

1980

# The State of Utah v. Mark Von Stettina : Brief of Appellant

Utah Supreme Court

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G. L. Fletcher; Attorney for Appellant ROBERT B. HANSEN; Attorney for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH

Plaintiff-Respondent

-v-

MARK VON STETTINA,

Defendant-Appellant.

Case No. 16898

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BRIEF OF APPELLANT

Appellant appeals from a jury verdict of guilty of Rape in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, Judge, presiding.

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FILED

OCT 20 1980

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Clk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent	:	
	:	
-v-	:	
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MARK VON STETTINA,	:	
	:	Case No. 16898
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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
MARK VON STETTINA,	:	Case No. 15919
	:	
Defendant-Appellant.	:	

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, MARK VON STETTINA, appeals from a conviction of Rape in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, MARK VON STETTINA, was charged with Rape, a Felony of the Second Degree, in violation of Utah Code Ann. §76-5-402 (1952 as amended) at jury trial before the Honorable Dean E. Conder. Appellant was convicted of the charge of Rape. Appellant was sentenced to the Utah State Prison for the indeterminate term of one to fifteen years for said conviction.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment rendered below and a remand of the case to the Third Judicial District Court for a new trial.

## STATEMENT OF THE FACTS

The State alleged that on July 3, 1979, Susie Stephenson, was raped by the defendant, Mark Von Stettina. At trial 21 year old Susie Stephenson testified that at around midnight on July 3, 1979, she was at the Sun Tavern, a bar located in downtown Salt Lake City. She testified that she had arrived there about three hours earlier in the company of her sister and some friends and that she had been having a party and drinking with them and dancing with some of the people at the bar. She testified that she had been to that bar on many previous occasions. She testified that it was a gay bar and explained that she liked to dance and drink there. The prosecutrix met the appellant inside the Sun Tavern at approximately 12:20 a.m. when he went to her table and introduced himself to her and asked her if she would like to dance. She agreed. He then asked her if she wanted to go outside and smoke some marijuana with him to which she also agreed. The two of them went outside the Sun Tavern and walked westward towards the Union Pacific Railroad Depot and a parking lot just to the south side of the entrance. Near that parking lot was a sloped grassy area out of the view of the street. They sat down together on the lawn. A pipe bowl was filled with marijuana. They smoked the marijuana together. The prosecutrix then testified that she wanted to go back and stood up to leave. The appellant took her arm and asked her to stay with him until he finished smoking the marijuana. She agreed and sat down beside him. He put his arm around her and kissed her. Prosecutrix

testified that she was frightened of him since she thought he was not gay but straight. She testified that he pushed her down on the ground on her back and began to take her pants off. She testified that she said no. She testified that he put his hand over her mouth and said "Do you want me to kill you?" She testified that he took a tampon out of her and had intercourse with her. Afterwards she sat with him and kissed him and walked back to the bar with him holding his hand and agreed to meet him later. Other witnesses for the State who had been at the bar and seen the prosecutrix at about closing time testified that she was crying. A police officer testified that she cried throughout the time that she was with her. Appellant was arrested in the area a short time later and made a complete statement to the police. Appellant testified at trial on his own behalf that he was at the Sun Tavern and made contact with Susie Stephenson at about midnight on July 3, 1979. He further testified that he asked her to dance and she agreed. He asked her then to go outside and smoke marijuana with him to which she also agreed. He described her as being friendly and nice and that they carried on a general conversation. He testified that they smoked marijuana together and that he began to kiss her and that he was feeling the effects of marijuana and she appeared to be feeling the effects of marijuana. He testified that he began kissing her and that he had one hand on her face as he was kissing her and he laid her down on her back. He testified that during that time she was saying "no don't" and that she was giggling at the same time.



They then had sex and they then got up and sat there for a minute and kissed a few more times and started walking back across the street holding hands. Appellant stated that they continued talking and found out more about one another. Appellant asked her if she wanted to go with him to have a few more beers and a little more partying and she agreed. He told her that he needed to get a payroll check cashed at his place of employment which was Denny's and that he would be back shortly to pick her up. He testified that he went to a bar next door to the Sun and then on to Denny's.

### ARGUMENT

#### POINT 1

THE EVIDENCE AS A MATTER OF LAW IS INSUFFICIENT TO SUPPORT A CONVICTION OF RAPE.

The standard for review of the sufficiency of the evidence for a conviction is that "it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime". State v. Wilson, 565 P.2d 66 (1977).

But when the sufficiency of the evidence is being reviewed in a sex-offense conviction,

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. State v. Horne, 12 Utah 2d 162, 364 P.2d 109 at 112 (1961).

