

1958

# State of Utah v. Robert Henry Martinez et al : Brief of Appellants

Utah Supreme Court

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L. G. Bingham; Attorney for Defendants and Appellants;

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IN THE SUPREME COURT

FILED

of the

FEB 17 1958

STATE OF UTAH

Clerk, Supreme Court, Utah

STATE OF UTAH,

Plaintiff and Respondent,

Vs-

ROBERT HENRY MARTINEZ,  
HENRY ALVERIZ, and  
JOSEPH BERT MATTEO,

Defendants and Appellants.

BRIEF OF APPELLANTS

L. G. BINGHAM  
Attorney for the  
Defendants and  
Appellants.

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STATE OF UTAH

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ROBERT HENRY MARTINEZ,  
HENRY ALVERIZ, and  
JOSEPH BERT MATTEO,

Defendants and Appellants.

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BRIEF OF APPELLANTS

---

L. G. BINGHAM  
Attorney for Defendants  
and Appellants

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PRELIMINARY STATEMENT

Defendants appeal from the verdict of the jury finding the defendants guilty of the crime of rape.

The record on appeal is in two volumes one of which consists of the pleadings, minute entries and similar



papers. All references to this volume are designated by the letter "R". The other volume which is separately numbered is a transcript of the testimony and proceedings at the trial. References to this volume are designated by the letter "T".

#### STATEMENT OF FACTS

The evidence discloses that on the 9th day of April, 1957, Ruth Donna Tracy, 17 years of age, the complaining witness in this matter, accompanied a girl by the name of Karen Evans and another girl to a Drive Inn restaurant in Ogden, Utah, known as Bob's Barbecue.

That while at this restaurant an automobile containing seven boys arrived, among them these three defendants. One of the boys talked to Ruth and she was invited to go with them to Pine View Dam. Ruth was at that time acquainted with three of the boys in the car, Bruce Voss (T.94), Louis Vigil (T.16), and Joseph Bert Matteo (T.13),

and had been in their company on prior occasions. Karen Evans, a girl 16 years of age, also knew Bruce Voss, Joseph Bert Matteo, and Louis Vigil (T.128), and was invited to go along with them. The seven boys, Ruth, and Karen Evans left Bob's Barbecue in one automobile and drove up Ogden Canyon towards Pine View Dam.

That on the way up to Pine View Dam the girls sat upon the laps of the boys and they engaged in friendly conversation. There is some dispute in the evidence as to how much or how little beer was consumed by the party. The evidence discloses that the girls engaged in some familiarities and "necking" with some of the boys.

When the party arrived at Pine View Dam, some of the boys got out of the car and Ruth remained in the car with Louis Vigil and later with Bruce Voss. The evidence further discloses that Ruth "necked" with these boys for a period of time (T.70, 112). The



zipper down the back of the trouser-like "Torreodores" that Ruth was wearing was torn at this time (T.71).

The defendant Alveriz left the group at the car and in a short time Alvariz returned and informed the group that Karen had met some friends in another automobile and had left with them. Thereupon the party returned to Ogden and to Bob's Barbecue, where inquiry was made concerning the whereabouts of Karen Evans.

It was then decided to return Louis Vigil to his home. He lived in Davis County, near Layton, Utah. The car was driven, however, near foothills to the East of Ogden, and the prosecutrix "necked" with Louis Vigil. When the group arrived at the home of Louis Vigil, the prosecutrix sat with him for some time in an old automobile near his home.

Louis Vigil was left at his home and the group started towards Ogden. A short

distance from Louis Vigil's home the car was stopped and the first portion of the alleged attack took place.

It is not alleged by the State or by the prosecutrix that at any time during this entire occurrence, did defendant Matteo have intercourse with Ruth Donna Tracy (T.42) Nor, is it alleged, that the defendant Matteo threatened her (T.75,78), held her (T.77), or struck her (T.76) in any manner whatsoever. It is alleged that defendant Robert Henry Martinez had intercourse with the prosecutrix, but she did not allege that he used force (T.76), threats (T.75, 78), or that he held her when any other act of intercourse took place with the others.

