

1979

# State of Utah v. Myers : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Appellant,

-vs-

EUGENE MYERS,

Defendant-Respondent.

Case No.  
14243

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BRIEF OF APPELLANT  
-----

APPEAL FROM AN ARREST OF JUDGMENT  
JURY VERDICT OF GUILTY OF  
JUDICIAL DISTRICT COURT, IN AND FOR  
LAKE COUNTY, STATE OF UTAH, THE  
BRYANT H. CROFT, UTAH.

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Appellant,	:	
-vs-	:	Case No. 16223
EUGENE MYERS,	:	
Defendant-Respondent,	:	

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

Defendant was charged by information with the  
crime of rape in violation of Utah Code Ann. § 76-5-402.

DISPOSITION IN THE LOWER COURT

Defendant was tried before a jury on December 11  
and 12, 1978, in the Third Judicial District Court in and  
for Salt Lake County, the Honorable Bryant H. Croft, presiding.  
The jury returned a verdict of guilty. At the sentencing  
hearing, Judge Croft arrested the judgment, pursuant to  
Utah Code Ann. § 77-34-1 and 2.

## RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing the trial court's arrest of judgment and ordering the trial court to sentence the defendant pursuant to the verdict of the jury.

## STATEMENT OF THE FACTS

On the morning of May 18, 1978, at approximately 10:00 a.m., defendant approached Susan Delyle and Roberta Fresh, both students with defendant in a paralegal training course, in the parking lot of the Utah Technical College and asked if he could join them for breakfast (Tr. 41), adding that he would buy (Tr. 47). Ms. Delyle and Ms. Fresh drove in Ms. Fresh's car to the Hilton where they met the defendant in the foyer (Tr. 42). After breakfast, defendant offered to buy drinks at the Watergate, a private liquor club (Tr. 43). Defendant, Ms. Delyle, and Ms. Fresh proceeded to the Watergate in Ms. Fresh's car, arriving at the club at approximately 11:00 or 11:30 (Tr. 43). Ms. Fresh left the Watergate at 1:00 to pick up her grandmother from work (Tr. 45), and to change into her work clothes. Ms. Fresh was employed as a cocktail waitress at a club known as the Iron Horse and changed into a black halter dress, mid-thigh length (Tr. 63). Ms. Fresh returned to the Watergate approximately 45 minutes later and joined

defendant and Ms. Delyle. Ms. Fresh and Ms. Delyle remained at the Watergate until 3:30, at which time Ms. Fresh drove Ms. Delyle to the University of Utah for a ballet lesson.

Concerning the approximate four hours that the defendant, Ms. Fresh and Ms. Delyle were at the Watergate, Ms. Delyle testified at the trial that the three of them had lunch and talked (Tr. 46). She further testified that Ms. Fresh never kissed defendant (Tr. 46), and that Ms. Fresh was not intoxicated (Tr. 51).

After taking Ms. Delyle to the University of Utah, Ms. Fresh returned to the Watergate (Tr. 67), and again joined the defendant. At the trial, Ms. Fresh testified that she had one more drink (Tr. 69), and for the remainder of the evening drank water to avoid becoming intoxicated (Tr. 70). Ms. Fresh remained at the Watergate with the defendant until it closed at 1:00 or 2:00 a.m. (Tr. 70). Ms. Fresh further testified at the trial that she and the defendant "talked about law" and danced (Tr. 70). The club manager, Mr. James K. Feraco, testified at trial that he saw Ms. Fresh lying down in respondent's lap (Tr. 174), and that he saw Ms. Fresh and respondent "necking" (Tr. 175).

Defendant and Ms. Fresh left the Watergate and Ms. Fresh testified she thought she was going to take defendant to his car at the Hilton (Tr. 71). Defendant

