

1980

State of Utah v. Steven M. Johns : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Phil L. Hansen; Hansen and Hansen; Attorneys for Appellant;

Robert B. Hansen; Attorney for Respondent;

Recommended Citation

Brief of Appellant, *State v. Johns*, No. 16218 (Utah Supreme Court, 1980).

https://digitalcommons.law.byu.edu/uofu_sc2/1573

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 16218
STEVEN M. JOHNS, :
Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from the
Seventh Judicial District Court
Carbon County, State of Utah
Honorable Boyd Bunnell, Judge

PHIL L. HANSEN
HANSEN AND HANSEN
250 East Broadway, Suite 100
Salt Lake City, Utah 84111

Attorneys for Appellant

ROBERT B. HANSEN
UTAH STATE ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	
POINT I THE TRIAL COURT COMMITTED REVERSIBLE ERROR, UNDER THE CONTROLLING DECISIONS OF THE UTAH SUPREME COURT, THE UTAH RULES OF EVIDENCE, AND THE WELL REASONED DECISIONS OF OTHER JURISDICTIONS, IN GRANTING THE PROSECUTION'S MOTION IN LIMINE.....	3
POINT II THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ERRONEOUSLY DEFINING AND LIMITING THE SCOPE OF REPUTATION EVIDENCE, WHICH ERROR EFFECTIVELY DENIED THE APPELLANT HIS OPPORTUNITY TO EXAMINE THE WITNESSES ON THE PROSECUTRIX'S GENERAL REPUTATION AS TO MORAL CHARACTER.....	10
POINT III THE TRIAL COURT'S FIRST AND SECOND RULINGS WITH RESPECT TO THE PER- MISSIBLE SCOPE OF EXAMINATION CON- CERNING THE PROSECUTRIX'S SEXUAL MORALITY WERE INCONSISTENT, CAPRICIOUS AND INHERENTLY UNJUST, THEREBY DEPRIVING THE APPELLANT OF DUE PROCESS OF LAW.....	13
POINT IV THE TRIAL COURT'S GRANTING OF THE PROSECUTION'S MOTION IN LIMINE DEPRIVED THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSOR.....	15
CONCLUSION	17

CASES CITED

<u>Burton v. State</u> , 471 S.W.2d 817 (Texas, 1971)	9
<u>Guy v. State</u> , 443 S.W.2d 520 (Tenn. 1970)	9

CASES CITED CONTINUED

	Page
<u>Interest of Nichols</u> , 580 P.2d 1370 (Kansas 1978)	9
<u>Matter of JWY</u> , 363 A.2d 674 (D. C. 1976)	9
<u>People v. Battilana</u> , 126 P.2d 923 (Calif. 1942)	8,9
<u>People v. Hurlburt</u> , 333 P.2d 82 (Calif. 1958)	9
<u>Sanders v. Commonwealth</u> , 269 S.W.2d 208 (Kent. ____)	9
<u>Smith v. Commonwealth</u> , 248 S.E.2d 135 (Virg. 1978)	9
<u>State v. Herrera</u> , 582 P.2d 384 (N. M. 1978)	9
<u>State v. Hill</u> , 244 N.W.2d 728 (Minn. 1976)	9
<u>State v. Howard</u> , 544 P.2d 466 (Utah 1975)	5,6,7,8
<u>State v. Sibert</u> , 310 P.2d 388 (Utah 1957)	17
<u>State v. Tiff</u> , 260 N.W.2d 296 (Neb. ____)	9
<u>State v. Vasquez</u> , 121 P.2d 903 (Utah 1942)	16

OTHER AUTHORITIES

U.S. Const. amend VI	16
Utah Const. art I, § 7	16
" " " " " 12	16
" " " " " 24	14
Utah Rules of Evidence	
Rule 49	7
Rule 50	7,8
Rule 63	12

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 16218
STEVEN M. JOHNS, :
Defendant-Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a verdict and judgment of guilty rendered on one count of aggravated kidnapping and two counts of aggravated sexual assault in the Seventh Judicial District Court in and for Carbon County, State of Utah, the Honorable Boyd Bunnell, Judge.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have his convictions reversed or, in the alternative, to have this case remanded for a new trial.

