

1961

# State of Utah v. Lawrence Albert Horne : Brief of Respondent

Utah Supreme Court

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Walter > Budge; Ronald N. Boyce; Attorneys for Respondent;

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## Recommended Citation

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,  
*Plaintiff and Respondent,*

— vs. —

LAWRENCE ALBERT HORNE,  
*Defendant and Appellant.*

State Supreme Court, Utah

Case  
No. 9380

## BRIEF OF RESPONDENT

WALTER L. BUDGE

Attorney General

RONALD N BOYCE

Assistant Attorney General

*Attorneys for Respondent*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,  
*Plaintiff and Respondent,*

— vs. —

LAWRENCE ALBERT HORNE,  
*Defendant and Appellant.*

} Case  
No. 9380

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

The respondent makes the following statement of facts, and adopts the appellant's nomenclature for designating the citations to the record.

The prosecutrix, Shirley Pies, is a 20-year-old mother of two minor children (T. 7) who resided with her children, ages 2 and 3 (T. 8) in a house trailer located in Hammond's Trailer Court, Clearfield, Utah. At

the time of the incident her husband, a serviceman, was overseas in the Philippine Islands.

On the night of June 14, 1960, at about 10:30 p.m., Mrs. Pies went to bed in her house trailer, placing her two-year-old daughter in bed with her, and her three-year-old son in another bedroom adjacent to her. (T. 8) Since the night was warm, she left the doors to the trailer open. At some time after midnight she was awakened by the defendant ringing her doorbell. The defendant entered the trailer without being invited. (T. 9) The trailer was not lighted, but the defendant had been in the trailer with his girl friend, also an acquaintance of the prosecutrix, the night before. The defendant had met the prosecutrix prior to the 14th of June, and had visited at the trailer before. (T. 17) Upon entering the trailer the defendant opened the refrigerator, and asked the prosecutrix if she had any "coke." She replied she did not, and then indicated that Bonnie Lee, the defendant's girlfriend, was not in the trailer. (R. 10) The defendant indicated he came for the prosecutrix, not Bonnie Lee. He entered the bedroom, took off his pants, and announced his intention to make love to Mrs. Pies. Defendant proceeded to climb on the bed where Mrs. Pies and her child were in an attempt to have intercourse with her. Mrs. Pies' testimony makes it clear that she struggled and resisted for some time to deter the defendant from raping her. (T. 11) She testified:

"A. My little girl was at the head of the bed, on the right of me. My little boy was asleep in the other bedroom.

Q. Will you relate the events then, after he came to the bed, Mrs. Pies? As you best remember them?

A. He kept trying to put his hands on me, and kept trying to put his mouth on me. And I kept pushing him away, and struggling with him. My little girl woke up and she started to cry, and she kept saying she wanted a drink of water, and finally I told Larry: 'Please, I have got to go to the bathroom.' I thought if I got to the bathroom that he'd think I had locked the door and he'd leave, but there wasn't a lock on the bathroom door.

I was in the bathroom about 10 or 15 minutes, and he kept telling me to come out, and I told him I wasn't going to, and then he opened the bathroom door. He found out it wasn't locked, and he came to the bathroom door and opened it, and he pulled me out of the bathroom and into the bedroom.

Q. What happened after you were taken back to the bedroom?

A. Well, we struggled for quite a while more, and Larry kept throwing me on the bed, and I would manage to get away from him, and then he would pull me back, and I couldn't get away from him.

Q. Was anything happening to your clothing during this time, Mrs. Pies?

A. Oh, he pulled my slip down, down to my waist, and he tried to take my pants off, and I had ahold of my pants with one hand, and he pulled them off of me. I couldn't hold them up.

Q. And after he had your pants off, what happened then?

A. Then he threw me back on the bed. And I was so tired, and my little girl kept crying for a



drink of water, *and at one time my head hit her in the stomach*, and I said: 'Stop it. You're hurting my little girl,' and he said: 'I'm not hurting you. If you'd quit fighting me,' he said, 'then none of this would happen.'

Q. Did you continue to struggle?

A. Yes, I did. I begged him to let me go, and he wouldn't. He wouldn't leave me alone.

Q. What happened after that, Mrs. Pies?

A. Well, after this he got me on the bed, and I don't know exactly how he got me pinned me down. I couldn't move, but anyway I kept trying to push him off, and I pulled his hair and I hit him, and it didn't do any good. He acted like he didn't feel anything. And then he had intercourse with me."

Later she also testified.( T. 16).

