1971

The State of Utah v. Clark James Redford : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

TATE OF UTAH,

Plaintiff-Respon

vs.

LARK JAMES REDFORD,

Defendant-Ap

BRIEF OF

AN APPEAL FROM
EGREE MURDER IN THE
RICT COURT IN AND
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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

CLARK JAMES REDFORD,
Defendant-Appellant.

Case No. 12480

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The defendant appeals his conviction for the crime of murder in the first degree. He was convicted in the District Court of the Fifth Judicial District, in and for Juab County, State of Utah, the Honorable James P. McCune, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The jury found the appellant guilty of murder in the first degree and he was sentenced to death.

the phone and asked her if she would like to go along (T. 1,640). Redford agreed to meet her at 8:00 p.m., October 10, 1969 (T. 1,560). Michael Branagan and Redford then agreed to meet in Grant's Lounge, a bar located in Spanish Fork, Utah, at 7:00 p.m. on October 10, 1969 (T. 1,695). However, Redford failed to keep his appointment (T. 1,695).

Redford testified that Mike Branagan left the Stocker Club at approximately 6:00 and that he left between 6:30 to 6:45 (T. 1,694). Prior to leaving Redford bought a six pack of beer (T. 1,694).

Redford, in accounting for the night's activities, gave the following unsubstantiated and contradicted testimony. Redford stated that he drove to Provo to buy a ring at Zales Jewelers. However, finding it closed, proceeded to Harold's Tap Room and Lounge, located on Center Street in Provo (T. 1,642, 1,750). He parked around the rear of the building (T. 1,753); the parking lot was covered with gravel (T. 1,753). At the lounge Redford testified that he played pool with casual acquaintances including one Tony Jensen (T. 1,642). Redford testified they played for twenty minutes and then he and Tony Jensen went to Regal's Bowling Lane. Redford testified that he and Tony had an argument over money which culminated in Jensen throwing a cue ball at Redford, hitting him in the eye (T. 1,643). After an alleged fight in the back of the Regal Bowling Lanes, Redford testified that he got in his car which was parked in a paved area, and went to Ream's Bargain Center

RELIEF SOUGHT ON APPEAL

The State submits that the judgment of the lower court should be affirmed.

STATEMENT OF FACTS

On Friday, October 10, 1969, Clark James Redford who resided at the home of his mother located at 1225 East Center Street, Springville, Utah (T. 190, 1,483) was awakened by his mother at approximately 6:30 in the morning and he then drove to Pleasant Grove in a 1955 Mercury, where he then traveled to Salt Lake City with other workers (T. 1,488, 1,633). He returned home from his work with Fugal Construction Company early, at approximately 1:30 in the afternoon that same day. The job was delayed because of the weather (T. 1,489, 1,635). He removed his high topped cowboy boots and pants, and changed into fresh clothes which included wing tipped dress shoes, sweater and a top coat (T. 1,635). Redford then went to the Sage Inn in Springville where his mother worked and there he drank a cup of coffee (T. 1,637). He then drove to the Stocker Club which is approximately one and one-half miles from Provo going towards Springville (T. 1,637).

At the Stocker Club, Redford played pool with his friends until approximately 6:30 p.m. (T. 1,638). During this time his friend Michael Branagan came in and stated that he and his girl friend Bobbie (Barbara) were going to Ely to get married and invited Redford to come along (T. 1,639). Redford agreed and called Kathy Palmer on

where he purchased some western clothing (T. 1,645). He then stated he took Highway 50 and 6 into Springville and talked to his mother at the Sage Inn (T. 1,646).

The record reveals that as part of the investigation following the crime that there was no such individual as Tony Jensen. Records and sources were checked at the vocational school (T. 1,766), taverns, (T. 1,766), and Brigham Young University (T. 1,767). A subpoena was not able to be served in Utah County (T. 1,767). There was no record of any fight at Harold's Tap Room at the lounge as testified by the proprietor, Harold L. Thatcher (T. 1,001-1,004). Nor was there any evidence of a fight at the Regal Bowling Lanes (T. 1,302-1,309). Redford was not able to produce a receipt nor was there any evidence in the record that Redford had purchased western clothing at Ream's Bargain Center as he so testified.

Ann Levanger, one of four children and the daughter of Reed and Elva Levanger who resided in Spanish Fork, was nineteen years old (T. 499), She shared an apartment in Provo, with Karren Roberts. The morning of October 10th, 1969, she went to the home of her parents in Spanish Fork (T. 510). She worked at a bank in Spanish Fork and frequently came home for lunch (T. 510). At noon, October 10, she came home for lunch clad in a plaid skirt, a yellow-gold turtle neck, long sleeve sweater, brown shoes and a brown bag (T. 511). Her father testified that she drove a 1965 Chevrolet Chevelle, described as medium brown in color, that was having mechanical problems (T. 501-2).

Miss Levanger left Zions' National Bank with Linda Chadwick Patterson at 6:15 p.m. October 10. Miss Levanger's automobile was having difficulty (T. 535), and finally killed on the freeway at a location of 1½ miles from the Spanish Fork turnoff on the way to Provo, Utah (T. 526).

While Miss Levanger was inside her stalled car on the freeway, Redford pulled his car off the freeway and talked to her. Mr. and Mrs. Pettit, travelers on the freeway, stated that the car behind was partially in the emergency lane and partly in the right traveling lane so that it was difficult to "merge" without coming to a complete stop (T. 542). The Doyles, also travelers on the freeway, observed Redford leaning over Miss Levanger's car, and when they honked Redford looked directly at them and smiled at short distance of from 12 to 15 feet (T. 545, 563).