STATEMENT OF FACTS

On or about the 12th day of October, 1977, the prosecutrix consented to drive her girlfriend of longstanding and her girlfriend's boyfriend, the appellant, in her pickup truck from Wellington, Utah, to Woodside, Utah, where the latter were intending to spend the

night (Tr. 20, 21, 123, 138, 139). At Woodside, the girlfriend's mother opposed the appellant's staying overnight and the girlfriend suggested that the appellant return to Wellington with the prosecutrix. Not wishing to cause any difficulty, the appellant agreed to return, and the prosecutrix consented to give him a ride back in her truck (Tr. 23, 125, 140). During the course of their return, the prosecutrix and the appellant engaged in conversation which led to sexual relations (Tr. 23-30, 135, 141-47, 150). The couple then drove to Price, Utah, where at the prosecutrix's request they stopped for a soft drink. Appellant remained inside the truck while the prosecutrix entered the store. While in the store the prosecutrix reported that she had been raped (Tr. 34, 36, 38, 148).

The appellant was charged with one count of aggravated kidnapping in violation of Title 76, Chapter 5, Section 302(1)(b), Utah Code Annotated, and with two counts of aggravated sexual assault in violation of Title 76, Chapter 5, Section 405 (1)(a)(ii), Utah Code Annotated.

During pre-trial conference and in chambers, the prosecution made a motion in limine to bar the appellant from introducing evidence as to the prosecutrix's reputation for sexual permissiveness and immoral character, evidence as to witnesses' opinions of the prosecutrix's sexual permissiveness and immoral character, evidence of the prosecutrix's sexual habits and customs, and evidence of specific instances of behavior which establish the

prosecutrix's sexual habits and customs. The motion was made with no prior notice to the appellant. The court granted the motion and limited the appellant to examination of the prosecutrix's general reputation in the community (Tr. 3-6).

At trial, because of the motion in limine and fear of contempt, appellant's counsel was unable to effectively examine witnesses as to the prosecutrix's reputation for sexual permissiveness and immoral character; counsel was unable to examine witnesses as to their opinions of the prosecutrix's sexual permissiveness and immoral character; counsel was unable to examine the appellant as to his opinion of the prosecutrix's sexual permissiveness and immoral character based upon representations made to him by the prosecutrix; and counsel was unable to examine the prosecutrix as to her sexual habits and customs and prior specific instances which would establish said habits and customs.

The jury found the appellant guilty on all three counts charged.

The appellant retained new counsel and filed his notice of appeal on December 28, 1978.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, UNDER THE CONTROLLING DECISIONS OF THE UTAH SUPREME COURT, THE UTAH RULES OF EVIDENCE, AND THE WELL REASONED DECISIONS OF OTHER JURISDICTIONS, IN GRANTING THE PROSECUTION'S MOTION IN LIMINE, WHICH DENIED THE APPELLANT HIS OPPORTUNITY TO PROVIDE EVIDENCE AS TO THE

PROSECUTRIX'S REPUTATION FOR SEXUAL PERMISSIVENESS AND IMMORAL CHARACTER; EVIDENCE AS TO WITNESSES' OPINIONS OF THE PROSECUTRIX'S SEXUAL PERMISSIVENESS AND IMMORAL CHARACTER; EVIDENCE AS TO THE APPELLANT'S OPINION OF THE PROSECUTRIX'S SEXUAL PERMISSIVENESS AND IMMORAL CHARACTER BASED UPON REPRESENTATIONS MADE TO HIM BY THE PROSECUTRIX; EVIDENCE AS TO THE PROSECUTRIX'S SEXUAL HABITS AND CUSTOMS; AND EVIDENCE OF SPECIFIC INSTANCES OF BEHAVIOR WHICH ESTABLISH THE PROSECUTRIX'S SEXUAL HABITS AND CUSTOMS, WHICH EVIDENCE WAS CRITICAL TO THE ISSUES OF THE PROSECUTRIX'S CONSENT AND THE APPELLANT'S LACK OF CRIMINAL INTENT AS TO ALL COUNTS OF ALLEGED CRIMINAL CONDUCT.

It should be noted at the outset that while the appellant's contentions advanced in this brief more directly impact the two counts of aggravated sexual assault, they impact the single count of aggravated kidnapping as well. The single basis for all three counts is the alleged forced sexual acts (aggravated sexual assault) and the alleged forced restraint necessitated therefor (aggravated kidnapping). Thus, the points contended for here, which raise the issues of consent and lack of criminal intent, go both to the prosecutrix's willingness to engage in sexual acts -- therefore no aggravated sexual assault -- and, due to this willingness, an absence of forced restraint -- therefore no aggravated kidnapping.