asked Ms. Fresh to take him instead to the Holiday Inn on North Temple, indicating that he wanted to see someone there (Tr. 73). At the Holiday Inn, defendant directed Ms. Fresh to drive to the back part of the parking lot, claiming his friend had a room in that particular area (Tr. 74). Defendant and Ms. Fresh talked for awhile about law. Defendant told Ms. Fresh that she could make better money doing something other than cocktail waitressing (Tr. 75), indicating that Ms. Fresh could "work" for him as a prostitute (Tr. 121), and that, if she would bestow sexual favors on him, he would reward her financially (Tr. 121). Ms. Fresh testified at the trial that she told defendant she "wasn't interested". (Tr. 76). Defendant then asked Ms. Fresh if her lack of interest had anything to do with the fact that he was Black. She responded that she had "very good friends that are Black" (Tr. 77), and she wanted to "keep it on that level" (Tr. 77), i.e., friends and no more. Defendant became angry (Tr. 77), and yelled at Ms. Fresh calling her derogatory names (Tr. 79). Ms. Fresh was frightened by defendant's behavior and tried to get out of the car (Tr. 81). She grabbed at her keys and tried to open the door. Defendant restrained her, also grabbing at the keys. The key chain broke (Tr. 82), and the keys fell to the floor. Ms. Fresh began to cry and tried once more to get out of the car. Defendant pulled her



back into the car by her hair (Tr. 82). Once again, defendant became angry and called Ms. Fresh offensive names (Tr. 84). At the trial, the following testimony was offered by the victim:

Q. After he pulled you back in by your hair, did he release your hair? Did he grab a hold of you in any way?

A. Yeah, he was sort of fumbling, trying to fondle my breasts and trying to kiss me and he had his arms around me.

Q. Try and describe it and explain it better. He pulled you in by your hair and what did he do after that?

A. Just grabbed me and was, you know--

Q. Was he calling you names while he was fondling you or trying to fondle you?

A. Yes, pretty much the same kind of names.

Q. What parts of your body did he touch?

A. At that point in time, just my chest. One of his hands was at various times on my thigh.

Q. What did you do while he was touching you?

A. Cried and screamed, and "Please don't", you know.

Q. Did you push him or did you shove him or did you do anything?

A. Yeah.

Q. What did you do?

A. Pushed and shoved and screamed.

Q. What areas of Mr. Myers did you push on?

A. Just, I don't know, his shoulders, his arms.

Q. When you say he tried to kiss you, where was he trying to kiss you?

A. My mouth.

Q. He wasn't successful?

A. Yeah.

Q. So what happened after that? He got his arms around you and he has been fondling and trying to kiss you; what happened next?

A. He was making-- he was saying things about he knew that I wasn't sweet and innocent and he thought I should have intercourse with him. And the fondling and the whole bit was still going on.

Defendant then pushed Ms. Fresh down on the seat (Tr. 85), pulled up her dress and removed her pantyhose (Tr. 87). Defendant pinned Ms. Fresh's hands to the seat with his knees and had intercourse with her. Ms. Fresh told the defendant to leave. As he left, he warned her to keep quiet:

A. He started to get out of the car and told me that if I told anyone about it, he would see to it that-- something about my neck wasn't worth a whole lot and he didn't have to do anything other than make a phone call to see to it.

(Tr. 90).

After defendant left, Ms. Fresh drove home. Unable to find her house key and afraid to awaken and upset her grandparents with whom she lived (Tr. 91), Ms. Fresh drove to a 7-11 Store nearby and called her girlfriend Julie Erickson who told her to come over. Ms. Fresh arrived at her friend's house at approximately 4:45 a.m. and was met at the door by Julie Erickson and her husband, Louie Muniz. At the trial, Ms. Erickson testified that Ms. Fresh was crying and her face and eyes were swollen; her dress was

ripped, "the entire front of her dress was torn open"; "a large strip of hair was missing out of the back of her head" (Tr. 134); and she had "red marks" on her arm (Tr. 135). Mr. Muniz, Ms. Erickson's husband, testified at trial that Ms. Fresh "looked like she had been roughed up a little bit. Her dress was torn; her hair was kind of messed up, had some markings on her arms" (Tr. 142). Ms. Erickson called the police and the Rape Crisis Center (Tr. 137). In response to Ms. Erickson's call, one James Harrison, a police officer employed by Salt Lake City Corporation, arrived at the Erickson residence. Officer Harrison testified at trial that Ms. Fresh told him she had resisted the defendant and tried to get out of the car two times (Tr. 171). Officer Harrison accompanied Ms. Fresh to Holy Cross Hospital where she was examined by Dr. John Geszon.

