1981

# State of Utah v. Larry Elliott and William H. Clayton : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LARRY ELLIOTT and
WILLIAM H. [illegible],

Defendants-Appellants.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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|---|---|---|
| STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -vs- | : | Case Nos. 17350 17351 |
| LARRY ELLIOTT and WILLIAM H. CLAYTON, | : | 17358 |
| Defendants-Appellants. | : | |

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE MAURICE HARDING, JUDGE, PRESIDING

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TABLE OF CONTENTS



CASES CITED

TABLE OF CONTENTS

(Continued)



STATUTES CITED



OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

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|---|---|
| STATE OF UTAH,<br><br>Plaintiff-Respondent,<br><br>-vs-<br><br>LARRY ELLIOTT and<br>WILLIAM H. CLAYTON,<br><br>Defendants-Appellants. | Case Nos. 17350,<br>17351, 17358 |

BRIEF OF RESPONDENT

## STATEMENT OF THE NATURE OF THE CASE

Appellants were charged with Aggravated Sexual Assault in violation of Utah Code Ann. § 76-5-405 (1953, as amended). They were convicted of the lesser included offense of Forcible Sodomy in violation of Utah Code Ann. § 76-5-403 (1953, as amended).

## DISPOSITION IN THE LOWER COURT

Appellants, Larry Elliott and William H. Clayton, were found guilty of Forcible Sodomy by a jury in the Fourth Judicial District Court, the Honorable Maurice Harding, Judge, presiding.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdicts of guilty rendered by the jury below.

## STATEMENT OF THE FACTS

All parties involved in this crime were inmates at the Utah County Jail on May 4, 1980, the date of the offense (T. 17,18). The victim, Dennis Lynn Frazier resided in a cell with one of the appellants, Elliott (T.18). The other appellant, Clayton, was housed in a nearby cell which did not lock (T.20,86,105). The victim testified that shortly after lock-up on May 4, 1980 appellant Elliott grabbed him, took off his pants and drug him to the cell bars where appellant Clayton was (T.24). Clayton then held the victim who was facing inward to the cell while Elliott told the victim to "lick my dick" and "give me a blow job" and we will leave you alone (T.24). The victim refused and a struggle ensued. The appellant Clayton took his penis out of his pants and attempted to get the victim to take it in his mouth (T.26). Although the penis did not enter his mouth at this point there was a touching of Clayton's penis and the victim's mouth (T.26). The victim was struck by Elliott and even became temporarily unconscious as result of choking (T.33,45,92).

The appellants stopped temporarily when they heard a noise in the corridor. The victim redressed and attempted to go to bed, but this upset appellant Elliott who grabbed the victim and wrestled him to the floor, taking the victim's mattress with him (T.35). Elliott once again took the victim's pants and shorts off and wrestled him back to the bars (T.37). This time the victim was held by Elliott facing Clayton who kept placing his penis in the victim's face, at this point he made contact with the victim's mouth (T.38,89).

A third incident followed, wherein Elliott again forced the victim to the bars. When the victim began to scream for help Clayton forced an old sock in his mouth to quiet him (T.41,52,78). During this incident the contents of a shampoo bottle were forced up the victim's rectum by Clayton (T.43,48). Clayton and Elliott then both attempted to insert their penises into the victim's mouth (T.46,90). In light of his resistence, appellant Clayton then placed a choke hold on the victim who again became unconscious and did not reawake until the next morning (T.45). The victim's testimony was corroborated by Brad Parry, an inmate in another cell at the time, who watched the incident through the meal slot in his door (T.111,118).

The victim attempted to notify officials about what happened by writing "Help" on his medical form but that was not immediately noted (T.11).

The appellants in the trial court denied any intent to do serious bodily injury to the victim (T.160,177), or any intent to engage in sexual acts with the victim (T.158, 178,184). Appellant Elliott objected to the failure to give instruction on assault by a prisoner (T.237), but not to any of the other instructions considered below. The instructions given by the trial court allowed the jury to find the appellants guilty of aggravated sexual assault or forcible sodomy or not guilty of any crime.

