

1998

Provo City Corporation v. David G. Cannon : Brief of Appellant

Utah Court of Appeals

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Vernon \"Rick\" Romney; Counsel for Appellee.

Thomas H. Means; Aldrich, Nelson, Weight and Esplin; Counsel for Appellant .

Recommended Citation

Brief of Appellant, *Provo City Corporation v. Cannon*, No. 981194 (Utah Court of Appeals, 1998).

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IN THE UTAH COURT OF APPEALS

PROVO CITY CORPORATION,

Plaintiff/Appellee,

vs.

DAVID G. CANNON,

Defendant/Appellant.

Case No. 981194-CA

Priority No. 2

981194-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,
PROVO DEPARTMENT, FROM A CONVICTION OF CHILD ABUSE,
A CLASS A MISDEMEANOR, BEFORE THE HONORABLE GARY D. STOTT

VERNON "RICK" ROMNEY
Deputy Provo City Attorney
P.O. Box 1849
Provo, Utah 84603

Counsel for Appellee

THOMAS H. MEANS (2222)
Aldrich, Nelson, Weight & Esplin
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200
Telephone: (801) 373-4912

Counsel for Appellant

FILED

JAN 19 1999

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IN THE UTAH COURT OF APPEALS

PROVO CITY CORPORATION,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 981194-CA
vs.	:	
	:	
DAVID G. CANNON,	:	Priority No. 2
	:	
Defendant/Appellant.	:	
	:	

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2) (e) (1992 as Amended).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in finding that Utah Code Annotated Section 76-5-109 does not require physical impairment to a child before an individual can be convicted of child abuse? Statutory interpretation is a question of law reviewed for "correctness" with no particular deference accorded to the trial court. State v. Fixel, 945 P.2d 149, 151 (Utah App. 1997).

This issue was preserved during argument at trial (R. 41 at 22-24).

CONTROLLING STATUTORY PROVISIONS

The text of Utah Code Annotated Section 76-5-109 is set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

David G. Cannon appeals from a conviction of Child Abuse, a Class A misdemeanor, in violation of Utah Code Annotated Section 76-5-109.

B. Course of Proceedings and Disposition in Trial Court

Cannon was charged by Information with Child Abuse, a Class B misdemeanor, in Fourth District Court, Provo Department, on or about January 7, 1997 (R. 1). On January 23, 1998, a bench trial was held before the Honorable Gary D. Stott, at which Cannon was convicted of Child Abuse, a class A misdemeanor (R. 20, 41). On March 23, 1998, Cannon was sentenced to 80 days in the Utah County Jail and ordered to pay a \$740.00 fine (R. 26). The sentence was stayed pending appeal (Id.). On March 25, 1998, Cannon filed a notice of appeal and this action commenced (R. 38).

STATEMENT OF RELEVANT FACTS

In March of 1996 Cannon and his wife lived in a third floor apartment located approximately at 401 North 900 East in Provo

(Tr. at 4-6). Angel Ivins and Penny Cooper also lived in the same apartment complex on the second floor (Tr. at 4-6, 11-12).

On the afternoon of March 13, 1996, Ivins was standing on her doorstep and she observed Cannon's wife, Cami, come down to the second floor to get some mail (Tr. at 6). At this time Ivins observed Cannon on the third floor approximately fifteen to twenty feet away (Tr. at 7). Ivins testified that she observed Cannon holding Christine Armstrong's eight or nine month-old child over the third story rail (Tr. at 8). Cannon was holding the child underneath his armpits (Tr. at 9). Ivins testified that she then heard Cannon's wife tell him to "stop" and Cannon removed the child from over the rail (Tr. at 9).

On the afternoon of March 13, 1996, Penny Cooper was likewise standing in front of her second story apartment (Tr. at 13). Cooper testified that she observed Cannon on the third floor approximately twenty to twenty-five feet from Cooper (Tr. at 13). Cooper testified that she also saw Cannon hold the baby over the rail for "just a few minutes" (Tr. at 14). Cooper also testified that Cannon's wife was standing by her and that when Cami told Cannon to "stop", he stopped and pulled the baby towards him (Tr. at 15). Cooper testified that the baby looked scared (Tr. at 16). Cooper testified that she didn't "know if [Cannon] thought it was a joke" but that she "just didn't agree with what [she] saw" (Tr. at 14).

SUMMARY OF ARGUMENT

Cannon held a nine month-old child over a third story railing for a few moments. The child received no injuries or physical impairment. Cannon was convicted of child abuse, a class A misdemeanor, because the trial court interpreted Utah Code Annotated Section 76-5-109 to prohibit any act by the defendant which could conceivably have imperiled the child's health or welfare. Cannon asserts that this interpretation is in error and that the statute requires, at the very least, that the child's physical condition be impaired by the defendant's conduct.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS INTERPRETATION OF UTAH CODE ANNOTATED SECTION 76-5-109 AND THAT ERRONEOUS INTERPRETATION RESULTED IN CANNON'S CONVICTION

Cannon was charged with Child Abuse, a class A misdemeanor, in violation of Utah Code Annotated Section 76-5-109. At trial the evidence established that for a few minutes Cannon held a nine month-old baby over the third story railing of an apartment complex before being instructed to stop, which he did (Tr. at 4-9, 13-16). One witness also testified that the baby looked scared (Tr. at 16).