Mrs. Perigo and her husband also observed Redford at short distance leaning over the Levanger vehicle with a big smile on his face and identified him in the court room (T. 599, 600). Commissioner Jackson of the Highway Patrol who was driving down the freeway also observed Redford at 6:40 and 6.45 October 10, and identified him in court (T. 632). Ned L. Deuel, a trooper for the highway patrol, found the Levanger automobile unoccupied at approximately 6:45 p.m. October 11, 1969 (T. 647).

On the 26th day of October, 1969, the body of Ann

Levanger was discovered laying 20 to 30 feet off a dirt road face down, clad in a yellow sweater, with one sleeve wrapped around her neck, and an orange plaid skirt (T. 706). The body was found near an old abandoned house which was formerly owned and occupied by Redford's grandmother. Redford had played in the house as a little boy (T. 1,494) and had visited the house and area with his wife's sister on about the 28th day of September, prior to the day of the murder (T. 1,399). A piece of the sweater Redford was wearing on October 10, 1969, was found on a window sill of the house (T. 1,095). In the same general area of the body of Ann Levanger were found her purse, shoes, and full cans of Coor's beer.

Redford did not arrive at the home of Kathleen Palmer at 8:00 p.m. on the evening of October 10. After waiting about 20 minutes, Kathleen Palmer went to the cafe with Mike Branagan and Barbara Cook (T. 1,561). She left the cafe after about 20 or 25 minutes and drove around for a few minutes (T. 1,577-1,587). Then she saw Redford coming from the east and going west in his 1955 Mercury (T. 1,588). Evidence revealed that it would have taken one hour and six minutes to go from the point on the freeway where the Levanger car was abandoned to Silver City and then to Goshen, Utah.

Barbara Cook (Branagan) testified that she and Mike followed Redford as he came into Goshen over to Barbara Cook's father's house (T. 969). At that time Mike went to get Kathleen and Barbara got in Redford's car. Barbara testified that there was mud all over the dash

and floor mat and that Redford's shoes and his hands were covered with mud and that Redford had a black eye (T. 970). Redford stated he had a black eye because he got in a fight over at Harold's Club in Provo (T. 971). Barbara also testified that Redford was wearing a burnt orange sweater (T. 974).

Mike Branagan then returned with Kathy Palmer and they loaded the luggage in Branagan's car and went to the Twin Pines Cafe for a coke (T. 977). They left the cafe about 10:00 for Ely, Nevada. While driving, Redford laid in the back seat of the car and between Eureka and Delta he just kept saying "Is it snowing yet?" (T. 970). Other testimony revealed that Redford was acting strangely. Upon arriving in Ely, Nevada, at about 2:00 p.m., they rented a motel and Redford told Barbara that he hadn't slept all night (T. 979). Redford's wife, Kathy Palmer and Redford testified that he paced the floor all night (T. 1,606, 1,660). After the marriage ceremony and a short distance outside of Ely, Redford threw his shoes out the window. After nearing Silver City or the approximate area, the conversation turned to the Levanger girl (T. 1,598). At about this time Redford stated "I did it didn't we, Mike?" (T. 1,598).

On the 11th of December, Redford's white over blue 1955 Mercury was picked up by the operator of the Springville Garage, Shirley Thorpe (T. 1,142). The pick-up was made in front of the Redford home, where the vehicle was located on the property line and the street (T. 1,142). Section 492 of the Springville ordinances pro-

vides that cars left on the public street in an inoperative condition can be picked up and seized at any time (T. 944). The vehicle had the engine missing as well as the front tires. The vehicle was taken to the county garage between 5:30 and 6:00, where it was not disturbed until the 15th day of December, 1969 (T. 1,146, 1,163). After the 15th of December the car was searched, and vacuum sweepings revealed hair strands which according to expert testimony were identical in 15 points to that of the victim, Ann Levanger (T. 1,278).

The trial counsel entered into a stipulation regarding the manner in which the vehicle was seized (T. 340-344). However, this stipulation was altered (T. 935, 947-955). Oral argument was presented to Judge McCune concerning the motion for suppression of evidence from the car. The facts are based in part on the uncontradicted testimony of Greg Newton, who owned a service station and garage in Mona, Juab County, Utah (T. 1,211) and who also worked part time as a deputy sheriff. Mr. Newton, before noon, went to the Sage Inn to see Redford's mother, who had the authority to sell or give away the 1955 Mercury (T. 342). Mr. Newton did not identify himself to Mrs. Redford, but identified himself three days later (T. 1,222). They had a discussion on the first visit concerning the purchase of the car and Mr. Newton asked Mrs. Redford if she would sell it (T. 1,222). Mrs. Redford replied that she would be more than happy to get rid of it; all she wanted from it was the tires and the radio (T. 1,223). Mr. Newton had a use for the car for parts in his

garage business (T. 1,228). Thereafter the car was picked up and brought to the county yard. Mr. Newton returned the only tires on the car, the two back tires, to Mrs. Redford. There was no radio in the car (T. 951).

Three days later, after the car was already in the possession of the police, Mr. Newton telephoned Mrs. Redford, identifying himself as Bart Holman, an alias which was sometimes used in the service station business (T. 1,224). Mr. Newton called in order to obtain the title to the car. At that time, the title to the car was in the name of M. D. Richmond. Redford signed and delivered the title to his mother, Mrs. Redford, in the Utah County Jail, and then she delivered it to Mr. Newton at the Sage Inn.

