a criminal prosecution for sexual offense, a charge is easily made and filed, but very difficult to disprove."

The court erred in giving to the jury the Court's Instruction No. 8, which reads as follows:

"You are instructed that in order to find the defendant guilty of either crime charged in the information, it is not necessary that the state prove that the circumstances constituting the offense charged occurred on the 18th day of April, 1947, but it is necessary that the evidence introduced in the case establish to your satisfaction beyond reasonable doubt that the offense charged occurred at or near the cemetery at Orem, Utah County, Utah, in an automobile in which the defendant, Grant Cooper, Doral Elder and Ferrell Sorenson were sitting. And unless the evidence so establishes beyond a reasonable doubt, it is immaterial and can make no difference to this charge that you find or believe, if you do find or believe, that the defendant did at some other time or place take indecent liberties with or upon the person of Doral Elder."

4. That the court erred in denying defendant's Motion for a New Trial on the ground of newly discovered evidence which could not with reasonable diligence have been produced at the trial.

5. That the court erred in denying defendant's Motion for New Trial on the ground that action and statements by the prosecuting attorney which were prejudicial to the substantial rights of the defendant were allowed or permitted at the trial.

## QUESTIONS TO BE DETERMINED

1. Whether testimony concerning separate sexual offenses against the person of one not the complaining witness, not legally connected with the instant charge nor tending to establish any material issue in dispute therein, is properly admissible in evidence.

2. Whether the trial court abused its discretion in denying defendant's Motion for New Trial on the ground of newly discovered evidence where such evidence is relevant; not cumulative; would probably produce a different result on retrial, and where the same could not reasonably have been produced at the trial.

3. Whether the court's Instruction numbered 8 was contradictory, ambiguous, and uncertain on its face and prejudicial to the defendant.

4. Whether in a case involving an alleged sexual offense, where the prosecuting witness is a child, where the testimony is not corroborated, where the evidence is questionable and where the prosecuting witness has been coached, the trial court is warranted in refusing to give a cautionary instruction where such instruction, otherwise proper, has been requested by the defendant.

5. Whether conduct and statements of the prosecuting attorney prejudicial to the substantial rights of the defendant, were allowed or permitted at the trial.

THE COURT ERRED IN ADMITTING TESTIMONY OF  
PURPORTED ASSAULTS BY THE DEFENDANT  
UPON THE PERSON OF ANOTHER, NOT THE  
COMPLAINING WITNESS, NOT CONNECTED  
WITH OR RELEVANT TO THE INSTANT CHARGE.

The State called to witness one Gary Wilkinson, aged 12 years, whose testimony on direct examination was to the effect that he had met the defendant, sometime after the instant charge had been brought, at a drug store in Provo. That the defendant had asked the said witness if he could see him for a moment and that the two of them had then stepped into the office entrance of the Knight Building on Center Street in Provo and had stood there talking. That the defendant asked said witness if he was going to go on the witness stand and pulled a pocket knife out of his pocket, whereupon said witness had run out of the entrance and caused the defendant to be arrested. That the witness had been with the defendant "Quite a few times" during the 3 years that he had known him and that he ran because he was frightened. (R. 118, 119, 120, 122).

Upon cross-examination, so far as is here material, counsel for defendant examined the boy as to the fear he had expressed. (R. 127, 128). On direct examination the witness had testified that he had been with the defendant on numerous occasions and it should be noted that at no place in the direct examination of said witness was there produced any testimony which in any way tied the evidence being elucidated from the witness to the matter before the court.

On redirect examination, over objection by the defendant, the prosecuting attorney was permitted by the court to draw from said witness evidence to the effect that

the defendant had committed indecent assaults upon the person of said witness. (R. 128, 129).