At trial, Cannon argued that he should be acquitted because the plain language of Section 76-5-109 requires that he must have inflicted a physical injury upon the baby in order to be convicted of child abuse (Tr. at 22). The City argued that Cannon need only create a condition which "imperils the child's health or welfare" in order to be guilty of child abuse (Tr. at 22-23).

The trial court adopted the City's position holding that "physical injury" can include any condition which could conceivably imperil the child's health or welfare (Tr. at 24). Accordingly, because placing the child over the railing could have imperiled his health or welfare, the trial court convicted Cannon of child abuse and sentenced to 80 days in jail (Tr. at 24; R. 26).

Cannon asserts that the trial court erroneously interpreted Utah Code Annotated Section 76-5-109's requirement of "physical injury" and that erroneous interpretation resulted in his conviction. Issues of statutory interpretation are reviewed for correctness with no deference accorded the trial court. State v. Fixel, 945 P.2d 149, 151 (Utah App. 1997). Moreover, on issues of statutory construction, this Court should look first to the "plain language" of the statute. State v. Winward, 907 P.2d

1188, 1190 (Utah App. 1995) (citations omitted). In addition, "each term in a statute should be interpreted according to its usual and commonly accepted meaning." State v. Paul, 860 P.2d 992, 993 (Utah App. 1993).

Utah Code Annotated Section 76-5-109(3) states that "any person who inflicts upon a child physical injury... is guilty of an offense as follows: (a) if done intentionally or knowingly, the offense is a class A misdemeanor; (b) if done recklessly, the offense is a class B misdemeanor; (c) if done with criminal negligence, the offense is a class C misdemeanor." Therefore, the requisite statutory elements for child abuse are criminal intent coupled with the infliction of physical injury upon a child.

Utah Code Annotated Section 76-5-109(1)(b) defines "physical injury" as "an injury to or condition of a child which impairs the physical condition of the child, including: (i) a bruise or other contusion of the skin; (ii) a minor laceration or abrasion; (iii) failure to thrive or malnutrition; or (iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in this section."¹

In State v. Paul, 860 P.2d 992 (Utah 1993), the defendant,

¹An individual who inflicts "serious physical injury" on a child is guilty of either a second degree felony, third degree felony, or class A misdemeanor depending upon the requisite criminal intent. Utah Code Annotated Section 76-5-109(2).

while an inmate in the Salt Lake County Jail, allegedly spit on a correctional officer and was charged with assault on a correctional officer. This Court affirmed the trial court's dismissal of the charge because the statute in question required that the inmate "throw" material at the officer and the plain meaning of "throw" does not include spitting.

Similarly, Utah Code Annotated Section 76-5-109(3) requires the infliction of a physical injury upon a child prior to a conviction of child abuse. Utah Code Annotated Section 76-5-109(1)(b) defines "physical injury" as some injury which "impairs the physical condition of the child." *Merriam Webster's Collegiate Dictionary, Ninth Edition* defines "condition" as "a state of being" or "a defective state of health" (p. 240); and it defines "to impair" as "to damage or make worse by" (p. 581). Cannon asserts that these definitions are the most commonly accepted meanings of these terms and that this Court should interpret Utah Code Annotated Section 76-5-109 accordingly.

The trial court erred, Cannon asserts, in holding that the plain language of Utah Code Annotated Section 76-5-109 did not require an actual impairment to the child's physical condition and that any act of the defendant which could have conceivably affected the child's health or welfare was sufficient to convict an individual of child abuse. In this case there was no evidence

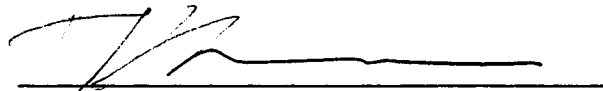
presented at trial which established any physical injury to the child or any impairment to the physical condition of the child.

Accordingly, Cannon asks that this Court hold that the trial court's interpretation of Utah Code Annotated Section 76-5-109 was in error and that his conviction should be reversed.²

CONCLUSION AND PRECISE RELIEF SOUGHT

Cannon asks that this Court reverse his conviction for child abuse because his conduct did not result in either physical injury to the child nor was the child's physical condition impaired by his conduct.

DATED this 19 day of January, 1999.



THOMAS H. MEANS
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Brief Of Appellant to Rick Romney, Deputy Provo City Attorney, P.O. Box 1849, Provo, Utah 84603 this 19 day of January, 1999.



²In the alternative, Cannon asks that this Court find that Cannon's conduct was at most, "reckless" and more probably "negligent" and that his conviction should be reduced to a class B or C misdemeanor.

