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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

ROBERT HENRY MARTINEZ,
HENRY ALVERIZ, and
JOSEPH BERT MATTEO,
Defendants and Appellants.

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DEC 19 1958
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Case
No. 8796

Brief of Respondent

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TABLE OF CONTENTS

| | Page |
|---|------|
| STATEMENT OF FACTS..... | 1 |
| STATEMENT OF POINTS..... | 2 |
| ARGUMENT | 3 |
| POINTS: | |
| I. THE COURT DID NOT ERR IN ADMITTING INTO EVIDENCE TESTIMONY BY THE DEFENDANT ALVERIZ THAT HE AND THE OTHER DEFENDANTS WERE IN THE STATE SCHOOL TOGETHER | 3 |
| II. IT WAS NOT ERROR FOR THE COURT TO INVITE JURORS TO ASK QUESTIONS OF WITNESSES, INCLUDING THE DEFENDANTS, NOR DID THIS CONDUCT RESULT IN PREJUDICIAL ERROR | 6 |
| III. IT WAS NOT ERROR FOR THE TRIAL COURT TO PERMIT THE WITNESS VOSS TO TESTIFY AFTER THE JURY HAD BEGUN ITS DELIBERATIONS, NOR WAS IT PREJUDICIAL..... | 9 |
| IV. THE TRIAL JUDGE'S CONDUCT OF THE TRIAL, TOGETHER WITH STATEMENTS MADE BY HIM, WERE NOT IN ERROR AND WERE NOT PREJUDICIAL | 11 |
| V. IT WAS NOT ERROR FOR THE COURT TO ADMIT AS EVIDENCE CONVERSATIONS HELD BY THE PROSECUTRIX AFTER THE ATTACK, NOR WAS SUCH EVIDENCE PREJUDICIAL..... | 15 |
| VI. ERRORS COMMITTED BY THE COURT, IF ANY, WERE NOT CUMULATIVE, AND WERE NOT PREJUDICIAL TO DEFENDANTS | 20 |
| VII. THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANTS OF THE CRIME OF RAPE | 21 |

Authorities Cited

| | |
|--------------------------|----|
| 159 A.L.R. 347 | 6 |
| 122 Fed. Supp. 523 | 22 |

Cases Cited

| | |
|--|----|
| Carlo v. Okonite Callender Cable Co. (1949) 69 Atl. 2d 734.... | 11 |
| Daniel v. Tower Trucking Co. (1944) 32 S.E. 2d 5..... | 10 |

| | Page |
|--|--------|
| Krause v. State (1942 Okla.) 132 P. 2d 179..... | 8 |
| Louisville Bridge & Terminal Co. v. Brown (1929 Ky.) 227 S.W. 320 | 6 |
| Miller v. Commonwealth (1920 Ky.) 222 S.W. 96..... | 9 |
| Miller v. Greenwood (1940 N.C.) 10 S.E. 2d 708..... | 10 |
| People v. Goldstine (Cal.) 303 P. 2d 892..... | 22 |
| People v. Halpin (1916 Ill.) 114 N.E. 933..... | 4 |
| People v. Macchiaroli (1921) 202 P. 474..... | 24 |
| People v. Marx (1919 Ill.) 125 N.E. 719..... | 22 |
| State v. Anderson (1945 Utah) 158 P. 2d 127..... | 6, 8 |
| State v. Bradford (1911 S. C.) 70 S.E. 308..... | 6 |
| State v. Brinkman (1926 Utah) 251 P. 364..... | 22 |
| State v. Carter (1947 Ariz.) 18 P. 2d 90..... | 22 |
| State v. Christensen, 276 P. 163..... | 18, 20 |
| State v. Duncan (1942 Utah) 132 P. 2d 121..... | 9 |
| State v. Cox (1929 Ut.) 277 P. 972..... | 20 |
| State v. Hougensen (1936 Utah) 64 P. 2d 229..... | 6 |
| State v. Justesen (Ut.) 99 P. 456..... | 20 |
| State v. Kendall (1907 N.C.) 57 S.E. 340..... | 6 |
| State v. Neal (1953 Utah) 262 P. 2d 756..... | 21 |
| State v. Neel (1900 Utah) 60 P. 510..... | 17 |
| State v. Roberts (1937) 63 P. 2d 585..... | 19 |
| State v. Sickles (1926 Mo.) 286 S.W. 432..... | 6 |
| Sweeney v. State (1923 Ark.) 256 S.W. 73..... | 5 |
| U. S. v. Moses (D. C. Pa.) 122 Fed. Supp. 523..... | 22 |
| White v. Little (1928 Okla.) 268 P. 221..... | 8 |

Statutes Cited

Utah Code Annotated 1953

| | |
|------------------------|----|
| Section 76-1-44 | 22 |
| Section 76-53-15 | 21 |

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

ROBERT HENRY MARTINEZ,

HENRY ALVERIZ, and

JOSEPH BERT MATTEO,

Defendants and Appellants.