"Q. Will you tell the jury, please, how you know that he had intercourse with you?

A. I know because he had ahold of both my arms with his hands, and he was laying on top of me, *and I tried to prevent it*. I tried to squeeze my legs together, and that didn't do any good. He got his knee between my legs, and pushed my legs apart." (Emphasis supplied)

In addition, she testified that the defendant pulled off the pair of panties she was wearing. (T. 11) These were introduced in evidence as part of Exhibit A. The elastic band on the panties was torn and stretched, and Mrs. Pies testified this resulted from the struggle with the defendant.

On cross-examination, and in defendant's brief, much was said about the door to the trailer being open so that

prosecutrix could have escaped at the time of going into the bathroom. This was still early in the encounter, and Mrs. Pies testified:

“Q. Now isn’t it true that, when you walked out of the bedroom, you could have gone out this door or out this door?”

A. *I wasn’t going to leave my two children in the house with him there.”* (Emphasis supplied)

Immediately after the act she was scared and confused (T. 31), and consulted a doctor.

Very shortly after the incident, only some two hours later, in a condition that indicated to her friends that she was upset (T. 37), she complained of the defendant’s assault upon her to a Mrs. Thelma Babcock, a close friend. (T. 37) Mrs. Babcock testified without objection that Mrs. Pies claimed she had been “raped.”

The defendant testified that he lived a few hundred yards from the prosecutrix’s trailer, and that on the night of June 14, 1960, he went to Mrs Pies’ trailer, rang the doorbell and entered (T. 66) He went back into the bedroom where the prosecutrix and her child were. He admitted making advances to her, and admitted that she objected. (T. 67) He then claims they engaged in necking until Mrs. Pies went to the bathroom. He admits going to the bathroom to see what was taking her so long and taking her back to the bedroom. (T. 68) He claims they then had intercourse and he left. (T. 69) On cross-examination the defendant admitted again that the prosecutrix denied his advances. (T. 71)

No evidence was introduced showing the prosecutrix was a woman untrue to her husband or of easy virtue, although the defendant's girl friend, Bonnie Lee, testified that the community opinion as to Mrs. Pies for her chastity was not very good. (T. 57)

Based upon the above evidence the jury returned a verdict of guilty of rape against the defendant, and the trial judge that conducted the trial denied a motion for new trial. The defendant has appealed, assigning various errors. Examination of the appellant's claim of irregularities reveals that they are totally without merit.

## STATEMENT OF POINTS

### POINT I.

THE TESTIMONY OF THELMA BABCOCK WAS PROPERLY ADMITTED, AND NO ERROR AROSE THEREFROM.

### POINT II.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE EXTENT OF RESISTANCE NECESSARY BY A FEMALE TO CONSTITUTE NON-CONSENT TO THE OFFENSE OF RAPE.

### POINT III.

THE COURT DID NOT ERR IN INSTRUCTING ON THE ELEMENT OF PENETRATION IN THE CRIME OF RAPE.

POINT IV.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY'S FINDING.

POINT V.

THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL.

ARGUMENT

POINT I.

THE TESTIMONY OF THELMA BABCOCK WAS PROPERLY ADMITTED, AND NO ERROR AROSE THEREFROM.

The defendant contends that the court erred in receiving the testimony of Thelma Babcock. She testified that at approximately 6:30 o'clock on the morning of the 15th of June, 1960, the prosecutrix came to her house in an upset condition (T. 36, 37), and upon inquiry from Mrs. Babcock, she stated, "Thelma, I'm in terrible trouble. Larry Horne entered my trailer last night and raped me."

No objection was made to the inquiry by counsel for the defendant, although the question the prosecutor asked was to state generally what the prosecutrix had said. Counsel for the defendant thereafter did not make a motion to strike, nor ask the court to instruct the jury *sua sponte* to disregard the statements. Counsel thereafter accepted the witness for cross-examination. Defendant did not set out the claimed error as a basis for his motion

for new trial. The failure to make timely objection waives the hearsay defect, if any there be, and renders the receipted evidence competent. In *White v. Newman*, 10 Utah 2d 62, 348 P. 2d 343 (1960), the present court ruled that “unassailed hearsay evidence” is competent evidence. The defendant having failed to make timely objection must be deemed to have waived any defect in the evidence. *Moore v. United States*, 56 F. 2d 764 (10th Cir.) ; *State v. Karvelos*, 80 N.H. 528, 120 A. 263 ; Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 351.

