

1963

State of Utah v. Larry Myers : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE **FILED**
STATE OF UTAH AUG 19 1963

STATE OF UTAH,

Plaintiff and Respondent,

vs.

LARRY MYERS,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No.

9937

BRIEF OF RESPONDENT

APPEAL FROM THE SECOND JUDICIAL DISTRICT
COURT, WEBER COUNTY, STATE OF UTAH
HONORABLE JOHN F. WAHLQUIST, JUDGE

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

LARRY MYERS,

Defendant and Appellant.

Case No.

9937

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The appellant appeals from a conviction for the crime of rape committed upon his ten year old daughter in violation of 76-53-15(1), U. C. A. 1953.

DISPOSITION IN LOWER COURT

The appellant was tried for the crime of rape in the Second Judicial District Court, Weber County, State of

Utah. He was convicted upon jury trial, and has appealed from that conviction.

RELIEF SOUGHT ON APPEAL

The respondent contends the conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts:

The appellant, Larry Myers, during October, 1962, resided with his daughter, Sherry, age 10 (R. 52, 117) and her two brothers in Ogden, Utah (R. 52). His daughter had previously that year resided with her aunt, but when school started, left and resided with her father and a woman named Theo, who shortly thereafter left the home (R. 54). After the woman, Theo, left, the appellant, Sherry's father, had sexual intercourse with her on several occasions. She testified (R. 54):

“Q. All right, now after Theo left and left with her children, where did you sleep then?

“A. Four or five days after she left, I slept in my father's bedroom with him.

“* * *

“A. Well, my; the first time it happened I was in my bedroom and my brothers had already gone to bed and I was in on my bed and getting the covers down and I was in the bed and my father came in and told me to come in his bedroom and I said, ‘no,’ and I just kept on saying ‘no,’ and he finally

got up and he told me to, and I came, just, I'm scared of my father and I didn't want him to hit me so I did.

"Q. Now, tell us what happened then when you went into your father's bedroom.

"A. I went in my father's bedroom and he locked the door and told me to take off my clothes and I did, and then he told me to lay down on the bed, and I did, and he took off all his clothes and then he laid on top of me and put his, took some Jergens lotion and put it inside of me and then he put some on his thing and then he laid down and he put it in me and started to go up and down."

Approximately four to five days later he again had sexual intercourse with his daughter (R. 57), and about ten days thereafter a third experience occurred (R. 58). On October 19, 1962, the Friday before deer season, the appellant again forced himself on his daughter (R. 59). She testified:

"* * * I was just going to bed and my father was making the rounds turning the lights off when I was in bed. My father came in and he told me to go get in his bed, so he just kept on saying that, so I got up and I went over and I went in his bedroom and he locked the door, and he locked the door, and he stood up and took off his shorts and he laid me down and he put some Jergens lotion inside of me and then he put some on him, and then he laid down on top of me and he put his thing in me and started to go up and down again, and when he was doing this, when he was through, when he was through he told me. we were just talking and he told me it isn't very nice. but he told me, he said, 'your grandma is going to die.'

"Q. Is that what he said?

"A. That is his exact words.

"Q. Now, while he was going up and down, did you do anything to stop him?

"A. Yes, I jerked it out once and he hit me in the forehead right here (indicating).

"Q. What did he hit you with?

"A. His hand, his fist.

"Q. And then what did he do?

"A. Then he put it back in and he started to go up and down again.

"Q. And then after that what did you do?

"A. When he was all through I was all wet and I was bleeding and I went and sat on the toilet again, and I put my pants on and my pajamas on and he told me to lay down in his bed, so I did. I stayed there until in the morning and it was real early, they went deer hunting; they went up to the Carters, and my father was,—."

On October 29, 1962, Sherry was examined by a pediatrician, Doctor Homer R. Rich, who testified as to Sherry's condition (R. 107) :

"A. She was chronologically ten years of age, according to my records and her maturity was that of an average ten year old girl, which is prepubescent, that is, she is still an infant as regards her sexual development, there is no axillary hair, no pubic hair, and no beginning maturation or secon-

dary sexual development as evidence by pubic hair or enlargement of the labia or other parts of the external genitalia. In other words, she was infantile.

