

1982

State of Utah v. Hoyt Glenny : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

HOYT GLENNY,

Defendant-Appellant.

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Case No. 18143

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FIFTH
JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY
OF IRON, STATE OF UTAH, THE HONORABLE LOUIS G. TERVORT,
AND THE HONORABLE ROBERT F. OWENS, JUDGES, PRESIDING

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Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF THE FACTS-----	2
LAW AND ARGUMENT	
ISSUE I: WHETHER OR NOT THE EVIDENCE HAS PROVEN THE CRIME OF SODOMY-----	6
ISSUE II: WHETHER OR NOT THE FAILURE TO RECORD THE CLOSING ARGUMENTS OF THE ATTORNEYS WAS ERROR WARRANTING A REVERSAL OF THE CASE-----	10
ISSUE III: WHETHER OR NOT THE ABSENCE OF THE DEFENDANT FROM THE COURTROOM DURING JURY SELECTION WAS ERROR-----	16
ISSUE IV: WHETHER OR NOT THERE WAS A DUTY TO INQUIRE INTO THE TESTIFYING CAPACITY OF THE STATE'S PROSECUTING WITNESS WHO WAS A MINOR MALE CHILD-----	21
ISSUE V: WHETHER OR NOT IT WAS NECESSARY TO GIVE INSTRUCTIONS TO THE JURY OVER AND ABOVE THE INSTRUCTIONS THAT WERE GIVEN IN ORDER TO SUSTAIN A CONVICTION OF SODOMY-----	24
ISSUE VI: WHETHER OR NOT THE DEFENDANT WAS DENIED EFFECTIVE COUNSEL-----	26
CONCLUSION-----	31

CASES CITED

Aronson v. Bass, 229 N.Y.S. 201, (New York 1928)-----	15
Brubaker v. Dickson, 310 FR2d 30, Ninth Circuit Court of Appeals, (United States 1962)-----	29
Cervantes v. State, 556 P.2d 622, (Oklahoma 1976)-----	11
Cole v. State, 179 P.2d 176, (Oklahoma 1947)-----	8
Commonwealth v. Althoff, 16 D & C 2d 640, (Pennsylvania)-----	9
Commonwealth v. Yingling, 19 Cambria 142, (Pennsylvania 1951)-----	8
Dougherty v. State, 471 P.2d 212, 86 Nev. 507, (Nevada 1970)-----	25
Dunn v. McKay, 584 P.2d 894, (Utah 1978)-----	30
Gresham v. State, 396 P.2d 374, (Oklahoma 1964)-----	12
Hanley v. State, 434 P.2d 440, (Nevada 1967)-----	18

TABLE OF CONTENTS (Continued)

	Page
Harvell v. State, 395 P.2d 331, (Oklahoma 1964)-----	13
Hervey v. People, 495 P.2d 204, 178 Colo. 38, (Colorado 1972)-----	13
In Interest of Trotter, 598 P.2d 557, (Kansas 1979)-----	14
Jones v. State, 580 P.2d 1150, (Wyoming 1978)-----	12
Lloyd v. State, 576 P.2d 740, (Nevada 1978)-----	12
McQueen v. Swenson, 498 F.2d 207, Eighth Circuit Court of Appeals, (United States 1974)-----	31
Parker v. State, 556 P.2d 1298, (Oklahoma 1976)-----	18
Powell v. Alabama, 53 S.Ct. 55, 287 U.S. 45, (United States 1932)-----	29
People v. Angier, 112 P.2d 659, Cal App. 1941-----	8
People v. Campbell, 589 P.2d 1360, (Colorado 1978)----	25
People v. Hickok, 216 P.2d 140, (California 1950)-----	8
People v. Lundy, 533 P.2d 920, 188 Colo. 194, (Colorado 1975)-----	11
People v. Ramos, 270 P.2d 540, (California 1954)-----	8
Reece v. Georgia, 76 S.Ct. 167, 350 U.S. 85, (United States 1955)-----	29
Soap v. State, 562 P.2d 889, (Oklahoma 1977)-----	13
State v. Alkhowarizmi, 421 P.2d 871, 101 Ariz. 514, (Arizona 1966)-----	9
State v. Black, 551 P.2d 518, (Utah 1976)-----	14
State v. Carcerano, 390 P.2d 923, 238 Or. 208, certiorari denied 85 S.Ct. 921, 380 U.S. 923, 13 L.Ed.2d 807, (Oregon 1964)-----	20
State v. Carver, 496 P.2d 676, 94 Idaho 677, (Idaho 1972)-----	18
State v. Codianna, 573 P.2d, certiorari denied, 99 S.Ct. 219, (Utah 1977)-----	20
State v. Corriz, 522 P.2d 793, 86 N.M. 246, (New Mexico 1974)-----	18
State v. Dixon, 199 P.2d 775, (Utah 1948)-----	26
State v. Elliott, 557 P.2d 1105, 89 N.M. 756, (New Mexico 1978)-----	9
State v. Estill, 492 P.2d 1037, 80 Wash. 2nd 196, (Washington 1972)-----	12
State v. Gilbert, 142 P.2d 584, 65 Idaho 210, (Idaho 1943)-----	11, 12
State v. Hancock, 426 P.2d 872, 247 Or. 21, (Oregon 1967)-----	20
State v. Harden, 406 P.2d 406, 99 Ariz. 56, (Arizona 1965)-----	13

TABLE OF CONTENTS (Continued)