## ARGUMENT

### POINT I

### THE TRIAL COURT GAVE AN INSTRUCTION ON THE ONLY APPROPRIATE LESSER INCLUDED OFFENSE OF FORCIBLE SODOMY.

The appellant's contention that error occurred as a result of the trial court's failure to give an instruction on the lesser included offinse of forcible sodomy in violation of Utah Code Ann. § 76-5-403 (1953, as amended) is without merit. The appellants were convicted of this crime after the judge issued instruction No. 10 which provides:

> You may find either of the defendants guilty of any offense which is necessarily

included in the charge of aggravated sexual assault as charged in the Information, if in your judgment, the evidence supports such a verdict under these instructions.

To enable you to apply the foregoing instructions, you are instructed that the offense of aggravated sexual assault, as charged in the Information, necessarily includes the crime of "forcible sodomy," which is a lesser offense, the elements of which are stated in paragraphs Numbered "1" and "2" of Instruction No. 7.

If you find, beyond a reasonable doubt, that the defendants are guilty of an offense included within the charge in the Information, but entertain a reasonable doubt as to the crime of which they are guilty, it is your duty to convict them only of the lesser offense.

(R. 49).

The elements of forcible sodomy as listed in instruction No. 7 provide:

1. That on or about the 4th day of May, 1980, at Utah County, Utah, the defendants, William Clayton and Larry Elliott, did engage in a sexual act involving the genitals of defendants and the mouth of Dennis Frazier.
2. That such sexual act was committed without consent of Dennis Frazier.

These elements are consistent with § 76-5-403 Utah Code Ann. (1953, as amended) which provides:

(1) A person commits sodomy when he engages in any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.
(2) A person commits forcible sodomy when he commits sodomy upon another without the other's consent.

Thus the appellants contention of error is without merit, since the trial court adequately instructed the jury on the lesser included offense of forcible sodomy § 76-5-403 Utah Code Ann. (1953, as amended).

POINT II

INSTRUCTIONS, RAISED FOR THE FIRST TIME ON APPEAL, ARE NOT REVIEWABLE UNLESS A FAILURE TO GIVE THEM SUA SPONTE, RESULTED IN A MANIFEST INJUSTICE; NO SUCH INJUSTICE HAS BEEN SHOWN.

Respondent does not dispute the basic premise that a defendant in a criminal case should be allowed to present his theory of the case to the jury. However, in State v. Hendricks, 596 P.2d 633 (Utah 1979) this Court recognized that "the right is not absolute, and a defense theory must be supported by a certain quantum of evidence before an instruction as to an included offense need be given." See also, State v. Close, 28 Utah 2d 144, 499 P.2d 287 (1972); State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971); State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947). Because the right is not unlimited, the trial court is not necessarily bound to give all instructions relating to defense theories simply because they are requested or characterized by the defendant as reflecting his theory of the case. This is especially true where the defendant does not request an

instruction. In such a case, the decision to give an instruction is totally within the discretion of the trial court. Utah Rules of Criminal Procedure § 77-35-19(c) provides:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid manifest injustice.

As here demonstrated, the general rule is that error will not be assigned to instructions given to the jury unless objections to those instructions or omissions are made in the trial court. Even though a party may raise error on appeal based on something not objected to below this should only be allowed where manifest injustice would result if the claim of error was not allowed.

The statute is based upon sound policy considerations. Attorneys must be required to call a court's attention to potential errors which could be avoided or corrected at the time. Otherwise an attorney could invite error or intentionally fail to call a courts attention to correctable reversible error, thus ensuring two chances to win his case if he or she loses at the trial. With the invited error, he or she

can appeal and obtain a second trial, where one trial would have sufficed. Thus the system could be bogged down in costly, unnecessary appeals and new trials. See Simpson v. General Motors Corp., infra at 9.

