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State of Utah v. Thomas R. Robinson : Brief of Appellant

Utah Supreme Court

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O. H. Matthews; Attorney for Appellant;

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CASE No. 7292

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Appellee.

v.

THOMAS R. ROBINSON,

Appellant.

Appeal from a judgment of conviction for rape and life sentence by the District Court for Salt Lake County. Hon. Ray Van Cott, Judge.

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O. H. MATTHEWS,

Attorney for Appellant.

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INDEX

THERE WAS INSUFFICIENT EVIDENCE TO CON-
VICT. THERE WAS NO LAWFUL EVIDENCE TO
SUPPORT THE JUDGMENT OF CONVICTION AND
SENTENCE. POINT ONE - - - - -PAGE 2

Assignment of Error,	2
Avis Barter, her testimony and qualifications to testify....	4, 3
Preliminary examination, absence of,	8, 10
Other witnesses for the State, testimony of,	
Jacobs, Rueben,	10, 11
Openshaw, Dr.	10
Smith, Wm. S.,	11
Incompetent evidence,	11, 12
Chronology of the Case as testified for the State:	
Barter, Mrs. Alice,	12, 13
Brimhall, Mrs.	13
Bukosky, Officer	15
Farnsworth, Officer	16
Heath, Officer	14
Jacobs, Reuben	10, 11
Mulligan, Officer	15
Smith, Wm. S.,	14
(For Defense)	
Adamson, Geo. M.	18
Farnsworth	16
Hicks, Wm. J.,	16, 18
Hill, Aaron,	19
Rosander, K. A.,	19
The Record Story,	3, 22

CITATIONS:

State v. Williams, 180 Pac. 2nd, 551, 1, 8, 9, 22.

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Appellee.

v.

THOMAS R. ROBINSON,

Appellant.

Case No. 7297

Brief for Appellant

Appeal from a judgment of conviction for rape and life sentence by the District Court for Salt Lake County. Hon. Ray Van Cott, Judge.

STATEMENT

Preliminary. This case in its type and outline is strikingly similar to that presented in the recent case of State v. Williams, 180 Pac. 2nd, 551, not yet published in the Utah Reports. And we make the same objection to the judgment of conviction that was made in that case, viz. *error* in that:

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT. THERE WAS NO LAWFUL EVIDENCE TO SUPPORT THE JUDGMENT OF CONVICTION AND SENTENCE.

Before taking up the evidence in detail we pause to mention that the record is not all that could be desired in the way of noting objections and exceptions in defendant's behalf by his trial attorney. But there are certain fundamental objections that are always available to an accused, of which he cannot be deprived by any act or neglect of an attorney, and which he may urge even for the first time in the Supreme Court. Among these are the objection that the complaint in a civil action, or the information in a criminal case, does not state facts sufficient to constitute a cause of action, or a criminal offense. The other objection, a corollary of the first, is that there is no evidence to prove cause of action alleged or the offense charged. No law authorizes a court to impose judgment of conviction on a man and take away his property, his liberty or his life where there is no evidence of his guilt. And this point may be raised in the Supreme Court for the first time, even if there were little or no vigilance shown by the defendant's attorney in the trial court.

Another objection available here is to the repeated and persistent use by the State of grossly incompetent evidence in making its case. We are aware that in cases where there is competent evidence in support of or against a verdict, and a party seeks to reinforce or strengthen the competent evidence by incompetent evidence; the other party must object to the incompetent evidence at the time, and except to the

overruling thereof, in order to assign error to its wrongful admission. But in a case where, as here, there is not sufficient lawful or competent evidence of guilt, the incompetent evidence may be objected to as really no evidence, upon a challenge to the entire record of evidence as insufficient, and no matter whether it was objected to at the time offered or not. And our objection here catches it.

