

1979

## State of Utah v. Gloria Danker : Brief of Respondent

Utah Supreme Court

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## TABLE OF CONTENTS

### PAGE

STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN THE LOWER COURT -----	1
RELIEF SOUGHT ON APPEAL -----	2
STATEMENT OF THE FACTS -----	2
ARGUMENT	
POINT I: IT WAS NECESSARY AND PROPER IN THIS CASE FOR THE STATE TO SHOW THE NATURE OF THE IN- VESTIGATION WITH WHICH AP- PELLANT INTERFERED -----	5
CONCLUSION -----	10

### CASES CITED

Oxedine v. State, Okla. 355 P.2d 940 (1958) -----	9
State v. Amundson, 37 Wash. 2d 356, 223 P.2d 1067 (1950) -----	9
State v. Poe, 21 U.2d 113, 441 P.2d 512 (1968) --	6, 8, 9
State v. Renzo, 21 U.2d 205, 443 P.2d 392 (1968)-	5, 6, 8

### STATUTES CITED

Utah Code Ann. § 76-8-508, 1953 as amended -----	1, 5, 7
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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. 16200
GLORIA DANKER,	:	
Defendant-Appellant.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with the crime of tampering with a witness in violation of Utah Code Ann. § 76-8-508, 1953 as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried in the Fourth District Court in Uintah County before a jury on October 11, 1978, and was found guilty as charged. On November 4, 1978, the Honorable George E. Balliff sentenced appellant to a term in the Utah State Prison of 0 to 5 years and ordered the appellant to pay a fine of \$250.00. Execution of the sentence was suspended and appellant was placed on probation for a period

## RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the lower court's action in the disposition of this case.

## STATEMENT OF THE FACTS

Early in the morning of August 6, 1978, the appellant called the Vernal City Police and asked them to come to her home in Vernal (T. at 57). Two patrol cars responded. When the officers arrived, they found appellant and a Mr. Kenneth D'Anza yelling at each other on the front porch (T. at 17). When D'Anza went to leave, appellant directed the officers to stop him. The officers questioned why and appellant replied, "I have caught him in bed with my daughter. I believe he has had sex with my daughter." (T. at 18). The officers immediately arrested Mr. D'Anza and took appellant and her daughter to a hospital to be examined (T. at 19).

On the way to the hospital, the appellant instructed her daughter to, "Tell the officer what happened. Be truthful about what happened." The child stated that Mr. D'Anza had "stuck his pee-pee in her bum hole, and his finger in her pee-pee." (T. at 19).

Detective Robert Downard of the Vernal City Police Department met appellant at the hospital and began an investigation of the incident. He stated:

I told her (appellant) that Mr. D'Anza would be charged with this; that the investigation was continuing, and that I would be to her residence sometime on Monday to review the crime scene.

T. at 24.

The following Monday, August 7th, Detective Downard visited appellant's house and told her that a forcible sodomy investigation was in progress and that her daughter was an integral part of the case. He stated on cross-examination:

I believe she even asked me if her daughter would have to testify and I indicated yes.

Later that afternoon, appellant took her children to the Vernal Family Health Center for an additional examination (T. at 34). While she was there, she was informed that her daughter Rayna (the victim in the sodomy investigation) was to be placed in temporary shelter care by the Division of Family Services (T. at 35). Appellant then indicated to the police that they no longer had a case; "that she had instructed her daughter not to testify against Kenneth D'Anza; and that she had also told her never to talk to any more police officers about this case."

(T. at 35). Officer John Parker of the Vernal City Police Department drove appellant and her children from the Health Center to the Division of Family Services (T. at 35-36). He testified that appellant continued to re-affirm

the fact that she had told her daughter not to talk or cooperate with the police. She also told her daughter, who was sitting on her lap, not to talk to the police and to forget everything she knew (T. at 36). Officer Darrell Lance was also in the car and corroborated Officer Parker's testimony (T. at 44). As the officers left the Division of Family Services, appellant yelled, "There goes your case, suckers. You haven't got a case, suckers." (T. at 36, 44, and 64).

Appellant testified as to what she had told her daughter:

I said, "If they ask you any questions about Ken (D'Anza), don't tell them. Tell them you forgot." I says, "When Mr. Downard came," I says, "When they came they said that you could stay with me, and now they are taking you away from me." So I says, "If they tell you that you can come back home to mommy, if you tell them that Ken did all of this stuff, don't believe them, because they are liars. Don't tell them nothing unless mommy is there."

(T. at 64).

She also testified:

I did say, "You suckers, you blew it. You don't have a case."

(T. at 64).

At the request of appellant's trial counsel, the court instructed the jury, inter alia, that:

. . . the defendant is charged with the specific offense of witness tampering, as set forth in these instructions, and that you should not allow yourselves to be prejudiced against her because of any relationship she may have had with Mr. D'Anza or by the fact that he has been charged with an offense.

(Jury Instruction No. 13, R. at 26 and T. at 80).

After deliberation, the jury found appellant guilty, as charged, of having tampered with a witness in violation of Utah Code Ann. § 76-8-508, 1953 as amended. After a pre-sentence investigation was completed, the court sentenced appellant to a \$250.00 fine and a suspended term of 0 to 5 years in the Utah State Prison with two years probation (R. at 33,34).

#### ARGUMENT

#### POINT I.

IT WAS NECESSARY AND PROPER IN THIS CASE FOR THE STATE TO SHOW THE NATURE OF THE INVESTIGATION WITH WHICH APPELLANT INTERFERED.