In the present case the trial court correctly issued instructions to the jury which gave them three alternatives. The jury could find the defendants guilty of aggravated sexual assault in violation of Utah Code Ann. § 76-5-405(1)(a)(ii) (1953, as amended), or guilty of forcible sodomy in violation of Utah Code Ann. § 76-5-403 (1953, as amended) or they could have found them not guilty of any crime if the evidence was insufficient to support guilty verdicts beyond a reasonable doubt. The evidence was either sufficient to establish their guilt on the crimes instructed or insufficient to find them guilty at all. The instructions which the appellants now, for the first time on appeal, claimed are applicable, are discussed in Points III and IV, infra.

There has been no showing of manifest injustice to the appellants by the trial court's not giving the instructions which they now claim are applicable. Absent such a demonstration, this Court should not review the instructions raised by the appellants for the first time on appeal.

The appellants, after failing in the requests they did make below, now attempt, for the first time on appeal, to raise other allegedly applicable instructions. In Simpson v. General Motors Corporation, 24 Utah 2d 301, 470 P.2d 399 (1970) this Court said:

> Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation.

470 P.2d at 401. See also: State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972); State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965).

The trial court was given no opportunity to rule on the applicability of the requested instructions. There was no request for many of the instructions now raised on appeal and in the absence of a showing of manifest injustice to the appellants, the instructions should not be reviewed by this Court.

## POINT III

INSTRUCTIONS, RAISED NOW FOR THE FIRST TIME, ON APPEAL, AND THE REQUESTED INSTRUCTION OF ASSAULT BY A PRISONER ARE NOT LESSER INCLUDED OFFENSES OF AGGRAVATED SEXUAL ASSAULT.

In addition to an instruction on forcible sodomy discussed in Point I, supra, the appellants contend that the trial court erred in not giving instruction on: 1) assault by a prisoner in violation of § 76-5-102.5 Utah Code Ann. (1953, as amended); 2) aggravated assault by a prisoner in violation of § 76-5-103.5 Utah Code Ann. (1953, as amended); 3) attempted forcible sodomy in violation of § 76-4-101 Utah Code Ann. (1953, as amended); and 4) forcible sexual abuse in violation of § 76-5-404(1) Utah Code Ann. (1953, as amended). Further they state that this error should be the basis of reversal regardless of the fact that there was only an objection to the failure to give the assault by a prisoner instruction by only one of the appellants--appellant Elliott. As noted above, all the other instructions are not properly before this Court.

However, if this Court should decide to review the appellants' requested instructions it will find that these instructions are not lesser included offenses and thus need not have been given.

The standard through which an offense is determined to be lesser and included in another offense is well established.

Under Utah Code Ann. § 76-1-402(3)(a) (1953, as amended), a defendant may be convicted of an offense included in the offense charged when:

> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged . . .

This statute codifies the so-called "same evidence" test for an included offense as defined in previous case law. See State v. Brennan, 13 Utah 2d 198, 371 P.2d 27 (1962); State v. Sunter, 550 P.2d 184 (Utah 1976); and State v. Woolman, 84 Utah 23, 33 P.2d 645 (1934).

In State v. Brennan, supra, the Court elaborated on the definition of a lesser included offense and stated:

> The rule as to when one offense is included in another is that the greater offense includes a lesser one when establishment of the greater would necessarily include proof of all the elements necessary to prove the lesser. Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense.

13 Utah 2d at 197, 371 P.2d at 29 (emphasis added). Thus, in accordance with both the statutory and judicial

definitions of a lesser included offense, it is necessary to look to the legal elements of the crimes to see if the "alleged" lesser included offenses only contain elements which are not part of the greater offense.

The instructions profferred by the appellants, for the first time on appeal, are not within this standard and thus are not lesser included offenses of aggravated sexual assault.