The cross-examination of the witness as to the knife episode, which concerned itself with an immaterial, separate, and distinct offense from that for which the defendant was on trial did not open the door to the introduction of other evidence concerning still another immaterial and separate and distinct offense purportedly committed against the person of one not the complaining witness. On a charge involving illicit sexual relations by consent, subsequent offenses of like character **between the parties** may be relevant, because the extreme intimacy and the amorous inclination and willingness evidenced by the commission of such offenses are a growth preceding the offense and are rather nourished than annihilated by their exercise. **20 Am. Jur. 290 - Evidence Par. 311.** But, in a prosecution for statutory rape, for example, the prosecution may not show that the defendant has had sexual intercourse with **other** young females or that he has committed other crimes or immoral acts. **State v. Irwin, 71 Pac. 608; People v. Gibson, 99 N. E. 599; Lee v. State, 72 S. W. 1005.**

In a prosecution for one crime proof of another direct substantial crime is never admissible unless there is some legal connection between the two, upon which it can be said that one tends to establish the other, or some essential fact in dispute. **People v. Gibson, supra; State v. Gaimos, (Mont.) 162 Pac. 596; Birmingham v. State, 279 N. W. 15.** Evidence concerning other purported crimes is not admissible except where such evidence is legally connected and is relevant and material to the charge which has been brought and the courts stress the importance of such requisite due to the nature and prejudicial character of such evi-

dence. 20 Am. Jur. 298 - Evidence Par. 316; *United States v. Dressler*, 112 Fed. (2) 972.

There was no indication whatever that the witness from whom the foregoing testimony was drawn knew anything about the charge upon which the defendant was being tried or that he could properly testify as to any material matter in connection with the issue before the Court. Counsel for the defendant pointed out the immateriality thereof to the Court:

“Your Honor, I don’t believe that this is quite proper here. We are not tying this thing in with the charge, and, Your Honor, we can’t possibly be prepared to meet all of these things that the prosecutor can dig up.” (R. 128).

It is to be doubted that anyone reading the Record in the instant case would fail to be impressed by the lengths to which the prosecuting attorney went to place before the jury irrelevant and inadmissible, but highly prejudicial, evidence. Had the question of the witness’s fear been a material and competent factor in the consideration of the issue before the jury, there might have been some justification for the admission of the evidence in question. However, in the instant case, whether the witness had or had not been frightened by the episode of which he was testifying, was of no probative value whatever to the jury in arriving at their conclusion as to the guilt or innocence of the defendant on the charge for which he was being tried. Since none of the evidence elucidated from said witness was relevant to or connected with the charge, it was not properly admissible and should not have been admitted over objection by the defendant.

The foregoing incident does not stand alone, of its kind, in this record. Over objections by defense counsel the Orem City Marshal, Wilkins, was permitted to place before the jury evidence to the effect that he had received a complaint of indecent assault by the defendant upon the person of one Grant McCune. (R. 99, 100). Such matter was in no way connected with the instant charge and the statement was inadmissible as evidence in this case.

The language of the Supreme Court of Nebraska in **Leahy v. State**, 48 N. W. 390, is particularly applicable here:

“The State has guaranted to everyone a fair trial, and such trial cannot be had if the prosecutor can resort to tricks to secure a conviction.”

Obviously it was the purpose and intent of the prosecutor to inject the foregoing irrelevant evidence into the case for the prejudicial effect it would have upon the jury. It is true that in overruling the defendant's objection to the admission of witness Wilkinson's testimony here complained of, the Court comented:

“Well, on that basis, I think I will overrule the objection, however, I think it is proper to instruct the jury that the question is answered only on redirect examination for the fear that the boy said he had of the defendant. With that instruction, the objection is overruled.”

Aside from the aforesaid comment the Court did not specifically instruct the jury with respect thereto or caution the jury with any particularity whatever as to the use they could make of it. Moreover, the nature of the evidence was such that even a most particular instruction by the Court to the jury with respect to the use thereof would

not have adequately safeguarded the defendant against the prejudicial effect of the admission thereof in evidence. Evidence is not competent which shows that the defendant may have committed other crimes of a like nature, upon some person other than the complaining witness, for the purpose of showing that he would be likely to commit the crime charged in the indictment, for ordinarily such proof will not reflect any light upon the special crime for which the defendant stands charged. This is one of the distinguishing features between common-law jurisprudence and the Civil Law. **People v. Grutz (N. Y.) 105 N. E. 843; Boyd v. United States, 142 U. S. 450.**

There can be little doubt but that the evidence in question was entirely incompetent and that its effect on the jury was highly prejudicial to the defendant's cause, thereby necessitating a reversal.