The Record Story. Avis Barter, the young girl upon whom the rape is charged to have been committed, was born June 21, 1933 (rec. p. 56-57) and at the time of the offense charged on Jan. 6, 1948, she was of the age of 14 years, 6 months, 16 days. That is, her physical body was that old. But her mental growth had been arrested at the age of 5 (56-57, 61-62, 72). She had entered kindergarten but, owing to her backwardness, was transferred to a special class at Jackson school for a half year. Then she was dismissed because of her inability to absorb instruction. They gave her an I.Q. test and a mental rating of a 5-year-old. She cannot read or write. Her intellectual perceptions and acts are almost infantile as revealed in many of her answers to questions on the witness stand. She resides with her parents at No. 432 W. 5th North.

On Jan. 6, 1948, at about 12:45 p. m., with her mother's permission, she left home for a walk over to the home of her aunt, Mrs. Brimhall, at No. 1062 West 5th North, some 6 or 7 blocks to the west. (57, 63-64). She first crossed some nearby railroad tracks on W. 5th North where were working some railroad switchmen who knew her and noted her passing, and then proceeded west, walking in the street to the

right of center, because there was no paved sidewalk there. When she had reached a point about a quarter of the block from the R.R. crossing, a green coupe car pulled up by her and stopped. (130-132). She was seen to gesture with her hand to the west down the road (140). Then the door opened and she got into the car, which proceeded west. When the car reached the 5th West crossing of 5th North, it turned into a vacant lot or field with tall weeds, and drove in there some 150 or 200 feet, but still within sight of the switchmen, where it stopped and remained motionless for 40 minutes to an hour. Soon after the car entered the vacant lot the switchmen, becoming suspicious, turned in an alarm by phone to the police station. The latter, in turn, sent out a radio alarm, and policemen began to converge, but did not arrive in time to catch the occupant of the car. The latter, as soon as he had finished with Avis, backed out of the lot, let her out of his car at 6th West, and disappeared. The latter then proceeded west with her interrupted walk to her aunt's home and her visit there. But she made no mention to her aunt of what happened to her on the way out until after her father arrived with a police officer some 15 or 20 minutes later. (73-76, 130-134. 139-142, 66-69). From her aunt's she was first taken to her home, then to the police station, and later to the City Physician. She testified to having identified the defendant Robinson as her assailant at her home, at the police station, and in the District Court room. Since the sufficiency of the evidence to convict rests entirely upon the observations and declarations of this young girl with a mental capacity of a 5-year-old, we will examine with some care her performance on the witness stand. She testified:

In January 1948 I left my home to go down to my aunt's (72). On the way a green car drove up and he pulled me in. The man did not say anything to me. He took me into a little field with high weeds and he played nasty with me. He unzipped his pants and pulled down my pants, and put his thing in me. I told him get off. He held me down by my legs. (74-75, 95, 99).

He was not on me very long. After he got off he took me down the road toward my aunt's and let me out by some tracks (76).

CROSS-EX. Yes, I said down stairs (in city court) that he was on top of me for an hour.

Q. How many minutes are there in an hour, Avis?

A. About three. (100).

My sister Shirley came out on the street and we waved good-bye to each other as she went back to school, and I to my aunt's (79). We were right near the R. R. tracks along 5th North toward my aunt's.

CROSS-EX. Q. Had you gotten past 5th West by the time this car came up? A. Yes.

Q. Had you gotten all the way to 6th West? A. Yes.

Q. Had you gotten to 7th West? A. Yes.

Q. To 8th West? A. Yes.

Q. To 9th West? A. Yes.

Q. Now 9th West is 4 or 5 blocks from your house. Are you sure you had gotten that far before this man came up with his car? A. Yes.

Q. Do you know where 10th West is? A. Yes.

Q. Had you gotten to 10th West? A. Yes, my aunt's house is four blocks from 10th West. Yes, I am positive. I have been to 10th West before. It was up near 10th West, where this green car stopped and pulled up beside me, and he pulled me in. (81).

