

1989

State of Utah v. Ronald G. Smith : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Paul Van Dam; attorney general; Charlene Barlow; assistant attorney general; attorney for respondent.

Stephen A. Laker; attorney for appellant.

Recommended Citation

Brief of Respondent, *Utah v. Smith*, No. 890319 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/1911

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO.

890319

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 Plaintiff-Respondent, : Case No. 890319-CA
 v. :
 RONALD G. SMITH, : Category No. 2
 Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A CONVICTION FOR SEXUAL ABUSE OF
A CHILD, A SECOND DEGREE FELONY, IN VIOLATION
OF UTAH CODE ANN. § 76-5-404.1 (SUPP. 1989),
IN THE SECOND JUDICIAL DISTRICT COURT, IN AND
FOR WEBER COUNTY, STATE OF UTAH, THE
HONORABLE RONALD O. HYDE, JUDGE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
CHARLENE BARLOW (0212)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

STEPHEN A. LAKER
2568 Washington Blvd. #203
Ogden, Utah 84401

Attorney for Appellant

FILED

JAN 10 1990

COUNT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 890319-CA
v. :
RONALD G. SMITH, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A CONVICTION FOR SEXUAL ABUSE OF
A CHILD, A SECOND DEGREE FELONY, IN VIOLATION
OF UTAH CODE ANN. § 76-5-404.1 (SUPP. 1989),
IN THE SECOND JUDICIAL DISTRICT COURT, IN AND
FOR WEBER COUNTY, STATE OF UTAH, THE
HONORABLE RONALD O. HYDE, JUDGE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
CHARLENE BARLOW (0212)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

STEPHEN A. LAKER
2568 Washington Blvd. #203
Ogden, Utah 84401

Attorney for Appellant

TABLE OF AUTHORITIES

CASES CITED

<u>State v. Ashe</u> , 745 P.2d 1255 (Utah 1987).....	5
<u>State v. Bagley</u> , 681 P.2d 1242 (Utah 1984).....	5
<u>State v. Featherston</u> , 781 P.2d 424 (Utah 1989).....	5
<u>State v. Walker</u> , 743 P.2d 191 (Utah 1987).....	5
<u>State v. Watts</u> , 675 P.2d 566 (Utah 1983).....	5
<u>State v. Wright</u> , 744 P.2d 315 (Utah Ct. App. 1987).....	5

STATUTES AND RULES

Utah Code Ann. § 76-5-404.1 (Supp. 1989).....	1
Utah Code Ann. § 77-35-26(7) (Supp. 1989).....	4
Utah Code Ann. § 78-2a-3(f) (Supp. 1989).....	1
Utah R. of Civ.P. 52(a).....	4-5

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 890319-CA
v. :
RONALD G. SMITH, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction for sexual abuse of a child, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1 (Supp. 1989). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(f) (Supp. 1989) because the appeal is from a district court in a criminal case involving a second degree felony.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the evidence presented at trial was sufficient to support the court's verdict convicting defendant.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies are included in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with sexual abuse of a child on September 19, 1988 (Record [hereinafter R.] at 1-3). Defendant

waived the jury and was tried by the court on January 26, 1989, in the Second Judicial District Court, in and for Weber County, the Honorable Ronald O. Hyde, district judge, presiding, and was found guilty as charged (R. at 30-31 and Transcript of trial [hereinafter T.] at 3). After a 90-day diagnostic evaluation, Judge Hyde sentenced defendant on May 12, 1989, to a third degree felony term not to exceed five years in the Utah State Prison, and fined him \$1,000, plus surcharge (R. at 37). Defendant filed a notice of appeal on May 12, 1989 (R. at 39).

STATEMENT OF THE FACTS

Between August 12 and August 21, 1988, defendant and the victim's grandmother shared an apartment on 25th Street in Ogden, Utah (T. at 88-89 and 9). During that time, the victim, a ten-year old boy named Chris who is mildly retarded, visited them (T. at 7-8, 14, 57, and 109). Chris spent the night several times, sleeping with defendant on a hide-a-bed in the dining area (T. at 11, 14-15, 86, and 109-11).

During one of the overnight stays, defendant woke Chris and began to fondle Chris's genitalia and directed Chris to fondle defendant's genitalia (T. at 18-20, 33-34, 49-51, 58, 86 and R. at 27). Sometime later, perhaps the next morning, defendant was in the bathroom of the apartment and directed Chris to come into the room (T. at 21-26, 36-38, 59, 77 and R. at 27). Defendant, who was sitting on the toilet, pulled Chris down onto defendant's leg and fondled Chris's genitals again (T. at 21-26, and 36-38). Defendant also took Chris's hand and placed it on

Phillip B. Johnson, a licensed family therapist, testified that he had administered psychological tests to Chris and determined that Chris was functioning at about a six-year old level (T. at 54 and 57). Chris had difficulty processing information and answering questions, sometimes losing the question while preparing an answer (T. at 57). Chris had been abused twice previously by other individuals and Johnson testified that Chris's handicap made him vulnerable to abuse (T. at 64, 70, 96-97 and 123). Chris had a need for affection and was unable to discriminate between appropriate affectionate behavior and sexual behavior (T. at 68-70). His mental processes made him a concrete thinker, unable to think abstractly or "futuristically", thus, unable to maintain a fabricated story for any length of time (T. at 74-75). Chris's consistency in the telling about the abuse, coupled with his inability to think abstractly and continue a fabrication, supported a belief in Chris's credibility (T. at 62-63). Chris had also demonstrated significant changes in behavior which had caused his mother concern and led to the exposure of this abuse (T. at 63-64, and 84-85). Johnson testified that reporting and testifying about the abuse was not a positive experience for Chris so that Chris probably was not doing this for attention (T. at 79-80).