“* * *”

(R. 108) :

“A. This child was unusual in that, first of all, a glove finger could be inserted into the vaginal canal which would be absolutely impossible under normal circumstances, and there was marked redness, irritation, inflammation of the internal introitus which includes the inner parts of the vulva and the vaginal canal.

“Q. Now, when you say introitus, you mean by that the entrance to the vagina?

“A. Entrance to the vagina, that is correct.

“Q. What about within the vaginal canal or inside of this little girl?

“A. Normally the hymen is seen, maybe four or five millimeters from the beginning of the labia minora which is the small lips of the female genitalia, the hymen, the shreds of it could be seen torn, red and inflamed, and as the labia were separated I could look into the vaginal canal which I have never been able to look into in a child of this age in my practice.

“* * *”

(R. 109) :

“A. Well, marked redness inflammation of the entire structure into the vaginal canal and also of the labia majora and minora, in other words, the

entire external genitalia or the lower portion of the vaginal area was inflamed and irritated.”

Although Sherry admitted being kicked in her private parts which induced bleeding (R. 66) the Doctor testified in his opinion that neither masturbation or a kick could cause the damage he observed (R. 110-113). He testified penetration could have caused the damage (R. 110).

At the time the appellant was being booked on the charge, he stated to the officer, “Can’t you make that a lesser charge, like molesting instead of rape?” (R. 95).

The appellant offered evidence that he had been a good father, that the child the day after the incident of October 19, 1962, had appeared friendly and loving to him and made no complaint to friends; that the child had previously in her life indicated malice towards her father, and that no fresh complaint was made.

Based on the above evidence the jury convicted.

ARGUMENT

POINT I.

**THE COURT DID NOT DENY THE ACCUSED
A FAIR TRIAL SINCE**

**A. NO EXCLUSION OF ANY PERSONS WAS
MADE EXCEPT DURING THE OPENING
ARGUMENT OF THE PROSECUTION,
AND THAT WAS LIMITED TO WITNESSES.**

- B. APPELLANT'S RELATIVES AND MEMBERS OF THE PRESS WERE PRESENT DURING THE TRIAL.
- C. THE TRIAL COURT'S ACTIONS WERE NOT OTHERWISE PREJUDICIAL.

The appellant, in his brief, argues that the trial court committed error by excluding the witnesses from the courtroom and thus denied the accused a public trial. The issue is not appropos to the facts of record. After the jury was sworn, the Assistant District Attorney made a motion to exclude spectators from the courtroom (R. 22). The prosecution obviously based its motion on 78-7-4, U. C. A. 1953, which provides :

"In an action of divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the court may, in its discretion, exclude all persons who are not directly interested therein, except jurors, witnesses and officers of the court; and in any cause the court may, in its discretion, during the examination of a witness exclude any and all other witnesses in the cause."

The trial judge refused to exclude spectators, but said, (R. 23) :

"THE COURT: To the extent only. I will grant it only as to the witnesses. If you want that, you can have that. If you don't want it, they can come back.

"MR. NEWHEY: We do desire that, Your Honor.

"THE COURT: All right, you may proceed."

The defense counsel did not, at that time, object to the limited exclusion, although he had previously objected on the grounds that exclusion of witnesses was not what the prosecution had requested (R. 23). Thereafter, the prosecution, in the absence of witnesses, made its opening address to the jury. Other persons were present, including members of the press (R. 4, 22, 23). Subsequently, the defense counsel made his previous objection more specific (R. 31) and argument out of the presence of the jury was had (R. 31-34). Thereafter, before any evidence was presented, the prosecution withdrew its motion (R. 35). Again argument was had (R. 35-38). The trial judge finally ruled that the trial would be held in open court with all persons, including witnesses, being present (R. 39):

“THE COURT: Let the record show the announcement in the courtroom is that the trial will be public. Let anybody in and out that wants to come in and out. Proceed.”

Thereafter, the first witness was called and the trial proceeded as a public trial. The appellant's mother and grandmother were present during the trial as were other spectators and friends (R. 195). The appellant's contention, therefore, that he was denied a “public trial” is not in accord with the facts. The trial, as such, was conducted as an open public trial, except that potential witnesses were excluded during the prosecution's opening argument only. Therefore, what appellant has argued in his brief is not appropos to the facts.

