

1979

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,  
Plaintiff-Respondent,

VS.

RONALD RAY HERZOG,  
Defendant-Appellant,

Case No. 16441

## BRIEF OF APPELLANT

Appellant appeals from a conviction of rape in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 16441
	)	
RONALD RAY HERZOG,	)	
	)	
Defendant-Appellant,	)	
	)	

BRIEF OF APPELLANT

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 of condition that he serve six months in the Salt Lake County Jail.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment rendered by the court and an entry of a judgment of acquittal, or in the alternative a new trial.

### STATEMENT OF FACTS

On November 1, 1978, the prosecutrix was at the Westerner Lounge in Salt Lake County. After a fight with her husband, she left (t.35). She walked East on 35th South where she observed Appellant in his parked truck. Appellant asked her if she wanted a ride which she accepted (t.37,105). After getting in Appellant's truck, prosecutrix suggested that they get some beer (t.38, 106), whereupon Appellant stopped at a 7-11 and prosecutrix entered and purchased a six-pack of beer (t.39). After purchasing the beer, Appellant suggested they smoke a joint. Prosecutrix agreed, but didn't want to go to her home to smoke it because she had been fighting with her husband (t.39). Appellant suggested going for a ride and prosecutrix agreed (t.40). They drove up Parley's Canyon, took one of the exits where they parked (t.41, 42, 43). After smoking the joint, Appellant asked prosecutrix if she wanted to ball (t.44). She responded "No" whereupon Appellant reached for her purse. Prosecutrix indicated he could have it and reached for the door, whereupon Appellant grabbed her shirt and bra and pulled her towards him, telling her not to make him violent---for her not to make him force her and he wouldn't hurt her---to do what he wanted and he wouldn't hurt her; whereupon, prosecutrix said "Okay, I'll do what you want (t.45, 111).

None of the clothing prosecutrix was wearing was torn or ripped (t.66, 67). Prosecutrix then tried to talk Appellant out of it and then agreed to do what Appellant wanted (t.46). She then exited the vehicle, removed a tampax, her under-pants, her levis and got back in the truck and laid down on the seat (t. 47, 68, 69, 116).

Appellant was unable to get an erection, so prosecutrix played with him until he got an erection; whereupon, intercourse occurred (t.48, 69, 70, 71, 117, 118). Appellant then drove prosecutrix home where she remained without reporting the incident to anyone until her husband returned at sometime between 12:00 and 2:00 P.M. that day (t.52, 73). Prosecutrix admitted she made no attempt to flee nor did she cry for help (t.60). She suffered no injuries including scratches or bruises (t. 75). No weapons were ever used (t.66).

Appellant was subsequently arrested and charged with rape. The jury returned a verdict of guilty.

#### ARGUMENT

##### POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT BECAUSE THERE WAS REASONABLE DOUBT AS A MATTER OF LAW THAT THE CONSENT OF THE PROSECUTRIX WAS LACKING.

The standard for review of criminal convictions on the basis of insufficiency of the evidence is that "it must appear that upon so viewing the evidence reasonable minds must necessarily entertain reasonable doubt that the defendant

committed the crime". State v. Wilson, 565 P. 2d 66 (1977).

The standard for determining if there was sufficient evidence to find consent as shown by the resistance to the sexual assault, was established by the Utah Supreme Court in State v. Horne, 12 Ut. 2d 16 364 P. 2d 109 (1961):

"The law does not require that the woman shall do more than her age, strength, the surrounding facts, and all attending circumstances make it reasonable for her to do in order to manifest her opposition. However, in determining the sufficiency of the evidence, there must be considered the ease of assertion of the forcible accomplishment of the sexual act, with impossibility of defense except by direct denial, or of the proneness of the woman, when she finds the fact of her disgrace discovered or likely of discovery to minimize her fault by asserting force or violence, which had led courts to hold to a very strict rule of proof in such cases." 364 P. 2d at 112.

Furthermore, "it is, of course, incumbent upon the state to prove resistance which was overcome by force as one of the elements of the crime" State v. Ward, 10 Ut. 2d 34, 347 P.2d 865 (1959).

Appellant in this case was convicted of rape pursuant to 76-2 Utah Code Ann. (as amended 1973) which defines rape as follows:

A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent. Utah Code Ann. §76-5-406 (as amended 1973) describes seven circumstances under which sexual intercourse, sodomy or sexual abuse occur without consent. The subsections which are applicable to this case are "(1) when the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or (2) the actor compels the victim to

submit or participate by any threat that would prevent resistance by a person of ordinary resolution."