The prosecutrix did testify that defendant Alveriz threatened her by word and with a pair of "brass-knuckles", which is denied by said defendant.

The prosecutrix, while testifying that she was held down at all times dur-

ing an assault by some five boys, testifies that she does not know who held her or who did not (T.79).

Sometime later the group drove into Ogden, Utah, and parked for a period of time during which other acts of intercourse are alleged to have occurred between prosecutrix and some of the boys.

The prosecutrix was let out of the car near her home around 4:00 A.M. Her mother had gone out in the family car to look for her (T.147), and her father had sat up waiting for her return (T. 81). She ran into the home and into her room and shut the door, she quickly changed her clothing and only came out of her room upon her parents demand (T.81). She refused to tell her parents anything about her activities, was evasive and insubordinate to the point that her father slapped her (T.83). During this conversation she made no complaint to her parents (T. 81, 150).

The next morning her mother found the clothing with the torn zipper hidden under some other clothing in Ruth's room and demanded an explanation (T.148). Ruth refused to inform her mother concerning the incident until and unless her friend, Karen Evans, was present. Whereupon, prosecutrix and her mother went to the home of Karen Evans, and there, after persuasion by Karen Evans, (T. 138) the prosecutrix indicated she had been raped.

The evidence indicated that some five boys either attempted or had intercourse with the prosecutrix, these defendants and Ernest Maestes were bound over to stand trial in the District Court, tried, and convicted of rape. Ernest Maestes, age 16 years, was placed in the State Industrial School, defendant Robert Henry Martinez, age 16 years, Joseph Bert Matteo, age 17 years, and Henry Alveriz, age 17 years, were sentenced to the Utah State Prison. Bruce

Voss, age 16 years, was placed in the Utah State Industrial School, and was not charged as an adult.

STATEMENT OF POINTS TO BE  
ARGUED

POINT I

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE OVER OBJECTION OF COUNSEL FOR THE DEFENDANTS, EVIDENCE ELICITED FROM DEFENDANT ALVERIZ THAT HE AND EACH OF THESE DEFENDANTS HAD BEEN INCARCERATED AT THE UTAH STATE INDUSTRIAL SCHOOL.

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THAT THE COURT ERRED IN INVITING JURORS TO ASK DIRECT QUESTIONS OF THE WITNESSES INCLUDING THE DEFENDANTS: IN RECALLING THE DEFENDANTS FOR CROSSEXAMINATION AT THE JURORS REQUEST, RESULTING IN EXTENSIVE AND INTENSIVE CROSS EXAMINATION, AND THE ADMISSION INTO EVIDENCE OF IMPROPER AND PREJUDICIAL TESTIMONY.

POINT III

THE COURT ERRED IN INVITING THE JURY TO CALL A WITNESS VOSS, NOT CALLED BY EITHER SIDE, AFTER THE JURY HAD BEGUN ITS DE<sup>2</sup> LIBERATIONS.

POINT IV

THAT THE COURT ERRED IN THE MANNER IN WHICH IT CONDUCTED THE TRIAL AND THE REMARKS MADE IN THE PRESENCE OF THE JURY INDICATING THE COURT'S OPINION CONCERNING THE EVIDENCE AND THE GUILT OF THE DEFENDANTS.

## POINT V

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE CONVERSATIONS HELD BY THE PROSECUTRIX AFTER THE ALLEGED ATTACK.

## POINT VI

THAT THE ERRORS OF THE COURT WERE CUMULATIVE AND WHEN VIEWED IN CONNECTION WITH EACH OTHER RESULTED IN PREJUDICE TO THESE DEFENDANTS.

## POINT VII

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN TH' CONVICTION OF THE DEFENDANTS.

## ARGUMENT

### I

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE OVER OBJECTION OF COUNSEL FOR THE DEFENDANTS, EVIDENCE ELICITED FROM DEFENDANT ALVERIZ THAT HE AND EACH OF THESE DEFENDANTS HAD BEEN INCARCERATED AT THE UTAH INDUSTRIAL SCHOOL.

During the cross examination of defendant Alveriz the State was allowed to question the witness in a manner whose sole purpose was to inform the jury defendants had been at the School, and hence that they had been in trouble with the law.