The need for these added considerations in determining the sufficiency of the evidence in a sex-offense is that the uncorroborated testimony of the prosecutrix will be enough to sustain a conviction, State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963). When the conviction is based upon the uncorroborated testimony of a single complaining witness the appellate Court must decide if the "evidence is so inherently improbable as to be unworthy of belief, that upon objective analysis, reasonable minds could not believe beyond a reasonable doubt, defendant was guilty of the offense charged". State v. Mills, 530 P.2d 1272 (Utah, 1975). See also State v. Danks, 350 P.2d 416 (Utah 1960)

The essential elements of the crime of rape are given in Utah Code Ann. §76-5-402 (1953 as amended).

A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent. Consent is defined by statute in Utah Code Annotated §76-5-406 (1953 as amended). The subsections applicable in this case include:

- (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.

Finally, the State has the burden of proving the lack of consent as an element of the crime. State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959).

POINT A

THE PROSECUTRIX'S STORY IS INHERENTLY IMPROBABLE BECAUSE THERE IS NO EVIDENCE CORROBORATING HER CLAIM OF A LACK OF CONSENT, THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION AS A MATTER OF LAW.

In this case the appellant was convicted on the uncorroborated testimony of the prosecutrix. But the prosecutrix's testimony is so inherently improbable that it is unworthy of belief. Thus, under State v. Mills, supra, this evidence is insufficient to support a conviction.

The prosecutrix's testimony was replete with inconsistencies and contradictions making her testimony improbable, and consequently unworthy of belief.

The major inconsistencies in the prosecutrix's testimony are when she described her own actions on the night of incident. She stated that she had had several drinks of alcoholic beverages throughout the evening. She stated that she had smoked a good deal of a pipe of marijuana shared with the appellant. She testified that, however, none of these intoxicants had affected her mind. However, she was unclear on several of the sequences of events including her testimony at preliminary hearing that she stated that she had filled the pipe bowl with marijuana and at trial that he had filled the pipe bowl with marijuana. She by her own description, her actions were by far more consenting than not consenting. She agreed to go with the appellant to dance, she agreed to go with him to smoke marijuana, she agreed to allow him

to put his arm around her and kiss her. She agreed after sex to have him continue to kiss her, she agreed to walk with him hand in hand back to the Sun Tavern. She agreed to meet him later. She testified that she did not want him to think that she was afraid. She testified that she thought something would probably occur with him even though she still agreed to go with him to a secluded place. She testified that she fought him to the extent that she was able to get him off of her but that she did not run away nor did she at anytime scream or hit him. Because of these inconsistencies in certain aspects of her testimony concerning her ability to resist appellant's advances and her efforts to indicate to him her consent the prosecutrix's story that the appellant forced her to engage in sex without her consent is inherently improbable. Thus, without further corroboration the prosecutrix's testimony of her failure to consent to the intercourse is insufficient as a matter of law to support a conviction. The prosecutrix's testimony that intercourse occurred without consent is uncorroborated and should be viewed carefully. The prosecutrix testified that at one point appellant's hand was over her mouth and nose and that she though that her nose had been broken. She admitted, however, that her nose did not bleed. No evidence was presented that she had severe injuries to her facial area. Witness who had seen the appellant at the bar that evening and police who interviewed the appellant at a later time did not present evidence that appellant was angry or violent. Consequently, reasonable minds would enter-

tain a reasonable doubt that the appellant committed the crime.

#### POINT B

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION AS A MATTER OF LAW BECAUSE LACK OF CONSENT WAS NOT PROVED BEYOND A REASONABLE DOUBT AND THERE WAS NO EVIDENCE OF REASONABLY EXPECTED RESISTANCE TO BE OVERCOME BY FORCE AND THERE WAS NO EVIDENCE OF IMMEDIATE THREATS WHICH WOULD PREVENT RESISTANCE BY A PERSON OF ORDINARY RESOLUTION.

Under Utah Code Ann. §76-5-406 (1953 as amended) a lack of consent may be demonstrated by showing either force that overcomes a reasonable resistance or threats that would prevent resistance by a person of ordinary resolution.

In State v. Horne, supra, the resistance that the law requires a woman make is no "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". Id at p. 111, 112. In that case, the Utah Supreme Court found that facts insufficient as a matter of law to support a conviction. The factors that the Court considered included: (1) during the period of time that the defendant was in her trailer the prosecutrix made no outcry; (2) the prosecutrix did not attempt to leave or seek help during the incident; (3) there was no evidence of marks or bruises; (4) there was no evidence of threats made either upon the prosecutrix or her children; and (5) the length of time the prosecutrix waited before making a complaint.



During the time that the prosecutrix and appellant spent together, prosecutrix made no outcry. Although she testified people were in the area and it was a public place. Furthermore, even though the prosecutrix testified that she felt that she was going to have trouble she went with the appellant anyway and on the way there passed several individuals in the area.