Q. And this was all the way to 10th West? A. Yes (92).

Q. How many blocks were you from your home when this man pulled up? A. Oh, it was about two. (99).

Avis was badly mixed in her head, not in heart. As any city map will show, 10th West is less than one block from her aunt's home, No. 1062 10th West, not four blocks as she said. And the man pulled up and took her in his car at only about one-quarter of a block from her home, according to the near-by switchmen who noticed the occurrence and alerted police headquarters (130-132). Also the man took her into the vacant lot of weeds just over the first intersection at 5th West where they could still see the car top as it stood motionless (130-132, 140), not so far away as 10th West as she said she was positive. Also there are no railroad tracks at or near 10th West Street, at which she could have been let out of the car, as she said in her account of it. But there are R.R.

tracks at the 5th West and 5th North crossing, as any city map will show. This is not to disparage her conscious veracity, but to show the scope of her intellectual perceptions—those of a five-year-old.

I was going down to my aunt's and a green car drove up, that one in the seat and one in front, etc. (other details, 73-75).

CROSS-EX. It was a coupe. Yes I remember down stairs (city court) I said the car had two doors on each side. It did have two doors and two handles on each side, yes. (78-79).

The witness was then shown and identified trial exhibits A, B, C, D and E, photographs of a car with only one door on each side. Again, deficient intellectual perceptions, or else confusion from cars she had seen since the rape.

After he got off me he took me down the road and let me off by some tracks (76). I went on to my aunt's and was there till my daddy and a policeman came and took me home (77).

To a person of *normal* perceptions 14 or 15 years of age, a great tragedy had happened to Avis Barter, that would have prompted her to return instantly to her home only a block or so away and report the occurrence to her mother. What did she do? She resumed her interrupted walk down to her aunt's, Mrs. Brimhall, some six blocks further west, as if there had

been only a casual stop to chat with a friend. Arriving at her aunt's she did not tell her aunt what had happened, though a little shy and nervous, until her father came with a policeman to take her away. Then she told her aunt that a man had played nasty with her. (67-71).

There should have been a special preliminary inquiry by counsel into the mental capacity of this girl to testify before putting her upon the witness stand, as was done in the case of *State v. Williams*, 180 P. 2d., 551. In that case such a hearing was had, the inquiry going to mental capacity of the witness (1) to understand and answer questions intelligently, and (2) to show her moral responsibility and sense of duty to accurately narrate the facts within her knowledge and recollection; that is—speak the truth. An absence of capacity in either of these particulars would disqualify the witness to testify.

The result of this preliminary inquiry in the *Williams* case was found by this Court, upon the record, to be not very satisfactory, lacking in clarity. But this Court allowed the trial court's decision to stand, in permitting the witness to testify. But the judgment of conviction was reversed for insufficiency of all the evidence, including that of the prosecuting witness, to convict. In that case, as in this, the prosecuting witness was the only witness to the physical acts and circumstances supporting the charge of rape. In that case, as in this, the prosecuting witness pointed out and identified the accused as the person who raped her. In that case the mental age of the witness was 8 to 10. Here it was 5.

It may be that the framing of questions to properly probe the witness' mental workings might have been of some difficulty or ingenuity; requiring some skill, patience and gentleness—some experience in such cases. The aid of the teachers and doctors who made the original I.Q. test when the girl was let out of school, might perhaps have been invoked. They acquire a certain skill in such matters from routine work. Nothing was done; no inquiry made—

If there was a duty to conduct such a preliminary inquiry, it would seem to have been a responsibility of the Court as well as of counsel, in the interest of justice. Or, if not, then of the State's counsel, before offering the witness. Counsel has some obligation to the public to see that justice is done, as well as the duty to obtain convictions; yes, even to an accused person himself, that he may not suffer if innocent.