The defendant relies upon *People v. Holmes*, 292 Mich. 212, 290 N.W. 384 (1940) in contending that the failure to object was not a waiver. That case is not applicable in the present situation since the court there said :

“It is axiomatic that an objection not properly and timely presented to the Court below will be ignored on review and, except under *unusual circumstances* we have no disposition to relax this rule.” (Emphasis supplied)

The facts of the Holmes case show an attempt by the prosecutor on cross-examination to prove similar acts of the accused, not the subject of the instant charge. This was the same action that was disapproved in *State v. Dickson*, 11 Utah 2d ....., 361 P. 2d 412 (1961), which is clearly absent here. In addition, the counsel in the Holmes case filed an affidavit alleging inopportunity to object because of the defendant’s age and eagerness, a factor also not present here. The courts have generally said the failure to object will only be overlooked in face of

obvious prejudice and fundamental unfairness. 4 C.J.S., Appeal and Error, Sec. 245; *People v. Dean*, 308 Ill. 74, 139 N.E. 37; *People v. Holmes*, supra, p. 385, N.W. Reporter. In the instant case the area of inquiry was highly relevant to the matter of corroboration; the prosecutor and the court had just previously cautioned the witness to speak slowly; and the matter receipted was not additional, immaterial, prejudicial matter, but evidence corroborating what had just been related by the prosecutrix. In addition, the defense was thoroughly apprised beforehand of what Thelma Babcock's testimony would be since the prosecutor clearly indicated such in his opening statement. (T. 4) For these reasons the failure to object must waive any claimed defect, *People v. Porter*, 123 Cal. App. 618, 11 P. 2d 894.

It is submitted that the evidence as presented was admissible and proper. There is no dispute as to the rule of law applicable to fresh complaint declarations. Generally complaints by the victim of rape made within a reasonable time after the offense are admissible as an exception to the hearsay rule. Abbott, Criminal Trial Practice, 4th Ed., Sec. 552. The rule has been applied in Utah as stated in *State v Christensen*, 73 Utah 575, 276 P. 163 (1929) :

“The rule is well settled in this jurisdiction that, in a prosecution for rape, testimony may be given that the prosecutrix recently after the alleged act complained of the outrage, to whom the complaint was made, and where and when the crime was committed, but that the details or particulars of the complaint may not be given.”

The Utah rule has been further defined in *State v. Martinez*, 7 U. 2d 387, 326 P. 2d 102 (1958), so as not to limit it to an abstract proposition, but rather to state a rule commensurate with the obvious expressions of persons complaining of the commission of rape. There the Court stated, p. 390 Utah Reports :

“We believe the conversation of the prosecutrix with a friend within hours after she had arrived home, as related by such friend, was so lacking in details that its admission did not violate the rule heretofore enunciated by this court to the effect that where a woman allegedly has been unlawfully violated sexually, any statement made by her within a reasonably short time thereafter, is admissible if, without recitation of the details, it refers to the commission of the offense, such statement being a spontaneous utterance whose very spontaneity together with a characteristic, natural feminine inclination to express an outraged feeling under such circumstances, guarantees its trustworthiness.”

Thus the Martinez case recognized that the complaint is not a sterile declaration, but rather oftentimes contains identifying and factual matter. An analysis of the respondent's brief in the Martinez case (Brief 8796, Respondent, p. 17, 18, 19), shows the very close similarity between the report in the instant case and that accepted by the Court in Martinez. Under the circumstances the declaration to Thelma Babcock was merely the natural expression of complaint, and not the detailed recitation of the event.

The defendant also complains it was improper to allow Thelma Babcock to state the complaint of the prose-



cutrix because the complaint named the defendant as the assailant. Reliance is placed upon *State v. Christensen*, supra, where the Court stated it is not generally competent to give testimony of the name of the person who committed the outrage. It is doubtful whether in view of the more practical rule laid down in *State v. Martinez*, supra, if this is still the law, but even so the Court went on to express itself beyond the rule quoted in defendant's brief, and in so doing laid to rest any possible claim to prejudice the defendant here may have. The Court said:

“Generally, it is not competent to give testimony as to the name of the person or who it was that committed the outrage upon her; but, under the circumstances, the statement the prosecutrix made, that the defendant ‘had had sexual intercourse with her,’ if not competent to be given, was harmless, in view that the defendant by his testimony admitted all of the facts and circumstances as related by the prosecutrix, except the force and violence, that he was the person with the prosecutrix, and had sexual intercourse with her. \* \* \*”

Since in the instant case no issue of identity or presence existed, the facts are within the quoted exception making the recitation harmless.