Case
No. 8796

Brief of Respondent

STATEMENT OF FACTS

At trial held on April 14, 1957, in the District Court of Weber County, appellants were convicted of the crime of rape and sentenced to the Utah State Prison.

The evidence revealed that on the night of April 9th and the early morning of April 10, 1957, in Davis and Weber Counties, a seventeen-year-old girl, the prosecutrix, had sexual intercourse with a number of boys. The acts occurred in the back seat of an automobile during times when the car was parked and moving. It appears that two of the appellants here had intercourse with the prosecutrix, and that the third one, Matteo, attempted,

but did not succeed. Appellants admitted acts of intercourse, and the substantial conflict of evidence concerns the use of force and threats. Prosecutrix testified that she was threatened, struck and forced to submit. Appellants deny that any force or threats were used. The jury chose to believe the prosecutrix. Other specific facts will be mentioned as they concern a particular issue on appeal.

For the purpose of clarity the points of this brief correspond to the points of Appellants' brief.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN ADMITTING INTO EVIDENCE TESTIMONY BY THE DEFENDANT ALVERIZ THAT HE AND THE OTHER DEFENDANTS WERE IN THE STATE SCHOOL TOGETHER.

POINT II.

IT WAS NOT ERROR FOR THE COURT TO INVITE JURORS TO ASK QUESTIONS OF WITNESSES, INCLUDING THE DEFENDANTS, NOR DID THIS CONDUCT RESULT IN PREJUDICIAL ERROR.

POINT III.

IT WAS NOT ERROR FOR THE TRIAL COURT TO PERMIT THE WITNESS VOSS TO TESTIFY AFTER THE JURY HAD BEGUN ITS DELIBERATIONS, NOR WAS IT PREJUDICIAL.

POINT IV.

THE TRIAL JUDGE'S CONDUCT OF THE TRIAL, TOGETHER WITH STATEMENTS MADE BY HIM,

WERE NOT IN ERROR AND WERE NOT PREJUDICIAL.

POINT V.

IT WAS NOT ERROR FOR THE COURT TO ADMIT AS EVIDENCE CONVERSATIONS HELD BY THE PROSECUTRIX AFTER THE ATTACK, NOR WAS SUCH EVIDENCE PREJUDICIAL.

POINT VI.

ERRORS COMMITTED BY THE COURT, IF ANY, WERE NOT CUMULATIVE, AND WERE NOT PREJUDICIAL TO DEFENDANTS.

POINT VII.

THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANTS OF THE CRIME OF RAPE.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN ADMITTING INTO EVIDENCE TESTIMONY BY THE DEFENDANT ALVERIZ THAT HE AND THE OTHER DEFENDANTS WERE IN THE STATE SCHOOL TOGETHER.

It is to be noted at the outset that the scope of cross-examination is always broad, and that the discretionary powers of the trial judge in permitting cross-examination are extensive.

As conceded by appellants, it is proper cross-examination to inquire of defendants whether they are acquaint-

ed. It is generally held that it is proper to show association. That they had lived together at the State School for a period of time might have been significant in this case where the alleged sexual offense was participated in by all defendants and appeared to be a concerted act. Their being together at the State School indicates a closer association than might exist otherwise.

For whatever effect it might have had on the minds of the jury, it is to be noted that the terms “incarcerated” and the “State Industrial School” do not appear in the transcript of record. The only term used in this connection was “The State School.”

The admission of the evidence herein objected to was not prejudicial to defendants. There was already testimony before the jury that defendants had been or were going to the State School. The prosecutrix and the witness Evans had both testified that the defendant Alveriz had said to them that he had been at the State School, and also that “we are going out to the State School anyway.” Counsel at trial made no motion to strike this evidence.