In this case, this Court is not called upon, as in the Williams case, to defer to the judgment of the trial court in passing on the result of such inquiry into the mental capacity of the prosecuting witness. No hearing was had and the court's judgment was not invoked or exercised, unless silently in accepting the verdict and pronouncing judgment of conviction. It will not do to suggest that, in the absence of objection, the trial court was warranted in passing it over, and taking no notice of a witness's mental infancy or imbecility. The facts in that regard were known to the State and were put upon the record at the very inception of its evidence. Suppose the

mental age of Avis Barter had been only 4 years, or 3, could the court and counsel ignore it and say that there was some evidence to support the verdict, foreclosing further inquiry under the rule of conflicting evidence? This Court said Nay in the Williams case, where the mental age was 8 to 10 years, and reversed the conviction.

We now leave the witness Avis Barter, and take up other witnesses for the State. Dr. C. R. Openshaw made a physical examination of Avis during the afternoon of Jan. 6, 1948, and found sperm or male semen in her vagina, proving recent sexual connection, but not who left the semen there. There was rupture of the hymen, in his opinion not recent, but no bruise, laceration, torn clothing, or evidence of rough handling. (7-11).

Reuben Jacobs, a railroad switchman, was on Jan. 6, 1948 working at the 5th North and 4th West crossing, directing traffic, signing trains through, lining switches, and giving signals. Has a near-by switchmen's shanty (130). On that day between 12 and 1 p. m. he observed Avis Barter pass him by going west on 5th North street, and saw her walking up the road a little to one side of the center of the road. When she was only about a quarter of a block west of him, he saw a green coupe pull up close to her; the door opened and she got into the car (131) on the north side of it. Then the car drove on, and when he next looked that way he saw the top of the car among some tall weeds in a vacant lot almost a block from where she had got into the car, and just north of 5th North.

My associate, Mr. Locke, turned in a call to the police department (132). Later the police came but the car had gone. It had remained there between 40 minutes and an hour (133). I have known Avis Barter by sight for several years playing around in the street where we worked, and knew where she lived (134).

William S. Smith, crossing switchman, was working with Reuben Jacobs, at the same time and place, and his testimony agreed with that of Jacobs (139-141).

Incompetent Testimony. The foregoing is a summary of all the testimony of witnesses purporting to know anything that happened before Avis Barter arrived at her aunt's home, 1062 W. 5th North, after the criminal attack upon her. There was some incompetent testimony, consisting of statements of what the witnesses saw Avis Barter do, and say, at specified times and places before the trial, and after the asserted attack upon her. That is, they saw and heard Avis pick out and identify the defendant and his Hudson car as those involved in the attack upon her on Jan. 6, 1948. Instances: Victor R. Heath, police (106); Chas. W. Farnsworth, police (122-125; and 127); Alice Barter, mother, (58); Avis Barter, girl, (78-79, 92).

It is a commonplace in the law of evidence, to say that the acts, statements and declarations of a testifying witness made previous to the trial, not under oath, in the absence of the party to be affected, are incompetent on the trial of an

issue against him. If Avis Barter is a qualified witness, she may testify under oath to material facts at the trial. But the State may not reinforce her testimony by having her testify that she had made similar or supporting statements before the trial. Neither may other persons so testify. The only instances in which such prior acts or declarations of a witness are admissible, is when they tend to contradict or disparage his statements on the witness stand. Never in support. In certain accident cases they are permitted, if they are expressions of instant pain. Or when made to a physician to enable him to diagnose and prescribe. Not otherwise. We won't take the time to hunt up and cite the cases on this point, since this Court is necessarily familiar with them. Certainly in this case such statements, reeking of hearsay, have no evidential value in this record. The identification of defendant as her assailant rests solely on what she testified at the trial.

Chronology of the Case. In view of the evidence to be cited later, showing that defendant Thomas R. Robinson was elsewhere than at or near the scene of the offense charged against him, and so could not have committed it, it becomes important to determine precisely the time of day—the hour of the day—that the crime was in process of being committed, according to the State's witnesses. And that means the space of time after Avis Barter left her mother's home, 432 West 5th North, until she arrived at her aunt's home, No. 1062 W. 5th North.

