1984

The State of Utah v. Joseph Lovato : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,		
Plaintiff/Respondent	:	
vs.	:	
JOSEPH LOVATO,	:	Case No. 18993
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from conviction and judgment of Aggravated Sexual Assault, a First Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction and judgment of Aggravated Sexual Assault, a First Degree Felony, in violation of Title 76, Chapter 5, Section 405, Utah Code Annotated (1953 as amended).

DISPOSITION IN THE LOWER COURT

Appellant's motion for a directed verdict to the jury ordering them to bring back a verdict of not guilty was denied. The jury found the appellant guilty of aggravated sexual assault. Pursuant to the verdict, appellant was sentence to a term of five years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction of Aggravated Sexual Assault or, in the alternative, that his case be remanded to the District Court for a new trial.

STATEMENT OF FACTS

On January 17, 1982, between 1:30 a.m. and 2:00 a.m., several people dropped by the apartment where Carmelito Romero ("Complainant") was staying (T.5,7,9). Complainant knew before hand that one of the men, John Hall, was coming over, but did not know the others would stop by (T.7). Joseph Lovato ("Appellant") was among the people at the apartment (T.8).

The group listened to music, used the phone and talked for a couple hours before everyone except complainant left (T.6,9). Appellant could not get a ride home so he returned to the apartment and asked complainant if he could use her phone to call for a ride (T.10-11).

Complainant let appellant in and he made two calls from the phone located in the bedroom in an attempt to get a ride (T.11, 205,235). Appellant spoke with his aunt at about 3:25 a.m. and, after speaking with her, expected a cab to arrive at the apartment (T. 207,235).

While complainant and appellant agree that sexual intercourse took place between them that night, their testimony about how that came about differs.

According to appellant, after he made his calls, complainant told him she was pregnant and that her boyfriend left her because of it and she did not know what she was going to do (T.208). Complainant then went into the bathroom and returned wearing only a white jersey and black panties and invited appellant into the

bedroom (T. 209). They had sexual intercourse, by mutual consent, with complainant on top and appellant underneath, on his back throughout (T.209). They also engaged in cunnilingus and fellatio (T. 64-65). Appellant never took off his clothes because he had seen a suitcase and work boots in the apartment, and expected a man to return for them (T.209).

The pocket knife appellant had used earlier at the apartment to clean his nails was in his pocket (T. 203,210). It had a single small, dull blade (T. 203,204). It fell out of appellant's pocket during intercourse (T. 56,210). According to both complainant and appellant, complainant found the knife in the bed and gave it to appellant (T. 56,210). The knife was lost by the prosecution and not placed into evidence at trial (T.190-192).

Complainant testified at trial that appellant grabbed her by the bones of the throat while she stood with him at the front door (T. 14,50,51). The front door was open (T. 51). According to complainant (at trial) appellant had one hand on her throat and held the knife to her temple with the other hand, then dragged her into the bedroom (T. 51-54). There was no testimony as to how or whether the front door was ever closed although complainant's testimony indicates that it was not open later when Nils Swenson came over (T. 26-27,78-79).

On the night of the incident, complainant told the officer a different version--that she initially did not want to let appellant into the apartment and that she was carried into the bedroom and thrown onto the bed before a knife was drawn (T. 145-146).

Complainant also testified at trial that appellant threw her against the bed, floor and walls (T. 18). She had not previously mentioned being thrown against the walls (T. 146). She had no bruises on her back, arms or throat (T. 62,95-100). Neither her clothing nor underpants were torn (T. 62). She did not kick, scratch, bite or yell (T. 56).

The night of the incident, complainant told both appellant and Officer Davis that she was pregnant (T. 70,146-147,208). However, at trial she testified, or at least implied by her testimony, that she had not been pregnant at the time (T. 70,84).

Complainant and appellant turned on the television and talked after the intercourse. Complainant testified that she did not know where the knife was during this time, and that she did not pay much attention to where it was (T.69-70).

At some point during their time alone together, appellant and complainant discussed complainant's cousin, Julia, and another woman, Charlena, and appellant's relationship with them (T. 66-67). Complainant asked appellant "what Charlena was to him" and believed Charlena was his girlfriend (T. 66-67). Appellant thought this conversation took place before they had intercourse; complainant testified that she brought the subject up after they had intercourse (T. 52,66-67).

Complainant was angry with Julia and Charlena on the night of the incident. She believed Charelena had cut the waterbed (T. 39-40,67-68).

