

1961

# The State of Utah v. Ruben B. Sanchez : Brief of Respondent

Utah Supreme Court

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Walter L. Budge; Gordon A. Madsen; Attorneys for Respondent;

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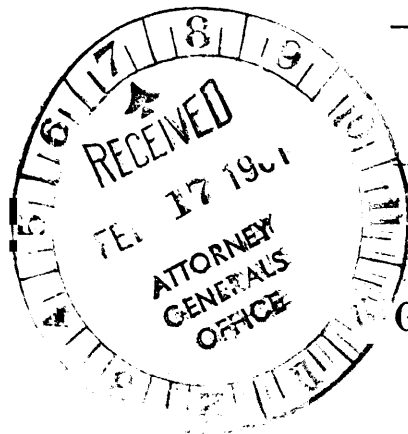
IN THE SUPREME COURT  
OF THE STATE OF UTAH

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THE STATE OF UTAH,  
  
— vs. —  
  
RUBEN B. SANCHEZ,  
  
*Respondent,*  
  
*Appellant.*

Clerk, Supreme Court, Utah  
  
Case  
No. 9298

BRIEF OF RESPONDENT



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# IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,

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— vs. —

RUBEN B. SANCHEZ,

*Appellant.*

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

Respondent notes that appellant's statement of fact is in reality argumentative in that at page 4 in particular, and elsewhere, such language as "but no evidence was shown to prove she had been raped," attempts to state the legal implications of testimony. Further, the appellant's statement of fact is not complete and respondent shall make reference in the course of its brief to such necessary additional facts as are relevant to this appeal.

## STATEMENT OF POINTS

### POINT I.

THERE WAS SUFFICIENT EVIDENCE OF PENETRATION BEFORE THE JURY TO JUSTIFY A VERDICT OF GUILTY, AND THE TRIAL COURT COMMITTED NO ERROR IN SUBMITTING THE CASE TO THE JURY.

### POINT II.

THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING THE TESTIMONY OF DR. McENTIRE.

### POINT III.

THE TRIAL COURT COMMITTED NO ERROR IN DETERMINING THE PROSECUTRIX TO BE A COMPETENT WITNESS, AND IN ADMITTING HER TESTIMONY.

### POINT IV.

THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING THE TESTIMONY OF AUGUST NUSSBAUM, HAROLD GIBBS AND REBECCA GARCIA, OR IF SUCH ADMISSIONS WERE ERROR, SUCH ERROR WAS NOT PREJUDICIAL.

## ARGUMENT

### POINT I.

THERE WAS SUFFICIENT EVIDENCE OF PENETRATION BEFORE THE JURY TO JUSTIFY A VERDICT OF GUILTY, AND THE TRIAL COURT COMMITTED NO ERROR IN SUBMITTING THE CASE TO THE JURY.

In spite of the conceded fact that no motion to dismiss or motion for directed verdict was made on defendant's behalf at the trial of this action, counsel for defendant-appellant, under the "palpable error" doctrine of the *State v. Cobo*, 90 Utah 89, 60 P. 2d 92, wishes this Court to rule as though some such motion had timely been made.

Assuming either motion had been made, respondent contends the trial court would have had no alternative but to deny it. This Court has repeatedly announced the standard on which such motions are to be considered. Most recently in the case of *State v. Iverson*, ..... Utah ....., 350 P. 2d 152, this Court, over the signature of Justice Callister, said:

"The law involved is ably discussed in the opinion of Justice Wolfe in *State v. Thatcher*, 108 Utah 63, 157 P. 2d 258. The controlling principle is that upon such a motion the evidence is to be viewed most favorably to the state, and if when so viewed, the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the judge is required to submit the case to the jury for determination of the guilt or innocence of defendant."