The only issue is, did what actually transpired, to wit: the exclusion of prospective witnesses only, during the

prosecution's opening address, violate any rights of the appellant? The issue has not been directly passed on in this state. 78-7-4, U. C. A. 1953. as noted above, provides in its relevant part:

“* * * and in any cause the court may, in its discretion, during the examination of a witness exclude any and all other witnesses in the cause.”

It should be noted that the exclusion is discretionary with the court, as to “any and all witnesses.” In *State v. Bonza*, 72 Utah 177, 269 Pac. 480 (1928), the court had an issue similar to the instant one except the trial judge, after allowing the public to hear part of the prosecutrix's testimony, excluded all persons for the remainder of the trial. The Supreme Court, of course, reversed, but in doing so noted:

“* * * If, as was held in the case of *State v. Callahan*, supra, it was necessary to temporarily exclude spectators from the courtroom so that the trial could proceed, and the order of exclusion went no further, we would not be disposed to hold such an order error. * * *”

Thus the court relying on *State v. Callahan*, 100 Minn. 63, 110 N. W. 342, indicated that a temporary exclusion of all spectators would not be error. In the instant case, it was only witnesses, not the public who were temporarily excused. In the *Bonza* case, the court found also that the exclusion of witnesses, even though one who might have been a witness was allowed to remain, was not error. The Utah authority would, therefore, seem to indicate no claim of prejudice could be made in the instant case.

In *State v. Moore*, 111 Utah 458, 183 P. 2d 973 (1947), the court was faced with a situation where witnesses were excluded, but the prosecutrix had not been. In finding no prejudice, the court commented:

“Appellant also claims prejudice by reason of the fact that the court invoked the exclusion rule, but permitted the prosecutrix to remain in the courtroom during the trial when she was not testifying as a witness. Appellant objected to her presence, but the court ruled that she might remain to consult with the district attorney. Inasmuch as the prosecutrix was the complaining witness and had occasion to be available at all times to advise the district attorney as to facts, and for the further reason that she was the first witness called to testify, and that by way of rebuttal she merely categorically denied certain testimony of defense witnesses, the court did not abuse its discretion, and no prejudice resulted.”

In *State v. Smith*, 90 Utah 482, 62 P. 2d 1110 (1936), this court held it was not improper to exclude part of the public and also to exclude witnesses, even where one witness remained in the courtroom.

In *State v. Beckstead*, 96 Utah 528, 88 P. 2d 461 (1939), the terms of what is now 78-7-4, U. C. A. 1953, were considered. The court held the right to exclude all persons as set out in the first part of the statute must be limited to civil trials, but that the discretionary power to exclude witnesses was proper in a criminal case. The court expressly noted that the exclusion of witnesses only “avoids any constitutional conflict.”

The instant case does not involve a broad exclusionary order, or even a temporary order excluding the public. The exclusion was only some of the witnesses, for a period only during the prosecution's argument, which actually would be helpful to the defense since prosecution witnesses would not have their recollection refreshed by the prosecutor's opening statement. This is certainly not what was condemned in *State v. Jordan*, 57 Utah 612, 196 Pac. 565 (1921) and *State v. Bonza*, 72 Utah 177, 269 Pac. 480 (1928). The court has relied on a statement in I Cooley, Constitutional Limitations, p. 647, as to what is encompassed by a public trial. It should be noted that it is therein stated that the purpose of the proviso or rule is to allow a "reasonable proportion of the public to attend." In the instant case there was a reasonable proportion of the public present at all times. The right to a public trial has limitations; thus Moreland, *Modern Criminal Procedure*, (1959), p. 261 notes:

"The public trial concept, however, while firmly engrained in our common law and in the federal and most state constitutions, has never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom and generally to further the judicial administration of criminal justice. But this language is general. More specifically, it has been held that the court may limit the number of spectators in the interest of health and sanitation or in order to prevent overcrowding or disorder. It has also been recognized that the court may temporarily exclude spectators where necessary

to enable an immature or emotionally disturbed witness to testify. In other words, there is an authority residing in the court to permit something less than a 'public trial' under certain circumstances."

See also Note, 49 Columbia L. Rev. 110, 111 (1949); 6 Wigmore, Evidence, Sec. 1834.