#### THE COURT ERRED IN GIVING TO THE JURY THE COURT'S INSTRUCTION NO. 8.

The Court erred in its 8th Instruction to the jury, said Instruction being as follows:

"You are hereby instructed that in order to find the defendant guilty of either crime charged in the information, it is not necessary that the state prove that the circumstances constituting the offense charged occurred on the 18th day of April, 1947, but it is necessary that the evidence introduced in the case establish to your satisfaction beyond reasonable doubt that the offence charged occurred at or near the cemetery at Orem, Utah County, Utah, in an automobile in which the defendant, Grant Cooper, Doral Elder and Ferrell Sorenson were sitting. And unless the evidence so establishes beyond reasonable doubt, it is immaterial and

can make no difference to this charge that you find or believe, if you do find or believe, that the defendant did at some other time or place take indecent liberties with or upon the person of Doral Elder."

The complaint on file herein alleged that the offense for which defendant was being charged occurred "On or about the 18th day of April, 1947." (JR-3). At the preliminary hearing the time of the purported offense was set by the prosecution witnesses as Friday, the 18th day of April (R. 47, 48). The information filed herein charges that the offense was committed "On or about the 18th day of April, 1947." (JR-5). At the trial of the cause the evidence of the same prosecution witnesses fixed the time of the cemetery episode as having been on the day that Doral Elder and Ferrell Sorenson played truant from school (R. 60, 62). One of the offenses mentioned, the one for which the prosecution apparently sought conviction, allegedly took place **within** the Orem City Cemetery (R. 50, 51).

At the trial the prosecuting attorney adduced evidence from Doral Elder and Ferrell Sorenson which was to the effect that the defendant had committed several indecent assaults upon their persons:

Q. Now, has he ever done or attempted to do that with you before?

A. Yes. (R. 33, Doral Elder).

Q. About how many times, if you remember?

A. Oh, about five times. (R. 33, 34, Doral Elder).

Q. Had you ever been with Doral Elder and the defendant before when the defendant attempted to play dirty with either of you?

A. Yes, Sir. (R. 69, Ferrell Sorenson).



Q. About how many times, as nearly as you can remember?

A. Oh, two or three times.

Q. Did he do the same thing; that is, play with your penis?

A. Yes, Sir. (R. 69, Ferrell Sorenson).

Q. Now let's talk just a minute about this cemetery episode. How long before that had it been since you had been out with the defendant in his car?

A. A few days. (R. 83, Ferrell Sorenson).

Q. How long?

A. A few days.

Q. Just a few days?

A. Yes, Sir.

Q. Who was with you?

A. Just me and Doral.

Q. Just you and Doral. And you had been with him just a few days before in his car before you went up to the cemetery?

A. Yes, Sir. (R. 83, Ferrell Sorenson).

Q. And I will ask you further if you ever talked to defendant Grant Cooper and told him you were having trouble with your penis and couldn't pull the foreskin back?

A. I told him I couldn't pull the foreskin back, but I didn't tell him I was having trouble with it. (R. 259, Doral Elder).

Q. Did you ask him about it, or did he ask you about it?

A. I don't remember.

Q. And was that during one of the times when he was playing nasty with you? (Boldface supplied).

A. Yes, Sir. (R. 260, Doral Elder).

Hence, the record is replete with accusations covering three or four purported indecent assaults, all of which purportedly took place in the defendant's automobile in which the defendant Grant Cooper, Doral Elder and Ferrell Sorenson were sitting and for which neither time or place is designated. Both time and place are left to the conjecture and speculation of the jury.

At the close of the trial the prosecuting attorney, apparently recognizing the difficulty inherent in the situation, moved the Court "That the information be amended to conform to the proof, to read April 8th, instead of the 18th," and stated, "Well, I just want to make sure there will be no uncertainty." (R. 281). In refusing the motion the Court stated:

"The Court has drawn its instructions on the basis of the information as it is, and I don't see that there would be any need of making any amendment. The motion will be denied."

The Court's 8th instruction to the jury is clearly erroneous, confusing and contradictory and it laid a foundation for a verdict of guilty by the jury under which both time and place of the offense upon which conviction rests are vague and uncertain. It left to the jury a broad range for conjecture and speculation with nothing to limit the members of the jury to a mutual selection of the same purported offense as the basis for their verdict. As stated by this Court in **State v. Hillberg**, 61 Pac. 215, 217: "Under the charge as given, there was no certainty whatever that the jurors all united upon the same act in finding the defendant guilty." The instruction in question in the instant case does not even limit or confine the jury to the selection of an

event which had occurred within the statutory period. Cf. **State v. Distefano**, 262 Pac. 113, and authorities there collected. Nor, does the instruction confine the jury to the selection of the event which allegedly happened **within** the Orem City Cemetery. The words "At or Near" the cemetery are vague, indefinite and uncertain and pave the way for the selection by the individual members of the jury of any one of the three or four purported assaults covered by the evidence for which neither time nor place is designated.

