

1987

# Utah v. John Joseph Thompson : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH  
**870276**

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|                       |   |                    |
|-----------------------|---|--------------------|
| THE STATE OF UTAH,    | : | REPLY              |
| Plaintiff/Respondent, | : | BRIEF OF APPELLANT |
| v.                    | : |                    |
| JOHN JOSEPH THOMPSON, | : | Case No. 870276    |
| Defendant/Appellant.  | : | Priority No. 2     |

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THIS IS AN APPEAL FROM A CONVICTION FOR THE OFFENSES OF OBJECT RAPE, A FIRST DEGREE FELONY, IN VIOLATION OF TITLE 76, CHAPTER 5, SECTION 402.2, UTAH CODE ANNOTATED, 1953 AS AMENDED, FORCIBLE SODOMY, A FIRST DEGREE FELONY, IN VIOLATION OF TITLE 76, CHAPTER 5, SECTION 403, UTAH CODE ANNOTATED, 1953 AS AMENDED, AND FORCIBLE SEXUAL ABUSE, A SECOND DEGREE FELONY, IN VIOLATION OF TITLE 76, CHAPTER 5, SECTION 404, UTAH CODE ANNOTATED, 1953 AS AMENDED, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR TOOELE COUNTY, STATE OF UTAH, THE HONORABLE JOHN A. ROKICH, JUDGE PRESIDING.

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**FILED**  
AUG 8 1988

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|                       | : | BRIEF OF APPELLANT |
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POINT I

THE COMMENTS BY THE PROSECUTOR RELATING TO A MISSING WITNESS WERE IMPROPER AND PREJUDICIAL REQUIRING A NEW TRIAL FOR APPELLANT.

The remarks by the deputy county attorney relating to a missing witness were improper and prejudicial.<sup>1</sup> The respondent, in briefing the issue fails to correctly analyze these remarks as required by the case law and also fails to correctly assess the prejudicial impact of the argument.

Respondent contends that the argument was proper under the standards set forth in State v. Kazda, 540 P.2d 949 (Utah 1975). In that case the defendant had been arrested late at night at the scene of a burglary while he was in the process of removing property from a building. The prosecutor argued that the defendant had not presented any evidence relating either to why he was at the scene of the crime, or what he was doing there. The court ruled that the State has a right to argue the evidence

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<sup>1</sup> Those remarks are set out in full in both appellant's and respondent's briefs and need not be repeated here. (See Brief of Appellant at page 8).

or lack of evidence presented by the defendant.<sup>2</sup> That situation is significantly different than what occurred in the case at bar. Here the prosecutor argued that appellant's testimony was not corroborated by a particular witness raising the inference that appellant should not be believed. The appellant, on the other hand, had explained what he was doing with Rosa Pitman, the prosecutrix, and why those acts had occurred.

Furthermore, Kazda is inapplicable to this case due to subsequent rulings by this court. The applicable rulings are found in State v. Smith, 706 P.2d 1052 (Utah, 1985), and in the line of cases beginning with State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973), and most recently in State v. Andreason, 718 P.2d 400 (Utah 1986). The general standard requires a two part test: (1) Whether the remarks of counsel call the attention of the jurors to matters they would not be justified in considering; and (2) whether the jurors, in reaching their verdict, were probably influenced by the improper remarks.

The impropriety of remarks relating to a party's failure to produce particular witnesses is discussed in State v. Smith, supra. Before counsel may argue that an opposing party is subject to a negative inference from the failure to produce a particular witness, a two part test must be met: First, there

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<sup>2</sup> The propriety of this is dubious, at best, when those facts are analyzed in light of the ruling in Griffin v. California, 380 U.S. 609 (1965) (improper for a prosecutor to overtly allude to the defendant's failure to testify in his own behalf).

must be a showing that the party who did not produce the witness had it peculiarly within his power to produce that witness. Second, the testimony of that witness would have to elucidate the issues at trial.