Finally, the appellant, in the last part of his brief, makes objection to the necessity of having to object before the jury to the prosecution's motion for exclusion. Every objection, not relating to evidence that the jury should not hear, is properly made in open court. In the instant case it could as easily help accused as hinder him by showing the jury that he had nothing to hide, and preferred a "public judgment." In *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912 (1908), the prosecution moved for exclusion, defendant objected and the court denied exclusion, noting he would but for his lack of power.¹ On appeal the defendant, who was convicted of a lascivious act with his own daughter, contended the judge's statement and the necessity of objecting to be error. The court found no error, noting:

"* * * The objection and exception to the court's statement upon that ground cannot be of any avail to the defendant. The court did not order the spectators to leave and remain from the courtroom during the trial, but explicitly declared that it had no power to do so. When the spectators withdrew from the room they certainly must have done so with a full understanding, from the remarks of the court, that they were not compelled under the law or the ruling of the court to retire. Whether

¹It should be noted here that the trial judge correctly ruled he could not exclude spectators because of the Constitution.

they did or not, it is very plain that an order excluding spectators was not made by the court, and that, if the defendant was deprived of the high constitutional privilege of having the public listen to the witnesses detail facts and circumstances tending to prove against him the commission of acts, the offensive and noxious odors from which would drive a polecat into bankruptcy, it was due less to the remarks of the court than to the commendable sense of decency with which the citizens of Red Bluff comported themselves with reference to the trial."

The above case is almost on all fours with this one. No error can be claimed.

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN REJECTING APPELLANT'S MOTION FOR MISTRIAL AS TO OFFICER DYER'S TESTIMONY.

The appellant contends that the trial court erred in not granting a mistrial because of statements made by Officer Dyer, while being cross-examined by appellant's counsel. Just what particular facet of Officer Dyer's testimony is found objectionable is not pinpointed: however, a complete review of the testimony will show no impropriety or prejudice.

At the time of the prosecution's opening statement the following was said, (R. 24) :

"* * * You know that this case, as well as the defendant's case will be presented to you through witnesses and actually only evidence is to be con-

sidered by you, not what I say in my opening statement or what Mr. Bingham may say, if he makes one.

“Really, our only purpose in making an opening statement is, we hope perhaps that we will enable you to better follow the evidence as presented here today. Now, the state expects to call at this time about four witnesses. Frankly, there will be two primary witnesses and the other witnesses will be very, very brief.”

The two primary witnesses referred to were the prosecutrix and the doctor. It was obvious that the latter person's testimony was that which convinced the jury, since after retiring they requested his testimony be reread, which was done, and thereafter a verdict of guilty was returned.

Officer Dyer was one of the “brief” witnesses. With reference to his expected testimony it was said during opening argument, (R. 29) :

“* * * We will call Officer Dyer who will briefly tell you that when this defendant was charged with the crime of rape and was advised that he was charged with the crime of rape, that instead of the defendant turning and denying it as a father would—.

“MR. BINGHAM: (Interposing) I object to this form of testimony. It is highly argumentative. He is not telling what the evidence will be. He is arguing the impact and effect of it.

“THE COURT: The objection is sustained.

“MR. NEWAY: Pardon me, Your Honor. We will show when this defendant is advised and charged with the crime of rape he turned to the

officer and said, 'you can't make it a lesser charge, something like that, fondling or that?'

"MR. BINGHAM: Like what?

"MR. NEWEY: Fondling, I believe that was the word. It may have been a little different.

"Officer Dyer will testify as to exactly what the defendant said, and he will testify that this defendant did not deny it, but merely asked Tim, 'can't you make it a reduced charge?' "

Thereafter, following the testimony of the prosecutrix and prior to the testimony of Doctor Rich, Officer Dyer was called. He had not been present during the prosecution's opening argument. He testified that he was an officer with the Youth Bureau of the Ogden City Police Department (R. 93), and that at the time of booking the following occurred. (R. 95) :

"A. The jailer asked me what I wanted him booked for, and I told the jailer, for the charge of rape. and then Larry Myers made a statement to me. He said, 'Officer Dyer, can't you make that a lesser charge, like molesting instead of rape.' "

Thus, his testimony was essentially the same as the prosecutor had said it would be. The testimony of Officer Dyer was to an express admission of the appellant, against appellant's interest, at the time of booking.

