

1958

State of Utah v. Jack Keeley : Brief of Appellant

Utah Supreme Court

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SUPREME COURT OF THE STATE OF UTAH

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Clerk, Supreme Court, Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

JACK KEELEY,

Defendant and Appellant.

Case No.
8828

APPELLANT'S BRIEF

M. RALPH SHAFFER,
Attorney for Appellant.

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In the
SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)

Plaintiff and Respondent,)

vs.)

Case No.
8828

JACK KEELEY,)

Defendant and Appellant.)

APPELLANT'S BRIEF

STATEMENT OF FACTS

The defendant, Jack Keeley, was charged with attempt to commit rape on the person of Ruth Marie Base (also known as Ruth Marie Keeley), a girl ten years of age and the daughter of the defendant's wife by a prior marriage.

At the time of the alleged offense the defendant, his wife and his stepdaughter were all living together at their apartment in Salt Lake City.

The complaint charging the defendant with this offense reads that the act was committed on or about the 16th day of May, 1957, with the typewritten "16th" crossed out and the notation "10th" inserted. The latter notation is in blue ink and is of a character not found elsewhere on the complaint. The record at page 20 appears to indicate that the complaint was amended, as to the date of the offense, on the morning of Thursday, June 13, 1957, the very morning of the taking of testimony at a preliminary hearing of Helen Gae Baxter, the school teacher of the prosecuting witness. Miss Baxter then testified that the prosecuting witness, Ruth Marie Keeley, was absent on the afternoon of May 10, 1957, from a school program in which she was scheduled to participate. The information, filed with the District Court on June 27, 1957, charged that the offense was committed on or about May 10, 1957; it was on this basis that the defendant was tried.

The defendant has flatly denied the charge from the beginning, has entered a plea of Not Guilty and has testified under oath that he has never made any

improper advances toward his stepdaughter.

There were only two witnesses at the trial -- the prosecuting witness and the defendant. However, the prosecuting attorney read into the record the above testimony of Miss Baxter that Miss Keeley was absent from a school program on the afternoon of May 10, 1957. (It appears that Miss Baxter was to leave for Mexico prior to the time of trial.)

The prosecuting witness, hereinafter referred to as Miss Keeley, testified that she came home for lunch at noon on May 10, 1957, that her mother was working at the time and that her stepfather, the defendant, was home also on that occasion. She alleged that after she had her lunch, her stepfather invited her into the bedroom of the family apartment and there committed the alleged improper advance. The lurid details which the prosecuting witness alleges to have occurred are found in the record at page 29 line 11 through page 31 line 10.

No medical examination was ever made concerning the physical condition of Miss Keeley thereafter despite the protest of the defendant.

The defendant testified that he was completely innocent of the charge and in fact had seen the step-daughter undressed on only two or three prior occasions all of which times being when the girl called him in to adjust the hot and cold water taps in the bathroom when the daughter was bathing. It seemed that the water faucets were difficult to adjust in their particular apartment. See the record at page 79, lines 24 through 29.

In his examination the defendant testified that at the outset Miss Keeley did not approve of her mother's marriage to him some four months previously, but on the contrary "pouted" on the very day of the marriage (record at page 66, lines 25-30). Subsequent to that time, the defendant testified that he and his wife had considerable difficulty with Miss Keeley so far as her telling untruths are concerned. On one occasion he testified as having slapped her for telling her mother over and over again that she had hung up her clothes, when in fact she had not done so, this incident further serving to add fuel to the fire. Miss Keeley herself admitted that her stepfather had

previously visited her school to check on her pre-disposition to tell untruths (see the record at page 35, lines 15-18).

It should be mentioned at this juncture that all during the taking of testimony of the prosecuting witness, one Mr. Eddington sat by her on the witness stand. This Mr. Eddington is an employee of the school system and in fact was the first one, even before her mother, to whom Miss Keeley finally reported the alleged improper act on behalf of the defendant.

This Mr. Eddington has related to present counsel that he in fact does social work for the school system and was called by Miss Keeley's principal to interview Miss Keeley regarding her poor marks in school, her personality deficiencies, and her inability to get along with other children. When Mr. Eddington sought an interview with Miss Keeley and questioned her regarding her home life, Miss Keeley only then related the alleged offense to him. Counsel invites the Office of the Attorney General to discuss this with Mr. Eddington and to stipulate to this fact; otherwise, counsel will supply the Honorable Court

with an affidavit to the above effect at or prior to the oral argument before the Court.