Appellant Elliott, in the court below, objected to the court's denial of his request for a "lesser included offense" instruction on assault by a prisoner (T.237). Appellant's requested instruction provided:

> If you do not find the defendants guilty of aggrevated [sic] sexual assault, you may find the defendants guilty of the lesser included offense of assault by a prisoner.
>
> 76-5-102.5 Assault by prisoner.-Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree.
>
> 76-5-102. Assault-(1) Assault is:
> (a) An attempt, with unlawful force or violence, to do bodily injury to another; or
> (b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another.
>
> 76-5-101. "Prisoner" defined.-For purpose of this part "prisoner" means any person who is in custody of a peace officer pursuant to a lawful arrest or who is confined in a jail or other penial [sic] institution regardless of whether the confinement is legal.

(R.45).

The trial court's refusal to give the appellants' proffered instruction was totally correct.

Under § 76-5-405 Utah Code Ann. (1953, as amended) aggravated sexual assault is defined as:

> (1) A person commits aggravated sexual assault if:
> (a) In the course of a rape or attempted rape or forcible sodomy or attempted forcible sodomy:
> (i) The actor causes serious bodily injury to the victim; or
> (ii) The actor compels submission to the rape or forcible sodomy by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person.

The crime of assault by a prisoner is defined in § 76-5-102.5 as follows:

> Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree.

The elements of the alleged lesser offense include an element which is not necessary to the proof of the alleged greater offense of aggravated sexual assault. In order to establish assault by a prisoner there must be proof that the defendant was in fact a prisoner when the act occurred. On the other hand, the crime of aggravated sexual assault does not require proof of this element. An individual may be convicted of aggravated sexual assault regardless of whether or not he is a prisoner, thus "proof of the lesser

offense requires some element not involved in the greater offense" State v. Brennan, supra, which means that the alleged lesser offense is not a lesser included offense of aggravated sexual assault.

Similar to assault by a prisoner, immediately preceeding, the aggravated assault by a prisoner statute contains an element which is not present in the aggravated sexual assault statute. Namely that the actor was a prisoner when the assault occurred. Since this is not an element of the "greater offense," the aggravated sexual assault statute does not come within the lesser included offense standard of State v. Brennan, supra, and it is clear that aggravated assault by a prisoner is not a lesser included offense of aggravated sexual assault.

Also, aggravated assault by a prisoner cannot be a "lesser" included offense because it carries the same penalty as the crime with which the appellants were charged. Both crimes are second degree felonies.

Forcible sexual abuse also contains elements necessary to conviction which are not present in the aggravated sexual assault offense, thus forcible sexual abuse is not a lesser included offense of aggravated sexual assault.

The forcible sexual abuse statute § 76-5-404 provides:

> —(1) A person commits forcible sexual abuse if, under circumstances not amounting to rape or sodomy, or attempted rape or sodomy, he touches the anus or any part of the genitals of another, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with himself or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other.
>
> (2) Forcible sexual abuse is a felony of the third degree.

The forcible sexual assault statute is aimed at punishing the taking of indecent liberties with the intent to cause emotional or bodily pain or the intent to arouse or gratify the sexual desire of any person. This intent element is not the same as the intent element found in the aggravated sexual assault statute and thus forcible sexual abuse "requires some element not involved in the greater offense" of aggravated sexual assault. Therefore, in accordance with State v. Brennan, supra, forcible sexual abuse is not a lesser included offense of aggravated sexual assault.

"Attempts" to commit a crime are statutorily declared included offenses in § 76-1-402(3)(b) Utah Code Ann. (1953, as amended). Thus attempted forcible sodomy, is an included offense of forcible sodomy which is a lesser

included offense of aggravated sexual assault, the original charge against the appellants. However, the circumstances of this case made the giving an instruction on attempted forcible sodomy inappropriate. (See Point IV below).

POINT IV

ASSUMING, THAT INSTRUCTIONS NOW RAISED FOR THE FIRST TIME ON APPEAL, COULD BE CONSIDERED INCLUDED OFFENSES, THEY WERE INCONSISTENT WITH APPELLANTS' EVIDENCE AND THEORY OF THE CASE, AND NOT JUSTIFIED IN THE CIRCUMSTANCES.