The factual focal point involved in the instant case is whether the sexual acts engaged in by the prosecutrix and the appellant were forced or consensual. The appellant contends as his defense that they were in fact consensual.

In order to maintain this defense at trial, it was necessary that the appellant be given the opportunity to introduce all

evidence relevant and material to the issue of the prosecutrix's consent, including evidence as to the prosecutrix's reputation for sexual permissiveness and immoral character, evidence as to witnesses' opinions of the prosecutrix's sexual permissiveness and immoral character, evidence of the prosecutrix's sexual habits and customs, and evidence of specific instances of behavior which establish said habits and customs. This opportunity was severely limited, if not entirely thwarted, by the trial court's granting of the prosecution's motion in limine restricting the appellant's scope of examination to what the trial court referred to as the prosecutrix's "general reputation in the community." (Tr. 5) As a direct consequence of this ruling, the appellant was effectively deprived of his defense.

State v. Howard, 544 P.2d 466 (Utah 1975), is the leading Utah case in this area. There the Utah Supreme Court was presented with a factual situation involving an allegation of rape analogous to the instant case. The court found, as is the case here, that the association between the parties involved came about in a sociable and peaceable manner, so that there was a genuine and critical issue as to whether the sexual relations had been consented to. The court then said:

It is in such instances that the probative value of the victim's reputation as to moral character is sufficient to outweigh the negative factors and justify the admission of such evidence. at p. 470

The court based its conclusion in part on the Utah Rules of Evidence, wherein Rule 47 provides:

. . . when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46 . . . (Emphasis added.) at p. 470

As the court further stated, Rule 46 allows for the proof of such a trait by evidence of reputation. Although not directly in issue in Howard and therefore not addressed by the court, Rule 46 also allows for evidence in the form of opinion to prove such a trait. Thus, under the Howard rationale, where consent to sexual relations is at issue in a sexual assault case, both evidence as to the prosecutrix's reputation for sexual morality and evidence in the form of opinion as to the prosecutrix's sexual morality is admissible.

As for the admissibility of opinion evidence on the prosecutrix's sexual morality, it should be emphasized that both the opinions of witnesses and the opinion of the appellant are admissible. Both are of substantial probative value on the issue of the prosecutrix's consent. In addition, the opinion of the appellant is of critical importance in determining the appellant's state of mind during the incidents in question and specifically whether the appellant had formed the necessary criminal intent. If, for example, the prosecutrix made representations to the appellant that gave the impression that she was sexually permissive and the appellant formed this opinion of her, the appellant's opinion would be a critical factor in determining whether he reasonably believed that the prosecutrix was consensually engaging in their subsequent sexual relations and, thus, whether the appellant lacked the

necessary criminal intent to compel the prosecutrix's submission to these relations.

The Utah Supreme Court, in dictum in the Howard case, also referred to the admissibility of specific acts of the prosecutrix. The court stated:

. . . though it is not proper to permit inquiry into specific acts of prior misconduct of the victim, where the critical issue is consent, and the circumstances are such that it reasonably appears that evidence concerning her moral character would have sufficient probative value to outweigh any detrimental aspects of admitting such testimony, it should be admitted.
(Emphasis added.) at p. 469

It is somewhat ambiguous as to whether the court, in saying that "it should be admitted," is making a reference back to the "specific acts" of the prosecutrix or a reference generally to "evidence concerning her moral character." The appellant suggests that the Utah Rules of Evidence, specifically Rules 49 and 50, support the reading of the court's language that would admit, under the limited circumstances specified, evidence of specific acts of the prosecutrix concerning her moral character.

Rule 49 of the Utah Rules of Evidence provides that:

Evidence of habit or custom is relevant to an issue of behavior on a specified occasion, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to the habit or custom. (Emphasis added.)

Rule 50 provides, in relevant part, that:

Evidence of specific instances of behavior is admissible to prove habit or custom . . . (Emphasis added.)

Thus, pursuant to Rule 49, in a sexual assault case, where the issue is the prosecutrix's consent to sexual relations, evidence of the prosecutrix's habitual or customary behavior as to sexual relations should be admissible as tending to prove that the behavior in question conformed to the habit or custom. Furthermore, under Rule 50, evidence of specific instances of behavior should be admissible to establish what the particular habits or customs are.