In the case of *State v. Penderville*, 2 U. 2d 281, 272 P. 2d 195, the court said:

"\* \* \* It has been repeatedly held by this court that upon a motion to dismiss or to direct a verdict of not guilty for lack of evidence that the trial court does not consider the weight of the evidence or credibility of the witnesses, but determines the naked legal proposition of law, whether there is

any substantial evidence of the guilt of the accused, and all reasonable inferences are to be taken in favor of the state. \* \* \* (Cases cited) As is pointed out in one or more of these cases, the trial court has a discretion in the case of a motion for a new trial that it does not have in case of a motion to dismiss or to direct a verdict of not guilty. Nevertheless, in either case if there is before the court evidence upon which reasonable men might differ as to whether the defendant is or is not guilty, he may deny the motion.”

In the case of *State v. Lewellyn*, 71 Utah 331, 366 Pac. 261, an adultery prosecution where defendant made a motion for a directed verdict, which motion is equivalent to the motion to dismiss under consideration here, the court said:

“In 16 C. J. 935, the conclusions of various courts are condensed in the statement :

“ ‘As a general rule the court should direct a verdict of acquittal \* \* \* where there is no competent evidence reasonably tending to sustain the charge; or where the evidence is undisputed and so weak that a conviction would be attributable to passion or prejudice, or where it is so slight and indeterminate that a verdict of guilty would be set aside, as where the evidence consists solely of the uncorroborated testimony of an accomplice, or is insufficient to overcome the presumption of innocence, or to show defendant’s guilt beyond a reasonable doubt. But the case should be submitted to the jury and the court should not direct a verdict of acquittal, if there is any evidence to support or reasonably tending to support the charge, as where it is sufficient to overcome prima facie the presumption of innocence, or where the evidence of a material nature is conflicting.’

“From *Pace v. Commonwealth*, 170 Ky. 560, 186 S.W. 142, we quote the syllabus on this point as follows:

“ ‘It is only in the absence of any evidence tending to establish the guilt of the accused that the trial court will be authorized to grant a peremptory instruction directing his acquittal.’

“The same principle is decided in *State v. Gross*, Ohio St. 161, 110 N.E. 466.

“An able discussion and determination of the bounds of judicial authority in considering a motion for a directed verdict is contained in *Isbell v. U. S.* 142 C.C.A. 312, 227 F. 788, in which it is made clear that the court in such case does not consider the weight of evidence or credibility of witnesses but determines the naked legal proposition of law whether there is any substantial evidence of the guilt of the accused. This is undoubtedly the correct rule. See annotation ‘Directing Acquittal,’ 17 A.L.R. 910. The function of a court in dealing with an application for a directed verdict must not be confused with that in considering a motion for a new trial upon the grounds of insufficiency of evidence. The court has a discretion in the latter case which he does not properly have in the former. The reason for the distinction is that the order sought in one case acquits the accused and finally ends the prosecution, while in the other, the order, if granted, does not discharge the accused but merely gives him the advantage and benefit of another trial. The rule is controlled by the same principles in criminal cases as in civil procedure. And in a civil case, *Stam v. Ogden P. & P. Co.*, 53 Utah 248, 177 P. 218, this court said:

“ ‘It is familiar doctrine in this jurisdiction and perhaps in nearly every other where the jury sys-



tem prevails, that, if there is any substantial evidence whatever upon which to base a verdict, the court will not withdraw the case from the jury or direct what their verdict should be.' ”

In the case at bar there is “substantial evidence” of penetration from which the jury could properly have returned a verdict of guilty. The prosecuting witness testified about two specific events of intercourse. Counsel for appellant, in his brief, cites part of the testimony relating to each event. The entire testimony of the prosecuting witness regarding the same follows:

“Q. Now you tell us what happened then.

A. Well, I had a dress on, and he tore it off me. And then he put me on the bed, and he got on top of me, and he put his penis in me.

