

1959

# State of Utah v. Danny Glispy and James Hallam : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Walter L. Budge; Vernon B. Romney; Attorneys for Respondent;

---

## Recommended Citation

Brief of Respondent, *State v. Glispy*, No. 9116 (Utah Supreme Court, 1959).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3450](https://digitalcommons.law.byu.edu/uofu_sc1/3450)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

IN THE SUPREME COURT OF THE STATE  
OF UTAH

FILED

NOV 2 - 1959

STATE OF UTAH,

*Plaintiff and* Clerk, Supreme Court, Utah  
*Respondent,*

vs.

Case No.  
9116

DANNY GLISPY and  
JAMES HALLAM,

*Defendants and*  
*Appellants.*

---

RESPONDENT'S BRIEF

---

WALTER L. BUDGE  
*Attorney General*

VERNON B. ROMNEY  
*Assistant Attorney General*

*Attorneys for Respondent*

---

---

PRINTERS INC., SUGAR HOUSE

## I N D E X

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	1
ARGUMENT .....	2
POINT I. THE COURT DID NOT ERR IN PERMIT- TING A DOCTOR TO TESTIFY THAT HIS EXAMINATION INDICATED THE COM- PLAINING WITNESS HAD BEEN A VIRGIN PRIOR TO THE TIME OF THE EXAMINA- TION .....	2
POINT II. THE COURT DID NOT ERR IN DENY- ING APPELLANTS' REQUESTED INSTRU- CTION DIRECTING THE JURY TO RETURN A NOT GUILTY VERDICT.....	5
POINT III. EVEN IF THE COURT DID ERR AS URGED IN APPELLANTS' POINTS I AND II. SAID ERROR WAS NOT PREJUDICIAL.....	10
CONCLUSION .....	11

## AUTHORITIES CITED

44 Am. Jur. 958.....	5
----------------------	---

## CASES CITED

Cottrell v. Grand Union Tea Co., 229 P.2d 622, 5 U.2d. 187.....	10
Schlatter v. McCarthy, 196 P.2d 968, 113 U. 543.....	7
Seybold v. Union Pacific Railroad Company, 239 P.2d 174, 121 Utah 61.....	6
State v. Neal, 262 P.2d 756, 1 U.2d 122.....	10

# IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

*Plaintiff and  
Respondent,*

vs.

DANNY GLISPY and  
JAMES HALLAM,

*Defendants and  
Appellants.*

Case No.  
9116

## RESPONDENT'S BRIEF

## STATEMENT OF FACTS

Respondent does not dispute the statement of facts set forth in appellant's brief, except that Dr. A. C. Curtis began his examination of prosecutrix at 11 o'clock. (T-5)

## STATEMENT OF POINTS

### POINT I.

THE COURT DID NOT ERR IN PERMITTING A DOCTOR TO TESTIFY THAT HIS EXAMINATION INDICATED THE COMPLAINING WITNESS HAD BEEN A VIRGIN PRIOR TO THE TIME OF THE EXAMINATION.

## POINT II.

THE COURT DID NOT ERR IN DENYING APPELLANTS' REQUESTED INSTRUCTION DIRECTING THE JURY TO RETURN A NOT GUILTY VERDICT.

## POINT III.

EVEN IF THE COURT DID ERR AS URGED IN APPELLANTS' POINTS I AND II, SAID ERROR WAS NOT PREJUDICIAL.

## ARGUMENT

## POINT I.

THE COURT DID NOT ERR IN PERMITTING A DOCTOR TO TESTIFY THAT HIS EXAMINATION INDICATED THE COMPLAINING WITNESS HAD BEEN A VIRGIN PRIOR TO THE TIME OF THE EXAMINATION.

Here the exact question objected to by appellants is as follows: "Now does a hymen which is intact normally indicate a person who is a virgin?" Over appellants' objections, the question was allowed and was answered "Yes."

At the time of making his objection, counsel for appellants claimed it was "immaterial." In his brief he now claims that the only effect of the question and answer was to excite passion and prejudice in the minds of the jury.

Respondent does not believe that the question was asked in an attempt to excite passion and prejudice, nor

that such was its result. It did not stand by itself, but instead was asked in a context which included other questions, the intent and effect of which were only to show that the prosecutrix had recently experienced sexual penetration.

The transcript of testimony, beginning at line 28 of page 5, and continuing to line 16 of page 6, reads as follows:

“Q Would you tell us what you observed, Doctor, which led you to believe that she had had intercourse?

A Yes. On the examination table she was put in a good position where we could make an examination of her female organs and we found the perineum covered with blood and mucus and serum, and by opening the lips of the vagina we could see the hymen, and the hymen had been torn, and it was recently torn because the tears were fresh and they were still bleeding.

Q Now does a hymen which is intact normally indicate a person who is a virgin?