Dr. Geszon testified that he found "several areas of bruising and scratches" (Tr. 28), and "a tan milky fluid specimen in the vagina" upon examining Ms. Fresh. Dr. Geszon performed two tests to determine the presence of sperm in Ms. Fresh's vagina: The first test, called a "wet mount" was performed and no evidence of sperm was present (Tr. 34); however, the results of the second test, called a "grandstand", showed evidence of sperm in the vagina.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN ARRESTING JUDGMENT PURSUANT TO UTAH CODE ANN. § 77-34-1, ET SEQ. BECAUSE THE FACTS PROVED AT TRIAL CONSTITUTE A PUBLIC OFFENSE AND ARE SUFFICIENT TO SUSTAIN THE JURY'S VERDICT OF GUILTY.

Utah Code Ann. § 77-34-1, et seq. provides that a motion in arrest of judgment can be made by the defendant in a criminal action and that the motion may be based, among other things, upon the ground that the facts proved do not constitute a public offense. The statute further provides that the court on its own view of any defects, can arrest the judgment without motion.

At the sentencing hearing in this case, the trial court arrested the judgment pursuant to the above statute. While appellant concedes that the trial court has the power to arrest judgment in appropriate cases, the State contends that the reasons the trial court arrested the judgment in this case were insufficient and that the decision to arrest judgment was an abuse of discretion.

Appellant's contention that the trial court's conduct was an abuse of discretion is based on the facts here and case law. A review of the facts shows that the major weakness in the trial court's decision

was that the judge arrested judgment because of his own determination of the credibility of witnesses. For example, Judge Croft, addressing the conflicting testimonies of the victim and the club manager stated at the sentencing hearing that "I think her [the victim's] credibility leaves something to be desired because I don't think that the manager of the club would come in and testify to those facts if they weren't in fact true." (Tr.p.110). At that point the trial judge invaded the jury's exclusive province to evaluate the credibility of witnesses and determine the weight of evidence.

The standard for passing on a motion made by the defednant for arrested judgment requires that the trial court may not weigh the evidence to determine whether the necessary quantum has been produced to establish some proof of an element of the crime; the trial court may only test or examine the legal sufficiencies thereof because the jury is the sole and exclusive judge of the weight of the evidence and of credibility of witnesses. State v. Randecker, 487 P.2d 1295 (Wash. 1971).

In Randecker, the defendant was found guilty of second degree forgery and grand larceny by embezzlement. The trial judge granted a motion in arrest of judgment and the State appealed. The Supreme Court of Washington held that there was substantial evidence from which the jury could reasonably have concluded there was sufficient proof of the crime and that the motion in arrest of judgment should not have been granted. The Randecker Court stated:

. . . the [trial] court is only empowered to determine whether there is "substantial evidence" tending to establish circumstances on which a necessary element of a crime may be predicated. However, whether the circumstances tending to connect the defendant with the crime, or tending to establish intent exclude, to a moral certainty, every other reasonable hypothesis than that of the defendant's guilt, is again a question for the jury. [Citations omitted.]

Id. at 1299 (emphasis added).

The court went on to state:

The fact that a trial or appellate court may conclude the evidence is not convincing or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute on negative guilt, or to cast doubt thereon does not justify the court's setting aside the jury's verdict. [Citations omitted.]

Id. at 1299 (emphasis added).

Thus, it is unnecessary, even irrelevant, for the trial court to be satisfied of the defendant's guilt beyond a reasonable doubt. It is only necessary for it to be satisfied that there is "substantial evidence" to support either the State's case or the particular element in question. When that quantum of evidence has been presented, there is some proof of the element of crime in question and an arrest of judgment should not be granted.

In this case the testimony at trial establishes the facts sufficient to constitute a public offense. Yet Judge Croft chose to disregard the facts presented at trial--chose to reject the jury's conclusions as to the evidence and the credibility of witnesses--and made the following statement at the sentencing hearing:

There isn't anybody in this courtroom that will ever live to see a more invited rape, if there was a rape, than is evidence in this case.

Tr. at 108.

In a recent Colorado case, the defendant was charged with felony menacing and impersonating a police officer. The court granted the defendant a judgment of acquittal notwithstanding the verdict of the jury. The Supreme Court of Colorado held in People v. Noga, 586 P.2d 1003 (Colo. 1978), that the standard for upsetting a jury verdict is very strict and the trial judge may

never invade the province of the jury. Thus, where conflicting evidence required a determination of guilt based entirely upon whose story to believe, the Noga court stated:

. . . if a determination of the defendant's guilt rests upon the credibility of witnesses or the weight to be accorded evidence, the case must be submitted to the jury, for these matters are solely within its province.