Mrs. Redford knew the car was in the county impound yard at the time title was given to Mr. Newton. The title was delivered by Mrs. Redford to Greg Newton prior to the time that any search was made on the automobile (T. 952). The title was then delivered to the sheriff by Greg Newton. There was a search warrant dated the 17th day of December issued which would have covered the car. However, it was not served because the car, along with the title, were already in the possession of the police (T. 953).

Counsel for Redford also filed a motion to suppress the testimony of Linda Ivie, Phyllis Valerie Reed and Marie Howard. The motion was argued beginning at T. 1,021. Phyllis Valerie Reed would have testified that Redford by the use of a gun had sexual intercourse with her

in the State of Illinois (T. 1,025). Redford was charged with robbery and rape and pled guilty to robbery on the 24th of March, 1966 (T. 1,633). Marie Howard would have testified that about 30 days after the disappearance of Ann Levanger that Redford attempted to abduct her in an automobile by using a weapon and taking her against her will (T. 1,025). The testimony of a third witness, Linda Ivie, was admitted in trial (T. 1,085). She testified that less than 24 hours before the disappearance of Ann Levanger the defendant, wearing the same clothes and driving the same automobile, by the use of force, attempted to abduct her (T. 1,323).

Mack Holley, Deputy Sheriff for Utah County, Provo, Utah, testified that the first time he had talked to Mr. Redford concerning the homicide of Ann Levanger was on the 1st day of December, 1969, at 2:45 p.m. at the Utah County Jail in the jailer's room (T. 1,168). Redford was in prison pursuant to a charge for forgery (T. 1,168). In the course of the interview, Redford forwarded statements like "Okay, suppose I did it" (T. 1,177); "Okay, I did it"; "I can't give you a statement to that effect because"; and "You know what would happen" (T. 1,177-1,179).

ARGUMENT

POINT I.

THE TESTIMONY OF LINDA IVIE WAS ADMISSIBLE TO SHOW THE IDENTITY OF THE ACCUSED AND THE METHOD OF HIS OPERATION.

The State attempted to introduce the testimony of three victims of Redford's assaults. The trial court suppressed the testimony of two of the witnesses, but admitted the testimony of Linda Ivie (T. 1,089). Prior to the testimony given by Linda Ivie, the court gave a limiting instruction:

> "I think it would be proper for the court to state for your information in connection with my instruction to you that her testimony will undoubtedly concern another offense or an alleged unlawful act by the defendant. This is admitted by the court only for the purpose of *identity of the defendant and for a method of operation.* As we say in the law, modus operandi, or the initial M initial O, which is commonly referred to. Now, I'll state that again, that you are to consider the testimony only as to the identity of the defendant, his presence in the locality and any method of operation of action on his part which you may consider from the testimony of this witness. In any event, *you are not to consider this as any proof of another offense* and simply for the purposes for which the court has stated." (T. 1,317-18). (Emphasis added.)

Redford asserts that the trial court erroneously admitted the testimony of Linda Ivie which described an assault upon her person by himself on the evening prior to Miss Levanger's murder. Redford further asserts that despite the limiting instruction, the jury was permitted to consider Mrs. Ivie's testimony for whatever purpose desired, citing this Court's earlier decision of *State* v. *Winget*, 6 Utah 2d 243, 310 P. 2d 738 (1957).

Redford erreonsly asserts that the conviction should be reversed because *Winget* holds that prior sex acts are inadmissible unless they involve the complaining witness.

Where the identity of the defendant is in issue, evidence of an assault upon another woman is admissible to prove the identity of the defendant in a rape-murder prosecution. The general rule regarding the admissibility of other criminal acts is that such acts are admissible if they form an element of the crime or are relevant to show the "(1) intent, (2) motive, (3) knowledge, (4) plan or scheme, or (5) the identity of the defendant." Wharton Criminal Law, Sec. 235, 240 (1955). If the evidence has a special relevancy to prove the crime for which the defendant stands charged, such evidence will be admissible for that purpose; and the fact that the evidence shows the commission of another crime will not render the evidence inadmissible. *State* v. *Dickenson*, 12 Utah 2d 8, 361 P. 2d 412, 415 (1961).

In *State* v. *Winget*, *supra*, the defendant was charged with the statutory rape of his 8 year old daughter. The trial court allowed into evidence testimony that the 17 year old stepdaughter of the defendant had been raped on four separate occasions by the defendant when the 17 year old girl had been near the age of the prosecutrix. Justice Henroid in writing the opinion of the court indicated that *State* v. *Williams*, 36 Utah 273, 103 P. 250 (1909) was controlling and that a new trial must be granted. The Court also indicated that 167 A. L. R. 588 (1947) represents the majority view, which position is the

same as that of the State of Utah.

Winget is not applicable to the case at bar on the following grounds: (1) Winget purported to follow the majority view in 167 A. L. R. 588, which stated the rule as:

> "Testimony as to the defendants having committed or having attempted to commit, similar offenses with girls other than the prosecutrix has been regarded, in the *majority of the statutory rape cases* in which the question has arisen, as to be so unrelated to the offense for which the conviction was sought as to be inadmissible in evidence." *Id.* at 588. (Emphasis added.)