	Page
State v. Herrera, 499 P.2d 364, 84 N.M. 46, certiorari denied 499 P.2d 355, 84 N.M. 37, certiorari denied 93 S.Ct. 918, 409 U.S. 1110, 34 L.Ed.2d 692, (New Mexico 1972)-----	11
State v. Hill, 176 So. 719, 179 Miss. 732, (Mississippi 1937)-----	10
State v. Irving, 538 P.2d 670, 217 Kan. 735, (Kansas 1975)-----	12
State of Utah v. Johnson, 137 P.632, 44 Utah 18, (Utah 1913)-----	7
State v. Lee, 585 P.2d 58, (Utah 1978)-----	21
State v. MacMillan, 145 P. 833, (Utah 1915)-----	23
State v. McNicol, 554 P.2d 203, (Utah 1976)-----	30
State v. Mannion, 57 P. 542, 19 Utah 505, 45 L.R.A. 638, 75 Am. St. Rep. 753, (Utah)-----	19
State v. Morasco, 128 P. 571, (Utah 1912)-----	22, 23
-----	24, 26
State v. Murrell, 585 P.2d 1017, 224 Kan. 689, (Kansas 1978)-----	14
State v. Musgrove, 582 P.2d 1246, (Montana 1978)-----	18
State v. Myers, 508 P.2d 41, 29 Utah 2d 254, (Utah)-----	19, 20
State v. Olsen, 258 P.2d 810, (Washington 1953)-----	10
State v. Pratt, 309 A.2d 864, (Maine 1973)-----	8
State of Utah v. Peterson, 17 P.2d 925, 81 Utah 340, (Utah 1933)-----	8, 10
State v. Randall, 443 P.2d 434, (Arizona 1968)-----	11
State v. Shambo, 322 P.2d 657, (Montana 1958)-----	8
State v. Smith, 561 P.2d 739, 114 Ariz. 415, (Arizona 1977)-----	13
State v. Smoot, 590 P.2d 1001, 99 Idaho 854, (Idaho 1978)-----	14
State v. Swain, 172 So.2d 3, (Florida 1965)-----	8
State v. Trusty, 502 P.2d 113, 28 Utah 2d 317, (Utah 1972)-----	14
State v. Valdez, 513 P.2d 422, 30 Utah 2d 54, (Utah 1973)-----	11
State v. Whittmore, 122 S.E.2d 396, (North Carolina 1961)-----	8
State v. Williams, 580 P.2d 1341, 224 Kan. 468, (Kansas 1978)-----	9
State v. Williams, 501 P.2d 328, 11 Or.App. 227, (Oregon 1972)-----	19

TABLE OF CONTENTS (Continued)

	Page
State v. Withrow, 96 S.E.2d 913, (West Virginia 1957)-----	8
State v. Zeezich, 210 P. 927, (Utah 1922)-----	23, 25, 26
U.S. v. Milby, 400 F.2d 702, C.A., (Kentucky 1968)-----	8
Young v. Bridwell, 437 P.2d 686, (Utah 1968)-----	30

STATUTES CITED

Utah Code Ann. Section 76-5-403 (1953), as amended-----	1, 6
Utah Code Ann. Section 76-53-22-----	7
Rule 17 (77-35-17), Utah Rules of Criminal Procedure---	16, 17
Utah Code Ann. Section 77-27-3 (1953), as amended-----	19

OTHER AUTHORITIES CITED

Affidavit of Defendant, Hoyt Glenney-----	33, 34
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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :
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Plaintiff-Respondent, :
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-vs- : Case No. 18143
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HOYT GLENNY, :
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Defendant-Appellant. :
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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Defendant was charged with and found guilty of forcible sodomy under Section 76-5-403, Utah Code Ann., 1953 as amended.

DISPOSITION IN THE LOWER COURT

The prosecution was handled by the Iron County Attorney, Mr. James L. Shumate. The Defendant was represented by Mr. Scott J. Thorley, who was acting as the Iron County Public Defender. The Defendant was convicted on October 29, 1981, and was sentenced on December 11, 1981, in the Fifth Judicial District Court in and for Iron County, Utah. The sentence the Defendant received was incarceration in the Utah State Prison for a period of time not less than five (5) years nor more than his natural life. The

Defendant is presently incarcerated in the Utah State Prison upon this same, said conviction.

RELIEF SOUGHT ON APPEAL

The Defendant seeks a reversal of the conviction for forcible sodomy in this case. In the alternative, if the Court so deems appropriate pursuant to the Defendant's position as stated herein, the Defendant seeks a remand to the trial Court for a retrial of this case.

STATEMENT OF FACTS

The factual situation incident to this case transpired in Cedar City, Iron County, Utah, on or about July 3, 1981. On that said date, the Defendant was a resident of Room #17 of the American Motel. Also, on that said date, John Cooper, a thirteen (13) year-old resident of Cedar City, Utah, was in the area of the American Motel searching for and collecting aluminum cans for recycling. John Cooper knocked on the door of Room #17 and the Defendant opened the door and invited John Cooper in. John Cooper went into the room and after the initial greetings and amenities, the Defendant learned that Mr. Cooper was collecting aluminum cans, and so he offered John Cooper two six-packs of beer located in the refrigerator of the motelroom. John Cooper went to the refrigerator, got the two six-packs of beer, drank one of the cans, and kept the

remainder pursuant to the agreement. A discussion was also made whereby the Defendant offered John Cooper some money if he, John Cooper, would run an errand to the Lunt Motel where the Defendant had left some clothes and possessions, and retrieve same for the Defendant. John Cooper then left the American Motel and went to the Lunt Motel, but was unable to obtain the clothes and possessions of the Defendant and so he returned to Room #17 of the American Motel, went in and informed the Defendant of what had transpired. At this point, the testimony of the prosecution witness, John Cooper, and that of the Defendant, Hoyt Glenny, begin to significantly differ.

