1981

State of Utah v. Roy Hutchison : 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-

ROY HUTCHISON,

Defendant-Appellant.

Case No. 17661

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED IN THE FOURTH JUDICIAL DISTRICT
COURT, IN AND FOR UTAH COUNTY,
OF UTAH, THE HONORABLE ALLEN B.
JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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Plaintiff-Respondent,

-vs-

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with forcible sodomy, a second degree felony pursuant to Utah Code Ann. § 76-5-403 (1953), as amended, for an act involving the genitals of SCOTT HARRIS and the mouth of appellant, without the consent of SCOTT HARRIS.

DISPOSITION IN THE LOWER COURT

Appellant was tried on January 19, 1981, in the Fourth Judicial District Court of Utah County, before the Honorable Allen B. Sorensen, Judge, sitting without a jury. Appellant was convicted of the above charge and sentenced to one to fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction in the lower court.

STATEMENT OF THE FACTS

About 2:10 on the morning of October 18, 1980, Scott Harris, age sixteen, arrived at the Provo, Utah, Trailways bus station, en route from visiting his parents in Price, Utah, to a boys' ranch near Provo where he was living. He planned to wait at the station for transportation from Provo to the ranch (Tr. 16-17). Appellant, Roy Hutchison, was also at the station. Two Provo policemen, on a routine burglary check, saw both appellant and Scott Harris there early that morning (Tr. 8-9).

After the policemen left, appellant and Harris engaged in trivial conversation, and appellant, learning that Harris had no place to spend the night, invited Harris to his apartment a short distance away (Tr. 19, 73).

At the apartment, appellant continued the drinking he had begun earlier and gave Harris four or five drinks of whiskey and Pepsi (Tr. 71-72, 19-20). When Harris began to feel the effects of the alcohol, he told appellant he needed to lie down, and appellant directed him to the bedroom (Tr. 20, 35). Just before he went into the bedroom, Harris saw that appellant had put on a woman's dress and wig (Tr. 20-21).

Harris fell unconscious on the bed but was awakened a short time later by appellant's tugging at his belt. Appellant was still wearing women's clothes (Tr. 20-21). Though he tried unsuccessfully to get up, and to push appellant off, Harris was too weak to do either and again passed out on the bed (Tr. 22).

The next thing Harris remembers is waking up with appellant's mouth on his penis (Tr. 22). Harris's pants had been pulled down to his knees (Tr. 31-32). He tried to resist by kicking, squirming, and hitting (Tr. 22, 34), but he testified that "it felt as though my arms were made of lead" (Tr. 22). When he finally managed to get away, he ran out the door and onto the lawn (Tr. 23).

At about 5:00 that morning, Jeff Suffern, who lived in the area, drove past appellant's apartment to go deer hunting. He saw Harris lying naked "in smoke and fire" in front of appellant's apartment (Tr. 12-13, 40, 71). When Suffern came to help, he found the boy "cold, burnt, and presumably in shock" (Tr. 13) near a pile of burning clothes. Harris was wearing only a boot, which had been burned (Tr. 14). Suffern removed the boot, covered Harris with his coat, and called the police.

Robert Smith, a Provo policeman who answered Suffern's

call, also found Harris apparently in shock. Though Smith spoke with Harris at the scene and also later at the hospital, Harris "wasn't able to respond too well" (Tr. 41), and also appeared to be still under the influence of alcohol (Tr. 42). Officer Smith's report, which appellant attempted to submit as evidence at the trial, was made from Smith's notes of these two conversations with Harris at the scene and at the hospital (Tr. 46-47). Though the police report apparently indicated that Harris responded affirmatively when asked if appellant had attempted anal intercourse with him (App. Brief, p. 3), even at trial Harris did not have a clear understanding of the terms anal intercourse and fellatio, and had probably never heard either term before this incident (Tr. 30-31). Appellant attempted to introduce the police report to impeach Harris's credibility, but the trial court excluded it as a violation of the hearsay evidence rule. The trial court found that appellant had the requisite intent to commit the crime and found Scott Harris "quite a credible witness under heated and extensive cross-examination" (Tr. 77). Appellant was convicted as charged.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY EXCLUDED THE POLICE REPORT BECAUSE OF ITS UNRELIABILITY.

