

1958

State of Utah v. Carlos Herrera and Kenny Navarez : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

SEP 12 1958

STATE OF UTAH,

Plaintiff and Respondent,

vs.

CARLOS HERRERA, and KENNY
NAVAREZ,

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No.

8804

RESPONDENT'S BRIEF

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

CARLOS HERRERA, and K E N N Y
NAVAREZ,

Defendants and Appellants.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

At trial, commencing on July 25, 1957, before the Second Judicial District Court, in and for Weber County, the appellants were convicted of the crime of rape. The evidence adduced at trial disclosed that the incident occurred on the outskirts of Ogden on the night of June 6, 1957. The State's evidence was to the effect that the appellants raped the prosecutrix, a married woman, 15 years of age. The evidence, as presented by the defense, conceded that the

appellants had each engaged in sexual intercourse but was to the effect that such acts were voluntary and with the prosecutrix's consent. The question of resistance was therefore the substantial factual issue before the Court.

STATEMENT OF POINTS

POINT I.

THE EXTENT OF CROSS EXAMINATION OF THE DEFENSE WITNESS BORELLA AS PERMITTED BY THE COURT WAS NOT ERROR.

POINT II.

THE EXAMINATION BY THE PROSECUTION OF CERTAIN OF ITS OWN WITNESSES WAS NOT ERROR.

POINT III.

IF THE TRIAL COURT COMMITTED ERRORS, SUCH ERRORS, WHEN VIEWED TOGETHER, DID NOT CONSTITUTE PREJUDICE TO THE DEFENDANTS WITHIN THE DOCTRINE OF CUMULATIVE ERROR.

POINT IV.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANTS.

ARGUMENT

POINT I.

THE EXTENT OF CROSS EXAMINATION OF
THE DEFENSE WITNESS BORELLA AS PER-
MITTED BY THE COURT WAS NOT ERROR.

Appellants object to certain cross examination of their witness Borella. See pages 171 to 172 of the transcript and pages 5, 6 and 7 of appellants' brief. The District Attorney in attempting to impeach the witness through cross examination brought out previous arrests and instances of misconduct.

The law in this country is not uniform in that area concerning the permissible extent of cross examination of a witness for impeachment purposes. It is admitted that a majority of the courts hold that evidence of arrests, without showing convictions, may not be admitted. See Wigmore on Evidence, 3rd Edition, Section 979, Vol. III. Appellants do not object here to the introduction of evidence of arrests, or of specific instances of misconduct, because that was not done, but rather, object to the questions put to the witness by the prosecutor. The scope of cross examination is broad. The *Houghensen* case, cited by appellants, *State v. Houghensen* (1936 Utah), 64 P. 2d 229, contains at pages 238 and 239 a number of principles which the court suggests as guides in the conduct of cross examination. Rule (3) as stated by the court is as follows:

“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."

It is submitted that the trial court has broad discretion in determining the extent of cross examination of a witness. A number of decisions rest on the principle that the admission or exclusion of evidence of arrests is left with the sound discretion of the trial court. See *Tollifson v. People* (1910 Colo.), 112 P. 794; *State v. Bowers* (1921 Kan.), 194 P. 650; and *Denny v. State* (1921 Ind.), 129 N. E. 308.

It is further submitted that the principal obstacle upon which Point I of appellants' argument falls is that the error, if such was committed, was not prejudicial. It is alleged that the admission of the evidence "destroyed the value of his [the witness's] evidence in the eyes of the jury", but that is mere supposition on the part of appellants. The attempts to impeach the witness Borella were only efforts to reflect on the witness's character for veracity. Considering the nature of the cross examination, the questions put, it could not have seriously discredited the witness. It is to be remembered that this was not the accused who was being cross examined. Even assuming for the sake of argument appellants' position, analysis of the witness's testimony reveals that it played an insignificant part in the case for the defense. In substance, the witness Borella testified that he had previously "dated" the prosecutrix; that he was in the car together with the prosecutrix and others earlier during the evening of the incident; that she drank beer and that she was kissing boys in the car;

all relating to the witness's acquaintance with the prosecutrix and to her conduct on the evening of the alleged assault. His testimony did not go directly to the fundamental issues in a rape conviction. He did not testify that he had ever had sexual relations with the prosecutrix, nor did he testify of her character as to chastity. He was not present at the time of the rape and therefore could offer no testimony on the essential question of resistance.

