

1961

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

Utah Supreme Court

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Craig T. Vincent; Attorney for Appellant;

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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.*

FILED

MAY 31 1961

Case No. 9380 Court, Utah

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BRIEF OF APPELLANT

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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 APPELLANT

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PRELIMINARY STATEMENT

Defendant appeals from the verdict of the jury, in the above entitled matter finding him guilty of the crime of rape, from the ruling of the court denying defendant's motion for a new trial, and from the sentence of the court to the Utah State Prison.

The record on appeal is in two volumes, one of which consists of the pleadings, minute entries and similar papers. All references to this volume are designated by the letter "R." The other volume which is separately numbered, is a transcript of

the testimony and proceedings at the trial. References to this volume are designated by the letter "T."

## STATEMENT OF FACTS

Shirley Pies, the prosecutrix, was a married woman, twenty years of age, at the time of the trial. (T. 7) Her husband, a member of the armed forces, was at all times mentioned herein stationed overseas. She lived alone with their two children in a trailer, located in Hammond's Trailer Court, Clearfield, Utah. (T. 7, 31, 32) The defendant, twenty-two years old, resided with his parents in their home which was but one hundred yards from the trailer housing Mrs. Pies. (T. 65)

The prosecutrix and the defendant had several mutual friends, and were well acquainted with each other, having met on sundry occasions in various bars and clubs. (T. 17, 65) He had been in her trailer on times prior to the night in question, including the next preceding night at approximately the same hour. (T. 65, 71)

The prosecutrix testified that she retired about 10:30 o'clock p.m. on the night of June 14, 1960, placing her two-year old daughter in bed with her, and her three-year old son in another bed just off the hallway. (T. 8) The night being warm, she left both outside doors to the trailer open; the screen doors were unlatched. (T. 18, 19) Shortly after midnight she awakened when the doorbell rang. (T.

8) She asked who was there, and recognized the voice of the defendant when he replied that it was he. (T. 9) He entered the trailer through the front door, went into the kitchen looking for a coke, and then into the bedroom where he found the prosecutrix still in bed, clothed only in a half-slip and a pair of panties. (T. 9, 10) From this point on, the testimony of the principals is somewhat contradictory.

When the defendant asked the prosecutrix permission to make love to her she refused, fearing she might become pregnant and afraid of what the defendant's girl friend would do if she learned of it. (T. 72) The defendant maintained that upon entering the bedroom he sat down on the edge of the bed next to the prosecutrix. (T. 66) For a time they talked, though the conversation quickly led to necking, laughing and giggling; both were soon lying across the bed. (T. 66, 67)

Approximately half an hour later the prosecutrix got up to go to the bathroom. (T. 11) Enroute she passed by the open rear door of the trailer. (T. 23) While she was in the bathroom, the defendant, undressed, smoked a cigarette, and then went to the door of the bathroom to meet her. (T. 68) She claimed he thereupon grabbed her and pulled her back to the bed; (T. 11) he said that he took her hand; she led him. (T. 68) The prosecutrix testi-



fied, somewhat vaguely, of a struggle which ceased only upon her becoming "so tired," and being held in such a manner that she could no longer prevent the act of intercourse. (T. 11, 12) The defendant admitted that she warned him she might become pregnant, and therefore took precautionary measures. (T. 70, 72) They then had intercourse, satisfying their mutual desires. (T. 69) Both principals testified that the defendant was in the trailer for more than three hours, almost all of which time was spent in bed with the prosecutrix. (T. 22, 70) Their final session lasted from 1:30 a.m. until nearly 4:00 a.m., two and one-half hours! (T. 22)

The evidence shows that the trailers in this park were in close proximity with each other, and that the Newell trailer was but twenty feet from the trailer wherein the alleged assault took place. (T. 60) Even though the doors were open, due to the warm night, and other trailers were close at hand, the prosecutrix failed to make any outcry. (T. 60)

After their love-making was over, the defendant dressed and they went into the livingroom, smoked a cigarette and talked for a few minutes; (T. 69) after the defendant left, the prosecutrix returned to bed. (T. 13) The defendant arose later that morning, worked all day, and went to a movie that night, only to return home and find law enforcement of-

ficers awaiting his arrival (T. 70) in response to the complaint of the prosecutrix made at 7:00 p.m. that night, (T. 30, 39) more than fifteen hours after the alleged rape!

