1978

Beverly R. Buxton v. Industrial Commission of Utah : Brief of Respondent

Utah Supreme Court

John R. Anderson; Attorney for Applicants;
Frank V. Nelson; Attorney for Defendant-Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

BEVERLY R. BUXTON, :

Applicant/Appellant, :

-vs- :

Case No. 15802

INDUSTRIAL COMMISSION :
OF UTAH, :

Defendant/Respondent. :

BRIEF OF RESPONDENT

Answer to the Brief of Plaintiff (Applicant) filed in her Appeal from the Decision of the Industrial Commission

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FILED

IN THE SUPREME COURT OF THE

STATE OF UTAH

BEVERLY R. BUXTON,

Applicant/Appellant,

-vs-

INDUSTRIAL COMMISSION OF UTAH,

Defendant/Respondent.

Case No. 15802

BRIEF OF RESPONDENT

Answer to the Brief of Plaintiff (Applicant) filed in her Appeal from the Decision Order of the Industrial Commission

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INDUSTRIAL COMMISSION OF UTAH,	:	
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STATEMENT OF THE NATURE OF THE CASE

Respondents agree generally with Appellants' statement of the nature of the case.

DISPOSITION BY INDUSTRIAL COMMISSION

Respondents agree generally with Appellants' statement of the disposition by the Industrial Commission.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the award of the Industrial Commission dated December 12, 1977, affirmed by the Supreme Court of Utah.

STATEMENT OF FACTS

Respondents agree generally with Appellants' statement of facts except the record does not indicate an increase of disability of Applicant over that awarded by the medical panel.

POINT I.

THE RECORD DOES NOT INDICATE ANY APPRECIABLE CHANGE IN APPLICANT'S DISABILITY FROM THE TIME OF THE MEDICAL PANEL REPORT.

The Findings of Fact, Conclusions of Law and Order of the Industrial Commission, as written by the Administrative Law Judge, best summarizes the lack of evidence in the record of increased disability of Applicant over the rating given in 1971 by the medical panel. (R. 315, 316).

Dr. Hebertson did testify at the 1975 Hearing that Applicant was permanently and totally disabled. He also wrote an earlier letter, for the purpose of Applicant filing the application for a hearing, in which he stated that "It is my opinion she is totally and permanetly disabled as a result of the industrial injury of February 15, 1966. But, as the record indicates almost no change in Applicant's condition in 1975 over 1971 it is reasonable to assume that Dr. Hebertson would have considered Applicant permanently and totally disabled in 1971 at the time the medical panel made their suggested award of 40 percent disability as a result of the industrial accident in 1966.

In the numerous examinations of Applicant by Dr. Hebertson he almost always noted that there was no change in her condition. (R. 82, 113, 153, 171, 238, 239, 253, 259, 312, 314). And other than a question as to what a myelogram taken April 21, 1972 indicated there was nothing in the remaining examinations by Dr. Hebertson that indicated an increased disability over the years.

(R-190). A followup myelogram in October of 1972 showed no change and there was nothing said to indicate that there was reason to believe there was an increased disability.

Applicant's Brief quotes Dr. Hebertson's testimony at the hearing (R. 294, 295) as to the doctor's reasons for the Applicant's disability. "I think that the disability is not only due to the difficulty she has in the lumbosacral region, but also the difficulty which she has in terms of pain in the dorsal region, and the deficits which have resulted as a result of her chordotomy procedure in the dorsal region."

All three of these conditions were considered by the Medical Panel. And the chordotomy, which was especially noted by the doctor, was performed some two years before the panel met.

POINT II.

STATUTE OF TIME HAS RUN ON APPELLANT'S APPLICATION

Appellant is seeking permanent total disability because any increase in permanent partial disability is disallowed by the six year limitation of time. (U.S. Smelting, Refining, and Mining Company v. Nielsen, 19 Utah 2 239).

If an applicant is precluded from maintaining an action for increased permant partial disability it would seem futile in the interest of justice to provide for an action for permanent total disability.

The present eight year statute of limitations is not applicable in this case as the six year statute had already run

when the legislature made the change from six to eight years. Del Monte Corp. v. Moore, Ut. S. Crt., 1978, Docket #15218.