It is submitted that the evidence that defendants were in the State School would be admissible for the purpose of discrediting defendants. It was held in *People v. Halpin* (1916 Ill.) 114 N.E. 933, that the cross-examination of a witness as to his occupation, associations, and conduct for the purpose of determining his credibility, is a matter to a great extent in the discretion of the court,

and does not constitute error unless the discretion is abused. See also Wharton's Criminal Evidence, 12th Edition, Section 880. In *Sweeney v. State* (1923 Ark.) 256 S.W. 73, the Supreme Court of Arkansas said:

“The court did not err in permitting counsel for the state, on cross-examination, to ask the appellant if he were a gambler and whether he had been in jail. The appellant, in answer to these questions, stated that he had gambled some, and that he had been in jail at Walnut Ridge, at Pochontas, and at Harrisburg. The connection in which these questions were asked shows that the prosecuting attorney was attempting to prove the recent residence, occupation, and history of the accused as affecting his credibility.”

In a leading Utah case, this court, in considering the problem of admissibility of testimony elicited on cross-examination, laid down the following rules:

“(1) Any witness may be asked on cross-examination whether he has been convicted of a felony.

(2) Any witness may be asked a question the answer to which has a direct tendency to degrade his or her character if it is pertinent to establish the ultimate fact in issue or to a fact from which such fact may be presumed or inferred.

(3) Questions whose only object could be to call for answers to affect the credibility of the witness and which answers would tend to degrade his or her character, but not tend to subject such witness to punishment for a felony, are permissible over a general objection as to their relevancy or competency, in the sound discretion of the court.

(4) Questions whose only object could be to call for an answer to affect the credibility of the witness and which would tend to subject such witness to punishment for a felony, are permissible over a general objection as to their relevancy or competency, in the sound discretion of the court.”

State v. Hougensen (1936 Utah) 64 P. 2d 229.

POINT II.

IT WAS NOT ERROR FOR THE COURT TO INVITE JURORS TO ASK QUESTIONS OF WITNESSES, INCLUDING THE DEFENDANTS, NOR DID THIS CONDUCT RESULT IN PREJUDICIAL ERROR.

It is generally held in this country that it is not error for the court to invite jurors to ask questions of witnesses. See 159 A.L.R. 347, *Louisville Bridge and Terminal Company v. Brown*, (1929 Ky.) 277 S.W. 320, *State v. Bradford* (1911 S.C.) 70 S.E. 308, *State v. Kendall* (1907 N.C.) 57 S.E. 340, and *State v. Sickles* (1926 Mo.) 286 S.W. 432. *State v. Anderson* (1945 Utah) 158 P. 2d 127, is a leading decision by this court discussing this problem. There the court, during trial, inquired of the jury whether they would like to ask questions of a witness. Two jurors responded by asking questions, and this was attacked by the defendants as error. On appeal this court found no error. A portion of the decision is quoted:

“Whether a juror will be permitted to ask questions of a witness is within the discretion of the trial court. * * * The fact that the trial court granted the jurors permission to ask questions of

witnesses without any 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 to be answered. If the questions asked are not germane to the issues involved or are such as would be clearly improper and therefore prejudicial to the rights of the defendants to a fair and impartial trial, the court's allowing them to be answered would be error. As stated in Jones' Commentaries on Evidence, 2nd Ed. Vol. 5, Page 4539, Sec. 2320:

'The privilege of examining witnesses is extended to jurors and may be exercised by them to draw out or clear up an uncertain point in the testimony. It has even been said that jurors should be encouraged to ask questions. They should not, however, be permitted to take the examination of witnesses out of the hands of counsel and to question witnesses at length, nor should they be permitted to interrupt the orderly conduct of the cause with unnecessary questions.'

See also cases cited supra.

* * * *

This privilege should only be granted when in the sound discretion of the court it appears that it will aid a juror in understanding some material issue involved in the case and ordinarily when some juror has indicated that he wishes such a point clarified."

The court also analyzed the questions asked by the jurors and appeared to lay down a criteria for the admission of such evidence.

"These questions might properly have been elicited on the direct examination of the witness

and were such as would clarify material points in the testimony.”

Appellants, in Point II of their brief, specify various instances in the transcript of trial when the court invited the jurors to ask questions, and claimed these to be error. Examination of the transcript does not reveal that the questions asked by jurors were improper or prejudicial. They were not leading, and they met the test suggested above in the *Anderson* case, *supra*, that they “might properly have been elicited on the direct examination of the witness.” As stated in the *Anderson* case, the determination of whether or not jurors may ask questions is a problem to be left to the sound discretion of the trial court. See also *Krause v. State*, (1942 Okla.) 132 P. 2d 179.

