

1978

State of Utah v. John Earl McMillan : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH

:

Plaintiff-Respondent,

:

Case No. 15654

-vs-

:

JOHN EARL McMILLAN,

:

Defendant-Appellant.

:

:

BRIEF OF RESPONDENT

AN APPEAL FROM CONVICTIONS OF FORCIBLE
SODOMY AND FORCIBLE SEXUAL ABUSE
RENDERED IN THE THIRD JUDICIAL DISTRICT
COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE PETER F.
LEARY, PRESIDING

FILED

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No.
		15654
JOHN EARL McMILLAN,	:	
Defendant-Appellant.	:	
	:	

- - - - -

BRIEF OF RESPONDENT

- - - - -

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged by information of committing the crimes of Forcible Sodomy, a first degree felony in violation of § 76-5-403, U.C.A., 1977, Supp., and Forcible Sexual Abuse, a third degree felony in violation of § 76-5-404, U.C.A., 1977 Supp.

DISPOSITION IN THE LOWER COURT

The case was tried without a jury before the Honorable Peter F. Leary, in the Third Judicial District Court.

The appellant was found guilty on all counts charged in the information.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the conviction below.

STATEMENT OF FACTS

On July 5, 1977, Bryson (age 4) and Anson Jack, (age 3), and Becky (age 4) and Kirk (age 3) Harpole were playing outside near a home that was being constructed in their neighborhood. (T. 40). As the children approached the house, they saw a man in the lower level of the house who was unzipping his pants (T. 27). The man told the children to "Come here," (T. 28, l. 2) which they did. At that time, three of the children "tasted" and "felt" his penis (T. 28). The fourth child, Kirk, did the same a few moments later (T. 29).

Mrs. Harpole testified that the new home was approximately 175 feet from her kitchen window. (T. 40). Prior to the incident, Mrs. Harpole observed the children "by a man by the side of the house . . . it looked like they were talking." (T. 40 l. 17, 19). (T. 40) At that time she also observed an older model red truck near the home. (T. 4

Mrs. Harpole hollered out the window for the children to come home, and in about ten minutes, after they had failed to respond and she was unable to see them, she went over to the home to get them. (T. 41). At this time, the red truck was gone. (T. 42). As Mrs. Harpole approached the garage area of the new home, she hollered for the children again. (T. 42). As the children came out of the house, Anson Jack told her, "that man showed us his weenie. He let us feel it, and we tasted it and it tasted yukky." (T. 43, l. 13).

Mrs. Harpole went over to the Jack residence, where she told Mrs. Jack what had occurred. (T. 43). A few minutes later, the mothers went out with the children to the Bookmobile, at which time they had an opportunity to observe the man identified by the children, the same man Mrs. Harpole had observed with the children by the side of the house. (T. 44, 45). The mothers also noted the license number on the red truck. (T. 45).

Mrs. Jack testified that after she became aware of the incident, she did travel it with her children and that Bryson told her what had occurred. (T. 53, 54). She also testified that she notified Deputy Russell Sanderson of the incident. (T. 58) Mrs. Jack described the suspect and the

vehicle to Deputy Sanderson.

Deputy Sanderson testified that on the following day, he spoke with Mrs. Jack, and asked her to send Bryson to the house to see if the suspect was there. T. 68 . While still on the phone with Mrs. Jack, Deputy Sanderson observed Bryson approach the house. T. 69 . He then went over to the Jack home, where he spoke with Bryson about the incident, T. 70 , and was given a physical description of the man. Subsequently, Deputy Sanderson went to the house, and spoke with Mr. McMillan, the appellant. T. 71 . Later at the Central Division office, Deputy Sanderson, after placing the appellant under arrest and after again giving him his Miranda warning, T. 72 , tape recorded a conversation with the appellant in which the appellant related the incident that had occurred at the home. T. 73-74 . The appellant denied in his statement that any oral sex occurred, T. 75 , but admitted that the children had observed and felt his penis.

ARGUMENT

POINT I.

THE TESTIMONY OF MARLENE HARPOLE AS
TO WHAT SHE HEARD FROM ANSON JACY
WAS PROPERLY ADMITTED AT TRIAL.

POINT A.

THE TESTIMONY WAS PROPERLY ADMITTED AS
NON-HEARSAY.

During the course of the States case in chief,
the following exchange occurred: (T. 42, 43).

"Q. And what happened when they came
out of the house?

A. I walked around, and then Bryson
said--.

MR. JOHNSTON: Objection, your Honor;
anything that was said is hearsay.

THE COURT: The objection is overruled.
She may answer; not for the truthfulness of
what is said but that it was said.

MR. JOHNSTON: May I have a continuing
objection?

THE COURT: You may have that.

THE COURT: All right, go on.

A. No, I walked around and the children
were coming out, and Anson said as they were
coming out of the house--you want me to say--.

Q. Go ahead.

A. He said, 'That man showed us his weenie. He let us feel it, and we tasted it and it tasted yukky.'

Q. What did you do after you heard those words?

A. The children and I walked down the sidewalk, which was there, went over to Anson's mother's home."

The record offers no indication as to why the trial judge ruled as he did. However, by stating that the statement was admissible "not for the truthfulness of what is said, but that it was said." (T. 43, l. 4, 5), it is known that the judge admitted the testimony as non-hearsay. State v. Sibert 6 Ut. 2d 198 310 P. 2d 388, (1957), Wigmore on Evidence, 3d. Vol. VI. § 1766 states:

"If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply."