The annotation then cited as one of the cases following this position is *State* v. *Williams*, 36 Utah 273, 103 P. 250 (1909). However, while this may be the general rule as to statutory rape, the subject of both *Williams* and *Winget*, this is *not* the law as to *common law rape.* In 167 A. L. R. 594 under the heading "2. Other offense not with same person," subsection (a), offense of rape or attempted rape, or sexual intercourse, the general rule is stated to be:

> "Evidence of the prior rape of, or assault upon, another woman has been held to be admissible for *purposes of identification*, or of *showing the plan, scheme*, or bent of mind of the defendant in a prosecution for forcible rape." *Id.* at 594. (Emphasis added.)

Also in *Williams, supra*, the court quoted from *Wharton's* Crim. Law 635, ". . . [n]or is admissible to prove independent crimes, even though of the same general char-

acter, *except when falling strictly within the exceptions stated.*" *Id.* at 278. (Emphasis added.)

(2) In *Winget* the court failed to give limiting instructions, but the trial court instructed the jury:

> "You are instructed that if you find and believe beyond a reasonable doubt that such other acts were in fact committed by the defendant, such evidence is admissible for the sole purpose of showing a system, plan and scheme of the defendant and *to prove the lustful* and lascivious disposition of the defendant and as having a tendency to render it more probable the acts of sexual intercourse charged in the information were committed on or about the date alleged, and for no other purpose." *State* v. *Winget*, appellant's brief 8630.

There is little question that the instruction given in *Winget* was clearly erroneous for prior offenses cannot be used to show the lustful disposition of the defendant. As explained, the trial court in the present case did give a limiting instruction.

(3) The court stated in *Williams, supra*:

> ". . . The statement that he had committed like crimes with other girls in no way tended to elucidate or explain the alleged assault upon the complaining witness. It was a narrative or recital of transactions which were neither directly nor remotely connected with the crime under consideration. . . ." *Id.* at 277, 278.

Similarly, in *Winget* the alleged rape of the 17 year old bore no particular relationship to the incident for which

the defendant was being tried. There was no showing that the acts relating to the 17 year old girl were in any way related to the rape of the prosecutrix, which was the crime for which the defendant was being tried. Identity was not in question, nor was there any question of *modus operandi* as there is in the present case.

(4) The first incident of rape of the 17 year old stepdaughter in *Winget* took place when she was 8 or 9 years old, and the last when she was 12. Thus, there was a period of 5 years between last incident of rape and 9 years difference between the first incident of rape and the testimony of the stepdaughter at trial when she was 17 years old.

In the present case, Linda Ivie was assaulted by Redford within twenty-four hours of his act of rape and murder upon Ann Levanger. In view of the short time span, the assault on Linda Ivie could be considered part of the *res gestae* of the crime. *Gephart* v. *State*, 249 S. W. 2d 612 (Tex. 1952).

In the case at bar the testimony of Linda Ivie was admissible for it was relevant to show both the identity of the accused and his method of operation. Linda Ivie was married and living in Springville, Utah, and employed as a secretary at Brigham Young University, while her husband went to school. She was twenty-nine years of age and described as an attractive young lady (T. 1,850). She went to a Springville laundromat about 9:00 on October 9, 1969, to wash her clothes and knitted while she waited for them to dry (T. 1,320). She noticed a tur-

quoise and white car go slowly up the street, then the car pulled up in front and parked in front of the laundromat. Redford walked from the car into the laundromat and talked to her for a minute and then grabbed hold of her (T. 1,323). Up to the time he had grabbed her Redford spoke in a normal conversational tone (T. 1,323). When Mrs. Ivie stood up she noticed he had a pocket knife in his hand (T. 1,338). Redford told her to put his arm around her and walk out to the car (T. 1,324). She stated that his car was a '56 or '57 Mercury or Lincoln (T. 1,325). As Redford opened the door, Mrs. Ivie broke away and hid in some bushes. She identified both the color and the style of the sweater Redford was wearing as well as the color of his pants and also the fact that Redford was wearing a school ring.

One of the most critical factors in showing the method of operation of Redford is the sheer brashness and openness of the two assaults. In the words of defense counsel:

> "Remember the location of this crime in Springville, as I recall, 1st South and 1st West, one block off the main street in Springville. Clark Redford lived in Springville, most of the people in Springville, in that area knew him. The Stocker Club, in fact is only three or four blocks from here. If someone were to commit this type of crime would they do it in their own neighborhood? (T. 1,850, 54).

In comparing the method of his assault upon Ivie with that upon Ann Levanger, Redford was present right on the freeway leaning over the side of the victim's automobile with at least four witnesses observing him from

a distance of ten to fifteen feet. Redford actually turned and smiled at the witnesses within minutes of a brutal and depraved act.

In both cases, Redford talked prior to his crimes in a seemingly normal conversational manner. In both cases Redford did or attempted to perpetrate his crimes with the use of an old dilapidated automobile, parked where any passerby would notice it. In both cases the victims were young and attractive. In the case of Linda Ivie, Redford used a knife to force her to leave the laundromat and get in his automobile. In the case of Ann Levanger, her roommate and witness for the defense, Karren Roberts, stated as follows:

> "Q. And during the time that you lived together and you knew Ann Levanger did you get to know her fairly well?
>
> A. Yes. We were very close.
>
> Q. How would you describe her as far as her character is concerned?
>
> A. A very lovely person to know, a person to get close to, someone that you could confide in. She was friendly with people and just a good person.
>
> * * *
>
> Q. Knowing Miss Levanger, knowing her character and her personality, I will ask you if you have an opinion as to whether or not she would accept a ride with a strange man?
>
> A. No.