The jury returned the verdict of guilty of "assault with intent to commit rape" (an includable offense in the charge of "attempt to commit rape"); subsequently, the defendant was sentenced to serve from one to ten years in the State Penitentiary.

STATEMENT OF POINTS

POINT I.

IT WAS ERROR FOR THE COURT TO GRANT THE STATE'S REQUEST THAT MR. EDDINGTON, AN EMPLOYEE OF THE SALT LAKE CITY SCHOOL SYSTEM, SIT ON THE STAND WITH MISS KEELEY DURING THE GIVING OF HER TESTIMONY.

POINT II.

THE COURT ERRED IN GRANTING THE STATE'S MOTION THAT THE TESTIMONY OF THE DEFENDANT AS RELATES TO A PHONE CALL WHICH HE RECEIVED FROM THE MOTHER OF A GIRL FRIEND OF THE PROSECUTING WITNESS, BE STRICKEN ON THE GROUND THAT THE DEFENDANT WAS ATTEMPTING TO IMPEACH THE PROSECUTING WITNESS BY RELATING SPECIFIC INSTANCES OF ALLEGED UNTRUTHS SPOKEN BY THE PROSECUTING WITNESS.

ARGUMENT

POINT I

IT WAS ERROR FOR THE COURT TO GRANT THE STATE'S REQUEST THAT MR. EDDINGTON, AN EMPLOYEE OF THE SALT LAKE CITY SCHOOL SYSTEM, SIT ON THE STAND WITH MISS KEeley DURING THE GIVING OF HER TESTIMONY. SEE THE RECORD AT PAGE 25 LINE 30 THROUGH PAGE 26 LINE 8.

The record, at page 49 line 16 through page 51 line 1, indicates that the first person to whom she related the alleged offense was Mr. Eddington. The conversation with Mr. Eddington was at an indeterminate time after May 10, 1957. It is interesting to note that she didn't even tell her own mother prior to the time of her conversation with Mr. Eddington. Further, Miss Keeley and Mr. Eddington reviewed the case extensively together immediately prior to the time that she came to the trial courtroom. See the record at page 54 lines 4 through 9.

Counsel has searched at length for cases on the point of whether or not adults should be permitted to sit on the stand with a child prosecuting witness during the trial of an alleged sex offense, particu-

about the alleged offense, and where the adult had gone over the case with the child prosecutrix immediately before the court trial.

To convenience the Office of the Attorney General and the Court in their research, counsel states that he has searched the Pacific Digest and all six general digest series and has discovered but one case in the general area. This case is Evers v. State, 121 N.W. 1005 (Neb.) June 11, 1909. In this case the defendant was found guilty of assault with intent to commit rape on the person of a little girl but eight years of age. It appears that during the trial the court permitted a Mrs. Wheeler to sit on the witness stand in close proximity with the prosecutrix while she was testifying.

Following is read at page 1007 of the report, the last third of the second column of the page:

"In the 6th assignment (of error) defendant complains because the court permitted one Mrs. Wheeler to sit on the witness stand in close proximity to the prosecuting witness while she was testifying. The prosecuting witness is a little girl eight years old. Her mother is dead and her father is residing

in another state. Mrs. Wheeler, it appeared, took a friendly interest in the little girl, and was permitted by the court to occupy a seat on the witness stand while she was testifying. This was objected to by defendant and overruled. The record shows that, during the examination of the little girl, counsel for defendant stated: 'Defendant wishes record to show that a lady by the name of Mrs. Wheeler is sitting on the witness stand within six inches of the witness on the stand and prompting the witness, and objects to Mrs. Wheeler's sitting on the same stand with the witness. The Court: The objection as to her sitting on the stand is overruled, but she is not permitted to suggest.' The examination of the little girl then proceeded, and there is nothing in the record to indicate that Mrs. Wheeler ever again, if she had previously, disregarded the admonition of the court. This assignment must fail."

Counsel for the defendant has no quarrel with the general principle of *Evers v. State*, namely, that where a child of tender years is called to the witness stand, an adult may certainly be allowed to sit by the child, and this is true even though the child is a prosecuting witness. However, it is earnestly urged that some restriction should be placed upon this general rule, especially where, as here, the adult was the first one to whom the prosecuting witness told her story some time after the offense

was alleged to have occurred, and particularly where the adult went over the case in detail with the prosecuting witness immediately prior to the trial.