CONCLUSION

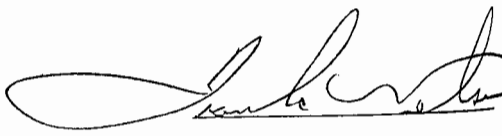
Applicant received an award of permanent partial disabili from the Industrial Commission in 1971. A medical panel reporte to the Commission after examining the applicant and the Commission followed their recommendation.

Applicant filed many applications for different purposes since the award in 1971, but never was application made for increased disability until 1975, nine years after the industrial accident.

The record does not indicate any material change in Applicant's disability from the 1971 award.

The judgment and decision of the Industrial Commission sould be confirmed.

Dated this 21 day of July, 1978.



IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

KENNETH EUGENE GOTFREY,

Defendant-Appellant.

APPEAL FROM THE
COURT, IN AND
UTAH, THE HO

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-vs-	:	Case No. 15804
KENNETH EUGENE GOTFREY,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged by information with one count of forcible sodomy (Utah Code Ann. § 76-5-403 (Supp. 1977)), two counts of rape (Utah Code Ann. § 76-5-402 (Supp. 1977)), and two counts of forcible sexual abuse (Utah Code Ann. § 76-5-404 (Supp. 1977)).

DISPOSITION IN THE LOWER COURT

The case was tried before a jury in the Seventh Judicial District with the Honorable Boyd Bunnell, presiding. The appellant was found guilty of one count of forcible sodomy and two counts of rape on the 21st of March, 1978. On March 22, 1978, appellant was given one sentence of one to fifteen years and two sentences of five years to life, all to be served concurrently in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the convictions.

STATEMENT OF THE FACTS

The charges against the appellant involved three instances of sexual abuse of his minor step-children. The first occurred on September 11, 1975. Appellant's young step-daughter, Petrita, testified that on that day appellant jerked her into a bedroom in their mobile home, made her take off her clothes, and then had intercourse with her (T.60). She was twelve years old at the time (T.4). She stated that, "he grabbed me by the arm and jerked me and said if I didn't get in there, he was going to beat the living heck out of me." (T.6). She testified that the same thing happened 20 to 50 times before (T.7).

Appellant admitted being in his home with two of his children on the evening of September 11, 1975, and that his wife was not at home (T.157,158). This was substantiated by the testimony of appellant's wife (T.48).

Appellant's step-son indicated on cross-examination that he had been in the home on occasions when appellant had abused his step-daughters and that he had observed sexual acts taking place between appellant and the girls (T.71).

Carbon County Sheriff Albert Passic testified that after appellant had been arrested on June 28th and informed of his rights in the Sheriff's Office, appellant stated in answer to the sheriff's questions that he had "undressed and played with" the little girls but denied having had sexual intercourse with them (T.103,104).

Brian Matsuda was a juvenile probation officer who had been assigned to work with the victim's step-son Michael (T.88). Mr. Matsuda testified that on the evening of the 27th of June, the night before appellant was taken into custody, he visited the Gotfrey home (T.88). He indicated that the boy had told him of appellant's abuses several days earlier (T.94), and that he was concerned for the safety of the children (T.93). Mr. Matsuda stated that appellant was present that evening with his wife (T.89), and that appellant at that time admitted having intercourse with the girls but denied any abuse of the boy (T.90).

Bobby Joe Fredrickson was a clinical psychologist of the Four Corner Mental Health Clinic in Price (T.110). He was not a licensed psychologist and never had been (T.111). Mr. Fredrickson testified that he had a conversation with appellant at the clinic on the evening of July 1, 1977, after appellant had been referred to him by his supervisor

(T.116,117). He noted that the conversation was not a "question answer session" but a "therapy contact" (T.117). Mr. Fredrickson stated that at that time appellant volunteered to him that he had sexual intercourse with his two step-daughters (T.118).

The next incident occurred on October 23, 1976. Appellant was deer hunting in the mountains with his 16 year old step-son. The boy testified that appellant came to the 8-man large ten in which he was sleeping in a sleeping bag and held him and threatened him as he committed an act of sodomy (T.50-51). The step-son testified, "first he put his hand over my mouth. When I came to he was starting to unzip the bag. I began to squeal about and he smacked me; threatened me. . . ." (T.67). Several other adults were sitting around a campfire outside the tent, drinking, and a cousin of the victim was asleep in the tent (T.56,67). When the boy kicked his cousin and awakened him, appellant rolled over and pretended to be asleep (T.58). The boy also testified that appellant had assaulted him in a similar manner several times before (T.52).