Where jurors have interrogated witnesses, it is the obligation of the party complaining to show that his rights have been prejudiced thereby. *White v. Little* (1928 Okla.) 268 P. 221. Analysis of the questions and the answers elicited in this case does not reveal prejudice to the defendants; they pertain to matters germane to matters which had been brought up previously by counsel for the parties. Defendants have failed to show how they were prejudiced.

We have not undertaken to quote these questions and answers which defendant objects to; we believe they can be examined more readily in the trial transcript. In view of the standards suggested by the court in the *Anderson* case, and after examination of the questions asked by

jurors here, we submit that they were not improper, nor were they prejudicial.

POINT III.

IT WAS NOT ERROR FOR THE TRIAL COURT TO PERMIT THE WITNESS VOSS TO TESTIFY AFTER THE JURY HAD BEGUN ITS DELIBERATIONS, NOR WAS IT PREJUDICIAL.

After the jury had started its deliberations, it returned to the courtroom and requested that one Bruce Voss be called as a witness. Voss had not been called by either the prosecution or the defense; he had been with the defendants in the car during the time of the alleged rape and admitted having sexual intercourse with the prosecutrix.

It has been generally held that whether a case will be reopened for additional evidence is a question within the discretion of the trial judge, and his decision will not be set aside unless it is clearly an abuse of discretion. In a Utah case, *State v. Duncan* (1942 Ut.) 132 P. 2d 121, where the right of the trial judge to re-open a case was in question, it was held that the court had the right to recall the jury and to re-open the case, to enable the witness to testify. The Supreme Court added:

“The purpose of a trial is to obtain the facts.”

In *Miller v. Commonwealth* (1920 Ky.) 222 S.W. 96, the Court of Appeals of Kentucky made the following finding:

“Any member of the jury has the right, during the examination of a witness, to ask any com-

petent, pertinent question, and, after the jury has retired to consider their verdict, they have the right to return to the courtroom and ask that a witness, who has testified, be recalled if he is present or so convenient as to be quickly secured and in the presence of the court, the parties to the case and their attorneys ask the witness any pertinent, competent questions relating to matter brought out on the examination of the witness.”

In North Carolina the rule seems well settled that it is discretionary with the trial judge, whether a case will be re-opened for additional evidence. In *Miller v. Greenwood* (1940 N.C.) 10 S.E. 2d 708, it was said:

“It is altogether discretionary with the presiding judge whether he will re-open the case and admit additional testimony after the conclusion of the evidence and even after argument of counsel. * * * (Cases omitted.) When the ends of justice require, this may be done, even after the jury has retired.* * * (Cases omitted.)”

It has been held in a South Carolina case that it is within the sound discretion of a trial court to grant or refuse an application for the re-opening of a case for the introduction of additional evidence, even after the commencement of arguments to the jury and later. *Daniel v. Tower Trucking Company* (1944) 32 S.E. 2d 5. In a recent New Jersey case in reviewing the action of a trial court in refusing to re-open a case and permit the introduction of evidence, the Supreme Court of that state made this broad ruling:

“After either or both parties have rested, the admission or exclusion of further evidence is in

the discretion of the judge, and this discretion extends to evidence offered during and after the argument, and even after the cause has been submitted to the jury, but an exception may be taken, and if the ruling be an abuse or discretion, relief may be had.” *Carlo v. Okonite Callender Cable Company* (1949) 69 Atl. 2d 734.

Defendants vigorously attack the admissibility of the testimony of Voss, but they have failed to show wherein any prejudice resulted to them. A review of the witness Voss’s testimony reveals that it closely parallels the testimony of the defendants, and in fact, it appears that he could well have been a witness for the defense. He testified that no force was used against the prosecutrix; that he helped her take her clothes off, and left the implication that he did this because she needed help. His testimony was to the effect that the prosecutrix had willingly submitted. Furthermore, Voss’s testimony did not bring up any new matter; it related entirely to evidence previously admitted.

It is submitted that it was not an abuse of the trial judge’s discretion to re-open the case and admit the testimony of the witness Voss, and further, if such evidence was not admissible, it was not prejudicial under the circumstances.

POINT IV.

THE TRIAL JUDGE’S CONDUCT OF THE TRIAL, TOGETHER WITH STATEMENTS MADE BY HIM, WERE NOT IN ERROR AND WERE NOT PREJUDICIAL.

Defendants allege, in Point IV of their brief, that certain conduct and remarks by the trial judge were prejudicial to the defendants. For the purpose of this point, it will be necessary to consider each instance separately.