As will be observed from that which follows, the record indicates that the child prosecutrix in the present case had serious difficulty in the past so far as the telling of untruths were concerned. Consider the fact that the adult in the present case, Mr. Eddington, was requested by the principal of the prosecuting witness to interview her regarding her personality and psychological problems in getting along with the other children at school and that, only after he approached the subject of family affairs did she relate to him her charge. Certainly, with the same towering adult but a few inches away from her on the witness stand, the witness would be impressed, more than likely, to be consistent in her testimony with the story which she told to him a few weeks previously. Should a new trial be granted, the defendant would have no objection to having some adult friendly to the child, such as Mrs. Wheeler in

the Evers v. State case, sit with the little girl while she testified on the stand. But certainly it should not be a person in the position of Mr. Eddington, for the motive to sacrifice truthfulness upon the altar of consistency is much too strong. Particularly should this be so where, as in the instant case, the prosecuting witness had been seriously challenged as to her truth-telling qualities.

The truth-telling qualities of the prosecuting witness and the challenging thereof will be dealt with in the argument relating to the following point.

POINT II.

THE COURT ERRED IN GRANTING THE STATE'S MOTION THAT THE TESTIMONY OF THE DEFENDANT AS RELATES TO A PHONE CALL WHICH HE RECEIVED FROM THE MOTHER OF A GIRL FRIEND OF THE PROSECUTING WITNESS, BE STRICKEN ON THE GROUND THAT THE DEFENDANT WAS ATTEMPTING TO IMPEACH THE PROSECUTING WITNESS BY RELATING SPECIFIC INSTANCES OF ALLEGED UNTRUTHS SPOKEN BY THE PROSECUTING WITNESS.

The striking of the subject testimony on the ground of improper impeachment is found in the record at page 73, lines 23 through 30.

The record at page 71, line 11 through page 73, line 30 indicates that during the flurry of the court trial some confusion came to develop. At page 71, line 11 through page 72, line 12 the defendant testified that the prosecuting witness told him a story about his employer calling him one morning when he wasn't at home. Then the subject of the testimony turned to a particular birthday party which the prosecuting witness informed her friends would transpire and in fact was not planned to take place. In the context of this examination the defendant alleged that he received a telephone call from a mother of a little girl in this regard (record at page 72 lines 23 and 24). The defendant's attorney asked the defendant if he had talked to the prosecuting witness about what the woman had said to him over the phone regarding the birthday party, asking the defendant what he specifically said to his step-daughter. At page 73, lines 4 through 9, the State objected to "this line of questioning" on the grounds that the defendant could not attack the truth-telling qualities of the prosecuting witness by testifying

as to specific instances of telling untruths. It was averred that such is improper impeachment. At page 73, lines 27 through 30 the prosecuting attorney said that he had no memory of any cross-examination on "the phone call". Since the prosecuting attorney objected to the particular line of questioning taken, it is queried whether or not the objection also went to the "phone call" relating to the defendant's employer, Mr. John C. Reid. See the transcript at page 71, middle of the page. However, the trial court appears to have been under the impression that the objection only went to the phone call received from the woman (record at page 72 lines 23 and 24) as relates to the birthday party (record at page 73 line 1). The prosecuting attorney mentioned that he had no memory of any cross-examination on "the phone call". The prosecuting attorney moved that such be stricken as improper impeachment and the court granted the motion. The grounds for the motion appear at page 73 lines 4 through 9, to wit, that to impeach a prosecuting witness the defendant cannot attack her veracity by relating specific instances of her telling untruths.

While there is a little confusion on the point, it shall be assumed that the "phone call" and testimony thereof to which the prosecuting attorney objected (with objection sustained) is directed to the phone call about the birthday party as relates to the "mother of a little girl" referred to on page 72 at lines 23 and 24, and not to the alleged phone call of John C. Reid, and this even though the objection of the prosecuting attorney on page 73, lines 4 through 9 would seem to go also to the latter phone call.