The decisions of the Court in **State v. Distefano**, *supra*, and **State v. Rosenberg**, 35 P (2) 1004, are distinguishable from the instant case. Aside from material differences in circumstance and evidence, the instructions given in each of those cases were very particular. In the **Rosenberg** case the information alleged the "26th day of June" and the evidence was directed to but **one** sexual act and no other acts of any kind were shown. The trial court there instructed the jury that they were limited to the exact place testified to by the prosecuting witness, the "B.A.C. Campus." In the **Distefano** case the trial court limited the jury to that event which had occurred "On or about the 8th day of September, 1926, a short distance South, and across an irrigation ditch, near a big tree, from her home, as testified to by the complaining witness, xx." The very particular specification as to place found in each of the above cases is entirely absent in the instant case. "At or Near" a given place, such as an inclosure like a cemetery, would not appear to limit the jury to the selection of an event occurring **within** the cemetery.

The defendant urges that the decision of the Court in **State v. Wade**, 67 P (2) 647, is applicable here. In that case the court held, in effect, that the trial court should

restrict the jury in their deliberations to the time and place fixed by the evidence and should not permit the jury to speculate whether the act might have taken place on some other date or at some other time and place not shown by the evidence. In the **Wade** case, *supra*, a defense of alibi was interposed. However, while that is a factor not here present, that case does not appear to have been decided on that point. The Court at page 651 stated: "The situation, in view of what has been said, assumes a more serious aspect than a mere failure to instruct on the alibi phase of the case."

Defendant concedes that the State is not bound by or limited to the date set forth in the information. But, defendant strenuously urges that when the State, by its evidence at the trial, deviates from the information and fastens its case to some particular time and place, the State is bound and limited to a conviction for that event. **State v. Hillberg, supra.**

Moreover, the instruction as given by the Court is patently conflicting, ambiguous and confusing on its face. Said instruction first informs the jury that time is immaterial, that is, that they did not have to find that the offense occurred on the 18th of April, but that it was necessary for them to find that it occurred "At or Near the cemetery at Orem, Utah County, Utah, in an automobile in which the defendant, Grant Cooper, Doral Elder and Ferrell Sorenson were sitting." The instruction then goes on to inform the jury that it can make no difference to this charge if they find or believe "That the defendant did **at some other time or place** take indecent liberties xx." The only time mentioned is the 18th day of April, 1947, and there was no evidence whatever that the offense occurred on that said date.

It seems quite apparent that the instruction herein considered was erroneous and confusing; that it deprived the defendant of the safeguards provided by law, and that in the circumstances of the case was so prejudicial to the defendant as to necessitate a reversal.

THE FAILURE OF THE COURT TO GIVE A CAUTIONARY INSTRUCTION, AS REQUESTED BY THE DEFENDANT, WAS REVERSIBLE ERROR.

Defendant requested the Court to give the following cautionary instruction:

“The jury must bear in mind that in criminal prosecutions for sexual offenses, a charge is easily made and filed but very difficult to disprove.” (Defendant’s request No. 1).

The Court refused to give the instruction as requested and failed and neglected to give its equivalent. The failure of the Court to so instruct the jury is, in view of the evidence, circumstances and factors present in the instant case, reversible error.

The evidence discloses that the alleged assault was upon the person of an eleven year old boy. (R-11). The purported assault was in the afternoon in an automobile having three occupants, the complaining witness, the defendant Grant Cooper, and eleven year old Ferrell Sorenson. (R-31). Witness Ferrell Sorenson testified both at the preliminary hearing and at the trial that he did not see the purported assault at all and that all he knew about the matter was what Doral Elder, the complaining witness, had told him afterward. (R-77, 87). While the purported assault allegedly happened in the forepart of April, 1947, on