Q. Yes or no, if you have an opinion.

A. Yes I have an opinion.

Q. And what is that opinion?

A. *No, unless she was forced*" (T. 1,462-3). (Emphasis added.)

It is evident from the defense's own witness that Ann Levanger would not have willingly entered that vehicle of Redford unless she was forced against her will. The evidence of the Ivie assault is admissible to determine Redford's method of operation.

Redford states, "The identity of a perpetrator of the offense is the only significantly triable issue" (Appellant's brief page 5). The testimony of Linda Ivie also was relevant to reveal the identity of the accused. Redford was wearing the same clothes as the day of the murder, driving the same car and also was wearing a class ring. Mrs. Ivie also described Redford's looks, including color of his hair, etc. There is little question that her testimony had relevance in describing and identifying the accused, Clark James Redford.

In *State* v. *McHenry*, 7 Utah 2d 289, 323 P. 2d 711 (1958), this Court stated:

> ". . . It is true evidence of a prior crime is as a general rule not admissible in the prosecution of an accused for a charged offense. An exception to this rule exists in instances when such evidence tends to aid of the identification of the defendant presently charged." *Id.* at 291.

See also, *State* v. *Baran*, 25 U. 2d 16, 474 P. 2d 728 (1970).

In *People* v. *Clark*, 86 Cal. Rptr. 106, 6 Cal. App. 3d 658 (1970), which has a fact situation similar to the case at bar, the court held that evidence in a prosecution for murder as to prior sex offenses committed by a defendant which were sufficiently similar to each other and the crime for which the defendant was being tried, were admissible to prove a common scheme, plan or modus operandi and was admissible to establish the defendant's identity. See also *Mims* v. *State*, 241 So. 2d 715 (Fla. App. 1970) and *Williams* v. *State*, 110 So. 2d 654 (Fla. 1959). In *People* v. *Lindsay*, 38 Cal. Rptr. 755, 227 Cal. App. 2d 482 (1964) the Court held that the essential question for determination in each instance is whether:

> ". . . [t]here is either a direct or circumstantial connection between the similar offense and the charged offense to support the inference that if the defendant committed the similar offense, he probably committed the act charged. That determination requires that the facts pertaining to the other offense show a general pattern, scheme or plan. . . . *Whether the applicable test is satisfied is primarily a question for the trial court.*" *Id.* at 769. (Emphasis added.)

It is clear from the facts and applicable case law that the testimony of Linda Ivie was admissible for the limited purpose of showing Redford's identity and method of operation.

POINT II.

THE DISTRICT ATTORNEY DID NOT EXCEED THE PERMISSIBLE BOUNDS OF CROSS-EXAMINATION WHEN CROSS-EXAMINING REDFORD.

The judge is the person who has the final responsibility for conducting the trial. He should be allowed considerable latitude of discretion with the mechanics of procedure. Utah Code Ann. § 77-44-5 (1953), provides in part that if a defendant offers himself as a witness he may be cross-examined by the counsel for the state the same as any other witness.

As stated in 3 Wharton Criminal Evidence, § 887 (1955):

> "Considerable or great latitude should be allowed in the cross-examination of the defendant even though his testimony is self incriminating. Some courts state that an even wider or greater latitude in the cross-examination of the accused should be allowed than is ordinarily the case. . . . As an application of the rule applicable to witnesses, generally the form, extent, and latitude of the cross-examination of an accused who voluntarily offers himself as a witness are matters for the discretion of the trial court. . . . The discretion will not be interfered with by the reviewing court unless there is a clear abuse thereof."

In *Hopper* v. *State*, 302 P. 2d 162 (Okl. 1956), the defendant appealed his conviction for sodomy and objected to the scope of cross-examination. The court within the opinion echoed the same rule of law as phrased in

Wharton by stating:

> ". . . Moreover, where a defendant, in a criminal case takes the stand in his own behalf, he may be cross-examined to the same extent as any other witness, and the extent of the examination is a matter within the trial court's sound discretion, *Murphy* v. *State*, 72 Okl. Cr. 1, 112 P. 2d 438 and will not be interfered with on appeal unless fragrantly abused." *Id.* at 166.

In the present case Redford voluntarily took the witness stand and in the face of his prior out of court statement, testimony of eye witnesses and circumstantial evidence relating to the crime, flatly denied that he had even seen Ann Levanger. It is a well known general rule of law that the accused may be cross-examined for the purpose of impeachment by questions which tend to impeach his credibility, by inquiry as to prior contradictory statement, as to matters relating to memory, motives, history, past conduct and other matters affecting his credibility. *Dixon* v. *State*, 228 Ark. 430, 307 S. W. 2d 792 (1957), *State* v. *Reid*, 146 Conn. 227, 149 A. 2d 698 (1959).

After the defense counsel objected to the District Attorney's line of questioning the court stated:

> "The court feels, however that perhaps the way some of the questions were framed by Mr. Burns, just before the objection are too much conjecture and insinuations or intimations and not perhaps the best way, proper way of asking the defendant to admit or deny certain facts which have been presented in evidence and referred to in this case."

The District Attorney rightfully questioned Redford about exhibits that were in evidence and attempted to impeach his testimony. Redford in stating that the questions asked by Mr. Burns were prejudicial, ignores the bulk of a lengthy cross-examination. If anything Redford's testimony during cross-examination was helpful rather than prejudicial for he certainly did not deny his alibi during the examination.