Based upon the above authorities, it is submitted that the defendant's claim of error as to the admission of Mrs. Babcock's testimony is significantly without merit. *State v. Roberts*, 91 Utah 117, 123, 63 P. 2d 584.

## POINT II.

### THE COURT PROPERLY INSTRUCTED THE JURY ON THE EXTENT OF RESISTANCE

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NECESSARY BY A FEMALE TO CONSTITUTE NON-CONSENT TO THE OFFENSE OF RAPE.

The defendant contends that the trial court erred in instructing the jury relative to the amount of resistance a female must use to frustrate her attacker. The instruction given must be looked upon as a whole to determine whether it adequately appraised the jury as to the required standard, and in making an appraisal isolated statements and paragraphs should not be singled out for individual consideration. *State v. Sweetin*, 134 Kan. 663, 8 P. 2d 397; *People v. Semone*, 140 Cal. App. 318, 35 P. 2d 379; *Abbott*, *supra*, Sec. 669.

In the instant case the Court's instruction on the charge of rape was more than adequate to properly apprise the jury of the applicable law. (R. 13) The jury was clearly instructed that the crime must be committed "against the resistance of the female," and that "proof of resistance" was necessary. The Court further instructed that the "nature and extent of the resistance" must "depend upon the surrounding circumstances." In addition, the "conduct of the female" must be such as to "make non-consent and *actual resistance*" manifest in accordance with all the surrounding circumstances, and until further resistance is "useless." At the outset it should be noted that this instruction is similar to those given and approved in other jurisdictions. *Ried's Branson Instructions to Juries*, 3rd Ed., Vol. 5 (1960 Supp.), Sec. 4098; Specifically see *People v. Nazworth*, 152 Cal. App. 2d 790, 313 P. 2d 113. The required standard now

generally accepted by most courts is one of reasonable resistance under the circumstances and not the standard upmost resistance. 1960 Annual Survey American Law, p. 114; Wharton's Criminal Law and Procedure, Vol. 1, Sec. 308.

The most obvious reasons for taking a less stringent attitude is the recognition of the fact that resistance to the upmost may often produce serious or severe injury and commonly death, and that to require such a standard of resistance is often contrary to the female's actions where it may appear that under the circumstances her non-consent was manifest and the practicalities and the safety of the situation demanded less than the upmost resistance. Discretion may be the better part of valor under such situations.

The Utah cases clearly support the more modern and better reasoned trend, and do not require the upmost resistance from the female. As was said in *State v. Roberts*, 91 Utah 117, 63 P. 2d 584:

“In certain decisions the courts have stated broadly that the State must show that the female resisted to her uttermost capacity to prevent penetration in order to show that there was no consent, and that the act was forcibly done. We think such a rule is too strict and that the trend of the more modern decisions is not to require such a showing. \* \* \*”

Subsequently the Utah Supreme Court reiterated its stand against the “uttermost resistance” theory in *State v. Beeny*, 115 Utah 168, 203 P. 2d 397 (1949), and

recognized the rule as such in *State v. Ward*, 10 U. 2d 34, 38 (1959).<sup>1</sup>

In *State v. Beeny*, *supra*, an instruction only similar in part to that given here was presented to the jury. The difference is that the first sentence of the instruction in the *Beeny* case, which was was aspect that the Court there found objectionable, was not given. Instead, here, it was clearly made manifest that the degree of resistance must depend upon the circumstances, and the woman's ability to resist; and that "actual resistance" must be reasonably manifest. A much more complete instruction was given in the instant case. This being so, the objections found in the *Beeny* case are not present here. Even so, in the *Beeny* case the Court did not find the instruction itself to be error, but stated:

"We are of the opinion that the instruction given would leave less uncertainty as to the resistance contemplated by law, with the sentence omitted. By so stating, *however, we do not wish to be understood as holding that its inclusion was in itself prejudicial error.*"

The *ratio decidendi* of the *Beeny* case was to the effect that where the jury manifests confusion from an instruction, the Court must instruct in such a manner as to clear the confusion. In the instant case the record reflects none of the confusion manifest in *Beeny*. Also, it should be noted that in addition to the appraisal that

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<sup>1</sup> Reliance by appellant upon *State v. McCune*, 16 U. 170, 51 P. 818, is misplaced since the rule was changed in *State v. Roberts*, *supra*. *State v. Wittinghill*, 109 Utah 48, 163 P. 2d 342 (1945), is not applicable to the principle for which it is cited, and has no bearing on the present issue.