Her mother, Alice Barter, testified that:

Avis left my home to go to my sister's home on Jan. 6th, 1948, at between 12:30 and 1 p. m. I next saw her at about 2 p. m. when my husband and an officer brought her back from my sister's house (56-57 and 62).

It was about 12:45 o'clock when Shirley and Avis left my home and waved at each other as they were crossing the tracks (63-64).

Mrs. Brimhall, aunt of Avis:

I live at 1062 W. 5th North. On Jan. 6th, 1948, Avis came to my house at about a quarter to 2 p. m. (67). Her father and police officer Heath came to my house at 2 p. m., which was feeding time for my baby (69). I aim to keep in touch with my baby's feeding time by the clock, and on that day I believe it was 1:45 p. m. when Avis came to my house. It takes 20, to 25 or 30 minutes to walk from my house to my sister's, Mrs. Barter's (71).

Reuben Jacobs, switchman:

On Jan. 6, 1948, while working at my post of duty at 5th North and 4th West, I saw Avis Barter after noon, between 12 and 1 p. m. as she passed us, going west on 5th North. She was alone walking up the road a little to one side of the middle of the road. When she reached a point about $\frac{1}{4}$ of a block west of us, we saw a green coupe car pull up to her, and she got into the car on the north side. Then the car went west, and I next saw the top of it in some weeds in a vacant lot, almost a block from where she got in. My associate, Mr. Locke, phoned the police, and later the police came, but the car had gone (130-132).

I should judge the car remained there 40 minutes to an hour (133-134).

Our noon period begins at 12 o'clock and we have twenty minutes noon time. It began that day at or pretty close to 12. We took about 20 minutes, and we had finished our noon hour before I saw this green car. And it was about 20 minutes later when I saw the green car. That brings us to around 12:45 p. m. when I saw the green car, yes. That is my best judgment (134-135). From the time that I saw the car in the weeds of the vacant lot I thought it remained there for 40 minutes to an hour, which would bring it to around 1:30 p. m. or a little later. That weed patch is at 5th North and 5th West. 5th West don't cross 5th North there, only there is a R. R. spur in there to supply spur cars for the railroad (136-138).

Wm. S. Smith, switchman:

I imagine it was, as Mr. Jacobs says, 45 minutes to an hour that the car was over in that vacant lot where we saw it stop (145).

Victor R. Heath, police:

The radio report I heard stated that the information was received at the police station by the dispatcher, at 12:59 p. m. It was around 1 o'clock when I heard the call on the air. I was then near 7th South, west of Main, in the southwest part of town (108-109).

According to all the foregoing, the raping began at or

very soon after 12.45 p. m. and was consummated at or before 1:30 p. m., so that Avis would have enough time to walk from the tracks at 5th North and 5th West to the home of her aunt (Mrs. Brimhall) at No. 1062 W. 5th North, about six blocks, and arrive there by about 1:45 p. m., or 15 minutes or so before Mrs. Brimhall's feeding time for her baby, which was 2 p. m. (69). The first point of time that any witness for the State saw the defendant Robinson that day was at about or between 2:15 p. m. and 2:30 p. m. when he was taken into custody by officer Howard Mulligan at a point described by him as on 6th West, just over the railroad tracks, headed north from 5th North (112-113).

I asked him a few questions, and he stated that he was on his way to the Griffin Wheel Co. to seek employment. I told him to drive back up the street with me, I wanted to make a check on him. By that time officer Bukosky had come up from the rear, and we had him turn his car around and go back to the residence at 432 W. 5th North. (Mulligan, 113).

He also told me that he had been out to Magna and Garfield looking for work (Mulligan, 115).