ADDENDA

(2) Under Subsection (1) any activity as described upon which the initiation, admission into, affiliation with, or continued membership in an organization is directly or indirectly conditioned is presumed to be "forced."

(3) An actor who recklessly, knowingly, or intentionally hazes another is guilty of a:

- (a) class B misdemeanor if there are no aggravating circumstances;
- (b) class A misdemeanor if the act of hazing involves the operation or other use of a motor vehicle;
- (c) third degree felony if the act of hazing involves the use of a deadly or dangerous weapon;
- (d) third degree felony if the hazing results in serious bodily injury to a person; or
- (e) second degree felony if hazing under Subsection (d) involves the use of a deadly or dangerous weapon.

(4) A person who in good faith reports or participates in reporting of an alleged hazing is not subject to any civil or criminal liability regarding the reporting.

History: C. 1953, 76-5-107.5, enacted by L. 1989, ch. 59, § 1.

76-5-108. Protective orders restraining abuse of another — Violation.

Any person who has been restrained from abusing or contacting another or ordered to vacate a dwelling or remain away from the premises of the other's residence, employment, or other place as ordered by the court under a protective order or ex parte protective order issued under Title 30, Chapter 6, or Title 78, Chapter 3a, who violates that order after having been properly served with it, is guilty of a class A misdemeanor.

History: C. 1953, 76-5-108, enacted by L. 1979, ch. 111, § 10; 1984, ch. 12, § 1; 1991, ch. 75, § 4; 1993, ch. 137, § 12.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "or contacting another or ordered to vacate a dwelling or remain away from the premises of the other's residence, employment, or other place

as ordered by the court under" for "another, or who has been ordered to vacate a dwelling by," inserted "or ex parte protective order," and made a minor stylistic change.

The 1993 amendment, effective May 3, 1993, substituted "class A misdemeanor" for "class B misdemeanor."

76-5-109. Child abuse.

(1) As used in this section:

- (a) "Child" means a human being who is 17 years of age or less.
- (b) "Physical injury" means an injury to or condition of a child which impairs the physical condition of the child, including:
 - (i) a bruise or other contusion of the skin;
 - (ii) a minor laceration or abrasion;
 - (iii) failure to thrive or malnutrition; or
 - (iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in this section.
- (c) "Serious physical injury" means any physical injury or set of injuries which seriously impairs the child's health, or which involves physical

torture or causes serious emotional harm to the child, or which involves a substantial risk of death to the child, including:

- (i) fracture of any bone or bones;
- (ii) intracranial bleeding, swelling or contusion of the brain, whether caused by blows, shaking, or causing the child's head to impact with an object or surface;
- (iii) any burn, including burns inflicted by hot water, or those caused by placing a hot object upon the skin or body of the child;
- (iv) any injury caused by use of a deadly or dangerous weapon;
- (v) any combination of two or more physical injuries inflicted by the same person, either at the same time or on different occasions;
- (vi) any damage to internal organs of the body;
- (vii) any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function;
- (viii) any injury which creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ;
- (ix) any conduct which causes a child to cease breathing, even if resuscitation is successful following the conduct; or
- (x) any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life.

(2) Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:

- (a) if done intentionally or knowingly, the offense is a felony of the second degree;
- (b) if done recklessly, the offense is a felony of the third degree;
- (c) if done with criminal negligence, the offense is a class A misdemeanor.

(3) Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows:

- (a) if done intentionally or knowingly, the offense is a class A misdemeanor;
- (b) if done recklessly, the offense is a class B misdemeanor;
- (c) if done with criminal negligence, the offense is a class C misdemeanor.

(4) Criminal actions under this section may be prosecuted in the county or district where the offense is alleged to have been committed, where the existence of the offense is discovered, where the victim resides, or where the defendant resides.

History: C. 1953, 76-5-109, enacted by L. 1981, ch. 64, § 1; 1992, ch. 192, § 1.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, subdivided and rewrote Subsection (1)(b), substituting the present language for former similar provisions and transferring the rest to Subsection (1)(c); in Subsection (1)(c), designated the existing provisions as Subsection (1)(c)(viii), except for a

reference to "substantial risk of death" now in the introductory language, and added the rest of the subsection; in Subsections (2) and (3), substituted "or" for "and" after "having the care"; and made stylistic changes.

Cross-References. — Child abuse and neglect prevention and treatment, § 62A-4a-301 et seq.

Reporting requirements, § 62A-4a-403.

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH, PROVO DEPARTMENT

PROVO CITY,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 971-240
)	
DAVID G. CANNON,)	
)	
Defendant.)	