The elemental law in connection with this problem is contained in Section 78-24-9, Utah Code Annotated, 1953:

"A witness must answer questions legal and pertinent to the matter in issue, although his answer may establish a claim against himself; but he need not give an answer which will have the tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it is the very fact in issue or to a fact from which the fact in issue would be presumed-----."

The matter is discussed in a recent Utah case State vs. Wellard, 279 P.2d 914, (1955) where in the Court stated:

"It is well settled in this Court that the state may not prove the defendant committed other offenses merely to show his propensity for the commission of crime, because such evidence is apt to be given undue weight."

The same rule was enunciated in State vs. Nemier, 106 Utah 307, 312, 148 P.2d 327, 329; State vs. Scott, 11 Utah 9, 21 and 22, 175 P.2d 1016, 1021 to 1023; State vs. Pretty man, 113 Utah 36, 191 P. 2d 142, 146; State vs. Cooper, 114 Utah 531, 201 P.2d 764, 768; State vs. Neal, 254 P.2d 1053, 1056.

It is not denied that the State may show whether the defendants know each other and for how long they have known each other. The obvious purpose of the State, as indicated by the questions contained in the transcript commencing on line 27, page 308, was not to show association, but to show the prior commission of unrelated offenses.

The State continued to ask detailed questions concerning the defendants' stay at the State Industrial School on page 309, 310, and 311 of the transcript.

In State vs. Houghensen (1936) 64 P. 2d 229, the Utah Court stated in discussing a defendant who elects to take the stand in a criminal case:

"-----the Court should consider the effect of questions in their tending to prejudice the jury against the defendant or divertits attention from the main issue or issues of the case as weighed against the effect such question in affect'ng the credibility of the witness, keeping in mind that such questions as to a defendant may directly prejudice the jury in the case, whereas in the case of a witness not a defendant they do no more than pre -

judice the jury against such a witness and thus less directly affect the case.

It is contended by the defendants that the trial court in allowing the jury to receive this evidence committed error and that said error directly prejudiced the defendant in the eyes of the jury. The revelation of such evidence to the jury in this case, as the transcript shows, was not for a justifiable purpose under the facts of this case.

## POINT II

THAT THE COURT ERRED IN INVITING JURORS TO ASK DIRECT QUESTIONS OF THE WITNESSES INCLUDING THE DEFENDANTS: IN RECALLING DEFENDANTS FOR CROSS EXAMINATION AT THE JURORS REQUEST, RESULTING IN EXTENSIVE AND INTENSIVE CROSS EXAMINATION, AND THE ADMISSION INTO EVIDENCE OF IMPROPER AND PREJUDICIAL TESTIMONY.

State vs. Anderson (1945) 158 P. 2d 127, was perhaps the first case in which an appellate court was called upon to decide the propriety of a trial court inviting jurors to question witnesses. It was held as follows by the Utah Court:

"Fact the Court granted juror permission to ask questions of the witness without special request from them for this privilege does not, in our opinion in and of itself constitute error. The determining factors as to whether error has been committed is the type of questions asked and allowed by the Court to be answered. If the questions are not germane to the issues involved or are such as would clearly be improper and therefore prejudicial to the rights of the defendant to a fair trial, the Court allowing them to be answered would be error."

"By so holding, this court does not want to be understood that it approves the practice of a trial court inviting jurors to ask questions."

The court on page 353 of the transcript invited the jurors to ask questions in the following manner:

THE COURT: This is the time to call any witness back if you have a question in your mind.

JUROR NUMBER THREE: Yes

THE COURT: Who do you want to question?

JUROR NUMBER THREE: I would like to talk to Henry Alveriz.

THE COURT: Take the Stand.

The court on page 144 of the transcript invited the jurors to ask questions concerning a stipulation:

THE COURT: Does the jury have any questions about the stipulation?

The Court on page 355 of the transcript invited the jurors to ask questions in the following manner:

THE COURT: Any other questions?

JUROR NUMBER THREE: I have a question I would like to ask Ernie.