At about 6:00 a.m., complainant told appellant that her "father" was coming to get the suitcase and boots, and that she needed to call him (T. 21-22,68-69). Appellant helped her find the phone number in the phone book (T. 68-69). Complainant actually telephoned Nils Swenson, the man who paid rent for the apartment, owned the waterbed, and allowed complainant to stay at the apartment rent free (T. 21-22,60-69). Appellant was awake when complainant dialed and knew that complainant's "father" might be coming to the apartment (T.70-71). Appellant lay on the bed fully clothed and fell asleep in the midst of complainant's conversation with Nils Swenson (T. 71).

About half an hour after complainant phoned him, Nils Swenson arrived at the apartment (T. 26). Throughout that period, appellant lay sleeping on the bed (T. 73,76). Complainant was in the kitchen and living room, and was as near the front door as the bedroom while appellant slept. Had appellant been awake, he would not have been able to see the front door without leaning to the side of the bed (T. 72,86-87).

There were apartments on both sides of the apartment, in addition to a store and laundry (T. 121-122). Numerous overcrowdedapartments were across the street (T. 122-123). Although appellant was asleep for over half an hour, complainant did not leave the apartment nor call for help (T. 74-78).

When Nils Swenson finally arrived, complainant held a note up to the front window telling him to call the police (T. 27,112).

Swenson stepped closer to the door to read the note (T. 112). Complainant did not leave the apartment when Swenson arrived, she chose to remain with appellant (T. 78-79).

Swenson went to the corner and called the police (T. 113). The police arrived and parked out of view (T. 113,133-134). Several minutes later, complainant exited the apartment (T. 134). Officer Davis was impressed by how controlled she was (T. 135).

Appellant was still asleep, stomach down, when the officers entered the bedroom and cuffed him from the rear (T. 140).

Complainant was examined following the incident. While no sperm was found in her vagina, sperm was found in the crotch of her underwear (T. 93,158).

Following the incident, a rape crisis volunteer filled out an incident report form (T. 173). The form indicated that complainant's last sexual intercourse prior to the incident occurred on January 25, 1981 (T. 242). Defense counsel was not permitted to ask that question nor to attempt to establish that complainant had intercourse less than forty eight hours prior to the incident even though complainant had already made it clear to the jury that she was not chaste (see T. 19,238-246).

Following the examination, complainant was given medication to abort pregnancy and eliminate venereal disease (T. 79,102).

Appellant was tried and convicted of aggravated sexual assault, a first degree felony.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ADMIT EVIDENCE OF COMPLAINANT'S LAST SEXUAL INTERCOURSE PRIOR TO THE INCIDENT.

A. THE EVIDENCE SHOULD HAVE BEEN ADMITTED TO SHOW COMPLAINANT CONSENTED TO THE ACT.

It has long been the rule in Utah that where a defendant in a rape case claims that no intercourse occurred, evidence of a complainant's prior sexual activity or chastity is not admissible. See State v. Scott, 188 P. 860 (Utah 1920); State v. Sims, 517 P.2d 466 (Utah 1975); State v. Johns, 615 P.2d 1260 (Utah 1980). However, where the critical issue is consent, courts have admitted such evidence. See State v. Howard, 544 P.2d 466,469; State v. Scott, supra at 864. The probative value of such evidence was set forth in State v. Scott, supra at 864:

> Where the defendant admits the sexual act, but contends that the proseuctrix consented thereto, and where, as here, she is of lawful age, such evidence is relevant and material upon the question of consent. While it is true that even a prostitute may refuse consent to the sexual act, yet, in contemplation of the law, a lewd woman is much more likely to consent to such an act than a chaste woman would be. Hence, evidence that the prosecutrix was generally reputed to be unchaste is relevant for the purpose just stated.

In recent years, this Court has recognized the inherent prejudice caused a complainant where evidence of her prior

unchastity is introduced as well as the embarassment and ordeal a complainant can be subjected to when such evidence is admitted. See State v. Johns, supra. On the other hand, this Court has recognized that a rape accusation generally evolves from a situation involving only two people and is easy to charge but difficult to defend. State v. Herzog, 610 P.2d 1281,1283 (Utah 1980); State v. Horne, 364 P.2d 109,112 (Utah 1961); State v. Howard, 544 P.2d 466, 469 (Utah 1975).