With respect to the first requirement, this court noted in State v. Smith, supra, that there are two situations that would make a witness "peculiarly within the power of a party to produce". First, there must be a showing that the witness is physically available only to that party. Second, that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the party seeking to make the "missing witness" argument. Respondent concedes that neither of these situations apply to this case. Rather, respondent argues that in United States v. Young, 463 F.2d 934 (D.C. Cir. 1972), that court noted there may be situations where each side has the capability to physically produce a witness and the judge may have the discretion to leave the matter open for debate. The court stated that such argument may be appropriate without giving an instruction to the jury on the effect of the failure to call a particular witness.

A claim that this particular passage from United States v. Young, supra, somehow justifies the prosecutor's remarks in this case misconstrues what that court was discussing in that passage. Respondent also disregards the background relative to that court's discussion. With respect to the background, the rule in the District of Columbia was that prior to closing argu-



ments counsel was required to request permission from the court to make a missing witness argument.<sup>3</sup> The passage cited by respondent was written with this notice requirement as a premise. The prosecutor in this case never requested that he be allowed to make such an argument nor did he give notice that he intended to make such an argument.<sup>4</sup>

Furthermore, the discussion from United States v. Young, supra, cited by respondent was made in relation to the necessity of giving a jury instruction on the inference to be drawn when a party does not call a particular witness. In making the remarks cited by respondent, the Court of Appeals was anticipating that trial courts give the specimen instruction which was set forth in the court's opinion.<sup>5</sup> That instruction details the inferences that are permissible for the jury to draw and the circumstances that would justify such inferences. The passage quoted by respondent in no way justifies the actions by the prosecutor in this case.

As for the second portion of the test in State v. Smith, supra, respondent argues that the witness referred to by

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<sup>3</sup> See, Gass v. United States, 416 F.2d 767 (D.C. Cir. 1969).

<sup>4</sup> At the time this case was tried there was no such notice requirements as part of Utah law. However, this court may use this case to take the opportunity to enact such a requirement. That requirement gives the trial court the opportunity to assess whether the party seeking to make the argument has met the requirements of State v. Smith, supra.

<sup>5</sup> The entire text of the instruction is attached in "Appendix A".

the prosecutor would not have elucidated the issues of the case.<sup>6</sup> If respondent is correct, there can be no question that the prosecutor's argument was improper. It is clear, however, that the reason that the prosecutor made the argument was to claim that appellant's testimony has not been corroborated and therefore should not be believed. As noted in appellant's initial brief, this case turned on the credibility of either Ms. Pitman or appellant.<sup>7</sup> Consequently, the testimony of that witness would be corroborative of one of the two critical witnesses, rather than cumulative as respondent contends. That witness' testimony would therefore have elucidated the issues at trial.

The final issue that needs to be discussed is that of the prejudicial effect of the prosecutor's comment. As described in Valdez, the question is: whether the jurors were probably influenced by the improper remarks. Respondent concedes that appellant's description of the law in this state is correct with respect to the effect of an improper argument being made when the case involves conflicting evidence. See State v. Andreason, supra, at 403.<sup>8</sup> Respondent argues that the prosecutor's comments were not as egregious as the comments made by prosecutors in other cases.<sup>9</sup> However, respondent does not analyze the comments

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<sup>6</sup> Brief of Respondent at page 13.

<sup>7</sup> Brief of Appellant at 12-13.

<sup>8</sup> See also Brief of Appellant at page 13.

<sup>9</sup> See Brief of Respondent at page 11.

of this prosecutor in light of the critical issue at trial. As previously noted, the critical issue was the credibility of appellant as opposed to that of Ms. Pitman. The argument he made was that part of the testimony given made by appellant which could have been corroborated by an independent witness was not so corroborated. In a case where the evidence is conflicting, such as this one, the jurors are more susceptible to the influence of such an remark. State v. Andreason, supra. Consequently, the jurors were probably influenced by the remark.

