

1981

State of Utah v. Howard D. Newmeyer : 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-

HOWARD D. NEWMAYER,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE JURY VERDICT
OF RAPE AND FORCIBLE SEX
JUDICIAL DISTRICT COURT
COUNTY, STATE OF UTAH
MAURICE HARDING, JUDGE

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Attorney for Appellant

IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
17512

HOWARD D. NEWMAYER, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

APPEAL FROM THE JURY VERDICT OF GUILTY
OF RAPE AND FORCIBLE SODOMY IN THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE
MAURICE HARDING, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
17512

HOWARD D. NEWMAYER, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with two counts of Aggravated Sexual Assault, (Rape and Forcible Sodomy) in violation of Utah Code Ann. §§ 76-5-405 (1953, as amended), both first degree felonies.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty on both counts on November 20, 1980, in the Fourth Judicial District Court, the Honorable Maurice Harding, presiding. On December 12, 1980 Judge Robert Bullock sentenced appellant to an indeterminate term of not less than five (5) years

which may be for life on both Count I and Count II, with the sentences to run concurrently at the Utah State Prison (R.63).

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF THE FACTS

The appellant and the victim, Marie Martin, although not socially acquainted, knew each other because the appellant frequented Mrs. Martin's place of employment and showed her pictures of furniture which he made in his home (T.26,31,134). Mrs. Martin became interested in purchasing furniture from the appellant and on August 28, 1980, she accepted the appellant's invitation to come to his home and see the furniture when she got off work (T.28). However, when Mrs. Martin, got off work that night she called the appellant to tell him that she did not feel right about going to his home and thus could not keep their appointment (T. 9,140). The appellant persisted in his request that she see the furniture (T.140), and even offered to pick her up at the Purple Turtle Drive-in in Pleasant Grove, Utah and take her to his home (T.30,141). Appellant met Mrs. Martin at the Purple

Turtle and they went to the appellant's home and looked at several pieces of furniture. As they went into each room Mrs. Martin would enter first followed by the appellant, who would turn on the light (T.63).

When the tour was complete they went back to the living room to discuss prices and terms of a sale (T.36,66,150). At this point the appellant told the victim that there was another piece of equipment which he thought might interest her (T.63). He led her down the hall to the bedroom and then moved aside to allow her to enter first. The victim entered and when the appellant failed to turn on the light, as he had done in the previous rooms, she turned to see what was wrong. Before she could, the appellant grabbed her from behind and took her with him as he fell to his knees (T.36,67). Mrs. Martin glanced up and noticed that the appellant had a knife in his hand (T.37,68).

The appellant took the victim's hands and secured them behind her back with tape (T.38). He threw her on the bed and took off her shoes, socks and pants and pulled her blouse over her chest, then he disrobed himself and told her to spread her legs and cooperate and she would not be hurt (T.40).

The appellant attempted to have intercourse with the victim. He did not penetrate her vagina but his penis touched her vagina (T.41). Becoming frustrated, the appellant, at knife point told the victim she was not cooperating. He said that she and appellant were going to engage in oral sex and any attempt to bite his penis "would be the end." The appellant then placed his penis in the mouth of the victim (T.42). When through he again attempted vaginal intercourse with the victim, and although there was penetration at this point there was not an ejaculation (T.42). The appellant then threatened the victim by running the knife across her bare chest and, once again engaged in vaginal intercourse (T.43). The appellant became frustrated and again performed oral sodomy on the victim, ejaculating into her mouth (T.44).

The appellant got up from the bed, dressed and asked "Now what am I going to do with you?" Mrs. Martin fearing the possibilities responded by saying "God don't hurt me" (T.44). There was a discussion about the victim going to the police during which the appellant told the victim that it would be his word against hers if she went (T.45). The victim was still bound and still fearful. She told the appellant that she would not go to the police

(T.46), and then attempted to change the subject by requesting something to drink. The appellant took the tape off her wrists and allowed her to dress.