(other discussion)

THE COURT: Ernie will you take the stand? The oath you took before will be binding at this time.

The Court invited the jury on page 354 of the transcript:

THE COURT: Any other questions?

Again on page 432 of the transcript the court stated:

THE COURT: Does the jury have any

Special questions?

JUROR NUMBER SIX: I would like him to relate-----.

The court on page 433 of the transcript:

THE COURT: Any more questions from the witness?

JUROR NUMBER THREE: Did she say that she wanted to go home before you went by the Terrace vicinity?

The court on page 434 of the transcript:

THE COURT: Are there any further questions?

The court at page 439 of the transcript stated:

THE COURT: Do you have further questions?

The record discloses that in response to the above invitations of the court, juror number three asked a total of 15 direct questions of witnesses, juror number six



asked 30 direct questions of witnesses. In excess of of 51 direct questions were asked by all of the jurors during the trial. These are questions not asked through the court, but directly by the juror to the witness.

The record further discloses that the defendant Matteo (T.358), defendant Alveriz (T.353), defendant Maestes (T. 355) and the prosecutrix (T. 360) were recalled to the witness stand at the special invitation of the court by individual jurors and cross examined at length.

The record discloses on a total of 8 separate instances the court invited the jury to ask questions of the witnesses (T. 353, 144, 355, 432, 433, 434, 439, 354).

In Pacific Improv. Co. vs. Weidenfeld (1921) (CCA 2d) 277 F. 224, the court stated:

"Much of the confusion in this case arose from the conduct of certain jury men, who, unchecked by the Court, interrupted with unnecessary questions upward of thirty five times, not infrequently and at some length."

Defendants have been unable to find any cases where in addition to the court inviting jurors to question witnesses, the court has also recalled witnesses to the stand at the request of jurors as was done in this case (T. 353,355). The effect of this action being the taking of the defense from the hands of counsel, and the disruption of an orderly and judicial proceeding by the extensive questioning of witnesses by jurors resulting at one point in laughter from the audience (T. 435).

Space will not permit a detailed discussion of all of the questions that were propounded to the witnesses by the jurors, in only one instance did the Court attempt to control the cross examination (T 439), at which point Juror

Number Three stated:

JUROR NUMBER THREE: Which door were you standing by, right or left?

WITNESS VOSS: The left.

JUROR NUMBER THREE: We've got two of you there now.

THE COURT: Do not comment. You can't deliberate here. You may ask questions, but that's all, do you have any further questions?

That the manner of Juror Number Three in questioning and stating his opinion on the testimony of the witness was improper cross examination is obvious. The effect of said comment on the other jurors could not but be prejudicial and harmful to these defendants.

Objections to the court's action in inviting jurors to ask questions were deferred by counsel until they could be made in the absence of the jury (T. 362).

In Krause vs. State (1942) 132 P. 2d 179, the court stated:

"The difficulty in allowing a juror to ask a witness questions arises by reason of the fact that the juror is not an attorney, most of ~~them~~ are not familiar with the rules of evidence, and they might intentionally or inadvertently ask some question which is wholly improper and one which should not be answered; yet, if counsel for the defendant objects or defendant fails to make answer to the question of the juror, or jurors, might think the witness is concealing something from them and little credence would thenceforth be placed in the testimony of the witness."

See also State -vs Sicles (1926) 220 Mo. App. 290, 286 SW 432, wherein the Court stated the same rule.

### III

THE COURT ERRED IN INVITING THE JURY TO CALL WITNESS VOSS, NOT CALLED BY EITHER SIDE, AFTER THE JURY HAD BEGUN ITS DE<sup>2</sup> LIBERATIONS.

In the absence of the jury the State indicated on page 343 of the transcript:

MR. ANDERSON: I will have Ruth Tracy is all. For the court's information Voss is downstairs if you want to see him.

The court then called the jury back into the courtroom and the following remarks were made by the Court at page 352 in the transcript:

THE COURT: For the information of the jury, there is available, none of the three parties care to call him to testify, but there is available one man, the other man that was in the car. If you want to hear from him I will call him for you. Do you want to hear him? In the opinion of the Court, the attorneys, none of them offer him as a witness. Do you want to hear him or not to hear him?

