1982

# State of Utah v. Woodrow Willie John : Brief of Respondent

Utah Supreme Court


Lynn R. Brown; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | Case No. 18108 |
| WOODROW WILLIE JOHN, | : | |
| Defendant-Appellant. | : | |

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# BRIEF OF RESPONDENT

Appeal from a conviction of Attempted Rape, a third-degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

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# BRIEF OF RESPONDENT

## STATEMENT OF THE NATURE OF THE CASE

Appellant, Woodrow Willie John, was charged with Attempted Rape, a third-degree felony, under Utah Code Ann., § 76-5-402 (1953), as amended; and with Forcible Sexual Abuse, a third-degree felony, under Utah Code Ann., § 76-5-404 (1953), as amended.

## DISPOSITION IN THE LOWER COURT

Appellant was found guilty of attempted rape after a jury trial on October 14 and 15, 1981 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding. On October 26, 1981, appellant was sentenced to imprisonment at the Utah State Prison for an indeterminate term not to exceed five years.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming [illegible] sentence of the trial court.

## STATEMENT OF FACTS

On July 9, 1981, it was hot and sunny in Salt Lake City. At approximately 4 p.m. that day, Ruth Robinson returned from work to her car parked in a lot located near 200 West and South Temple (T. 9, 10). Shortly after Ms. Robinson entered her vehicle, appellant opened the door on the driver's side and slid into the front seat, pushing Ms. Robinson out from behind the steering wheel (T. 12, 13). When Ms. Robinson grabbed the car's horn and began screaming, appellant placed his hands over her mouth and forced her to lie down on the seat, his body on top of hers (T. 14, 15). Appellant attempted to kiss Ms. Robinson, unbuttoned her blouse to fondle her breasts, and rubbed his leg up and down inside of hers (T. 16, 17).

Although Ms. Robinson kicked and screamed, struck appellant in the face and chest, and repeatedly tried to honk the car's horn, appellant proceeded to remove her clothing, saying to her "I got to do it, lady; I got to do it" (T. 18). Appellant "roll[ed] all over" Ms. Robinson, fondling her female organs and repeating the phrase "I got to do it, lady" (T. 19, 20).

Samuel Lee was in the parking lot at the time Ms. Robinson was accosted (T. 51). Alerted by Ms. Robinson's screaming, he approached her car in time to observe appellant positioned on top of her (T. 52, 54). Once appellant noticed Lee, he backed out of the car and ran from the scene (T. 22, 55, 56).

Carlin Jacobson and his wife were also in the parking lot at the time of appellant's attack (T. 68, 69). Having been informed by Mr. Lee that appellant had tried to rape Ms. Robinson, Mr. Jacobson ran after appellant, who was then fleeing the area (T. 71). He finally caught up with appellant as appellant drove away in a truck (T. 73). Although he failed to apprehend appellant, Mr. Jacobson did get a good look at appellant from a distance of approximately three feet, and managed to observe the truck's license plate number which was then relayed to the police (T. 74, 75).

That same day law enforcement officers located appellant--who fit the description they had of Ms. Robinson's assailant (T. 88)--at the Prison Diagnostic Center[1] at 302 West 800 North in Salt Lake City (T. 85). Less than one hour after the attack and after telling police that her assailant was an Indian wearing a red shirt, Ms. Robinson accompanied police to the Diagnostic Center in order to view the appellant (T. 23, 39, 40). At the Center, she positively identified appellant as the man who had attacked her after first seeing him from the patrol car at a distance of approximately twenty feet and then viewing him inside the building at a distance of approximately four feet and hearing him say "lady" as he had during the attack (T. 26, 27, 28, 481 91).[2]

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[1]The Diagnostic Center is referred to as the St. Mark's Halfway House in appellant's brief.

[2]It is not particularly clear from the record at what point during their meeting at the Diagnostic Center

At trial, Ms. Robinson identified appellant as her assailant; Samuel Lee identified appellant as the person he had seen accosting Ms. Robinson in her car; and Carlin Jacobson identified appellant as the man he chased around the area that day after Mr. Lee had pointed him out as the man who had attempted to rape Ms. Robinson (T. 12, 26, 53, 72). Ms. Robinson also identified pictures of scratches on appellant's chin and neck (scratches noticed by Officer Barraclough, the Salt Lake City police officer who took appellant into custody at the Diagnostic Center (T. 89)) as those she had inflicted on appellant while the crime was in progress (T. 29).