The appellant took the victim back to her car and demanded that she return the paper with his name and address on it (T.47). Mrs. Martin returned home and found that her husband was angry. She did not know how to tell him about the assault (T.48). She washed and went to bed but did not sleep (T.49). The next morning Mr. Martin left the house without speaking to her so again she was unable to tell him what had happened to her (T.49). Shortly after her husband left she received a phone call from a friend of her husband. The friend sensed something was wrong (T.50) and called back later in the morning to see if she was alright. When Mrs. Martin told him that she needed to talk to someone he came to the home accompanied by his wife. The two of them listened to Mrs. Martin and then they gave her alternatives for dealing with the attack. They also contacted Mr. Martin and helped her to break the news to him (T.49-52). Mrs. Martin went to the hospital where tests were taken at 2:00 p.m., August 29, 1980, approximately 12 hours after the rape and sodomy occurred.

At trial the defendant took the stand and testified in his own behalf. During cross-examination by the prosecution the court questioned the defendant in order to clarify his testimony (T.151). The appellant objected to the questioning and his objection was overruled. After the jury had retired the appellant moved for a mistrial due to the judge's questioning of the defendant and this was denied.

The appellant also moved for a mistrial on the basis of alleged errors by the prosecutor in his closing argument, which was not transcribed. This motion was also denied by the court.

ARGUMENT

POINT I

IN CERTAIN CIRCUMSTANCES THE TRIAL COURT MAY QUESTION WITNESSES; IN THIS CASE THE COURT PROPERLY EXERCISED THAT RIGHT.

On appeal appellant alleges that the questioning of the defendant by the trial court was prejudicial and should be the basis of reversal of his convictions for rape and forcible sodomy. During the prosecution's questioning of the defendant, questions similar to those asked by the judge were asked. The defendant did not respond to a question, and the judge upon completion of

the questioning of the defendant by both parties, questioned to the defendant. Respondent submits that these questions were within the trial court's prerogative and were not prejudicial or the basis upon which the appellant's convictions may be reversed.

In order to determine whether the questioning was in fact prejudicial it is necessary to read the questions in context. Prior to the judge's questioning the prosecutor conducted the following examination of the appellant.

Q. Did you have a knife on you at the time?

A. I don't carry a knife. I had no reason to carry a knife.

Q. Where was it?

A. Where was it?

Q. Where was it?

A. The knife was in the closet.

Q. The closet where Detective Blackhurst indicates he found it?

A. That is true.

Q. On the shelf?

A. That is right.

Q. Did you take a look at State's Exhibit No. 3 when I showed it to your counsel, the one right in front of you, the picture?

A. It's a picture.

Q. Do you see a closet door there?

A. Yes, I see the closet door there.
Q. It's closed, isn't it?
A. That is correct.
Q. It customarily remains closed in your residence, doesn't it?
A. Yes.
Q. Did you have any furniture in there that you wanted to show Mrs. Martin?
A. I had no reason to show Miss Martin my closet.
Q. She never looked in your closet, did she?
A. She had no reason to.
Q. You were with her all the time she was in the house, weren't you?
A. That is correct.
Q. She didn't look in that closet, did she?
A. No, she didn't.

T.141-142; and

Q. You keep your camping gear, as you testified to, stored underneath the basement staircase, right?
A. Yes.
Q. You have got butcher knives and cheese knives and other knives in the kitchen, right?
A. I don't own a butcher knife.
Q. Carving knives? Do you keep them in the kitchen? Is that your testimony?
A. Yes.
Q. Keep them in the drawers?
A. I keep one in the drawer and keep the other one underneath the snack bar on the cheese block.

Q. Marie didn't go underneath the snack bar and the cheese block or any drawers to look at any of your knives, did she, while you were present?

A. No, she didn't.

Q. She didn't go in the closet and look at a knife?

A. (No response.)

T.151.