Later, in § 1790 Wigmore states that: "On the principle of multiple admissibility, if there's any relevant circumstance, the utterance is admissible for that purpose."

There are several reasons why the statement may have been admitted as non-hearsay.

"Utterances serving to mark a time or a place are the commonest instances of this sort, and are admissible so far

as they have a real service for that purpose and are not merely used as a pretext for introducing a hearsay assertion." Wigmore, 3d. ed., Vol. VI., § 1791.

The statement was also admissible to specify the grounds for the witness' knowledge and recollection. Wigmore, 3d. ed., Vol. II, § 655.

Anson's statement served to mark a point in time for Mrs. Harpole. It also gave her a reason to make an effort to fix in her mind the description of the man she had seen earlier at the home. At that point in time, she also made an effort to make a specific identification of the truck. The statement also serves to explain Mrs. Harpole's subsequent act of notifying Mrs. Jack, as well as her general concern that led to the questioning and arrest of the appellant by Deputy Sanderson.

The State had the obligation to establish a prima facia case before the confession of the appellant could be admitted and considered. All of the things that Mrs. Harpole testified to and which she became aware of the incident were important to the State as circumstantial evidence in establishing a prima facia case against the appellant.

POINT B.

THE STATEMENT WAS ALSO ADMISSIBLE
AS AN EXCEPTION TO THE HEARSAY RULE
UNDER THE RES GESTAE THEORY.

The record reflects that prior to the incident Mrs. Harpole saw the four children playing near the new home through her kitchen window, some 175 to 200 feet away, and "that they were by a man by the side of the house." (T. 40). About 5 to 10 minutes later, after hollering out the window for the children to come home, (T. 41), she went out to the house to get them. (T. 42). As she approached the garage area of the home, the children came out of the home and she called to them. (T. 42). The first comment that any of the children made to her, without any inquiry on her part, was Anson's statement: "That man showed us his weenie. He let us feel it, and we tasted it and it tasted yukky." (T. 43, 1. 13, 14).

The doctrine of res gestae is recognized by Rule 63 (4) (b) of the Utah Rules of Evidence. This exception to the hearsay rule has been widely discussed, and the criteria for admission frequently stated. Wigmore states the requirements as being: (1) a startling occasion, and

(2) a statement made before time to fabricate, (3) relating to the circumstances of the occurrence. Wigmore on Evidence, 3d. ed., § 1750. In Cromeenes v. San Pedro, Los Angeles, and Salt Lake Railroad Company, 37 Utah 475, 109 P. 10, (1910), Chief Justice Straup stated in his concurring opinion the majority position of the Court regarding limitations on res gestae statements:

"(1) The declaration or utterance must be spontaneous or instinctive, (2) it must relate to or be connected with a main or principal event or transaction itself material and admissible in evidence; and (3) it must have been the result or product, the outgrowth, of the immediate and present influences of the main event, or preceding circumstances, to which it relates, and it must be contemporaneous with it and tend to explain or elucidate it."¹ 109 P. at 18.

-
- 1 The appellant, at page 4 of his brief, has cited the minority position on the res gestae issue in the Cromeenes case. Although the statement was included in the main opinion, a careful reading of the case indicates that 2 members of the 3 man court disagreed with this part of the main opinion, and expressed their definition of the standards in the concurring opinion of Chief Justice Straup. In addition, the quote as contained in the appellants brief is not in the record presented in the opinion, and the phrase "Where the facts talking . . ." should be: "Were they the facts talking . . ." See 109 P. at 15, and Leach v. Oregon Short Line, 29 Ut. 285, 81 P. 90. (1905).

In a subsequent paragraph, Chief Justice Straup noted that "The word 'contemporaneous' is not taken literally, and that time is not the real governing factor in the determination, but is only important in determining whether the statement was spontaneous and intimately connected with the main transaction, and was prompted or produced by its immediate and present influences." 109 P. at 18.

The purpose of the res gestae exception is to allow into evidence statements that would not otherwise be admissible because of the defendant's inability to actually cross-examine the person that made the statement. The Washington Supreme Court, in Johnston v. Ohls., 457 P. 2d at 194, (1969), stated the key res gestae issue in a succinct manner:

"The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgement." 457 P. 2d 199.

Courts have struggled with res gestae principles derived from other cases that do not apply to the factual situation in the case before them. Some courts have addressed themselves to this particular problems, as did the Arizona

court in State v. Finley, 85 Az. 327, 338 P. 2d 790, (1959):

"It is clear from our previous pronouncements that: (1) it is impossible to formulate a definition of res gestae which will serve for all cases; (2) no rule may be formulated as to the limit of time within which the exciting cause should be held to have been dissipated so as to render such statement inadmissible; (3) a want of suitable opportunity, or fear, may sometimes excuse or justify a delay in making the disclosure; and (4) each case must depend upon its own facts and much must be left to the sound discretion of the trial court." 338 P. 2d at 794.