## ARGUMENT

### POINT I

### APPELLANT'S FAILURE TO FOLLOW PROPER PROCEDURES FOR OBJECTING TO RUTH ROBINSON'S IDENTIFICATION TESTIMONY PRECLUDES CONSIDERATION ON APPEAL OF HIS ASSIGNMENT OF ERROR RESPECTING THE TRIAL COURT'S REFUSAL TO STRIKE THAT TESTIMONY; ALTERNATIVELY, THE TRIAL COURT PROPERLY REFUSED TO STRIKE THAT TESTIMONY.

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Ms. Robinson became certain that appellant was her assailant. Ms. Robinson's testimony and that of Nolan Barraclough, a Salt Lake City police officer present at the Diagnostic Center at the time of the meeting, appear to be somewhat inconsistent on this point. However, whether Ms. Robinson positively identified appellant before or after she heard him say "lady" is not critical (Appellant's Brief makes light of the possibility that Ms. Robinson was unable to make a positive identification until after appellant uttered the word "lady"). The important fact is that she positively identified appellant at the Diagnostic Center.

Relying on Neil v. Biggers, 409 U.S. 188 (1972), and a number of law journal articles which purportedly establish the highly unreliable nature of eyewitness identification, appellant argues that Ruth Robinson's testimony concerning her identification at a show-up of appellant as her assailant was so unreliable that it should have been stricken by the trial court. Specifically, appellant challenges the admissibility of that testimony on the ground that the show-up procedure used by the police was impermissibly suggestive. However, appellant's failure to follow the proper procedures for objecting to admission of the challenged testimony precludes consideration of his assignment of error on appeal.

It is well established that a defendant has a duty to present challenges to the admissibility of evidence before trial when that is possible, and that unless good cause is shown, the failure to assume this obligation constitutes a waiver. See Nardone v. United States, 308 U.S. 338 (1939); Segurola v. United States, 275 U.S. 106 (1927); United States v. Tisdale, 647 F.2d 91 (10th Cir. 1981); People v. Takencareof, 119 Cal. App. 3d 492, 174 Cal. Rptr. 112 (1981). Thus, the proper time to raise objections to the propriety of identification procedures, which a defendant believes affects the admissibility of anticipated identification testimony, is before trial. State v. Allman, 19 Wash. App. 169, 573 P.2d 1329 (1977). Appellant's challenge to the propriety of the

show-up procedure used in this case (i.e., taking the victim, Ms. Robinson, to the Diagnostic Center to have her view appellant and determine whether he was her assailant) should have been presented to the trial court in a pre-trial motion to suppress under Utah Code Ann., § 77-35-12 (1953), as amended. Subsection (b) of that statute provides:

> Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial on the general issue may be raised prior to trial by written motion. The following shall be raised at leat five days prior to trial:
> . . .
> (2) Motions concerning the admissibility of evidence.

Subsection (d) further provides:

> Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

Section 77-35-12(b)(2) explicitly states that motions concerning the admissibility of evidence "shall" be raised before trial. The provision is mandatory. Section 77-35-12(d) makes clear that failure to make mandatory pre-trial motions--of which a motion concerning admissibility of evidence is one--results in a waiver, with the proviso that relief from waiver may be granted for cause shown. The obvious intent of this rule is to eliminate the disruptive

effects of objections to the admissibility of evidence during the trial phase by requiring that those objections be presented and ruled upon before trial when possible. The importance of eliminating those disruptive effects was recognized by the United States Supreme Court in Nardone v. United States, supra, at 341-342:

> Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention.
> . . .

The admissibility of Ruth Robinson's identification testimony was capable of determination before trial, and any objections to it should have been timely raised in a pre-trial motion to suppress as required by § 77-35-12(b)(2). Since appellant has not shown cause for his failure to follow the required procedure, under § 77-35-12(d) he has waived the right to complain of any error concerning the admission of Robinson's testimony. Strict adherence to the waiver provisions in subsection (d) is necessary if the obvious purpose of Rule 12 (discussed above) is not to be defeated. The California Supreme Court, for example, has recognized the importance of strictly applying the waiver provisions of a

similar rule contained in that state's code of criminal procedure. See People v. Takencareof, supra, citing People v. Superior Court [Edmonds], 4 Cal. 3d 605, 94 Cal. Rptr. 250, 483 P.2d 1202 (1971).

Furthermore, appellant failed timely to object to Ms. Robinson's testimony at trial. He made no objection to it as it was being given (see T. 9-50). It was not until the day after the testimony was given and after the State had rested its case that appellant made a motion to strike the testimony (see T. 101).