As a result of the appellant's lack of response to this last question there was an obscurity in the testimony of the appellant. It was this obscurity which prompted the court to ask:

Q. Where was it you said you kept this knife?

A. The one there, Your Honor?

Q. Yes.

A. Up in the closet.

Q. You didn't show it to Marie?

A. No, not at all. In fact all the knives in the house really are not in a visible viewpoint at all. They are either in drawers or attached to equipment. They were not visible at all.

Q. Have you ever shown it to her at any time?

A. No, Your Honor. No.

Q. How do you account for the fact she told the officers the next day what kind of a knife it was?

A. I cannot account for that. I know the officers asked me if I had one like it. I have no way of accounting for that, Your Honor.

Read in context, it is clear that the questions asked by the trial judge lack the prejudicial characterization of the appellant's brief.

Moreover, the test for determining whether the trial court acted properly in questioning a witness as based on case law and common sense does not include subjective characterizations of judicial demeanor, tone and voice inflections which cannot be supported by the record on appeal.

In State v. Mellen, 583 P.2d 46 (Utah 1978), this Court sustained the appellant's conviction for aggravated sexual assault despite questioning by the trial court of a witness. In that case the Court noted that there is a requirement that a judge maintain an attitude of neutrality. This Court also stated:

Notwithstanding what has just been said, the judge does have a function beyond sitting as a comparatively silent monitor of the proceedings. In order to discharge his responsibility of carrying out the above stated objective, it is within his prerogative to ask whatever questions of witnesses as in his judgment is necessary or desirable to clarify, explain or add to the evidence as it relates to the disputed issues.

Id. at 48 (footnotes omitted, emphasis added).

See also, State v. Green, 89 Utah 437, 57 P.2d 750 (1936);

State v. Gleason, 86 Utah 26, 40 P.2d 222 (1935); State v. Garret, 595 S.W.2d 422 (Mo. 1980). Similarly in this case the court's questioning was directed at making clear, points in evidence. The record does not support appellant's claim of prejudice, and the trial court was properly exercising its prerogative to question witnesses.

In Hernandez v. State, 490 P.2d 1245 (Nevada 1971), the court affirmed questioning by a trial court where:

. . . the questions asked by the court were merely repetitive of those asked by counsel; no new avenues were opened by this questioning.

Id. at 1247.

The present case presents the same type of questioning by the court. The court's questions were similar to the prosecutor's; they examined subject matter which had been reviewed by the State and they opened no "new avenues."

Recognizing that the permissible scope of questioning by a court is narrow, if the trial court was in error in asking the defendant questions the error was not prejudicial to the appellant's right to a fair trial, and thus it does not justify reversal of the appellant's conviction. Under Utah Code Ann. § 77-42-1:

After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

In State v. Kazda, 550 P.2d 949 (Utah 1975), this Court stated that error which had a substantial effect upon defendant's right to a fair trial would be that:

. . . in the absence of the error there is a reasonable likelihood that there would have been a different result.

Id. at 950.

If the court had not questioned the appellant in this case the same evidence would have gone to the jury. The alleged error occurred after the prosecution had rested and the elements of the offense had been established. Furthermore, the court mitigated any damage which may have occurred as a result of his questioning by issuing jury instruction No. 18:

If during this trial, the Court has said or done anything which has suggested to you that it is inclined to favor the claims or position of either party, you will not permit yourselves to be influenced by any such suggestion.

The Court has not intended to indicate any opinion as to which witnesses are, or are not, worthy of belief, nor which party should prevail. If any expression has seemed to

indicate an opinion relating to any of these matters, you should disregard it, because you are the exclusive judges of the facts.

(R.50).

In so stating the court specifically admonished the jury that they and not he, were the exclusive judges of the facts, and credibility of all witnesses. Thus in accordance with § 77-42-1 this Court should not presume prejudice. The questioning when read in context does not establish a basis for reversal of the appellant's conviction since it was merely an attempt to "clarify an obscurity" and thus within the trial court's prerogative.

