1972

State of Utah v. Jesse Bautista & John Francis Bautista : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case Nos.
	)	9986 and
JESSE BAUTISTA &	)	9987
JOHN FRANCIS BAUTISTA,	)	
	)	
Defendants-Appellants.	)	

BRIEF OF APPELLANTS

Appeal from the judgment of the Second Judicial District Court for Weber County, State of Utah, The Honorable John F. Wahlquist, Judge, presiding.

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DISPOSITION IN LOWER COURT

The Appellants were charged by information with the crimes of robbery and rape in violation of Sections 76-51-1 and 76-53-15, Utah Code Annotated (1953), as amended. Upon pleas of not guilty a jury trial was held and Appellants were each found guilty of rape and robbery and committed to the Utah State Prison for ten years to life (R 69, 70). Defendants-Appellants now appeal from the verdicts and judgments entered.

RELIEF SOUGHT ON APPEAL

The Appellants seek reversal of the convictions and judgments of the Lower Court and ask that the cases be remanded for a new trial.

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JESSE BAUTISTA and	)	
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BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

These are appeals from convictions of rape and robbery and sentences to the Utah State prison on each count for each Defendant. The case was tried to a jury with the Honorable John F. Wahlquist presiding.

STATEMENT OF FACTS

The prosecutrix is a 19-year old Weber College student (R 114). She testified that on the night of February 10, 1972, she attended an exchange party between her sorority and a fraternity held at the bowling alley in the Studen Union Building. She left the social at 11 p.m., in her Peugeot Sports car and drove South along Harrison Boulevard, turning off on a side road near the Wilshire Theatre. She stated the occupants of an old, big white car behind her began honking its horn as if they wanted to talk to her. (R 118, 119) They drove alongside as if to pass. She stated she pulled her car over, and that Appellants got out of the

white automobile and came over to her small foreign car. Her reason for stopping is not clear from the record as she stated "Well, I can't remember the thoughts that were in my mind at that time" in response to the prosecutor's attempt to lead her into saying she was forced off the road. (R 120) Under cross-examination, she stated the other auto merely pulled up along side her and did not pull in front of her. (R 148, 149, 152) She stated one Appellant got into her car from the driver's side and the other from the passenger's side. "They had a gun and told me to get in the middle," she stated, (R 120). No weapon was produced at the trial and the prose-

cutrix described it as follows: "It seems like it was white on yellow or something, I don't know" (R 122). She stated the men drove her car to a point near the Seven-Eleven store on Washington Boulevard and parked it.

The occupants were joined by a third man, who had followed them in the white car. At this juncture, prosecutrix got into the white car and a white hat was allegedly placed over her head so as to obstruct her vision. (R 123)

As the four drove around in the white car, one of the men seated next to her is said to have asked if she had any money in her purse. She said she told him that he could have her money - that "he could have

anything, but please just let me go and don't hurt me". (R 124, 125)

Subsequently, they stopped to buy gas for the car, and later they stopped again to buy some beer. (R 125, 126) At no time did she attempt to sound an alarm or make an escape. (R 173-74) They continued driving for twenty or thirty minutes and the men began drinking some of the beer. Prosecutrix told them "they shouldn't drink it while he was driving," (R 127) and they then turned off onto a dirt road and drove for another ten or fifteen minutes. The prosecutrix had no idea of where they were. (R 129)

She testified that after the automobile was parked one Appellant began

unzipping her coat, she stated, "and he kind of hit me" (R 130) "on the face or chest or somewhere," removed her lower articles of clothing (R131) and had intercourse with her. (R 132) She later remembered that she had removed at least some of her own clothing. (R 167) The driver then sat in the back seat with her, tried to kiss her, but did not have intercourse with her at that time. (R 132) The second Appellant allegedly then had intercourse with her, and was followed by the driver who also had intercourse with her. The prosecutrix testified that the three then drove her back to her car in Ogden. She testified about running a police "road block" on

the way back (R 135) and that when they returned to where her auto was parked, two police cars pulled up along side and checked the driver's license and took him to their car when he couldn't produce one. (R 137) After the police left, the prosecutrix claims the Appellants returned her to her auto, gave her a dollar and offered to follow her home. (R 137)

South Ogden police officers confirmed that they had stopped a white 1960 Dodge at 2:40 a.m. of the day in question and identified one Appellant as being an occupant. Officer Darrell Jones testified that he observed a female in the back seat and a male and they appeared to be embraced most of the time. (R 204) He said he

figured it was a boy friend-girl friend relationship. (R 206) Another South Ogden Police Officer, Louis J. Passey, remembered seeing a couple in the back seat. He noted that "one was maybe a girl friend-boy friend there and it looked like embracing in that fashion." He did not recall seeing anyone wearing a hat. (R 209)

The prosecutrix testified she arrived home between 3 and 4 a.m., and was met by her mother and

> "as I walked in the door she came. She watched me come in. She was waiting for me. She heard me come home, the lights were on."