This rationale coincides with that of the Utah courts as it was stated in Balle v. Smith, 81 Ut. 179, 17 P. 2d. 224 at 232, (1932) and cited in Morton v. Hood, 105 Ut. 484, 143 P. 2d 434 at 438 (1943). "The trial court has wide discretion in the admissions of declarations of this character, and should be fully satisfied by evidence that a statement claimed to be res gestae comes within the rule and meets all the requirements thereof . . ."

Many courts have relaxed res gestae requirements where the declarant was a young child, both in cases in which the child appeared as a witness, and in cases in which he was too young to appear. 83 ALR 2d 1372. The record reflects that at the time of trial, the declarant, Anson Jack, was

four years of age. (T. 52). The record also reflects that Anson's statement was made within a few minutes after the event occurred. (T. 42), and was not made in response to any question. (T. 43). The State submits that the declarant was of such a tender age that it is inherently improbable that his statement was invented in the short period of time between the alleged incident and his communication of it to Mrs. Harpole. See State v. McFall, 75 S.D. 630, 71 NW 2d 299, (1955), Beausoliel v. U.S., 107 F. 2d 292, (D.C. Cir. 1939). The appellant argues that since the declarant was not emotionally excited or upset, the declaration lacks spontaneity. Other courts have dealt with this problem and attributed the lack of visible emotional trauma to the youthfulness of the victims. In State v. Hutchinson, 222 Ore. 533, 353 P. 2d 1047, (1960), a five year old boy was sexually assaulted in the defendant's trailer home, a short distance from his parent's home. Within three or four minutes of seeing his parents after the incident, the victim blurted out: "That was a bad man, Mommy." 353 P. 2d at 1049. The boy was neither upset nor agitated at the time, and was not offered as a witness.

At trial, the mother related the declaration over the defendant's hearsay objection. The court recognized his lack of excitement by stating:

"The little fellow, according to what he told his parents, and likewise according to what the defendant described in his confession, had undergone an experience in the defendant's trailer house different from what children encounter in the little world in which they live."
353 P. 2d at 1052.

The Oregon court approved the admission of the res gestae, and affirmed the conviction. In Beausoliel, supra, the child was not at all agitated; in fact, the mother questioned the child only after noting a "peculiar expression" on her face. 107 F. 2d at 294. The mother was allowed to testify as to what the child related in response to her queries as part of the res gestae.

The test to be applied in determining whether a statement is part of the res gestae is not whether the child is visibly excited or upset, or how much time has elapsed; but whether there has been time for deliberation or reflection. Time and excitement are mere indices of this opportunity. In this case, the declarant (1) encountered a startling event, and (2) made an unsolicited statement to Mrs. Harpole,

the first adult he saw after the event, as soon as he saw her and within a few minutes after the occurrence of the event, (3) relating the facts of the event. The statement was admissible as part of the res gestae.

Another issue to be dealt with is whether the incompetency of the declarant at the time of the utterance affects the admissibility of the statement. Courts that have considered this issue have found in favor of admissibility. See Heflin v. State, 274 S.W. 2d 681, (Tex Cr., 1955), Johnston v. Ohls, supra, State v. Boodry, 96 Az. 259, 394 P. 2d 196 (1964). It is unknown whether Anson would have been found competent to testify. It is known, however, that he was merely 4 years old at the time of the trial, and presumably incompetent at the time of the incident.

In view of the fact that each case must be considered on its own circumstances, Finley, supra; Langford v. State, 312 So. 2d 65, (Ala. Cr. 1975), and State v. Sanders, 27 U. 2d 354, 496 P. 2d 270, (1972) cited by the appellant in his brief are distinguishable on their facts alone. In Langford, supra, even though the court felt that the testimony was improperly admitted, it did not find prejudicial error and upheld the conviction. In a later

case, Brooks v. State, 329 So. 2d 167, (1976), the Alabama court limited the Langford decision to the facts, and recognized spontaneity as qualifying a statement within the res gestae rule. (329 So. 2d at 169). In Sanders, supra, the defendant contended that hearsay statements made by an alleged participant were admissible under Rule 63 (4) (b), Utah Rules of Evidence. The statements consisted of a description of the robbery made to a third person several hours after the crime occurred, and their admission was properly limited at trial.

Assuming that the statement was part of the res gestae, then not only the fact that the statement was made, but its contents were admissible. State v. Beaudin, 136 P. 137, (Wash., 1913), State v. Chaney, 134 Neb. 734, 171 N.W. 2d 787, (1969). In State v. Imlay, 61 P. 557, (Utah, 1900), the court stated that where the utterance was part of the res gestae,

"... not only evidence of the complaint, but also of the particulars thereof, was admissible, because the disclosure was part of the res gestae. Such evidence is generally received for corroborating the evidence of the prosecutrix, but not as substantive testimony, to prove the commission of the offense." 61 P. at 558.

POINT II

THE TESTIMONY OF LAURIE JANE
JACK OBJECTED TO BY APPELLANT
AT TRIAL WAS PROPERLY ADMITTED.

Three different times during the testimony of Mrs. Jack the appellant raised hearsay objections. At T. 53, L. 11, he objected to the admission of what Mrs. Harpole told her after the incident. The appellant does not complain about the overruling of this objection in his appeal.