POINT II

WHERE ALLEGED ERROR BY THE PROSECUTOR
IN CLOSING ARGUMENT WAS NOT PRESERVED
IN THE RECORD THERE IS NOTHING TO
REVIEW ON APPEAL.

The appellant alleges that the trial court erred in refusing to grant his motion for mistrial based on alleged errors of the prosecution in its closing argument to the jury. The argument was not transcribed. The motion which was made after the jury retired was properly denied by the trial court. In this case the trial court is the only court which was able to analyze what was said and the effect, if any of those statements.

Appellant correctly cites the test to determine if remarks made by counsel in arguments require reversal. In State v. Valdez, 513 P.2d 422 (Utah 1973) this Court stated:

Counsel for both sides have considerable latitude in their arguments to the jury; they have a right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom. The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the juror matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks. The determination of whether the improper remarks have influenced a verdict is within the sound discretion of the trial court on motion for new trial. If there is no abuse of this discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment.

413 P.2d 422, 426.

It is recognized that on appeal "this Court is not inclined to reverse a conviction on matters dehors the record." State v. Starlight Club, 406 P.2d 912, 913 (Utah 1965). In State v. Langley, 371 P.2d 586 (Ariz. 1962) the court stated that it "should only review those matters appearing in the trial court's records." Other states have specifically refused to review on appeal issues of prosecutorial error

where the transcript does not contain the arguments and objections raised in the trial court. See State v. Standley, 586 P.2d 1075 (Mont. 1978); Lewis v. State, 572 P.2d 211 (Nev. 1977); State v. Halloway, 219 Ka. 245, 547 P.2d 741 (1976); and Diebold v. People, 485 P.2d 900 (Colo. 1971).

Without a record, this Court must rely on the wisdom of the trial court which was the only court which was able to ascertain whether the alleged error of the prosecutor justified a mistrial.

POINT III

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

Appellant was convicted of two counts of aggravated sexual assault in violation of Utah Code Ann. § 76-5-405 (1953, as amended), which provides:

- (i) A person commits aggravated sexual assault if: (a) in the course of a rape or attempted rape or forcible sodomy or attempted forcible sodomy;
- (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.

Forcible Sodomy is defined in § 76-5-403:

- (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.

In the trial court appellant proceeded on the theory that there was no vaginal intercourse, only oral sodomy to which he claimed the victim consented (T.129). Appellant appears to argue in his brief that the evidence presented at trial indicates that the victim consented both to intercourse and sodomy. While defendant is entitled to present his theory of the case to the jury, he can not advance that theory for the first time on appeal. Therefore, the appellant may not, on appeal, raise for the first time the issue of consent as to the sexual intercourse. State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972).

However, if this Court should choose to examine the issue of consent as to the rape charge the appellant's claim that the evidence established at trial was "inherent^{*}ly incredible" and thus not sufficient for reasonable minds to conclude that appellant was guilty beyond reasonable doubt is without merit. The evidence presented below when read in a light most favorable to the jury's verdict was sufficient to establish that the appellant committed forcible rape and forcible sodomy upon the victim, Mrs. Mar

In reviewing a claim of insufficient evidence to support a jury verdict it is well established that:

The weight of evidence and the credibility of witnesses are reserved exclusively for the jury, and this Court will not interfere unless the evidence is found to be so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt. Nor will we weigh conflicting evidence, the credibility of witnesses, or the weight to be given appellant's testimony. Further, unless there is a clear showing of lack of evidence, the jury verdict will be upheld.

State v. Lamm, 606 P.2d 229, 231 (Utah 1980), See also State v. Logan, 563 P.2d 811, 813-814 (Utah 1977); State v. Romero, 554 P.2d 216 (Utah 1976); State v. Fort, 572 P.2d 1387 (Utah 1977); State v. Wilson, 565 P.2d 66 (Utah 1977); and State v. Erickson, 568 P.2d 750 (Utah 1977).

In the case of State v. Studham, 572 P.2d 700 (Utah 1977), this Court stated that where the question of guilt or innocence depends upon weighing the credibility of the victim against that of the accused:

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 702.