Q. What do you mean by that? Would you tell me what you mean by that? Could you tell us what he did to you?

A. Well, he got his penis, and put it between my legs.

Q. Pardon me?

A. He put his penis between my legs.

Q. And then what did he do?

A. Then he went up and down.

Q. And do you know whether he was — You say that he put it inside of you. How do you know it was inside of you, Beverly?

A. Because it hurt.

Q. And tell us what happened then?

A. Well, he went up and down on me, and it hurt. I was screaming, and when he got through there was something sticky between my legs.

Q. Did you tell your mother about this?

A. No. I was too scared.

Q. Now what did Ruben Sanchez do then? After you felt the sticky between your legs, what happened then?

A. Well, then he done it for awhile, and he got through and he put his clothes on and he went out, and he told me to don't tell.

Q. He told you what?

A. He told me to don't tell. And I said okay, so then he unlocked the doors and he went out.

Q. Now did you see Ruben Sanchez again, after this first day?

A. Yes.

Q. And tell us if you ever saw Ruben Sanchez again at your home, when your mother wasn't there.

A. Well, she went out, and he came over again, and he brought some men.

THE COURT: Brought some what?

THE WITNESS: Men.

THE COURT: Men?

THE WITNESS: Yes.

MR. NEWAY: Q. What happened then?

A. Well, they came in our house. And me and my sister, we were cleaning the house up, and he brought the men in, and they took my sister, they were taking turns with her, and Ruben Sanchez was with me in the other room.

Q. Tell me now — particularly with you, if you would, Beverly — what did Ruben Sanchez do to you at that particular time?

A. Well, he took me in the other room and put me on the bed, and told me to take my clothes off,

and I wouldn't, so he pulled up my dress and pulled down my pants, and he took his clothes off, and I was screaming and I wouldn't let him, so then he kept doing it to me. He opened my legs.

Q. He kept what?

A. He kept doing it to me. He opened up my legs, and put his penis in me.

Q. And would you tell us what he did then?

A. Then he went up and down on me.

Q. He did what?

A. He went up and down on me.

Q. All right.

A. And I was screaming it hurt, so kept doing it. When he got through it hurt, and ~~he~~ he got through he put his clothes on and he went in the other room, and he told me and sister to don't tell. When the other men got through with my sister, he told me and my sister to don't tell. When the men was through with my sister." (R. 19-21)

On cross-examination the prosecuting witness was asked:

"Q. Now you told us, Beverly, that Mr. Sanchez was inside of you. Are you sure that he was inside of you?

A. Yes.

Q. Now are you sure that it was Mr. Sanchez and not one of the other men that was inside of you?

A. It was Mr. Sanchez.

Q. Do you remember for a certainty?

A. Yes." (R. 30)

As cited by appellant in his brief, Section 76-53-17, U.C.A. 1953 provides:

“Any sexual penetration, however slight, is sufficient to complete the crime.”

While this section has never been formally construed by this Court, a similar statute of almost identical words in the State of Washington was construed in the case of *State v. Snyder*, 91 P. 2d 570, wherein the court said:

“\* \* \* Some statutes expressly provide that any sexual penetration, however slight, is sufficient to complete the crime, and such a provision applies to all the subdivisions of a statute defining the offense. And, generally, it is not necessary that the penetration should be perfect, the slightest penetration of the body of the female by the sexual organ of the male being sufficient; nor need there be an entering of the vagina or rupturing of the hymen; the entering of the vulva or labia is sufficient.”

The prosecuting witness's testimony, if believed, indicates the defendant was “inside” her and it “hurt.” This testimony was supplemented by the testimony of Dr. McEntire to the effect that sexual intercourse with an adult male of average maturity and size would have been possible with this girl. (R. 38-39)

## POINT II.

### THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING THE TESTIMONY OF DR. McENTIRE.

Appellant in his brief seems to argue that because Dr. McEntire did not testify the prosecuting witness

had been “raped,” his testimony was, therefore, irrelevant and prejudicial. The word “rape” to appellant apparently means the act of intercourse, accompanied with force and resistance, and that unless evidence showing resistance or lack of consent and force, the crime has not been completed in spite of the fact that counsel cites, as noted above, the applicable statute with regard to penetration alone constituting the crime. Appellant further contends that because the State, through the testimony of Dr. McEntire, failed to show such force and resistance, it has failed to meet its burden of proof. As the statute indicates, the crime is complete upon a showing of the act of intercourse, entirely independent of consent, force or resistance, when perpetrated on a female under the age of 13 years (76-53-15 [1], U.C.A. 1953), and, as indicated above, any penetration, however slight, is sufficient demonstration of the act.