John Cooper testified as follows. That when John Cooper returned to Room #17, he was again invited in, but the Defendant shut the door behind him. The Defendant then gave John Cooper \$5.00 for the errand that he had run. The Defendant then asked John Cooper to come over to the chair upon which he was sitting. John Cooper then sat on the Defendant's lap and the Defendant kissed him on the lips. After that, the Defendant started to rub John Cooper's penis through the long pants and underwear John Cooper was wearing. Then the Defendant slipped the underwear down and started rubbing the penis directly. At the Defendant's request, John Cooper got up and sat on the bed, and was apparently

joined by the Defendant on the bed. On the bed, the Defendant held John Cooper down by pushing him down on the chest. John Cooper stated, "he put his mouth to it", (T.T. P. 56, L28). After that, John Cooper stated, "he started just putting his mouth--started rubbing my penis again", (T.T. P. 57, Ls. 16, 17). After that, the prosecutor asked John Cooper the question of, "was it while you were on the bed that he put his mouth on your penis?" (T.T. P. 57, Ls.21,22). In response to that question, John Cooper responded, "Yes." (T.T. P. 57, L23). After that, on cross-examination, the defense counsel asked John Cooper, "Okay. And then he asked you if there had been any contact between Mr. Glenny's mouth and your penis, isn't that right?" (T.T. P. 62, Ls.17, 18, 19). In response to this question, John Cooper stated, "Yes". (T.T. P. 62, L20). After that, also on cross-examination, the defense counsel asked, "Okay. And then didn't you tell him that you were--that he was sitting in the chair when he put his mouth to your--and you used the word, 'dick', is that right?" (T.T. P. 67, Ls.27, 28, 29). In response to that question, John Cooper stated, "Yes". (T.T. P. 67, L30). At no point in the trial transcript did the prosecution witness, John Cooper, testify that his penis was inserted in or into the mouth of the Defendant.

At the point that John Cooper returned to Room #17

of the American Motel, the Defendant, Hoyt Glenny, testified as follows. Upon John Cooper's return to Room #17 of the American Motel after running his errand, the Defendant paid John Cooper \$2.00 for running the errand. Upon John Cooper's return, the Defendant was fairly well intoxicated, being he had been sipping whiskey, but that his memory of the entire matter was clear. After John Cooper was paid the money for doing his errand, the Defendant invited him to come over and sit down on his lap. John Cooper then complied and the Defendant kissed John Cooper on the forehead below the hairline. That at no time did the Defendant touch his lips to any other part of John Cooper's body. Also, neither John Cooper or the Defendant were on the bed at any time. The Defendant also testified that he has emphysema and as a result, walking and breathing of the Defendant is extremely difficult. In fact, taking the ten to fifteen steps necessary would have been very difficult. The Defendant did also never open up the pants or unzip or lower the underwear of John Cooper. The Defendant also stated that at the time John Cooper was sitting on his lap, he placed his hand on John Cooper's thigh in a gesture of "thanks-a-lot".

It is interesting to note that John Cooper testified that the Defendant had his mouth on the penis of John Cooper for just a few seconds. (T.T. P. 57, L26).

For the purposes of argument herein, the factual situation as brought forth by the Respondent, State of Utah, will be deemed the correct factual situation. This is done solely for the purpose of viewing the evidence in the best light of the prosecution, and in no way is an admittance that the facts as propounded by the Respondent, State of Utah, are correct. The Defendant will attempt to show that even though the facts of the case are brought forth in the best light for the prosecution, the Defendant should still prevail in this action.

LAW AND ARGUMENT

ISSUE I

WHETHER OR NOT THE EVIDENCE HAS PROVEN
THE CRIME OF SODOMY.

As can be seen in the facts as reiterated above, the transcript is positive that the Defendant's mouth was on the penis of John Cooper, or to the penis of John Cooper, or that there was contact between the Defendant's mouth and John Cooper, but at no point is there any evidence that the penis was inserted in or into the mouth of the Defendant.

The Defendant was charged under a Utah sodomy statute, Section 76-5-403, Utah Code Ann., 1953

as amended, which is as follows, to-wit:

A person commits sodomy when he engages in any sexual act involving the genitals of one person and the mouth or annus of another person, regardless of the sex of either participant.

A person commits forcible sodomy when he commits sodomy upon another without the other's consent.

Sodomy is a class B misdemeanor. Forcible sodomy is a felony of the second degree unless the victim is under the age of 14, in which case the offense is punishable as a felony of the first degree.

The statute, however, as well as the entire Utah Code Annotated, fails to define what sodomy is. In Black's Law Dictionary, sodomy is defined as the carnal copulation of human beings in other than the natural manner. This definition is, however, not the definition that Utah has followed. The Utah Supreme Court has deferred to the common law definition of sodomy in the case of State of Utah v. Johnson, 137 P.632, 44 Utah 18, (Utah 1913). In that case, the Court reversed a sodomy conviction because the sexual contact was between the Defendant's mouth and that of a penis. On page 632 of 137 Pacific Reporter, the Court states that they must look to and be governed by the common law definition of sodomy. The Utah legislature in 1923 amended the former sodomy statute, Section 76-53-22 Utah Code Ann., to include

the use of the mouth. Then, in the 1933 case of the State of Utah v. Peterson, 17 P.2d 925, 81 Utah 340 (Utah 1933), the Court solidified the legislative enactment by sustaining a conviction of sodomy that included copulation in the mouth. In the Peterson case, the element of penetration was proved as the facts were stipulated to be as stated on page 926 as follows:

On September 8, 1931, at Salt Lake county, state of Utah, the defendant Clyde Peterson "inserted his sexual organ, to-wit, his penis into the mouth of Elaine Giles;

The element of penetration was proven in the Peterson case by the use of the word, into.

In sodomy, mere contact is not enough. People v. Angier, 112 P.2d 659, (Cal App. 1941). For a conviction of sodomy, a necessary element that needs to be proven is penetration. U.S. v. Milby, 400 F.2d 702, C.A., (Kentucky 1968); State v. Pratt, 309 A.2d 864 (Maine 1973); State v. Swain, 172 So.2d 3, (Florida 1965); State v. Shambo, 322 P.2d 657, (Montana 1958); State v. Withrow, 96 S.E.2d 913, (West Virginia 1957); State v. Whittmore, 122 S.E.2d 396, (North Carolina 1961); Cole v. State, 179 P.2d 176, (Oklahoma 1947); Commonwealth v. Yingling, 19 Cambria 142, (Pennsylvania 1951); People v. Hickok, 216 P.2d 140, (California 1950); People v. Ramos, 270 P.2d 540, (California 1954).