On cross-examination the defense counsel sought to show that the accused had denied the charge of rape during the time he was with Officer Dyer.² The following occurred, (R. 96) :

²This scope of cross-examination exceeded the time and subject of direct.

"Q. Were you present here in court when Mr. Newey gave his opening statement to the jury?

"A. No, I was barred from the courtroom.

"Q. I see. Now, is it true that Mr. Myers didn't deny the charge of rape?

"A. What was this again?

"Q. Did Mr. Myers deny to you that he was guilty of rape; yes, or no?

"A. I don't get your question. Would you repeat it again?

"Q. When a man is arrested and charged with a crime, the officer asks him if he is guilty of this thing. You do this, don't you?

"A. On this case or other cases?

"Q. On any case, when you arrest a man of a crime, you ask him if he is guilty or innocent, don't you. Did you do it or didn't you?

"A. No, we don't ask a fellow if he is guilty or innocent, no.

"Q. Do you mean to tell me if I got arrested for a charge like this you wouldn't ask me if I did it?

"A. I didn't ask him if he did it.

"Q. Is it your testimony under oath that you didn't ask Larry Myers if he committed this offense or not?

"A. That's right, I didn't ask him that.

"Q. Is it your testimony that that is standard police procedure not to ask an accused person if he did the offense that he is charged with?

"A. Now, state that question again, please, I don't get what the question is.

"Q. Is it my understanding that it is standard police procedure when you arrest a person not to ask him whether he has done the offense that he is charged with?

"A. It all depends on whether you have other cases with this person or not. We know him pretty well.

"Q. Thank you, Sir.

"A. Yes, sir.

"Q. Your Honor, I have a matter to be brought up in the absence of the jury at this time.

"THE COURT: The motion is denied.

"Q. What has Mr. Myers been guilty of? Name one thing. I don't know what his complete record is.

"Q. What has he been guilty of?

"A. I don't know what his complete record is.

"Q. Name me anything, anything that this man is guilty of, you name me one thing.

"A. (No response.)

"Q. You have had experience with this man, you know him. What has he been guilty of? You've told the jury that.

"A. (No response.)

"Q. Now, you tell the jury why you said that.

"A. You asked me.

"Q. I didn't ask you.

"A. You did, you asked me why.

"A. All right, I'll ask you this. You said the reason why you didn't ask Mr. Myers why he was guilty or innocent of raping his ten year old daughter is because you had experience with him in the past. Is that right?

"A. Yes, sir; that is right.

"Q. Therefore, you knew that he wouldn't answer you. Is that right?

"A. Yes, sir.

"Q. So you didn't bother to ask him. Right?

"A. Yes, sir; that is right.

"Q. And he never denied it, is that right.

"A. Let's see. Wait a minute now. We had a conversation down in my office. Of course I haven't been asked all about the conversation though.

"Q. He never denied it, right? The charge of rape, he never denied it, right?

"A. Yes, he did, down in my office.

"Q. And strongly and violently, didn't he?

"A. Yes, I believe he did.

"Q. So violently that he threatened to punch you, didn't he?

"A. No, he never threatened to punch me.

"Q. Did he deny it as violently as you have ever seen a man deny a charge, in your opinion?

"A. No, it wasn't that violent.

"Q. All right, then he did deny his guilt, didn't he. Officer Dyer?

"A. Yes, sir; down in my office.

"Q. Well, did you ask him?

"A. No, I didn't.

"Q. On, he just did it on his own?

"A. No, I just told him he was arrested for the charge of rape.

"Q. What did he say?

"A. I don't know the exact words.

"THE COURT: Answer as near as you can what he said.