the day when Doral Elder and Farrell Sorenson played truant from school (R. 60, 62), the complaint was not filed until May 3, 1947, (JR-3), approximately one month later. Also, that the time alleged in the complaint was changed during the course of the trial with no explanation or reason offered for said change. The evidence further discloses that during the time when the assault was purportedly being made, the complaining witness and the Sorenson boy were in attendance at school according to the official records of the school and according to the testimony of the principal of said school who taught the sixth grade and who made and kept the records of attendance of each of the above said boys. (R-137, 155). Moreover, the evidence reveals that each of the boys had been coached with respect to the testimony he was to give at the trial. (Doral Elder R-47, 48) (Farrell Sorenson R-71). The reputation of Doral Elder for truth and honesty was bad (R-145), whereas the reputation in the community for truth and veracity, as well as for morality, of the defendant was good. (R-173). The evidence of the complaining witness as to the alleged assault was not corroborated. Also, the evidence discloses that the claimed assault came to light only after the mother of Doral Elder had caught Doral and another boy "Playing Nasty," at which time when asked where he learned such nasty things Doral blamed this defendant. ((R-21, 22).

Inherently, the situation was such that the jury, without a word of caution from the Court, might readily have let their imaginations and emotions control or influence their judgment in the consideration of the matter.

Defendant does not claim nor argue that a cautionary instruction is a matter of right in all sex cases. In many cases and even in most cases the circumstances may be such

that an instruction of the character here considered would constitute an undue invasion of the province of the jury without just cause or reason. Defendant is not unmindful of the Court's decision in **State v. Rutledge**, 63 Utah 546, 277 Pac. 479. In that case, however, the prosecution did not rest on the sole testimony of the prosecutrix, but was otherwise supported. The defendant respectfully submits that this Court has never held that in no event would a cautionary instruction be warranted or that in all cases, irrespective of circumstances, it would uphold the refusal of the trial court to so instruct.

At the hearing on the motion below, the learned trial judge conceded that if there was ever a case where a cautionary instruction was needed, it was the instant case. His Honor, however, took the view that such an instruction was improper and indicated that he would not give instructions of that character until he was taught to do so by the Supreme Court.

There have been, and will continue to be, cases wherein the need for a cautionary instruction is so pronounced and so necessary as an aid in averting a miscarriage of justice, that the failure to so instruct constitutes reversible error. In **People v. Vaughn** (1933), 131 Cal. Appl. 265, 21 P (2) 438, it was held, in view of the inherent doubtful character of the testimony as a whole, i. e., no complaint of mistreatment made during or immediately after the alleged offense; the fact that the matter came to light only after the prosecuting witness had been taken into custody by juvenile authorities; and tender age of the prosecutrix; and the fact that the testimony was uncorroborated, that the trial court erred in refusing to give the cautionary instruction there requested. The **Vaughn** case, *supra*, was an indecent assault

case and the court pointed out in that case that the reasoning and remarks of the authorities with respect to rape cases were equally applicable to cases of lewd treatment and indecent assault. A more recent application of the same principles is noted in **State v. Gannett (1938), 27 Cal. App. (2) 249, 81 P (2) 241**. That case involved a prosecution for a crime against a 10-year-old child who had admitted having been coached as to her testimony, which testimony was uncorroborated, and the court held that the refusal of the trial court to give the cautionary instruction requested was reversible error. See also **People v. Neal (Cal.), 150 P. (2) 13**, and **People v. Roberts (Cal.), 123 Pac. 628**. The rule of the foregoing cases was approved by the Supreme Court of California (In Banc) in **People v. Lucas, 105 P (2) 102**. The same view has been taken and reversals ordered by the courts of other jurisdictions. **State v. Slane (Wyo.), 41 P (2) 269**; **State v. Connors (Wisc.) 2 N. W. 1143**; **Reynolds v. State (Neb.) 42 N. W. 903**; **State v. Clavenger (N. M.) 202 Pac. 687**. In **State v. Loomer, 184 Pac. 723, 725**, the Supreme Court of Kansas stated:

“Doubtless conditions may exist making such cautionary instruction necessary, and in that case it should, of course, be given.”

There are several Utah cases wherein the need for cautionary instruction has been recognized. In **State v. Morasco, 128 Pac. 571, 574**, where appropriate instructions had been given by the trial court, the Court stated:

“The Court, as we have pointed out, instructed the jury that they should, because of the boy’s tender years, examine his testimony with care and caution. Thus the defendant’s rights in this regard were fully protected.” (Boldface supplied).