In testing her credibility, the prosecuting witness was asked by defendant's counsel on cross-examination as to untruths she allegedly told relating to her possession of and intent to give away ponies (page 38, lines 20 through 30), the time school starts (page 37, lines 9 through 11), the time of Sunday School (page 37, line 30 through page 38 line 7), and the incident in which she stuffed her clothes in a box instead of hanging them up properly and about lying to her mother and stepfather in this regard (page 56 lines 14 through 20), etc. The defendant on direct examination refuted the general denials and "I don't

remember" statements of the prosecuting witness as follows: the pony incident (page 70, lines 1 through 30), the school time incident (page 69, lines 11 through 30), the Church time incident (page 68, lines 1 through 19) and the clothes incident (page 76, line 20 through page 79, line 3), etc. The prosecuting witness was not cross-examined either with reference to the alleged phone call made by John C. Reid (the employer of the defendant) nor of the telephone call relating to the birthday party, which telephone call is spoken of at page 72, lines 23 and 24.

Assuming then that the objection as improper impeachment of the prosecuting attorney was to the telephone call relating to the birthday party, the ultimate issue is whether or not in a sex charge case the prosecuting witness can be impeached by offering independent testimony (here the testimony of the defendant) to the effect that in times past and in specific instances the prosecuting witness has told untruths, and this without first laying a foundation.

Now the defendant's counsel had a perfect right

to cross-examine the prosecuting witness, and in doing so to test her credibility relating to specific instances. But, in testing credibility the witness' answer is final. Independent evidence cannot be introduced. It is believed that no authority need be cited for this general proposition. However, the prosecuting attorney did not object to the defendant's testimony as to instances of lying of the prosecuting witness where the prosecuting witness had already testified to the contrary in regard to these instances on cross-examination. It is believed that the admission of the defendant's testimony regarding specific instances of lying of the prosecuting witness is perfectly proper, and this whether or not the prosecuting witness was cross-examined relative to the specific instances.

It is elementary that, as a general rule, a witness may be impeached as to his character for telling the truth by proof of reputation in the community, and not by independent proof of the witness' lying in specific instances. Wigmore gives the following reasons for the rule of excluding testimony

of relating to specific acts of lying relative to impeaching the veracity of a witness: (1) Each additional witness introduces an entirely new group of questions relating to his qualifications and veracity as to a witness. (2) The doctrine of "Unfair Surprise", which recognizes that the opposition couldn't possibly anticipate which phase of the witness' life would be attacked so far as the telling of untruths is concerned.

Wigmore asserts that there is no consideration of the issue of relevancy so far as the reasons for the exclusionary rule are concerned. Wigmore goes on to say the following, however: "There is, however, one situation in which an exception should be recognized, in spite of these reasons of policy, viz. where the witness is a woman-complainant on a charge of sex-offense. To ascertain such a witness' veracity without an inquiry into her life-history (ed. as to specific instances) it is psychologically impossible, for her testimonial trustworthiness is often linked with her other traits (ed. afortiori with past

instances of lying)." See in regard to the above, pages 536 and 537 of Wignore on Evidence, Vol. 3, Third Ed., Sec. 979.

This exception to the exclusionary rule which Wignore suggests appears to be impliedly recognized and accepted by the prosecuting attorney by his non-objection to the narration of specific instances of lying by the defendant where the defendant's counsel had previously cross-examined the prosecuting witness relative to those instances. However, the prosecuting attorney appears to insist upon a foundation being laid, i.e. cross-examining the prosecuting witness first, before evidence as to specific instances of lying may be entertained by the court and jury.

Certainly no foundation need be laid where, as in the general case, a witness is impeached as to his veracity by testimony of a third person to the effect that the witness' reputation for telling the truth in the community is not good. See 58 Am. Jur., Sec. 725, State v. Driver, 107 S.E. 189 (W. Va.). The witness need not first be asked on cross-examination whether or not his reputation for telling the

truth in the community is good or bad. So also, where as in the present case, the Wignore exception is to be applied in connection with sex crime testimony, veracity impeachment should not be dependent upon the requirement of first laying a foundation in the cross-examination of the prosecuting witness.

It is of course to be noted that when a witness is to be impeached on the grounds of prior inconsistent statements relative to issues relevant in the case, the opposing counsel must first lay a foundation by inquiring of the witness in cross-examination as to her telling of such prior inconsistent statements before he can introduce independent proof as to those prior inconsistent statements. Wignore states the reason for this rule as being that a witness, on coming into court for the purpose of serving a litigant and society, should not suddenly find himself on trial as to his truthfulness without first being given the opportunity, on cross- and redirect-examination, to admit, deny, or explain away alleged prior inconsistent statements. See Wignore on Evidence, 3rd Ed., Secs. 1023-1027. The problem seldom arises

where a party is the witness, since the statement can come into evidence in any event as an admission for which no foundation need be laid.