force was necessary in the Instruction complained of, the Court instructed in Instructions 5, 7 and 10 (R. 12, 15) that it was necessary to use force, and to overcome the prosecutrix's resistance. This clearly gave the jury the correct standard by which to weigh the evidence

The Instruction given was in keeping with the law of this jurisdiction, and similar to the rules of law applicable in other jurisdictions. It was a correct statement of the required standard of resistance. See Wharton's, Criminal Law and Procedure, Vol. 1, Sec. 308. When looking at the totality of the instructions given, it cannot be maintained that the jury was misled nor that the Court committed error in its charge to the jury. Appellant's claim on this point is without substance.

### POINT III.

#### THE COURT DID NOT ERR IN INSTRUCTING ON THE ELEMENT OF PENETRATION IN THE CRIME OF RAPE.

The appellant contends that the Court erred in instructing the jury that "any sexual penetration, however slight, is sufficient to constitute the act of sexual intercourse as that term is used with reference to the crime of rape." (R. 12) Appellant contends this was prejudicial since the fact of intercourse was not in dispute. The basis of his claim is that the instruction is abstract, and contrary to the rule espoused in *State v. Marasco*, 81 Utah 325, 17 P. 2d 919. That case dealt not with rape, but arson, did not concern itself with the instant instruction, and finally the principle announced therein, "that it is erroneous to give instructions based on a state of facts

which there is *no evidence tending to prove*” is not applicable to the instant case since both prosecution and defense presented facts and evidence tending to prove the act of sexual intercourse. The fact that the matter was not in dispute in no way lessens its presence before the jury. For this reason the instruction was not rendered in the abstract.

The instruction given by the Court covered an essential element of the crime. The crime of rape requires “an act of sexual intercourse.” 76-53-15, U.C.A. 1953, and “any sexual penetration, however slight,” when present with other facts making out the elements of the crime is sufficient. 75-53-17, U.C.A. 1953. Penetration is required, and is therefore an essential element of the crime. *People v. Griffin*, 117 Cal. 583, 49 Pac. 711; *People v. Howard*, 143 Cal. 316, 76 Pac. 1116; *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000; Wharton, Criminal Law and Procedure, Vol. 1, Sec. 304.

The act of sexual penetration being an essential element was thus one which the jury had to find to convict the accused. The Court had a duty to instruct upon all the essential elements that make up the crime charged. 75 C.J.S., Rape, Sec. 82(a). In keeping with that requirement the Court here charged the jury on the element of penetration. The fact that this was admitted was of no prejudice to the accused. It is the generally stated rule that:

“In a prosecution for rape, the Court must properly charge as to the necessity for penetration; \* \* \*.”

(75 C.J.S., Rape, Sec. 82(b)).

The instruction given was in keeping with the above stated general mandate. The authorities that have considered the possible prejudice from an instruction like that given by the Court, where sexual intercourse was admitted, have concluded that no prejudice results. *Territory v. Edie*, 20 Pac. 851, 6 N.M. 555; 75 C.J.S., Rape, Sec. 82(b).

It is not necessary to go beyond the decisions of the Utah Supreme Court to resolve the issue against the defendant. In *State v. Beeny*, 115 Utah 168, 203 P. 2d 397 (1949), a similar contention was raised. There the defendant admitted intercourse with the prosecutrix and the Court instructed on the issue of sexual intercourse. The Supreme Court stated that although the act of intercourse was admitted, it was not prejudicial to instruct on the matter. The Court indicated that the only danger that might arise would be if the jury were to indicate confusion on the amount of force necessary to constitute rape. The Supreme Court held no error resulted, stating:

“Under the evidence, elements one and two were not in dispute. \* \* \* Nevertheless, error cannot be predicated upon including elements one and two in the charge.”

The only dispute involved in the present case was the issue of force and resistance. On this issue the jury was clearly instructed, and no confusion of the jury appears of record, *in any of the juror's minds as to the issue at stake*, nor does the appellant contend any existed. The aspect of penetration being an essential element of the offense, no error can be claimed from instructing



thereon. Appellant's claim of error on this point is not established.

#### POINT IV.

### THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY'S FINDING.

The appellant contends that this Court should reverse the lower court's verdict because the evidence is insufficient to sustain the conviction. In support of his argument he contends that the testimony of the prosecutrix is inherently improbable and contradictory, and thus requires corroboration, and that the record does not contain sufficient corroborative evidence.