Trial
Electronically Recorded on
January 23, 1998

BEFORE: THE HONORABLE GARY D. STOTT
Fourth District Court Judge

For the Plaintiff: Rick Romney
Deputy County Attorney
100 East Center Street
Suite 2100
Provo, Utah 84606
Telephone: (801)370-8026

For the Defendant: Thomas H. Means
ALDRICH, NELSON, WEIGHT &
ESPLIN
43 East 299 North
PO Box "L"
Provo, Utah 84603-0200
Telephone: (801)373-4912

Transcribed by: Beverly Lowe RPR/CSR/CCT

CENTER COURT REPORTING
PO BOX 1786
PROVO, UTAH 84603-1786
TELEPHONE: (801)224-9847

FILED
Utah Court of Appeals
OCT 26 1998
Julia D'Alesandro
Clerk of the Court

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P R O C E E D I N G S

(Electronically recorded on January 23, 1998)

THE COURT: Next item is that of City vs. Cannon, David Cannon present? Are you Mr. Cannon?

MR. MEANS: Your Honor, I'm on that matter, and I'll be right back in.

THE COURT: Sure. Are you ready Mr. Means?

MR. MEANS: Yes, your Honor.

THE COURT: Mr. Romney?

MR. ROMNEY: I believe so, your Honor, yes.

THE COURT: You may go ahead, gentlemen.

MR. ROMNEY: Thank you, your Honor. We'll call Angel Ivins.

COURT CLERK: You do solemnly swear that the testimony you are about to give in this case now pending before the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

ANGEL IVINS

having been first duly sworn,

testifies as follows:

DIRECT EXAMINATION

BY MR. ROMNEY:

Q. Would you state your name, please, for the record?

1 A. It's Angel June Ivins.

2 Q. What city do you live in?

3 A. Provo.

4 Q. I'm going to call your attention, ma'am, to
5 the date of March 13, 1996. That's a long time ago,
6 coming up to a couple of years, and ask you if on that
7 date you lived at 401 North 900 East?

8 A. I did.

9 Q. Do you still live there?

10 A. I sure do.

11 Q. And you still live in the same apartment
12 there that you did then?

13 A. Yes.

14 Q. What apartment is that?

15 A. Twenty.

16 Q. Tell us, if you will, that building, how is
17 it configured, and where you live in the building.

18 A. Well, it's kind of like square, kind of, you
19 know.

20 Q. Would it be a U-shaped apartment complex?

21 A. Yeah, it's U-shaped, and I'm in the straight
22 part in the back.

23 Q. So you're in the part furthest west on the
24 U-shape of the complex?

25 A. Yes.

1 Q. Where is your apartment, on which of the
2 levels?

3 A. Second floor.

4 Q. How many levels are there?

5 A. Three.

6 Q. Three?

7 A. Uh-huh.

8 Q. Let me ask you, ma'am, are you acquainted
9 with a David Cannon?

10 A. Yes.

11 Q. Would you recognize that person if he were
12 here today?

13 A. He's there to the left.

14 Q. Seated by the attorney at the other table,
15 is he the fellow in the blue shirt?

16 A. Yes.

17 Q. How do you know David Cannon?

18 A. He was a neighbor, he lived on the third
19 floor.

20 Q. Does he still live there?

21 A. No, he doesn't.

22 Q. Are you acquainted with Christine Armstrong?

23 A. Yes, I am.

24 Q. And her children?

25 A. Yes, I am.

1 Q. Let me call your attention, then, to that
2 date we talked about, March 13, 1996, and ask you if
3 on that date you observed Mr. Cannon in company with
4 any of the children of Ms. Armstrong.

5 A. Yes, I did.

6 Q. Ma'am, if you will, tell us when that
7 occurred more or less on that day, what you observed.

8 A. Well, I was standing outside next to my
9 door, and Cami was going down -- his wife, I don't
10 know if they're still married or not.

11 Q. Cannon's wife?

12 A. Yes.

13 Q. Was where?

14 A. She was walking down on my level to go down
15 to get some mail.

16 Q. And did you mention where Mr. Cannon lived,
17 on which level?

18 A. He was on the third floor. I don't remember
19 exactly what apartment number it was, but it was on
20 the third floor.

21 Q. And then you left your apartment and were
22 standing on the (inaudible)?

23 A. I was standing -- I was just like walking
24 out my door and I was standing on the doorstep there.

25 Q. And his wife was on your same level, you

1 indicated was going to get some mail?

2 A. Yes, she was going to get some mail.

3 Q. Did you see Mr. Cannon from where you were
4 located?

5 A. Yes, I did.

6 Q. Tell us, if you will, where it was that you
7 saw him.

8 A. He was on the third floor.

9 Q. How far away from you in distance would you
10 say, in terms of this courtroom.

11 A. Maybe 15 feet, 20 feet.

12 Q. Close?

13 A. Pretty close.

14 Q. Did you have obstructions to your ability to
15 see him?

16 A. No, I didn't.

17 Q. What did you notice about him? Tell us, if
18 you will, if you remember what time of day it was.

19 A. It was like afternoon, mid afternoon. I
20 don't exactly know what time it was because it's been
21 a long time.

22 Q. Was it still daylight?

23 A. Yes, it was.

24 Q. How many people were around you?

25 A. Well, Penny was outside, and his wife was

1 outside, and a couple of other witnesses -- I mean
2 another witness that had seen it is not here right
3 now, but she was outside, too.

