1978

Walter G. Simpson, and Elizabeth H. Simpson, His Wife v. Peter M. Lowe, and Martha H. Lowe, His Wife; and Marlowe Investment Company, A Utah Corporation, Et Al : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DANNY WAYNE SMATHERS,

Defendant-Appellant.

BRIEF OF [illegible]

APPEAL FROM THE [illegible]
COURT, IN AND FOR [illegible]
UTAH, THE HONORABLE [illegible]
JUDGE

DANNY WAYNE SMATHERS,

P. O. Box 250
Draper, Utah 84020

Appellant In Pro Se

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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. 15911

DANNY WAYNE SMATHERS, :

Defendant-Appellant. :

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Defendant was charged by information with the crime of aggravated sexual assault in violation of Utah Code Ann., § 76-5-405.

DISPOSITION IN THE LOWER COURT

Defendant was tried before a jury on March 13 and 14, 1978, in the Third Judicial District Court in and for Salt Lake County, the Honorable Stewart M. Hanson, Jr., presiding. The jury returned a verdict of guilty. Defendant was sentenced to serve an indeterminate term of five years to life at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the conviction of appellant.

STATEMENT OF THE FACTS

On the evening of November 9, 1977, defendant approached the prosecutrix, Ms. Judy Stapes, who was working as a bartender at Marion's Lounge in Murray, Utah (Tr. 8). Defendant and the prosecutrix engaged in light conversation and defendant asked her to go to breakfast with him (Tr. 8). She said no. Defendant asked her again and the prosecutrix declined, saying "No, I really don't feel like it" (Tr. 8). Defendant told the prosecutrix he needed "somebody to talk to" and she said she would go to breakfast. Defendant and Ms. Stapes drove in her car to the China Inn where they had breakfast. They left the China Inn at 2:10 a.m. and Ms. Stapes drove back to Marion's Lounge where defendant had left his car (Tr. 9). Defendant asked Ms. Stapes if she would go to bed with him and she refused. Defendant then told her "I've got $100.00" (Tr. 10), and Ms. Stapes said, "You don't have enough money to buy me. Will you please just get out of the car and let me go home?" (Tr. 10).

Defendant grabbed Ms. Stapes and shoved her up against the door. He grabbed the steering wheel and drove the car behind the lounge. Ms. Stapes tried to jump out and

defendant grabbed her by the hair (Tr. 10). Defendant got out of the car and knocked Ms. Stapes to the ground. He started ripping her clothes. Ms. Stapes scratched defendant on the nose (Tr. 11). Ms. Stapes testified at trial that she was terrified of defendant (Tr. 11), and that the defendant had told her he was "going to kill me and throw me in the river." Ms. Stapes suggested they go to a motel: "I thought if I could get him out on State Street where I could find a police officer or even to a motel, I knew there would be people that would help me." (Tr. 10).

Once again, defendant told Ms. Stapes he needed to talk and she suggested they go to her house and have coffee (Tr. 11). Defendant told Ms. Stapes he was "going somewhere where there are no cars." (Tr. 12). He kept asking Ms. Stapes to go to bed with him and she kept telling him no (Tr. 10,12). Defendant stopped the car and Ms. Stapes grabbed her purse, jumped out of the car and started to run towards the nearest house with the lights on (Tr. 13). She yelled "Help me. Please help me." Defendant tackled her on the lawn and started hitting her on the head, telling her if she didn't "shut up" he would kill her (Tr. 14).

Ms. Stapes followed defendant back to the car. He ordered her into the back seat and told her to take off her clothes or he would kill her (Tr. 15). Defendant then had intercourse with the prosecutrix (Tr. 15).

Defendant drove Ms. Stapes back to Marion's and got out of her car. She locked both doors and drove directly to St. Mark's Hospital (Tr. 18).

Ms. Stapes was examined at St. Mark's Hospital by one Dr. James M. McGreevy, who testified at trial that she was bruised "principally about the eyes" (Tr. 67), and had "a minor laceration that did not require suturing above her right eye." Dr. McGreevy further testified at trial that the bruising "was considerable to the extent I thought it necessary to order examination of bony structures underneath the swelling and bruising to make sure there was no fracture of the bony structure of the eye socket as well as her skull." Dr. McGreevy performed two standard tests, the results of which did not positively indicate the presence of sperm in the victim's vagina.