Rule 4, Utah Rules of Evidence, provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding. However, the court in its discretion, and in the interests of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated.

Recently, in State v. McCardell, Utah, 652 P.2d 942 (1982), this Court made clear what effect a defendant's failure to comply with the "contemporaneous objection" requirements of Rule 4 would have on assignments of error made

on appeal. In holding that McCardell's failure to interpose a timely and specific objection to the admission of several "mug shots" precluded consideration on appeal of his arguments respecting that issue (even though his "arguments on [that] point clearly ha[d] merit," 652 P.2d at 946), the Court said:

> We endorse the following statement made by the Kansas Supreme Court in [State v. Moore, 218 Kan. 450, 543 P.2d 923 (1975)]:
>
> "The contemporaneous objection rule long adhered to in this state requires timely and specific objection to admission of evidence in order for the question of admissibility to be considered on appeal. The rule is a salutory procedural tool serving a legitimate state purpose. By making use of the rule, counsel gives the trial court the opportunity to conduct the trial without using the tainted evidence, and thus avoid possible reversal and a new trial. Furthermore, the rule is practically one of necessity if litigation is ever to be brought to an end."
>
> 543 P.2d at 927, quoting Baker v. State, 204 Kan. 607, 611, 464 P.2d 212, 216 (1970).

652 P.2d at 947. See also: State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965). The same considerations apply here. Thus, appellant's failure to interpose a timely objection, which thereby denied the trial court an opportunity to address his concerns, should have the same consequences such inexcusable procedural default had in State v. McCardell, supra--a refusal by this Court to consider any assignment of error on appeal.

As noted in State v. Pierre, Utah, 572 P.2d 1338 (1977), cert. denied, 439 U.S. 882 (1978),

> . . . in order to preserve a question for appellate review on alleged error by the trial court, generally a party must object to improper questions and inadmissible evidence at his earliest opportunity.

Id. at 1353. Clearly, appellant did not object to the challenged testimony at his earliest opportunity. It was three witnesses and a day later that he made his motion to strike. That does not constitute a timely objection. See State v. Sterling, Or. App., 537 P.2d 578, 579 (1975), where the court said that defendant's motion to strike testimony offered a day earlier and received without objection came too late; and Temple v. State, Okl. Cr., 568 P.2d 1321, 1322 (1977), which said that where "defendant's counsel failed to object to the admission of any evidence as it was presented, but instead waited until the State rested its case," that was not a timely objection.

It is generally accepted that denial of a motion to strike certain evidence is proper where the defendant failed to object to the evidence at the time it was offered. See Foss v. State, 92 Nev. 163, 547 P.2d 688 (1976); State v. Lucero, 151 Mont. 531, 455 P.2d 731 (1968). As previously noted, appellant did not object at the time Ms. Robinson's identification testimony was given, although he had ample opportunity to do so. In State v. Nevarez, 108 Ariz. 414, 499

P.2d 709 (1972), the Arizona Supreme Court addressed a situation very similar to that presented in the instant case as follows:

> At the time of trial, [the witness] identified the defendant before the jury and there was no objection by defense counsel, and there was no objection interposed when pictures of the defendant were identified by [the witness] and admitted in evidence. It was not until the State's case was completed that defendant raised an objection to the identification of the defendant and asked that [the witness's] testimony be stricken.
> . . . Defendant, . . . by failing to object at the time of the identification testimony, lost any right he might have had to have that testimony stricken.

Id. at 711.

The rule followed in State v. Nevarez, supra, Foss v. State, supra, and State v. Lucero, supra, is designed to promote judicial efficiency by requiring timely objections at trial, and is directly applicable in the instant case. Accordingly, the trial court's denial of appellant's motion to strike where appellant failed timely to object to Ms. Robinson's testimony was proper and consistent with State v. McCardell, supra, wherein this Court expressed the importance of strict adherence to Utah's contemporaneous objection rule.

In sum, appellant's failure to comport with the requirements of § 77-35-12 and his additional failure to interpose a timely objection to Ms. Robinson's identification

testimony at trial precludes consideration on appeal of appellant's assignment of error concerning the trial court's denial of his motion to strike that testimony. Accordingly, this Court should not proceed to decide that issue on the merits. As Justice Powell stated in Estelle v. Williams, 425 U.S. 501 (1976),

> [T]here are two situations in which a conviction should be left standing despite the claimed infringement of a constitutional right. The first situation arises when it can be shown that the substantive right in question was consensually relinquished. The other situation arises when a defendant has made an "inexcusable procedural default" in failing to object at a time when a substantive right could have been protected.