JUROR NUMBER SIX: How was he involved?

THE COURT: One of the men that has been testified was in the car. He is in custody at this time. If you want to hear him I will call him.

(No response)

At still another point in the trial (T. 357) a juror asked of the Court:

JUROR NUMBER TWO: Where does this fellow

Voss fit in?

THE COURT: He is the witness I have got down stairs locked up. Do you want to hear him?

JUROR NUMBER TWO: That is all right.

The jury retired and began its deliberations, when brought into court and asked concerning dinner the following discussion took place: (T.422).

JURY FOREMAN: I have been asked by the jury to act as their foreman, and during the trial the court gave them the opportunity to call a witness to the purported crime, and they had it in their mind to call the witness. The recess was called at that moment. They did not avail themselves of that opportunity.

There seems to be some concern in their minds as to why the defendants didn't want to call him, or why the prosecution didn't want to call him, and they feel they would like to know what his testimony would be.



Whereupon the Court ordered that Voss be brought before the Court, and was examined by the court and cross examined by the jury.

The Court asked the jury four times if they wished Voss called (T.343,352, 357). The effect of these repeated solicitations to the jury could not but focus attention on Witness Voss and give undue weight to his testimony in the eyes of the jury. In the event the Court felt the evidence of Voss was important to the case, it is respectfully submitted that the proper procedure would have been to call said witness in proper order, not in the midst of the deliberations of the jury, and in a manner that would not have indicated to the jury that said testimony was, in the eyes of the court, of considerable importance.

It is not claimed by the State that this is an instance where the State does not wish to be bound by testimony of a

witness that the State feels is untrustworthy. Notwithstanding that the State called the attention of the Court to Voss (T. 343) the State objected to his testimony (T. 443) as did the defendants.

That the witness Voss was not considered of importance by the jury prior to the Court's repeated calling him to their attention is indicated by the following remarks of jurors.

JUROR NUMBER SIX: How was he involved (T.353) ?

JUROR NUMBER TWO: Howdoes this Voss fellow fit in (T. 357) ?

Defendants have been unable to locate any cases in which the trial court invited jurors to call a witness if they desired.

The matter of allowing a case to be reopened after the jury has retired for the admission of additional evidence was discussed in State -vs- Duncan (1942) 132 P. 2d 121, a Utah case in which it was held

that the court had discretionary power to permit additional evidence to be taken. In the Duncan case it was obvious that if the newly discovered evidence was believed by them, it would be determinative as to their verdict. There was no such compelling reason for the admission of the testimony of Voss.

The Court allowed extensive direct cross examination of Voss as discussed under Point Number II, which further accentuated the importance of said testimony to the prejudice of these defendants.

Jones Commentary of Evidence Section 2287, page 4461:

"The trial judge should exercise his right to call and examine a witness with great care. He should not adopt the procedure except where it is shown that otherwise there may be a miscarriage of justice."

By custom and by statute (77-31-1), Utah Code Annotated, 1953, the defendant is

afforded the right to argue his case to the jury after the evidence has been presented to it. No opportunity was given the defendants to argue the case again or to present to the jury their argument concerning the Voss testimony alone. The Court in denying this right gravely prejudiced the defendants.

The Court stated to the jury in relation to the calling of Voss "there is available none of the three parties care to call him to testify-----In the opinion of the Court, the attorneys, none of them offer him as a witness (T.352)."

The effect of the Court's above remarks, instructing the jury that the defendants feared Voss's testimony, could not but afford said testimony undue and prejudicial weight. The defendants, in open court were "dared" to call the said witness, by the Court. This sharpened the curiosity of the jury and placed the def-

endants in a position where they appeared to be concealing evidence from the jury. For the State to have commented on the defendants failure to call Voss would appear to be questionable. For the Court so to comment it is submitted was clearly error and prejudicial.

#### IV

THAT THE COURT ERRED IN THE MANNER IN WHICH IT CONDUCTED THE TRIAL AND THE REMARKS MADE IN THE PRESENCE OF THE JURY INDICATING THE COURT'S OPINION CONCERNING THE EVIDENCE AND THE GUILT OF THE DEFENDANTS.