In State v. Johns, supra, this Court resolved the tension between these two competing concerns by acknowledging that evidence of a complainant's prior sexual activity may be relevant where consent is at issue, but can only be admitted where the probative value of such evidence outweighs the inherent danger of unfair prejudice as well as the possibility of confusion of issues, unwarranted invasion of privacy and needless presentation of issues. See State v. Johns, supra.

In State v. Pope, 545 P.2d 946 (Arizona 1976), the Arizona Supreme Court recognized that there are certain situations where evidence of prior unchaste acts of the complainant has sufficient probative value to outweigh the inflamatory effect and require admission. "These would include evidence. . . which directly refutes physical or scientific evidence, such as the victim's alleged loss of virginity, the orgin of semen, disease or pregnancy," State v. Pope, supra at 255.

In this case, the probative value of evidence that complainant had sexual intercourse with someone other than appellant

within forty eight hours of the incident clearly outweighs the concerns set forth in State v. Johns, supra.

The fact that complainant had intercourse with someone immediately prior to the intercourse with appellant would have bolstered appellant's theory that complainant was pregnant, or at least believed herself to be, and that complainant had venereal disease and consented to intercourse, thereafter accusing appellant of rape, in an effort to shield herself. The evidence indicates that complainant was pregnant at the time of the incident, or at least believed herself to be, since she told both appellant and the police officer at the scene that she was pregnant (See T. 70,146-147,208).

The evidence also suggests that complainant transferred some form of venereal disease to appellant. Appellant had not had intercourse for over a month prior to the incidenct with complainant; two weeks after the incident, while still confined in the county jail, appellant contracted a form of venereal disease which could have been sexually transmitted (see T. 212-214,200). It was appellant's theory that complainant desired to protect herself by accusing appellant and possibly obtaining medication to abort the pregnancy and eliminate the venereal disease. Evidence that complainant had recent sex with another would have enhanced this theory.

In addition, the existence of sperm on the crotch of complainant's underwear was introduced as physical evidence by

the proseuction to bolster its case. The sperm was not directly linked to appellant, however, absent information that complainant had sex with another immediately prior to the incident with appellant, it is safe to assume that the jury made such a connection and considered the location of the sperm as probative to the proseuction's case. Evidence that complainant had recent sex with another would have caused the jury to question who deposited the sperm. As the evidence stood, no such question would arise. When such evidence is coupled with evidence that complainant was angry with Charlena and believed Charlena to be appellant's girlfriend, the case showing complainant's motive to consent and later to lie is strengthened.

Clearly, evidence that complainant had prior sex with another is probative to the issue of consent since it shows complainant had a reason to consent in order to shield herself and could raise questions as to physical evidence introduced by prosecution to show lack of consent.

The probative value of such evidence outweighs the concerns set forth in State v. Johns, supra.

First, there would be no undue prejudice by admitting this evidence. Complainant had already made it clear to the jury that she was not inexperienced when she explained to the Court and jury that she did not like cunnilingus (T.19). The implication in such statement is, of course, that she is sexually experienced and experienced enough to know her prefences. In

light of this, she would not be prejudiced by introduction of evidence that she had previously had sexual intercourse since she had already made the jury aware of that fact.

Second, there would not have been a confusion of the issues. Appellant merely wanted to establish that the bruises and semen could have been caused by another and that complainant had a reason to consent and thereafter implicate appellant.

Nor would there be invasion of privacy or needless presentation of evidence. Defense counsel endeavored to ask only one question. No names were sought and, as previously stated, complainant had already clarified to the jury that she was sexually experienced.

In balance, it is clear that the probative value of such evidence outweigh the other considerations, and therefore, should have been admitted.

The excluded evidence would probably have had a substantial influence in bringing about a different verdict, since evidence of sexual intercourse immediately prior to the incident when combined with evidence of complainant's pregnancy and anger at Charlena would have bolstered appellant's theory and possibily caused the jury to return a different verdict. In light of this, the verdict should be overturned. See Rules of Evidence 5, Utah Code Ann. (as amended 1953).

B. ADMISSIBLE AS TO CREDIBILITY.

Although the issues of credibility of the complainant in a rape case and consent are somewhat overlapping, they are clearly two separate questions. See dicta in State v. Smith, 62 P.2d 1110,1113 (Utah 1936).

While the law does not and should not recognize any connection between veracity of a witness and her sexual promiscuity prior sexual acts can provide a motive to alter the truth when testifying. See State v. Scott, supra at 865; State v. Johns, supra at 1264.