Joseph Louis Vasquez was with appellant and his step-son on the hunting trip and testified that the fire was

50 or 60 feet away from the tent and confirmed the fact that the adults were drinking around the campfire that night. He also noted that there was a truck in front of the tent (T.127,128).

Brian Matsuda, the juvenile probation officer, testified that when appellant's step-son had told him of appellant's abuses in June of 1977, the boy had given him a version of the incident which varied in certain aspects from the boy's testimony at trial. Essentially the two versions conflicted in that Mr. Matsuda stated that the boy had told him that appellant forced the boy to put his mouth on appellant's sexual organ rather than that appellant had placed his mouth on the boy's sexual organ (T.97). It should be noted, however, that Mr. Matsuda did not record or write down any notes at the time of the conversation with the boy, and that he did not make any notes until some three days later (T.100). Additionally, both versions indicated sexual perversion and forced abuse of the boy.

The third indicent occurred on March 15, 1977. Another of appellant's step-daughters, 13 year old Rosie, testified that her step-father "raped"her on that day. She stated that her step-father, who was in the home with just her and her younger sister, took her by the hand into the bedroom (T.20,21). Her testimony was that "he took me in the bedroom and started putting his hands on me and started

feeling my chest, and he started getting my pants down and took my--put me on the bed and took my pants off. And he put his private in mine and had sexual intercourse." (T.21). The girl further testified that this had happened many times before when her mother was home, asleep, and when her mother was away from the home (T.22).

Rosie's mother testified that appellant usually got up after they had gone to bed and remained up much of the night (T.36). She stated that she never got up to check on the children unless they were sick (T.45), and that she never checked to see what her husband was doing (T.47).

Dr. Lynn Taylor Dayton, a gynecologist, testified that he had examined Rosie and had concluded that she was definitely sexually active (T.83,84), and that although there would be a fair likelihood of pregnancy if appellant had had intercourse with the girl as often as she said he had, that likelihood would be higher for an older woman (T.87).

As noted above, Brian Matsuda, Bobby Joe Fredrickson, and Albert Passic all testified that appellant had admitted sexual abuse or intercourse with his daughters on separate occasions.

In his defense, appellant testified that none of these incidents took place and that he had never admitted abusing his children (T.164-165).

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY VERDICTS.

A

THE CONVICTION OF FORCIBLE SODOMY IS SUPPORTED BY THE EVIDENCE.

The crimes of sodomy and forcible sodomy are defined in Utah Code Ann. § 76-5-403 (Supp. 1977):

> "(1) A person commits sodomy when he engages in any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.
> (2) A person commits forcible sodomy when he commits sodomy upon another without the other's consent."

The elements of the crime are thus:

(1) any sexual act involving the genitals of one and the mouth or anus of another, and

(2) the victim's lack of consent.

Lack of consent is further defined in Utah Code Ann. § 76-5-406 (Supp. 1977), which states:

> ". . . Sodomy is without consent of the victim . . . [when] the actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution."

In the instant case, the victim, 16 year old Michael Anthony Gene Garcia, testified that the appellant came to the tent where he was sleeping on October 23, 1976, and committed sodomy with him, against his will, by placing his mouth over the victim's penis. The boy stated that appellant threatened him, put his hand over his mouth and held him so that he could not get up (T.51). On cross-examination, the witness further testified that appellant had "smacked" him (T.67). When questioned concerning his cousin, who was sleeping in the same tent, the victim indicated that he had kicked his cousin, and that as his cousin started to awaken, appellant rolled over and pretended to be asleep (T.58). Although the victim did stat that there were other adults around the campfire, 15 to 20 feet away, he noted that they were all drunk at the time (T.56). One of those who was at the campfire that night confirmed the fact that all were drinking and noted that the fire was 50 or 60 feet from the tent and that a truck wa in front of the tent (T.128).