It is contended by the State in this case that the defendant Matteo is guilty of rape in that he aided and abetted the others in the act, it being conceded that he did not have intercourse with the prosecutrix (T. 42). The State asked Ruth Donna Tracy on direct examination, to list the sequence in which defendants had intercourse with her (T.41), whereupon she listed all of the parties, excepting defendant Matteo, whereupon she was asked:

Q. As to the defendant Matteo?

MR. BINGHAM: I object to that, your Honor, as highly leading and suggestive, practically insisting that she relate an incident.

THE COURT: The objection is overruled, you may continue.

MR. BINGHAM: There is no testimony in the record he had intercourse with her. His question was, state the order in which they had intercourse. There is no testimony in the record that she had intercourse with Matteo.

THE COURT: In the opinion of the court it is superficial and technical. The Jury understands the situation.

It is submitted that in a criminal charge of rape against a defendant it is not superficial and technical whether or not intercourse occurred between the prosecutrix and the defendant.



It is as vital an element and as important a question as can be asked of a prosecutrix. It is respectfully submitted that if there be an area in this trial where the state should not be allowed to lead the complaining witness it is upon this very point.

The Court's further statement "The jury understands the situation (T.41)" was a remark which had the effect of instructing the jury of what the Court feels the situation is, not merely what the State claimed the situation to be.

The Court some two questions later remarked:

THE COURT: The theory is obviously joined her, assisting the others, you may go forward.

These further remarks of the Court also served to instruct the jury that - the defendant Matteo aided and abetted the

other boys in having intercourse with the prosecutrix.

During the cross examination of Robert Henery Martinez by the state the following testimony was given:

Q. Did you have more than four?

A. I may have.

Q. But you don't know is that right?

A. That is right.

Q. So you really didn't have 8 or 10 at all, did you?

A. Well when I drink I don't pay any attention to see how many bottles I drink. I just drink.

THE COURT: Answer the question, did you drink 8 or 10 bottles or did you not drink 8 or 10 bottles? Answer the question if you can.

MR. BINGHAM: I believe he did your honor, I would like to interject on that.

THE COURT: I didn't hear his answer.

MR. BINGHAM: The answer was, "when I drink I don't pay attention to how many bottles I drink."

THE COURT: Answer the question. Cease to coach the witness. Answer the question. Did you drink 8 or 10 bottles or did you know? Or, do you know?

A. I don't know.

The manner in which the Court took over the cross examination of the witness from the state, and from the questions asked clearly indicated to the jury the Court's opinion that the witness was being evasive, which it is submitted the record does not indicate. The Court's further remark that counsel for the defendant was coaching the witness was not warranted and rebounded to the prejudice of the defendants.

The Court instructed the jury concerning the question of accessory at the close of the opening remarks of the State and before any evidence had been placed

before the jury (T.11).

THE COURT: "-----You might be curious about one matter in law which he mentioned to you, that you might be interested in knowing now, that will guide you, some states have what is known as accessory before the fact and accessory after the fact-----that law may or may not be of assistance to you. You will be more fully instructed on it later."

The Court's instructing the jury before any evidence has been introduced that the State will attempt to prove the guilt of some of the defendants as accessories before the fact, and hence principals, clearly indicated to the jury that the court felt it was important. In giving special emphasis to this one aspect of the case, before any evidence had been placed before th jury indicated clearly to the jury the Court's feeling to the prejudice of the defendants.

The Court informed the jury that his instruction "will guide you". In other words the jury was instructed to pay special attention to evidence relating to the question of accessory during the trial. The Court's remarks amounted to instructing the jury not only on its own views, but the weight to be given a vital aspect of the case.

V

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE CONVERSATIONS HELD BY THE PROSECUTRIX AFTER THE ALLEGED ATTACK.

At 44 American Jurisprudence page 952 and 953, the general rule is stated:

"The rule admitting evidence of the complaint is based on the well known fact that when an outrage has been committed on a woman, the instinct of her nature prompts her to make her wrongs known, and seek sympathy and assistance. The complaint which she makes is the natural expression of her feelings. It may therefore be shown in evidence as a circumstance which would usually and probably have occurred in case the offense had been committed."