4 Q. How many people were around Mr. Cannon?

5 A. Children were like right next to him.

6 Q. How many children?

7 A. Amber and Malcolm.

8 Q. You've indicated that he lived on the third
9 floor; is that right?

10 A. Uh-huh.

11 Q. How far would it be in your estimation in
12 distance from the third floor to the ground?

13 A. I'm not really good at estimating. I would
14 say at least 15 to 20 feet, it could be more.

15 Q. What happened as you looked up and observed
16 Mr. Cannon?

17 A. He was hanging Malcolm over the rail, and
18 his wife had said, "No, David, don't. Stop."

19 Q. Let me stop you there. Malcolm, who is
20 Malcolm?

21 A. Christine Armstrong's son.

22 Q. And at that time, ma'am, in March of 1996,
23 how old was Malcolm?

24 A. I believe eight or nine months.

25 Q. A little baby?

1 A. Yes.

2 Q. You've indicated that Mr. Cannon was hanging
3 Malcolm over the rail. Tell us specifically what you
4 mean by that. What was he doing with the baby?

5 A. He had him underneath his arms, and he was
6 literally just hanging him over like this.

7 Q. What was his wife doing, Cami Cannon, what
8 did she say?

9 A. She said, "No, David, don't. Stop," like
10 that.

11 Q. What happened next?

12 A. I don't really exactly remember. I think he
13 brought the baby back from over the rail.

14 Q. How long did this take? How long over what
15 time period did this occur?

16 A. Probably a few minutes.

17 Q. What was your response, ma'am, when you
18 looked up and saw him hanging the baby, Malcolm, over
19 the rail?

20 A. I was really shocked because I wouldn't even
21 dream of doing something like that. Just playing
22 around it would not be something funny, you know.

23 Q. What was underneath the baby as he was being
24 hung out over the railing?

25 A. Nothing.

1 Q. What happened then?

2 A. He had brought the baby back over the rail,
3 and I guess they went back into the apartment.

4 Q. What did you do then?

5 A. I was completely shocked.

6 Q. Why?

7 A. Because to see something like that. I mean
8 if he were to fall, there's no way that baby would
9 have made it. I was just totally shocked.

10 Q. What happened next?

11 A. I had talked with Christine about it when
12 she came home, and from there I believe she called the
13 police.

14 Q. Did you have further interaction with the
15 police as to what you had seen that day?

16 A. I think I gave them a statement, but I'm not
17 for sure.

18 MR. ROMNEY: That's all the questions that I
19 have of the witness, your Honor.

20 THE COURT: Wait just a moment. Mr. Means
21 might have some questions for you.

22 MR. MEANS: No questions, your Honor.

23 THE COURT: All right, thank you, ma'am.

24 Mr. Romney, your next witness?

25 MR. ROMNEY: We call Ms. Cooper, your Honor,

1 Penny Cooper.

2 COURT CLERK: You do solemnly swear that the
3 testimony you are about to give in this case now
4 pending before the Court will be the truth, the whole
5 truth, and nothing but the truth, so help you God?

6 THE WITNESS: I do.

7 PENNY COOPER

8 having been first duly sworn,

9 testifies as follows:

10 DIRECT EXAMINATION

11 BY MR. ROMNEY:

12 Q. Ma'am, good morning, would you state your
13 name, please, for the record?

14 A. Penny Lynn Cooper.

15 Q. Are you a resident of Provo?

16 A. Yes, I am.

17 Q. I want to call your attention to the same
18 date we have talked about with the other witness, that
19 being the 13th of March of 1996. Were you a resident
20 of 401 North 900 East on that date?

21 A. Yes, I was.

22 Q. Is that the apartment complex that's been
23 described to us by Ms. Ivins?

24 A. Uh-huh.

25 Q. U-shaped complex?

1 A. Yes.

2 Q. Which apartment did you live in at that
3 time?

4 A. Seventeen.

5 Q. Which level is that on?

6 A. Second.

7 Q. Is that a three level apartment complex?

8 A. Uh-huh.

9 Q. In your estimation, ma'am, how far in
10 distance is it from the top level to the ground?

11 A. About 30 feet.

12 Q. And what separates that level from the
13 ground, what protective devices, if any? Is there a
14 guard rail?

15 A. Just a guard rail, yeah.

16 Q. So you lived on the second floor?

17 A. Uh-huh.

18 Q. Are you familiar with a David Cannon?

19 A. Yes, I am.

20 Q. Would you recognize that person if he were
21 here?

22 A. Yes, I do.

23 Q. Is he here?

24 A. Yes, he is.

25 Q. Point him out, please.

- 1 A. Right there.
- 2 Q. Next to Mr. Means in the blue shirt?
- 3 A. Uh-huh.
- 4 Q. And how are you familiar with him?
- 5 A. He lived in our apartment complex.
- 6 Q. Which level did he live on?
- 7 A. Third floor.
- 8 Q. Calling your attention to that date, March
9 13, 1996, did you have occasion to observe Mr. Cannon
10 on that date?
- 11 A. Uh-huh.
- 12 Q. Where was he and where were you?
- 13 A. I was in front of my apartment complex next
14 to the guard rail, and he was up by -- in front of his
15 apartment next to the guard rail.
- 16 Q. Which was how far away from you?
- 17 A. On a flat surface it would be about 20 to 25
18 feet.
- 19 Q. Did you have anything obscuring your view of
20 Mr. Cannon or what he was doing?
- 21 A. Huh-uh.
- 22 Q. Describe, if you will, the daylight
23 conditions and how many people were around, what was
24 happening.
- 25 A. It was between probably approximately 3:30,

1 4 o'clock.