Before proceeding to examine the contention, it is well to review the position of appellate courts on the extent to which they will intrude into a jury verdict in a criminal case. The issue of the guilt or innocence of an accused is primarily for the jury. In *State v. Green*, 78 Utah 580, 6 P. 2d 177 and *State v. Harris*, 1 U. 2d 182, 264 P. 2d 284 (1953), it was said:

“It is the sole and exclusive province of the jury to determine the facts in all criminal cases, whether the evidence offered by the state is weak or strong, is in conflict or is not controverted \* \* \*.”

This being the status of the jury in a criminal trial, the verdict will not be easily set aside. Based upon the function of the jury, the Court has previously said:

“With respect \* \* \* [to] the scope of review \* \* \* ‘if the evidence favorable to the state, with all reasonable inferences and intendments that can

be drawn therefrom, could sustain a verdict of guilty the cause should be submitted to the jury.”

Thus the Court has said with reference to its power of reversal:

“We reverse a jury verdict only where we conclude from a consideration of all of the evidence and the inferences therefrom *viewed in the light most favorable to such verdict that the findings are unreasonable.*” *State v. Berchtold*, 11 U. 2d 208, 357 P. 2d 183 (1960). (Emphasis supplied)

Most recently in a rape case, *State v. Ward*, *supra*, the Utah Court said:

“The rules governing the scope of review on appeal as to the sufficiency of the evidence to sustain the verdict are well settled: that it is the prerogative of the jury to judge the credibility of the witnesses and to determine the facts; that the evidence will be reviewed in the light most favorable to the verdict; and that if when so viewed it appears that the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed. \* \* \*”

Only if the evidence, reviewed in a light most favorable to the State, could be said to be so unreasonable and improbable that no reasonable jury could have found the accused guilty, can the Court entertain a claim for reversal. To the degree that the facts supporting the conviction in the instant case are reasonable and not improbable, the appellate tribunal should affirm.

As to the issue of the necessity for corroboration of the testimony of a prosecutrix, the rule is clear that corroboration is not necessarily a requirement. As was



stated in *State v. Mills*, 122 Utah 306, 249 P. 2d 211 (1952):

“There is without doubt wisdom in recognizing the danger of conviction of a sex crime upon the uncorroborated testimony of the prosecutrix and of viewing the same with caution as suggested in *Morris v. State*, supra. Yet if the law did not permit conviction on such testimony, the guilty would often go unpunished. Seldom are such deeds perpetrated in the presence of others. Where there is nothing inherently unreasonable or improbable in her testimony, it alone may support a conviction if the jury finds guilt beyond a reasonable doubt.”

In *State v. Diamond*, 50 Nev. 433, 264 Pac. 687, it was said:

“There is no rule requiring the testimony of a prosecutrix in a rape case to be corroborated. It is sufficient, standing alone, to sustain a conviction.”

Unless the testimony of the prosecutrix is inherently improbable, it requires no corroboration. *State v. Hillard*, ..... Ariz. ...., 359 P. 2d 66 (1961).

It is submitted that on the question of sufficiency of evidence, the defendant has erred in three particulars. (1) He has not appraised the evidence in a light most favorable to the verdict; (2) He has found supposed improbabilities in the testimony of the prosecutrix by accepting the defendant's testimony where conflict exists; (3) He has failed to note that the record does corroborate the testimony of the prosecutrix.

In the instant case the outrage of Mrs. Pies is not even remotely in dispute. She constantly maintained that the resultant intercourse was over her objection. (T. 9, 10, 11, 12). At no point in her testimony can any inference of consent be found. After the act she made it clear that she was outraged and expressly told the accused to "get out" and that she "never wanted to see him again." (T. 13) This is corroborated by the testimony of the defendant, who claimed the act to be consensual, for he testified that the prosecutrix wanted him to leave. (T. 69) The first person the prosecutrix saw the next morning made it clear that Mrs. Pies was upset, and related a complaint of rape. (T. 35) The prosecutrix testified that she fully resisted the advances of the accused. She made full and reasonable effort to deter his actions. There is nothing in Mrs. Pies' testimony that can be deemed inherently improbable or untruthful.

It is contended that the prosecutrix could have effected her escape when she passed an open door on her way to the bathroom. It should be recalled that this was early in the encounter, and the defendant's actions had not reached the violent pitch to which they later rose. It certainly is not unreasonable to expect that a woman would reluctantly leave her home, and the action of pretending to be locked in the bathroom is certainly believable and foreseeable. Very possibly a delay might cause the attacker to cool off and think rationally. The most

reasonable explanation for Mrs. Pies' action was given by herself. (T. 23) :

“Q. Now isn't it true that, when you walked out of the bedroom, you could have gone out this door or out this door?