The prosecutrix testified further,

"I walked into the house and

I said something terrible had happened to me, but I can't tell you because I promised." (R 176)

Her mother then advised her she had already called the police and the hospitals. Prosecutrix then went to the bathroom without further conversation. (R 177) Her mother then called the hospital and advised prosecutrix they were going to the hospital. Prosecutrix did not ask to go. As they prepared to leave, a police car drove into the driveway and the officer indicated he wanted to ask her some questions. (R 178) Prosecutrix left for the hospital with her mother without saying anything to the police. At the hospital, a police sergeant again tried to ask her questions but she declined

to answer. Later, she was examined by a doctor and after the examination her Bishop arrived. She was then taken into another room and in the presence of her mother, the police, the doctor and her Bishop she "answered questions." (R 179, 180)

Dr. William R. Egnert testified that he examined the prosecutrix on the morning in question and confirmed that the prosecuting witness had sperm in her vagina and a laceration of the hymen one centimeter in length. (R 184) He further testified that he found no bruises (R 185) or evidence of her having been recently struck on the upper part of her body, (R 188) and that she

remained silent during the course of his examination. (R 187) He stated that prior to the examination he had been told prosecutrix "was not willing to say anything about what happened" (R 186) but that he had been told she had allegedly been "raped" and had been asked to check her to see what he could find. (R 187)

Appellant Jesse Bautista testified that he, his brother and a third man had encountered the prosecutrix Southbound on Washington Boulevard in her auto stopped at a red light. He stated they pulled along side her auto and his brother hollered and whistled and that she waved back. Prosecutrix then turned into a lot and then drove back on the street and headed North.

Appellant stated they turned and followed her and that after a block and a half she pulled over and they stopped behind her. (R 225, 226) He then stated his brother, Johnny Bautista, got out and walked up to her auto and that after a few minutes of conversation prosecutrix got out of her auto and joined them in theirs.

Appellant further stated that as they drove they decided to get some beer and that prosecutrix volunteered to pay at least a portion of the cost of a six-pack. (R 227). He stated that prosecutrix opposed their drinking while driving and suggested "we just go off and drink some place where you don't have to drive and drink and hit somebody." (R 228)

They then went to a service station to get some gas and use the washroom (R 229) and then drove in a Westerly direction for about 20 or 30 minutes and stopped. Appellant stated that he and the third man left the auto with prosecutrix and Johnny Bautista seated in the back seat. When he returned Johnny approached him "bragging how he talked her into it." (R 231) Appellant stated that he and the driver each tried to seduce her but that she resisted him saying she was "sore down there." He stated that he at no time had sexual relations with her. (R 232, 233) He denied the presence or exhibition of any gun (R 334 and denied that any hat was ever placed over her eyes. (R 237)

Under cross-examination Appellant Jesse Bautista further stated that he was a student at Weber State College until the time of his arrest, that he was married but separated from his wife (R 238) and that he repairs automobiles for a living.

Appellant John Bautista also testified. His statements corroborated the account given by his brother (R 264-274). He acknowledged that he had intercourse with the prosecutrix but denied that any force was exerted. (R 271, 272)

STATEMENT OF POINTS RELIED UPON

POINT I

THE TRIAL COURT ERRED IN DISPLAYING A CO-DEFENDANT NOT ON TRIAL, TO THE JURY WHILE CHAINED, HANDCUFFED, UNSHAVEN, UNGROOMED AND DRESSED IN COMMON JAIL ATTIRE, AFTER DEFENDANTS RAISED THE DEFENSE OF CONSENT TO RAPE AND ROBBERY CHARGES.

POINT II

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL BASED ON THE PROSECUTOR'S DERISIVE STATEMENTS CONCERNING DEFENDANTS' RACIAL AND SOCIAL BACKGROUND.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO EXCUSE PROSPECTIVE JURORS FOR CAUSE.