Later, at T. 53, L. 25, and at T. 55, L. 26, the appellant objected to the admission of what Bryson told Mrs. Jack immediately after he saw her, and to Bryson's identification of the van. It is about these admissions of testimony that the appellant complains.

The testimony of Mrs. Jack regarding Bryson's statement to her was admissible on two theories: as non-hearsay and as an exception to the hearsay rule.

Initially, it should be noted that the statement of Mrs. Jack is not the testimony of Bryson. In State v. Sweet, 848, the Court confronted a problem similar to the issue presented in this appeal. The facts in Sweet indicate that a police officer who told the complainant's story was allowed to testify, over the defendant's objection, as to what was related to him.

The complainant had testified previously, and parts of his testimony had been impeached. The Court reviewed the problem and came to the following conclusions:

"It is not every instance in which a witness relates what he heard someone else say that he is purporting to represent that the statement he heard is true. The purpose of his testimony may be simply to prove that someone else made a statement without regard to whether it be true or false. Testimony of this nature does not violate the hearsay rule since the witness is asserting under oath a fact he personally knows, that is, that the statement was made, and he is subject to cross-examination concerning that fact."

Mrs. Jack's relation of Bryson's story may be viewed in this context. The statement served to mark a point in time, and to explain her subsequent actions. It also serves to show that a complaint was in fact made.

The testimony is also admissible as an exception to the hearsay rule. Rule 63(1)(c) of the Utah Rules of Evidence states:

"A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that: . . . (c) it will support testimony made by the witness in the present case when such testimony has been challenged."

There can be little doubt that the appellant challenged the testimony of Bryson on cross-examination (T.35,37,38).

The Sibert Court continued its discussion of hearsay and non-hearsay stating:

"We think the better view is that where there has been an attempt to impeach or discredit a witness, prior statements consistent with his present testimony may be offered to offset the impeachment. Such procedure has previously been approved by this court." 310 P.2d at 391.

At page 392, the Court concluded:

"Insofar as Officer Ferrin's testimony actually supported the parts of Butters' testimony upon which impeachment was attempted, that is, as to the color and model of the robber's car, his evidence was properly admitted as rehabilitating testimony."

Mrs. Jack was not serving as a mere conduit for the testimony of Bryson. He had already testified as to the facts of the incident, and he was challenged as to the occurrence of the oral surgery. Mrs. Jack's testimony was properly admitted as an exception to the hearsay rule to rehabilitate Bryson's testimony.

Assuming, arguendo, that this testimony was improperly admitted, it does not constitute prejudicial error requiring reversal. This testimony was merely

cumulative of Mrs. Harpole's testimony. In addition, the appellant's admissions made to Deputy Sanderson, and admitted at trial, corroborate Mrs. Jack's testimony as to the acts that Bryson told her occurred, with the single exception of the oral sodomy.

The second objection appellant raises on appeal regards the testimony of Mrs. Jack as to Bryson's extrajudicial identification of the appellant:

"Q. Did Bryson tell you something about that man?

A. I asked him, I said, 'Which one was it?'

MR. JOHNSTON: Objection to this testimony, your Honor, on the grounds it's hearsay, what he told her.

THE COURT: The objection is overruled.

Q. (By Mr. Marson) Go ahead.

A. He told me which man it was.

Q. Now, is the man Bryson pointed to in the courtroom today?

A. Yes, he is.

Q. Point him out, please.

A. This gentleman right here.

Q. May the record reflect that the defendant has been identified by this witness?

THE COURT: The record may so show." (T. 55, 1.24-30, T. 56, 1. 1-8.)

In People v. Gould, 7 Cal.R. 273, 354 P.2d 865 (1960), the victim was unable to identify the people

that robbed her at the time of the trial. In approving testimony of her extrajudicial identification, the court stated the following:

"Evidence of an extra judicial identification is admissible not only to corroborate an identification made at the trial, but as independent evidence of identification. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached [citations omitted], evidence of an extra judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the court room after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness mind." 354 P.2d at 867.

In Gallegos v. People, 157 Colo. 484, 403 P.2d 864 (1965), the Court discussed this issue and stated:

"As an exception to the hearsay rule, its application has been extended to the admission of the testimony of a third person who heard or observed the extra judicial identification under consideration [citations omitted], and admissibility is particularly sanctioned in cases where the identifier testifies at trial [citations omitted]." 403 P.2d at 869.

See also State v. Findling, 123 Mn. 413, 144 N.W. 142 (1913), and State v. McSloy, 127 Mont. 265, 261 P.2d 663 (1953).

The Utah Court has not addressed this specific issue. However, in State v. Underwood, 25 Utah 2d 234, 479 P.2d 794 (1971), the Court approved the testimony of the victims as to their extrajudicial identification of the accused.

The problems presented by the youthfulness of the victims pervade each issue that has been advanced in this appeal. It is improbable that a three or four year old child would be able to identify any offender at a later date. In the case at bar, one of the victims, Bryson, pointed the appellant out to his mother within an hour after the act occurred. This identification, and his identification the next day in conjunction with the arrest of the appellant by Deputy Sanderson (T.71), are inherently more reliable than any later identification he might attempt to make. Furthermore, the appellant had ample opportunity to question Mrs. Jack as to her identification of the appellant based on what she was told by Bryson at the time she viewed the appellant on the day of the crime.