A. *I wasn't going to leave my two children in the house with him there.*” (Emphasis supplied)

Indeed, the answer is more in keeping with any rational explanation than the argument made against it. Courts have long recognized that women may be willing to forego their own safety because of a concern for their children. *Hallmark v. State*, 22 Okla. Crim. 422, 212 Pac. 322 (1923). In *United States v. Daniels*, 12 CMR 442 (1953), the Court clearly recognized the reasonableness of such action, saying :

“\* \* \* in view of the strong protective instincts of a mother for the life of her newborn child the mother may have been impelled by subjective fear to submit against her will to such acts even if such submission was more for the purposes of protecting her child than for the purpose of saving herself. She is to be commended for her conduct in protecting her offspring and her conduct cannot be said to constitute that species of consent which will render the accused's acts guiltless.”

The prosecutrix had previously been concerned by the crying of her child, (T. 11) and after being dragged into the bedroom, still expressed concern for the safety of her little girl. (T. 12) Under these circumstances the conduct of the prosecutrix was wholly reasonable and proper. No merit exists in any argument to the contrary.

The claim that the prosecutrix admitted any unfaithfulness or unchastity is a misstatement of the evidence. Mrs. Pies completely denied having any sexual relations with anyone other than her husband (T. 32, 33) and expressly denied the inference in the testimony of Bonnie Lee to such acts. (T. 76) The jury heard all the witnesses and could believe whom they desired. It is not surprising they should choose not to believe Bonnie Lee, for her testimony appears biased even from the cold record, and she admitted being defendant's lover. (T. 58) The jury was free to appraise the demeanor of the witnesses and believe whom they desired. Wigmore, Evidence, 3rd Ed., Sec. 1395. Their conclusion was proper, and it cannot be said to be unreasonable.

The defendant contends that the prosecutrix made no outcry, and delayed reporting the incident and, therefore, her story is so unbelievable as to require reversal. The defendant contends that the prosecutrix waited some 24 hours later to report the incident. This is not so. If we assume the defendant's testimony to be true that he left at 4:00-4:30 in the morning, then the prosecutrix made her complaint to the first person she talked with only two hours later. (T. 35) At about 6:30 she entered the home of her friend, Thelma Babcock, who noticed that she was upset, and there she complained she had been "raped." Thus the very first person she confronted she complained to. What more proper person to relate the truth to than a close friend and confidant? This was a fresh complaint, and as such was also corroboration of her testimony. Wharton's Criminal Evidence, 13th Ed., Vol. 1, p. 678.

The most logical reason for such evidence is that "it indicates the truth of the charge, and is corroborative thereof." Wharton, op. cit.; *State v. Imlay*, 22 Utah 156, 61 Pac. 557 (1900). The close similarity between the corroborative declarations found proper in *State v. Martinez* and those present here should be noted. The fact that the police were not immediately informed is not so unreasonable, when it is noted that the victim made almost immediate complaint, and then went to the doctor. Many women are assaulted and do not report the matter at all because of the embarrassment and stigma associated with it. The desire to be free from disease or an unwanted child may weigh as heavily as the need to have the attacker punished. The unfortunate position of the rape victim faced with the need to make disclosure and the humiliation connected therewith has been noted by Sutherland and Cressey in their excellent work, *Principles of Criminology*, 5th Ed., p. 21:

"The loss of status in the community is frequently a result of crime. The victim of rape, especially, suffers this loss, and the loss is immensely magnified by the continued publicity given to it in the newspapers."

The fact that a woman is reluctant to call police or friends and submit to the attack upon her character is not surprising. In this case, however, Mrs. Pies did complain, and did subject herself to such harrassing, which certainly corroborates her story and indicates that what she says happened actually took place. *State v. Ward*, 10 U. 2d 34, 347 P. 2d 865 (1959). Courts have held delays of the nature made here to be well within the bounds of

reason. *DeSalvo v. People*, 98 Colo. 368, 56 P. 2d 28 (1936). *Commonwealth v. Ellis*, 319 Mass. 677, 67 N.E. 2d 234; *Commonwealth v. Krick*, 164 Pa. Super 516, 67 A. 2d 746; *Lewis v. State*, 226 S.W. 2d 861 (Tex. Cr. App.). Also for a similar complaint, *People v. Ristau*, 363 Ill. 583, 2 N.E. 2d 833. In the instant case the complaint was timely under the circumstances, and the actions of the prosecutrix were not inconsistent with the guilt of the defendant. In any event the "truth of the charge" is for the jury, *Clark v. State*, 28 Ala. App. 448, 186 So. 778. The prosecutrix made complaint shortly after the crime, sought medical assistance and then called the police, all reasonable actions.