As can be seen, the elements of the crime of forcible sodomy are present. The credibility and weight of the boy's testimony, in light of all the other evidence presented at the trial was a question for the jury to determine as the trier of fact. State v. Wilson, 565 P.2d 66 (Utah 1977). There, the Court noted:

> "The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury." Id. at 68.

Many courts have noted that in cases of sexual abuse, the testimony of the victim alone is sufficient to support a conviction. The Arizona Supreme Court has held in a rape case that:

> "A conviction may be had on the basis of the uncorroborated testimony of the prosecutrix unless the story is physically impossible or so incredible that no reasonable person could believe it."

State v. Williams, 111 Ariz. 175, 526 P.2d 714, 716-717 (1974). See also State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963); and May v. State, 89 Nev. 277, 510 P.2d 1368 (1973).

In State v. Mills, 530 P.2d 1272 (Utah 1975), this Court extended this same standard of review to a sodomy case. The Court stated:

> "To set aside a verdict it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly must have entertained reasonable doubt that defendant committed the crime." (Emphasis added.) Id. at 1272.

Appellant's brief cites, at length, evidence from the trial in an attempt to question the credibility of the boy's testimony. However, this Court has indicated that a

possible weakness in the evidence of the state is not grounds for reversal. In State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957), cert. denied 355 U.S. 848, 2 L.Ed.2d 57, 78 S.Ct. 74 (1957), this Court stated:

> "It is to be conceded. . . a weakness existed in the state's case from which the jury, had they been so minded, may well have entertained a reasonable doubt of defendant's guilt. But it is not sufficient merely that reasonable minds may have entertained such doubt. Before a verdict may properly be set aside, it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that defendants committed the crime." (Emphasis added.)

See also State v. Middelstat, 579 P.2d 908 (Utah 1978); and State v. Romero, 554 P.2d 216 (Utah 1976). It is the prerogative of the jury to weigh the evidence and determine the credibility of witnesses. That is what has happened in this case. There was ample evidence for a finding of guilt beyond a reasonable doubt.

B

THE CONVICTIONS OF RAPE ARE SUPPORTED BY THE EVIDENCE.

Utah Code Ann. § 76-5-402 (Supp. 1977), defines the crime of rape as follows:

> "A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent."

Lack of consent is pertinently defined in the same part of the Code as being present whenever the victim is under fourteen years of age. Utah Code Ann. § 76-5-406(7) (Supp. 1977). The elements which just have been established in the state in this case are that:

(1) a male actor

(2) had sexual intercourse

(3) with a female

(4) not his wife

(5) under 14 years of age.

Petrita Garcia testified that her step-father, the appellant, jerked her into a bedroom and had intercourse with her on September 11, 1975, when she was 12 years old (T.4-6). She stated that this had happened 20 to 50 times before (T.7), and that she complied with his demand because he threatened to "beat the living heck" out of her if she didn't comply (T.6).

Rosie Garcia, Petrita's sister, testified that appellant had intercourse with her, against her will, on March 15, 1977. She was 12 years old at that time (T.21-21). She noted that the same thing had happened many times before, sometimes when her mother was home, asleep in bed (T.22). Rosie stated that she had never told her mother of the acts because appellant had threatened to kill her (T.32). Rosie's mother testified that appellant usually got up after going to bed (T.36), and would stay up most of the night (T.45). She stated

that she never checked on him or went to see what he was doing (T.47).

Dr. Lynn Dayton, a specialist in the area of obstetrics and gynecology testified that he had examined Rosie on October 24, 1977, and that, in his opinion, she was definitely sexually active (T.83,84).

Brian Matsuda, an officer of the Juvenile Court, testified that the appellant had admitted having sexual relations with the girls (T.91). Bobby Joe Fredrickson, an employee of the Four Corners Mental Health Clinic, also indicated that appellant had admitted having sexual relations with his step-daughters (T.118).

Thus, the elements of the crime are firmly established by the evidence. Appellant cites State v. Ward, 10 Utah 2d 34, 347 P.2d 865, 868 (1959), to indicate that a conviction of rape "should be scrutinized with great care because it is a charge easy to make and hard to defend against." In that case, the state's case rested directly upon the testimony of the prosecutrix. The Court, in affirming the conviction, noted:

> ". . . this offense is rarely committed in the presence of witnesses and often the conviction of the guilty could only be had upon the victim's testimony. It has often been held that if there is nothing inherently contradictory or incredible in her story a conviction may rest upon the victim's testimony alone." Id. at 868.