ARGUMENT

POINT I.

THE INFORMATION FILED WAS SUFFICIENT AND APPELLANT'S CONVICTION SHOULD BE AFFIRMED.

Appellant argues on appeal that the information filed in this case was insufficient and alleges it failed to state facts sufficient to establish the offense charged. Respondent contends that in light of the statutory language found in Utah Code Ann., § 77-21-8 and supportive case law, appellant's argument is without merit.

The requirements for sufficiency of an information are found in Utah Code Ann., § 77-21-8, which states:

> (1) The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:
>
> (a) By using the name given to the offense by the common law or by a statute.
>
> (b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.
>
> (2) The information or indictment may refer to a section or subsection of any statute creating the offense charged therein, and in determining the validity or sufficiency of such information or indictment regard shall be had to such reference.

In this case, appellant was charged in an information which used the statutory name of the crime pursuant to Utah Code Ann., § 77-21-8(1)(a), and also stated the particular of the offense, i.e., "That on or about the 10th day of November, 1977, in Salt Lake County, State of Utah, the said Danny Wayne Smathers raped Judy Stapes by the threat of death and serious bodily injury." (See. Tr. 5, 6, Record 12).

The purpose of an information, as Utah Code Ann., § 77-21-8(1)(b) states, is to give the court and defendant notice of the offense intended to be charged. An information

is not insufficient as appellant contends because it fails to state all the elements of the crime. See People v. McFarland, 540 P.2d 1073 (Colo., 1975).

In a recent Utah case, State v. Taylor, 570 P.2d 697 (Utah, 1977), where the defendant was convicted of theft of a firearm and appealed on grounds it was error for the Court, among other things, to refuse to dismiss the complaint because of failure to prove elements of theft as charged, this Court stated that:

> Offenses are validly and sufficiently charged by information or indictment which uses the name given to the offense by the common law or by statute.

Id. at 698 (emphasis added). See also Harris v. Smith, 541 P.2d 343 (Utah, 1975).

Appellant was charged with a specific crime, Aggravated Sexual Assault, and was given the details upon which that charge was founded. On this basis, defendant knew the crime with which he was charged and was given a fair and adequate opportunity to prepare his defense.

This Court in State v. Stites, 5 Utah 2d 101, 297 P.2d 227 (1956), was presented, in a misappropriation of corporate monies case, with the claim that the information was insufficient to apprise the defendant of the offense for which he was to be tried. The Court held that the employment of almost identical phraseology in the information as was

found in the statute defining the offense satisfied the provisions of § 77-21-8. The Court stated:

> We believe that the information also satisfied the general rule applicable where there may be no statute like 77-21-8. . . . that the information must be sufficiently definite to (1) notify the defendant of the charge against him so as to enable him to prepare a defense, (2) identify the offense so that the defendant can successfully interpose a double jeopardy plea . . . and (3) apprise the court of the issues before it so that it can properly rule on questions of evidence and determine the sufficiency thereof.

Id. at 229, (emphasis added).

In this case, the information charged appellant with the offense of Aggravated Sexual Assault, the statutory name for the crime he allegedly committed. Thus, the reasoning of Stites dictates that the information is sufficient to give notice to both the Court and the defendant pursuant to Utah Code Ann., § 77-21-8. However, following the analysis of that case, the general requirements which would be looked to only in the absence of statutory provisions, are also met. Appellant was clearly given notice that he was charged with the offense of aggravated sexual assault, in violation of § 76-5-405, Utah Code Ann., and given the specifics of the offense; the information alleged that appellant raped Judy Stapes on or about

the 10th day of November, 1977, by the threat of death and serious bodily injury (Record 12).

Recent case law from other jurisdictions is also supportive of respondent's position. In State ex rel McKenzie v. District Court of Ninth Judicial District, 525 P.2d 1211 (Montana, 1974), where a challenge to amending an information in a criminal case was made, that Court held:

> The purpose of an information is to inform the defendant of what he is charged, nothing more nothing less . . . no bill of particulars is called for, nor is a statement of all possible legal theories the prosecutor intends to pursue. It is not the function of an information to anticipate or suggest instructions to the jury, to argue the case, or to influence either public opinion or the jury. It is a notice device, not a discovery device.