A.

THE POLICE REPORT IS UNRELIABLE BECAUSE IT IS HEARSAY, AND THEREFORE IS NOT ADMISSIBLE AS SUBSTANTIVE EVIDENCE.

In an attempt to impeach the credibility of Scott Harris, the prosecuting witness, appellant endeavored at trial to introduce as evidence a report prepared by Provo police Officer Robert H. Smith. The report was compiled from notes Officer Smith took of two conversations with Harris, one conversation at the scene of the incident, on appellant's front lawn, and the other at the hospital where the witness was taken for treatment (Tr. 46-47). Since the police report was an after-the-fact account of conversations between Smith and Harris, it qualifies as hearsay ("a statement which is made other than by a witness while testifying at the hearing"). Utah Rules of Evidence 63.

Hearsay has historically been categorized as inadmissible because it is unreliable. See 5 Wigmore, Evidence, §§ 1362-34 (Chadbourn rev. 1974); 29 Am.Jur. 22, Evidence, § 493. Although appellant in his brief asserts that the report was prepared October 18, 1980, the day of the assault (Brief of Appellant, at 3), the transcript only indicates that the

conversations took place on that date, not that the report was prepared then (Tr. 46). It is logical to assume that any lapse in time between the conversation and the reporting of it would affect the reliability of the report.

Appellant suggests that police reports generally are admissible as substantive evidence, to prove the truth of the matter asserted (Brief of appellant, at 3-4). However, just because a document is a police report does not make it immune from hearsay and other reliability requirements. Appellant himself concedes that the report still must meet the primary prerequisite of trustworthiness. See State v. McGeary, 322 A.2d 830 (N.J. 1974). The general rule for gauging a document's trustworthiness has been articulated as follows:

> [A]n official document, to be admissible, must state facts within the personal knowledge and observation of the recording official or his subordinates. . .Only those official documents are admissible which are based solely on the personal knowledge of the official who prepared them.

State ex rel. Blankenship v. Freeman, 440 P.2d 744 (Okla. 1968) (emphasis added). The matter asserted in the police report here, that Hutchison committed anal intercourse, not fellatio, on Harris, is not something "within the personal knowledge and observation of the recording official." Officer Smith arrived some hours after the act occurred; his report of the actual

incident could not be based on his own observation. Moreover, admission of the report to prove "the truth of the matter asserted" would not have aided appellant's case. Its admission would have been proof of anal intercouse, which is merely a different type of forcible sodomy. The report therefore lacks the necessary reliability to be admissible as substantive evidence of the supposed act of anal intercourse.

B

THE POLICE REPORT WAS NOT ADMISSIBLE UNDER ANY OF THE EXCEPTIONS TO THE HEARSAY RULE.

Rule 63, Utah Rules of Evidence, prohibits "evidence of a statement which is made other than by a witness while testifying at the hearing" for the purposes of proving "the truth of the matter stated" unless the proof fits one of several enumerated categories. Appellant then names three of those categories which supposedly exempt the police report from exclusion as hearsay.

Rule 63(1)(a) allows testimony of a witness's prior statements which are inconsistent with the testimony of that witness at the hearing. Prior inconsistent statements are admissible both as proof of the matter stated and for impeachment purposes. Note, following Rule 63(1), Utah Rules of Evidence. Appellant's position is that in the police report Harris described Hutchison's act as anal intercourse,

while at trial Harris referred to it as fellatio. However, the prior statement does not meet the foundation requirement of reliability. The record clearly shows that the sixteen year old Harris was not, even by trial time, familiar with the "legal" or "scientific" terms for the various types of sodomy. Furthermore, the boy seemed somewhat reluctant to immediately reveal his ignorance:

> Q. [Defense counsel, Mr. Weight]: When you were aroused or woke up again you testified that you believe the defendant was committing the act of fellatio?
> A. [Scott Harris]: Yes.
> Q. Do you know what fellatio means?
> A. No.

(Tr.31). That same reluctance to press for a definition of an unfamiliar term could easily have been present when the police officer questioned him as well.