Clearly, Dr. McEntire’s testimony ran solely to the question of possibility of penetration. This is clearly relevant and was accordingly properly admitted. In the Snyder case cited above, the court notes that expert testimony of doctors was introduced in that trial to show that the prosecuting witness’s hymen was not punctured, but the court upheld a conviction on the ground that sufficient penetration of the labia was demonstrated to justify a guilty verdict from the jury. Since expert testimony tending to show lack of penetration is admissible, so also should expert testimony tending to show possibility of penetration be admissible. The trial court committed no error, therefore, in admitting Dr. McEntire’s testimony.

### POINT III.

#### THE TRIAL COURT COMMITTED NO ERROR IN DETERMINING THE PROSECUTRIX TO BE A COMPETENT WITNESS, AND IN ADMITTING HER TESTIMONY.

At Points IV, V and VII of his brief, appellant argues that the testimony of Beverly Garcia, the complaining witness, was inadmissible in its entirety for two reasons, (1) that she was not a competent witness, and (2) that she did not sufficiently understand the questions. Further, appellant maintains certain specific testimony by this witness should have been precluded relating to other offenses committed by other parties than defendant at the time of the offense charged. These three points shall be answered under the above heading.

(A) Counsel for appellant cites the case of *State v. Zeezich*, 61 Utah 61, 210 Pac. 927, in support of his position that the prosecutrix in this case was incompetent to testify. As a matter of fact, the Zeezich case holds exactly to the contrary. In that opinion, rendered by Justice Thurman, the court enunciated the established rule in this jurisdiction in the following language:

“The authorities are practically uniform to the effect that the admission of testimony in cases of this kind is *within the sound discretion of the trial court, and that its decision in such cases will not be reversed unless there is a manifest abuse of discretion*. Such has been the holding of this court in many decisions heretofore rendered. *State v. Blythe*, 20 Utah, 379, 58 Pac. 1108; *State v. Morasco*, 42 Utah 5, 128 Pac. 571; *State v. Macmillan*, 46 Utah, 19, 145 Pac. 833. There are no decisions



to the contrary in this jurisdiction. Besides holding that the question of competency is within the discretion of the trial court, these cases hold that, not age, but mental capacity, is the test of competency.

“In State v. Blythe, *supra*, at page 380 of 20 Utah, at page 1108 of 58 Pac., it is said:

“ ‘Not age, but capability of receiving just impressions of facts and of relating them truly, are the tests of competency, under the statute’

“In State v. Morasco, *supra*, the court states the rule as follows:

“ ‘If the child has the mental capacity to understand the obligations of an oath — that is, appreciates the difference between truth and falsehood — is sensible of the impropriety of telling a falsehood, and that it is his duty to tell the truth, and is capable of receiving just impressions of the facts of which he is to testify, and has the ability to relate them correctly, he is a competent witness.’