2 Q. Was it daylight?

3 A. It was still daylight, and there wasn't very
4 many people around. It was just me and a few children
5 and a couple of adults.

6 Q. What did you see happen?

7 A. I seen the person in question hang--

8 Q. Well, the person in question, who are you
9 talking about?

10 A. David Cannon, over the railing I seen him
11 hang Malcolm Bailey over the railing by -- underneath
12 his arms in front of his apartment.

13 Q. How did he do that? Describe what he did.

14 A. Pretty much just picked him up and held him
15 like this over the railing.

16 Q. How long did that take?

17 A. It was probably just a few minutes.

18 Q. What was the defendant, Mr. Cannon, doing at
19 that time?

20 A. I don't know if he thought it was a joke or
21 if -- I don't really know the mental state he was in
22 at the time, but I just didn't agree with what I saw.

23 Q. You indicate you didn't agree, what was your
24 response? What did you do?

25 A. I was in shock, and if it would have been my

1 son I probably would have went up there and got the
2 baby from him.

3 Q. Why?

4 A. Because I don't think that's right, jokingly
5 or otherwise.

6 Q. What happened then?

7 A. His neighbor next to him grabbed the baby
8 when they came back from the rail and took him into
9 the apartment.

10 Q. The neighbor that took the child--

11 A. The witness that isn't here.

12 Q. And then what happened?

13 A. Cami went upstairs. Cami was standing by me
14 when all this was happening. She had just barely came
15 from the mailbox.

16 Q. So she was by you when you were watching
17 David?

18 A. Uh-huh.

19 Q. Did she see it?

20 A. Yes, she did.

21 Q. What happened as she saw it?

22 A. She said, "David, don't. Stop."

23 Q. What did he do?

24 A. He stopped, he pulled the baby back over the
25 railing towards him.

1 Q. So then what happened next?

2 A. I went into my apartment because I just
3 couldn't believe what I had seen, and that was pretty
4 much all I saw.

5 Q. How old was this baby?

6 A. About eight to ten months, and was -- I
7 don't know if he still is -- a chronic asthma patient.

8 Q. Did you know his physical condition at that
9 time?

10 A. Yes, I did.

11 Q. What was it?

12 A. He looked pretty scared. I don't know at
13 the time after he had pulled him over the railing if
14 he was in shock or not.

15 MR. ROMNEY: That's all the questions I have
16 of the lady, your Honor.

17 THE COURT: Mr. Means?

18 MR. MEANS: No questions.

19 THE COURT: Thank you, ma'am.

20 Anything else, Mr. Romney?

21 MR. ROMNEY: Your Honor, I'm going to see if
22 Cami Cannon is here, or Tracy Wotecki. We'll call
23 Sergeant Hodgson.

24 COURT CLERK: You do solemnly swear that the
25 testimony you are about to give in this case now

1 pending before the Court will be the truth, the whole
2 truth, and nothing but the truth, so help you God?

3 THE WITNESS: I do.

4 GARY HODGSON

5 having been first duly sworn,

6 testifies as follows:

7 DIRECT EXAMINATION

8 BY MR. ROMNEY:

9 Q. Sergeant Hodgson, for the record, state your
10 name and occupation, please.

11 A. Gary Hodgson, I'm a police officer for Provo
12 City.

13 Q. How long have you been working for Provo
14 City?

15 A. Over 13 years.

16 Q. You were a police officer, then, in that
17 capacity on the 13th of March of 1996?

18 A. I was.

19 Q. Officer, are you familiar with David Cannon?

20 A. I am.

21 Q. Would you recognize him if he were here?

22 A. Yes, he's seated at the defense table next
23 to Mr. Means.

24 Q. How are you familiar with him?

25 A. I met him as a result of this investigation.

1 Q. As to this particular incident that the
2 witnesses have described, Sergeant Hodgson, when did
3 you become aware of it?