Similarly, the Idaho Supreme Court in State v. McKeehan 430 P.2d 886 (Idaho, 1967), held that:

> The appellant was properly informed of the exact nature of the charge against him within the general criteria governing the sufficiency of an information and was afforded thereby the means by which to prepare a proper defense . . . it is neither necessary or proper to allege evidence or disclose in the information the proof which the prosecution relied upon to establish the charge.

In a recent Montana case, State v. Coleman, 579 P.2d 732 (Mont., 1978), the defendant, charged with deliberate homicide, aggravated kidnapping and sexual intercourse without consent, challenged the information on grounds of

insufficiency. In rejecting his argument, the Court stated:

> . . . An information need only be sufficient to apprise the accused of the nature of the crime charged. It need not be perfect.

Id. at 745.

Furthermore, if appellant deemed the Information in this case to be insufficient, he could have requested the trial court for a Bill of Particulars pursuant to Utah Code Ann., § 77-21-9. See State v. Crank, 105 Utah 332, 142 P.2d 178 (Utah, 1943), and State v. Robbins, 102 Utah 119, 127 P.2d 1042 (Utah, 1942).

Additionally, the constitutionality of the short form information allowed by 77-21-7 and 8 has been upheld. State v. Hill, 100 Utah 456, 116 P.2d 392 (Utah, 1941); State v. Anderson, 100 Utah 468, 116 P.2d 398 (Utah, 1941); State v. Crank, 105 Utah 332, 142 P.2d 178 (Utah, 1943), and State v. Tacconi, 110 Utah 212, 171 P.2d 388 (Utah, 1946). (See also, State v. Landrum, 3 Utah 2d 372, 284 P.2d 693 (Utah, 1955), where an indictment which charged that the defendants had "robbed Joseph Shepherd" met the requirement of Art. I. § 12 of the Utah Constitution. It advised the defendants of the nature and cause of the accusation against them and met the requirements of 77-21-8 because it charged

the defendants with having committed a crime and it stated the act which the defendants did constituting that crime).

It is well settled that the purpose of an information is to serve as a notice device to a defendant to inform him of a specific charge against him and allow him to begin preparation for defense against that charge. See State v. Angus, 581 P.2d 992 (Utah, 1978). Here appellant knew he was charged with the crime of aggravated sexual assault and the details upon which such charge was premised.

Respondent submits that in light of the statutory provisions cited above and the case law, the information in this case was sufficient and appellant's conviction should be affirmed.

POINT II.

THE STATUTORY PROVISIONS PERTAINING TO AGGRAVATED SEXUAL ASSAULT AND RAPE PRESCRIBE DIFFERENT PENALTIES FOR DIFFERENT CRIMES AND APPELLANT IS NOT ENTITLED TO THE PENALTY FOR RAPE ON A CONVICTION FOR AGGRAVATED SEXUAL ASSAULT.

Appellant argues that the conduct prohibited under Utah Code Ann., § 76-5-402 for the crime of rape, a second degree felony, is the same conduct prohibited under Utah Code Ann., § 76-5-405 for the crime of aggravated sexual assault, a first degree felony. Appellant cites State v. Loveless, 581 P.2d 575 (Utah, 1978), as authority for his position that since the two statutes prohibit the same

conduct, but impose different penalties, he should be entitled to the lesser penalty as a matter of law.

Respondent concedes that if in fact the two statutes did prohibit the exact same conduct and imposed different penalties, appellant's reliance on this Court's decision in Loveless would be justified and he would be entitled to the lesser penalty. However, respondent avers that appellant's reliance on this Court's decision in Loveless is misplaced in that the conduct prohibited by the two statutes is not identical and thus Loveless is not controlling here.

In State v. Loveless, supra, the defendant was convicted by a jury of aggravated sexual assault, a felony of the first degree. Defendant appealed. The only matter relied upon by the State as an aggravating circumstance was the fact that the victim was under fourteen years of age at the time of the offense. The Loveless Court determined that the two statutes did in fact prescribe different penalties for the same prohibited conduct. Specifically, if the victim of intercourse without consent were under fourteen years of age, the defendant could be charged with either aggravated sexual assault, a first degree felony, or rape, a second degree felony. Thus, the statutory language left the decision of whether to charge a first degree felony or a second degree felony to the discretion of the prosecutor.