I heard officer Mulligan question defendant. He said he had been driving around looking for work; that he had been out to Garfield and Magna looking for work, and that he was on his way to the Griffin Wheel Co. looking for work. (Bukosky, 120).

I discussed the case with defendant shortly after 5 p. m. in the city jail. I asked him if he knew what he had been arrested for, and he said, No, he didn't. I asked him if he had had a little girl in his car and assaulted her. He said he couldn't have had her in his car because he had been out to Magna and Garfield looking for work that day, and then to that place on 9th South in the vicinity of 6th or 7th West, and also to the Griffin Wheel. I asked him if that was down in the vicinity of 6th West and 5th North, and he said Yes. (Officer Farnsworth, 126-127).

The foregoing contains mention of all of the State's witnesses testifying to matters occurring at or before the arrest, and one witness, Farnsworth, as to an interview occurring after the arrest.

In agreement with the testimony of police officers Muligan, Bukosky and Farnsworth, as to what defendant Robinson told them on the day of his arrest as to his whereabouts at the time of the raping, is the testimony of the following gentlemen who were called to the witness stand by the defense:

William J. Hicks:

I live at the Arthur plant, Magna; am employed by Kennecott Copper Corporation, as supervisor of all personnel. My duties are interviewing, employing and separating men from service. On Jan. 6, 1948, Tom Robinson came to me seeking employment; he is the gentle-

man seated here at your right. At our plant we all go to lunch by the whistle signals. The whistle sounds for lunch at 11:30. It blows again at 12 to return to work. I had gone to lunch and returned at from 5 to 10 minutes after the return whistle had blown. Then I went out on an errand for about 12 to 15 minutes business. Then returning to my office I was informed that a couple of gentlemen wished to see me. Then it was about 5 minutes before I went out to the counter to meet them; and the first one I talked to was this gentleman here, Tom Robinson (148-150).

(*Author's Note:* Within the above maximum and minimum limits, Mr. Hicks began his interview with defendant at from 22 to 30 minutes after 12 o'clock).

Robinson had worked for us in 1929 for 3 or 4 months as core maker. I had some conversation with him for between 7 and 10 minutes. Then he went out of the door and that is the last I saw of him (150).

(*Note:* This adds up to between 12:29 and 12:40 p. m. when Robinson left Mr. Hicks' office).

I drive into Salt Lake City almost daily. I have clocked the time on 21st South, driving at about 42 to 45 miles an hour and coming by way of 21st South and Redwood Road; 3rd South to 10th West; 10th West to 2nd South; and 2nd South to West Temple at 2nd South — about 30 minutes. On 3500 South, about 40

minutes. On the speedway about 5 minutes less—35 minutes (151).

I wrote Robinson's name on a date tab in my office when he was there on Jan. 6, 1948. I still have that date tab, and have since verified the date from that (152).

After 1929 when Robinson worked for us, I had never seen or associated with him until Jan. 6, 1948, when he called. I then knew him by face but could not recall his name (153).

George M. Adamson:

I am Chief Clerk of Employment at Garfield Smelter; have been for 28 years. On Jan. 6, 1948, I saw Tom Robinson in our employment office, just about 12:30 p. m. or a minute or so before 12:30. I had with him a general conversation regarding employment. He applied for a job as welder. At the time I told him we were not hiring welders. He then told me he had worked there before, and I went to get his record out of the dead file. I told him his record was good but that we were not hiring at the time. Advised him to go see Mr. Hicks at Kennecott Copper. I believe he was there with me for about ten minutes that day. It was very close to 12:40 p. m. when he left. My assistant, Mr. Kelsey Rosander, was present there with me at the time (166-167).

I never saw Mr. Robinson before Jan. 6, 1948, to my knowledge and am not related to him (168). It is about a mile and a half from my office to Mr. Hicks' (169).