4 A. I became aware of it on April the 23rd of
5 1996.

6 Q. How was it that you became aware of it?

7 A. Christine Armstrong, along with a couple of
8 other ladies, came into my office.

9 Q. Christine Armstrong is whom as to this case?

10 A. The mother of Malcolm Bailey.

11 Q. She came into your office accompanied by
12 whom?

13 A. She came in with Penny Cooper and Tracy
14 Wotecki.

15 Q. For what purpose?

16 A. To discuss with me some allegations
17 regarding what they believed to be inappropriate
18 conduct by Mr. Cannon.

19 Q. Did any of those allegations center on the
20 event described here today?

21 A. It did.

22 Q. What did you do, Sergeant Hodgson, by way of
23 your investigation?

24 A. I talked with the witnesses pursuant to this
25 particular victim. Of course, I couldn't talk to the

1 child, he was born in 1995, June the 6th, to be exact.

2 Q. So at this event would have been how old?

3 A. At this particular time he would have been
4 nine months, approximately.

5 Q. You couldn't talk with the victim, then what
6 did you do to investigate?

7 A. Well, I talked to the witnesses in the case,
8 also talked to Mr. Cannon.

9 Q. After speaking with the witnesses, when was
10 it that you talked to Mr. Cannon?

11 A. Let me refer to my report for the date of
12 the interview, May the 24th of 1996.

13 Q. What were the circumstances of your visiting
14 with him? Where was he, where were you?

15 A. He came down to my office at the police
16 department.

17 Q. Was he in custody?

18 A. He was not.

19 Q. Was he advised that he was not?

20 A. He was.

21 Q. He spoke to you voluntarily?

22 A. He did.

23 Q. Did you discuss this incident that we've
24 talked about here this morning?

25 A. We did.

1 Q. What in particular?

2 A. Specifically regarding what the allegations
3 were regarding this particular case.

4 Q. What did you tell him as to what they were?

5 A. Well, we discussed -- as I recall, I told
6 him that there was allegations that there had been
7 some inappropriate conduct with Ms. Armstrong's
8 children, further on this particular case that there
9 was an allegation that he had placed a young child in
10 danger.

11 Q. Did you describe what you knew about it, the
12 circumstances?

13 A. As we continued through the interview I did.

14 Q. Did you invite his response?

15 A. I did.

16 Q. What did he say?

17 A. To the best of my knowledge he denied any
18 type of activity as he had been accused of.

19 Q. You had conducted an investigation by
20 talking to the witnesses; is that correct?

21 A. I had.

22 Q. At the conclusion of that, your
23 investigation into the incident and talking with Mr.
24 Cannon, did you prefer charges against Mr. Cannon?

25 A. I screened the case with yourself, and

1 charges were filed, yes.

2 Q. For what?

3 A. Child abuse.

4 Q. Based on what facts that you had available
5 to you?

6 A. Based on the fact that by his actions of
7 hanging the victim over the railing of the apartment
8 complex, that he had placed the child in imminent
9 danger of physical abuse -- or physical danger,
10 physical injury.

11 Q. Did you conduct any other investigation into
12 this case?

13 A. For what circumstances?

14 Q. As to the incident that we've described here
15 today?

16 A. Not that I recall.

17 MR. ROMNEY: Thank you, that's all the
18 questions I have of Sergeant Hodgson, your Honor.

19 THE COURT: Mr. Means?

20 MR. MEANS: No questions, your Honor.

21 THE COURT: Thank you, sir.

22 Anything else, Mr. Romney?

23 MR. ROMNEY: If I could just have a moment,
24 your Honor.

25 THE COURT: Sure.

1 MR. ROMNEY: That's the extent of the
2 testimony that we have, your Honor.

3 THE COURT: Mr. Means?

4 MR. MEANS: Your Honor, I'm going to move
5 that the Court issue an order or acquittal based on
6 the evidence you've heard so far, without need for the
7 defendant to put on a defense.

8 The reason I'm going to do that is that he's
9 been charged with an offense that under Section 76-5-
10 109, which says that he is charged with "intentionally
11 and knowingly inflicting a physical injury upon
12 Malcolm Bailey, or having the care and custody of that
13 child, caused or permitted another to inflict physical
14 injury upon the child," and you've had no evidence
15 whatsoever of any physical injury.

16 MR. ROMNEY: May I respond to that, your
17 Honor?

18 THE COURT: Yes, sir.

19 MR. ROMNEY: Definitionally in the Section
20 76-5-109(1)(b) subsection (4) -- first in the
21 proceeding subsection defines physical injury as a
22 condition which impairs physical -- "an injury to or
23 condition of the child impairing physical condition,
24 including a bruise, a laceration, an abrasion, failure
25 to thrive or malnutrition, or" -- and this is the

1 subsection we are going under -- "any other condition
2 which imperils the child's health or welfare," and
3 which is not a serious physical injury is defined in
4 this section.

5 Certainly the holding of a child -- a nine
6 month old child over a railing 20 or 30 feet above the
7 ground constitutes that condition imperiling a child's
8 health or welfare. There can be no other
9 interpretation than that makes statutorily what is
10 defined here.

11 We submit that in fact that's what has been
12 testified to, and that does constitute child abuse or
13 physical injury -- it's a physical injury component of
14 child abuse as defined by the legislature in this
15 statute.

