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State of Utah v. Delbert Waters : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

vs.

DELBERT WATERS,

Appellant.

Case No. 7812

BRIEF OF RESPONDENT

FILED

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

vs.

DELBERT WATERS,

Appellant.

Case No. 7812

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Delbert Waters, defendant and appellant herein, was tried before the court without a jury, and convicted of the crime of assault with intent to commit rape.

The assault upon which the State relies for conviction was committed some time between the hours of 2:00 o'clock and 3:00 o'clock A.M. on the morning of August 1, 1951. Defendant made three unauthorized intrusions into the home

of prosecutrix. The first of these was momentary, an entry and immediate departure, and was made in the company of one Gary Dickinson. The second intrusion was also made in the company of Dickinson, and lasted about an hour. The third and last intrusion defendant made alone, leaving Dickinson out in the car (Tr. 6, 7, 10, 11, 28, 29). Both defendant and Dickinson had been drinking (Tr. 31, 32).

The prosecutrix; at the time of the offense was fifteen years of age. She was alone in the house, her parents having gone to Yellowstone Park (Tr. 3, 5).

On the second intrusion defendant made improper advances toward prosecutrix (Tr. 7, 8), which were resisted by her. The third time defendant entered the house he did so by the back door, proceeded to the bedroom where prosecutrix was in bed, asleep, got into bed with her, threw his arms around her, felt her with his hands, and tried to force his penis between her legs. This sexual assault was resisted by prosecutrix to the best of her ability (Tr. 9, 10, 11). Defendant, after struggling with prosecutrix for some time, went to sleep. Prosecutrix was then able to extricate herself from his grasp, whereupon she got out of bed and ran a "block and a half or two blocks" to her aunt's home (Tr. 11, 12).

The uncle of prosecutrix notified the town Constable, who in turn, notified the sheriff (Tr. 36). When the Sheriff arrived defendant was either asleep, or pretended to be asleep (Tr. 20), his pants were still open and his privates exposed (Tr. 13). Defendant was arrested, he was convicted, and he now appeals.

STATEMENT OF POINTS

POINT I

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE FINDING OF THE COURT.

POINT II

THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR ARREST OF JUDGMENT.

POINT I

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE FINDING OF THE COURT.

Point I of appellant's brief challenges the sufficiency of the evidence to support the finding of the court, that defendant is guilty of the crime of assault with intent to commit rape. It is respectfully submitted that the record includes ample evidence of the assault coupled with overt acts and circumstances which unquestionably indicate an intent and an attempt on the part of defendant to have intercourse with prosecutrix. Further, the uncontradicted testimony shows that the attempt was accompanied by force which was resisted by prosecutrix (Tr. 10, 11).

During the second visit defendant made advances to prosecutrix by "patting" her on the head and calling her "Blondie," at which time prosecutrix slapped his hand hard "and shoved him away (Tr. 7). Defendant again patted her,

chased her into her bedroom, threw his arms about her pushing her over on to the bed (Tr. 8). At this point prosecutrix called out and defendant was induced by his friend Dickinson to leave the house.

Prosecutrix was next aware of defendant's presence approximately an hour and one-half later when she was awakened by his assault upon her which started while she was asleep in her bed. Her testimony reveals the following:

* * * and when I woke, Delbert was in bed with me.

Q. Could you tell how much later it was?

A. Oh, I don't know what time it was then.

Q. You went to sleep and the next you recall was when you woke up?

A. When I woke up.

Q. All right. You may continue.

A. And he had both his arms around me and he was rubbing his face over my back and I didn't know what to think.

Q. How did you know it was Delbert?

A. Well, I didn't know, but I just had the feeling it was, until I came back with Kathleen and Dee. I wasn't sure who it was. I really didn't know who it was.

Q. Did he say anything?

A. No, and he had both his arms around me and held me tight around the waist and I tried to move his hands and he wouldn't move them and he tried to put hands up here (indicating)—

Q. When you say here, do you mean your chest or neck?

A. Up here, my neck (indicating). I took hold of his hands and put them back down and he started putting his hand down this way and I pushed them away (indicating).