## STATEMENT OF POINTS

### POINT I.

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION, AND THAT THE VERDICT OF THE JURY AND THE JUDGMENT AND SENTENCE OF THE COURT SHOULD BE SET ASIDE BECAUSE THERE IS NOT COMPETENT CORROBORATION OF THE TESTIMONY OF THE PROSECUTRIX; THAT THE EVIDENCE FAILS TO PROVE, BEYOND ALL REASONABLE DOUBT, THE FORCIBLE RAPE OF THE PROSECUTRIX BY THE ACCUSED.

### POINT II.

THAT THE COURT ERRED IN INSTRUCTING THE JURY ON THE REQUISITE EXTENT OF PENETRATION NECESSARY TO CONSTITUTE SEXUAL INTERCOURSE IN A PROSECUTION FOR RAPE, WHERE DEFENDANT HAD ADMITTED THAT AN ACT OF SEXUAL INTERCOURSE HAD BEEN CONSUMMATED.

### POINT III.

THAT THE COURT ERRED IN INSTRUCTING THE JURY THAT THE CONDUCT OF THE FEMALE PERSON NEED ONLY BE SUCH AS TO MAKE NON-CONSENT AND ACTUAL RESISTANCE REASONABLY MANIFEST.

### POINT IV.

THAT THE TESTIMONY OF THELMA BABCOCK RECITING PARTICULARS AND DETAILS OF THE ALLEGED OFFENSE AS RELATED TO HER BY THE PROSECUTRIX WAS HEARSAY AND INADMISSIBLE, AND WAS PREJUDICIAL TO THE DEFENDANT.

POINT V.

THAT THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL.

POINT VI.

THAT THE ERRORS OF THE COURT WERE CUMULATIVE AND WHEN VIEWED IN CONNECTION WITH EACH OTHER RESULTED IN PREJUDICE TO THE DEFENDANT.

ARGUMENT

POINT I.

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION, AND THAT THE VERDICT OF THE JURY AND THE JUDGMENT AND SENTENCE OF THE COURT SHOULD BE SET ASIDE BECAUSE THERE IS NOT COMPETENT CORROBORATION OF THE TESTIMONY OF THE PROSECUTRIX; THAT THE EVIDENCE FAILS TO PROVE, BEYOND ALL REASONABLE DOUBT, THE FORCIBLE RAPE OF THE PROSECUTRIX BY THE ACCUSED.

A charge of rape is one easily made but difficult to defend. Inasmuch as such an assault would rarely take place in the presence of witnesses, the jury generally has only the testimony of the prosecutrix and the defendant upon which to base its consideration of the accusation. The appellate courts have therefore closely scrutinized the testimony of the principals in an effort to make certain that the conviction is supported by evidence not incredible or unsubstantial:

“Nevertheless, we cannot escape the responsibility of passing judgment upon whether under the evidence a jury could, in reason, conclude that the defendant's guilt was proved

beyond a reasonable doubt.” *State v. Williams*, 111 Utah 379, 180 P. 2d 551.

“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. In considering this question we must keep in mind that this is a criminal prosecution, so the evidence must be sufficient to support a finding that all reasonable doubt in favor of the defendant has been eliminated. A mere preponderance of the evidence, or a finding that guilt is more probable than innocence, is not sufficient.” *State v. Berchtold*, 11 Utah 2d 208, 357 P. 2d 183.