The appellant contends, in view of the cited language and rationale of Howard and the import of the Utah Rules of Evidence, that the trial court should have permitted the appellant to examine witnesses as to the prosecutrix's reputation for sexual permissiveness and immoral character, examine witnesses as to their opinions of the prosecutrix's sexual morality, examine the appellant as to his opinion of the prosecutrix's sexual morality, examine witnesses and the prosecutrix as to the prosecutrix's sexual habits or customs and examine witnesses and the prosecutrix as to specific instances of behavior establishing said habits or customs. This contention also finds support in the case law of other jurisdictions.

In People v. Battilana, 126 P.2d 923 (Calif. 1942), the California court ruled that:

Evidence of the general reputation of the prosecutrix for unchastity together with specific acts in proof thereof were competent with respect to the two charges of rape, since the defendant admitted having had intercourse with her, but asserted

that she voluntarily submitted to that relationship. (Citations omitted.) (Emphasis added.) p. 929

Similarly, in People v. Hurlburt, 333 P.2d 82 (Calif. 1958), the court restated the California position:

. . . if consent is the issue, as it is in a forcible rape charge, evidence of prior particular acts of unchastity is admissible on the issue of consent. (Citations omitted.) (Emphasis added.) p. 85

A number of other jurisdictions have adopted positions similar to that in California and that contended for here. See, District of Columbia (Matter of JWY, 363 A.2d 674 (D.C. 1976)); Kansas (Interest of Nichols, 580 P.2d 1370 (Kansas 1978)); Kentucky (Sanders v. Commonwealth, 269 S.W.2d 208 (Kent. ____)); Minnesota (State v. Hill, 244 N.W.2d 728 (Minn. 1976)); Nebraska (State v. Tiff, 260 N.W.2d 296 (Neb. ____)); New Mexico (State v. Herrera, 582 P.2d 384 (N.M. 1978)); Tennessee (Guy v. State, 443 S.W.2d 520 (Tenn. 1970)); Texas (Burton v. State, 471 S.W.2d 817 (Texas 1971)); and Virginia (Smith v. Commonwealth, 248 S.E.2d 135 (Virg. 1978)).

In conclusion, as to Point I, the appellant contends that the trial court's granting of the prosecution's motion in limine effectively denied him the opportunity of proving his defense -- that the prosecutrix consented and that he lacked the necessary criminal intent. The appellant further contends that had any or all of the evidence of reputation, opinion, habits or customs, and specific acts been admitted, there is a reasonable likelihood that the verdict rendered by the jury would have been different and that

the trial court's ruling was, therefore, prejudicial and should be reversed.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ERRONEOUSLY DEFINING AND LIMITING THE SCOPE OF REPUTATION EVIDENCE, WHICH ERROR EFFECTIVELY DENIED THE APPELLANT HIS OPPORTUNITY TO EXAMINE THE WITNESSES ON THE PROSECUTRIX'S GENERAL REPUTATION AS TO MORAL CHARACTER.

As stated under Point I, the appellant at trial sought to prove his defense -- the prosecutrix's consent -- but was met by the prosecution's motion in limine which restricted the appellant's examination to what the trial court characterized as the prosecutrix's "general reputation in the community." The trial court, during the course of the trial, enlarged the scope of "general reputation" to include the prosecutrix's reputation as to "sexual morality," but then the court proceeded to erroneously define and limit the scope of reputation evidence so that the appellant was effectively denied the opportunity to examine the witnesses on any aspect of the prosecutrix's reputation.

The following exchange (Tr. 127-129) which took place during the appellant's counsel's examination of a witness, recapped in relevant part, contains the trial court's erroneous definition of and limitation upon the scope of reputation evidence:

Q. (By Ms. Taylor (appellant's counsel at trial))
Had you known her and known of her to the point where you would be able to make a statement with regard to her (the prosecutrix's reputation in the community with regard to sexual behavior? (Emphasis added.)

THE WITNESS: Yes. (Emphasis added.)

- Q. (By Ms. Taylor) And would you state for the jury your knowledge of the reputation that she does have in the community with regard to this?

. . . THE COURT: I think we have to limit it, of course, to the general reputation of as to chastity and sexual morality, as I recall -- are the phrases that are used. So if you want to rephrase your question in that regard.