"A. Well, I told him that his daughter Sherry had stated that he had committed sex relations with her and that I was placing him under arrest for this charge of rape on the statement that his daughter had made the night before, which was on Sunday night, and he said, 'well, I didn't rape her.' He said, 'I don't know anything about it.' "

Apparently counsel for the appellant had misconstrued what the prosecution was going to show by way of evidence,

that of an admission against interest, rather than a failure to deny guilt. This might have been due to some ambiguity in the opening statement, but it was clear, after the evidence was presented, in just what area the prosecution had presented testimony and thus limited its case. Thereafter, defense counsel entered into a new area, and having asked questions of the officer in such area, he cannot complain of the answers received. The officer did not mention any previous crimes, but merely that he knew the appellant "pretty well" and, therefore, would not bother to ask the accused whether he was guilty or not. This evidence, when viewed in the light that it was presented by the defense, while exceeding the scope of direct, was not incriminatory or informative of other criminal activity of the accused, was on a relatively minor point of evidence, was diluted by the fact, that on cross-examination the officer admitted the accused protested his guilt. Finally, the statement did not appear to weigh in the jury's mind. Additively, no basis for a claim of prejudice is manifest.

No claim of prejudice can be sustained from the ambiguity of the prosecution's opening statement, since the testimony of Officer Dyer was in substance just as the prosecution said it would be. Even if it were slightly different, this is no basis for error, since it is well settled that:

“* * * the fact that the prosecuting attorney stated more than he is able to prove, is not prejudicial error provided he makes such statement in good faith. * * *”

Abbott, Criminal Trial Practice. 4th Ed., p. 466.

See *State v. Broadhurst*, 184 Ore. 178, 196 P. 2d 407; *State v. Welsh*, 138 Kan. 379, 26 P. 2d 592 (1933); *People v. Chalmers*, 5 Utah 201, 14 Pac. 131 (1887).

Nor can error be claimed from the innocuous statement that the appellant was well known to Officer Dyer. First, because the answer was to a question posed by counsel for appellant, and, secondly, nothing connecting the accused with a crime was stated, nor did the officer indicate any such knowledge. In *Cahill v. People*, 111 Colo. 173, 138 P. 2d 936 (1943), a much more serious, but similar remark was held not to constitute reversible error. The witness for the prosecution in a larceny case, being cross-examined as to what had happened to some previously missing cattle, stated that they were stolen and that a confession from the men who stole them had been given, inferring the guilt of the defendant. Defense counsel immediately moved to strike and claimed prejudicial error. The Colorado Supreme Court noted that the witness had testified that she had no real knowledge of any theft and concluded that no prejudicial error occurred:

“It is said reversible error arose from the failure of the court to sustain the motion to strike. The answer to which the motion was directed, which gave the witness’ view of the effect of the evidence already before the jury, did no more than accentuate, as she consistently admitted, that she had no personal knowledge of the theft. Considering her previous admissions in this respect and the form of the question, it cannot be considered that counsel was surprised by the answer or that the cause of defendant was injured in any degree thereby.”

See also *People v. Zammora*, 66 C. A. 2d 166, 152 P. 2d 180 (reference to accused as being in a "gang"); *People v. Mason*, 65 C. A. 2d 5, 149 P. 2d 742 (inference of prostitution); *State v. Cofer*, 73 Ida. 181, 249 P. 2d 197 (inference of immorality).

Clearly, where there was actual evidence of the defendant having many wives (R. 80), and living with other women, a statement that he was "known" by the youth officer is not error. To hold otherwise would make a mountain of a molehill and deny to people essential justice.

POINT III.

THE COURT COMMITTED NO ERROR IN NOTING FOR THE RECORD WHAT WAS OBVIOUS TO THE JURY AND A MATTER OF VISIBLE FACT AND WHICH WAS INFORMATIVE OF WHAT WAS OCCURRING DURING TRIAL.

The appellant contends it was error for the trial court during the course of the cross-examination of the prosecutrix, when the defense asked the prosecutrix why she was looking at her aunt before answering each question, to make the following comment, (R. 75) :

"THE COURT: The record may show that counsel stands between Aunt Freda and the witness."

This was merely a statement for the record of what was obvious to all who were in court, but would not be obvious to an appellate court. It could have two possible adverse

inferences. First, that the reason Sherry was looking at her aunt was because her aunt was in direct view when she was replying to counsel; secondly, that counsel would block the view to some extent. A more innocuous statement could hardly be imagined. No objection was made to the court's action, so that it is arguable that the matter has not been preserved for appeal. *State v. Kerns*, 50 N. D. 927, 198 N. W. 698. Even so, the incident was not improper. In Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 236, it is noted :

“The trial court has inherent power to do everything reasonably necessary for the administration of justice within the scope of its jurisdiction. It is his duty to so supervise and regulate the course of a trial that *the truth shall be revealed* in so far as it may be within the established rules of evidence.”
(Emphasis added.)