The defendant's assertion that the prosecutrix did nothing about being scantily clad is ignoring her testimony to the contrary. The prosecutrix testified that she attempted to put on her peddle pushers, but that the defendant prevented her. (T. 24) In addition she sought the refuge and sanctuary of the bathroom, all to no avail.

The defendant apparently would require a showing of severe injury or the upmost resistance. Indeed, herein is where his cited authorities fail to support his contention for they appear to support such a rule, whereas the Utah requirement is one of reasonableness under the circumstances. *State v. Roberts*, supra. The female need not show great wounds or bruises — "It is not necessary to show that a woman was butchered or brutally beaten to corroborate her testimony of resistance to such an attack." *State v. Ward*, supra. Indeed, in the instant case the circumstances show a struggle, and the torn and

stretched panties clearly corroborate the prosecutrix. If she were to lie about this, why not say all the holes in the clothing were the result of the struggle? In the instant case the evidence, when viewed most favorable to the verdict, shows that the prosecutrix struggled until subdued; that she attempted to evade the defendant and pleaded with him, both for herself and to stop "hurting her little girl"; that her clothing was torn, that her most immediate neighbor and friend was in the hospital and no one appeared to whom she could make outcry, that the next morning she was upset and disturbed and made immediate complaint. All these factors, when viewed against the appellate requirements for sufficiency, strongly demonstrate the absence of merit in the defendant's contentions. Cases less flagrant than the present one have been affirmed on appeal. *Manning v. State*, 93 So. 2d 716 (Fla.); *Perry v. State*, 80 N.W. 2d 699 (Neb.); *Andrews v. State*, 289 S.W. 2d 262 (Tex.); *People v. Fremont*, 47 Cal. App. 2d 341, 117 P. 2d 891; *United States v. Wright*, 5 CMR 323.

Based upon the evidence, it is submitted that the jury, acting within their province as finders of the fact, acted reasonably and based upon evidence neither uncertain nor inherently improbable. The defendant's argument on the sufficiency of the evidence will not support reversal.

#### POINT V.

#### THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL.

The totality of the evidence and the record shows without question that the accused was afforded a fair



and adequate trial. The evidence is more than sufficient to sustain the conviction, and nowhere in the record can it be said that the cumulative effect of the trial was such as to compel a finding that it was not commensurate with due process of law. *Palko v. Connecticut*, 302 U. S. 319.

## CONCLUSION

The jury found the appellant guilty after a fair and proper trial. They were adequately instructed on the law, the evidence, the presumption of innocence and requirement of proof beyond a reasonable doubt. (T. 81). In addition, it must be remembered that the jury had the opportunity to view the witnesses, to contrast their size and strength, and to denote their demeanor.<sup>2</sup> As was said by Justice Frank in *Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (2d Cir.) :

“\* \* \* For the demeanor of an orally-testifying witness is ‘always assumed to be in evidence.’ It is ‘wordless language.’ The liar’s story may seem uncontradicted to one who merely reads it, yet it may be ‘contradicted’ in the trial court by his manner, his intonations, his grimaces, his gestures, and the like — all matters which ‘cold print does not preserve’ and which constitute ‘list evidence’

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<sup>2</sup> Many places in the record indicate that the defendant’s demeanor and flippancy may have been a relevant factor. For example (T. 71):

“Q. And you had intercourse with this girl, with her consent?

A. The way she acted, yes.

Q. And during all of this time you didn’t once kiss her on mouth?

A. No.

Q. Doesn’t that strike you as unusual?

A. No. I’m not in love with her.”



so far as an upper court is concerned. For such a court, it has been said, even if it were called a 're-hearing court,' is not a 'reseeing court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him. \* \* \*''

Under the circumstances, the jury had available to them much that may have persuaded them of the defendant's guilt. Their verdict was one reasonable under the circumstances, and the trial was free of prejudicial error. Therefore, the verdict must be affirmed.

Respectfully submitted,

WALTER L. BUDGE  
Attorney General

RONALD N BOYCE  
Assistant Attorney General

*Attorneys for Respondent*