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# The State of Utah v. Ronald Ray Herzog : Brief of Respondent

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

RONALD RAY HERZOG,

Defendant-Appellant.

Case No. 16441

---

BRIEF OF RESPONDENT

---

APPEAL FROM A CONVICTION OF
THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PETER F. LEARY

---

D. GILBERT ATHAY

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Attorney for Appellant

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IN THE SUPREME COURT OF THE

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-vs-

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BRIEF OF RESPONDENT

---

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of the crime of rape in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

DISPOSITION IN THE LOWER COURT

After appellant's conviction he was sentenced to a term of one to fifteen years in the Utah State Prison and was placed on probation on condition that he serve six months in the Salt Lake County Jail.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the judgment rendered by the trial court.

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## STATEMENT OF FACTS

Although respondent is in substantial agreement with appellant's statement of facts, one discrepancy and one material omission merit comment. First, appellant's assertion that the prosecutrix made no attempt to flee is erroneous. Under direct and cross-examination the prosecutrix testified that she attempted to get out of the truck but her effort was thwarted by appellant (T.45,67, 76,79). The prosecutrix's description of the incident was corroborated by appellant who testified that the prosecutrix tried to escape but he stopped her by grabbing her and telling her that she was not going to walk (T.112,113,123,124,125,128). In addition, the prosecutrix testified that she could not have escaped when she exited the truck to remove her clothing because appellant also stepped out of the truck, effectively blocking the only avenue of escape (T.46,67,79). Second, testimony of both the prosecutrix and appellant indicates that only after the prosecutrix's attempt to flee was met with physical restraint and threats by appellant did the prosecutrix refrain from making further attempts to escape. The prosecutrix stated that she acquiesced in appellant's demand out of fear. She was frightened of provoking him and being hurt (T.45,46,78,79).

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## ARGUMENT

### POINT I

### THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR REASONABLE MINDS TO HAVE FOUND APPELLANT GUILTY BEYOND A REASONABLE DOUBT.

The Utah Supreme Court enunciated the standard by which it will review jury findings to determine whether there was sufficient evidence presented at trial to sustain a conviction. In State v. Allgood, 28 Utah 2d 119, 499 P.2d 269 (1972), the Court stated:

> . . . to set aside a jury verdict the evidence must appear so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that the defendant committed the crime.

See also State v. Mills, 122 Utah 306, 249 P.2d 211 (1952); State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957); State v. Danks, 10 Utah 2d 162, 350 P.2d 146 (1960); State v. Mills, 530 P.2d 1272 (Utah 1975); State v. Romero, 554 P.2d 216 (Utah 1976).

In applying this standard the Supreme Court assumes that the jury believed that which supports its verdict. State v. Reddish, 550 P.2d 728 (Utah 1976). With this principle in mind it is necessary to examine the State's evidence to isolate those inconsistencies which

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would compel reversal of the guilty verdict. This task is easily disposed of because there are none. The prosecutrix's description of the incident is internally consistent and substantially corroborated by appellant's testimony. The prosecutrix's avowal of fear of physical abuse is reasonable in light of appellant's threat of violence and physical restraint of her at such a desolate locale so late at night. The appellant himself admitted that he forced the prosecutrix to comply with his demand and expressed regret and fear of the possible consequences of his behavior (Exhibit 1-P). The coherence and conclusiveness of the State's case demonstrate that the jury's verdict is well founded.

POINT II

THE JURY PROPERLY FOUND THAT THE PROSECUTRIX'S RESISTANCE WAS SUFFICIENT TO ESTABLISH RAPE.

The standard of resistance sufficient to negate consent in a charge of rape was established by the Utah Legislature through the 1975 amendments to the Utah Criminal Code, Section 76-5-406(1) and (2):

> Sexual intercourse, sodomy, or sexual abuse without consent of victim . . . Circumstances . . . An act of sexual intercourse, sodomy, or sexual abuse is without consent of the victim under the following circumstances:
>
> (1) When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably

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> (2) The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution. . . .

Appellant contends that a verbal threat does not rise to the level of force necessary to negate consent. Appellant asserts this argument despite the clear language of Section 76-5-406(2), which states that submission may be compelled by threat alone if such threat would prevent resistance by a person of ordinary resolution. See also State v. Reddish, 550 P.2d 728 (1976).