The other arguments that respondent makes with respect to the issue of the prejudicial effect of the improper comments are that the court's jury instructions cured the error and that the comment was only a small part of the prosecutor's arguments. With respect to the curative jury instructions, respondent cites to the instructions stating that the jurors were to be governed solely by the evidence introduced at trial (R. 87) and the instruction relating to the presumption of innocence and burden of proof. (R. 81) Respondent provides no authority for the proposition that these particular instructions cure the prejudice created by an improper argument. Furthermore, this argument does not address the nature of the remarks as they relate to the issue that the jury had to decide.

Finally, respondent claims that the improper remark was only one part of a long and detailed argument. The prosecutor's argument was long and detailed covering over sixteen pages of transcript. (Tr. 259-276) However, respondent ignores the fact

that the remark took place at the very end of the argument. (Tr. 275) There is less than one page of further argument by the prosecutor after the improper comment. The improper remark was made at a point in the argument where it would have a substantial impact on the jury. Respondent disregards where in the closing argument that the improper comment was made and the potential effect of such a comment at the end of the closing argument.

The remark by the prosecutor relating to the missing witness was improper and likely to have influenced the jury's verdict. Appellant's conviction should be reversed and the case remanded to the district court for a new trial.

## POINT II

APPELLANT WAS THE SUBJECT OF AN ILLEGAL SENTENCE FOR THE THREE LESSER INCLUDED OFFENSES WHEN HE WAS ORIGINALLY CHARGED WITH ONLY ONE OFFENSE.

Respondent, in its brief, misconstrues appellant's arguments regarding the propriety of sentencing appellant on alternative charges. Respondent then answers those "straw man" arguments with correct statements of the law. Consequently, the respondent's analysis of this issue simply does not address the issue raised by appellant.

Appellant does not question that the three offenses for which he was convicted are lesser and included offenses of the aggravated sexual assault with which he was originally charged. Nor does appellant claim that the court's instructions on the

lesser included offenses were improper. The critical issue is whether appellant can be sentenced for three offenses when these offenses were originally charged as alternatives in the Information.

Respondent argues that appellant waived any right to raise this issue on appeal because counsel failed to object to the jury instructions on the lesser offenses. As authority for this proposition, respondent cites Utah Code Annotated §77-35-19(c) (1953 as amended). However, that statute addresses only assigning error to either a portion of the jury instructions as given or a failure to give a requested instruction to the jury. That statute does not address how the courts must approach alternative charges, verdicts or sentencing on such charges. Appellant does not question the propriety of the lesser included offense instructions. The real issue here is how a court is to sentence with respect to alternative charges. Therefore, Utah Code Annotated, §77-35-19(c) (1953 as amended) offers no guidance whatsoever in resolving the issue raised by appellant.

Respondent claims that by failing to object to separate verdicts and by allowing the court to inform the jury that they may convict of any one or all of the lesser included offenses appellant waived his right to challenge the sentencing on all three alternative charges. As described in appellant's brief the alternate verdict forms were a necessity. Those alternatives were not for a single offense that could be committed in different manners. See, State v. Tillman, 750 P.2d 546 (Utah 1987).

The alternative lesser offenses all are separate crimes. Each has individual elements and one has a different punishment. (Two of the offenses were first degree felonies and one was a second degree felony). Consequently, jury unanimity was required for a finding of guilt on each of the alternative offenses. Separate verdicts were required for each offense. State v. Russell, 733 P.2d 162 (Utah 1987). An objection to the verdict forms or the response to the jury's question would not have been appropriate.

Respondent simply disregards the question of separate elements and different punishments when addressing the waiver claim. Likewise, respondent disregards the fact that the claim involved in this case is that appellant is the subject of an illegal sentence. Utah Code Annotated, §77-35-22(e) (1953 as amended) allows such a sentence to be corrected at any time. In other words, there is no such thing as waiver when the court is addressing a claimed illegal sentence.<sup>10</sup>

Appellant argued in his original brief that the sentencing procedure in this case constituted an improper amendment to the information. (See Brief of Appellant at pages 18-19)

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<sup>10</sup> Respondent mentions that appellant received concurrent sentences on these alternative convictions. Implicitly respondent seems to be arguing that there is no harm from this sentence to appellant. However, the Utah State Board of Pardons uses guidelines and a time matrix in determining the length of time an inmate must serve on a prison commitment. Additional concurrent convictions have the effect of raising appellant's guideline used to determine the length of his incarceration by about 27 months. (See the Board of Pardons time matrix attached as "Appendix 3").