The trial court responded to the boy's confusion by suggesting that defendant counsel "use nonlegal language for the witness." He then cautioned Harris: "Be sure you understand the questions, young man, before you answer them. If you don't understand them, tell me" (Tr.31). It was, no doubt, obvious to the trial court that the boy's confusion of the terms was not evidence that anal intercourse occurred nor grounds for impeaching his credibility as a witness, but was simply a teenager's unfamiliarity with specific vocabulary. When asked to describe in detail the act itself, Harris was not at all confused, nor does appellant claim

any inconsistency in that testimony. It is only in Harris's use of the labels that appellant finds any variation.

Appellant also contends that Rule 63(13), Utah Rules of Evidence, excepts the police report from exclusion as hearsay. The rule provides for exception of:

> (13) Business Entries and The Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate trustworthiness.

(Emphasis added.) The investigating police officer and the witness who discovered Harris naked on the lawn described him as being "presumably in shock" (Tr.13), "cold" (Tr.41) and under the influence of alcohol (Tr.42). He was lying "in smoke and fire," burned (Tr.12), beside his smoking belongings, with nothing on but a burned boot (Tr.14). It was in these circumstances that Harris had his first conversation with Officer Smith. The second took place at the hospital a short time later. These were the "sources of information" and the "circumstances" from which the report was made. They cannot be expected to be as lucid or as consistent as the "trustworthiness" standard implies

they must be. Indeed, the setting of the extrajudicial statement is generally a key indicator of the statement's probable trustworthiness. State v. Derryberry, 528 P.2d 1034, 1037 (Ore. 1974). For example, an out-of-court statement by a person who had taken drugs earlier in the day has been ruled inadmissible because of the drug's effect on the witness's memory and perception. See State v. Howard, 12 Wash.App. 158, 529 P.2d 21, 22 (1974). Undoubtedly, the trial court took into account the circumstances and the dazed state of the witness when it ruled against the report's admission.

Appellant also relies on Rule 63(15), Utah Rules of Evidence, to justify admission of the report for impeachment purposes. That hearsay exception, entitled "Reports and Findings of Public Officials," provides for admission of:

> . . .factual data contained in written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition, or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation.

(Emphasis added). Harris's alleged statement in the police report does not qualify under this description. First, Harris's reply to the Officer's questioning cannot be classed as "factual

date" or "findings of fact." The officer did not find as a matter of fact that Hutchison committed anal intercourse on Harris. The reply certainly cannot be classified as empirical or tangible evidence or data. It does not fit the category of evidence intended by the exception. The section further contemplates the reporting of an "act, condition or event," performed, observed, or investigated by the officer (subsections a, b, and c). However, the evidence at issue here is a statement, not an act, condition, or event, nor is it a finding about the event. Again, it is not the tangible, reliable kind of evidence that would meet the requirements of the exemption. If the officer's report is to be sufficiently credible to stand as proof of the matter asserted, this section requires a close involvement by the officer with the event itself. Reporting of a statement about the event is a step removed from the evidence allowed by Rule 63(15).

The value of the police report for impeachment was very limited. Appellant could have accomplished the same result by asking the victim and the officer about the victim's confusion of terms. Sufficient foundation to allow cross-examination about the inconsistency was possible without the report. Appellant's counsel failed to lay adequate foundation, but such failure does not render rejection of the report as error.

Appellant has not objected to the exclusion of the police report on the grounds that it qualifies under the spontaneous or contemporaneous utterances exception to the hearsay rule (See Rule 63(4), Utah Rules of Evidence). Therefore, that argument is technically not an issue on appeal. However, because the hearsay issue is generally before this court, and because the point is one that might naturally be raised under these facts, respondent will deal with it here.

Rule 63(4), Utah Rules of Evidence, allows admission of a statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception. The rationale behind the exception is that instinctive or spontaneous statements that rise out of events reflect the true nature of the situation and the speaker's feelings, and thus are presumptively truthful. See 29 Am.Jur.2d, Evidence, § 708. The exception does not apply in this case, however, since the requisite spontaneity is lacking. The situation is parallel in crucial respect to McGugan v. State, 167 P.2d 76 (Okla. 1946), where the court ruled inadmissible

statements made to police officers by the victim of a rape. The statements were not part of the res gestae, said the court, because the prosecutrix had not volunteered them to the first person she had contact with after the crime, and because some time had elapsed before she could get to the police station. Similarly, the prosecuting witness's contested statement here was not volunteered to Suffern, who first discovered him, nor to Officer Smith, but was a response to questioning which occurred sometime after Harris was discovered and regained consciousness.