Id. at 1003.

In this case, the only testimony that contradicted the testimony of the victim was that of the club manager, Mr. Feraco. Whether the jury believed his testimony or that of the victim and other state witnesses, the jury acted within its sole province in assessing the credibility of the witnesses to reach a decision.

The trial court in this case did not leave the matter of credibility of witnesses or determination of the weight of the evidence to the jury. (Only in cases where the judge tries a case without a jury can he pass on the credibility of witnesses. DeVas v. Noble, 369 P.2d 290 (Utah 1962).) Instead, based on the trial judge's disbelief of the victim's testimony, the court chose to override the jury verdict and arrest judgment.



. . . as a judge of this court, I cannot close my eyes to the fact situation that for this long period during that day these two people were in friendly contact [and] association, necking with each other and participating in the kind of activity that ultimately might well lead to sexual relations.

Tr. at 113.

Judge Croft further discredited the testimony of the victim and stated:

. . . If she [the victim] had been able to get into her grandmother's home, I wonder whether or not we would have heard anything about this case. I doubt it.

Tr. at 113.

Judge Croft ignored the evidence presented at trial. He ignored the facts which were undisputed of the medical examination results and the testimony of Dr. John Geszon. He discredited as unbelievable the testimony of Susan DeLyle, Julie Ericson, Louis Muniz and the victim herself.

Judge Croft decided that the jury verdict could not stand:

But sometimes juries [sic] make mistakes, just as judges make mistakes when we have to render judgments in cases we try without a jury. None of us are perfect. And I think that the jury verdict in this case left much to be desired from a point of view of justice under the facts and circumstances of the case.

Tr. at 114 (emphasis added).

Appellant asserts that the trial court's action in arresting judgment was an abuse of discretion and should be vacated by this Court.

A.

THE EVIDENCE IS  
SUFFICIENT TO SUPPORT THE  
CONVICTION OF RAPE.

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.

Appellant avers that the evidence adduced at the trial is sufficient to support the verdict of the jury and thus the trial court's arrest of judgment was improper and an abuse of discretion.

The standard used to review the sufficiency of evidence was established in State v. Ward, 347 P.2d 865 (Utah 1959):

The rules governing the scope of review on appeal as to the sufficiency of the evidence to sustain the verdict are well settled: That it is the prerogative of the jury to judge the credibility of the witnesses and to determine the facts; that the evidence will be renewed in the light most favorable to the verdict, and that if

when so viewed it appears that the jury acting fairly and reasonably guilty beyond a reasonable doubt, the verdict will not be disturbed.

Id. at 869 (emphasis added).

This Court reiterated that general rule in a recent case, State v. Sharp, \_\_\_ P.2d \_\_\_ (Utah 1979), and added that "the question of which testimony is to be believed is for the trier of fact and this Court will not substitute its own judgment for that of the jury unless it is clear that the testimony given is completely unbelievable." (Emphasis added.) Citing State v. Middelstadt, 579 P.2d 908 (Utah 1978), and State v. Wilson, 565 P.2d 66 (Utah 1977). The standard for the trial court, however, does not look at whether a reasonable person could find the defendant guilty beyond a reasonable doubt, but only must determine if there is sufficient evidence to establish some proof of an element of the crime. Thus, in passing on a defendant's motion in arrest of judgment or on its own motion, the Court cannot weigh the evidence to determine whether the necessary quantum has been produced because this would invade the province of the jury to judge the weight of the evidence; the trial court can only test the legal sufficiency of the evidence. Thus, if substantial evidence exists as it does in this case,

whether the "circumstances tending to connect the defendant with the crime or tending to establish intent exclude, to a moral certainty every other reasonable hypothesis than that of the defendant's guilt" is not for the trial judge to determine--it is strictly a question for the jury. See State v. Randeck: supra.

The most pertinent issue in judging the sufficiency of the evidence in this case is consent. 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, supra, 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).

A usual occurrence in the trial of a rape case is that the defendant's version of what occurred differs significantly from the evidence presented by the State. In such a situation, this Court has in the past accepted the assumption that the jury believed that which supports their verdict. See State v. Wilcox, 28 Utah 2d 71, 498 P.2d 357 (1972); State v. Siddoway, 61 Utah 189, 211 Pac. 968 (1922).