- Q. (By Ms. Taylor) Would you make a statement with regard to chastity or her morality?

THE COURT: Sexual morality.

MS. TAYLOR: Sexual morality.

(Objection by the prosecution for lack of foundation.)

THE COURT: No. I think we leave it to cross-examination. We feel there's enough foundation. I believe she can give her opinion as to these items.

- Q. (By Ms. Taylor) You do have an opinion?
A. Yes.

THE COURT: As to general reputation we're talking about.

- Q. (By Ms. Taylor) We realize it is your opinion and it is your own. Will you tell the jury what that is, please?
A. I'd rather not. (Emphasis added.)

. . . MR. BOUTWELL (the prosecutor):
She's got to give the opinion of society, not her opinion.
(Emphasis added.)

THE WITNESS: I don't know what the

opinion of society is.

MR. BOUTWELL: There. That's fine. I move to strike anything she's said prior to this in this regard.

THE COURT: The objection will have to be sustained, if she doesn't know what society's opinion is . . .
(Emphasis added.)

Thus, after the witness had testified that she could make a statement as to the prosecutrix's reputation in the community with respect to sexual morality, the trial court, with the help of the prosecution, erroneously defined and limited the scope of reputation evidence to "society's opinion." The witness, clearly not wanting to testify to her friend's (the prosecutrix's) reputation anyway -- as evidenced by her first reply, "I'd rather not" -- then said with apparent relief that she did not know what the "opinion of society" was. It is obvious that the only explanation for the witness' sudden change in first saying that she could make a statement as to the prosecutrix's reputation in the community and later saying that she did not know society's opinion is that the witness perceived a difference between the community and ~~the society~~ as a whole.

It is without question that reputation evidence is not limited to the "opinion of society." As Rule 63 of the Utah Rules of Evidence states, reputation evidence refers to the reputation of the person "in the community in which he resides" or the reputation of the person "in a group with which he habitually associates."

In the instant case, the witness testified that she was

able to give the prosecutrix's reputation "in the community" (Tr. 127) and most likely, as a close friend of the prosecutrix, the witness would also have been able to give the prosecutrix's reputation among close friends or "habitual associates." The erroneous definition, supplied by the prosecution and given effect by the trial court, confused the witness by equating the prosecutrix's community with society as a whole, thereby allowing the witness to escape a difficult situation and not testify to a critical fact that she was indeed qualified and required to testify to. Furthermore, the trial court's definition ignored the fact that reputation evidence may speak to one's reputation in small circles of friends, precluding the witness from testifying to this form of reputation.

In conclusion, as to Point II, the appellant contends that the trial court, in erroneously defining and limiting the appellant's examination into reputation evidence, committed reversible error as had the reputation evidence concerning the prosecutrix's sexual morality been admitted as the Utah Rules of Evidence provide, there is a reasonable likelihood that the jury would have rendered a different verdict.

POINT III

THE TRIAL COURT'S FIRST AND SECOND RULINGS WITH RESPECT TO THE PERMISSIBLE SCOPE OF EXAMINATION CONCERNING THE PROSECUTRIX'S SEXUAL MORALITY WERE INCONSISTENT, CAPRICIOUS AND INHERENTLY UNJUST, THEREBY DEPRIVING THE APPELLANT OF DUE PROCESS OF LAW.

the prosecution's motion in limine which restricted the scope of the appellant's examination concerning the prosecutrix's sexual morality. A second conference in chambers was held during the course of the trial wherein the trial court ruled that evidence of the prosecutrix's predisposition to sodomy may be admitted. (Tr. 6) However, the trial court held steadfast to its earlier granting of the motion in limine and refused admission of similar evidence tending to show the proxecutrix's proclivities toward extramarital sexual intercourse or sexual permissiveness in general. Even though the appellant had been charged with both the offense of forcible sodomy and the offense of forcible sexual intercourse (in the two counts of aggravated sexual assault), the trial court elected to treat evidence negating the element of force as to each offense differently.

The admission of evidence showing a predisposition to one type of sexual activity while prohibiting the same kind of evidence as to the other is illogical and inconsistent and further reflects the trial court's misunderstanding and misapplication of the law. The announcement of such a rule is in effect an arbitrary and capricious interpretation of the Utah Rules of Evidence in violation of the Utah Constitution Article I, Section 24, which provides:

All laws of a general nature shall have uniform operation.