“In State v. Macmillan, *supra*, a case in which the offense charged and the age of the child were the same as in the case at bar, the court, speaking of the discretion vested in the trial court, at page 22 of 46 Utah, at page 834 of 145 Pac., says:

“It is next contended that the district court erred in receiving the testimony of the little girl, with whose person the indecent liberties were taken, and who testified in behalf of the state, upon the ground that she by reason of her youth and want of comprehension of the solemnity of an oath, was incompetent to testify. The question of the competency of a child who is called as a witness, in the very nature of things, *must to a large extent at least, be left to the sound discretion of the trial*

*court. When that court has passed upon the question either way, we cannot interfere, unless it is clearly made to appear that the court abused the discretion vested in it.” (Emphasis added)*

Reading the record at pages 15 through 18, there is certainly no apparent abuse of discretion on the part of the trial court. At the conclusion, the court said:

“I think she’s qualified to testify. You may go ahead.” (R. 18)

No objection was made at the time of the trial as to this witness’s competency, and from a reading of the witness’s entire testimony (R. 15-32), it is apparent that she had sufficient mental capacity “to receive just impressions of the facts and the ability to relate them correctly.”

(B) Counsel for appellant maintains, because of a supposed specific example cited showing lack of comprehension in the witness, that the entire testimony of Beverly Garcia should be excluded. In the example cited by appellant, however, it is apparent the witness, while not understanding the first question posed, upon its being re-phrased, understood and responded to the question.

Again a reading of the entire testimony of this witness shows a coherence, capacity to understand and a rational relating of the facts requested. The fact that a given question may have needed to be re-phrased for this 10-year-old girl is certainly no ground for error in and of itself. As to all material facts, this witness’s tes-



timony was unequivocal and coherent and responsive to the questions.

No objection was made at the time of trial by defendant's counsel that this witness was failing to understand the questions, and clearly, counsel at the time of trial had much better opportunity to observe the witness's behavior, demeanor and capacity than does this Court or appellate counsel. There is nothing in the record in the absence of objection to give rise to the "palpable error" doctrine relied on by appellant.

(C) Appellant further contends that the testimony of the prosecutrix with regard to commission of similar crimes by friends of defendant on prosecutrix's sister, was prejudicial and should have been precluded by the court.

A reading of the record, beginning at page 20, shows the witness testified the defendant "brought some men" with him, and that, further, "he brought the men in, and they took my sister, they were taking turns with her and Ruben Sanchez was with me in the other room." Later she testified:

"When he got through it hurt, and when he got through he put his clothes on and he went in the other room and he told me and my sister to don't tell. When the other men got through with my sister, he told me and my sister to don't tell. When the men was through with my sister."

On cross-examination, defendant's own counsel asked :

“MR. PHILLIPS: Q. Did you say prior to this time — earlier, at the preliminary hearing, when we were talking — did you mention that the men that came in with Mr. Sanchez also had relations with you, or did this same thing to you as Mr. Sanchez has done? Do you understand what I'm asking you?

A. Yes. Yes, they done it.

Q. They did it to you, too?

A. Yes.

Q. And when did they do this to you, Beverly? Do you remember?

A. It's between the 4th of July and the 24th of July.

Q. Now is this the same time that you have spoken about Mr. Sanchez doing the same thing to you?

A. Yes.

Q. I see. Now how many times did those other men do this to you? Do you remember?

A. No.

Q. Do you remember the times that they did it? Were they there at any time that Mr. Sanchez was not there?

A. No.

Q. They were only there when Mr. Sanchez was there?

A. Yes.

Q. Now then, was Mr. Sanchez there at any time that they were not there? Did he come alone at any time?

A. Yes.

Q. He came alone at other times?

A. Yes.

Q. Now are you absolutely sure, Beverly, that it was Mr. Sanchez that did these things to you, and not some other man?

A. Yes.”

(R. 26-27)

“Q. Now are you sure that it was Mr. Sanchez, and not one of the other men, that was inside of you?

A. It was Mr. Sanchez.

Q. Do you remember for a certainty?

A. Yes.”

(R. 30)

No objection was made by defendant’s counsel at the time this first testimony was elicited on direct examination. It appears further that such testimony was part of a description of the entire *res gestae*. It was well within the bounds of propriety and relevancy in describing who was present and what others were doing in the witness’ presence at the time of the acts of the defendant.