On pages 26, 27, and 28 of appellants' brief, objection is made to two statements of the trial judge as they relate to the defendant Matteo. The court said that defendants' objection to testimony was "superficial and technical." Defendants attack this, stating that whether intercourse occurred between prosecutrix and defendant was not "superficial and technical" in a criminal prosecution. It is noted, however, that after the objection was overruled and the prosecutrix was permitted to testify, she stated that Matteo did not have sexual intercourse with her. Defendants also attack the court's statement, "The jury understands the situation," as amounting to an instruction as to what the court feels the situation is, but the court does not reveal what it thinks the situation is. Defendants are merely suggesting how the jury was impressed; there was no showing that this was prejudicial.

Defendants next take objection to the following statement by the Court: "The theory is obviously joined her, assisting the others, you may go forward." See page 42 of the transcript and page 28 of defendants' brief. This statement does not instruct the jury that defendant Matteo aided and abetted the other defendants. The court's statement is merely an explanation of the legal

ground on which he overruled defendants' objection, his use of the term "theory" is significant in that respect. Certainly the court may explain his reason for such a ruling.

On page 29 of their brief, defendants take exception to certain statements made by the court during the cross-examination of the defendant Martinez as to how much beer the defendant had drunk. The court did not take over the cross-examination. The trial judge stated that he did not hear the witness's answer. Certainly it is not improper for a trial judge to seek to clear up a matter which he did not hear, or which he did not understand. The court's statement did not indicate to the jury that he believed the witness was evasive. Martinez's answer had not been responsive, and the court sought to have a direct answer. It appears from the record that the Court might reasonably have believed that defendant was evasive. It was not insisted that the witness answer yes or no to the question, rather he was directed to "answer the question if you can," and again "did you drink 8 or 10 bottles, or did you know? Or, do you know?"

It may have appeared to the court that counsel was coaching the witness in this instance, especially since the court stated that it had not heard the witness's answer, and since counsel was now attempting to explain it to the court. Such statement, in any event, was not prejudicial. If it were held to be error every time counsel in a criminal prosecution was reproved or cautioned, few convictions would stand.

Defendant's objection to the court's statement at the beginning of trial concerning accessory before the fact and accessory after the fact is not substantiated. The court's instruction to the jury at the close of trial properly explained the law and removed doubts which may have existed in the jury's mind. Obviously, when the court made the statement at the beginning of trial, it was referring to a statement made by the prosecuting attorney in his opening statement. The terms "accessory before the fact," and "accessory after the fact" are not familiar to the layman, and may have created questions in the jurors' minds. The court merely sought to make a general explanation and mentioned that the law would be given them later.

It is to be noted that the conduct of a trial is in the hands of the trial judge, and his rulings should not be overruled unless clearly an abuse of discretion or prejudicial. The court sees the trial at first hand and is aware of conditions which may not clearly be reflected in the transcript of record.

At the close of trial, the court instructed the jury. Instruction No. 26 is as follows:

"The court does not express to you any opinion on any of the facts in the case, for it is immaterial what the views of the court thereon may be. Neither by these instructions nor by any words uttered or remarks made during the trial, does the court intimate or mean or wish to be understood as giving an opinion as to what the proof is or what it is

not, or what the facts are or what are not the facts in this case.”

This instruction served to cure statements made by the judge during the course of trial, which might appear on their face to be prejudicial.

POINT V.

IT WAS NOT ERROR FOR THE COURT TO ADMIT AS EVIDENCE CONVERSATIONS HELD BY THE PROSECUTRIX AFTER THE ATTACK, NOR WAS SUCH EVIDENCE PREJUDICIAL.

We concur with appellants’ general statement of the law pertaining to the admission of testimony concerning a complaint of rape. A statement of complaint made by a woman sexually attacked is admitted as an exception to the rule that the evidence of a witness may not be corroborated by testimony of another witness who heard the statement made. There are limitations to that rule. One being that the details of the attack may not be related by the witness, another that the complaint should have been made reasonably soon after the assault was committed. Those eliminations do not apply here. The first point to be observed from an analysis of the testimony which appellants attack is that contrary to appellants’ allegation, the details of the assault were not related. The only testimony made by the prosecutrix in the form of a complaint was that contained on pages 38 and 39 of the transcript. We quote portions hereof.