POINT III

BRYSON JACK WAS COMPETENT TO TESTIFY AT TRIAL.

The Utah Court has consistently held that the admission of the testimony of a child under the age of ten lies within the sound discretion of the court, and will not be reversed unless there is a clear abuse of discretion. State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965); State v. Zeetzich, 61 Utah 61, 210 P.2d 927 (1922). In so holding, the court recognizes the advantaged position of the trial judge in determining these matters, resulting from his proximity to the trial. State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174 (1961); Wheeler v. United States, 159 U.S. 523 (1895).

The test to be used by the trial judge in determining competency of the witness is set forth in Smith, supra, 401 P.2d at 447:

"What is essential is that it appear that the child has sufficient intelligence and maturity that she is able to understand the questions put to her; that she has some knowledge of the subject under inquiry and the facts involved therein; that she is able to remember what happened; and that she has a sense of moral duty to tell the truth."

Prior to allowing Bryson to testify, Judge Leary conducted an examination of the child to determine his competency as a witness (T.17-23). The examination revealed that Bryson was five years of age and attended Monte Vista School in South Jordan (T.17). The judge inquired several times if Bryson knew what it meant to tell the truth, and the consequences of telling a lie:

"THE COURT: Now, you look like a young boy that has learned a lesson that you're to tell the truth; isn't that right?

BRYSON JACK: Yes. Yes.

THE COURT: And when I say that you're to tell the truth what does that mean to you?

BRYSON JACK: It means tell what's supposed to tell, like if you did something and Mom tells you what you did you say 'I did it.'" (T.18, 1. 18-26).

"THE COURT: Now, tell me what happens to young boys that tell lies. Do you know?

BRYSON JACK: They get spankings." (T.19).

Although Bryson was confused by questions on a couple of occasions, as noted by the appellant in his brief at page 10 and 11, the clear import when the pre-trial interview is considered as a whole is that Bryson knew the difference between a truth and a lie, and that he would be punished if he lied.

At the close of the Judge's examination of Bryson, the appellant moved to have him disqualified as a witness. The motion was denied by the trial judge (T.23).

The appellant also notes that Bryson apparently contradicted himself on cross-examination (T.35,37,38), and that this rendered him incompetent to testify. The nature of the questions posed by the appellant would have been confusing to any witness, especially a five year old. Defense counsel's indiscriminate use of double and triple negatives undoubtedly resulted in confusing the witness. However, the mere fact that the witness was temporarily confused does not render him incompetent.

When considered as a whole (see appendix), Bryson's testimony on direct and cross-examination reflects that (1) he understood the questions put to him, (2) he had personal knowledge of the incident complaint of, (3) he was able to recall and relate that knowledge, and (4) he knew what it meant to tell the truth. Indeed, Bryson's testimony was corroborated, for the most part, by the defendant's own admission to Deputy Sanderson. Under the test advanced by this court in State v. Smith, supra, Bryson Jack was a competent witness.

CONCLUSION

In determining the issues raised on appeal, it is imperative that the Court recognize that this was a

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non-jury trial. While this does not mean that the rights of the defendant are less significant, this Court has recognized on several occasions that, "where the trial is to the court, the rulings upon admissibility of evidence are not required to be so strict, nor are they of such critical importance as where the trial is to the jury." Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972). It is presumed that the trial judge will disregard the inadmissible, and where there is competent evidence to support the result, the improper admission of evidence will not cause reversal. McCormick on Evidence, 1972 ed., § 60.

The appellant raises claims of several errors on the part of the trial court in admitting hearsay testimony. Although it is not clear in each instance, the testimony was generally admitted not for the truth of the statement, but merely to show that the statements were made. In each instance, the testimony would also have been admissible as an exception to the hearsay rule.

There was ample evidence presented at trial to establish a prima facie case against the appellant, thereby allowing the judge to consider the appellant's own admissions.

The only charges not substantiated by the appellant's admissions relate to the oral sodomy counts. The testimony of Bryson, rehabilitated by his mother, and Anson's spontaneous declaration, all properly admitted, support the court's finding of guilt.

The competency of Bryson Jack is a matter within the sound discretion of the trial court. The judge, during the course of a preliminary examination of Bryson, established that he knew what it meant to tell the truth and the consequences of lying. This fact, and his testimony when considered as a whole, indicate that the court was not clearly erroneous in its decision to accept Bryson's testimony.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent

1 He might not want to talk that loud.

2 (Whereupon, BRYSON JACK, called as a witness by coun-
3 sel for the State, and having previously been admonished
4 by the Court as herein transcribed, assumed the witness
5 stand under examination as follows:)