Where the claims of the prosecutrix are uncorroborated, the survey of the appellate tribunal is even more carefully conducted:

“While it is the law . . . that a conviction of rape may be sustained upon the uncorroborated testimony of the outraged female, it is nevertheless equally well settled that the appellate court will closely scrutinize the testimony upon which the conviction was obtained, and, if it appears incredible and too unsubstantial to make it the basis of a judgment, it will reverse the judgment.” *State v. Goodale*, 210 Mo. 275, 109 S.W. 9.

Thus, as in the instant situation, when the prosecutrix’ statements are uncorroborated, such must be clear and convincing, and where they bear upon their face inherent evidence of improbability, are contradictory, inconsistent or unreasonable, they

will be held as insufficient, and under these circumstances must be corroborated to the extent of making them sufficient. *State v. Whittinghill*, 109 Utah 48, 163 P. 2d 342; *DeWitt v. State*, 79 Okla. Cr. 136, 152 P. 2d 284; *People v. Silva*, 405 Ill. 158, 89 N. E. 2d 800.

This court has gone even one step further in holding that where the uncorroborated testimony of the prosecutrix is improbable, contradictory, inconsistent, or unreasonable, a presumption of falsity arises:

“(I)f she concealed the injury for any considerable length of time after she had opportunity to complain; if she be of evil fame, and stand uncorroborated by others; if she give false and contradictory statements as to the occurrence; if the place where the act was alleged to have been committed was where it was possible she might have been heard, and she made no outcry; if she did not show signs of injury, but remained on friendly terms with the assailant after the assault, . . . these and like circumstances carry a strong presumption that her testimony is false or feigned.” *State v. Halford*, 17 Utah 475, 54 P. 819.

This reasoning arises mainly from the fact that the essential guilt of the crime of rape consists, not in the act of intercourse itself, but in the outrage to the person and feeling of the female. Section 76-53-17, Utah Code Annotated, 1953; *State v. McCune*, 16 Utah 170, 51 P. 818. Thus, unless the evidence conforms to this statutory requirement, there

can be no conviction of the accused for the crime of rape, even though an act of intercourse took place between the principals. The existence of this element of outrage is portrayed by the acts and omissions of the prosecutrix during and following the alleged assault. It is submitted that the evidence adduced in the instant situation demonstrated that though the complaining witness was at first unwilling, she consented to having intercourse with the defendant, made no substantial effort to resist, and suffered no outrage to her feelings until nearly twenty-four hours later when she called the police and made her complaint.

When such an outrage is committed, it is the natural instinct of a woman's nature to promptly make the wrong known, and to seek assurance and sympathy and legal retribution. The prosecutrix in this case showed no such instinct until the next evening when she then contacted law enforcement officers and made formal complaint. (T. 30, 39) In *Commonwealth v. Berkowitz*, 133 Pa. S. 190, 2 A. 2d 516, five days elapsed before the prosecutrix made official complaint, causing the court to instruct the jury to carefully scrutinize her testimony in deciding whether she consented, because of the lapse of time. In *State v. Black*, 204 So. Car. 414, 29 S. E. 2d 675, the woman wrote to her mother the day of the assault, but failed to inform her husband

or an official agency, the court therefore reversing the conviction. In *People v. Blanch*, 309 Ill. 426, 141 N. E. 146, the prosecutrix failed to inform the police for more than a month, though she told her sister-in-law the very night the assault took place. The court held that in scrutinizing her testimony, they were uncertain as to defendant's guilt because of her failure to make prompt complaint, and reversed the conviction.