POINT IV

THAT THE CUMULATIVE EFFECT OF THE FOREGOING ASSIGNED ERRORS DEPRIVED THE APPELLANTS OF A FAIR TRIAL.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISPLAYING A CO-DEFENDANT NOT ON TRIAL, TO THE JURY WHILE CHAINED, HANDCUFFED, UNSHAVEN, UNGROOMED AND DRESSED IN COMMON JAIL ATTIRE, AFTER DEFENDANTS RAISED THE DEFENSE OF CONSENT TO RAPE AND ROBBERY CHARGES.

Defendants-Appellants were charged with rape and robbery. Both testified raising the defense of consent and considerable evidence of consent was before the Court. A third man had also been charged, was awaiting a separate trial, and was languishing in jail. In the middle of the defense case the trial Judge abruptly interruped the testimony and summoned counsel to the bench to advise them that the third Defendant had been brought into Court. (R254)

The Judge later acknowledged that the third Defendant had been introduced to the Courtroom while trial was in progress "in order to avoid delay" and to "have him somewhere available if he is wanted." When asked by defense counsel if the prosecutor had requested that he be brought in, the Judge replied "I did this myself." (R 283)

Upon timely objection from defense counsel, the Judge stated for the record:

"The record may show that Batchelor has been brought down, and that he is in jail clothes and the defense makes a motion to redress him before they put him in the Courtroom. The Court denies this. I believe the jury understands that he is in jail, and he has got jail clothes on, and he has been brought in in irons and is handcuffed." (R 254)

The Court casually observed that the

Co-Defendant "looked like an ordinary prisoner" (R 285) and allowed him to be identified as the driver of the vehicle in which Defendants and prosecutrix had previously testified they were riding (R 290-91). The Co-Defendant described the occurrence and his physical conditions at a hearing outside the jury (R 287-88) as follows:

Q. Were you at that time in your regular jail attire, jail clothes?

A. Yes, sir.

Q. Were you given an opportunity to put on your street clothes?

A. No, sir; I was not.

Q. Were you advised as to where you were to be taken?

A. No, sir.

Q. Were you brought from the jail into the Courtroom directly?

A. Yes, sir.

Q. Did you have an opportunity to consult with your legal counsel before you were brought here?

A. No, sir, I did not.

Q. Did you have an opportunity to shave prior to coming here?

A. No, sir.

Q. When was the last time you shaved?

A. Yesterday.

Q. Were you given an opportunity to comb your hair?

A. No, sir.

Q. When was the last time you combed your hair?

A. Yesterday.

Objections to the Co-Defendant being in the Courtroom for identification in his condition were timely and properly registered by the defense, (R 254 and 290) renewed in a motion for a mistrial. (R 282)

These appeals present an issue of first impression before this Court. Defendants contest the propriety of the trial Judge's unilateral disruption of a trial to bring a Co-Defendant - not then on trial - from the jail to be paraded in front of the jury "for identification purposes" while dressed

in common jail attire, in handcuffs and leg irons, and while unshaven, ungroomed, and uninformed as to where and for what purpose he was to be taken and used. To so exhibit a Defendant to a jury would clearly be prejudical error. The Idaho Supreme Court has properly observed that a Defendant's right to make a presentable appearance is intricately related to the fairness and openess of the trial he receives. State v. Carver 94 Idaho 677, 496 P2d 676 (1972). See also Alexander v. State _____ Okla. Crim. _____ 493 P2d 458 (1972); Garcia v. Beto 452 F2d 655 (5th Cir. 1971) Ephriam v. State _____ Tex. Crim. App. _____ 471 S.W. 2d 798 (1971).

In light of the particular sensitivity

of appearance in this case and by a parity of reasoning, a compelling argument is made that a Co-Defendant - not on trial - must be properly attired before being injected into the trial of others charged with personal association and with the same criminal acts. The point could nowhere be more compelling than in the trial of a rape case where consent is the basis of the defense. Clearly, if a man who allegedly was their associate makes a slovenly appearance the defense of consent is vitiated and Defendants were prejudicated. The trial Court's refusal to grant Defendants timely request that Co-Defendant be made presentable prior to further

contact with the jury deprived the Defendant a fair trial. Furthermore, the Court's action could accomplish nothing more than instillation in the jurors' minds 'that here was a worthless lot". See State v. Martinez 7 Utah 2d 387, 326 P2d 102. The trial Judge's assertion that the Co-Defendant was introduced to the jury as he was "in order to avoid delay"(R 283) is not persuasive. No one had asked for him. Neither counsel intended to call him and both were aware that he was incarcerated in the same building and available to them in a matter of minutes if they asked for him.