6 DIRECT EXAMINATION

7 BY MR. MARSON:

8 Q What's your name?

9 A Bryson.

10 Q Bryson what?

11 A Jack.

12 Q How old are you?

13 A Five.

14 Q Five?

15 A Yes.

16 Q Are you in school?

17 A Yes.

18 Q What grade are you in?

19 A Kindergarten.

20 Q Do you know who your teacher is?

21 A Yes, Mrs. Anderson.

22 Q Do you like her?

23 A Yes.

24 Q What do they teach you in school?

25 A About Indians.

26 Q What do you learn about Indians?

27 A About Indians and Indian clothes.

28 Q Do you like that?

29 A Yes.

30 Q How many brothers and sisters do you have?

1 A. Four.
2 Q. Four?
3 A. I only have one baby sister, and I have two
4 brothers.
5 Q. One baby sister and two brothers?
6 A. Yes.
7 Q. One of your brothers is outside of the courtroom
8 A. Yes.
9 Q. What's his name?
10 A. Anson.
11 Q. Do you like him?
12 A. Yes.
13 Q. Do you like your daddy?
14 A. Yes.
15 Q. Is your daddy in the courtroom?
16 A. Yes.
17 Q. What does your daddy do?
18 A. Sells wallets.
19 Q. What kind of wallets?
20 A. Prince Gardiner.
21 Q. Yeah? Does your daddy go in airplanes?
22 A. Yes.
23 Q. A lot?
24 A. Yes.
25 Q. Bryson, do you know what the truth is?
26 A. Yes.
27 Q. Are you going to tell the truth right now?
28 A. Yes.
29 Q. See the Judge there?

1 Q You promised the Judge you'd tell the truth?

2 A Yes.

3 Q Okay. What does your daddy do to you if you
4 don't tell the truth?

5 A Spanks me.

6 Q Do you like that?

7 A No.

8 Q Okay. Bryson, do you remember a day a long time
9 ago you and Becky and Anson and Kirk went to the house?

10 A Yes.

11 Q Okay. What house are we talking about; near your
12 house?

13 A This house--this white house that's been built.

14 Q Now, was it being built at the time?

15 A Yeah.

16 Q Who did you go to that house with?

17 A Becky and Kirk and Anson.

18 Q And you?

19 A Yes.

20 Q When you came to that house did you see something?

21 A Yeah, I saw the man.

22 Q That man?

23 A Yeah.

24 Q What did you see the man doing?

25 A Opening his pants.

26 Q Opening his pants?

27 A Opening his pants.

28 Q Did Becky say something at that time?

29 *Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
MR. JOHNSON: Objection to that on the grounds that*

30 *it's leading, your Honor.*

1 THE COURT: Just a minute--.

2 A. (By the witness) Becky said that, and then he
3 unzipped his pants.

4 THE COURT: I think that perhaps you ought to ask the
5 question, please, and not have him relate it from--

6 MR. MARSON: Okay.

7 THE COURT: --memory. Ask him the questions.

8 Q. (By Mr. Marson) Now, when Becky said that, what
9 happened?

10 A. He unzipped his pants and showed us.

11 Q. Unzipped his pants. Now, where were you children
12 standing? Where was he? Do you remember, Bryson?

13 A. Yeah, right beside of the window.

14 Q. Looking through the window?

15 A. Yes.

16 Q. What did he do when he unzipped his pants?

17 A. Pulled his weenie out.

18 Q. His weenie?

19 A. Yes.

20 Q. Do you know what a weenie is?

21 A. No.

22 THE COURT: What was his answer?

23 MR. MARSON: He. Show the judge where your weenie is.

24 A. (Indicating)

25 MR. MARSON: May the record reflect he's pointing to
26 his crotch area?

27 THE COURT: It may so show.

28 Q. (By Mr. Marson) And what happens when he pulled
29 his weenie out? Then what did you do then?

30 A. He let saw it.

Q What happened then?

A Then he said, "Come here." We went on down, and he was on the stairs. And--.

MR. JOHNSTON: Objection to that, your Honor, and request it be stricken.

THE COURT: I didn't hear his answer. You'll have to read it back for me.

(Whereupon, the previously asked question was read aloud by the reporter in open court:)

THE COURT: The objection is overruled.

Q (By Mr. Marson) Did you hear what you said?

A (Nodding)

Q That's you. You went on down the stairs. He was on the stairs. What happened, Bryson?

A And we tasted it, and we felt it.

Q Okay. Now, who is down there, Bryson? Were all the children down there? Who was down there?

A All of us.

Q "All of us"? Who was "they"?

A Becky and Kirk and Anson and me.

Q And you. And Becky is your friend?

A Yes.

Q Where does she live?

A She lives next door to me.

Q Next door to you?

A Yes.

Q And is Becky's mom here?

A No.

Q Is she outside of the court? Did you see her today?

1 A. Yeah.

2 Q. The tall lady?

3 A. Yeah.

4 Q. Okay. Now, you went down to the stairs and he
5 said "Taste it." What happened?

6 A. I tasted it.

7 Q. You tasted "it." What? When you say that what
8 are you talking about, Bryson?

9 A. Went downstairs and we tasted it.

10 Q. Who is "we"?

11 A. We felt it. Then Kirk didn't get to, so then we
12 went upstairs. Then Kirk did, and then we all went back
13 downstairs and went outside.