Case law is replete with examples. In the case of Commonwealth v. Althoff, 16 D & C 2d 640, (Pennsylvania 1949), the Defendant undressed his young son, turned the boy on his stomach, got on top of the boy and moved up and down in an apparent attempt at sex, but could not penetrate because the Defendant was in a drunken state. The Court held there was no penetration, therefore there was no sodomy. In the case of State v. Alkhowarizmi, 421 P.2d 871, 101 Ariz. 514, (Arizona 1966), a policeman came upon a truck at night and turned his flashlight on two male suspects in the back of the truck. The policeman testified that both males were lying down in close proximity to one another, that their trousers and shorts were pulled down so as to expose their private parts, that at least one of the men had an erection and that the officer observed what appeared to be a moist milky-white substance on one of the men's leg. The Court held that there was no proof of penetration, therefore, there could be no conviction of sodomy. In the case of State v. Williams, 580 P.2d 1341, 224 Kan. 468, (Kansas 1978), the Defendant's penis penetrated the lips of the complaining witness, although further penetration was prevented by clenched teeth. The Court held that this was penetration to sustain a conviction of sodomy. In another case, State v. Elliott, 557 P.2d 1105, 89 N.M. 756, (New Mexico 1978), the Court

held that any penetration, however slight, proves this element that is essential for the crime of sodomy.

In another case, the touching of a female sex organ with the mouth or tongue of the Defendant did not constitute penetration. State v. Olsen, 258 P.2d 810, (Washington 1953). In the case of State v. Hill, 176 So. 719, 179 Miss. 732, (Mississippi 1937), the Court held that where the Defendant male "sucked the private sexual parts" of the female prosecution witness, there was no penetration, and hence, there was no case of sodomy.

By the above, it can be seen that in the case at hand, there was a failure of the prosecution to prove penetration which is a necessary and proper element to prove the crime of sodomy. There is no debate, that pursuant to the 1923 Utah statutory enactment and the 1933 Peterson case, sexual contact by the mouth of one to the sexual organ of another can also be sodomy, but because the common law definition still prevails, there is no sodomy in the case at hand.

ISSUE II

WHETHER OR NOT THE FAILURE TO RECORD
THE CLOSING ARGUMENTS OF THE ATTORNEYS
WAS ERROR WARRANTING A REVERSAL OF THE
CASE.

Both Mr. James L. Shumate, Attorney for the prosecution, and Mr. Scott J. Thorley, Attorney for the

Defendant, presented their closing arguments to the jury, but for some reason not brought forth in the transcript, these closing arguments were not reported. (T.T. P. 98, Ls. 18, 19, 20). The attorneys are entitled to a reasonable measure of latitude in closing remarks to the jury. State v. Herrera, 499 P.2d 364, 84 N.M. 46, certiorari denied 499 P.2d 355, 84 N.M. 37, certiorari denied 93 S.Ct. 918, 409 U.S. 1110, 34 L.Ed.2d 692, (New Mexico 1972). This right of argument to the jury contemplates a liberal freedom of speech and wide range of discretion, illustration, and enumeration. Cervantes v. State, 556 P.2d 622, (Oklahoma 1976). Utah has also adhered to this latter-mentioned proposition. State v. Valdez, 513 P.2d 422, 30 Utah 2d 54, (Utah 1973). However, there are limitations. In State v. Randall, 443 P.2d 434, (Arizona 1968), the Court held that the prosecution rebuttal argument should contain itself to answering issues brought out in the argument of the defense and should serve no other purpose. The scope of the closing argument should not be unduly restricted. People v. Lundy, 533 P.2d 920, 188 Colo. 194, (Colorado 1975). In a criminal case, the purpose of argument is not merely a discussion of the facts and any limitation of the argument is to deprive the Defendant to the right to have his counsel make the proper argument and discussion of the application of the laws to the facts shown to exist. State v. Gilbert,

142 P.2d 584, 65 Idaho 210, (Idaho 1943). It is also improper for an attorney to argue legal theories to a jury when the jury has not been instructed on those theories. Lloyd v. State, 576 P.2d 740, (Nevada 1978). In the Lloyd case, which was a rape prosecution, the trial Court properly prohibited counsel from instructing the jury in the closing argument, on alternative theories of law relating to rape. A Court has also held that it is error for an attorney to define the term, "reasonable doubt" when the Court has failed to do so. Gresham v. State, 396 P.2d 374, (Oklahoma 1964). Another case held that statements by the prosecution or the defense to the jury upon law, must be combined to the law as set forth in the instructions. State v. Estill, 492 P.2d 1037, 80 Wash. 2nd 196, (Washington 1972). Where a prosecutor repeatedly mistated the law and implanted in the jury an erroneous conception which prejudiced the Defendant, a fair trial under certain circumstances may have been denied. Jones v. State, 580 P.2d 1150, (Wyoming 1978). The argument of counsel is to be confined to the questions that are at issue, and evidence relating thereto. State v. Irving, 538 P.2d 670, 217 Kan. 735, (Kansas 1975). The Oklahoma Court has said that a prosecuting attorney should confine his arguments before a jury to fair discussions of issues in the case, and improper