The Court noted that the Legislature subsequently amended the statutes to make the crime of rape, where the victim is under fourteen years of age, a felony of the first degree and deleted the element of age as a circumstance of aggravated sexual assault.

Here, however, the prohibited conduct is not the same. The crime of aggravated sexual assault requires that the act of intercourse without consent be accomplished by "serious bodily injury to the victim", or that "the actor compels submission to the rape or forcible sodomy by threat of kidnapping, death, or serious bodily injury to be inflicte The crime of rape merely requires that the intercourse takes place without the consent of the woman. Utah Code Ann., § 76-5-406(1) and (2), defines "without consent" as follows:

> An act of sexual intercourse, sodomy, or sexual abuse is without consent of the victim . . .
>
> (1) When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or
>
> (2) The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution.

To determine whether a victim consented, this Court has looked to her age, strength, surrounding facts, State v. Ward, 347 P.2d 867 (Utah, 1959); to "threats of

immediate and great bodily harm which create in the mind of the female a real apprehension of dangerous consequences," State v. Nunez, 520 P.2d 882 (Utah, 1974); to whether she took advantage of a reasonable opportunity to escape or otherwise seek help. State v. Horne, 12 Utah 2d 162, 364 P.2d 109 (1961); and to the conduct of the victim after commission of the assault. State v. Roberts, 91 Utah 117, 63 P.2d 585 (1937).

In this case, the information charged defendant with the crime of aggravated sexual assault and the element of aggravation (serious bodily injury and threat of death), was proven. The Court instructed the jury that if it could not find the defendant guilty of aggravated assault, then it could find him guilty of the lesser included offenses of rape or fornication, or not guilty at all. Thus, the jury determined that the evidence supported the charge as stated in the information, aggravated sexual assault, i.e., not only did the rape occur, but it was accomplished by serious bodily injury and threat of death.

Appellant correctly cites Rammell v. Smith, 560 P.2d 1108 (Utah, 1977), in support of his contention that where there are two statutes which proscribe the same conduct, but impose different penalties, the violator is entitled to the lesser. However, as the Court determined to be the

case in Rammell, respondent contends that the statutes pertinent here do not proscribe the same conduct. In Rammell, the defendant was convicted of a felony charge under the Controlled Substances Act, and challenged her conviction in a habeas corpus proceeding. She argued that since the offense of forgery under the Controlled Substances Act is a felony and the allegedly same offense under the Pharmacist's Act is a misdemeanor, she was entitled to the lesser penalty. The Court in Rammell stated:

> Proceeding to the main issue in this case; we agree with petitioner's premise that where there are two statutes which proscribe the same conduct, but impose different penalties, the violator is entitled to the lesser. The difficulty with petitioner's argument is that the two statutes referred to do not prohibit exactly the same conduct.

Id., at 1109 (citation omitted).

The Court held that the Controlled Substances Act applied more specifically to defendant's offense and took precedence over the more general act. Similarly, in this case, the crime of rape, a second degree felony, is the more general offense, while the crime of aggravated sexual assault, a first degree felony, is the specific act; thus, the two statutes prohibit different conduct and can correctly impose different penalties. In illustrating the difference between the statutes in Rammell, this Court stated:

> There is a significant and important difference between that statute and section 58-17-14.13 which creates the misdemeanor under which petitioner seeks the benefit of a lesser sentence. The latter section is in chapter 17 of Title 58, which is entitled, "Pharmacists." It deals generally with the dispensing of drugs by prescription and covers all drugs of every nature which have "been designated as unsafe for use except under the supervision of a practitioner," and it is not necessary that they be of the class of "hard drugs" proscribed in the "Controlled Substances Act." Inasmuch as the latter act applies more specifically to the petitioner's offense, it takes precedence over the more general act.

Id. at 1109, 1110.

Respondent submits that the statutes involved in this case are analogous to those discussed in Rammell, and that appellant's conviction for aggravated sexual assault, the more specific offense, should be affirmed.

CONCLUSION

Respondent asks this Court to affirm appellant's conviction for aggravated sexual assault.

Respectfully submitted,

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