But here we are not dealing with prior inconsistent statements. None of the instances of lying above referred to are relevant to the issues of the case. Mr. Barclay, defendant's counsel below, was merely testing on cross-examination the credibility of the prosecuting witness by asking her as to prior instances of lying. The Wigmore rule above cited has no application in the present case since (1) we are not dealing with prior inconsistent statements, and (2) a prosecuting witness in an immorality case is and must always be "on trial" as to her truthfulness.

It is respectfully urged, therefore, that the laying of a foundation by cross-examining the prosecuting witness as to prior instances of her lying is not necessary when impeaching her veracity.

CONCLUSION

The rule in the State of Utah is too well-

testimony of a prosecuting witness is alone sufficient to convict a man of a charge of immorality if the jury chooses to believe the testimony of the prosecutrix and to disbelieve that of the defendant, providing of course that the girl's testimony is not so unreasonable and incongruous as to be cast aside as the fanciful imagination of a distorted, if immature mind. See the general rule as outlined in State v. Mills, 249 Pac. 2d 211, Supreme Court of Utah, October 13, 1952, beginning at the lower third of the second column. (Miss Keeley's testimony for all practical purposes may be considered to be completely uncorroborated, since any tendency of Miss Baxter's testimony at the preliminary hearing, as read into the record, toward corroboration of Miss Keeley's testimony must be largely discounted. It will be remembered that the date of the alleged offense was altered on the Complaint the very day Miss Baxter gave her testimony; the result of such alteration was that the afternoon of Miss Keeley's absence from school was matched - at this late date - with the time of the alleged offense.)

Nonetheless, the authorities counsel wide latitude of inquiry in determining veracity and encourage the use of extreme caution in other regards, for fear that sex immorality, perhaps the blackest of all misdeeds, may in fact be the figment of a warped, spiteful and frenzied imagination. For example:

"...The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

"No doubt any judge of a criminal Court and any prosecuting attorney can corroborate this with instances from his own observation. But the lamentable thing is that the orthodox rules of Evidence in most instances prevent adequate probing of the testimonial mentality of a woman-witness, so as to reveal the possible falsity of such charges. Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed. And the situation of injustice has become the more extreme, because in some States the so-called age of consent has been raised to 16 or 18 years (thus making consent immaterial

below that age) and in a few States even life imprisonment may be imposed; so that a plausible tale by an attractive, innocent-looking girl may lead to a life-sentence for the accused, because the rules of Evidence (and the judge's unacquaintance with modern psychiatry) permit no adequate probing of the witness' veracity."

Wigmore on Evidence, Third Ed., Sec. 924A, p. 459.

In the above regard surely the defendant in this particular case should be permitted to cross-examine the prosecuting witness as to all past instances of lying, and this whether or not the witness had been questioned as to such instances on cross-examination. Certainly there is no demand in the law that a foundation be laid (through cross-examination) in order that a witness may be impeached as to her veracity.

In relation to charges of sex crimes in general, the following quotation from the writings of Lord Hale is often quoted in the American Reports:

"This is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent."

See Reidhead v. State, 250 P. 366, Sup. Ct. of Arizona, November 8, 1926.

The same admonition of Lord Hale is quoted in State v. Goodale, 109 S.W. 9 Sup. Ct. of Missouri 1908: (The court continued)

"...It is well settled that the appellate court will closely scrutinize the testimony upon which the conviction was obtained, and if it appears incredible, and too unsubstantial to make it the basis of a judgment, will reverse the judgment. While, on the one hand, it will not do to hold that because the evidence indicates a depravity not ordinarily witnessed among men it must be rejected, because the annals of crime are replete with examples wherein the most sacred relations have been disregarded, and the testimony left no room for a reasonable doubt of the guilt of the accused, yet, on the other, many well-authenticated decisions attest that this charge has often been the result of malice and hidden motives, and the courts have refused to permit convictions to stand because of the utter improbability of the testimony, in the light of the conceded circumstances. Instinctively, the character of the accused and of his accuser is a prime consideration."

Thus, it is respectfully urged that a new trial should be granted the defendant so that he may be prejudiced neither by (1) such extraneous reinforcement of the girl's incorrigibility in her foul charge as the presence of Mr. Eddington by her

side on the stand would undoubtedly produce, nor by (2) denial of his unequivocal right to testify as to any and all past incidents of his accuser's fibs and fables.

Respectfully submitted,

M. RALPH SHAFFER

Attorney for Defendant