In its instructions to the jury, the trial court submitted Instruction No. 10 (Record, p. 79), which explained "without consent" as defined by statute; Instruction No. 12 (Record p. 81), which enumerated the four elements of the crime of rape which the State must prove beyond a reasonable doubt. "Reasonable doubt" was defined by this Court in State v. Williamson, 22 Utah 245, 62 Pac. 1022 (1900), as:

. . . not a mere imaginary, captious, or a possible doubt, but a fair doubt, based upon reason and common sense, and growing out of the testimony of the case. It is such a doubt as will leave the juror's mind, after careful examination of all the

evidence in such condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt.

Id. at 1024.

There is a presumption that the jury will follow the instructions given to them by the court. In this case, appellant submits the jury weighed the evidence according to the instructions given.

To best establish the sufficiency of the evidence it is necessary to explore all elements of the crime.

As to the first element, that respondent had sexual intercourse with the victim, not his wife, the following evidence was introduced at trial: the victim testified that respondent had intercourse with her (Tr.p.87); the victim's friend, Julie Erickson, testified that the victim told her that respondent forced her to intercourse (Tr.p.134). Mr. Erickson's husband, Louis Muniz, testified that he had been told by the victim that she had been raped (Tr.p.142); and the testimony of Dr. John Geszon, who testified as to the results of the tests which indicated that intercourse had occurred as to the condition of the victim's body.

No evidence was presented nor any defense raised that the victim was respondent's wife.

The next element is that such act of sexual intercourse occurred without the consent of the victim. To prove the element of lack of consent, the following evidence was presented at trial: the testimony of the victim that she tried on two occasions to get out of the car (Tr.p.82); that respondent tore at her clothes and pinned her arms down so she could not move (Tr.p.84); that she screamed and yelled (Tr.p.84); Dr. Geszon's testimony as to the bruises, contusions, etc. on the victim's body; and the testimony of those persons who had contact with the victim soon after the rape occurred: the testimony of Julie Erickson that the victim told her she had been raped (Tr.p.134); the testimony of Louie Muniz that the victim was upset and crying and looked roughed up and had a chunk of hair missing from the back of her head (Tr.p.142); and the testimony of the police officer who escorted the victim to the hospital (Tr.p.171).

Recently, in State v. Studham, 572 P.2d 700 (Utah 1977), this Court held that the evidence was sufficient to establish the use of force and the absence of consent. In Studham, the prosecutrix and defendant had lived together at one time. One night the defendant

knocked on the prosecutrix's door but she refused to let him in. He kicked the door open and remained in the prosecutrix's apartment for about two hours, during which time there was "some kissing and amorous advances." At the trial the prosecutrix testified that the defendant pinned her to the floor during a struggle and "forced intercourse upon her against her will." The prosecutrix did not scream or attempt to run; her only visible injuries were a bruised face and cut lip. The defendant argued on appeal that the evidence was insufficient to prove his guilt beyond a reasonable doubt and that the evidence is "inherently improbable and inconsistent," because, although the victim claims force and denies consent she did not scream or try to escape. In rejecting the defendant's argument in Studham, this Court rejected the traditional requirement that the woman "must resist to the utmost" and stated:

Even though it is necessary that the rape be against the victim's will, manifest by a determined effort on her part to resist, it is not necessary that it be shown that she engaged in any heroics which subjected her to great brutality or that she suffered or risked serious wounds or injuries (citing State v. Ward, supra).

Id. at 702.



See also State v. Horne, 364 P.2d 109 (Utah 1961).

The Court went on to establish a new standard to determine the issue of consent:

What we think is a sounder view recognizes that the bruising and terrorizing of the sense and sensibilities can be just as real and just as wrong as the beating and bruising of the flesh; and that the law should afford a woman protection, not only from physical violence, but from having her feelings and sensibilities outraged by force or fear in violation of what she is entitled to regard and protect as the integrity of her person. Accordingly, in determining whether the victim's will and resistance were overcome, it is appropriate to consider that this may be accomplished by either physical force and violence, or by psychological or emotional stress imposed upon her, or by a combination of them. As to the degree of resistance required: The victim need do no more than her age and her strength of body and mind make it reasonable for her to do under the circumstances to resist. In this case there is a reasonable basis in the evidence upon which the jury could believe beyond a reasonable doubt that the test was met.