Although the jail clothing, unkempt appearance, handcuffs and leg irons may

not influence adversely the thinking of a seasoned trial Judge, it does not follow that jurors are similarly calloused. One need not dwell on the propriety of the Court's motives in taking the action complained of inasmuch as the prejudicial effect on the jury can and should be assumed.

The introduction of the Co-Defendant as described was an open invitation for the jurors to speculate as to many issues not before them. Although he was not called upon to answer questions, the State was able to elicit prejudicial testimony from him through his silence and his appearance.

The jurors were encouraged to spe-

culate that the defense did not choose to call the Co-Defendant for fear of what he would say, or they could speculate that he too was facing a separate trial and would choose to say nothing which might incriminate him. It is error for a prosecution to call a Co-Defendant, knowing that he will invoke his privilege against self-incrimination and it matters not that the party calling the witness was the Judge. See State v. Smith 446 P2d 571, 581 (1968).

The jurors could further speculate that since Co-Defendant was not on trial with Appellants that he had already been convicted or more likely entered a plea of guilty. From his jail clothes, handcuffs, leg irons and unkempt condition it

would be normal to speculate that such was the case and that if he was guilty the other Defendants were also guilty.

It is significant that it was the Defendant's case which was interrupted by the Judge's declaration that Mr. Batchelor was available in the Courtroom. Hence, in effect the Judge called the Co-Defendant as a witness. His appearance testified. So did his silence. Both were negative and adverse to Defendants. The trial Judge's action could only be indicative of a desire that the jury view the Co-Defendant at his worst. The jury in turn was left to speculate as to why the Judge wanted them to view the Co-Defendant. They were forced to

give unwarranted attention to the Co-Defendant. He was spotlighted to them in a totally negative light. They could hardly overlook defense's surprise or the hurried bench conferences filled with whispered emotional conversations between defense counsel and the Court. (R 254)

This Court has repeatedly taken the position that a trial Court should not on its own motion invite the jury to question witnesses. State v. Anderson 108 Utah 130, 158 P2d 127, 128 29 (1945) State v. Martinez 7 Utah 2d 387, 326 P2d 102 103-04 (1957). In the instant case, jurors were not invited to question the witness but they were clearly invited to speculate as to why the Defense did not question him.

He could have already been convicted or have pled guilty or there might have been differences between the men. All add up to one thing, the trial Court put Defendants in an unwarranted dilemma. We would be naive to assume that the jury would not interpret the defense's decision not to call the witness as evidence of their guilt.

The issue becomes whether the jury in viewing the set of facts as developed could have arrived at adverse conclusions influencing their verdict. If so, the judgment should be reversed. It is fundamental to a fair trial that as many opportunities for speculation as possible be removed from the trier

of fact. This was clearly not done. For additional guidance this Court might turn to U.S. Supreme Court's statement that "prejudice is presumed from a material error absent in affirmative showing to the contrary." Crawford v. United States 212 U.S. 183 (1909) Appellants' submit that the conduct complained of is the kind of material error to which the United States Supreme Court referred.

POINT II

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL BASED ON THE PROSECUTOR'S DERISIVE STATEMENTS CONCERNING DEFENDANTS' RACIAL AND SOCIAL BACKGROUND.

The prosecutor argued his closing

position by painting a rosy picture of the prosecutrix and an unsavory one of the Appellants chastising them socially and racially. (R 323-35)

> Next, you have to ask yourselves, if Jill Bateman is going to engage in sex, illicit sex, why is she going to choose these two individuals right here? What is there about these two people over here that is so appealing? Jill Bateman, a daughter of a dentist, a daughter of a school teacher, a student at Weber State College, a dental technician by her own testimony is a religious girl, a virgin, why would she go out with this caliber of individuals? She belongs to a social sorority. From such you can draw the implication that she wants to meet similar situated people as her, people with her background, people she can empathize with, people that she feels familiar with, perhaps meet somebody that some day can support her in the manner in which she is accustomed to. Why would she go out with a person not of

> her own race, a person she never knows, and a person that allegedly flags her down on Washington Boulevard? . . . And anybody that would do that is about as low an individual that you will ever come across.

Clearly, such comments disparaging the Appellants and appealing to racial and social bias is rank prosecutorial misconduct. Such were not even tolerated in Louisiana in 1915. In State v. Washington 136 La 855, 67 So. 930 (1915) a conviction of rape was reversed wherein the district attorney referred to prosecutrix as "a woman having white blood in her veins" and saying "Gentlemen do you believe she would have had intercourse with this black brute?"