Since the trial court properly instructed the jury regarding the applicable law, the question here to be resolved is whether the jury could find that appellant's threat prevented resistance by the prosecutrix. Appellant insists that the Supreme Court has already answered this question in State v. Horne, 12 Utah 2d 162, 364 P.2d 109 (1961), when it found that the prosecutrix made no effort to escape and sustained no injury, and thus "her claim that consent had been obtained by force or fear was not substantiated by the evidence" (Appellant's Brief, p. 5). Appellant conveniently overlooks these facts of the Horne case which held the Court's attention:

> During the three hour period defendant was in her bedroom the prosecutrix made no outcry. This despite the fact that all doors and windows were open and there were occupied trailers within 20 to 30 feet from hers. . . The prosecutrix did not attempt to leave the trailer to seek help although she had ample opportunity. . . There was no evidence of marks or bruises upon either party. This after an alleged struggle which lasted three hours.

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Appellant's comparison is strained indeed. True, the prosecutrix in the instant case made no outcry; but unlike the Horne situation, no one was in the vicinity to hear her cries. True, the prosecutrix in the instant case made no attempt to escape after her first attempt was thwarted; but unlike the Horne situation, she had no further opportunity to flee. When the prosecutrix got out of the truck to remove her clothing, so also did appellant. Moreover, the isolated location provided an insurmountable obstacle to escape. True, the prosecutrix in the instant case was not injured or bruised; but unlike the Horne situation, she did not claim to have struggled against appellant because of the great fear for her safety which was engendered by his threats. The prosecutrix in the instant case has not made claims "so inherently improbable as to be unworthy of belief." Id. at 11

Finally, appellant argues that the Utah Supreme Court decisions which affirm rape convictions involve force which constitutes more than verbal threats and thus should be distinguished from Horne and from the instant case. Review of these decisions makes it apparent that the distinction urged by appellant is without merit. Once again appellant has misrepresented the thrust of the Court's opinions by focusing on the quantum of physical force employed by defendants rather than considering the Court's rationale for its decisions



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In State v. Nunez, 520 P.2d 881 (Utah 1974), the Court stated:

> Other than pleading and crying, the prosecutrix offered little physical resistance, but she did testify that she greatly feared physical abuse from the defendant and his companions should she resist . . . there is nothing to indicate that the prosecutrix consented or that her conduct would tend to create the impression in the mind of the defendant that the prosecutrix had in fact consented.

Id. at 882. Contrary to appellant's contention, the Nunez case supports respondent's position. During the trial of the instant case, not only did the prosecutrix testify that she was physically restrained and feared appellant would hurt her (T. 46,53,54), but appellant himself testified that he had regretted his behavior and had been fearful of the possible consequences (T. 119). The only inference which can be drawn from this admission of regret is that at the time he had intercourse with the prosecutrix appellant realized that she had not consented. This inference is fortified by appellant's statement to police that he "forced" the prosecutrix to have sexual intercourse (Exhibit 1-P).

Appellant also cites State v. Studham, 572 P.2d 700 (Utah 1974), as distinguishable from State v. Horne, supra, and from the instant case because Mr. Studham used physical force to overcome his victim. That credence in such a distinction is misplaced is obvious from the Studham decision itself. In that opinion, Justice Crockett stated:

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> . . . a sounder view is recognized that bruising and terrorizing of the senses 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.

Id. at 702 (emphasis added).

It is clear from the Studham decision that the instant case presents an example of the violative behavior against which the law is designed to protect. Here the prosecutrix was taken to an isolated and unfamiliar locale where she refused appellant's demand for sexual intercourse. After appellant threatened violence, the prosecutrix attempted to flee, but was physically restrained by appellant who stated she would not be harmed if she submit. Only after this psychological stress was imposed on her did the prosecutrix acquiesce. It is apparent that the appellant succeeded in having sexual intercourse with the prosecutrix through physical and psychological force sufficient to negate consent.



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## CONCLUSION

The law requires evidence of resistance "as might reasonably be expected under the circumstances" to support a conviction of rape. The question to be resolved with respect to sufficiency of the evidence is not whether a reasonable doubt may have existed, but whether a reasonable doubt is compelled by the evidence. Only under such circumstances should a jury verdict be reversed. In this case, the evidence clearly demonstrates reasonable resistance by the prosecutrix, and therefore the jury verdict should stand. Respondent urges that this Court affirm the ruling of the trial court finding appellant guilty of rape.

Respectfully submitted,

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