16 THE COURT: Okay.

17 MR. MEANS: If I could, your Honor, I think
18 (inaudible) defining words define injury, not
19 circumstances, they define a condition to the child,
20 not the overall circumstances surrounding his conduct.
21 He hasn't inflicted an injury which is either a
22 bruise, a laceration, an abrasion, or some other
23 injury which imperils the child's physical condition.
24 Not the created circumstances which might have
25 imperiled the child's physical condition, but there

1 has to be a result (inaudible) injury (inaudible).

2 THE COURT: Well, as I read the statute, I
3 find that physical injury as defined in subsection (4)
4 of that paragraph, as Mr. Romney has referred to it,
5 as any other condition which imperils, and the other
6 condition in this instance may well be the condition
7 of placing the child over the railing, which would
8 imperil the child's health or welfare. That is a
9 factor of the physical injury as defined by the
10 statute. I'm going to deny your motion.

11 MR. MEANS: Can I have just a minute, your
12 Honor?

13 THE COURT: Yes, sir.

14 MR. MEANS: We'd rest, your Honor.

15 THE COURT: Thank you.

16 Anything from either side?

17 MR. ROMNEY: Your Honor, I think we'll
18 submit it.

19 THE COURT: Anything else, Mr. Means?

20 MR. MEANS: Submit it.

21 THE COURT: Based upon the testimony before
22 me, I find the defendant guilty of the charge of child
23 abuse, a class A misdemeanor, as set forth in 76-5-
24 109. I find that the activity of the defendant with
25 respect to the minor child that has been testified to

1 created a condition which imperiled the child's health
2 or welfare, which under the section, would be defined
3 as a physical injury.

4 Under that section the penalty imposed could
5 be that of a class A misdemeanor, which has been the
6 charge filed in the crime against Mr. Cannon.

7 Comments?

8 MR. ROMNEY: You haven't arrived at
9 sentencing, your Honor. When you get there may I
10 (inaudible)?

11 THE COURT: I'm there.

12 MR. ROMNEY: Your Honor, in speaking with
13 Sergeant Hodgson -- and I'm looking at Mr. Cannon's
14 criminal history -- he was charged in May of 1996 with
15 rape of a child, and speaking with the sergeant, the
16 judicial resolution shows none or no information
17 available. I had to rely on Sergeant Hodgson, whose
18 recollection is that he is on probation for that. I
19 believe he's been convicted either of that or a lesser
20 charge. I think it's appropriate that he be referred
21 to AP&P for presentence report.

22 THE COURT: I intend to make the referral,
23 thank you.

24 Mr. Means, would you and your client come
25 forward, please?

1 MR. MEANS: Yes, your Honor.

2 THE COURT: Mr. Means, would you discuss
3 with your client on the record the necessity to
4 continue sentencing for the purpose of the referral?

5 MR. MEANS: Yes, your Honor.

6 Mr. Cannon, you have a right to be sentenced
7 no sooner than two days from today, no longer than 45
8 days from today. The Court has indicated that he
9 desires that you participate in a presentence
10 evaluation. You might have done one of those before.
11 If you have, you know that that may take longer than
12 45 days.

13 MR. CANNON: All right.

14 MR. MEANS: Do you consent that your
15 sentencing can be pronounced at a time longer than 45
16 days from today?

17 MR. CANNON: Yes.

18 MR. MEANS: We'll waive it, your Honor.

19 THE COURT: Thank you. I find that the
20 defendant has agreed to have sentencing continued and
21 waives the opportunity of immediate sentence.

22 I'm going to refer Mr. Cannon to the Adult
23 Probation and Parole office in Provo, Utah, for the
24 purpose of participating in the preparation of a
25 presentence report that will be submitted to this

1 Court. Sentencing is set for what date?

2 COURT CLERK: February 23rd at 9 o'clock.

3 THE COURT: Nine a.m. on that date of 2/23,
4 Mr. Cannon, you are to be present. You are to contact
5 the Adult Probation and Parole office within seven
6 days of today's date. Please cooperate with them
7 fully.

8 For your information, if you fail to
9 participate with them as you need to, and I get a
10 report back saying that the report is not ready
11 because you failed to cooperate, then I'll place you
12 in custody until we get the report done and until the
13 sentencing is taken care of. You understand?

14 MR. CANNON: Yes.

15 THE COURT: All right, sign your promise to
16 appear right here on the document that the clerk has,
17 and then you're free to go.

18 MR. ROMNEY: Thank you, your Honor.

19 MR. MEANS: Thank you, your Honor.

20 THE COURT: Thank you, Mr. Means.

21 (Hearing concluded)

REPORTER'S CERTIFICATE

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STATE OF UTAH)
)
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That the foregoing proceedings were transcribed under my direction from the electronic tape recording made of these proceedings.

That this transcript is full, true, and correct and contains all of the evidence, all of the objections of Counsel and rulings of the Court and all matters to which the same relate which were audible through said tape recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 12th day of June 1998.

My commission expires:
February 24, 2000



NOTARY PUBLIC
residing in Utah County