remarks objected to will be considered and construed in reference to the evidence. If it appears that the improper argument may have determined the verdict, judgment will be reversed. Harvell v. State, 395 P.2d 331, (Oklahoma 1964). It is also improper for an attorney to argue matters which were not or could have not been introduced into evidence. State v. Smith, 561 P.2d 739, 114 Ariz. 415 (Arizona 1977). The Arizona Court has also held that reference in an argument to the jury to anything not legally admissible against the Defendant is highly improper and can justify a reversal. State v. Harden, 406 P.2d 406, 99 Ariz. 56, (Arizona 1965). Another Court reversed a conviction where the prosecution theory of the robbery in question was wholly speculative and unsupported by evidence. The argument being by innuendo and conjecture, that the victim was murdered as a result of an attempted robbery by the poverty-stricken Defendant. Hervey v. People, 495 P.2d 204, 178 Colo. 38, (Colorado 1972). In another Court, the prosecution's closing argument in a sodomy case that, because the Defendant had previously been imprisoned where deviant sexual practices are common, the jury could infer the Defendant's guilt of the crime of sodomy. This was highly improper and was reversible error. Soap v. State, 562 P.2d 889, (Oklahoma 1977). In addition, it has been held that a prosecutor must exercise care in

addressing the jury during argument and must avoid references to personal opinion and irrelevant material. State v. Smoot, 590 P.2d 1001, 99 Idaho 854, (Idaho 1978). Accord State v. Murrell, 585 P.2d 1017, 224 Kan. 689, (Kansas 1978).

Utah has also decided upon this issue. In the case of State v. Trusty, 502 P.2d 113, 28 Utah 2d 317, (Utah 1972), the Court held that any comment by a prosecutor which in a substantial way impairs or disarranges the right of the Defendant to claim the privilege as improper. That if there is a possibility that the comment prejudiced the Defendant in a sense that there is any likelihood that there may have been a different result, the error should be deemed prejudicial and another trial should be granted. However, the converse is also true, unless both propositions are affirmatively shown, there should be no reversal. The determination of those propositions is properly within the discretion of the trial Court. The trial Court's decision will be reversed only for a clear abuse of discretion. However, the Supreme Court must be able to be in a position to know what was said so that it can analyze same. State v. Black, 551 P.2d 518, (Utah 1976).

Even more in point is the case of In Interest of Trotter, 598 P.2d 557, (Kansas 1979). That case held the

failure of the trial Court to provide either a Court Reporter or electronic equipment to record proceedings or to keep adequate notes itself from which a Record on Appeal may be prepared, constitutes an abuse of discretion entitling a party to a new trial. In a New York case, the trial Court committed error directing that the summation be had in a trial in the absence of the presiding Justice and the official stenographer. The Court held that the judgment be reversed and a new trial be granted. It is interesting to note that this case is a civil case, and not a criminal case whereby the standards would be even more strict. This latter-mentioned case is Aronson v. Bass, 229 N.Y.S. 201, (New York 1928).

It can be easily seen from all of the above cases that a closing argument and what is said therein is of significant import. In the case at hand, because of factors unknown to all, no transcript of the closing arguments was made. Because the trial Court Judge has full and absolute control over trial Court proceedings, it can only be assumed that through the inadvertence, neglect, or negligence of the trial Court, the closing arguments were not recorded so that judgment can be passed upon the contents thereof by the Utah Supreme Court. We need not be put into a position of speculating as to what was said in the closing arguments.

Hence, a reversal or at least a reversal and remand is very much in order based upon this issue alone.

ISSUE III

WHETHER OR NOT THE ABSENCE OF THE
DEFENDANT FROM THE COURTROOM DURING
JURY SELECTION WAS ERROR.

The record includes much dialogue between the Court, the prosecutor and the defense counsel in regards to the Defendant's condition and the Defendant's absence from the Courtroom during the selection of the jury. (T.T. P. 2, L.30). (T.T. P. 3, Ls.1-30). (T.T. P. 4, Ls.1-30). (T.T. P. 5, Ls.1-23). During these discussions, the prosecutor and the defense counsel both concluded without any evidence or testimony to substantiate same, that the Defendant was substantially intoxicated at the commencement of the trial. At that time the Defendant was incarcerated in the jail which is in close proximity to the Courtroom. The Court also made the conclusion that the Defendant was intoxicated and jumped to the conclusion that the Court should commence the trial without the Defendant at least through the jury selection.

The prosecutor cited as authority to allow the trial to commence without the Defendant 77-35-17. Rule 17 of the Utah Rules of Criminal Procedure. (Erroneously cited in the Record as 17-35-17). The prosecutor

stated that he relied upon sub-paragraph (2) that allegedly justified the Defendant's absence from the trial. The proper portions of this said statute are as follows:

In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

. . .

In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present;

. . .

This sub-paragraph (2) states that the Defendant's absence must be voluntary and requires notice to the Defendant. First of all, it is not even known that the Defendant was intoxicated, it was only presumed. Therefore, without evidence or testimony, there is no way of knowing if the Defendant's absence was voluntary. Then in addition, there was no notice given to the Defendant. Consequently, the prosecutor, the defense counsel and the Court are all in error in allowing this matter to proceed and the jury be selected without the presence of the Defendant.

A Defendant's right to be present in the Courtroom at all stages of the trial is a basic right guaranteed

by the sixth and fourteenth amendments of the United States Constitution. State v. Carver, 496 P.2d 676, 94 Idaho 677, (Idaho 1972). The Carver case went on to state that the purpose of having an accused present at trial is to insure that he has first hand knowledge of the actions taken which lead to the eventual outcome of the trial. It is particularly important that he knows how the jurors who decided the facts were selected. Accord State v. Musgrove, 582 P.2d 1246, (Montana 1978); Hanley v. State, 434 P.2d 440, (Nevada 1967).