Respondent maintains that the prosecuting witness's statements to the police were not, by their nature, of the type that generally qualify under the exception. They were not instinctual reactions to the criminal act itself, since that had occurred some hours before, nor were they uttered in a startled or excited state. On the contrary, Harris was dazed and subdued. Further, the nature of the disputed terms (anal intercourse or fellatio) makes it highly unlikely that they would be part of the instinctive vocabulary of a sixteen year old (see also State v. Wilson, 532 P.2d 825 (Ore. 1975)).

C

THE POLICE REPORT WAS INADMISSIBLE BECAUSE APPELLANT FAILED TO LAY APPROPRIATE FOUNDATION FOR ITS ACCEPTANCE.

The police report was inadmissible as substantive evidence to impeach Harris under any of the hearsay exceptions because it lacks inherent reliability; its reliability is further questionable because a proper foundation was not laid for its admission. It is a well-established rule of evidence that before a report can be received in evidence certain authenticity requirements must be met. See State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979); Dolan v. People, 449 P.2d 828 (Colo. 1969); Johnson v. State, 253 A.2d 206 (Del. Supr. 1969); Mathis v. Stricklind, 201 Kan. 655, 443 P.2d 673 (1968); McCormick, Law of Evidence (1972) 14-19. These requirements include, in addition to establishing the time and place of the recording, verification by the maker that the report is an accurate reflection of his memory of the event. This verification is usually accomplished by exhausting the witness's memory on the subject--asking him to testify first to his independent recollection of the incident. See State v. Orona, supra, at 1045; 3 Weinstein's Evidence, § 612[01] (1978). Appellant's counsel here failed to meet the authentication requirements because he did not ask Officer Smith either to testify as to his recollections of the interviews with Harris or to refresh his recollection by looking at the report. Officer Smith identified the document as being a copy of the incident report prepared from notes of the

conversations between himself and Harris, but appellant's counsel went no further than those preliminary identification questions before requesting that the report be submitted in evidence (Tr.46-48). What specifically transpired during the interviews was not even alluded to; Officer Smith was never asked if he could remember the content of the interviews nor given an opportunity to testify independently of the statements in the report. Appellant's counsel came to the point in his questioning where those questions would have been appropriate, but failed to ask them.

Failure to lay proper foundation was not cited by the trial court as a reason for excluding the report. However, even if, arguendo, the report was excluded for the wrong reason, the existence of other valid reasons for its exclusion means that the evidence was properly barred. See Shore Line Properties, Inc. v. Deer-O-Paints and Chemicals, Ltd., 24 Ariz.App. 331, 538 P.2d 760 (1975); Foss Lewis & Sons Const. Co. v. General Ins. Co. of America, 30 Utah 2d 290, 517 P.2d 539 (1973); Green Ditch Water Co. v. Salt Lake City, 15 Utah 2d 224, 370 P.2d 586 (1964).

POINT II

THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION BY EXCLUDING THE POLICE REPORT.

The trial judge found that the police report was

not admissible for impeachment purposes (Tr.49)--to prove that a contradictory statement had been made. The court noted Harris's uncertainty about nomenclature under examination (Tr.31) and specifically found him a credible witness, even under heated cross-examination (Tr.77). Whatever inconsistency there may have been was not of significant relevance or reliability, in the court's judgment, to impair the credibility of the prosecuting witness or require the admission of questionable evidence.

This court has consistently held that "the trial judge has superior knowledge as to the competency and effect which should be given evidence." Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972). In addition, when the trial is to a judge, as here, and not to a jury, decisions about the admissibility of evidence are less stringently examined, since the judge is making his decisions on both the law and the facts. This court has said:

> . . .when the trial is to the court, his rulings on evidence need not be subjected to quite such critical scrutiny as when it is to a jury, because in arriving at his conclusions upon the issues he will include in his consideration of them his knowledge and his judgment as to the competency, materiality and effect of evidence.