Even if, arguendo, all of the instructions raised by the appellants' on appeal, are somehow considered lesser included offenses, the requested instructions would still be inappropriate. Included offense instructions need not be given unless there is evidence to acquit the defendant of the higher crime and convict him of the lesser, putative crime. Utah Code Ann. § 76-33-6 reads:

> The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.

In State v. Bender, 581 P.2d 1019, 1020 (Utah 1978) this Court stated that the above section is governed by Utah Code Annotated § 76-1-402(4) (1953, as amended), under which:

> The court shall not be obligated to charge the jury with respect to an

> included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. (Emphasis added.)

The Court also noted that this statute is a codification of case law which extends back to 1889. People v. Robinson, 6 Utah 101, 21 P. 403 (1889).

In State v. Dougherty, 550 P.2d 175 (Utah 1976), the defendant was convicted of the crime of unlawful distribution for value of a controlled substance. He appealed, alleging that the trial court erred in refusing to give an instruction on the lesser included offense of possession of a controlled substance. In affirming the conviction, this Honorable Court held that where defense testimony could prove only complete innocence, the defendant was not entitled to an instruction on the lesser included offense. This Court citing Lisby v. State, 83 Nev. 183, 414 P.2d 592 (1966), enunciated the three situations in which the question of whether to instruct on lesser included offenses are frequently encountered:

> . . . First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.

> Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict, or where the elements of the offense differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.
>
> Third, is an intermediate situation. One where the elements of the greater offense include all the elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser offense. In such a situation instructions on the lesser included offense may be given because all elements of the lesser offense have been proved. However, such an instruction may properly be refused if the prosecution has met its burden of proof of the greater offense, and there is no evidence tending to reduce the greater offense. 550 P.2d at 176, 177. (Emphasis added.)

This was affirmed in State v. Pierre, 572 P.2d 1338 (Utah 1977); State v. Bell, 563 P.2d 186 (Utah 1977). Thus an instruction is not properly given if there is no evidence to support a conviction on the lesser offense and acquit the appellant of the greater offense.

Furthermore, if a defendant's theory of the case is all theory and no evidence, or based on the evidence, so unreasonable that it does not satisfy the requirements of a

defense, no instruction thereon is required. See Utah Code Ann. § 76-2-201, et seq. (1953, as amended).

The appellant correctly states that in order to have instructions on lesser included offenses given there must be a basis for acquitting the defendant of the greater crime and convicting him of the lesser.

In the present case, the evidence presented by the appellants falls under the second situation cited in State v. Dougherty, supra, at 18, in which an instruction on a lesser included offense is not appropriate at all. The appellants denied any complicity in the crime, stating that they had no intent to cause the victim any bodily injury (T.160,177) or to engage in any sexual acts (T.158, 178,184). If this were in fact the case, and the jury was inclined to believe appellants' versions of the story, then no conviction could stand either for the greater offense of aggravated sexual assault or for the "alleged" lesser offense of assault by a prisoner, since there would be no criminal intent. On the other hand, if the jury believed, as they apparently did, that the appellants forcibly sodomized the victim, then there would only be grounds for conviction of forcible sodomy without a basis to convict on the lesser offense of assault by a prisoner.

This case falls directly under the guidelines of State v. Dougherty, supra, where the Court declared, "The defense testimony could only prove complete innocence." There, as here, the appellant tried to proceed on a lesser included offense theory, but this was rejected by the Court:

> . . . Such a theory is not available to him where the record shows he could only be found guilty or not guilty of the crime charged. 550 P.2d at 177.

It can be said, therefore, that under Utah Code Ann. § 76-1-402(4) (1953, as amended), the trial court in the case at bar was not obliged to instruct as to an included offense, because even though the jury may have chosen to believe the appellant, thereby acquitting him, no evidentiary basis existed upon which a conviction of assault by a prisoner could stand. Since Utah Code Ann. § 76-1-402(4) is stated in the conjunctive, both statutory requisites must be present before the trial court would be required to instruct on the included offense.