Even greater aspersions are cast upon the credibility of her testimony when examining her actions during the period of the alleged assault. She admitted when going to the bathroom prior to their act of sexual intercourse, she passed right by the open screen door, and had the opportunity to run out and go to one of the neighboring trailers to seek aid and assistance. (T. 23) Having no doubt by that time as to what the intentions of the defendant were, (T. 22) she failed to make any attempt to escape, though the opportunity was there. Further, she admitted that she made no effort to turn the lights of the bedroom on, though the switch was handy, being just above her head, preferring to remain in the dark with the defendant. (T. 21)

Since this was a warm summer night, the prosecutrix had left both doors to the trailer open and unlocked. (T. 18, 19) Because of the close proximity of adjoining trailers (T. 60) had the prosecutrix



made an outcry, there was a good chance that the same would have been heard, and that help could have been obtained. No outcry was made. She made no attempt to wake her son, who was asleep in the adjoining nook, (T. 25) nor did the sounds of the struggle and her resistance awake him. (T. 26) Her daughter, in bed with her, was awake earlier, but was not bothered nor did she cry out during any of the time in which her mother was allegedly being violated. To the observer it is odd indeed that in her intense objection to having intercourse with the defendant, the prosecutrix did none of the things normally resorted to by a female defending her honor and virtue.

Further, her testimony was contradictory. She said that she went to a Dr. Bitner at the Tanner Clinic the morning after the alleged assault for a medical examination. (T. 15) On cross examination she said the doctor she visited at the Tanner Clinic was a Dr. Cutler. (T. 31) Whatever his name, the doctor was not called as a witness to verify her testimony. She did not complain of any wounds, bruises or other marks. Her physical condition seemed to be unharmed.

Her failure to escape, the unexplained absence of any outcry, the delay in making formal complaint, and the lack of evidence of physical abuse, completely alter the tenor of her story and minimize the credibility of her claim:



“Unexplained failure to make outcry and delay in making complaint tend to show consent. The absence of visible injury to the prosecutrix by her alleged assailant or the spoiling or disarray of her garments are of probative value.” *Brown v. State*, 127 Wis. 193, 106 N. W. 536, 7 Ann. Cas. 258. See also: *Terry v. State*, 98 Tex. Cr. R. 540, 266 S. W. 511; *Stewart v. State*, 25 Ala. App. 266, 145 So. 162; *State v. Caldwell*, 212 No. Car. 484, 193 S. E. 716; *People v. Schiro*, 361 Ill. 117, 197 N. E. 535.

“Again, as bearing on the question of consent, is whether the person assaulted called for help or made other outcry, especially where help may reasonably be expected . . . (C)onsider carefully . . . the place where the alleged assault took place, the proximity of persons . . . calls for help or other outcry . . . and that she made prompt complaint to her husband and to the police.” *State v. Dill*, 42 Del. 533, 40 A. 2d 443.

“Upon a charge of rape, if consent appears, however reluctant it may be, there can be no conviction, and consent may sometimes be inferred if there has been no outcry and no serious resistance.” *State v. Marable*, 4 Wash. 2d 367, 103 P. 2d 1082. See also: *State v. Cobb*, 359 Mo. 373, 221 S.W. 2d 745.

The conviction is even more incredible in that she admitted being unfaithful to her husband, (T. 32, 34) and in light of testimony of her prior unchastity. (T. 57) It becomes quite evident that the situation now under examination was nothing more

than one where the prosecutrix, though at first unwilling to have intercourse with the accused because of her fear of a pregnancy, did not resist nor object to the act ultimately. The Wisconsin court reversed a conviction in a parallel situation where there was evidence of prior unchastity of the female, and where the defendant admitted intercourse:

“The court has carefully reviewed the record in this case and is of the opinion that the complaining witness failed to make anything approaching the utmost resistance required by the law, and that although somewhat unwilling, she ultimately consented to the acts in question, her unwillingness apparently being due to her fear of becoming pregnant rather than to any resentment about the manner in which she was being treated. Although she claimed she was thrown down, dragged and pulled under a wire fence, there were no marks either upon her person or clothing which indicated any such treatment. Her story is not only uncorroborated but improbable.” *Kaczmarzyk v. State*, 228 Wis. 247, 280 N.W. 362. See also: *Davis v. State*, 152 Ga. 320, 110 S.E. 18.