CROSS-EX. Are you testifying your recollection of an approximate time Robinson was there? A. No, sir; it is a definite time, because the whistle blows at 12:30 out there to finish the lunch hour. He was in the office when the whistle blew, and he had been in the office a minute or so before that time. We hadn't gone back to work from lunch. There might be an error of a minute or so in fixing the time, not more (170-171).

Kelsey A. Rosander:

I am assistant safety director, and know Mr. George Adamson. I saw Tom Robinson on Jan. 6, 1948, at the American Smelting & Refining Co.'s employment office. He was there just as we were finishing lunch. Mr. Adamson interviewed him about employment. He was there with us about 10 minutes. He left at about 5 or 6 minutes after the 12:30 whistleblew, ending our lunch period. Yes, I recall specifically hearing the whistle blow. I never saw Robinson before Jan. 6, and I am not related to him (173-175).

Aaron Hill:

I live at 174 Parker St., Murray, Utah. My business is driving a truck, but for the last year I have been a laborer.

I saw Tom Robinson here on Jan. 6, 1948 out at the Chicago Steel Bridge & Iron Co. on 17th South and about 5th West. I had never seen him before, and have seen him but once since. The hour I saw him there was about 1:20 or 1:30 p.m. I had just returned from Idaho

visiting my father who was ill. I got in Monday night, Jan. 5, and I went there Tuesday at about 1 p.m. to seek employment. I had been there, oh, 15 to 20 minutes when Mr. Robinson drove up; he also was seeking employment (157-159).

I asked him, if he didn't make the job there, if he wanted to go out to Magna and Garfield and try there? He said No use, he had just come back from there, nothing doing.

At that time I did not know his name. I would say he was there a half hour or longer at the Chicago Bridge & Iron Co. While there we talked with Ray Duckworth, sup't. for the Olson Construction Co. I am not related to Robinson or any of his family, and don't know them.

I am positive as to the time we were there, to within 15 minutes, I would say. I ate my dinner at about 12:30 p. m. at Murray, and then drove in from Murray to the job as soon as I had finished my dinner at home. That would bring me there at approximately 1 p. m., and I left there approximately at 2 p. m. (159-164).

The foregoing covers completely all of the time that defendant was supposed to be engaged in committing a rape upon the little girl in this case. It shows that the defendant could not possibly have committed the offense charged because he was not there at the time and place proved in the State's evidence. The defendant did not go upon the witness stand in person to testify. The State's evidence made it un-

necessary. That is, the State by proving with its own witnesses that the defendant claims in defense that he was elsewhere seeking work at the time, and telling the jury so, made it unnecessary for defendant to himself tell the jury the same facts. If he had testified, he could but have repeated the same statements that the State's witnesses had imputed to him. He would not want to deny those statements because they were true. And they served the purposes of his defense as well as if he had himself made them on the stand, or better.

The defendant could not have proved his own prior self-serving statements in defense. The State alone committed that error, as we have seen (ante page 11-12). But when the State proved them for him, he was entitled to the benefit thereof. Especially is this true of the testimony of Officer Farnsworth who testified for the State to his conversation with defendant in the city jail as a substantive fact in the case. Thereby the State is bound as by a statement in the evidence vouched for, sanctioned and inspired by it. If not to the extent of admitting defendant's innocence, then certainly to the extent of proving that that was defendant's defense. By putting these officers on the stand and causing them to testify as they did, the State is bound to admit the competence thereof, and that it has some value as evidence in the case, even if against the State. This is not a case where defendant had made other conflicting statements which the State sought to contradict or disparage before the jury. But they were original evidence for the State, both that on direct and cross-examination of its witnesses.

Independently of this feature of the case, the State has submitted no lawful evidence of the offense charged. As in the Williams case, this court is confronted with impeccable evidence that defendant was not present at the time and place of the rape, and so could not have committed it. The State has gotten the wrong pig by the ears, and should release him.

Respectfully submitted,

O. H. MATTHEWS,

Attorney for Appellant.