In re Baxter's Estate, 16 Utah 2d 284, 399 P.2d 442, 445 (1965). See also Super Tire Market, Inc. v. Rollins, 18

Utah 2d 122, 417 P.2d 132 (1966). The presumption is that the trial judge will be able to distill what is relevant from the evidence presented and offered.

Therefore, unless there is a clear showing that the trial judge has abused this discretion, his decisions should not be overturned. "This court has held that it will not disturb any decision within the discretion of the trial court, unless there is a clear showing of an abuse of that discretion." State v. Carlson, Nos. 16582, 16583 (Utah, July 31, 1981). Since the trial judge has great leeway in deciding what the facts are, as presented by the evidence, there is no clear showing that he abused his discretion in choosing to believe and give weight to certain facts while excluding others. See Salt Lake City v. United Park City Mine Co., 28 Utah 2d 409, 503 P.2d 850 (1972).

In order to reverse a verdict based on the erroneous exclusion of evidence, two things must be shown, as described in Rule 5 of the Utah Rules of Evidence:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions

> indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

Appellant has failed to satisfy these prerequisites. The evidence was not introduced in a form approved by the judge; instead, it was classified as hearsay. Nor did appellant indicate the substance of the expected evidence by his questions; in fact, he neglected to ask the questions necessary for a proper foundation for the evidence. Since there is no clear showing that there would have been a different result if the report had been admitted, as discussed below, the trial court's discretion should not be overturned.

POINT III

IF EXCLUSION OF THE REPORT WAS ERROR, IT WAS HARMLESS ERROR.

Should this Court find that the trial court's refusal to admit the police report was error, such refusal did not prejudice the substantive rights of the appellant and thus does not justify reversal of the conviction. This Court has pointed out on numerous occasions that it "will not reverse criminal cases for mere error or irregularity." State v. Neal, 1 Utah 2d 122, 262 P.2d 756 (1953). Utah Code Ann. § 77-42-1 (1953), states in part:

> 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.

Improper reception or rejection of evidence is not grounds for reversal if there is sufficient competent evidence to sustain the judgment. See Bonine v. Bonine, 367 P.2d 664 (Ariz. 1961).

In this case, appellant has failed to show that the result would have been different if the evidence has been admitted. The prosecuting witness's testimony is not denied or contradicted by appellant. Although appellant admitted inviting Harris home with him, he testified that he does not remember what happened that night (Tr.73,75). The prosecuting witness's testimony, on the other hand, is corroborated by several verified facts: Harris saw Hutchison in a dress and wig; in court Harris identified a dress and wig found in Hutchison's apartment as looking like those he saw Hutchison wearing; Harris testified that appellant pulled Harris's pants down and he ran out of the house in the middle of the night; Harris was found naked on appellant's lawn at five o'clock a.m.

Harris's testimony that the sodomy occurred was uncontradicted and even verified by circumstantial evidence. But even if there was proof that the event occurred as purportedly recorded in the police report, the act would still

constitute sodomy. Under the Utah statute, either unconsented anal or oral intercourse is forcible sodomy:

> (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.

Utah Code Ann. § 76-5-403 (1953) (emphasis added). Therefore, even if the matter asserted could be proven, its exclusion would be harmless error because the act would still constitute a necessary element of the crime.

In State v. Simmons, upon finding that excluded hearsay evidence was admissible, the court gave a test for determining whether the exclusion was harmless:

> We must review alleged error in conformity with 77-42-1, U.C.A. 1953, and may not interfere with a jury verdict, unless upon review of the entire record, there emerges error of sufficient gravity to indicate defendant's rights were prejudiced, in a substantial manner. There must be a reasonable probability there would have been a result more favorable to defendant, in the absence of error.

573 P.2d 341 (Utah 1977). The alleged error in this case is not of sufficient gravity to indicate that appellant's rights were prejudiced.