Id. at 513-514 (concurring opinion) (emphasis added).

Even if this Court decides to consider the motion to strike issue, appellant's assignment of error is without merit. The identification procedure employed in appellant's case was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). In State v. McCumber, Utah, 622 P.2d 353 (1980), this Court said:

> Police identification procedures such as photograph displays, lineups, showups, and the like, do not deny the accused due process of law unless, under a totality of the circumstances, they are so unnecessarily suggestive and conducive to

> irreparable mistaken identification as to deny the accused a fair trial. [Stovall v. Denno, 388 U.S. 293 (1967).] Where an identification procedure, even though suggestive, does not give rise to a substantial likelihood of misidentification, no due process violation has occurred. [Neil v. Biggers, 409 U.S. 188 (1972).] In determining the reliability of the identification under the totality of the circumstances, the court must also consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of any prior description of the criminal, the level of certainty demonstrated during the identification procedure, and the time between the crime and the identification. [Neil v. Biggers, supra; Manson v. Brathwaite, 432 U.S. 98 (1977).]

Id. at 357.

Acknowledging that the victim of an attempted rape and aggravated sexual assault "had a very limited opportunity to observe her assailant" in that "[h]er view of his face was very brief, and occurred in a darkened room immediately after she had been awakened from sleep," the McCumber Court also said:

> Such factors, however, although they may weaken the probative impact of the evidence offered, do not mandate suppression of the evidence in the name of due process without some showing that the identification procedures were themselves impermissibly suggestive.

Id. at 357.

Thus, even if, as appellant contends, Ms. Robinson's identification of appellant was weak on two of the five Neil

v. Biggers factors (noted by this Court in the above quote from McCumber), that does not mandate suppression of her testimony--although the probative impact of her testimony dmittedly may be weakened.

However, it should be noted that the validity of appellant's allegation that Ms. Robinson's identif cation of appellant was very weak in two respects is suspect. Appellant contends that Ms. Robinson's prior description of appellant was not particularly accurate and that she was "not at all certain as to her identification, even after she viewed the appellant from a few feet away in a one-on-one show-up" (Appellant's Brief at p. 5).

With respect to the prior description, appellant first asserts that Ms. Robinson was inaccurate in her estimation of appellant's weight; yet no evidence was presented at trial establishing appellant's actual weight or that Robinson's estimate of 250-300 pounds was 100 pounds too heavy. Second, appellant notes that Robinson said her assailant was wearing a red T-shirt and that he wore his hair different than did appellant when viewed at the show-up. These differences do not amount to fatal inaccuracies; they are easily explained: as noted by Ms. Robinson at trial, appellant had changed his shirt and freshly combed his hair between the time of the attempted rape and the subsequent meeting of Robinson and appellant at the Diagnostic Center (see T. 26).

With respect to appellant's assertion that Ms. Robinson was not at all certain as to her identification of appellant, the record simply does not establish that this was so. In fact, the very opposite was true. Ms. Robinson positively identified appellant as her assailant after seeing and hearing him at the Diagnostic Center (see T. 26, 27, 28, 48, 91). Appellant seems to suggest that Ms. Robinson's reliance on appellant's verbalization of the word "lady" in identifying appellant was somehow improper. Initially, it should be noted that appellant used the word "lady" without any prompting from the police or Ms. Robinson (see T. 27, 91). The record further indicates that Robinson's identification was based on both her visual and auditory observations. Reliance on the sound of the voice or the manner in which someone says a particular word as a factor in the identification of an individual is a perfectly proper and often necessary means of making an identification.

In short, appellant has not clearly shown that Ms. Robinson's identification of him was weak on any of the five factors outlined in Neil v. Biggers, supra. As noted earlier, even if it were assumed, arguendo, that the identification was somewhat weak on one or more of those points, that does not mandate suppression of the identification testimony. State v. McCumber, supra.

Finally, appellant argues that the show-up procedure used in his case was improper because it was highly suggestive

and ignored the line-up procedures provided for in Utah Code Ann., §§ 77-8-1 through 4 (1953), as amended. First, because appellant does not point to any specific conduct of the police at the show-up which rendered that procedure impermissibly suggestive, he appears to be suggesting that one-on-one showups are inherently suggestive and therefore violative of due process. However, he cites no authority in support of that proposition. In fact, this Court has repeatedly approved of the show-up as a proper identification prcoedure which is not impermissibly suggestive. In State v. Clemens, Utah, 580 P.2d 601 (1978), the Court said:

> The idea of taking the victim forthwith to identify a suspect is of value to the detained person if he is innocent; and while the matter is fresh in mind, it assists the victim in determining whether a suspect is or is not the perpetrator of the offense. [See State v. Vasquez, 22 Utah 2d 277, 451 P.2d 786 (1969).]