The friendship and intimacy of the principals further negates the guilt of the accused. The complaining witness asserted that her reason for not wanting the defendant in her trailer was because of her friendship with another woman with whom the defendant was also friendly. (T. 72) Though she was clothed only in a half-slip and a pair of panties, she made no effort to get out of bed, or

cover up when the defendant entered her bedroom. (T. 9) They talked for a time on the bed, and then began to neck and make love. (T. 66) She went to the bathroom, again without any effort to put on proper clothing, seemingly unaware of her lack of dress and completely unconcerned. (T. 23) Upon her return from the bathroom, they got in bed and spent two and one-half hours in each others arms. (T. 22) The defendant testified of having been in her trailer before, and both parties admitted prior friendship. (T. 17, 65) She showed a complete lack of fear, and no serious objection. To spend two and one-half hours in bed with one who has just raped her does not seem to be natural. These factual conditions wholly square with an Illinois case wherein the court reversed the conviction because of insufficiency of the evidence:

“She testified that he without any invitation came to her room dressed in his pajamas and a bathrobe. He told her he was lonesome, but that she told him she did not want to talk with him for fear of trouble with another woman with whom the evidence shows defendant was on friendly terms; that he had liquor, which he drank, but that she refused it, as she did not drink hard liquor; that the talked for awhile on matters of politics and the like.”  
*People v. Serrielle*, 354 Ill. 182, 188 N.E. 375.

The conduct of both parties after the alleged assault further distracts from the prosecutrix' claim. The evidence shows that after they left the bedroom

they went to the livingroom where they talked and smoked a cigarette prior to defendant's leaving the trailer. (T. 69) After he left, she returned to bed. (T. 13) The next morning he arose at his usual time, went to work, worked throughout the day, went to a movie that night with a girl friend. (T. 70) He freely admitted that they had intercourse, just as he vehemently denied that it was accomplished with force and without her consent. These are not the actions of a woman who has been violated, or a man who has committed a grievous crime. *State v. Cutrone*, 8. N.J. Super. 106, 73 A. 2d 354.

The prosecutrix' description of her resistance to the advances of the defendant is somewhat vague, and without detail. She summed it up as a "struggle," followed by her being "pinned" in such a manner as she was unable to move or to resist any longer. (T. 11, 12) Her claim of resistance becomes somewhat doubtful in considering her failure to cry out for help, or to escape when she got up off the bed and passed by the open rear door enroute to the bathroom, or the lack of evidence describing marks or bruises resulting from their wrestle. Her testimony makes a feigned and passive resistance and is insufficient to make a case of rape by force:

"The prosecutrix gives as her chief reason for yielding to defendant that she was 'afraid not to. At the same time, she makes it clear that he made no threats. He gave her to under-

stand that he was making none. She said she did kick and holler when he pushed her against the truck, but there is no evidence in the record of any struggle between them other than this. It is clear she could have escaped from the truck while he was walking around from the left to the right side of it. She made no effort to do so. There was no tearing of the clothing nor bruises or marks of violence on her body. There is no evidence of scratches or bruises, or other indications of a resistance, found on defendant. Her testimony makes a feigned and passive resistance which, in the absence of other circumstances, is insufficient to make a case of rape by force. 'Although some force be used, yet if she does not put forth all the power of resistance which she was capable of exerting under the circumstances it will not be rape.' " *Killingsworth v. State*, 154 Tex. Cr. R. 223, 226 S.W. 2d 456, citing *Perez v. State*, 50 Tex. Cr. R. 34, 94 S.W. 1036.

In both the cited cases, convictions were reversed.