Q. You mean on your lower body?

A. Yes.

Q. When you say "here" the record wouldn't say and I have to inquire what part of your body or your anatomy, and if you mention that part of the body, then we get it into the record, you see what I mean?

A. Yes.

Q. All right, you may continue.

A. And at first I couldn't stop him. He just, well, he was just all hands. I couldn't take hold of his hands and he tried to take my under clothes off and I don't know, but anyway his thing was out and he was trying to put it between my legs and I wouldn't let him and I didn't know what to think and I took hold of his hands and I held them just as tight as I could and he had hold of my waist so hard I couldn't move.

Q. When you say his "thing," for the record do you mean penis?

A. Yes, and I couldn't even move and I tried to move over once and he wouldn't let go of me and I raised up on my elbow and I sat there, laying on my elbow and I had to wait quite a while and then not too long he went so [to] sleep real fast, it seemed to me anyway, and I took hold of his hands, anyway I took hold of his one hand and moved it over and he didn't make any move to move it

back and I decided he must be asleep and I took the covers and moved them back and I got out of bed as quiet as I could and I jumped up and ran, and ran just as fast as I could for the bathroom, * * * I locked the door, * * * I turned on the light and from the way things was I guess he was wandering around the house, because there was a beer can on top of the toilet * * * (Tr. 9, 10, 11).

Quietly going into another bedroom prosecutrix put on a housecoat and ran "as fast as I could" to the home of her aunt and uncle's (Tr. 12).

On cross examination, prosecutrix testified as follows:

Q. You testified he attempted to remove your panties?

A. Yes.

Q. Did he attempt to tear them from your body or did he attempt to slide them down your legs?

* * * *

A. He just took hold of them and started pulling and then he put his hands underneath them (Tr. 17).

Clearly, evidence of this character affords the trier of the facts ample ground upon which to find defendant guilty.

Appellant admits the evidence shows prosecutrix had not the strength to overpower defendant and that defendant was a "young man of considerable strength" (Page 23, App. Br.) Under these circumstances appellant contends however, that the evidence does not make out the requisite intent to have carnal knowledge of prosecutrix, because he did not in fact rape her, and because he voluntarily desisted by going to sleep (Page 31, App. Br.)

In the case of State v. Andreason, 44 Idaho 396, 257 P. 370, 371, similar facts were considered sufficient to sustain a conviction of assault with intent to commit rape. The court stated:

The gravamen of the offense charged against appellant is the specific intent with which the assault, admittedly proved, was alleged to have been made; that is, that appellant attacked the person of the prosecuting witness with the aim, design, and purpose of having carnal knowledge of her. The question of intent is one of fact to be determined by the jury. (Citing cases).

* * * *

If it be conceded that appellant finally desisted in his efforts to accomplish the object which the jury found he had intended, and that it was by reason of his cessation from the encounter that he did not consummate his purpose, *this would not justify the conclusion of an absence of a lecherous desire before he withdrew from the struggle, or detract in any way from the effect of his exhibition.* (Emphasis supplied).

In People v. Lutes, 97 Cal. App. 2d 233, 179 P2d 815, 817, a case tried before the court without a jury, the court in sustaining a conviction of assault with intent to commit rape, stated the law to be as follows:

* * * It is asserted on behalf of appellant that he had no intention of committing rape, and it is argued in his behalf that the fact that he had the physical power, ability and opportunity to have committed the act and voluntarily gave up the quest without outside interference or fear of interruption is evidence that he had no such intention. The fact that appellant desisted is immaterial. The crime is complete if at any

moment during the assault the defendant intends to have carnal knowledge of the victim and to use for that purpose whatever force may be required. (Citing cases).

Whether or not such intention existed must be determined from all the circumstances and the acts of the defendant, and is a question for the trial court.

To the same effect see *People v. Norrington*, 55 Cal. App. 103, 202 P. 932; *Ross v. State*, 60 Tex. Cr. Rep. 547, 132 S. W. 793; *State v. Moore*, 110 Kan. 732, 205 P. 644.