Certainly, where the judge has a right to interrogate a witness, he would also have a right to point out what is visible for all, but would be silent in the record. It is difficult to see how such a statement caused any prejudice.

Additionally, it is asserted that the trial court committed error, after a side bar conference, when he noted for the record what had transpired at that conference, (R. 135) :

“THE COURT: The record may show there has been an injection which might tend to bear upon this woman's mental capacity and the court has ruled that you may ask. You may proceed.”

The court did not comment on its feelings of guilt or innocence, or the evidence to be presented, but merely allowed the prosecution to go forward with its evidence. An additional notation for the record, out of the presence of the jury, was made, reflecting, (R. 200) :

“THE COURT: Put in your evidence tomorrow of what your information is. In view of the representation made to me at the bench plus the misconduct of this particular witness during the trial, I think it is all right to let him ask it.”

All the trial judge previously did was note for the record the fact that the prosecution had relevant evidence on the credibility of one defense witness, and that it was proper for him to go forward with his proof. Thereafter, psychiatric testimony was presented by two doctors to the effect that at the times relevant to the witness's testimony, she had been under psychiatric care. The witness herself admitted psychiatric treatment for drugs. Clearly therefore, there was nothing improper in the trial judge merely noting for the record what had occurred.³

Even if there was impropriety, subsequent testimony of record did more to destroy the witness than what the trial judge may have done. Consequently, no error can be claimed. *State v. Riddle*, 112 Utah 356, 188 P. 2d 449; *State v. Dodge*, 12 U. 2d 293, 365 P. 2d 798 (1961); *State v. Neal*, 1 U. 2d 122, 127, 262 P. 2d 756.

Finally, it must be noted that the court did not comment on the evidence, indicate any belief as to the guilt of

³Notably the prosecution was overly cautious and afforded the witness the physician-patient privilege in a criminal case where none exists — 78-24-8, U. C. A. 1953.

the accused, or afford the jury any basis to conclude he felt the appellant guilty. No objection was made to the court's statements. Few more unmeritorious claims have been pressed before appellate tribunals than those assertions advanced on this point by the appellant.

POINT IV.

THE RECORD DEMONSTRATES THAT APPELLANT WAS AFFORDED A FAIR TRIAL AND THAT SUBSTANTIAL JUSTICE WAS DONE.

The appellant claims cumulative error, but as can be seen, no errors have in fact been demonstrated. Such an argument may be meritorious where a series of errors are admitted, the totality of which would induce a jury to unjustly convict, *State v. St. Clair*, 3 U. 2d 230, 282 P. 2d 323 (1955). In the instant case however, a complete examination of the record reveals a superabundance of caution on behalf of both the judge and the prosecution, to the extent of seriously prejudicing the case. the prosecution could present. The essence of the proper application of criminal law is the affirmative answer to the question: Was essential justice done? In this instance, it clearly was afforded the appellant. Consequently there is no merit to the contention of cumulative error.

CONCLUSION

The appellant was convicted of a despicable crime, but what is more important, his conviction was based upon

overwhelming, substantial, credible evidence of guilt. The jury obviously weighed the evidence thoroughly and concluded the appellant's guilt was conclusively proved beyond any reasonable doubt. The record in the instant case supports that contention, but in addition, shows a conscientious concern of both the prosecution and the court for the accused's rights, and for fair play in the face of a determined and capable defense. To reverse the instant case would serve neither the ends of justice nor the advancement of the law, but rather, would promote injustice, destroy respect to the courts, and depreciate the individual right of a citizen to be free of injury, without just cause, to his body and person. Jeremy Bentham, the incisive English legal reformist, once commented that "the law was an ass". He did so attacking the theory of jurisprudence then being proffered in England — technical and strict adherence to legal formalism. Bentham concluded this could be a two-edged sword. An overly technical application of the law could work both ways; it could unjustifiedly acquit or unjustifiedly convict. He advocated reform, but phrased it in terms of essential justice. Such was done in the instant case.

This court, in pursuit of that end, must affirm.

Respectfully submitted,

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