In *State v. Zeezich*, 210 Pac. 927, 929, where the witness was young and had been told by his mother what to say at the trial, the Court said:

"They (the jury) were instructed by the court to examine the testimony of the child with care and caution on account of her tender years and susceptibility to wrong impressions concerning facts. The instructions in that respect were all that could be asked."

As heretofore pointed out, in the instant case the prosecuting witness was an eleven year old child; his reputation for truth and honesty was bad; he had been coached by his mother as to the testimony he was to give; and his testimony was entirely uncorroborated as to all material parts thereof. He made no complaint of any mistreatment at or near the time of the alleged assault and the evidence of assault came to light only after his mother had caught him playing nasty. The testimony of the respectable, non-interested principal of the school established that the boys were in school during the entire month of April, 1947, without missing a day of school; no one saw the boys with the defendant at or near the time of the purported assault, and there is only the confused testimony of the prosecuting witness that such assault took place.

Defendant submits that in the light of the evidence and the circumstances of the case he was entitled to the requested instruction, or its equivalent, and that the failure and refusal of the trial court to so instruct constitutes reversible error.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE THAT COULD NOT REASONABLY HAVE BEEN PRODUCED AT THE TRIAL.

At the preliminary hearing the State, by its evidence, established that the alleged assault occurred on Friday, the 18th day of April, 1947, in the defendant's automobile within the Orem City Cemetery. There was no indication that the offense might have occurred at some other time or place until trial when the same prosecution witnesses indicated that the offense might have taken place on the 8th day of April, 1947, or on some other date upon which Doral Elder and Ferrell Sorenson had played truant from school. At the preliminary hearing and at the trial both Doral Elder and Ferrell Sorenson testified that they had been in the Orem City Cemetery with the defendant between 2:00 o'clock and 3:00 o'clock in the afternoon and that there had been no other persons present therein at that time.

By the payroll records of Orem City the defendant had been able to ascertain that said City employed a caretaker at the cemetery and had paid him for eight hours work in said cemetery on the 18th day of April, 1947. Said caretaker, when contacted by defendant, stated that he had been present in the cemetery on the date and at the times in question and was ready and willing to testify that he did not see defendant Grant Cooper accompanied by two boys in the cemetery and that had they been present therein, he would have seen and observed them.

During the course of the trial the State's evidence, as aforesaid, changed the time of the alleged offense to some

unknown time about the 8th of April. The above said caretaker had commenced work on the 15th day of April, at the said cemetery, and consequently could offer nothing in relation to an event purportedly occurring prior to that time.

Immediately after the trial, and with due diligence, the defendant was able to ascertain that the City of Orem had employed a prior caretaker in the cemetery, which said caretaker had been on duty for eight hours each day except Sunday during the period April 1, to April 14th. Defendant secured an affidavit from the prior caretaker (JR-36, 37) which said affidavit states that the affiant was present in the said cemetery for eight hours on the days above mentioned; that the Orem City Cemetery is so arranged and situate that one present therein probably would see, notice and observe automobiles entering or leaving the cemetery, and would probably see, notice, observe and detect the presence of other persons in said cemetery during the hours mentioned; that although the affiant was present in said cemetery during the dates and hours above mentioned, and would probably have seen and noticed others entering or leaving or moving about in said cemetery, the affiant did not see Grant Cooper or any other person, accompanied by two young boys, in or about the cemetery during the period above mentioned; and that had Grant Cooper or any other person, accompanied by two young boys, entered the cemetery and moved about therein during such times, this affiant would probably have seen, observed, noticed and detected their presence there.

In addition to the foregoing affidavit, the defendant was able to secure affidavits from two workmen who had been working at the entrance to the cemetery during the

day of April 8, 1947. Warren Merrill (JR-35) stated that on the 8th day of April, 1947, he, together with other men, was laboring at and building an approach to a bridge by the road leading into the Orem City Cemetery; that his position and work at that time and place was such that he could see, notice and observe the movement of traffic into or out of said cemetery; that he was able to see and notice the occupants of cars moving into or out of the cemetery and about the cemetery; that he knew the defendant Grant Cooper by sight; and that he did not see said defendant in or about the cemetery and that he believes that had the defendant Grant Cooper been in or around the said cemetery at that time that he would have seen and recognized him. John Turner, another of the men working by the entrance to the cemetery on April 8, 1947, furnished an affidavit substantially similar to that given by Warren Merrill. (JR139).