Chris's grandmother, Clarinda Dickey, testified that she did not believe that the abuse had occurred (T. at 123). She admitted that her daughter, Chris's mother, had expressed concern about Chris and defendant being together and had asked Dickey to keep an eye on them (T. at 118). In spite of that concern,

Dickey allowed Chris to sleep with defendant (T. at 110-11). Dickey also admitted that defendant did not lock the door to the bathroom when he was using it, in spite of his knowing that Chris would sometimes walk into the room when others were there (T. at 111, and 117).

SUMMARY OF THE ARGUMENT

The testimony of the victim in this case supports the trial court's verdict convicting defendant. The ten-year-old victim, who has the mental age of a six-year-old, told of two incidents of defendant fondling the victim's genitals and directing the victim to fondle defendant's genitals. The confusion shown by the victim's testimony is explained by his mental handicap and his inability to think abstractly and his difficulty in processing questions. This same handicap makes it unlikely that the victim would be able to fabricate a story of abuse and maintain that story consistently through repeated interviews.

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL SUPPORTS THE COURT'S VERDICT CONVICTING DEFENDANT.

Defendant's only claim on appeal is that the evidence did not support the court's verdict. Defendant claims that the victim's testimony was inconclusive and could not support the verdict.

The standard of review in bench trials has been clarified in accordance with Utah Rule of Civil Procedure 52(a), as applied to criminal cases by virtue of Utah Code Ann. § 77-35-

26(7) (Supp. 1989). The Utah Supreme Court held in State v. Walker, 743 P.2d 191 (Utah 1987), that, in reviewing an insufficiency of evidence claim, the appellate court must not set aside the lower court's verdict unless it is clearly erroneous. Walker, 743 P.2d at 193. See also State v. Feathererson, 781 P.2d 424, 431-32 (Utah 1989); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). The clearly erroneous standard requires that

if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside.

Walker, 743 P.2d at 193. However, as this Court has noted, the application of this standard to bench trials "does not eliminate the traditional deference afforded the fact finder to determine the credibility of witnesses." State v. Wright, 744 P.2d 315, 317 (Utah Ct. App. 1987) (emphasis added) (citing Utah Rule of Civil Procedure 52(a); State v. Bagley, 681 P.2d 1242, 1244 (Utah 1984) ("[I]t is not our function to determine the credibility of conflicting evidence or the reasonable inferences to be drawn therefrom.")); see also State v. Watts, 675 P.2d 566, 568 (Utah 1983).

In the present case, the victim, Chris, testified that defendant fondled him and forced him to fondle defendant (T. at 19-26). Chris clearly became confused at some of the questioning but that confusion was explained by Phillip Johnson, the therapist (T. at 40-42, 57-58, and 74). For example, when Chris was asked a more abstract question, "Didn't you tell Mr. Parmley that he [defendant] did something else in the bathroom?", Chris

gave a negative indication (T. at 40). However, when the question was more specific, "[D]idn't you tell Mr. Parmley that you touched Ron's pee-pee?", Chris answered affirmatively (T. at 40-41). The trial court was able to observe the difficulty Chris had in understanding the questions asked of him. The court was then able to relate that difficulty to the testimony of the therapist, Johnson, who explained, based on his testing of Chris, why Chris would appear to give confused testimony (T. at 57-58 and 74). General questions about the abuse may have elicited contradictory responses from Chris at times; but, when he was asked specifically whether the abuse occurred and whether his testimony was the truth, Chris answered that it had occurred and his testimony was true (T. at 40-42).

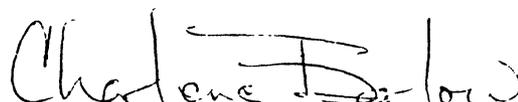
Because the trial court was in the position to observe Chris during his testimony, this Court should accord deference to the trial court's verdict. Obviously the trial court determined that Chris was a credible witness in spite of, or even because of, his handicap and accepted his testimony about the abuse as the truth. That determination is not against the clear weight of the evidence.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm defendant's conviction.

RESPECTFULLY submitted this 10th day of January, 1990.

R. PAUL VAN DAM
Attorney General


CHARLENE BARLOW
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Stephen A. Laker, Attorney for Defendant, 2568 Washington Blvd. #203, Ogden, Utah 84401, this 10th day of January, 1990.