The exclusion, if error, would also be harmless error because appellant had other ways of attacking Harris's credibility. The trial court's ruling only excluded the police report; it did not prevent appellant from questioning

the witness's consistency and credibility in other ways. Appellant might have questioned Harris's knowledge of other anatomical terms or homosexual practices, to establish that Harris really did have more acquaintance with the subject than he seemed to have. But appellant did not. The burden was on him, not on the court or the state, to pursue all avenues which might discredit the witness. Since the police report was not appellant's only recourse, its exclusion was not of itself prejudicial and any error in excluding it is harmless. Appellant had ample opportunity to challenge appellant's prior statement and confusion. This was possible without the report and its exclusion was therefore harmless.

The conclusion this Court reached in State v. Urias, is fully apposite here:

> The mandate of our statute [U.C.A. § 7-42-1 (1953)], and the policy firmly established in our decisional law, is that we do not upset the verdict of a jury merely because some error or irregularity may have occurred, but will do so only if it is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result.

609 P.2d 1326, 1329 (Utah 1980) (emphasis added). Respondent submits that even if the police report had been admitted, the discrepancy was so easily explainable and insignificant that

the trial judge would not have ruled differently. If there was error committed, it had no prejudicial effect upon appellant's rights. In short, the judge could easily have determined, with or without the police report, that the prosecuting witness's testimony was consistent and believable.

POINT IV

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE VERDICT.

A

UNDER THE CIRCUMSTANCES, THE PROSECUTING WITNESS'S UNCORROBORATED TESTIMONY IS SUFFICIENT TO CONVICT.

Appellant's challenge of the sufficiency of the evidence is not unusual in a sexual assault case, because so much of the proof rests upon the testimony of the victim. In response to a similar challenge in State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959), this Court said:

> In regard to the general charge that the evidence does not support the verdict, the defendant argues that the conviction should be scrutinized with great care because it is a charge easy to make and hard to defend against; particularly so here because important parts of the state's case rest entirely upon the testimony of the prosecutrix. With that general proposition we are in accord. But it also should be kept in mind that this offense is rarely committed in the presence of witnesses and often the conviction of the guilty could only be had upon the victim's testimony. It has often been held that if there is nothing inherently contradictory or incredible in her story a conviction may rest upon the victim's testimony alone.

Id. at 868 (emphasis added).

Appellant stresses that testimony by Harris "was the only evidence at all presented by the State to prove the elements of the crime alleged." Appellant's Brief at 18-19. Yet, this court has specifically found that fact unpersuasive. In State v. Middelstadt, 579 P.2d 908 (Utah 1978), the court gave the basis on which it must deal with uncorroborated testimony:

> In general, the common law supports the contention that a conviction may be sustained upon the uncorroborated testimony of the victim, and that such evidence is not insubstantial simply because the testimony is conflicting in some respects. As to the quality of the testimony given, it is settled that it must be so improbable that it is completely unbelievable before it is insufficient to uphold a conviction. We do not find that to be the case here.

Id. at 911 (emphasis added.). Consistent with the Ward and Middelstadt guidelines, there is in this case "nothing inherently contradictory or incredible" in the victim's story; nor is Harris's testimony "so improbable that it is completely unbelievable." On the contrary, the circumstances surrounding the incident tend to support Harris's account.

Nor does the issue of consent apply here to invalidate Harris's testimony. The pertinent part of Utah Code Ann § 76-5-406 (1977), contains this definition of lack of consent:

> An act of sexual intercourse, sodomy, or sexual abuse is without consent of the victim under any of the following circumstances:
> (3) The victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist; . . . .

(Emphasis added.) Harris's testimony that he was both unconscious and, later, physically unable to resist are corroborated by his conduct after the assault: he freed himself as soon as he could and fled the house. In his intoxicated condition he could not go far, but his immediate impulse was to leave. Harris was found a few hours later outside, not inside, the house, his condition verification of a hasty exit. In State v. Roberts, 91 Utah 117, 63 P.2d 585, 588 (1937), this Court concluded that the trial court "could properly consider the conduct of the [victim] towards the defendant after the commission of the assault as bearing on whether [he] consented." Hutchison does not deny that an act of sodomy took place; Harris's condition the next morning is certainly strong evidence that the act was not consensual.

B

ON APPEAL, EVIDENCE SHOULD BE VIEWED IN THE LIGHT MOST FAVORABLE TO CONVICTION.