There are cases that discuss the facts that would justify the Defendant's waiver of his right to be present. In State v. Corriz, 522 P.2d 793, 86 N.M. 246, (New Mexico 1974) the Court held that where the Defendant's conduct in the Courtroom on the first day of trial was obscene and disruptive, the trial Court could exclude him from the trial. In another case, another Defendant who was proceeding pro se refused to enter the Courtroom, resisted attempts by deputies to be placed in there, and was subsequently placed by force in a nearby room where he could hear proceedings and at all times was free to attend the trial if he so chose; the Defendant thereby waived his right to be present at trial. Parker v. State, 556 P.2d 1298, (Oklahoma 1976). The same result would be where the Defendant was giving admonitions and chanting, which interrupted the proceedings, the trial Court

could exclude the Defendant from the Courtroom during trial.
State v. Williams, 501 P.2d 328, 11 Or.App. 227, (Oregon 1972).

The Utah legislature felt that the presence of the Defendant at trial was so important that they passed the statute requiring same. Section 77-27-3, Utah Code Ann., 1953 as amended states as follows:

If the prosecution is for a felony, the defendant must be personally present at the trial, but if for a misdemeanor, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the prosecuting attorney, by an order or warrant require the personal attendance of the defendant at the trial.

This said statute utilizes the word, "must" and hence, it can only be concluded that the Defendant's presence at trial is mandatory. However, Utah has held that a Defendant who absconds in the middle of his trial is an exception to the rule. State v. Myers, 508 P.2d 41, 29 Utah 2d 254, (Utah). In the case of State v. Mannion, 57 P. 542, 19 Utah 505, 45 L.R.A. 638, 75 Am. St. Rep. 753, (Utah), the trial Court was held to have committed reversible error by denying the defendant who was convicted of assault with intent to rape his six-year-old daughter, when during the trial, after the prosecutrix had said that she was "afraid to tell" because of the Defendant, the Court ordered the Defendant to a place in the Courtroom where the prosecutrix could not see him

and he could not hear her testimony. Another Utah case has stated that the entitlement of the accused to both his and his attorney's presence at a critical stage of criminal proceedings is an inviolate right. The denial of that right means that injury to the accused is conclusively presumed and the Supreme Court must reverse the lower Court conviction. State v. Codianna, 573 P.2d 343, certiorari denied, 99 S.Ct. 219, (Utah 1977). In addition, the Myers case mentioned above passed judgment upon the immediately above-mentioned statute and by case law reiterated that the Defendant must be personally present at trial.

The fundamental right of the accused to be present at his trial at all stages of the proceedings includes the right of the Defendant to be present in such a physical and mental condition as to be able to comprehend the nature of the proceedings and to assist in his own defense. State v. Hancock, 426 P.2d 872, 247 Or. 21, (Oregon 1967). In addition, the Defendant should be present when there occurs something which concerns his case and about which he might possibly either take action or make practical suggestions. State v. Carcerano, 390 P.2d 923, 238 Or. 208, certiorari denied 85 S.Ct. 921, 380 U.S. 923, 13 L.Ed.2d 807, (Oregon 1964). An important case in Utah has held that not only does the Defendant have a right and duty to be present at all

stages of the trial, but the Defendant should also be present where any communication between the Judge and jury takes place. State v. Lee, 585 P.2d 58, (Utah 1978). The trial transcript is replete with communications between the Court and the jury outside the presence of the Defendant.

In view of all of the above, it appears like again we have an issue that in and of itself would justify a reversal of a conviction. Even in the lightest interpretation, a reversal would be justified because a remand to the trial Court as to the reason for the Defendant's absence is now moot. Also correlated with this issue is the fact that the trial Court had the obligation to make an inquiry as to the nature of the Defendant's absence, but failed to do this also. Consequently, this, too, would be a sole and separate reason for a reversal.

ISSUE IV

WHETHER OR NOT THERE WAS A DUTY TO
INQUIRE INTO THE TESTIFYING CAPACITY
OF THE STATE'S PROSECUTING WITNESS
WHO WAS A MINOR MALE CHILD.

Throughout the transcript, there are references to the testimony of John Cooper and there is a large amount of testimony by John Cooper himself. There is no question that John Cooper was thirteen years of age at the time of the trial. The question that comes to mind is

to whether John Cooper was mature enough to understand the consequences and import of his testimony. In the case of State v. Morasco, 128 P. 571, (Utah 1912), a six-year-old boy was the State's prime witness in a case involving an assault with intent to commit the crime against nature. At that time, there was a 1907 law in effect that precluded children under ten-years-of-age from becoming witnesses. However, the boy was questioned as to whether he knew what it was to tell the truth and to tell a lie. The boy also was aware that he will be punished if he tells a lie and that God wants him to tell the truth. Because of the response to these questions, the Court made a determination that the boy was capable of testifying as a competent witness. The Court held that whether or not a child possesses the necessary qualifications to testify is for the trial Court to determine in the exercise of its sound discretion. In the absence of an abuse of this discretion, the ruling will not be disturbed on appeal. In the case at hand, it is true that the prosecuting witness is thirteen-years-of-age, but the fact stands that he is still a minor child under the definition of the law. However, absolutely no inquiry as to whether or not the child possessed the necessary qualifications to testify were made by the Court. It can therefore be inferred that the Court concluded John Cooper

was a competent witness without any inquiry into his competency. Consequently, the inaction of the Court is in direct contravention to the standards set up in the Morasco case. The same standard as set out in the Morasco case was further solidified and reiterated in the case of State v. MacMillan, 145 P. 833, (Utah 1915). In the MacMillan case, the Defendant was on trial for taking indecent liberties with a child between seven and eight-years-of-age. On page 835, the Court reiterated the necessity of the Court to utilize its sound discretion in making this determination as follows:

The question of the competency of a child who is called as a witness, in the very nature of things, must, to a large extent, at least, be left to the sound discretion of the trial court. When that court has passed upon the question either way, we cannot interfere, unless it is clearly made to appear that the court abused the discretion vested in it.