As is noted in Wilson and Sullivan, supra, the weight and credibility of the evidence is for the trier of fact to determine. Unless there is such a lack of evidence that a reasonable doubt is compelled, the conviction must stand. In this case there is more than adequate evidence to indicate guilt. The verdict of the jury on these counts should therefore be upheld.

POINT II.

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF MR. FREDRICKSON, AN UNLICENSED CLINICAL PSYCHOLOGIST.

A.

THE TESTIMONY OF MR. FREDRICKSON WAS NOT BARRED BY THE PSYCHOLOGIST-PATIENT PRIVILEGE AS STATED IN U.C.A. § 58-25-8 (1953) AS AMENDED.

Bobby Joe Fredrickson, as clinical psychologist at the Four Corners Mental Health Clinic, was called by the prosecution to testify as to certain statements made to him by appellant. Defense counsel objected to his testimony on the ground that "a psychologist-patient privilege ought to exist in the situation" (Tr. 111). When it was established out of the jury's presence on voir dive examination, that Mr. Fredrickson was not a licensed psychologist (Tr. 114), but that there were other licensed psychologists at the Four Corners Clinic, Defense Counsel asked that the witness be cautioned to not reveal any information received through those licensed psychologists (Tr. 115, 116). The trial court noted that if such information were offered, counsel could object at that time, but overruled the objection to the evidence of Mr. Fredrickson's conversation with appellant (Tr. 116).

Later, in the presence of the jury, appellant again objected to Mr. Fredrickson's testimony and claimed that the psychologist-patient privilege should apply because Mr. Fredrickson was acting as an agent of a licensed psychologist (Tr. 117). The trial court refused to expand the statute (U.C.A. § 58-25-8, (1953), as amended) beyond its explicit wording and overruled the objection.

Appellant claims that the trial court committed reversible error in allowing Mr. Fredrickson to testify. In support of that claim, he raises two arguments. The first, raised for the first time on appeal, is that since employees of government agencies are exempted from the state licensing requirements but may still hold themselves out as psychologists, they should be treated as licensed psychologists for the purposes of the psychologist-patient privilege found in U.C.A. § 58-25-8, supra. The second argument, which was raised at trial, is that Mr. Fredrickson was acting as an agent of a licensed psychologist and that communications with an agent of a licensed psychologist should also be privileged under U.C.A. § 58-25-8, supra.

EMPLOYEES OF GOVERNMENT AGENCIES

It is a generally recognized rule of law that "where evidence is admitted over the defendant's objections at trial, no new grounds for objection can be claimed on appeal."

State v. Craig, 215 Kan. 381, 524 P. 2d 679 at 682 (1974). See also In Interest of Oaks, 571 P. 2d 1364 at 1365 (Utah, 1977). State v. Crace, 260 Or. App. 927, 554 P. 2d 628 at 631 (1976), and Burns v. State, 574 P. 2d 422 (Wyo., 1978).

Only the agency theory argued on appeal by appella in support of an expansion of the scope of the psychologist-patient privilege was raised at trial. The additional theory that government employed psychologists should be included was not raised at trial and should not now be consid

Nevertheless, even if the government employee theor had been raised at trial, it does not compel an expansion of the psychologist-patient privilege.

U.C.A. § 58-25-8, (1953), as amended, states:

> "A psychologist licensed under the provisions of this act cannot, without the consent of his client or patient, be examined in a civil criminal action as to any information acquired in the course of his professional services in behalf of the client. . . ." [Emphasis added]

As can be seen by the express language of the above statute, the scope of the psychologist-patient privilege is very narrow and is limited to licensed psychologists. In Gord v. Salt Lake City, 20 U. 2d 138, 424 P. 2d 449 (1967), this court declared several guidelines helpful in interpreting acts of the legislature:

> "The enactment of the statute prescribing this procedure is the legislature prerogative. It carries with it the presumptions that it is valid, and that the words and phrases were chosen advisely to express the legislative intent. The statute should not be stricken down nor applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional right. If it meets these tests it is not the court's prerogative to consider its wisdom, or its effectiveness, nor even the reasonableness or orderliness of the procedure set forth, but it has a duty to let it operate as the legislature has provided. (Id. at 451) [Emphasis added]

Had the legislature intended to make communications with unlicensed psychologists privileged, they would have done so. A literal reading of the statute leaves the nature and scope of the privilege clear. On the other hand, the interpretation urged by appellant creates confusion.