It is noted that a number of the cited cases in appellants' brief, pages 8 and 9 directed to this point, are cases which involve the cross examination of the accused. Here we are concerned with the cross examination of witnesses—not the parties to the action. In both *Ross v. United States* (1937 C. C. A. 7th), 93 F. 2d 950, and *State v. Nyhus*, 129 N. W. 71, cited on page 9 of appellants' brief, the question concerned the cross examination of the defendant. So far as the matter of prejudicial error arises, it is submitted that error committed in the impeachment of a party would likely result in more prejudice than error committed in the impeachment of a witness, not a party.

POINT II.

THE EXAMINATION BY THE PROSECUTION OF CERTAIN OF ITS OWN WITNESSES WAS NOT ERROR.

It is alleged as Point II of appellants' brief that the court erred in allowing the prosecution to impeach various of its witnesses; specifically Dr. Hirst and Johnny Dominguez.

The redirect examination of Dr. Hirst by the prosecution as recorded on pages 56 and 57 of the transcript, although involving leading questions, did not constitute impeachment of the witness. There are two grounds upon which a party may cross examine or ask leading questions of his own witness: (1) where the party is surprised by the witness's testimony; and (2) to refresh a witness's memory or recollection. The following general principle is quoted from 98 C. J. S.:

“Page 236, § 428, WITNESSES.

“To refresh a witness's memory or recollection it may be permissible to ask leading questions, and to call his attention to previous conversations or statements had with relation to the subject of his testimony.”

Page 367, § 484, WITNESSES.

“A party may cross-examine his own witness when he has been surprised by the witness's testimony.”

See also 58 Am. Jur. 342, Sec. 618, Witnesses. This court, in the case of *Morton v. Hood* (1943 Utah), 143 P. 2d 434, affirmed the rule that a party under certain circumstances may cross examine his own witness. The court said:

“We are of the opinion that when a witness has made statements on a prior occasion which would induce counsel acting in good faith to call such person as a witness, and when testifying such witness gives testimony materially different from the prior statement; the party so surprised and misled by such adverse testimony, under proper circumstances, should not only be permitted to ask leading questions to refresh the recollection of the witness as to

the prior declarations, but if the witness asserts that such questions or reference to alleged prior declarations do not refresh his memory, or he denies making such statements, or refuses to answer, or even professes that he is unable to remember; proof of such prior statements should be received, not as substantive evidence of the facts about which such statements were made, but to offset the effect of the surprise adverse testimony.”

It is noted that on page 58 of the transcript in response to counsel’s objection, the court said: “You may proceed on surprise.”

As a second argument contained within Point II of appellants’ brief, it is urged that the court erred in permitting the prosecutor to ask certain questions of his own witness, one Johnny Dominguez. The prosecution had called this witness who had been present during the early hours of the evening of the assault and who testified as to the persons present and what transpired during the time that he was present. He testified that he was a very good friend of both defendants. The following testimony is quoted from page 246 of the transcript, and includes that which appellants object to:

“Q. You may cross examine. One other question. Have you been in the Industrial School?

“A. Yes.

“Q. You have been in a lot of trouble have you?

“A. I haven’t been in trouble for a long time now.

“Q. You haven’t been in any trouble for a long time now. Is that right?

“A. Two years ago.”

It is noted that earlier during the witness's testimony the court allowed the prosecutor to lead the witness, commenting that he was "obviously reluctant."