In yet another Utah case, State v. Zeezich, 210 P. 927, (Utah 1922), the prosecution witness was an eight-year-old girl. In this case, on voir dire examination, it was elicited from the girl that she not only knew what it is to tell the truth and what it is to tell a lie, but she also knew that if she told a lie she would be punished. The girl further testified to the fact that her mother and the District Attorney had instructed her to tell the

truth. Again, a serious inquiry was made into the capacity of the prosecuting witness to adequately testify. The only inquiry that was made in the case at hand was made by the defense counsel as to the competency of John Cooper. Mr. Thorley asked if John Cooper understood the importance of telling the truth in the situation and asked whether or not he had told the truth. However, no other inquiry was made as to whether or not he understood the distinction between a truth and a lie and nothing in the record shows that John Cooper had the capacity to receive impressions of the facts as required in the Morasco case.

Accordingly, because the Court made no such inquiry into the capacity to testify of John Cooper, the conviction should be overturned and reversed or should at least be remanded to the trial Court for an adequate inquiry thereto.

ISSUE V

WHETHER OR NOT IT WAS NECESSARY TO GIVE INSTRUCTIONS TO THE JURY OVER AND ABOVE THE INSTRUCTIONS THAT WERE GIVEN IN ORDER TO SUSTAIN A CONVICTION OF SODOMY.

The record indicates that several instructions were given to the jury. One instruction was on the presumption of innocence of the Defendant. Another instruction was on reasonable doubt. Another instruction

was on two reasonable interpretations. Yet, another instruction was on forcible sodomy and another instruction was on the consent to sodomy. Finally, there was an instruction that to find the Defendant guilty of forcible sodomy, the jury must find the following: (1) That the offense, if any, occurred at and within Iron County, State of Utah; (2) That the offense, if any, occurred on or about July 3, 1981, although the exact date is immaterial; (3) That at said time and place the said Defendant, Hoyt Glenny, did engage in a sexual act involving his mouth and the penis of John Cooper; and (4) That at said time John Cooper was under the age of fourteen years.

In Dougherty v. State, 471 P.2d 212, 86 Nev. 507, (Nevada 1970), the Court held that accurate instructions upon the basic elements of the offense charge is essential and failure to instruct as to those elements constitutes reversible error. There was no instruction given on penetration. Yet penetration is a requisite element of the crime of sodomy as can be seen from the law and argument brought forth in Issue I above. The obligation is one that is placed directly upon the shoulders of the Court, and not of counsel for the parties. People v. Campbell, 589 P.2d 1360, (Colorado 1978).

In the case of State v. Zeezich, supra,

the jury was instructed by the Court to examine the testimony of the child with care and caution on account of her tender years and susceptibility to wrong impressions concerning facts. In the case of State v. Dixon, 199 P.2d 775, (Utah 1948), the prosecution witness was a boy under six-years-of-age. Again, as in the Zeezich case, the trial Court gave a cautionary instruction calling the jury's attention to the fact that the boy was of tender years. In accordance with that necessity of instruction to the jury, the State v. Morasco case supra, also gave an instruction that the testimony of the minor should be examined with caution because of his age and unfamiliarity with the subject matter under investigation and that children are susceptible to impressions oftentimes erroneous. In the case at hand, no cautionary instructions were given as in these three immediately above-mentioned cases.

It is because of the lack of the two instructions, one on penetration and the other a cautionary instruction as to the testimony of a child, that the trial Court has erred enough to warrant a reversal of the conviction previously sustained.

ISSUE VI

WHETHER OR NOT THE DEFENDANT WAS DENIED
EFFECTIVE COUNSEL.

There are several issues incident to the

acts and/or omissions of Mr. Scott J. Thorley, Attorney for the Defendant, in the trial Court. These issues could all be treated independently but they all appear to emanate from the advocacy, or lack of advocacy as the case may be, of Mr. Thorley. First of all, a change of venue from Iron County to a more liberal venue, such as Salt Lake County, should have been at least attempted by counsel. Because of the greater concentration of citizens in rural Utah counties who are against the consumption of alcoholic beverages, as well as the inordinate amount of influence that the prosecutor had with the various jurors because of his contact with them and their knowledge of him, the Defendant most probably would have fared much better in a venue such as Salt Lake County. Secondly, because of the testimony elicited from the Defendant, as to his drinking alcoholic beverages, the defense counsel should have made a voir dire examination of the jury as to how they felt about persons who imbibe in alcoholic beverages, coupled with an inquiry as to whether or not they could be fair and impartial towards an imbibitor. Thirdly, it appears that the defense counsel himself concluded that the Defendant was intoxicated without having any evidence presented that would substantiate this conclusion. It was at least partially because of the defense counsel's representations

as to the Defendant's intoxication that the Judge concluded intoxication to be true, which ultimately resulted in the Defendant's absence during the jury selection. Fourthly, the defense counsel could have insisted upon a continuance so as to effect the presence of the Defendant at all stages of the proceedings. Fifthly, the defense counsel only met with the Defendant briefly prior to the trial and it is highly questionable whether the brief encounter time was enough to actively prepare for trial. See the Affidavit of the Defendant, Hoyt Glenney, that is attached hereto and is hereby incorporated by reference as though set forth fully herein. Sixthly, it has been established by interviews with the Defendant's present counsel, Mr. Stephen Mark Stephens, that the Defendant has had no sexual urges or drives for at least ten to fifteen years prior to July 3, 1981, and that the said Defendant has been a hard-core alcoholic for at least twenty years prior to July 3, 1981. It is submitted that not only should the prior counsel have illicited these important facts, but that they should have been brought up at the time of trial. See the Affidavit of Hoyt Glenney attached hereto. Seventhly, there was a need for an expert witness to testify that hard-drinking alcoholics often lose their sex drives as a result of the alcoholism. All of the above on the surface may appear to be Monday-morning-

quarterbacking, but an in-depth review of the case law indicates that the Courts have given much import to the competence of a defense counsel in a criminal case and there are basic standards that have to be met, and if they are not met, the Defendant has not been adequately represented in the trial Court.