U.C.A. § 58-25-6 (1953), as amended, does state:

> "Nothing in this act . . . (regulating the practice of psychology) . . . shall be construed to limit the activities, and use of official title on the part of a person in the employ of a federal, state, county, or municipal agency, or other political subdivision, or a duly chartered educational institution . . ." (Emphasis added)

Appellant contends that this clause exempts government psychologists from the state licensing requirements. He further contends that even though unlicensed, the prohibition

on testimony of licensed psychologists in § 58-25-8, supra, should be extended to them in order to not hamper governmental activities.

Consistently, if appellant's argument were adopted, this policy should be uniformly applied in the interpretation of § 58-25-6 in total. That statute goes on to state:

> "Nothing in this act shall be construed to limit the activities and services of a student, intern, or resident in psychology, . . . provided that the person is designated by such titles as 'psychological intern,' 'psychological trainee,' or other title clearly indicating such training status. Nothing in this act shall be construed as preventing members of other professions from doing work of a psychological nature, so long as such persons do not represent themselves to the public as being a psychologist, except when so licensed . . ." [Emphasis added]

If appellant's theory that the privilege given to licensed psychologists in § 58-25-8, supra, is essential to the activities of anyone practicing psychology; students, interns, and resident psychologists as well as other professionals seeking to do psychological activity should all be included within the privilege. Yet, the statute explicitely and expressly applies only to licensed psychologists.

In the instant case, there were licensed psychologis at the Four Corners Mental Health Clinic (Tr. 113). Given this access to persons with whom conversation might be held

confidential, limiting the psychologist-patient privilege to communication with them would not hamper the activities of the clinic. On the other hand, to extend the privilege to anyone connected with the clinic as proposed by appellant is to completely ignore the explicit statement of legislative intent in § 58-25-8, supra. Respondent urges that such an interpretation contravenes not only the intent but the clear meaning of the psychologist-patient privilege. The trial court was correct in allowing the testimony of Mr. Fredrickson once it was determined that he was not a licensed psychologist (Tr. 110-111).

AGENTS OF LICENSED PSYCHOLOGISTS

Appellant's second theory is that Mr. Fredrickson was acting as an "agent" of a licensed psychologist and that the agent's communication should therefore be equally privileged. Again, appellant seeks to expand the scope of the statutory privilege set forth in § 58-25-8, supra.

Appellant argues that:

> "if a certified or licensed psychologist referred the patient to another psychologist in the Four Corners Mental Health Center the credentials of the referror ought to flow to the psychologist to whom the patient was referred." (Appellant's Brief, p. 8).

The record does not indicate that appellant was referred to Mr. Fredrickson by a licensed psychologist. Instead, Mr. Fredrickson indicated that appellant had been referred to

him by his superior who was not a licensed or certified psychologist (Tr. 121).[1]

Nevertheless, even if appellant had been referred to Mr. Fredrickson by someone whose communications were privileged under § 58-25-8, supra, his testimony would not have been improperly received. As noted in Gord, supra, the statute should be read literally unless doing so renders it meaningless or unreasonable. Section 58-25-8, supra, is clear on its face. The section expressly states the legislative intent to make only those communications with licensed psychologists privileged. Had the legislature intended to expand the privilege, they would have done so. Other courts have limited similar statutes dealing with licensed physicians to their explicit wording. State v. Fourquette, 67 Nev. 505, 221 P. 2d 404 at 420 (1950), and Commonwealth v. Cohen, 142 Pa. Super. 199, 15 A. 2d 730 at 732(1940).

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1 In fairness to the appellant, it should be noted that the witness did indicate that his superior was a certified social worker. U.C.A. § 58-35-10, (1953), as amended, could be interpreted to give a social worker's testimony a status similar to that of a licensed psychologist. However, (1) this privilege was not claimed by appellant at trial or on appeal and, (2) the testimony of Mr. Fredrickson as to the qualifications of his superior or other psychologists at the center is hearsay.