Defense counsel, in fact, on cross-examination, further inquired into the matter with the apparent hope of getting the prosecutrix confused as to ~~who~~ had perpetrated the acts upon her. Having elected to explore that possibility, appellant should not now be free to argue that such testimony, which his own counsel helped elicit, was inadmissible and should never have been permitted.

#### POINT IV.

THE TRIAL COURT COMMITTED NO ERROR  
IN ADMITTING THE TESTIMONY OF AU-

GUST NUSSBAUM, HAROLD GIBBS AND REBECCA GARCIA, OR IF SUCH ADMISSIONS WERE ERROR, SUCH ERROR WAS NOT PREJUDICIAL.

At Points III, VI and VIII in his brief, appellant objects to the admission of the testimony of Captain August Nussbaum, Harold Gibbs and Rebecca Garcia, the complaining witness's mother.

(A) With regard to the testimony of Captain Nussbaum, the record discloses at pages 45 through 47 that this witness testified concerning conversations had with the defendant. Counsel for defendant twice objected that such conversations were hearsay. On both occasions the court overruled the objection. Counsel for appellant now insists that such conversations and statements by defendant were hearsay or, if not hearsay, were admissions which do not meet five elements requisite according to Wharton on Criminal Evidence.

A reading of the testimony shows that the defendant was interrogated as to his acquaintance with the complaining witness and her mother and with their home. He at first denied any acquaintance with them or knowledge of the home, and thereafter admitted knowing both the complaining witness and her mother, and further admitted being in the home in company of other Spanish men. This testimony is patently an admission, and the only objection possibly available to defendant had he raised it would be the question of voluntariness of such admissions. Foundation for such testimony was in fact laid (R. 45), and no objection either to the foundation or

voluntariness was proffered by defense counsel. In fact, on cross-examination of Captain Nussbaum counsel for defense reiterated that his client admitted knowing the complaining witness, having been in the home with her in company of others, and emphasized that the defendant denied "having done anything to the little girl."

The defendant later elected to take the stand, and on direct examination admitted virtually the same facts in his own testimony. (R. 49 and 50) On cross-examination the defendant further admitted this conversation with Captain Nussbaum and corroborated substantially what the Captain had testified. (R. 53 through 55) The jury, therefore, would have had the same facts out of defendant's own mouth, even though this witness's testimony had been precluded. Therefore, defendant-appellant was not prejudiced thereby.

(B) The testimony of the witness, Harold Gibbs, did no more than connect, for the benefit of the jury, the events in the life of the prosecuting witness from the time she was living with her mother until she was placed in the foster home where she was residing at the time of the trial.

Section 77-42-1, U.C.A. 1953, provides that the commission of error by the trial court will not be presumed to have resulted in prejudice unless it affects the substantial rights of the parties. See *State v. Neal*, ..... Utah ....., 262 P. 2d 756. Clearly, this testimony does not affect the substantial rights of the defendant. Indeed, counsel for appellant does not so complain but argues only that the testimony was irrelevant, imma-

terial and improper, and tended to provoke sympathy for the victim, and for these reasons was prejudicial.

As indicated in the Neal case cited above, the test of prejudicial error seems to be: Would the result have been otherwise had the testimony not been admitted? Clearly in this instance the absence of the testimony of Harold Gibbs would not, indeed, could not, have effected the verdict.

(C) Appellant further objects to the admission of the testimony of Rebecca Garcia, the mother of the complaining witness. Appellant argues that because in response to one question the witness hazarded an opinion, to-wit: "and those times I think he was at the house," the entire testimony of the witness should have been disallowed. While it may have been that this answer might well have been objectionable, no objection was timely made and, hence, no error for the same can now be claimed. Even, however, if such an objection had been made, quite clearly this answer, in and of itself, could hardly be said to be so inflammatory or prejudicial as to have affected the substantial rights of the defendant sufficient to constitute reversible error.

## CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to affirm the decision of the trial court.

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