A. Karen asked me, she asked me if anything happened, and I said, “Yes,” and she said, “Oh,

no; have you told your mother.” I said, “No, but I am going to.” She said, “Don’t, come and talk to me first.” And I said “all right.” When the telephone rang, mama, or about that time walked out with my toreadors and asked me what happened, and I told her, well, let’s go down to Karen’s and I’ll tell you, and so she was very—she didn’t want to at first and I said, “Well I won’t say anything until we talk to Karen,” we went down to Karen’s place, mama driving. She drove me down there. Karen came out.

* * * *

A. I told her that I had been with these five Spanish boys and that they had done something to me and she asked me what, and I told her.

Q. What did you tell her?

A. I said they had sexual intercourse with me and she got real upset and started to cry.”

The testimony of the witness Karen Evans as to the prosecutrix’s complaint is likewise brief and without details. See pages 123 and 124 of the transcript. We here-with quote portions of that testimony:

A. I asked her what time she got home and she didn’t tell me but pretty late, I said, “did you get home okay,” and she said, “no.” I said, “no, what happened?” And she said, “I’ll talk to you later.” And I said, “get your mother to bring you over here now.” She said, “what will I tell her.” I said, “tell her that you want to bring my dress and shoes over and then we will talk to her about it,” or talk it over. And her mother came right over.

* * * *

Q. Yes. What did Ruth tell you?

A. I just asked her what, we sat there about 5 or 10 minutes and neither of us said anything and her mother said "what's the matter with you two." And, I said, "nothing," and Ruth said, "nothing," and I said, "why don't you tell her so we can do something." And she said, "All right." Her mother kept saying, "tell me Ruth, what happened." And she just kept saying, "just a minute." And finally it came out and she told her mother.

Q. What did she tell her mother?

A. Right at the time all she told us, is that five Spanish boys were in the car and she said that they raped her.

Certainly this testimony did not constitute a detailed description of events. What this testimony amounted to was simply that the prosecutrix was raped by five Spanish boys. There was no testimony as to names or where the assault took place, or under what conditions.

There are three Utah decisions, two of which were cited by appellants which we feel to be determinative of this question. The first bears on the rule that a complaint should have been made within a reasonable time after the offense. In *State v. Neel* (1900 Utah) 60 P. 510, a conviction for rape, it appeared that the prosecutrix did not complain to anyone about the offense until some time after the day upon which it was committed. The court held that it was error to admit the testimony concerning the complaint, but on the ground that it was too delayed. The court, however, made the following state-

ment as to lapse of time within which a complaint should be made.

“While delay in making complaint may awaken suspicion, and tend to discredit the testimony of the prosecuting witness, yet mere lapse of time is not a test of admissibility, but simply a matter which the jury may consider in determining the weight which ought to be given to it.”

In 1929, this court rendered a decision in *State v. Christensen*, 276 P. 163, also a rape conviction. That case is significant in that the evidence admitted there appears to be more extensive and detailed than similar testimony admitted in this case. The court’s decision quoted testimony of the mother of the prosecutrix as follows:

The witness answered: “She said that, ‘Mama, I hope I haven’t disgraced you; this man has had something to do with me.’” The district attorney asked: “Did she state what the act was?” The witness answered: “Yes, sir.” Here further objections were made which were overruled. Then further questions were asked and answered as follows:

“Q. You may state what your daughter said at that time? A. She said that he had had sexual intercourse with her.

“Q. Did your daughter make any statements to you as to the conditions, under what conditions the act of sexual intercourse took place? (Here further objections were made which were overruled.) A. Yes, sir.

“Q. What did she say? A. She told me he had whiskey — She told me he had whiskey, he poured whiskey down her.”

The mother further testified that her daughter, when she came home, was intoxicated, and that she “smelled like a saloon.”

The court held that the admission of this evidence was not error. The court said:

“It undoubtedly was competent to give testimony that the prosecutrix complained of an injury or outrage inflicted upon her and the nature and character of it, where and when it occurred, and that some one forcibly and against her will and consent had sexual intercourse with her, had ravished her. Generally, it is not competent to give testimony as to the name of the person or who it was that committed the outrage upon her; but, under the circumstances, the statement the prosecutrix made, that the defendant ‘had had sexual intercourse with her,’ if not competent to be given, was harmless, in view that the defendant by his testimony admitted all of the facts and circumstances as related by the prosecutrix, except the force and violence, that he was the person with the prosecutrix, and had sexual intercourse with her. There thus, on the record, was no issue or dispute as to the identity of the person who committed with or upon the prosecutrix, and no dispute as to the fact stated by the prosecutrix to her mother that the defendant ‘had sexual intercourse with her.’ ”

Here, as in the Christensen case, there was no question of fact as to whether acts of sexual intercourse took place; the issue was whether force and violence were employed.