Redford relies on two cases for his theory that the cross-examination was prejudicial. *McDonald* v. *Price*, 181 P. 2d 115 (Cal. 1947) arose out of an action for wrongful death. In that case, the plaintiff's sole assignment of error related to the prejudicial misconduct of defendant's counsel in asking a series of questions over plaintiff's objections with respect to criminal activities of the decedent some years prior to his death. *Leeth* v. *State*, 230 P. 2d 942, (Okla. 1951), concerned the attempted admission of a wire recording, which then prompted the remarks of the court. Neither case is applicable to the facts of the case at bar.

Let us not forget that Redford was being tried for the most heinous of all crimes, rape and murder. As stated in *Wingate* v. *State*, 232 So. 2d 44 (Fla. App. 1970):

> ". . . Certainly the ideal climate for the conduct of a criminal trial is one of fair and cool impartiality, *Goddard* v. *State*, 143 Fla. 28, 196 So. 596 (1940). However, the emotional weaknesses unto which men are prone have been recognized by the common law and provision has been made for these human fallibilities which may intrude

upon the most experienced prosecuting attorneys." *Id.* at 45.

Assuming *arguendo* that the manner of cross-examination was prejudicial to the defendant, it must still be considered harmless error, *Chapman* v. *California*, 306 U. S. 18 (1967). Many jurisdictions have enunciated the principle that the concept of a "fair trial" must not be confused with that of a perfect trial. An accused has constitutional right to a "fair trial" but not necessarily to that seldom experienced rarity of a perfect trial. *State* v. *Smith*, 119 W. Va. 347, 193 S. E. 573, 574 (1964). In light of the overwhelming amount of evidence that was brought forward by the State, the cross-examination of Redford was harmless beyond a reasonable doubt and would not affect the outcome of the trial.

POINT III.

THE TRIAL COURT PROPERLY REFUSED TO GRANT REDFORD'S MOTION TO SUPPRESS THE EVIDENCE DISCOVERED AS A RESULT OF THE SEARCH OF THE AUTOMOBILE.

This case represents a rather unusual fact situation. At the time the car was given to Greg Newton, a garage owner and part time employee of the county sheriff's office, by Redford's mother, Redford was incarcerated in the Utah State Prison, pursuant to a recent conviction for forgery (T. 1,632) and a prior conviction in 1966 for robbery for which conviction he was on parole (T. 1,635).

Mrs. Redford had the authority to sell or give away the vehicle (T. 342). The car was out in the front of her house partially in the street in a dilapidated condition without an engine with the hood up and without tires or hubs on the front wheels. Mr. Newton went to the Sage Inn, where Redford's mother was working, and without telling her his name asked if she would like to sell the car. She replied that she would be more than happy to get rid of it and only requested that Mr. Newton give her the tires and the radio out of the car. The car was later towed away that same day and three days later Mr. Newton using the name of Bart Holman, an alias he used in the garage business, called Mrs. Redford requesting the title. She went to the prison, had Redford sign it, and knowing the car was in the county impound yard, Mrs. Redford delivered the title to Mr. Newton. Thereafter, the car was searched. The search revealed five strands of hair which were later identified as being identical to the type of hair of Ann Levanger.

Redford urges that the auto was not validly seized and therefore violative of the Fourth Amendment. The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." (Emphasis added.)

Although the language of the Amendment is clear that it prohibits only unreasonable searches and seizures, the Supreme Court of the United States, through its construction of the Fourth Amendment applicable to the states through the Fourteenth, has evolved a doctrine in respect to automobile searches which is most recently expressed in *Coolidge* v. *New Hampshire,* 91 S. Ct. 2022 (1971). There are various exceptions to *Coolidge,* such as consent and standing, and the present case falls within those exceptions.

In the recent case of *United States* v. *Wilmoth,* 325 F. Supp. 1397 (1971), where agents were acting in an undercover capacity and the defendant relinquished possession of a double-barreled shot gun and rifle and a quantity of ammunition to agents voluntarily, not realizing they were federal agents, the court held there was no reason to suppress that evidence. This principle has long been recognized in cases wherein narcotics agents misrepresent their identity in order to purchase narcotics from a willing seller. *Lewis* v. *United States,* 385 U. S. 206 (1966). However, in the present case, Mr. Newton did not misrepresent himself but simply asked if he could buy the car and thereafter upon agreement obtained possession of the automobile.

The State submits that the case of *State* v. *Montayne,* 18 Utah 2d 38, 414 P. 2d 958 (1966) is controlling under the present factual situation. In *Montayne* the defendant was found guilty of the crimes of robbery and grand larceny, and argued on appeal that the trial court

erred in failing to suppress certain evidence. The defendant was driving a rental car and after a police officer who stopped the vehicle found the car was far overdue, arrested the defendant for car theft. After arresting the defendant the officer searched the vehicle and found incriminating evidence used in the course of robbery and grand larceny charges.

The court then stated:

> "Three questions arise with regard to that case: (1) was the search incident to a lawful arrest? (2) if not did the appellant have standing to object to the unlawful search and seizure, (3) if not incident to unlawful arrest and if the appellant had 'standing' to object, was the evidence prejudicial or merely harmless error?" *Id.* at 41.

This Court then stated that it did not need to consider question (1) and (3) because the answer to (2) was dispositive of the case. This Court then explained that in order for the appellant to have standing the sole prerequisite is that he claim a proprietary interest in the search or seized property. *Simpson* v. *United States*, 346 F. 2d 291 (10th Cir. 1965).