Clearly, there is no uniformity whatsoever in the trial court's allowing evidence negating the force element as to one type of

sexual activity and prohibiting the same evidence as to another type of sexual activity.

The appellant should have been given the opportunity to put forth evidence as to the prosecutrix's inclinations to both types of sexual activity -- sodomy and extramarital sexual intercourse. The trial court's prohibition as to evidence of the latter, given its allowance as to evidence of the former, constitutes reversible error as had the jury been able to hear evidence of the prosecutrix's predisposition to extramarital sexual intercourse and sexual permissiveness in general there is a reasonable likelihood that the jury would have rendered a different verdict finding the prosecutrix's overall consent to the sexual episode.

POINT IV

THE TRIAL COURT'S GRANTING OF THE PROSECUTION'S MOTION IN LIMINE DEPRIVED THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSOR.

Through its granting of the prosecution's motion in limine, the trial court prevented the appellant from presenting crucial evidence which with reasonable likelihood would have altered the verdict. Evidence would have been offered to show the probability of the prosecutrix's consent, and evidence would have been offered to show the appellant's lack of criminal intent. This crucial deprivation was the equivalent of a denial of appellant's right to confront his accuser, a right guaranteed by both the Utah and the United States Constitutions, both explicitly and implicitly, as part of due process.

Article I, Section 12 of the Utah Constitution provides
that:

In criminal prosecutions the accused shall have the right . . . to testify in his own behalf, to be confronted by the witnesses against him

Article I, Section 7 of the Utah Constitution mandates
that:

No person shall be deprived of life, liberty, or property without due process of law.

Similarly, the sixth amendment to the United States Constitution, as incorporated by the fourteenth amendment, requires that in state proceedings:

(t)he accused shall enjoy the right to be confronted with the witnesses against him

As the Utah Supreme Court previously stated in State v. Vasquez, 121 P.2d 903 (Utah, 1942):

The right of confrontation, in a constitutional or bill of rights sense, is more than the dictionary definition, viz., to meet face to face. A trial is more than a meeting of a defendant by witnesses face to face and silently. The confrontation is the meeting of the proof or evidence as understood by the interested parties according to their understanding. at p. 906

The evidence which appellant was prevented from introducing went to his own understanding of what transpired; it went, as well, to the issue of the prosecutrix's consent, that is, to

the veracity of her testimony. Addressing the role of evidence, the Utah Supreme Court has stated in State v. Sibert, 310 P.2d 388 (Utah, 1957):

The function of evidence is to assist the jury in arriving at the truth, and if it has any logical tendency to destroy or support the veracity of the witness, it is relevant to be considered as bearing upon his credibility.
at p. 391-392

Hence, following the formulations of the right to confront one's witnesses as articulated by the Utah Supreme Court and the role of evidence in general, the appellant was denied his constitutional rights as guaranteed by the Utah and United States Constitutions.

CONCLUSION

As evidence critical to the appellant's defense that the prosecutrix consented to the sexual relations and that the appellant lacked the necessary criminal intent, and as evidence whose probative value substantially outweighs any prejudicial effect, the trial court committed reversible error in denying the appellant his opportunity to put forth at trial evidence of the prosecutrix's reputation as to sexual permissiveness and immoral conduct, both in the community and in small circles of friends, evidence as to witnesses' opinions of the prosecutrix's sexual permissiveness and immoral conduct, evidence of the appellant's opinion of the prosecutrix's habits and customs with respect to sexual behavior, and evidence of specific instances of behavior which establish said

habits and customs. In addition, the trial court committed reversible error in its inconsistent rulings as to the admissibility of evidence negating the element of consent as to the offense of forcible sodomy while refusing the same evidence as to the offense of forcible sexual intercourse, denying the appellant due process. Furthermore, the trial court's rulings effectively denied the appellant his constitutional right to confront his accuser.

Wherefore, the appellant seeks to have his convictions reversed or, in the alternative, to have this case remanded for a new trial.

Respectfully submitted,

HANSEN AND HANSEN
250 East Broadway, Suite 100
Salt Lake City, Utah 84111

Attorneys for Appellant

By Phil L. Hansen
Phil L. Hansen

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were served on the office of the Utah State Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 22nd day of May, 1979.

Phil L. Hansen