Thus, the most critical elements of the crime charged, (1) that intercourse did occur with a woman not his wife and (2) that it was without the victim's consent, are adequately supported by the facts

and evidence introduced at trial. The conflicting testimony presented by the club manager that the victim and respondent were necking does not constitute consent.

In State v. Studham, supra, the Court refers to the "kissing and amorous advances" that occurred prior to the rape. Yet this behavior does not invite the act nor imply consent.

Appellant submits that the evidence adduced at trial is sufficient to sustain the conviction of the respondent.

B.

THE VICTIM'S TESTIMONY  
ALONE, IF NOT UNREASONABLE, IS  
SUFFICIENT TO SUPPORT THE CON-  
VICTION OF RESPONDENT.

In many crimes, the only two persons who can testify about what actually occurred are the victim and the perpetrator. It is natural that each version of what occurred is significantly different. Nevertheless, many courts have noted that in cases of sexual abuse or assault, the testimony of the victim alone is sufficient to support a conviction.

The Arizona Supreme Court has held in State v. Williams, 111 Ariz. 175, 526 P.2d 714 (1974), 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.

Id. at 716-717.

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 the case of State v. Studham, 572 P.2d 700 (Utah, 1977), this Court stated that where the question of guilt or innocence depends upon weighing the credibility of the victim against that of the accused:

The rule is that if there is nothing so inherently incredible about the victim's story that reasonable minds would reject it, a conviction may rest upon her testimony alone.

Id. at 702.

See also, State v. Ward, 10 Utah 2d 34, 347 P.2d 867 (1959), and State v. Mills, 530 P.2d 1272 (Utah 1975).

In a recent Wyoming case, Brown v. State, 581 P.2d 189 (Wyo. 1978), the Supreme Court of Wyoming sustained a conviction of rape on the uncorroborated testimony of the prosecutrix. In Brown, after the prosecutrix and defendant had enjoyed a pleasant dinner together, the prosecutrix asked the defendant to take her to her car. The defendant told her they were "going to Harry's for awhile." The prosecutrix told defendant she couldn't stay long. The defendant grabbed her arm and pulled her over to him. On arriving at Harry's, the defendant pulled her from the car; inside the house he pushed her into one of the bedrooms. The defendant started tearing at her clothes and pulling at her panty hose and underwear. The prosecutrix asked him to stop, but he did not. Not unlike this case, the prosecutrix testified at trial that "she does not have any idea or memory of how he got off her dress (Tr.p.125), and further, that "she did not scratch, bite, or kick him" because she was afraid for her life. The bruises on the prosecutrix' body were, as here, minimal, but the doctor who examined

her found her "very emotionally upset and very distraught." The Court determined that the tears in the dress and pantyhose, together with the bruises and scratches and her emotional condition could not be ignored in evaluating the evidence. The court differentiated between submission and consent and stated that "acquiescence is not consent if induced by fear or reasonable apprehension of bodily harm." In the instant case, the victim testified that she told the respondent to stop (Tr.p.85), but that he did not do so, telling her that she would enjoy it (Tr.p.87 ).

The testimony of the victim is not uncorroborated: the testimony of Dr. Geszon about her bruises and scratches (Tr.P. 28), and the positive results of the tests to determine the presence of sperm; the testimony of Julie Erickson, Louie Muniz, and Officer Harrison as to the victim's emotional state; the evidence of the torn dress and ruined pantyhose all corroborate the commission of a rape.

Appellant submits that the testimony of the prosecutrix is not unreasonable and, corroborated by the testimony of Dr. Geszon, Julie Erickson and Louie Muniz, together with the torn dress and pantyhose is sufficient to sustain the verdict of the jury and should not have been rejected by the trial judge.

C.

IT IS THE EXCLUSIVE PROVINCE  
OF THE JURY TO DETERMINE THE  
CREDIBILITY OF WITNESSES.

It is well-settled in Utah that it is the prerogative of the jury to weigh the evidence and determine the credibility of witnesses. See State v. James, 89 P.460 (Utah 1907); State v. Green, 911 P.987 (Utah 1908). The jury may accept or reject all or any part of the witness' testimony. People v. Gardner, 530 P.2d 496 (Colo. 1975).