The matters contained in the foregoing affidavits would have been material, and admissible at the trial. The statements therein are direct and factual, and are relevant to the determinative issue in the case. They run to the merits of the controversy, and do not concern themselves with some collateral issue. The new evidence represented by the affidavits is of such character that it, when considered by the jury along with the other evidence, would leave a reasonable doubt as to the defendant's guilt. This, we are taught, is the test. **39 Am. Jur. 173 - New Trial Par. 166.**

Defendant realizes that applications for new trials on the ground of newly discovered evidence are not favored by the courts; that the courts generally take the position that the moving party has had ample opportunity to pre-

pare his case carefully and to secure all of the evidence before trial. In the instant case the defendant had no opportunity whatever to produce the evidence here in question. The affidavits bring into the picture new evidence which, owing to the circumstances of the case, the defendant was precluded from having the advantage of at the time of the trial. The new evidence has sufficient probative force or weight to produce a result different from that which has been obtained at the trial. See **Ren v. Jones 1 P (2) 11; Hensly v. Com., 43 S. W. (2) 996.**

Nor, do the affidavits constitute cumulative evidence. True, it relates to a point which was at issue at the trial, but a new trial is not precluded in every case where the testimony relates to some matter which was contested. If such were the case, a new trial would seldom, if ever, be granted. The evidence here is of such character that it would probably so strengthen evidence already offered as to bring about a different result.

Defendant respectfully urges that in fairness and in law he is entitled to bring before a jury the evidence of the aforesaid affidavits in order that the jury might have access to the same in determining the guilt or innocence of the defendant, and that the denial of his motion for new trial was error on the part of the trial court.

**DEFENDANT'S MOTION FOR NEW TRIAL UPON THE  
GROUND THAT CERTAIN ACTIONS AND STATE-  
MENTS OF THE PROSECUTING ATTORNEY, PRE-  
JUDICIAL TO THE SUBSTANTIAL RIGHTS OF  
THE DEFENDANT, WERE DONE OR ALLOWED**

AT THE TRIAL, WAS ERRONEOUSLY DENIED BY THE COURT.

At the trial the defendant testified that his wife, Melissa C. Cooper, had made accusations against him to a Doctor Weight of Provo, Utah. Dr. Weight was an M. D. (R.230) and was qualified as a psychiatrist. (R. 233). His qualifications were admitted by the State (R. 230). The accusations to the said Doctor by Mrs. Cooper had been made about one year prior to the date of trial of this cause (R. 233). After hearing the accusations by Mrs. Cooper, Doctor Weight called the defendant to his office and told him about the charges, and stated to the defendant that if the accusations were true he wanted to help defendant, and that if they were false he wanted to help Mrs. Cooper (R. 187). Doctor Weight examined the defendant several times (R. 187).

Upon objection by the District Attorney, the defendant was not permitted to answer the following question:

“Did the Doctor advise you whether you had homosexual characteristics?”

The objection of the prosecutor was that the answer called for a conclusion which the defendant was not qualified to give, and that it was hearsay, and that it was incompetent, irrelevant and immaterial (R. 188). In sustaining the objection, the Court stated (R. 190):

“You see, the question there definitely is one that goes to the mental responsibility of the defendant, ‘Does he have homosexual characteristics?’ That is an abnormality, it is insanity. And there is no plea of insanity. The court is bound to sustain the objection.”

At the outset counsel for defendant may not be remiss in pointing out that the foregoing statement on the part of the Court was very damaging to defendant's cause. Certainly the defendant would not and could not be expected to set up a plea of insanity or homosexuality when that was, inherently at least, the very thing that he was attempting to disprove. The attitude of the Court, as reflected by the said statement, is consistent only with the idea that the Court thought and expected that the answer to the question would show an abnormality or insanity. The jury may well have taken their cue from the aforesaid statement of the Court, and proceeded on the theory that the Court thought the defendant to be homosexual.

On the basis of his investigation and examinations Dr. Weight recommended that Mrs. Cooper secure employment to keep her occupied (R. 235, 236). The entire testimony of Dr. Weight and the testimony of the defendant relating to the examinations and investigations of Dr. Weight was ordered stricken as immaterial, and the jury were instructed to disregard the evidence completely (R. 219, 236).