The doctrine that one may be convicted of rape on the uncorroborated testimony of the prosecutrix is well founded. But just as well settled as the rule itself is the exception, that where her testimony is contradictory, uncertain or improbable, her testimony should then be corroborated. This corroboration should be of such dignity as to give it weight with the jury upon the question that the actual crime has been committed. It should not be such slight circumstances as to leave the court and jury to guess



or speculate that the crime has been committed and that the defendant is guilty. It is apparent that the testimony of the prosecutrix here is uncertain and improbable, and that throughout her testimony it is made obvious that her acts and failures to act wholly contradict the legal basis for a conviction of the defendant of the crime of rape. Her testimony stands uncorroborated. The evidence completely fails to sustain the conviction; the verdict of the jury and the judgment and sentence of the court should be set aside because of the lack of corroboration of the prosecutrix' testimony. It has not been proven, beyond all reasonable doubt, that Shirley Pies was forcibly raped by Larry Horne.

#### POINT II.

THAT THE COURT ERRED IN INSTRUCTING THE JURY ON THE REQUISITE EXTENT OF PENETRATION NECESSARY TO CONSTITUTE SEXUAL INTERCOURSE IN A PROSECUTION FOR RAPE, WHERE DEFENDANT HAD ADMITTED THAT AN ACT OF SEXUAL INTERCOURSE HAD BEEN CONSUMMATED.

The jury was instructed by the court that "(A)ny 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) The instruction was given over the objection of counsel, (T. 85) that defendant had admitted during the course of his direct examination that an act of sexual intercourse took place on the

night in question between he and the prosecutrix.  
(T. 69)

This court has repeatedly stated that an instruction, although it sets forth a correct legal proposition, not based upon or applicable to the issues raised by the pleadings and the evidence, is erroneous and prejudicial:

“It is familiar doctrine that it is erroneous to give instructions based on a state of facts of which there is no evidence tending to prove, though such instructions abstractly contain correct statements of the law.” *State v. Marasco*, 81 Utah 325, 17 P. 2d 919. See also: *State v. Baum*, 47 Utah 7, 151 P. 518; *State v. Siddoway*, 61 Utah 189, 211 P. 968.

In the cited case which was a prosecution for arson, the court’s instruction to the jury predicated, in part, conviction on finding that the accused had “. . . aided, counseled, and procured said burning” of the building, even though such a proposition was totally unsupported by the pleadings or evidence. The instruction was held erroneous and prejudicial, the conviction reversed, the case remanded for a new trial.

In the instant case the pleadings and evidence gave rise to no issue of whether or not an act of sexual intercourse took place. Both the prosecutrix and the defendant admitted the same, and the jury was under no responsibility to make any determination on this subject. The purpose of the instruction

is not clear. If the instruction meant to treat it as evidence, it violated the rule of singling out a particular piece of evidence. If the instruction aimed to treat the acts as one of the unlawful events upon which the information was drawn, and the action predicated, it failed because of the lack of any factual issue to which it pertained. In either event there was no basis to support the court's instruction, and the giving of such was erroneous and prejudicial to the accused, improperly appealing to the sympathies and prejudices of the jury. *Wolf v. United States*, 259 F. 388. The essential guilt of rape is not the act of intercourse itself, but the outrage to the person and feeling of the female. Section 76-53-17, Utah Code Annotated, 1953.

### POINT III.

THAT THE COURT ERRED IN INSTRUCTING THE JURY THAT THE CONDUCT OF THE FEMALE PERSON NEED ONLY BE SUCH AS TO MAKE NON-CONSENT AND ACTUAL RESISTANCE REASONABLY MANIFEST.

The jury was instructed by the court that "The conduct of the female person need only be such as to make non-consent and actual resistance reasonably manifest" in order to convict the defendant of the crime charged. (R. 13) This instruction closely contrasts a similar instruction given by a trial court to a jury in a case wherein the defendant was also charged with the crime of rape. The jury there be-



came so confused as to the extent and meaning of resistance that they wholly failed to comprehend the import of the defense, and the requirements of the law. *State v. Beeny*, 115 Utah 168, 203 P. 2d 397.