Secondly, the prosecutrix had ample opportunities to get away from the appellant but did not avail herself to such opportunities.

Thirdly, there was little or no evidence of a struggle. The prosecutrix testified that she hurt her nose but there was no observable evidence of actual injury. She had no bruises, abrasions, lacerations around the face and throat nor any to any other area of her body. She had no marks on her mouth where she testified that appellant had grabbed her. Prosecutrix admits that she did not strike appellant, nor scratch him, nor try to hurt him even though she testified her hands were in no way bound. Prosecutrix testified that appellant said, "Do you want me to kill you?" She also testified that she did not respond since she did not want appellant to think that she was afraid. Prosecutrix claims that she was saying "No, no, no" to appellant. Appellant testified that while she said no that she was giggling and laughing and that she had allowed him to be kissing her just previously. Prosecutrix also stated that she had pleasant conversation with appellant before and after sex had occurred. That conversation

combined with the fact that there was no physical resistance does not provide sufficient evidence to establish that the prosecutrix resisted any force asserted by the appellant under the circumstances.

Another factor in the Horne case was that there was no evidence that threats had been made. Here, the prosecutrix claims that the appellant asked if she wanted him to kill her. Prosecutrix testified that she had seen no evidence of a weapon and that she had been able to push him away on her own. This case is distinguishable from State v. Cederstrom, Utah Supreme Court No. 14777 (December, 1977), in that the prosecutrix in Cederstrom claimed that the defendant also produced a knife, screw driver, or other object when making the threat that she would be hurt. Here no weapon was displayed. No weapon was ever found. In fact, the prosecutrix did not testify that the appellant had a weapon or threatened to use a weapon. Similarly, this case is distinguishable from State v. Studham, 572 P.2d 700 (1977). In the Studham case, this Court found several facts which in totality added to the circumstances, the prosecutrix had resisted force sufficient to meet the standards in the Horne case. In that case, the evidence showed that the prosecutrix had a young son in the apartment and that she had a bruise or cut on her lip. The prosecutrix had testified that defendant had told her that she would not live to be past the age of twenty-one. The threats, combined with the concern of the safety of the young child and the bruises or cut on her lip, were

sufficient to show that the prosecutrix had acted reasonably under the circumstances. This case is distinguishable, however, on several grounds. First of all, the prosecutrix had no young son or other person to protect besides herself. Secondly, this act occurred in a public place not too far from a well traveled area in which the prosecutrix knew that there was other people. Thirdly, prosecutrix displayed no signs of physical injury or trauma such that might be expected if one had resisted force. It must be remembered that in this case, the prosecutrix is 21 years old and in good health. She had not been forced to go any place that she did not want to go. In fact, she had agreed to go with appellant. She had agreed to smoke marijuana with appellant. She had agreed to allow him to kiss her and put his arm around her. She agreed to meet him later. She was aware at the Sun Tavern that people do go with one another to have sex. She testified that she suspected that something was going to happen. Yet in this case the prosecutrix put up no recognizable physical resistance other than the words no, no, no, gave very little indication of lack of consent. Combined with the fact that she had agreed to several other acts, and that she had partaken of intoxicants which may have caused her to giggle and laugh is apparent that no lack of consent was displayed by the prosecutrix.

On the basis of these facts, a reasonable mind would entertain a reasonable doubt that there was a lack of consent on



the part of the prosecutrix, and judgment must be reversed.

### CONCLUSION

The evidence in this case is insufficient for the appellant to be convicted of rape. The prosecutrix testified that there was a threat made to her. However, this is indirect conflict with the appellant's testimony concerning the events. Furthermore, the prosecutrix testified that at one point she was able to get the appellant away from her but made no move to run away from him. The prosecutrix's lack of consent was not evidenced by resistance reasonable for her age, strength, the surrounding facts and attending circumstances. The prosecutrix testified she did not see any weapon nor was there any threat made with regard to a weapon and that combined with the fact that she knew that she was able to get away from appellant by her own testimony shows that the prosecutrix did not resist in a way reasonably expected under the circumstances. Her only indication to appellant that she did not consent was when she said no, no. This, however, could be misinterpreted as no resistance if combined with giggling. At no time did the prosecutrix make an attempt to leave the area after she had agreed to kiss the appellant and allow him to have his arm around her. She did not make any attempt to attract the attention of others even though she knew that there were other people in the area. Prosecutrix suffered no physical injury, there was no physical damage to any of her clothing as a result of this incident. Furthermore, as she was returning to

the tavern the prosecutrix agreed to meet the appellant at a later time and continued to converse with him and continued to walk hand in hand with him. The total circumstances surrounding this incident give rise to a reasonable doubt. The evidence was insufficient to sustain a conviction for the crime of rape.

Respectfully submitted,

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