In State v. Renzo, 21 U.2d 205, 443 P.2d 392 (1968), this court noted that:

. . . discretion on the part of a trial judge to admit or reject evidence should not be interfered with by an appellate court unless manifest error is shown.



In that case, particularly gruesome pictures of a sexual molestation/murder victim had been admitted to establish the depravity element for voluntary manslaughter. The verdict was affirmed.

Admission of color slides as evidence in a murder case was also considered in State v. Poe, 21 U.2d 113, 441 P.2d 512 (1968). This Court stated that:

Initially, it is within the sound discretion of the trial court to determine whether the inflammatory nature of such slide is outweighed by their probative value with respect to fact in issue. If the latter they may be admitted even though gruesome. In the instant case they had no probative value. All the material facts which could conceivably have been adduced from a viewing of the slides had been established by uncontradicted lay and medical testimony. The only purpose was to inflame and arouse the jury.

(21 U.2d at 117) [emphasis added].

Reading Renzo and Poe together, it is clear that evidence which is gruesome or particularly prejudicial may be admitted when it is probative with respect to a fact in issue and that fact is not shown by other, less gruesome evidence. The conviction in Poe was reversed, partly because the only purpose for the evidence complained of was "to inflame and arouse the jury." (Id. at 117). Other less gruesome photos demonstrated the very fact which the complained of photos showed.

In the instant case, appellant was charged with a violation of Utah Code Ann. § 76-8-508, 1953 as amended;

A person is guilty of a felony of the third degree if:

(1) Believing that an official proceeding or investigation is pending or about to be instituted, he attempts to influence or otherwise cause a person to:

(a) Testify or inform falsely; or

(b) Withhold any testimony, information, document, or thing; . . .

It was necessary for the state to show that appellant knew or believed that an official investigation was pending and also that instructing her daughter to not testify would interfere. The information before the jury in the instant case would have been nonsensical if the prosecution had omitted any reference to the nature of the official investigation concerning appellant's daughter. In order to make clear that appellant was attempting to interfere with that investigation by telling her young daughter to not talk to the police, the prosecution had to show that the other charge centered upon the little girl's testimony and that appellant knew it. Although the potential for arousing passion and feelings of disgust is great where sexual abuse of small children is involved, these cases are also the ones wherein a prosecutor's case must

often rely most heavily upon the testimony of young children. In order to show that appellant attempted to interfere with the investigation by withholding her daughter's testimony, the state had to show the nature of the investigation. The purpose of the evidence was not solely to arouse and inflame the jury as in Poe, supra, but was, instead necessary to the demonstration of a material fact, as in Renzo, supra.

Appellant specifically complained of the testimony of one of the police officers wherein he noted what the little girl had told him concerning the sexual abuse (Appellant's brief at p. 9, T. at 19). This statement of the child, made in her mother's presence and at her mother's urging, showed the fact that the mother clearly knew that an investigation for abuse of her daughter was likely and that her daughter's testimony would go directly to establishing a case against Mr. D'Anza. Although other evidence in this case may have shown that appellant knew of the forcible sodomy charge, this evidence alone clearly showed that appellant understood what her daughter's testimony would be and how important it was to the state's case.

The additional cases cited by appellant can be distinguished and are not determinative of this matter.

In Oxedine v. State, Okl. 335 P.2d 940 (1950), as in Poe, supra, gruesome photographs were admitted where they had no probative value but served only to inflame and arouse the jury. In this case, the complained of evidence formed an essential part of the state's case and could not have been omitted.

State v. Amundson, 37 Wash. 2d. 356, 223 P.2d 1067 (1950), was an indecent assault case. In that case, the evidence complained of was a statement by a witness connecting the defendant with other, unrelated sex crimes without showing that the defendant had been convicted for those crimes. In the instant case, the evidence is of a substantially different nature. It did not indicate that appellant may have committed other crimes similar to, but unconnected with the instant charge. In this case, the evidence shed light upon the nature of this charge. It explained the circumstances surrounding the very crime with which appellant was charged. In Amundson, the court noted:

To stress this alleged act of misconduct (which had no logical connection with the crime charged) constituted prejudicial error and entitled appellant to a new trial.

Id. at 1069, (paranthesical in original).

In the instant case, the evidence was logically and inseparably connected with the state's case. Appellant's attorney states that "defendant Danker was painted as a

person who defended a man accused of abusing her own daughter." (Appellant's brief at pp. 8-9). While he may be correct, the effect of appellant's crime in this case was to do just that. It was impossible for the state to prove its case and hide that fact from the jury. Prejudicial evidence should be excluded when it has nothing to do with the charge at hand. But when, as in this case, the evidence goes to the very charge before the jury and explains the circumstances and crime to be considered by the jury it should not be excluded. Respondent urges this Court to affirm the judgment and conviction of the lower court.

#### CONCLUSION

When other evidence is available or has been presented to demonstrate the same facts sought to be shown by evidence which is highly prejudicial and inflammatory by nature, the prejudicial evidence should not be admitted. In such a case, the only purpose for the evidence would be to arouse and impassion the jury. However, in this case, the complained of evidence was a necessary and integral part of the state's case. Without it, the evidence as a whole would have been unclear. The jury could not have understood the charge. Moreover, the prejudicial aspect

stemmed not so much from the evidence itself as from what it demonstrated about the nature of this case. There was no error, the verdict and sentence should be affirmed.

Respectfully submitted,

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