1981

The State of Utah v. Mark Von Stettina : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MARK VON STETTINA,

Defendant-Appellant.

Case No. 16898

BRIEF OF RESPONDENT

APPEAL FROM THE 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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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with rape, a second degree felony, in violation of Utah Code Ann. § 76-5-402 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty on December 6, 1979, in the Third Judicial District Court, the Honorable Dean E. Conder, presiding. On January 9, 1980, the trial judge sentenced appellant to an indeterminate term of not less than one year nor more than fifteen years at the Utah State Prison. In addition, appellant was fined $500.00.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming appellant's conviction and sentence.

STATEMENT OF FACTS

Appellant and Ms. Stephenson first met on the evening of the 23rd of July at the Sun Tavern Bar in Salt Lake City (T.18). Ms. Stephenson had been in the bar for a few hours with some relatives and friends, when appellant approached her table and began talking to her (T.23). However, because the music was loud appellant suggested that they go outside to talk (T.23). Ms. Stephenson went outside with appellant without informing any of her companions where she was going (T.24).

Once outside, appellant asked Ms. Stephenson if she would like to smoke some marijuana (T.25). Ms. Stephenson indicated that she did, and so she and appellant proceeded across the street to a parking lot, where appellant noticed an inclined grassy area where no one would be able to see them (T.26,27). They sat down together on the grass, and appellant produced a pipe, which they filled with marijuana and began smoking (T.28,29). After each person had taken a few "tokes" of marijuana, Ms. Stephenson stood up and said she wanted to return to the bar (T.29). Appellant, however, grabbed Ms. Stephenson's arm and pulled her back down, telling her to wait until he finished smoking (T.29, 30).

After Ms. Stephenson sat back down appellant put his arm around her, and when he finished smoking, he asked her if he could kiss her (T.30,31). Ms. Stephenson told him "No;" however, appellant proceeded to kiss her, ignoring her refuals, and pushing her back onto the ground straddling her (T.31,33). While pushing Ms. Stephenson down, appellant placed his hand over Ms. Stephenson's nose and mouth so she could not breathe (T.33). When Ms. Stephenson tried to push appellant's hands away he said, "Shut up and put your hands down" (T.34).

Frightened by appellant, Ms. Stephenson allowed him to unbutton her blouse and to kiss her (T.34). Ms. Stephenson repeatedly begged appellant to stop, but he did not stop until he heard a noise, which caused him to sit up (T.36). As he leaned back, Ms. Stephenson was able to free her foot and kick him (T.37). Appellant responded by putting his hand over Ms. Stephenson's mouth and saying, "Do you want me to kill you?" (T.37). When Ms. Stephenson shook her head no in acquiescence, appellant pulled down her pants and removed her tampon (T.39). Then, appellant pulled down his own pants and had sexual intercourse with Ms. Stephenson (T.40). During this time

Ms. Stephenson continued to ask him to stop, and she even began to yell, during intercourse, that he was hurting her (T.39,40).

After intercourse, Ms. Stephenson allowed appellant to kiss her and hold her hand because she feared that if she did not he might do something else (T.41). Ms. Stephenson and appellant returned to the bar, where she told appellant she would see him later that evening, hoping that he would leave (T.42,43).

After appellant left, Ms. Stephenson entered the bar, and told her brother she had been raped (T.43). Her brother in turn told the doorman, who took them to the office and called the police (T.43). After the police arrived, Officer Hagelburg took Ms. Stephenson back across the street, where he found the discarded tampon (T.83).

Ms. Stephenson testified that she did not remember seeing any people, from the time she and appellant left the bar until they returned (T.25,26,27,42). Also, the doorman, who called the police, associated the description given by Ms. Stephenson with appellant (T.72). The doorman, Officer Hagelburg and Officer Smith all testified that Ms. Stephenson was extremely upset after the alleged rape (T.69,70,81,87).

ARGUMENT

POINT I

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

Appellant was convicted of rape in violation of Utah Code Ann. § 76-5-402 (1953), as amended, which provides:

> A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent.

Appellant does not deny having sexual intercourse with Ms. Stephenson, nor does he claim she is his wife. Therefore, the only issue raised by appellant on appeal is that the evidence was insufficient to establish that the act of intercourse took place without Ms. Stephenson's consent.

Utah Code Ann. § 76-5-406 (1953), as amended, provides that an act of sexual intercourse takes place without the victim's consent in either of the following circumstances:

> (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. . . .

Applying this standard in State v. Herzog, 610 P.2d 1281, 1283 (Utah 1980), this Court stated:

> The determination of whether . . . consent was present or absent in any given case is factual in nature, and is thus a matter for determination by the finder of fact.

Accord: State v. Meyers, 606 P.2d 250 (Utah 1980).

The Utah Supreme Court has on many occasions 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 this Court assumes that the jury believed that which supports the jury verdict. State v. Reddish, 550 P.2d 728 (Utah 1976).

Respondent submits that the evidence in the instant case, viewed in the light most favorable to the jury verdict, is not so inconclusive that reasonable minds must have entertained a doubt as to appellant's guilt. In fact, the evidence shows that appellant compelled Ms. Stephenson to submit to intercourse by force which overcame a reasonable amount of resistance on her part, and appellant compelled Ms. Stephenson to submit to intercourse by threatening her. Ms. Stephenson testified that, from the time appellant began kissing her until he had intercourse with her that she repeatedly asked him to stop and that during intercourse she began screaming. She further states that many times she tried to push him away, and that she tried to kick him off of her. Ms. Stephenson testified that appellant placed his hand over her mouth and nose making it difficult for her to breathe. Finally, the evidence shows that Ms. Stephenson continued to resist appellant until he threatened to kill her and only then did she acquiesce (T.30-40). Therefore, appellant's conduct falls within the scope of Section 76-5-406, which establishes that he had intercourse with Ms. Stephenson without her consent.