Thus the trial court did not err in refusing to instruct on assault by a prisoner, even if assault by a prisoner could somehow be considered a lesser included offense of aggravated sexual assault.

Similarly, the evidence below did not justify an

instruction on aggravated assault by a prisoner. As noted above, the appellants' theory of the case in the trial court was that they were teasing the victim and did not possess any intent to cause serious bodily injury to the victim nor any intent to sodomize the victim. According to the appellants, they were merely teasing the victim in an attempt to get him to tell them about the "rape" he was charged with (T.158,176). If this theory were believed by the jury, the appellants could not have been convicted of any crime for which they now request instructions, not aggravated sexual assault, nor forcible sodomy, nor aggravated assault by a prisoner.

Thus, "the defense testimony could only prove complete innocence." State v. Dougherty, supra. There, as here, an instruction on the "alleged" lesser offense instruction need not be given by the trial court.

The evidence and the appellants' theory of the case did not justify an instruction on attempted forcible sodomy. The attempt statute § 76-4-101 Utah Code Ann. (1953, as amended) provides:

> (1) For purposes of this part a person is guilty of an attempt to commit a crime if acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense. (Emphasis added.)

The appellants' theory in the court below was that they possessed no intent to either, cause serious bodily injury or engage in sodomy with the victim. If the jury chose to believe this theory there would not be a basis for a conviction of any crime. Not forcible sodomy or aggravated sexual assault nor attempted forcible sodomy. Therefore, as in State v. Dougherty, supra, an instruction may properly be refused if there is no evidence to both convict on the lesser offense and acquit of the greater offense. As in Dougherty if the jury believed the appellants theory of the case it would only prove complete innocence, thus the appellan were not entitled to such an instruction.

Assuming, arguendo, that forcible sexual abuse were a lesser included offense of aggravated sexual assault, neither the facts of this case nor the theory presented by the appellants justify such an instruction. The appellants denied intent to engage in any sexual acts with the victim (T.158,178,184), thus there is no basis upon which the jury could find intent to arouse the sexual desire of any person. The appellants also denied any intent to cause

pain to the victim (T.160,177) thus, no intent to cause substantial emotional or bodily pain could possibly be found by a jury if they believed the appellants. Although the appellants acknowledged some unlawful touching of the victim they denied any contact with his genitals or anus. Once again the appellants' theory and testimony could only prove complete innocence, thus the appellants are not entitled to an instruction on an "alleged" lesser included offense. Therefore, the trial court did not err in not, sua sponte, giving an instruction on forcible sexual abuse.

## CONCLUSION

Utah Rules of Criminal Procedure § 77-35-19(c) provide that a party may not assign error on appeal to the charging or omission of instructions by the trial court where no objection was made in the trial court. The exception to this rule is where failure to do so will result in manifest injustice to the parties. In this case the appellants did not demonstrate that manifest injustice would occur to them, therefore no error should be assigned from instructions now raised by appellants for the first time on appeal.

Furthermore, even if this Court should examine

the instructions raised by the appellants there is no basis upon which reversible error may be found. The trial court instructed on the lesser offense of forcible sodomy, and appellants were convicted thereof. The other instructions raised now by appellants are not lesser included offenses of aggravated sexual assault. Finally, assuming, arguendo, that the unrequested instructions could somehow be considered lesser included offenses, the trial court was not obligated to give the instructions because there was no rational basis upon which the appellants could be "acquitted of the greater offense and convicted of the lesser offense" State v. Brennan, supra. Therefore the instructions as given by the trial court were proper and the appellants' convictions of forcible sodomy should stand.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Respondent to Thomas A. Means, Attorney for Appellants, 67 North 200 East, Provo, Utah 84601, this 31 day of July, 1981.

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