Utah Code Annotated, §77-35-4(d) (1953 as amended) prohibits an amendment to an information or indictment that involves "additional or different" offenses. Respondent argues that a lesser included offense is not such an amendment because it does not involve a different offense. Appellant does not question the fact that a lesser included offense is included in the original charge. State v. Baker, 671 P.2d 152 (Utah 1983) For that reason a lesser included offense is not a different charge than that involved in the original indictment or information.

However, when addressing the amendment issue respondent simply disregards the first alternative of prohibited amendments to indictments or informations. Utah Code Annotated, §77-35-4(d) (1953 as amended) also prohibits additional offenses from being charged. Simple arithmetic tells us that when appellant is originally charged with one offense and is ultimately sentenced for three offenses, there has been an amendment to the information resulting in additional charges. Consequently, sentencing appellant for all three lesser offenses constitutes an improper amendment to the information.

Appellant also argued that since he was charged only with one offense that single charge was by definition a single criminal episode as defined in Utah Code Annotated, §76-1-402(1) (1953 as amended). The result is that appellant could only be sentenced for one offense. (See Brief of Appellant at pages 19-20). Respondent answers that argument citing cases where defendants were charged and convicted of multiple offenses arising out

of the same episode and those sentences were upheld on appeal.<sup>11</sup> Respondent again disregards the fact that appellant in this case was charged with only one offense.<sup>12</sup> That makes the series of sex acts constituting lesser included offenses a single criminal episode for purposes of sentencing.

Appellant was illegally sentenced for three offenses after being charged with only one offense. This court should order two of these sentences to be vacated and remand the case to the district court with an order that appellant be sentenced on only one of the three lesser included offenses.

#### CONCLUSION

Based on the improper argument of the prosecutor and the prejudicial effect of such an argument, appellant's conviction should be reversed and the case remanded to the district court for a new trial. Furthermore, the sentences for two of the lesser included offenses should be vacated and the case should be remanded to the district with an order that appellant be sen-

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<sup>11</sup> State v. Suarez, 736 P.2d 1040 (Utah App. 1987); State v. O'Brien, 721 P.2d 896 (Utah 1986), State v. Porter, 705 P.2d 1174 (Utah 1985).

<sup>12</sup> Whether appellant could have been charged with a separate offense of aggravated sexual assault for each separate sex act is not before this court.



tenced for only one lesser offense.

Dated this \_\_\_\_ day of August, 1988.

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CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of August, 1988,  
I delivered a true and correct copy of the foregoing to Barbara  
Bearnson, Assistant Attorney General, at 236 State Capitol Build-  
ing, Salt Lake City, Utah, 84114.

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## APPENDIX A

The following is the specimen instruction on missing witnesses provided in United States v. Young, supra:

Counsel have argued that you should draw an inference from the absence of certain witnesses. The court has determined that each side had the ability to produce the witnesses. If you conclude that the testimony of a witness would have cast significant light on the issues, and that it would have been natural for one of the parties to have called that witness in support of his presentation if the facts known by the witness has been favorable to the position of that party, you may infer that if the witness had been called he would have given testimony that would have been unfavorable to that party which failed to call him. But you are not required to draw that inference. And if you think that it would have been equally natural for each of the parties to have called the witness, and that each might equally have been expected to do so, then you may rightly conclude that since an equal inference could be drawn against each party, they cancel each other out. And if the matter seems doubtful, then you may rightly decide that no inference should be drawn from the absence of the witness. In that event, your verdict should be based on the evidence that was presented in court, and should not be affected by the witnesses, who were not called. United States v. Young, supra, at 944.

## APPENDIX B

Appellant's History Risk Assessment put him into the "excellent" category. The time matrix reflects that his minimum time of incarceration should be sixty months for a first degree felony. When the concurrent alternative commitments for another first degree felony and second degree sex offense are factored into the matrix appellant's minimum time of incarceration is eighty-seven months, a twenty-seven month difference.