In a more recent Utah case, *State v. Roberts* (1937) 63 P. 2d 585, this court upheld the admission of cer-

tain testimony given by a friend of the prosecutrix. The decision followed and applied the *Christensen* case, *supra*.

Consideration of the evidence here reveals no prejudice to defendants. They admitted sexual intercourse with the prosecutrix, but denied using force or threats. Her complaint as related by witnesses was not a detailed description of events.

POINT VI.

ERRORS COMMITTED BY THE COURT, IF ANY, WERE NOT CUMULATIVE, AND WERE NOT PREJUDICIAL TO DEFENDANTS.

The errors here, if any, were not cumulative, nor were they prejudicial to defendants' rights. As early as 1909, this court said, in considering the question of error:

“The admission of the immaterial evidence, unless it in some way tends to prejudice the rights of the party litigant against whom it is offered, is no ground for reversing a judgment. This rule has so often been declared that we deem it unnecessary to cite authorities in support of it.” *State v. Justesen* (Ut.) 99 P. 456.

In *State v. Cox*, (1929 Ut.) 277 P. 972, this court was considering on appeal an objection that the admission of certain evidence was error because it related to independent offenses. The court said at page 973:

“We are inclined to think the evidence was erroneously admitted, but in view of the satisfac-

tory and convincing evidence of appellant's guilt which stands wholly undisputed, the erroneous admission of the evidence does not call for a reversal of the judgment. Without the objectional evidence, the verdict must have been the same." (Cases omitted.)

In the recent *Neal* case, this court again reaffirmed the general rule:

"We will not reverse criminal causes for mere error or irregularity. It is only when there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted." *State v. Neal* (1953 Utah) 262 P. 2d 756.

POINT VII.

THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANTS OF THE CRIME OF RAPE.

The offense of rape is defined in Section 76-53-15, UCA 1953, quoted in part as follows:

"Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

* * * *

(3) Where she resists, but her resistance is overcome by force or violence.

(4) Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic or anaesthetic substance administered by or with the privity of the accused.

Appellants raise in issue the law of principals. Section 76-1-44, UCA 1953, is quoted in part as follows:

“All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed.”

Appellants here were all principals. The above-quoted statute makes clear that one may be guilty of rape without having had intercourse with the person upon whom the offense was committed; see also *State v. Brinkman* (1926 Ut.) 251 P. 364, and *State v. Carter* (1947 Ariz.) 18 P. 2d 90. The significant terms of the statute are “aid and abet.” Those terms have been defined as meaning to instigate, encourage, promote, or aid with a guilty knowledge of the wrongful purpose of the perpetrators. *People v. Goldstine* (Cal.) 303 P. 2d 892. Also, it has been held that in order to “aid and abet” another to commit a crime, it is necessary that the defendant in some way associate himself with the venture, that he participate in it as in something that he wishes to bring about, and that he seek, by his action, to make it succeed. *U. S. v. Moses* (D. C. Pa.) 122 Fed. Supp. 523.

The following cases are significant in revealing to what extent the courts have considered persons to be principals in rape prosecutions. In *People v. Marx* (1919 Ill.) 125 N.E. 719, several defendants were convicted of the crime of rape. Two of the defendants, foster broth-

ers, appealed on the ground that they had not participated in the offense, and they could not therefore be convicted. The sexual attack occurred in the back seat of an automobile. The brothers were seated in the front seat of the car, one of them being the driver of the vehicle. There was no evidence that either brother participated in the sexual act or threatened or directly applied any force against the person raped. The car was driven about for a period of time while the sexual attacks were taking place. The Supreme Court of Illinois affirmed the conviction of the two brothers. We quote the following extensive extract from that decision:

“It cannot be contended, of course, that mere presence at the commission of a criminal act renders a person liable as a participator therein. If he is only a spectator, innocent of any unlawful intent, and does not act to countenance or approve the acts of those who are actors, he is not criminally responsible because he happens to be a looker-on and does not use active endeavors to prevent the commission of the unlawful acts. ‘Notwithstanding these rules as to the nonliability of a passive spectator, it is certain that proof that a person is present at the commission of a crime without disapproving or opposing it is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same.’ 1 R.C.L. 141, and authorities there cited. It is clear that the plaintiff in error Alex Marx, who was driving the automobile, did not in any way take part actively in the holding of the prosecutrix at the time when she charges the acts were being forcibly committed, but the evidence shows

without contradiction, and he himself admits, that he drove the car several miles out of the way in Chicago while going from the cabaret to the hotel at Wabash avenue and Eighteenth street. His acts in this regard tend to show that he was actually encouraging and approving what was being done in the car. We think, under the authorities and the testimony in this regard, the jury were justified in finding that his foster brother, Peter Marx, was assenting and by his actions approving, thereby aiding and abetting in the commission of the offense, as he himself said that he suspected what was going on in the rear of the car, and while he denies the act the prosecutrix testified that he put one of his hands upon her breast at some time while they were in the car.”

In a California case, *People v. Macchiaroli* (1921) 202 P. 474, appellant was one of three persons convicted of robbing a man and woman and of raping the woman. The third count against appellant charged him with rape in that he aided and abetted one Gonzolez in the rape of the woman. The fourth count charged him with rape in that he aided and abetted Marsiglia in the rape of the woman. The evidence disclosed that the three came upon the man and woman in a car. They ordered them out and robbed them both. Then while appellant held a gun on the man, the other two, Gonzolez and Marsiglia carried the woman across the road and raped her. Appellant testified that he made some objection to the attack on the woman. The man who was with the woman testified that he heard the woman scream, but did not go to her aid because of the gun being held against him. Appellant appealed on the ground that there was no evidence to

sustain the conviction of the two rape charges. The California statute on principals is substantially the same as the Utah statute. The appellate court affirmed the conviction, holding that appellant did both aid and abet the others in the commission of the crime of rape.

The evidence adduced at trial reveals that the sexual assault was a common venture of all the appellants. There was no evidence that any of them attempted to prevent the commission of the acts. Appellants assert that as to Matteo and Martinez, no force or threats were made. But the threats and force were applied at the beginning of the series of sexual assaults by the defendant Alveriz and one Voss. The prosecutrix was, in fact, struck twice (T. 27) with brass knuckles and bore bruises as a result of those blows. She was warned that her face would be "messed up." (T. 26, 27, and 29) Prior to the time that either Matteo or Martinez assaulted her, Alveriz and Voss had attempted to have intercourse with her. She had been struck and threatened; she had screamed (T. 35); she attempted to run away (T. 25); and shouted at a passing car for help, but was caught and forced back into the automobile. She requested on numerous occasions that she be taken home, and she pleaded with defendants to leave her alone. The jury could reasonably believe she was too afraid or exhausted to further resist. After the initial threats and force, the prosecutrix could reasonably have assumed that any further resistance by her would be met by more force or blows. She testified that she attempted to raise herself several times, but was forced down. Under the circumstances she likely

believed that all the defendants were acting concertedly; they gave no indication that their purposes were not the same. It is often the situation in rape cases where a woman is assaulted by a number of men that her resistance to the later attacks fails because of fear or exhaustion.

It is alleged that the defendant Matteo did not have intercourse with the prosecutrix, and that he did not apply force or threats. He was, however, present in the car at all times, and he made no effort to prevent the assault. His private parts were exposed (T. 45) and he was physically on the prosecutrix for a long period of time, 45 minutes, according to his own testimony (T. 185) and according to her testimony, trying to have intercourse with her. (T 32) His conduct is certainly not that of an innocent observer.

The prosecutrix's conduct in not reporting the assault until the following morning is not unusual, and under the circumstances, a jury could reasonably believe that she was too embarrassed, ashamed, or even afraid of her parents, to have reported the incident. The evidence is strong that this was a scheme participated in by all appellants. All during the night some one or more persons were driving the car. Prosecutrix was not taken home as she repeatedly requested, but the car was parked, delayed, and driven in a round-about course, all while the sexual assaults were taking place. She testified that while Alveriz was on her, at least two were holding her legs, and further, that some one was always

maneuvering her legs. The force used against her was always by more than one person, as in forcing her down on the back seat and in taking off her clothes. The witness, Karen Evans, testified that earlier in the evening when she was with the group in Weber Canyon, that the defendant Alveriz warned her to stay away from the car, that “those guys have one thing on their mind.” (T. 117) He further implied that the group was planning to have sexual intercourse with the prosecutrix.

It is submitted that there was sufficient evidence to convict all three appellants. The testimony reveals concerted action, promotion and encouragement by the defendants. The jury could reasonably have found that all defendants assented and lent their countenance to the assault.

Respectfully submitted,

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