Finally, an extension of this privilege to all who might be acting as "agents" of a licensed psychologist would make the privilege over-broad and would frustrate the demands of justice. Physicians are not restrained by any privilege in felony matters (Utah Rules of Evidence, Rule 27 (2)) or in any matter with respect to juvenile abuse (U.C.A. § 55-16-5 (1953) as amended). Neither should any others who are not explicitely identified be bound by such a privilege. The trial court, therefore, acted properly and within the law in refusing to restrict the testimony of Mr. Fredrickson on an agency theory.

B.

ALLOWING THE TESTIMONY OF THE UNLICENSED CLINICAL PSYCHOLOGIST AT TRIAL IN THIS CASE WAS JUSTIFIED UNDER UTAH STATUTES REQUIRING THE REPORTING OF ABUSE OF MINORS.

The Supreme Court of Washington, in State v. Fagalde, 85 Wash. 2d 730, 539 P. 2d 86 (1975), was faced with a case which is very similar to the case at hand. That defendant had been convicted of assault upon a three year-old child. On appeal, the defendant claimed that the trial court had erred in admitting the testimonies of the director and an employee of the Walla Walla Mental Health Center concerning statements made to them by the defendant while he was seeking

treatment. The director was not a licensed psychologist although he did possess a Ph.D. in psychology. The employee was a therapist, but not a doctor or a psychologist. The trial court held that since neither were licensed psychologi their testimonies were admissible over the defendant's objec

The Supreme Court refused to consider whether or not the defendant could claim the psychologist-patient privilege even though these witnesses were not licensed psychologists. Instead, they noted, first, that confidential communications between doctor and patient are not privileged where they relate to child abuse. Revised Code of Washington § 5.60.060, 1974, states:

> "A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof." (Emphasis added)

As the Washington Court stated:

> "It will be seen that this section is not restricted to the case where the injured child is a patient. In any proceeding regarding a child's injuries, the exception does not apply. Thus, the language covers the situation where the parent visits a psychiatrist and reveals that he has subjected his child to abuse." (Fagalde at 90)

The court then noted that their child abuse reporting act, R.C.W. § 26.44.04(7) requires:

> "that physicians (practitioners) and psychologists report incidents of child abuse which come to their attention, and that they include in the report [a]ny other information which may be helpful in establishing the cause of the child's death, injury, or injuries and the identity of the perpetrator of perpetrators." (Id. at 90).

The court then stated:

> "Thus, we cannot accept the appellant's theory that confidential communications between the perpetrator and a psychologist, or a doctor, or a mental health center employee, are protected from disclosure and privileged in a judicial proceeding, according to the terms of the applicable statutes. Such protection might well be deemed to be in the public interest. But it is evident that, in its recent enactment the legislature has attached greater importance to the reporting of incidents of child abuse and the prosecution of perpetrators than to counseling and treatment of persons whose mental or emotional problems cause them to inflict such abuse . . . and . . . has expressed an intent to protect the confidentiality of communications made in the physician-patient and psychologist-patient relationship, except where they relate to child abuse; and in this area the interest in discovery of cases of such abuse and in protecting the child from future recurrences if found to be overriding. Prosecution of the offender is contemplated and properly incidental to at least the latter purpose. The

interest in encouraging the child abuser to seek treatment is subordinated to this aim." (Id. at 90).

Utah's statutes in this area are very similar to those of Washington. All persons are required to report incidents of child abuse and include any information helpful in establishing the cause of the injuries and identity of the perpetrator; U.C.A. § 55-16-2 (1953), as amended, provi

> "Any person having cause to believe that a minor has had physical injury as a result of unusual or unreasonable physical abuse or neglect shall report or cause reports to be made in accordance with the provisions of this act."

U.C.A. § 55-16-3 (1953), as amended, provides:

> " . . . Such reports shall contain the name and address of the minor, if known by the person making the report, and any other information the person making the report believes might be helpful in establishing the cause of the injuries and identity of the perpetrator."