The transcript reveals that appellants made no objection at trial to the questions. It is a general rule of appeal law that an appellate court will consider only those questions as were raised and reserved at trial. See 3 Am. Jur. 25, Sec. 246, Appeal and Error. The rule is one of fairness, based on the reasonable requirement that reversals should not be granted on grounds of objection which might have been obviated by a timely objection raised at trial. Prior to the adoption of the present rules of civil procedure, it was necessary, in order to preserve a question on appeal, to make exception to the court ruling at the trial. Present Rule 46 of the Utah Rules of Civil Procedure provides:

"Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Although the section abolishes the requirement that an exception be taken, it certainly implies that in order to preserve the question on appeal the party either make known to the court the action he desires the court to take or else that he object to the court's action. In the instant case, appellants remained silent. It is conceded that in certain situations where the error is of such magnitude or mani-

festly prejudicial to the accused, that the Appellate Court should not refuse to consider the question, even though objection was not made below. The error presented to this court is technical and of minor significance. It is submitted that inasmuch as appellants failed to raise objection at trial, they cannot now demand that this court consider the question.

It is further submitted that it was within the discretion of the trial judge to permit the questions. The latitude allowed a party in cross examining his own witness is generally a matter within the discretionary powers of the trial judge. See 98 C. J. S. 367, Sec. 484, Witnesses. The court here, in the exercise of such discretion, permitted the questions. This court, in the case of *Xenakis v. Garrett Freight-lines* (1954 Utah), 265 P. 2d 1007, said:

“There is no doubt that, where a party is surprised at finding that a witness believed to be favorable is in fact adverse, it is permissible to cross-examine the witness and to put leading questions to him, and the extent to which this may be done is, generally speaking, within the discretion of the presiding judge. * * *”

POINT III.

IF THE TRIAL COURT COMMITTED ERRORS,
SUCH ERRORS, WHEN VIEWED TOGETHER,
DID NOT CONSTITUTE PREJUDICE TO THE
DEFENDANTS WITHIN THE DOCTRINE OF
CUMULATIVE ERROR.

Defendants have raised specifically three errors, discussed in Points I and II. It is significant that all three

touch merely on collateral matters. They do not involve the testimony of the prosecutrix or of either of the defendants, and they do not relate to the primary issue before the trial court, viz., whether the prosecutrix resisted and was overcome by force or violence. (It was conceded by appellants that they engaged in sexual intercourse with the prosecutrix.)

The first alleged error related to questions asked for the purpose of impeaching one of appellants' witnesses. The second concerned leading questions asked of a doctor, the State's witness, pertaining to a statement previously made by the witness indicating abrasions on the prosecutrix's legs. The third related to impeachment questions asked of one of the State's witnesses.

Section 77-42-1, U. C. A. 1953, provides that where error has been committed it shall not be presumed to have resulted in prejudice and that the Appellate Court shall not give regard to errors which do not affect the substantial rights of the accused. It is submitted that the errors here, if any, were minor, technical in nature and not prejudicial to the rights of appellants.

POINT IV.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANTS.

The appellants attack the sufficiency of the evidence to sustain the conviction. A basic principle of appellate review provides that an appellate court will not review questions of fact; that being the function of the jury. The

court may, however, make a determination of the sufficiency of the evidence and if the verdict is supported by substantial evidence, the reviewing court will not disturb it. See 3 Am. Jur., Secs. 883 and 887, Appeal and Error, and 5A C. J. S., Sec. 1647, Appeal and Error.

This court has held that where there is evidence to support the jury's verdict it will not be overturned by a reviewing court. *Henrie v. Rocky Mountain Packing Corporation* (1949 Utah), 202 P. 2d 727; see also *Angerman v. Edgemon* (1930 Utah), 290 P. 169. The above stated rule applies to criminal as well as to civil verdicts. See *State v. Mann* (1941 No. Caro.), 13 S. E. 2d 247, where the Supreme Court of North Carolina said:

“It is not the province of this court to weigh the testimony and determine what the verdict should have been, but only to see whether there was any evidence for the jury to consider; if there was, the jury alone could determine its weight.”

See also *State v. Johnson* (1955 Ida.), 287 P. 2d 425. There was evidence here to support the jury's verdict.

CONCLUSION

It is respectfully submitted that the Court should affirm the conviction of appellants.

Respectfully submitted,

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