MR. CHRISTENSON: We object to that as being immaterial?

THE COURT: He may answer.

A Yes.

Q And you say in this case the hymen had been torn?

A Yes.

Q And there was blood on it?

A Yes?”

As is readily seen, the fact of sexual penetration necessarily had to be proven in order to establish that rape had occurred, since it is a necessary element of the crime.

So, properly, the District Attorney asked the doctor how, from his own observation, he came to believe that intercourse had taken place. In his answer (at line 1, page 6 of the transcript), he testified to his examination of the prosecutrix' female organs, one of his observations being that the hymen had been torn and that tears were fresh and still bleeding.

It was a logical and normal thing at this point for the District Attorney to ask the question to which appellants object since some members of the jury might not have known, had the doctor not so stated, that an intact hymen is an indication of a woman who has not experienced sexual penetration, and by the same token that a torn hymen indicates the possibility, at least, of one whose organs have been penetrated sexually.

It is difficult to imagine how the jury could have become inflamed with passion and prejudice upon hearing this scientific question and its answer when it had not already become so upon hearing the preceding question and the gruesome details in the doctor's answer, a question, incidentally, which was not objected to by appellants.

Respondent believes the question about the hymen was in all regards proper, and that it was asked only in an effort to give the jury an understanding of female physiology sufficient to enable it properly to render its verdict. Respondent does not believe that it aroused pas-

sion and prejudice in the minds of the jury, particularly in light of the other questions in the context of which it was asked.

The first sentence of appellants' first point states: "The general rule is that in prosecutions for rape by force and without consent, evidence of the prior chastity of the prosecutrix is inadmissible as a substantive defense \* \* \*." Respondent believes that the word "chastity" was used in error and that the word properly should have been "unchastity." (44 Am. Jur. 958)

The text cited by appellants on page 7 of their brief and the Scott case deal entirely with attempts by defendants to show unchastity on the part of the prosecutrix. Here, quite to the contrary, her chastity was shown. It is a fair assumption that a 15-year-old girl who has been raped was, up to that time, a virgin, testimony to the contrary being inadmissible, and the proof of the assumed fact certainly is not prejudicial to the defendant.

Finally, even if error did occur, respondent does not believe it was prejudicial, under all the circumstances.

## POINT II.

THE COURT DID NOT ERR IN DENYING APPELLANTS' REQUESTED INSTRUCTION DIRECTING THE JURY TO RETURN A NOT GUILTY VERDICT.

Respondent cannot understand how appellants seriously can urge that evidence in the record was not such that the jury could properly bring in a verdict of guilty.



True, there was some conflict, particularly as to circumstantial or inconsequential matters in the testimony of the three girls, all of whom were called to the stand by the State. However, the existence of such conflict did not in any way preclude the jury from giving full credit to the testimony of the prosecutrix while at the same time disregarding or discounting testimony of the State's other witnesses in conflict therewith.

The State's case could have rested entirely upon the testimony of a single witness, the prosecutrix, and there was no absolute necessity for the testimony of the other girls at all, nor was the jury obligated to believe what they said.

The Utah case of *Seybold v. Union Pacific Railroad Company*, 239 P2d. 174, 121 Utah 61, states that in this way:

“\* \* \* After referring to a variety of methods of phrasing the rule and a great many authorities he [Wigmore] concludes the section with this: ‘Perhaps the best statement of the test is: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain.’

“We approve the rule thus stated by Mr. Wigmore. If there is any substantial competent evidence upon which a jury acting fairly and reasonably could make the finding, it should stand.”

Here the prosecutrix stated clearly and simply that she had been raped by the defendants. This was the important thing. In addition her further testimony was such as to

show an opportunity as to time and place for the performance of the acts.

As a matter of fact, the testimony of the other two girls to the effect that they were gone from the car for perhaps five minutes would not, in and of itself, even if believed, necessarily eliminate the possibility of rape, since the act could have been accomplished within such a time period. The estimate of the girls at best was only a guess and this, of course, was taken into consideration by the jury.

Obviously the same period of time would seem much shorter to the two others who were off in the canyon "going to the bathroom," than to the prosecutrix fearfully engaged in fighting off two men trying to rape her.

Interestingly, even defendant Hallam estimated the time at ten minutes (T-58).

One of the other two girls called by the State was a sister of one of the defendants. (T-45). The jury had the right, said relationship having been placed in evidence, to consider the same, and to evaluate her testimony in the light thereof. The interest or bias of a witness, or the absence thereof, should always be considered as affecting the weight of his testimony.

Appellants rely somewhat on *Schlatter v. McCarthy*, 196 P.2d 968, 113 U. 543, and quote the following statement from that case:

"Generally a party who calls a witness vouches for his veracity and cannot afterwards impeach such witness, either by testimony of an impeach-

ing witness or by argument to the jury and he may not argue to the jury that such witness is unworthy of belief."