The physician-patient privilege is also not applicable in child abuse cases in Utah as well as in Washington. U.C.A. § 55-16-5 (1953), as amended, reads:

> "The physician-patient privilege shall not be a ground for excluding evidence regarding the minor's injuries or cause thereof in any proceeding resulting from a report made in good faith pursuant to this act." (Child Abuse Reporting Act) [Emphasis added]

As with the Washington statute, a careful reading of this statute clearly indicates that it is not restricted to instances where the child is the patient. It applies to any proceeding resulting from a report made pursuant to title 55 chapter 16 of the Utah Code. The instant prosecution arose from such a report (Tr. 95).

Thus, while psychologists are required to report any information regarding abuse of minors pursuant to U.C.A. § 55-16-1, et seq., on the other hand, Section 58-25-8 inconsistently makes any information acquired by licensed clinical psychologists in the course of their professional services privileged. Given the fact that physician-patient communications, which would include psychiatrist-patient communications, is not privileged in child abuse cases, a fortiori similar communications involving psychologists should not be privileged and should be admissible. Therefore, in the instant case, the trial court's ruling admitting the testimony of the clinical psychologist was consistent with this sound public policy and should be sustained.

POINT III.

ALL FIVE COUNTS AGAINST APPELLANT WERE PROPERLY BROUGHT IN ONE INFORMATION.

U.C.A. § 77-21-31, 1953 as amended, states:

> "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." [Emphasis added]

Appellant urges a narrow interpretation of this statute and cites several Oregon cases to indicate that several offenses may be charged in one indictment only when they arise out of the same act or transaction, meaning when they are closely linked in time, place, and circumstances. The Oregon statute involved, however, is much narrower than its Utah counterpart. The Oregon statute provides:

> "The indictment must charge but one crime, and one form only, except that:
>
> (1) Where the crime may be committed by the use of different means, the indictment may allege the means in the alternative.
>
> (2) When there are several charges against any person or persons for the same act or transaction, instead of having several indictments, the whole may be joined in one indictment in several counts. . . ." Oregon Revised Statutes § 132.560, 1953 as amended.

Utah, unlike Oregon, not only allows one indictment to charge a defendant with two or more offenses when they arise from the same act or transaction, but also where they are of the "same or similar character" or where they are "connected together" or "constitute parts of a common scheme or plan."

In the instant case, appellant was charged in one information with one count of forcible sodomy, two counts of rape, and two counts of forcible sexual abuse. In this case particularly, all five counts charged appellant with acts of the same or similar character which were connected as part of a common pattern.

All of these offenses are found within part 4 of section 5 of the criminal code entitled "Sexual Abuse". (Specifically §§ 76-5-402, 403 and 404). Each of the acts charged involved abuse of the genitals of appellant's stepchildren. There were incestuous overtones in each count. While it is true that the forcible sodomy count involved the step-son and the other counts involved step-daughters, the same type of sexual abuse, i.e., forcible misuse and manipulation of the genitals was charged in each count. The testimony at trial indicated repeatedly that the specific incidents listed in the information were part of an on-going pattern of abuse inflicted upon these three children. (Tr. 7, 22, 25, 52, 53).

Thus, the offenses charged in this case were not only of a similar character, but were connected together a could also be considered part of a general pattern of child abuse. The information, therefore, properly charged appell with all five counts.

CONCLUSION

Sufficient evidence establishing each of the eleme of the crimes of which appellant was convicted was presente at trial. The issue on appeal with respect to sufficiency of the evidence is not whether a reasonable doubt may have existed, but whether a reasonable doubt is compelled. Only in the latter instance should a jury verdict be overturned upon a claim of insufficient evidence. (State v. Sullivan, supra.) In this case, the evidence clearly exceeds the requisite standard and the jury verdicts should stand.

The trial court was correct in allowing the testim of Mr. Fredrickson, the unlicensed psychologist. Psychologi patient communication is explicitely privileged only when the psychologist is licensed by the state. Moreover, the privilege does not extend to situations involving child abuse.

Finally, the several counts charged in the information were all for sexual abuse crimes. All were of a

similar character and were connected together in a general pattern of sexual child abuse. The trial court acted properly in allowing each of the counts to proceed on the same information.

For these reasons, Respondent urges that the convictions are sound and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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