The court distinguished *Simpson* in *Montayne* by stating:

> ". . . [t]he Tenth Circuit Court of Appeals gave such standing to a defendant because he claimed a possessory interest in the car *and his lack of ownership was not established until after the search.* (Emphasis ours.) Here lack of ownership was established with reasonable certainty

before the search, thus distinguishing it from the Simpson case." *Id.* at 41.

Here also Redford does not have standing to challenge the admission of evidence obtained from the car. Title to the car was in the name of M. D. Richards. The search was not conducted until after Greg Newton was the owner and had title to the automobile. The fact that Newton was working part time for the sheriff's office or he knew the sheriff's office had use of the car is not relevant for title and possession of the car were obtained as a private individual. (See *Herbert* v. *State,* 10 Md. App. 279, 269 A. 2d 430 (1970).) Utah Code Ann § 41-2-1(e) (1967) provides:

> ". . . A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for a conditional sale . . . shall be deemed the owner for the purpose of this act."

There is also question whether the Fourth Amendment, designed to protect a person's right to privacy, should apply to a semi-abandoned vehicle without an engine, sitting in the street, that was given away in return for the tires on the back hubs. This Court in *Montayne,* stated: "Courts are diligent in preventing the lowering of barriers which protect the individual liberties of our citizens, but in the exercise of this diligence the personal and property rights of members of the public should not be completely overlooked for the benefit of those who have no regard for either." *Id.* at 42.

In *United States* v. *Powers,* 439 F. 2d 373 (1971), the

issue concerned the legality of a search for identification numbers. The Court held the two most significant factors were (1) the mobility of the automobile and (2) the "expectation of privacy" that a person may reasonably claim for those parts of the vehicle where identification numbers are posted. ". . . Thus, warrantless searches of the trunk, the glove compartment, the console or similar areas have been approved, only within strict limitations . . ." *Id.* at 375. The extent of Redford's interest in his privacy in an automobile without an engine, without the tires and sitting partially in a public street while Redford was incarcerated could not be great, especially in light of the fact that Mrs. Redford was more than happy to get rid of the car.

According to the record (T. 944) a Springville ordinance provides that cars left on the public street in an inoperative condition can be picked up and seized at any time. In *Dyke* v. *Taylor Implement Manufacturing Co.*, 391 U. S. 216 (1968) the Court noted that although the police had taken an automobile and its occupant to a jail — there was no indication that the police had purported to impound or hold the automobile, *or that they were authorized by any state law to do so*, or that their search of the automobile was intended to implement the purpose of such custody. See, *Cooper* v. *California*, 386 U. S. 58 (1967). In the present case it appears that the police could have been justified in seizing on the grounds of the city ordinance for the automobile was at least partially in the street.

Furthermore, the argument may not be made that the officers could have obtained a search warrant and did not do so. In the first place the officers did not need a search warrant. They had possession of the car and also permission to search the car from Greg Newton who was given title to the car. Secondly, in *United States* v. *Dgembiewski*, 437 F. 2d 1212 (8th Cir. 1971), the Court stated:

> ". . . It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable'." *United States* v. *Rabinowitz*, 399 U. S. 56, 66 [70 S. Ct. 430, 435, 94 L. Ed. 653]." *Id.* at 1215.

Redford relies primarily on *Gouled* v. *United States*, 255 U. S. 298 (1921), in stating that the evidence was illegally obtained. In *Gouled* a business acquaintance of the petitioner, acting under orders of federal officers, obtained entry into the petitioner's office by falsely representing that he intended only to pay a social visit. In the petitioner's absence the intruder secretly ransacked the office and seized certain private papers of an incriminating nature. The Supreme Court had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking. This clearly is not similar to the facts of the case at bar. Here Newton went to the Sage Inn where Redford's mother was working and simply asked if she would like to sell the car.

The facts and the law are clear that the evidence obtained from the car was properly admitted at trial.

is punishable with death?" (T. 155). (Emphasis added.)

When asked, Mr. Knotts again replied:

"A. I'd be the same on that" (T. 156).

On voir dire, Knotts was questioned by the Court as to his beliefs regarding capital punishment and his ability to return the death penalty:

"Q. Mr. Knotts, you have indicated that you have some question or reservation as to the death penalty. Would your feelings in the matter prevent you from bringing in a verdict imposing the death penalty in any event in any case without regard to the evidence and the facts?

A. I'd say yes, because I wouldn't want that on my conscience to sentence somebody to a death penalty that you're not sure of, regardless.

Q. That would be your feeling in any case —

A. That would be right.

Q. — in which you may be a juror?

A. Yeah.

Q. Do you understand, or do you feel that a person such as yourself who may oppose the death penalty just as much as one who may favor it in certain cases, that you could make your discretionary judgment and consider the matter on the evidence and all of the facts and that you could still fulfill your oath as a juror and vote the death penalty if you in fact thought it should be?

A. I'd be opposed to the death penalty, I wouldn't want it to be on the jury to give the death penalty or hang the jury that wanted to give the death penalty, or detain it in any way.

POINT IV.

PROSPECTIVE JUROR GLEN KNOTTS WAS PROPERLY EXCLUDED FROM THE JURY PANEL.

The trial court first asked each of the 32 jurors individually that since the laws of the State of Utah provide that "Every person guilty or found guilty shall suffer death, or upon the recommendation of the jury may be imprisoned at hard labor in the state prison for life" (T. 152), whether the punishment affixed by law is too severe for the offense of murder in the first degree. When asked Mr. Knotts replied:

> "A. No, I don't go for the death penalty" (T. 153).