In the instant case the defense asked first for an opportunity to reply to the

inflammatory remarks at a bench conference immediately after the prosecutor concluded his diatribe. (R 326) The request was denied and the Judge gave no precautionary instructions to the jurors. Minutes later and after the jury had left the Courtroom to deliberate, the defense renewed the objection in the form of a motion for a mistrial which in part focused upon the prosecutor's remarks as being improper and prejudicial. (R 327)

POINT III

THE TRIAL COURT ERRED IN REFUSING TO EXCUSE PROSPECTIVE JURORS FOR CAUSE.

The jury voir dire was confusing from the outset. The Court got matters started by telling the jury "Now the

fact that the two men are on trial is merely a matter of convenience." (R 78) The Judge went on to say "What the State is alleging, occurred. They allege that there was a female student at Weber State College . . . they claim that she was taken forcefully from the car and a weapon was used to threaten her . . . they claim she was taken to a secluded place and there she was raped by three individuals . . ." (R 78, 79)(Emphasis added)

The jurors added to the problem. A Mr. Dykes stated of Defendants "These two fellows I have seen before. When I worked for Chambers Music when we were working in the vending machine business, with juke box machines or whatever on 25th Street

area." (R 83) (In fact Defendants were new to the City but how do you impeach a juror?)

A Mr. Cherry followed by responding to the Court's inquiry as to his personal knowledge of the alleged offenses by saying "No, I have no knowledge of this Court case. I have never been acquainted with any rape or robbery charge. I have been acquainted with a murder charge." (R 85) (After the trial it was learned that Appellants were being investigated in a murder case for which Co-Defendant Batchelor was charged.)

During the course of the remainder of the voir dire several instances of

juror bias were demonstrated. A Mr. Dee volunteered that he had very strong feelings against the crime of rape. In exploring his comment the conversation went as follows:

Mr. Marsh: Do you feel that the aversion would have any undue influence on you?

Mr. Dee: Well, I like to think not. I am trying to be honest. As far as guilt or innocence is concerned, like I say, I don't think it would have much bearing, but then again it might be subconscious.

Mr. Marsh: You think the fact that a person is charged with a crime is any kind of indication of guilt or innocence or would this arouse any feeling of animosity

in yourself?

Mr. Dee: Well, I feel that, in due process of law and everything if a person is arrested and were identified by the victim, I feel that there must be some sort of significance to that.

Mr. Marsh: You feel the fact that the charge has been made and that the allegation has been made is in fact some evidence to the guilt or innocence of the parties charged?

Mr. Dee: Well, I feel they have been involved, I don't know about guilt or innocence. (Emphasis added) (R 99)

At another point a Mrs. Wagstaff indicated that because of her feelings arising out of another rape charge she

should not be involved in hearing this matter. When asked by the prosecutor "In light of your feelings do you think your verdict might be swayed even slightly in the way that you would veiw this evidence that would come out today?" Mrs. Wagstaff acknowledged that "It might." The prosecutor in open Court asked that Mrs. Wagstaff be struck for cause from the panel. (R 96) The Court deferred judgment and later defense counsel asked Mrs. Wagstaff "You mean that you would not be able to listen objectively to the evidence as it is submitted to you and make an independent and objective determination as to the guilt or innocence of the accused?" To which Mrs. Wagstaff replied: "I am too

upset." The Court then inquired: "You realize that this is an entirely different case?" To which Mrs. Wagstaff replied: "Yes, but" (R 97, 98)

A Mr. Herrera also stated that he would prefer not to sit on the case. In the ensuing conversation the prosecutor asked "And is this a personal feeling or is it because the Defendants are of the same origin and background as you?" Mr. Herrera then stated "One is for that and the other one, I don't think I could make a decision. Sometimes I don't even make my own decisions." The prosecutor then asked "Do you think that your feelings would affect the verdict?" To which Mr. Herrera replied: "Right." The pro-

secutor in open Court then moved that Mr. Herrera be struck for cause. (R 97) Again the Court deferred decision on the motion to strike the juror.