At most there was a verbal threat involved in this case. A number of Utah cases since Horne, supra, have dealt with the question as to whether there was sufficient evidence to find consent as shown by the resistance of the prosecutrix to the sexual assault. In State v. Horne, supra, the Supreme Court reversed the conviction finding that the actions of the prosecutrix did not establish that her consent was obtained by force or fear; in other words, the Supreme Court, in reviewing the evidence found that the prosecutrix's claim that her consent had been obtained by force or fear was not substantiated by the evidence. In that case, there was some evidence of verbal threats but nothing more. The prosecutrix made no effort to escape when the opportunity presented itself. In this regard, the Supreme Court rejected as an excuse for not attempting an escape, potential danger to the children of the prosecutrix who remained in the presence of the alleged rapist. There was no evidence of attempt to cry for help. There was no evidence of any injury to the prosecutrix. There was some evidence of damage to clothing in that the panties of the prosecutrix were slightly torn. This case is closest in it's facts to the case before the court although here there is no evidence of damage to the clothing, only a verbal threat.

In 1974, the Utah Supreme Court affirmed a rape conviction in State v. Nunez, 520 P.2d 881 (Ut. 1974). In that case,



two men were found guilty of rape. In affirming the conviction against a claim of insufficient evidence the court found: (1) that there were two men present who detained the proxecutrix, (2) that they verbally threatened her, (3) that they threatened her with a knife, and (4) that they physically restrained her with the use of force to have intercourse with them despite her begging and pleading. In this case, more than mere verbal threat were present, thus distinguishing it by its facts from State v. Horne, supra and the case herein.

In 1977, this court dealt twice with the issue of the sufficiency of the evidence in a claimed consent rape case. In State v. Anselmo 558 P.2d 1325 (Ut. 1977) the defendant's conviction was affirmed. The court noted in it's opinion that the prosecutrix had: (1) been verbally threatened, (2) had her clothing torn from her, (3) been struck in the face so as to severly blacken both eyes, (4) had been followed to the bathroom and hit with fists, (5) had hands placed on her throat, (6) fists had been drawn back as a symbol of striking, and (7) had been forcibly placed on the bed where she had been raped. More than mere verbal threat were made thus distinguishing this case by its facts from State v. Horne, supra and the case herein.

The other 1977 case was State v. Studham, 572 P.2d 700 (Ut. 1977). The Supreme Court affirmed the conviction against the claim of insufficiency of the evidence on the issue of consent. In doing so, the court noted that the consent, if

any, had been obtained through force and fear. The court found that the prosecutrix had been: (1) verbally threatened, (2) physically pinned to the floor during a struggle, (3) physically assaulted in that a hand had been put over her mouth so that she had difficulty breathing and (4) forced intercourse against her will had occurred. Again, this case is distinguished by it's facts from State v. Horne, supra and the case herein.

It is clear from the record that in the instant case, the most we have is a verbal threat together with a grabbing of clothing (not sufficient to cause any damage). There is no evidence of physical force. There is no evidence of physical injury. There is no evidence of torn clothing. There is no evidence of a struggle. There is no evidence of a weapon. There is no evidence of an attempt to cry out or obtain attention. There is no evidence of an attempt to flee. There is only evidence that after a verbal threat and a grabbing of certain items of clothing that the prosecutrix left the vehicle by herself, removed her levis by herself, removed her panties by herself, removed her tampax by herself and then re-entered the vehicle where she laid down and prepared herself for intercourse and when appellant was unable to obtain an erection, she assisted; in fact, but for this assistance, penetration could never have been made and we would not be in court today.

This case is as close on a factual basis to State v.

Horne, supra, as any reported Utah case. Looking at all of the facts and circumstances, it is apparent that reasonable minds would necessarily entertain a reasonable doubt that the prosecutrix had in fact, consented to the sexual intercourse and the verdict should be reversed.

#### CONCLUSION

The evidence in this case is insufficient for the appellant to be convicted of rape. The prosecutrix did not resist in a way reasonably expected under the circumstances. At no time did she resist physically, nor did she attempt to flee. At no time during the intercourse did she indicate that she did not desire to participate in the act. She suffered no cuts, bruises, abrasions or damage to her clothing as a result of this incident. Consequently, there is a reasonable doubt that the appellant engaged in the act of sexual intercourse by force or fear.

Respectfully submitted,

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