The undisputed evidence establishes that defendant committed the assault on prosecutrix at night, in a private home, away from fear of apprehension; that he exposed his penis and attempted penetration; that he was alone and that he knew prosecutrix to be alone; that prosecutrix was frightened and resisted him the best she could. Facts of this nature have all been considered sufficient to warrant an inference of intent, drawn by the jury and the trial court. *People v. Norrington*, supra; *People v. Onessimo*, 65 Cal. App. 341, 224 P. 101; *People v. Moore*, 155 Cal. 237, 100 P. 688. See also, *People v. Jones*, 112 Cal. App. 68, 296 P. 317, 319, where the court stated that advanced preparation to commit the crime of assault with intent to commit rape was shown by the fact that the assailant apparently had every opportunity to know prosecutrix to be in her house alone.

POINT II

THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR ARREST OF JUDGMENT.

Appellant asserts in Point II that neither the information nor the conduct of the trial by the prosecution apprised defendant of the offense for which he was convicted. In other words, appellant seems to say the State proved two dis-failed to indicate the one of which he was found guilty. Appellant made no demand at the trial that the prosecution make any election.

It is respectfully submitted that the evidence adduced by the State shows only one offense of assault with intent to commit rape. Further, that the evidence showing the advances made to, and the improper liberties taken with the person of prosecutrix on the occasion of defendant's second visit to her home (Tr. 7, 8) was not introduced to establish said offense; and in fact did not establish it. Respondent submits that this evidence was brought out by the prosecution only to show preliminary facts with reference to the relationship of the parties, to indicate the frame of mind of defendant and the intention with which he committed the later assault. In addition it will be observed that during the second visit of defendant to the home of prosecutrix he did not expose himself, he was not there alone with prosecutrix, the lights were on, defendant did not attempt the sexual act. On the occasion of the third visit, defendant assaulted prosecutrix in her bed (Tr. 9, 10, 11, 12).

Respondent invites the court's attention to the case of *People vs. Miller*, 56 Cal. App. 472, 206 P. 89, where a conviction of assault with intent to commit rape was sustained. There the defendant took prosecutrix riding in an automobile, turned off the main highway into a "little road," threw his

arms around her and proposed sexual intercourse, she resisted, and he discontinued his advances. This incident took place in the afternoon. Later, after dark of the same day, at another location, defendant again made an assault upon prosecutrix; this time forcing her to touch his privates and demanding she accede to his demands. Defendant, on appeal, contended that the prosecution should have elected between the assault of the afternoon and that of the evening. The court, in discussing the alleged error, at page 91, said:

* * * It is apparent from the record that evidence of the occurrences during the afternoon was not offered to prove the commission of the crime at that time, but to show the relations between the parties and the conduct of the defendant as bearing upon the intent with which he committed the later assault. The case is wholly unlike that of *People vs. Williams*, 133 Cal. 165, 65 Pac. 323, relied upon by appellant, where many distinct crimes of rape were proved, covering a period of four months * * *

The cases of *State v. Hilberg*, 22 Utah 27, 61 P. 215; *People v. Laycock*, 66 Colo. 441, 182 P. 880; *People v. Martinez*, 57 Cal. App. 771, 208 P. 170; are relied upon by appellant. The evidence in these cases showed several distinct crimes of rape committed over a period of fourteen months; two years, and three days, respectively. Respondent thinks these cases are wholly unlike the case presently before the court.

Respondent respectfully submits that an examination of the record in the instant case will disclose that the information charged only one offense; further, that all of the evidence was directed toward the proof of the one offense, viz., the assault

with intent to commit rape committed on prosecutrix on the occasion of defendant's third intrusion. Therefore, it is concluded defendant was not prejudiced in his defense, nor were there grounds for a motion in arrest of judgment. 105-35-1, Utah Code Ann., 1943.

CONCLUSION

Respondent respectfully submits that a review of the transcript and proceedings in this case reveals sufficient and ample evidence upon which to sustain the conviction of appellant of the crime of assault with intent to commit rape. The motion of appellant for arrest of judgment was properly denied, and that appellant was not prejudiced in his defense.

Respectfully submitted,

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