It is widely held that the State, in a prosecution for rape, must establish beyond reasonable doubt that utmost reluctance and resistance on the part of the female was exhibited. *State v. Whittinghill*, supra; *State v. McCune*, supra. The cited cases do not stand for the proposition that *the* utmost resistance be shown, but utmost reluctance and resistance. Where there is no evidence of threats, it is incumbent upon the court to instruct the jury that the female must have been shown to have in fact made an actual, physical, honest attempt to resist the defendant's advances . . . efforts concomitant with her ability and opportunities. *State v. Roberts*, 91 Utah 117, 63 P. 2d 584; *State v. Christensen*, 73 Utah 575, 276 P. 163. The law obviously requires more than merely demonstrating that her conduct suggests she resisted in some degree. Instead it must be shown that the woman resented the attack made upon her in good faith and without pretense, with an active determination to prevent the violation upon her person:

“Although some force be used, yet if she does not put forth all the power of resistance which she was capable of exerting under the

circumstances it will not be rape.” *Perez v. State*, *supra*.

In here heeding the instruction of the court, the jury may easily have returned their verdict, guilty of rape, when in fact all that was shown to them beyond reasonable doubt was evidence sufficient for conviction of a battery. *Kreiner v. United States*, 11 F. 2d 722, cert. den. 46 S. Ct. 639, 271 U. S. 688 70 L. Ed. 1152.

#### POINT IV.

THAT THE TESTIMONY OF THELMA BABCOCK RECITING PARTICULARS AND DETAILS OF THE ALLEGED OFFENSE AS RELATED TO HER BY THE PROSECUTRIX WAS HEARSAY AND INADMISSIBLE, AND WAS PREJUDICIAL TO THE DEFENDANT.

The State called Thelma Babcock, a close friend of the prosecutrix, as a witness. After stating that the prosecutrix had come to her trailer on the morning of June 15th, she said (T. 37):

A. When she came to my trailer, or up to my apartment, I thought she had come up to tell me that she was going to work, but when I saw the expression on her face I knew something was badly wrong, and I asked her, I said: “Shirley, what is wrong?”

Q. Did she respond?

A. Yes.

Q. What did she say?

A. She said: “Thelma, I’m in terrible trouble.” She said: “Larry Horne entered my trailer last night, and raped me,” was the very words she said.

It is well settled in this state that in a prosecution for rape, while it is competent to give testimony, as an exception to the hearsay rule, that the prosecutrix complained that someone had sexual intercourse with her, forcibly and against her will, it is not competent to give testimony as to the name of the person or who it was that committed the outrage upon her:

“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.” *State v. Martinez*, 7 Utah 2d 387, 326 P. 2d 102.

“... (I)t is not competent to give testimony as to the name of the person or who it was that committed the outrage upon her ...” *State v. Christensen*, *supra*. See also: *State v. Tellay*, 100 Utah 25, 110 P. 2d 342; *State v. Neel*, 21 Utah 151, 60 P. 510.

Counsel's failure to make timely objection to the question when propounded by the prosecutor

at the trial is not fatal to this assignment of error, nor does it bar the court from now considering the effect of her reply upon the rights of the defendant. *People v. Holmes*, 292 Mich. 212, 290 N.W. 384. The prosecutor knew his witness, and well understood what she would testify, and that her testimony could irrevocably prejudice the defendant in that it might be accepted by the jury to nearly the same extent as if she were testifying as an eye-witness to the alleged offense . . . irrevocably in that once her testimony was before the jury the harm was done, the error completed; motions and objections could not then repair the injury to the defendant. Knowing this, as the prosecutor surely must have, he framed his question in such a manner as to elicit specifically the answer he got: "Larry Horne entered my trailer last night, and raped me."

This court has well stated the sober responsibility of a prosecutor:

"Both the court and the prosecutor should be zealous in protecting the rights of an accused, and should carefully refrain from doing or saying anything from which it might be inferred that an unfair advantage was taken of a defendant." *State v. Jameson*, 103 Utah 129, 134 P. 2d 173.