After all questions had been asked of the prospective jurors the prosecutor renewed his motion to excuse Mrs. Wagstaff and Mr. Herrera for cause and defense counsel acquiesced. The trial Judge summarily denied both requests. Defense counsel then challenged Mr. Dee for cause and after the Court's refusal to discharge him defense counsel challenged the entire panel of jurors. (R 102, 103)

Clearly the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by jury, one or

more of whose members is biased or prejudiced, is not a constitutional trial. State v. Parnell, 77 Wash. 2d 503, 463 P.2d 134 (1969); Seattle v. Jackson, 70 Wash. 2d 733, 425 P.2d 385 (1967). The Kansas Supreme Court recently noted that an "impartial juror" is one who is free from bias. State v. Coleman, 206 Kan. 587, 481 P.2d 1008 (1971). These cases are instructive in that they provide some basic guidelines. Here the question presented in juror disqualification because of bias in the context of a trial Court's abrogation of the right to challenge a propective juror for cause. The Nevada Supreme Court has ruled that a legislature cannot abrogate the right to challenge a juror for cause. Frame v. Grisewood,

81 Nev. 114, 399 P.2d 450 (1965). Should a trial court be able to so do then? Appellants submit that the question must be answered in the negative.

The Appellants further assert that the disqualification of the prospective juror was evident and manifest as a matter of law. The United States Supreme Court has stated that "the bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." United States v. Wood, 299 U.S. 123, 133 (1936). When a juror candidly acknowledges that he has strong feelings against rape, and goes on to say that he feels that the fact that a party is charged and identified is evidence of involvement, surely fairness requires that

this venireman be excused for cause. In the same vein jurors who admit that because of personal reasons their emotions might sway their verdict should not be retained on a jury. Each are disqualified as a matter of law. Surely it is error to force counsel to needlessly expend valuable peremptory challenges on veniremen who exhibit bias.

POINT V

THAT THE CUMULATIVE EFFECT OF THE FOREGOING ASSIGNED ERRORS DEPRIVED THE APPELLANTS OF A FAIR TRIAL.

Appellants submit that each of the foregoing errors assigned presents adequate grounds upon which this Court could reverse and order a new trial. Should the Court find, however, that no

single issue, by itself, necessitates reversal, the Court is then urged to "scrutinize with care the propriety of all aspects of the proceedings." State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955). And in so doing:

> (I)f there is a reasonable likelihood that in the absence of such errors a different verdict might have been rendered, a new trial should be granted. Id. at 244.

It has long been recognized by this Court that there may be several errors in a trial, and each error may not independently be sufficiently prejudicial to warrant a reversal, but when each is viewed in conjunction with the others, the cumulative effect will amount to the denial of a fair trial. This position was established in

State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942), and the latter was reaffirmed by this Court in State v. St. Clair, supra, wherein it was said:

> It is recognized that a combination of errors which, when singly considered might be thought insufficient to warrant a reversal, might in their cumulative effect do so. Id. at 243.

Viewed from another perspective, a judgment should be reversed on the ground of judicial misconduct although any one of several items of misconduct may not justify reversal, where their cumulative effect is such that in their absence a different verdict would not be improbable. Delzell v. Day, 36 Cal. 2d 349, 223 P.2d 625 (1950) (Cal. Sup. Ct. in bank).

Indeed, a Federal Court recently concluded that a person's right to a fair trial can be violated even without a showing of identifiable prejudice, if the totality of the circumstances raises a probability of prejudice. Glenn v. State, 341 F. Supp. 1055 (D. Mo. 1972). If the assigned errors are not found to be prejudicial singly or in the cumulative effect, this Court can still find that the totality of the circumstances raises a probability of prejudice due to the emotional nature of a rape case.

As previously noted, the inherently emotional nature of prosecutions for rape present unusual problems for Courts. This is illustrated in the fact that the essence

of rape has been said to be not the fact of intercourse, but injury and outrage to the feelings of a woman by means of carnal knowledge effectuated by force. State v. McCune, 16 Utah 170, 51 P. 818 (1898). The impossibility of a defense in such a case must also be considered. See State v. Horne, 12 Utah 2d 162, 364 P.2d 109 (1961). Appellants submit that the emotion and difficulty of defense which accompany rape prosecutions require a more strict scrutiny of the entire record to ascertain whether improprieties when considered as a whole were prejudicial.

CONCLUSION

The individual and cumulative effect

of the foregoing assigned errors is clearly and uncontrovertably prejudicial, reversible error. The conduct of this trial falls short of standards enunciated by this Court and the United States Supreme Court and necessitates a new trial.

Appellants therefore pray that the judgments against each Defendant on each charge be reversed and Appellants be discharged or in the alternative, that the cases be reversed and remanded for new trials.

Respectfully Submitted,

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