14 Q. Okay. Let me--can I backtrack just a little bit
15 Bryson? Would that be okay?

16 A. Yes.

17 Q. Downstairs you say "we tasted it;" right?

18 A. Yes.

19 Q. Who is "we"? Who are you talking about?

20 A. All of us.

21 Q. "All of us"?

22 A. Yes.

23 Q. Who were the people? Just the children?

24 A. Becky and Kirk and Anson and me.

25 Q. Okay. Now, when you say "it;" what did you taste?

26 A. His weenie.

27 Q. His weenie?

28 A. Yes.

29 Q. Did you do anything else to it?

30 A. Then we felt it.

1 Q Did Becky do that?

2 A Yeah, all of us did it. Then Kirk didn't get to,
3 so he went back upstairs and did it.

4 Q Kirk didn't get to do it at that time?

5 A Yeah.

6 Q He didn't?

7 A Yeah.

8 Q When did he do it?

9 MR. JOHNSTON: Objection to that. That's leading.

10 THE COURT: Just a minute. The objection is overruled.

11 Q (By Mr. Marson) When did Kirk do it?

12 A When he went upstairs.

13 Q Okay. And then you went outside. Who went out-
14 side of the house?

15 A All of us.

16 Q "All of us"? Did someone call you to go outside?

17 A No, we just--he just said we was going to go out-
18 side now, so we went outside. And Anson told Becky's
19 --Becky's mom.

20 Q Becky's mom?

21 A Yes.

22 Q What did Anson tell Becky's mom?

23 MR. JOHNSTON: Objection, hearsay.

24 THE COURT: The objection is sustained.

25 A (By the witness) That--.

26 Q (By Mr. Marson) Don't say that, Bryson. Now,
27 did you meet Becky's mom right then?

28 A Yes.

29 Q Where did you go?

30 A Went over to our--Becky's--our house.

1 Q You mean the Jack house where your mom and dad
2 live?

3 A Yes.

4 Q And who did you see when you went there?

5 A My mom and dad.

6 Q And did you go anywhere later on, a little bit
7 later in that day?

8 A Yes--yeah.

9 Q Where did you go?

10 A Went down to the Bookmobile.

11 Q Who did you go with?

12 A My mom.

13 Q Who else?

14 A And Becky and Kirk's mom.

15 Q And Becky and Kirk's mom? Were there any other
16 children there; do you remember?

17 A Anson.

18 Q Now, did your mom ask you about this man?

19 A Yes, she said, "Is that the man?" I said, "Yes."

20 MR. JOHNSTON: Objection to that and request it be
21 stricken, your Honor.

22 THE COURT: Well--.

23 MR. JOHNSTON: What was said is hearsay.

24 THE COURT: I think you ought to lay a foundation as
25 to identification, please.

26 MR. MARSON: Your Honor, this witness cannot identify
27 the defendant.

28 THE COURT: Go ahead.

29 MR. MARSON: He's just--okay. Now, did you point a m
30 out to your mom at that time?

1 A. Yes.

2 Q. (By Mr. Marson) And why did you point that man
3 out, Bryson?

4 A. Because my mom told me which man it was, and I
5 pointed it out.

6 Q. You pointed it out?

7 A. Yes.

8 Q. Okay. Was that the man that did it?

9 A. Yes.

10 Q. Are you sure?

11 A. Yes.

12 Q. Okay. Now, let me ask you a few more questions.
13 Is that okay, Bryson?

14 A. Yeah.

15 Q. Downstairs when Becky and Anson and Kirk and you,
16 you were downstairs, did you see Becky lick his weenie?

17 MR. JOHNSTON: Objection to that, your Honor.

18 THE COURT: Objection sustained to the question.

19 Q. (By Mr. Marson) What did you see Becky do to his
20 weenie?

21 A. Taste it.

22 MR. JOHNSTON: Objection to that also, your Honor.

23 THE COURT: The objection is overruled.

24 Q. (By Mr. Marson) What did you see Anson do?

25 A. Then Anson did it.

26 Q. What did he do?

27 A. Tasted it and felt it.

28 Q. What did you do?

29 A. Then I tasted it and felt it.

30 Q. Now give it to us. Go ahead, what did you say?
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1 A. I was scared to say nothing.

2 Q. Okay. Thank you. No further questions. Mr.
3 Johnston is going to ask you a few questions. Do you want
4 a drink of water or something?

5 A. (By the witness) No, thank you.

6 CROSS-EXAMINATION

7 BY MR. JOHNSTON:

8 Q. Bryson, you indicated that you go to school.
9 Could you tell me what school you go to?

10 A. I go to Monte Vista.

11 Q. And do you know what month it is now, Bryson?

12 A. No.

13 Q. And do you know what month it was--.

14 MR. MARSON: Objection to this line of questioning.

15 THE COURT: The objection is overruled.

16 MR. JOHNSTON: Do you know what month it was, Bryson,
17 when the things about--that you just told the Court about,
18 do you know when that was?

19 A. No.

20 Q. (By Mr. Johnston) What time of day was it, Brys?

21 A. It was at this day that we went over to the house

22 Q. Was it in the springtime?

23 A. Yes.

24 Q. It wasn't in the fall?

25 A. No.

26 Q. It wasn't in the summertime?

27 A. No.

28 Q. And how many brothers do you have, Bryson?

29 A. I have two.

30 Q. Do you have any sisters?
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1 A. Yes, I have one little baby sister only five months
2 old.