It is submitted that this duty, incumbent upon the prosecutor, was breached, in that he failed to make certain that the defendant, accused of such a crime, difficult at best to defend, was fully protected from

conviction by any means tainted with unfairness or prejudice.

POINT V.

THAT THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL.

Defendant timely and properly moved for a new trial, (R. 27) which was denied by the court. (R. 29)

The grant or refusal of a new trial generally rests in the sound discretion of the court. Such discretion, however, is not mere caprice, but the exercise of a deliberate judgment, founded on well established principles, having for its aim the promotion of justice and the protection of the innocent. When ruling on such a motion, it is incumbent upon the court to make its determination upon the merits of the motion itself. *State v. Weaver*, 78 Utah 555, 6 P. 2d 167. Such discretion has been said to be perhaps the greatest protection of the accused against the mistakes and prejudices of the jury. *State v. Maloney*, 115 La. 498, 39 So. 539. Where there is any doubt as to the duty to grant a new trial, it should be resolved in favor of the defendant. 23 C.J.S. 1121, § 1422. The court is referred to each of the points hereinbefore alleged, as proper grounds in support of the defendant's motion.

Where the prosecutor has been guilty of conduct calculated to arouse prejudice against the defendant, and to prevent him from having a fair

trial, a conviction will be set aside and a new trial granted. *Brasher v. State*, 22 Ala. App. 79, 112 So. 535; *Neely v. State*, 60 Okla. Cr. 99, 61 P. 2d 741; *Hager v. State*, 10 Okla. Cr. 9, 133 P. 263. This is especially true where the improper conduct or the results thereof cannot be obviated by timely objection and appropriate action as is here the case. *Carlile v. State*, 129 Fla. 860, 176 So. 862; *State v. McIntyre*, 203 Iowa 451, 212 N.W. 757.

The erroneous instructions of the court are also grounds for a new trial, in that they misled and misdirected the jury. *Arnold v. United States*, 94 F. 2d 499.

The motion should have been granted because of the insufficiency of the evidence, *Fuson v. Commonwealth*, 230 Ky. 761, 20 S.W. 2d 742, in that the verdict of the jury was clearly against the weight of the evidence, there being reasonable doubt as to the accused's guilt. *People v. White*, 85 Cal. App. 241, 259 P. 76.

The serious errors of the court and prosecutor; the lack of substantial evidence in support of the accusation against the defendant; the strong presumption of falsity of the prosecutrix' testimony; . . . for these reasons it is submitted that the failure of the court to grant defendant's motion for a new trial was an abuse of discretion and is reversible error.



## POINT VI.

THAT THE ERRORS OF THE COURT WERE CUMULATIVE AND WHEN VIEWED IN CONNECTION WITH EACH OTHER RESULTED IN PREJUDICE TO THE DEFENDANT.

It is a fundamental rule that even though the errors of the court, if they were considered to be separate and isolated instances may not amount to the deprivation of a fair trial, if the various errors combine to reach that result, prejudice to the defendant may be shown. *State v. Moore*, 111 Utah 458, 183 P. 2d 973. This is especially so in a case of the nature of the instant action, as the court has recognized:

“There are some criminal offenses that by their inherent nature are so repulsive or even so abhorrent to most people that the mere accusation, unless accompanied by every precaution of law, creates a prejudice. Rape is among these.” *State v. Whittinghill*, *supra*.

It is submitted that the errors of the court and prosecutor as set forth heretofore do constitute prejudice to the defendant and did in fact deprive him of a fair trial.

## CONCLUSION

It is submitted that the conviction of this defendant should be reversed in that the errors of the court and prosecutor, and the lack of sufficient evi-

dence, resulted in a deprivation of a fair and impartial trial for the accused, and that the verdict of the jury was based upon bias, passion and prejudice, and not upon the evidence adduced at the trial.

Respectfully submitted,

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