At trial, the finder of fact found appellant guilty of forcible sodomy. On appeal, the evidence should be viewed in the light most favorable to that verdict. State v. Ward, 10 Utah 2d 34, 341 P.2d 865 (1959); State v. Berchtold,

11 Utah 2d 208, 357 P.2d 183 (1960). The finder of fact was in the best position to observe the facial expressions, mannerisms, and tone of voice of the witnesses, and thus was in the best position to weigh the evidence. Those kinds of judgments are difficult, if not impossible, to make on appeal.

Further, this court has determined that on appeal from conviction, the court must assume that the trial court believed those aspects of evidence and drew inferences that reasonably could be drawn therefrom in a light favorable to the verdict. State v. Erickson, 568 P.2d 750 (Utah 1977); State v. Gandee, 587 P.2d 1064 (Utah 1978). In other words, the strong presumption is that the trial verdict is correct. Appellant, to prevail, has the burden of proving that the verdict was unreasonable, and this he has failed to do.

Appellant, citing as error the trial court's refusal to admit the police report as evidence, attempts to undermine the prosecuting witness's credibility. Yet it is a well-settled axiom of criminal law in this state that the trial court is the sole judge of the credibility of witnesses. State v. Wilson, 565 P.2d 66 (Utah 1977); State v. Romero, 554 P.2d 216 (Utah 1976); State v. Mills, 530 P.2d 1272 (Utah 1975); State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957). In a restatement of the standard of

review it would apply to claims of insufficiency such as appellant's, this court declared:

> It is the exclusive function of the jury [fact-finder] to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of this court to substitute its judgment for that of the fact-finder. This court should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

State v. Lamm, 606 P.2d 229, 231 (Utah 1980) (emphasis added).

Thus, appellant's burden here is to show that the evidence was so clearly inconclusive or unsatisfactory that reasonable minds must have had reasonable doubts that the crime was committed. Appellant has not met that burden. This court even more emphatically set the standard appellant must meet in State v. Romero, supra:

> This court has set the standard for determining sufficiency of evidence to require that it be so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime. Unless there is a clear showing of lack of evidence, the [trial court] verdict will be upheld.

554 P.2d at 219 (emphasis added).

Respondent submits that in viewing the evidence in its entirety, as the trial court did, it is not "so inconclusive or so inherently improbable that reasonable minds"

could not convict appellant. On the contrary, the evidence was sufficient and substantial and, therefore, the verdict should be upheld. Appellant has not made "a clear showing of lack of evidence," as this court requires. The only "lack of evidence" appellant points to is his question of Harris's credibility. However, appellant's objection is without foundation on appeal, since judging the credibility of witnesses is a trial court responsibility. The trial judge specifically found Harris "quite a credible witness under heated and extensive cross-examination" (Tr.77). The testimony of the passerby who discovered Harris, of the examining police officer, of the officers who saw appellant and Harris at the bus station, of appellant's sister in regards to appellant's intoxication of the morning after, and the tangible evidence at the scene all corroborate the details of Harris's testimony. Harris's purported confusion with terminology falls far short of rendering his testimony "completely unbelievable," as required by this Court in Middlestadt, supra:

> [I]t is settled that [the victim's uncorroborated testimony] must be so improbable that it is completely unbelievable before it is insufficient to uphold a conviction.

597 P.2d at 911 (emphasis added).

CONCLUSION

The trial court properly excluded from evidence a

police report on the basis that it was hearsay and did not qualify as an exception to the hearsay rule. If, arguendo, error was committed, it was harmless error which did not affect appellant's substantive rights.

A victim's uncorroborated testimony is sufficient to convict in a sexual abuse case, particularly where, as here, circumstances and other testimony support the victim's account. The trial court, as the exclusive judge of the credibility of the witnesses and the sufficiency of the evidence, determined in this case that adequate evidence was present to sustain a verdict of guilt; and on review, the evidence meets the standard of being adequately conclusive and probable so that reasonable minds could and did reasonably believe that appellant committed the crime.

On the basis of the above authority and the evidence against appellant presented at trial, respondent prays that the verdict and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Respondent to Mr. Gary H. Weight, Attorney for Appellant, 43 East 200 North, P. O. Box "L", Provo, Utah 84601, this 7 day of October, 1981.

Craig L. Barlow