In the case of Reece v. Georgia, 76 S.Ct. 167, 350 U.S. 85, (United States 1955), the Court held that the effective assistance of counsel in a criminal case is a constitutional requirement of due process which no member of the Union can disregard. The Reece case cited as authority and embellished upon the most famous case of Powell v. Alabama, 53 S.Ct. 55, 287 U.S. 45, (United States 1932). The Powell case, amongst other things, reiterated the rule that the right of the accused to assistance of counsel includes the right of assistance from the time of arraignment up to the preparation for trial as well as thereafter. Powell also held that attorneys, beings they are officers of the Court, are bound to render service when required by appointment as counsel for the accused. It is to be noted that the Reece case included the element of effectiveness to this necessity of counsel. In the case of Brubaker v. Dickson, 310 FR2d 30, Ninth Circuit Court of Appeals, (United States 1962), the Defendant petitioned for

a Writ of Habeas Corpus to the United States District Court which was dismissed, and the Court herein, the Court of Appeals, granted the Petition being it showed the existence of substantial defenses on behalf of the Defendant who had been convicted of first-degree murder and they were sufficient to make a prima facie showing that the Defendant had been denied the effective assistance of counsel at his trial. Again, the Court talked in terms of the Defendant being denied the effective assistance of counsel at his trial.

In Utah, the claim of inadequacy or effectiveness of counsel must be established by the record that counsel was ignorant of the facts of the law resulting in the withdrawal of a crucial defense and reducing the trial to a farce and sham. State v. McNicol, 554 P.2d 203, (Utah 1976). Also, Utah has held that counsel is required to possess ordinary legal knowledge and skill common to members of his profession, but he is not required to know all of the law nor to second-guess the trial Judge. Young v. Bridwell, 437 P.2d 686, (Utah 1968). Another Utah case has held that there is an implied covenant in an attorney's relationship with his client that he will represent the client's interest with competence and diligence. Dunn v. McKay, 584 P.2d 894, (Utah 1978). Another case held that a defense counsel who failed to do anymore investigating of a

murder charge against the Defendant than to interview the prisoner failed to render effective assistance of counsel. That on remand, the Defendant would have the burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and would have proved helpful at the original trial. However, if the changed circumstances made it impossible for the Defendant to produce any helpful evidence, the burden would shift to the prosecution to show the absence of any prejudice because of the inadequacy of counsel. McQueen v. Swenson, 498 F.2d 207, Eighth Circuit Court of Appeals, (United States 1974).

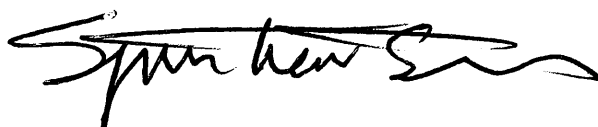
Because there are at least seven major factors involving the ineffectiveness of the trial Court's defense counsel as enumerated above, there is significant reason and proof that because of the acts and omissions of the Defendant's counsel, there should either be a reversal or a reversal and remand for a new trial. The decisions above-mentioned requiring the standard of effective counsel make this so.

CONCLUSION

As can be seen from the facts and law and argument enumerated above, the Defendant is entitled to a reversal of the conviction of sodomy. In the alternative,

a reversal and remand may be necessary pursuant to what has been set forth above. In any event, the present conviction of sodomy should not be sustained.

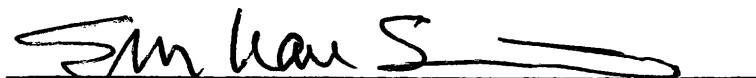
Respectfully submitted,



STEPHEN MARK STEPHENS
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered a copy of the foregoing Brief of Appellant to Earl Dorius, Assistant Attorney General, at 236 State Capitol Building, Salt Lake City, Utah, this 2nd day of August, 1982.


STEPHEN MARK STEPHENS
Attorney for Defendant-Appellant

AFFIDAVIT OF HOYT GLENNY

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

HOYT GLENNY, being first duly sworn upon oath,
deposes and says:

I.

That the affiant was the Defendant in Case No.
835, the State of Utah v. Hoyt Glenny, that was tried in the
Fifth Judicial District Court in and for Iron County, State
of Utah. That this said case is presently on appeal to the
Utah Supreme Court as Case No. 18143.

II.

That the affiant had as an attorney in the
above-mentioned District Court case Mr. Scott J. Thorley who
was appointed by the above-mentioned Court to represent the
affiant in the criminal action which was a case of sodomy.

III.

That prior to the trial of the affiant, the
said Scott J. Thorley spent a very minimal and small length
of time talking to the affiant about this matter, and upon
reflection, there are matters and things that should have
been discussed between the affiant and said Scott J. Thorley,
but due to the short length of time the Defendant had with
said Scott J. Thorley, these matters never came up, or were

never discussed by the affiant and said Scott J. Thorley. That these matters include, but are not necessarily relegated to, the sexual drive and desires of the affiant and the change of venue from Iron County to a more liberal venue.


IV.

That for at least fifteen years prior to the date of the alleged offense in question, July 3, 1981, the affiant has had no sexual urges or desires. That the affiant believes that this may be due to the fact that the affiant has been a heavy-drinking alcoholic for at least fifteen or twenty years prior to July 3, 1981. In addition, if there was any sexual activity that the affiant is so debilitated by emphysema that the affiant is unable to have any physical activity without difficulty.

V.

Further affiant saith not.

DATED this 2 day of August, 1982.


HOYT GLENN, Affiant

SUBSCRIBED AND SWORN TO before me this 2nd day of August, 1982.


NOTARY PUBLIC

my comm. Exp: 6/1/83

Residing in Salt Lake Co. etc.