Nevertheless, appellant argues that he had intercourse with Ms. Stephenson with her consent because

she allowed him to hold her hand and kiss her. In addition, appellant claims that the following factors indicate that the act of intercourse was consensual: the fact that there is no evidence of a weapon or a struggle; the fact that Ms. had no apparent injuries; the fact that she was friendly to the defendant after intercourse; and the fact that Ms. Stephenson made no outcry or attempt to escape, even though there were other people in the area. Appellant's argument is untenable. First, there is evidence that Ms. Stephenson did struggle against the defendant. Ms. Stephenson testified that she repeatedly asked appellant to stop, and that she did begin screaming during intercourse. However, contrary to appellant's assertion, Ms. Stephenson testified that she saw no one, from the time she left the bar until she returned (T.25,26,27,42). Ms. Stephenson also testified that she kicked appellant and tried to push him away (T.34,37). Therefore, there is ample evidence of a struggle. Appellant's argument also ignores the fact that, having threatened Ms. Stephenson, his conduct falls within the scope of Section 76-5-406.

Consent is not shown from the fact that Ms. Stephenson consented to accompany appellant or from the fact that she failed to resist so fervently that she subjected herself to great physical harm in the face of a

threat that appellant would kill her. In State v. Herzog, 610 P.2d 1281 (Utah 1980), which is remarkably similar to the instant case, the defendant picked up the prosecutrix in the parking lot of a local lounge and, at her request, proceeded to a store, where she purchased some beer. Pursuant to the defendant's suggestion to smoke a marijuana cigarette, they drove to the mouth of Parley's Canyon, where due to the lateness of night, no people were around. Both the defendant and the prosecutrix drank a can of beer and mutually shared a marijuana cigarette, then the defendant suggested they have sex. When the prosecutrix refused, the defendant said, "dont make me violent." The prosecutrix then partially disrobed and submitted to intercourse with the defendant.

The defendant in Herzog was convicted for rape and he appealed to this Court on the issue of consent. With reference to that issue this Court stated:

> The fact that the prosecutrix accepted a ride from defendant, accompanied him to a store where she bought beer for the two of them, and even agreed to ride into the canyon with him, is not legally determinative of the question of consent. One does not surrender the right to refuse sexual intimacy by the act of accepting another's company, or even by encouraging and accepting romantic overtures.

Id. at 1283.

This Court went on to state:

> . . . the law does not require an individual, in the face of an open and apparently genuine threat of violence, to engage in detached reflection regarding the sincerity with which it was made, or the likelihood that it will be carried out. This is so whether or not the defendant makes open display of a deadly weapon, and whether or not the victim makes outcry when such would be futile, there being no one within shouting distance.

Id. at 1283, 1284.

In conclusion, even though Ms. Stephenson did consent to certain contact with appellant, she did not consent to have intercouse with him as is evidenced by her resistance and the fact that she only submitted to intercourse with appellant after he had threatened her life.

The final assertions made by appellant are that because Ms. Stephenson's testimony contains some inconsistencies and because it is uncorroborated it is inherently improbable and therefore, insufficient to support the verdict. However, the inconsistencies cited by appellant are peripheral in nature and they do not go to the issue of consent. In addition this Court has stated on numerous occasions that a conviction for rape can rest on the uncorroborated testimony of the prosecutrix. In State v. Studham, 572 P.2d 700 (Utah 1977), this Court stated:

> Most crimes are committed in such secrecy as can be effected; and that is particularly so of this type of offense. Therefore, the question of guilt or innocence often depends upon the weighing of the credibility of the victim against that of the accused. Accordingly, the rule is that if there is nothing so inherently incredible about the victim's story that reasonable minds would reject it, a conviction may rest upon her testimony alone.

Id. at 701.

In the instant case, Ms. Stephenson's testimony with reference to consent is uncorroborated. Much of her testimony, however, is corroborated. Appellant testified that he went with Ms. Stephenson to smoke marijuana and that he had sexual intercouse with her. Officer Hagelburg stated that he found a tampon where Ms. Stephenson told him the rape took place, which corroborates her testimony that the defendant removed her tampon before the intercourse occurred. From the description that Ms. Stephenson gave the doorman, he identified the appellant. Therefore, Ms. Stephenson's testimony is substantially corroborated. With reference to the issue of consent, there is nothing inherently improbable in her testimony that she made substantial efforts to resist the defendant, and that the only reason she submitted to intercourse was because he threatened to kill her.

CONCLUSION

The only issue raised by appellant on appeal is whether as a matter of law the act of intercouse with the prosecutrix was consensual. The evidence viewed in the light most favorable to the jury's verdict establishes that Ms. Stephenson submitted to intercourse only after she made a substantial effort to resist appellant, and even then she did not submit until he threatened her life. Therefore, the issue of consent is resolved under Sedtion 76-5-406, which states that intercouse is without consent if the actor compels the victim to submit to intercourse by threatening her or by overcoming a reasonable amount of resistance by force.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing Brief of Respondent, postage prepaid, to Ms. G. L. Fletcher, Attorney for Appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 20th day of February, 1981.

Craig L. Barlow