3 Q. And you're in Kindergarten; is that right, Bryson?

4 A. Yes.

5 Q. I see. And what grade is your brother in?

6 A. I don't know.

7 Q. And what grade is your sister in?

8 A. I don't have a big sister.

9 Q. Do you have a little sister?

10 A. Yes.

11 Q. How long have you been in school, Bryson?

12 A. For two months.

13 Q. Bryson, can you tell me what time of day it was
14 on the day that these things happened that you just talked
15 about?

16 A. Yes.

17 Q. When was that?

18 A. That was in February.

19 Q. All right. Your Honor, at this time I would move
20 to strike Bryson's testimony on the grounds that the exami-
21 nation he has just responded to would indicate that he simply
22 does not have the knowledge of the facts about which he
23 testified; that it is unworthy of any credibility, unworthy
24 of belief.

25 He does not understand the time of year, the months,
26 and I would submit the testimony should be stricken for that
27 reason.

28 THE COURT: The objection is overruled.

29 Q. (By Mr. Johnston) Bryson, do you go to church?

30 A. Yes.

1 Q What church do you go to?
2 A Go down to the church.
3 Q Okay. Are you a member of a religion?
4 A Yes.
5 Q What religion are you a member of?
6 A My teacher.
7 Q Your teacher?
8 A Yes.
9 Q Do you know what religion you're a member of?
10 A No.
11 Q How often do you go to church, son?
12 A Just every day.
13 Q Every day?
14 A After school.
15 Q Every day after school?
16 A Yes.
17 Q Bryson, you've told the Judge that you tasted
18 somebody's weenie.
19 A I know.
20 Q Now, that isn't true; is it, Bryson?
21 A Uh-uh.
22 Q It isn't true; is it?
23 A Uh-uh; not true.
24 Q It isn't true; is it, son?
25 A Uh-uh.
26 Q I have nothing further.

27 REDIRECT-EXAMINATION

28 BY MR. MARSON:

29 Q Bryson, did you say that Becky tasted the man's
30 weenie?
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1 A. Yes.
2 Q. Did that happen?
3 A. Yes.
4 Q. You just--and did you taste the man's weenie?
5 A. Yes.
6 Q. Okay. You just told that man--what did you tell
7 that man just a second ago when he asked you did you taste
8 the weenie? What did you mean?

9 A. I meant--.

10 Q. What happened?

11 A. Kirk didn't get to.

12 Q. Kirk didn't get to; did he? Did you?

13 A. Yes.

14 Q. Did you tell someone how it tasted?

15 A. No.

16 Q. No. How did it taste; do you remember?

17 A. No.

18 Q. Don't remember?

19 A. No.

20 Q. But did you taste it?

21 A. Yes.

22 Q. What did you taste it with?

23 A. My tongue.

24 Q. Your tongue?

25 A. Yes.

26 Q. Point your tongue out? You're sticking your
27 tongue out?

28 A. Yes.

29 Q. Is that what you used to taste the man's weenie?
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30 A. Yes.

1 Q You sure of that?

2 A Yes.

3 Q Okay.

4 RECROSS-EXAMINATION

5 BY MR. JOHNSTON:

6 Q Bryson--

7 A What?

8 Q --it's true, isn't it, that you didn't taste the
9 man's weenie?

10 MR. MARSON: Your Honor, could I ask Mr. Johnston to
11 rephrase that question? I understand this is cross-exami-
12 nation, but conceptually we're dealing with a difficult
13 type of question; "It's true, isn't it." If we could be
14 rather straightforward with this child I think it would be
15 helpful.

16 THE COURT: The objection is overruled.

17 Q (By Mr. Johnston) That's true; isn't it?

18 A Uh-uh.

19 MR. MARSON: Your Honor, I'd like to object again.

20 THE COURT: The objection as to the form of the ques-
21 tion will be sustained.

22 MR. MARSON: Thank you, Your Honor. With a minute,
23 Bryson.

24 Q (By Mr. Johnston) Bryson--

25 A What?

26 Q --Becky didn't taste the weenie; did she?

27 A Uh-uh.

28 Q She didn't, now; did she, Bryson?

29 A No.

30 MR. MARSON: Your Honor, again, I wish he could be

straightforward. I don't think the child understands the two double negatives. He's saying yes to the fact that she did.

THE COURT: Rephrase the question, please.

Q. (By Mr. Johnston) Bryson--

A. What?

Q. --Becky didn't taste the weenie; did she?

A. No.

MR. MARSON: Again same objection, your Honor.

THE COURT: The objection will be sustained to the form of the question, Mr. Johnston.

MR. MARSON: Ask the answer be stricken under the circumstances; a reasking of the same question.

THE COURT: The answer may stand.

MR. JOHNSTON: I have nothing further.

MR. MARSON: No further questions. Your Honor--.

THE COURT: Court will be in recess until 2:00.

(Whereupon, at the hour of 12:10 p.m., court stood in noon recess; after which, at the hour of 2:30 p.m., the following proceedings were had in open court in the presence and hearing of the defendant:)

THE COURT: This is Case No. 31157. The record may be read by the defendant, or by anyone representing him by counsel. The State's represented.

MR. JOHNSTON: Before we start, your Honor, may I request the Court to ask if these gentlemen are going to be witnesses in the matter? Are you going to be witnesses? Thank you.

THE COURT: All right, what if they were going to be witnesses they would be excluded. Go ahead.