Here, however, the State is not attempting to impeach any of the witnesses even though they did give somewhat contradictory testimony on minor points.

The Schlatter case goes on, however, in some detail to point out that a party is not bound by everything stated by his witness. The actual language of the court, occurring on page 975, is as follows:

"\* \* \* But a party is not bound by every statement that his witness makes, and he may, by testimony of other witnesses and in argument to the jury, show that the facts were different from those testified to by the witness. This is permitted, not for the purpose of impeaching the witness (although it may have that incidental effect), but for establishing the true facts. It would be a monstrous rule that would bind a party to every statement of every witness produced by him. It is common experience that several eye-witnesses to an occurrence will have different versions of the same transaction. A party who calls several eye-witnesses is entitled to argue before the jury that they should believe the facts to be as testified to by the witness most favorable to him. This is not an attack upon the veracity of the other witnesses called by him whose testimony may be different in some respects from that of others, but merely an attempt to convince the jury that the facts are really as contended by him. \* \* \*"

As to the ultimate question, that is, whether or not sexual penetration occurred, only the prosecutrix, of the

three women, was in any position to know, since the seat of the automobile was lowered, (T-62) and since the other two women were at least 30 steps away from the car in the dark. (T-47).

The only really important question was, did appellants commit unlawful sexual acts with the prosecutrix or did they not? The question of the amount of time available for the perpetration of the act is not of grave consequence. This is not a matter of circumstantial evidence alone, as to the commission of the act, but instead is one of direct testimony by the person best able to know the facts.

At page 12 of appellants' brief, they claim that considerably more than two hours elapsed between the time of the alleged attack and the time when the complaining witness was examined by Dr. Curtis, who stated that her injuries in his opinion had occurred within one or two hours previously. Appellant says this is so because the evidence indicated the parties arrived back in Payson before ten minutes to 10:00 p.m. and that the attack must have occurred prior to this time.

It is submitted that appellant is in error in setting midnight as the time of the examination, since it is clearly set forth on page 5 of the transcript at lines 4 through 7 that the examination began at 11:00 o'clock.

Thus, even assuming Dr. Curtis' opinion as to the two hours was correct, the attack still could have taken place as early as 9:00 o'clock and been within his estimate, since while the transcript is not specific on the point, it is likely Dr. Curtis' estimate of the time of the attack

was made with reference to the time of beginning of the examination—or 11:00 o'clock.

It is interesting to note that while the other girls said they did not hear prosecutrix yell and scream (T. 43, 45, 47) as she claims to have done (T-36), Defendant Hallam himself testified that prosecutrix “started kicking and hollering” (T-73) when he tried to pull her pants down.

On appeal the courts are reluctant, of course, to overrule findings of fact made by juries. This rule has been stated and restated time and time again. In a recent Utah case entitled *Cottrell v. Grand Union Tea Co.*, 299 P.2d 622, 5 U.2d 187, decided in 1956, the court, speaking through Justice Crockett, said:

“This case having been tried to a jury, they were the exclusive judges of the evidence and of the inferences to be drawn therefrom. It was not the privilege of the court to disagree with and overrule their action unless the evidence so unerringly pointed to a contrary conclusion that there existed no reasonable basis for the jury’s finding. This court has many times affirmed commitment to a policy of reluctance to interfere with findings of fact and verdicts rendered by juries, and has declared that it should be done only when the matter is so clear as to be free from doubt \* \* \*.”

### POINT III.

EVEN IF THE COURT DID ERR AS URGED IN APPELLANTS’ POINTS I AND II, SAID ERROR WAS NOT PREJUDICIAL.

One good statement of the court’s general attitude in this regard is that taken from the case of *State v. Neal*, 262 P.2d 756, 1 U.2d 122:

“We are also conscious of the fact that a trial in the courts of this state is a proceeding in the interest of justice to determine the guilt or innocence of the accused, and not just a game. We will not reverse criminal cases for mere error or irregularity. It is only where there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted. The defendant was entitled to a full and fair presentation of the case to a jury of unbiased citizens and to have his rights safeguarded by competent counsel.”

### CONCLUSION

The Court did not err in permitting a doctor to testify that his examination indicated the complaining witness had been a virgin prior to the time of the examination, nor did it err in denying appellants' requested instruction directing the jury to return a not guilty verdict.

If, however, error was committed in either regard, such error was not prejudicial to the substantive rights of the appellants and therefore their appeal should be dismissed and an order issued affirming the decision of the Trial Court.

Respectfully submitted

WALTER L. BUDGE  
*Attorney General*

VERNON B. ROMNEY  
*Assistant Attorney General*

*Attorneys for Respondent*

Oct. 20, 1959