State's witness, Scott Wilkins, Orem City Marshal, stated on his direct examination that the first complaint that came to him came from the defendant's wife. (R. 98). Mr. Wilkins, without knowing anything about the purported cemetery episode, went to the boys themselves and found out about it from them (R. 105). He questioned many children without knowing that anything had actually happened (R.22A, 101, 106). Without checking into the matter, Marshal Wilkins advised Mr. Elder to file the charge, and picked the 18th day of April, 1947, at random. (R. 110).

Hence, the wife of the defendant was directly tied up

with the charge by the evidence of Marshal Wilkins. At the time the action was tried on this charge, the District Attorney was prosecuting the defendant upon a divorce complaint brought against him by his said wife. (R. 184).

In his summary to the jury, the prosecuting attorney declared that the defendant was "Homosexual," and that the defendant had a diseased and depraved mind. By references to the age of the children and to the number of children and to the enormity of the purported offense, he appealed to the passions, emotions and prejudices of the jury for a conviction. Defense counsel, choosing to meet and answer such argument, stated in his summary to the jury that the testimony of Doctor Weight, the only evidence bearing directly upon the matter of homosexuality, had shown that a competent doctor, one qualified to deal with such matters, did not regard the defendant as a "Homosexual," but had shown that the doctor attributed the accusations to a frustration on the part of the defendant's wife. (Affidavit JR. 33, 34).

Upon objection by the prosecuting attorney, the remarks of defense counsel with reference to Doctor Weight's testimony were ordered out of order, and the jury were instructed that they should disregard defense counsel's statement with reference thereto. The statements and prejudicial accusations of the prosecutor were allowed to remain. (JR. 33, 34).

The district attorney, by pursuing an improper line of argument (made improper at his own instigation), thereby invited a reply by defense counsel, and the reference to the testimony of the qualified psychiatrist was proper even though that testimony had previously been ordered stricken as immaterial. By his improper argument, the prosecutor



opened the door to a retaliation by reference to evidence that might not have otherwise been proper. **State v. Duncan**, 68 S. E. 684; **State v. Hilton**, 69 S. E. 1077; **Annotation** 78 A. L. R. 1500. Nor does the fact that the defendant failed to object to the use by the prosecutor of the extravagant and intemperate language of such prejudicial nature preclude the Court from taking such language into account in determining whether a fair trial was had by the defendant. **Etna Life Ins. Co. v. Kelley**, 70 Fed. (2), 589, 93 A. L. R. 471; **Annotation**, 109 A. L. R. 1090.

There can be little doubt but that the statements of the prosecutor were calculated to influence the jury. They were designed to arouse in the minds of the jurors a prejudice and resentment; to arouse animosity; and to impress the enormity of the purported offense. As pointed out by the Supreme Court of Arkansas in **Holder v. State**, 25 S. W. 279: "A prosecuting attorney is a public officer, 'Acting in a quasi-judicial capacity'. It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty, xxx. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury, whether true or not, which have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by argument based on anything except the evidence in the case, and conclusions legitimately deducible from the law applicable to the same." See, also, **State v. Irwin**, 71 Pac. 608, 611.

The statements and insinuations of the prosecutor were highly prejudicial to the defendant, and were manifestly contrary to the only competent evidence offered in that respect. To permit such statements to stand, and at the same time deprive the defendant of his evidence in relation

thereto, is manifestly unjust. It deprived the defendant of the fair and just trial to which the law entitles him.

### CONCLUSION

It is the position of the appellant that the judgment of the lower court should be reversed, and the case remanded for a new trial for the following reasons:

1. That the Court erred in admitting testimony of purported assaults by the defendant upon the person of another, not the complaining witness, not connected with or relevant to the instant charge.

2. The 8th Instruction of the Court was erroneous and prejudicial to the defendant.

3. That in the circumstances of this case the failure of the Court to give the cautionary instruction requested by the defendant, or to give its equivalent, constitutes reversible error.

4. The Court erred in failing to grant the defendant a new trial on the ground of newly discovered evidence which could not reasonably have been produced at the trial.

5. The Court erred in denying defendant's motion for a new trial on the ground that certain actions and statements of the prosecutor were prejudicial to the substantial rights of the defendant.

The judgment should be reversed and a new trial ordered.

Respectfully submitted,

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Attorneys for Appellant