Id. at 602. See also: State v. Allen, 29 Utah 2d 442, 511 P.2d 159 (1973).

Second, appellant's reliance on §§ 77-8-1 through 4 is misplaced. Although those sections of the Code set out certain rules relating to line-ups, they do not prohibit police from conducting show-ups. This was recognized in State v. Allen, supra, at 160. Chapter 8 of Title 77 does not give a suspect the right to a line-up; it simply provides an alternative identification procedure for law enforcement

officers. In short, nothing in Utah's statutory law or case law indicates that police officers are required to use line-ups rather than show-ups, or that they must be confronted with exigent circumstances in order to use the show-up procedure. As noted in State v. Clemens, supra, and State v. Allen, supra, the show-up has distinct advantages which are necessary to continued effective enforcement of the criminal law. Thus, the decision to use the show-up procedure instead of a line-up in the instant case is not a basis for holding that the trial court improperly denied appellant's motion to strike Ms. Robinson's testimony. It should be emphasized that there was nothing in how the show-up was conducted which made it impermissibly suggestive.

In sum, under the totality of the circumstances, the identification procedures employed in this case were not "unnecessarily suggestive and conducive to irreparable mistaken identification," State v. McCumber, supra, at 357; and, applying the Neil v. Biggers test, Ms. Robinson's identification testimony was highly reliable.

## POINT II

### THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

In State v. McCardell, Utah, 652 P.2d 942 (1982), this Court set out the standard for reviewing an insufficiency of the evidence claim:

> This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt. State v. Asay, Utah, 631 P.2d 861 (1981); State v. Lamm, Utah, 606 P.2d 229 (1980); State v. Gorlick, Utah, 605 P.2d 761 (1979); State v. Logan, Utah, 563 P.2d 811 (1977). We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it.

Id. at 945.

Appellant's contention that the evidence was insufficient to support the verdict in his case is based solely on the alleged unreliability of Ms. Robinson's testimony. However, that testimony was hardly unreliable. As conceded by appellant, Ms. Robinson had an excellent opportunity to observe her assailant at close proximity in broad daylight; her degree of attention could only have been very high given the nature of the crime (i.e., an attack on her person); and only a short time had elapsed between the attack and her identification of appellant as her assailant. As respondent showed in Point I, appellant's contentions that Ms. Robinson gave an inconsistent prior description of appellant and that she was uncertain of her identification of him at the show-up lack support in the record.

Moreover, appellant's persistent assertion that eyewitness testimony is inherently unreliable is not a

sufficient basis for overturning his conviction for lack of evidence. He cites no case law to support the position he is quite obviously arguing for--i.e., that the jury cannot reasonably rely on eyewitness identification testimony because it is inherently unreliable. Significantly, this Court implicitly recognized the value of that type of testimony in State v. Clemens, supra, and State v. Allen, supra, and, more recently, in State v. Malmrose, Utah, 649 P.2d 56 (1982), which held that the trial court's denial of expert testimony on the issue of the reliability of eyewitness testimony was not prejudicial error, and that "[o]n the firm identification of the victim alone, it was reasonable for the jury to have found the defendant guilty [of sexually assaulting the victim]." Id. at 62.

Finally, appellant completely ignores the testimony given at trial by Samuel Lee and Carlin Jacobson which identified appellant as Ms. Robinson's assailant. He also does not mention the photographic evidence introduced showing scratches on appellant's chin and chest which Ms. Robinson testified she inflicted on appellant during his attack on her.

In short, the totality of the evidence, taken with the inferences the jury might reasonably draw therefrom, certainly is not so lacking and insubstantial that a reasonable person could not possibly have found appellant guilty beyond a reasonable doubt. Ms. Robinson's positive

identification of appellant along with the strong corroborative evidence noted in the preceding paragraph is clearly a greater quantum of evidence than that found sufficient to support a similar conviction in State v. Malmrose, supra. Accordingly, this Court should not interfere with the jury's verdict; appellant's conviction should be affirmed.

## CONCLUSION

For the reasons discussed above, appellant's conviction and sentence should be affirmed.

Respectfully submitted this 21st day of April, 1983.

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## CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Lynn R. Brown, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 21st day of April, 1983.

Susan Patton