In this case, the jury received instructions regarding the criteria to be used in judging the credibility of witnesses (see Instruction No. 3, Record p. 72). Using the instructions given them, the jury concluded that the testimony of the prosecutrix was convincing and credible; that the corroborative testimony of Julie Erickson and her husband, Louis Muniz, were believable, and that the testimony of the doctor as to his findings on examination of the victim supported the allegation of rape made by the prosecutrix and proved by the State.

When evidence is conflicting, as between the testimony of the club manager and the prosecutrix, as to events which did or did not occur, the jury as fact finder has the duty to decide who to believe. State in Interest of M \_\_\_\_\_ S \_\_\_\_\_, 584 P.2d 914 (Utah, 1976). There is substantial evidence in the trial record for the jury to

conclude that the prosecutrix's allegations were true and thus reach a verdict of guilty.

In State v. Harless, 459 P.2d 210 (Utah, 1969), this Court held the evidence sufficient to sustain a conviction for rape and reviewed the record with the assumption that the jury believed those aspects of the evidence which supported their verdict. In Harless, as in the instant case, the issue of consent was paramount: the defendant claimed that the alleged force occurring in such a restrictive space (inside the car) was not "only inherently improbable, but physically impossible." The Court recognized that neither the victim nor the jury saw the facts in the same light as did the defendant and stated:

. . . it is their [the jury's] exclusive prerogative to judge the credibility of the evidence and to determine the facts; and we do not regard the evidence given and the verdict rendered as being so inherently improbable that no reasonable minds could so believe, in which event we do not disturb them.

(Citations omitted) (emphasis added).

Likewise, the trial court should not have arrested judgment solely because the trial judge disagreed with the conclusions reached by the jury.

Appellant submits that the trial court erred in arresting judgment based on the judge's personal opinion of the credibility of witnesses, since that responsibility is the exclusive province of the jury.

## POINT II

THE DOUBLE JEOPARDY CLAUSE IS  
NOT A BAR TO THE IMPOSITION OF SENTENCE  
PURSUANT TO THE VERDICT OF THE JURY.

The underlying premise of double jeopardy is that a defendant should not be twice tried or punished for the same offense. Where there is no threat of multiple prosecution the double jeopardy clause is not offended. See State v. Allen, 557 P.2d 176 (Ariz. 1976).

The United States Supreme Court in United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), discusses the history and principles of the double jeopardy clause. In Wilson, the defendant was found guilty by a jury of converting union funds in violation of a federal statute. The Court dismissed the indictment on a post verdict motion. The United States Supreme Court held that when a judge rules in favor of the defendant after a guilty verdict has been returned by the trier of fact, the government may appeal without contravening the double jeopardy clause, since if the government prevails the effect would be to reinstate the guilty verdict and there will not be a second trial. The Wilson Court stated:



Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and submits him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

Id. at 1023.

The Oklahoma Court of Criminal Appeals in a recent Oklahoma case, State v. Robinson, 544 P.2d 545 (Okla. 1975), stated that an appeal from an order arresting judgment may be received by an appellate court and "if the trial court's order arresting judgment is incorrect, the appellate court may direct the trial court to vacate the order in arrest of judgment and sentence the defendant in accordance with the law or the verdict of the jury." The court went on to state:

The order in arrest of judgment does not operate to discharge the defendant nor prohibit pronouncement of judgment and sentence.

Id. at 549.

Appellant asserts that the granting of an arrest of judgment in this case does not operate as an acquittal but only places the defendant in the same situation he was prior to the prosecution of his case;

and the double jeopardy clause is not offended.

If the relief which appellant seeks on appeal pursuant to Utah Code Ann. § 77-39-4 (1953), is denied by this Court, the State will not be permitted to bring a second prosecution against respondent for the same offense, because there would be two trials and two times in jeopardy; however, if appellant prevails on appeal, then the case must go back to the District Court for sentencing pursuant to the verdict of the jury. Regardless of the result, the double jeopardy clause is not a bar to the State's appeal in this case. Respondent would not be tried nor punished twice for the same offense; the judgment of guilty as determined by the jury will cease to be arrested and will be reinstated so that the respondent may be sentenced in accordance with the verdict of the jury.

#### CONCLUSION

Appellant asks this Court to vacate the arrest of judgment ordered in the trial court and reinstate the jury verdict so that the respondent may be sentenced pursuant to statute.

Respectfully submitted,

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