The Court then asked the entire body of jury men.

> "Q. As the Court has explained to the jury, this offense is punishable by death under the law of the *State of Utah, do any of you entertain a conscientious opinion which would preclude you from finding the defendant guilty in view of the fact that the penalty may be death?* Mr. Burraston and Mr. Knotts have expressed such a reservation or opinion. The court feels that it is his duty to advise all members of the jury panel that being opposed to the death penalty or just merely having conscientious scruples against the death penalty is not sufficient to disqualify you for jury service. . . . The court will ask each of you for the record do you have a conscientious opinion which would preclude you from finding the defendant guilty based upon the fact that the offense charged

Q. Well, the Court will ask you this, Mr. Knotts, and if you don't understand it be sure to bring it to the court's attention. Is it your frame of mind at this time, then, that you could not and that you would not under any circumstances regardless of what the evidence might be, return a verdict recommending the death penalty?

A. No, I couldn't do it.

Q. That is your frame of mind, then —

A. That's right" (T. 158-60).

In *Witherspoon* v. *United States*, 391 U. S. 510 (1968), the defendant had been convicted of murder in Illinois. At the time of his trial, an Illinois statute provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, *on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.*" (Emphasis added.) 391 U. S. at 512.

Pursuant to this statute, the prosecution challenged nearly half of the prospective jurors without inquiring as to whether or not their admitted bias against capital punishment would influence their impartiality on the guilt-innocence issue. The jury in Illinois, like in Utah, makes findings on both the guilt-innocence and penalty issues.

The Supreme Court affirmed the findings of guilty but reversed the imposition of the death sentence on the grounds that:

> ". . . in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that im-

> partiality to which the petitioner was entitled under the Sixth and Fourteenth Amendment." 391 U. S. at 516.

The Court ruled that a death-qualified jury stacks the deck against the accused on the penalty issue. On the other hand, the Court did not address itself to the issue of whether or not death-qualified jurors could be excused if their biasness would prohibit an impartial finding on the guilt-innocence issue.

Under Utah law, a challenge for implied bias may be taken:

> "If the offense charged is punishable with death, *the entertaining of such conscientious opinions as preclude (the juror's) finding the defendant guilty,* in which case he must neither be permitted nor compelled to serve as a juror." (Emphasis added.) Utah Code Ann. § 77-30-19(9) (1953).

This is substantially different than the Illinois statute cited above. Under Utah law, mere conscientious scruples is not enough to challenge a prospective juror. The bias must be sufficiently strong so as to "preclude (the juror's) finding the defendant guilty." This standard appears to be in harmony with *Witherspoon,* although this specific issue was not discussed in that case as mentioned above.

However, the Nevada Supreme Court has ruled precisely on this point in *Howard* v. *State,* 446 P. 2d 163 (Nev. 1968). When this case was tried, Nevada had an exclusion statute identical to the Utah statute cited above.

The defendant, on appeal, alleged error in challenging prospective jurors with scruples in light of the *Witherspoon*, case. The Court upheld the defendants' conviction and resolved the point on appeal by saying:

> ". . . the rationale of *Witherspoon* is inapposite to the Nevada statute since the statutory purpose is to disqualify jurors whose opinions against the death penalty would preclude their finding the defendant guilty. The Illinois statute considered in *Witherspoon* did not involve the right to challenge for cause those prospective jurors who stated that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt." 466 P. 2d at 165.

The Nevada Court affirmed this position in *Bornes* v. *State*, 450 P. 2d 150 (Nev. 1969).

This court in the case of *State* v. *Kelbach*, 23 Utah 2d 331, 461 P. 2d 297 (1969), decided the same exact issue before the court now. The court held that the question asked by the trial judge in his voir dire examination:

> "* * * Since this offense is punishable by death, if these men should be convicted of the crime of first degree murder, do any of you jurors entertain such conscientious opinions about the death penalty as would preclude you[r] finding a defendant guilty irrespective of how strong the evidence may be concerning guilty? * * *" 461 P. 2d at 303.

complied with the statutory provisions of Utah Code Ann. 77-30-19(9) (1953). This court further added that

the statute complies with the second exclusion of footnote 21 of *Witherspoon, supra,* wherein the court stated:

> "* * * We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as the defendant's guilt. * * *" 461 P. 2d at 303.

It is clear from the language of Utah Code Ann. § 77-30-19(9) (1953), if the juror entertains conscientious objections which would preclude finding the defendant guilty, the juror must neither be permitted nor compelled to serve. In view of Mr. Knotts' replies, the court could not permit him to serve. Furthermore, the transcript is clear that Mr. Knotts was excluded because he could not be impartial on the guilt-innocence issue and not because he was opposed to capital punishment.

CONCLUSION

Under Utah law, the testimony of Linda Ivie was admissible to show the identity of the accused and also his method of operation. Furthermore, the search of Redford's car was not conducted until after both possession and title to the car had been lawfully transferred. There

is similarly no merit to Redford's additional contentions that Mr. Burns exceeded the bounds of cross-examination or that Mr. Knotts was improperly excluded as a juror. In light of the overwhelming amount of evidence which the State brought forth at trial, any error must be deemed harmless error. Wherefore, the State respectfully prays that the judgment of the lower court be affirmed.

Respectfully submitted,

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