"The rule supported by the weight of authority is that the prosecutrix may merely testify to the fact of making the complaint and not as to the details."

State -vs- Christensen (1929) 73 Utah 575, 276 P. 163, was a case where the prosecutrix complained to her mother "as soon as the prosecutrix arrived at the home."

"The rule is settled in this jurisdiction that, in a prosecution for rape, testimony may be given that the prosecutrix recently after the alleged act complained of the outrage, to whom the complaint was made, and where and when the crime was committed, but the details of the complaint may not be given."

The above rule was also enunciated in State vs- Neel, 21 Utah 151, 60 P 510.

On page 38 of the transcript the Court allowed into evidence a conversation between prosecutrix and Karen Evans the day after the alleged attack:

THE COURT: It is a question of complaint. The first person she asked.

At (T.82) prosecutrix testified she did not complain immediately to her parents

because she did not want to upset them.

At (T.123, 124) the Court allowed Karen Evans to testify concerning conversations she had with Ruth the next morning.

In this case the complaint was only made after accusation had been made by the prosecutrix's mother (T. 148), and then only after pursuasion (T. 138). The basis for admitting this type of evidence is that the complaint is a natural expression of her feelings, and hence is apt to be reliable.

However, in this case there is not a bona fide complaint. It is not, as the Court stated (T. 38) the first person whom she asked, which is the test.

When a woman reveals an alleged attack, unless she be under some incapacity, only after accusation and pursuasion, the basis for its reliability does not exist and it should not be admitted.

It is not permissible to state the details of the alleged offense as was allowed in this instance (T. 38,39,40).



## VI

THAT THE ERRORS OF THE COURT WERE CUMULATIVE AND WHEN VIEWED IN CONNECTION WITH EACH OTHER RESULTED IN PREJUDICE TO THESE DEFENDANTS.

It is fundamental rule that even though the errors of the Court, if they were considered as separate and isolated instances may not amount to the deprivation of a fair trial, if the various errors combine to reach that result, prejudice to the defendants may be shown.

It is submitted that the errors of the Court as set forth heretofore do constitute prejudice to the defendants and deprived them of a fair trial.

## VII

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THE DEFENDANTS.

The defendants were charged with the crime of rape. It is essential that the State prove beyond a reasonable doubt that each defendant either did all of the acts and had the intent required by the statute

or that he aided and abetted another in the doing of the acts.

There is no evidence that defendant Matteo had sexual intercourse with the complainant. The testimony of the complainant is to the contrary itself (T.42). There is no evidence that defendant Matteo threatened the prosecutrix (T. 75,78), held her (T. 77) or struck her (T. 77). He did attempt to have intercourse with her, but there is no evidence in this case of a conspiracy, or of his aiding or abetting anyone to have intercourse with her. Therefore, as to Matteo there was not sufficient evidence to justify a finding of guilt to the crime of rape.

It is admitted that Robert Henry Martinez had intercourse with the complaining witness, but as in the case of Matteo, she does not allege that she was threatened by him (T. 75, 78), that he used force (T. 76)

or that he held her (T.77).

There is evidence that the defendant Henry Alveriz had intercourse with the complainant, and that she was threatened with violence by him. However, her behavior before and immediately after the alleged attack, in not complaining to her parents immediately (T.83), and in associating with defendant Matteo immediately after the alleged occurrence (T.52) indicates little violence and force, if any was offered to her.

A charge of rape, as is often said, is easily made and hard to disprove.

Therefore, it is submitted the jury did not have sufficient reliable evidence upon which to find a verdict of guilty of the crime of rape as to any of these defendants.

#### CONCLUSION

That the conviction of these defendants should be reversed in that they were deprived of a fair, orderly and proper trial.

(37)

That improper evidence was allowed into the trial, and the Court's inviting the jury to call witnesses, recall witnesses, and crossexamine the various witnesses, resulted in counsel being unable to conduct an orderly defense.

Respectfully submitted  
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and Appellants