In the present case there is nothing so inherently

incredible about the victim's story that reasonable minds would reject it. Mrs. Martin testified at trial that she went to the home of the appellant in order to look at furniture which she was interested in purchasing (T.28,136). The evidence also establishes that there was no prior social contact between the victim and the appellant as they had never dated and had only met in a business setting (T.26,31,134). The victim attempted to get out of the arranged meeting by calling appellant to tell him she could not make it but the appellant convinced her to come and look at the furniture (T.29, 140). Because she didn't know where the appellant's residence was located she met him and left her car at a local drive-in thus retaining no method of escape (T.29, 141).

They went to the appellant's home and looked at furniture. There is no discrepancy in the testimony of either witness until the time when they entered the bedroom of the appellant. The appellant claims that the victim willingly consented, even suggested that they engage in sodomy (T.153). In contrast, the victim's version of the evening, which is supported by circumstantial evidence, is that when they entered the bedroom the

appellant grabbed her from behind and then taped her mouth and bound her hands (T.37,38). This is substantiated by the red marks on her wrists noted by the police officer, the nurse, and the doctor (T.101,115,124) and by the bruise on her neck which was noted by the nurse (T.115). At knife point the victim was told to cooperate and she would not be hurt (T.38,40). The appellant then threw the victim on the bed and took off her shoes and pants, and pulled her shirt and bra over her chest (T.40). He attempted to force himself into the victim, and although he did not penetrate there was touching of his penis and her vagina (T.41). The appellant then told the victim that he was going to perform oral sodomy upon her and any attempt to bite him "would be the end" (T.42). He then rubbed the knife across the chest of the victim, and engaged in vaginal intercourse and although there was penetration he did not ejaculate at that time (T.43). Appellant once again performed oral sodomy on the victim and ejaculated in her mouth (T.44), while holding the knife to her throat (T.43).

These events were sufficient to establish that the rape and sodomy did in fact occur without the victim'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).

In this case the victim acquiesced in the sexual acts under threats by the appellant which were accompanied by use of a knife. This was sufficient to prevent the victim's escape or resistance, and thus the fact that there was no attempt to escape is not determinative. Appellant has failed to show that the jury's verdict was based on such unsubstantial evidence that reasonable minds could not possibly find him guilty beyond a reasonable doubt. State v. Wilson, supra. The jury heard the witnesses and saw the evidence

introduced. It was their prerogative to weigh the evidence and attach credibility to the witnesses' testimony as they saw fit. In this case, it is neither inconsistent nor unreasonable for the jury to have found the appellant guilty of rape and forcible sodomy, and this Court should not set aside the jury's verdict.

CONCLUSION

The trial court has considerable discretion in questioning witnesses in order to clarify testimony or elicit the truth and it is only when this discretion is clearly abused as demonstrated by an objective reading of the transcript, that a conviction may be reversed. In this case there was no abuse of this discretion and any error that may have occurred was harmless and cured by jury instruction No. 18 which admonished the jury not to be influenced by statements of the judge.

The appellant's attempt to allege error as a result of the closing argument of the prosecution must fail because there is nothing in the record upon which this Court may determine if an abuse occurred. In such instances the Court should defer to the ruling of the trial court in refusing to grant a mistrial since they possess an ability to weigh prejudicial effect of the

alleged errors.

Finally, the appellant's contention that the evidence was insufficient to sustain the appellant's convictions is without merit. The evidence viewed in the light most favorable to the jury's verdict establishes that Mrs. Martin submitted to intercourse and sodomy only after she was bound and threatened by words and by use of a knife. Therefore the issue of consent is resolved under Section 76-5-406, which states that intercourse and sodomy 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

Mailed a copy of the foregoing Brief of Respondent to Gary L. Anderson, Attorney for Appellant, 43 East 200 North P. O. Box "L", Provo, Utah 84601, this 13 day of July,

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