# TIME MATRIX

USED TO CALCULATE MINIMUM TIME IF SENTENCE IS INCARCERATION

## CRIME SEVERITY

|   | CAPITAL   | 1ST DEGREE |        | PERSON CRIMES       |                    |         | OTHER CRIMES |         | MISDEMEANORS |       |
|---|-----------|------------|--------|---------------------|--------------------|---------|--------------|---------|--------------|-------|
|   |           | MUR II     | OTHER  | HOMICIDE<br>2ND SEX | 2ND DEG<br>3RD SEX | 3RD DEG | 2ND DEG      | 3RD DEG | A            | B     |
|   |           |            |        |                     |                    |         |              |         |              |       |
| CRIMINAL HISTORY                        | POOR      | 12 YRS     | 10 YRS | 6 YRS               | 36 MON             | 24 MON  | 24 MON       | 18 MON  | 12 MON       | 6 MON |
|   | FAIR      | 10 YRS     | 7 YRS  | 5 YRS               | 30 MON             | 21 MON  | 21 MON       | 15 MON  | 10 MON       | 5 MON |
|   | MODERATE  | 7 YRS      | 5 YRS  | 4 YRS               | 24 MON             | 18 MON  | 18 MON       | 12 MON  | 8 MON        | 4 MON |
|   | GOOD      | 5 YRS      | 5 YRS  | 3 YRS               | 21 MON             | 15 MON  | 15 MON       | 9 MON   | 4 MON        | 3 MON |
|   | EXCELLENT | 5 YRS      | 5 YRS  | 2 YRS               | 18 MON             | 12 MON  | 12 MON       | 6 MON   | 3 MON        | 3 MON |
| CONSECUTIVE ENHANCEMENTS                |           |            |        |                     |                    |         |              |         |              |       |
|   |           | 36 MON     | 30 MON | 24 MON              | 18 MON             | 12 MON  | 12 MON       | 6 MON   | 3 MON        | 3 MON |
| CONCURRENT ENHANCEMENTS ADDED BY B.O.P. |           |            |        |                     |                    |         |              |         |              |       |
|   |           | 18 MON     | 15 MON | 12 MON              | 9 MON              | 6 MON   | 6 MON        | 3 MON   | 3 MON        | 3 MON |

DRUG DISTRIBUTION OF OR INTENT TO DIST. OVER \$500 & RESIDENTIAL BURGLARY SHOULD BE "PERSON" CRIMES

## ACTIVE CONVICTIONS

|                   | DEGREE | YEARS | MONTHS |
|-------------------|--------|-------|--------|
| MOST SERIOUS      | _____  | _____ | _____  |
| NEXT MOST SERIOUS | _____  | _____ | _____  |
| OTHER             | _____  | _____ | _____  |
| OTHER             | _____  | _____ | _____  |

TOTAL \_\_\_\_\_

SENTENCES SHOULD GENERALLY BE CONCURRENT. HOWEVER, THE EXISTENCE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES SUGGEST CONSIDERATION OF CONSECUTIVE SENTENCES:

1. ESCAPE OR FUGITIVE
2. UNDER SUPERVISION OR BAIL RELEASE WHEN OFFENSE WAS COMMITTED
3. UNUSUAL VICTIM VULNERABILITY
4. INJURY TO PERSON OR PROPERTY LOSS WAS EXTREME FOR CRIME CATEGORY
5. OFFENSE CHARACTERIZED BY EXTREME CRUELTY OR DEPRAVITY

IF THE SENTENCES ARE TO BE CONSECUTIVE, USE THE CONSECUTIVE ENCHANEMENTS PORTION OF THE "TIME MATRIX" FOR ALL CONSECUTIVE SENTENCES EXCEPT THE "MOST SERIOUS" CONVICTION.

NAME \_\_\_\_\_ USP# \_\_\_\_\_

## CRIMINAL HISTORY