In State v. Scott, supra at 865, this court stated in dicta that in a prosecution for rape where the defendant's theory was that the complainant was pregnant by another and prosecuting appellant to shield herself, it would be proper on cross-examination to establish that fact and to show complainant had intercourse with a third person. See also State v. Smith, supra at 1113.

Evidence that complainant had sex within forty eight hours of the incident would have been probative as to credibility, not because her veracity was linked to promiscuity, but because she may have had a motive to lie, i.e., that she was pregnant or had venereal disease, and desired to shield herself. This evidence, coupled with complainant's anger at Charlena whom she believed to be appellant's girlfriend, takes on even greater probative value.

Even where the balancing test set forth in State v. Johns, supra, is applied, this evidence, as previously outlined, outweighs concerns which might otherwise preclude its admission. Thus, the evidence should have been admitted.

In this case, where complainant is the principal witness against appellant, it is critical that appellant be permitted to attack complainant's credibility. Failure to admit evidence of complainant's last sexual intercourse prior to the incident severely hampered appellant and such evidence would probably have had a substantial impact on the minds of the jury.

C. THE COURT'S REFUSAL TO ADMIT SUCH EVIDENCE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM.

The Sixth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees an accused the right to confront witnesses against him. Article I, Section 12 of the Utah Constitution guarantees a similar right. The right to confront witnesses is more than a mere right to face witnesses; it includes the right of a defendant to cross-examine witnesses against him. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.ed.2d 347 (1974).

One aspect of cross-examination is the ability to expose a witness' motive in testifying. See State v. Maestas, 564 P.2d 1386, 1388 (Utah 1977). See also Davis v. Alaska, supra.

While limiting cross-examination is within the discretion

of the court, "(t)he court is particularly careful to allow wide latitude in areas of bias and motive for testifying," State v. Maestas, supra at 1258.

As previously outlined, evidence that complainant had intercourse within forty eight hours of the incident was relevant to the issues of consent and credibility of the complainant, and such relevancy outweighed any concerns as to undue prejudice, confusion of issues or needless presentation of evidence. Failure to admit such evidence inhibited appellant's opportunity to establish complainant's motive to testify falsely and to otherwise cross-examine complainant and thereby violated appellant's right to confront witnesses against him, thereby depriving him of due process of law.

POINT II

THE STATES FAILURE TO PRESERVE EVIDENCE IN ITS POSSESSION DENIED APPELLANT DUE PROCESS OF LAW.

The duty of the prosecution to preserve evidence in its possession has evolved from the prosecution's duty to disclose favorable evidence to an accused as set forth in Brady v. Maryland, 373 U.S. 83 (1963). In Brady v. Maryland, the U.S.S.C. held:

> that the suppression by the prosecution of evidence favorable to an accused upon request violates due process of law where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87.

The right to discovery set forth in Brady is applicable in three situations: (1) where state's case contains perjured testimony and such testimony could have affected the verdict, regardless if whether a request for discovery was made; (2) where the state fails to disclose evidence which was specifically requested; and (3) where undisclosed evidence raises a reasonable doubt as to guilt, regardless of whether such evidence was requested. See also Codianna v. Myers, 660 P.2d 1101,1106 (Utah, 1983); U.S. v. Agurs, 427 U.S. 97, 103-113 (1976).

Courts in other jurisdictions have expanded the prosecution's duty to disclose to include the duty to preserve evidence. In United States v. Bryant, 439 F.2d 643 (D.C.Cir. 1973), the Court remanded the case where the state did not preserve a tape recording between defendant and narcotics agents to determine: (1) the efforts by the state to preserve the tape; (2) the importance of the lost tape; and (3) the evidence of guilt at trial. Id. at 653. The court pointed out that the government bears a heavy burden to explain the loss, based on its duty to preserve evidence which might be favorable to the defendant. Id. at 652. See also State v. Wright, 87 Wash. 2d 783, 557 P.2d 1 (Wash. 1976); People v. Morgan, 606 P.2d 1296 (Colo. 1980).

Colorado applies a three prong test in determining whether destruction of evidence violates a defendant's due process rights:

(1) Whether evidence was suppressed or destroyed by prosecution;
(2) Whether evidence was exculpatory;
(3) Whether evidence was material to defendant's case.

State v. Morgan, supra.

Since in destruction cases the evidence no longer exists to determine whether it is favorable to defendant, courts have relaxed the materiality standard and found a due process violation where there was a "reasonable possibility that the evidence destroyed by the police or at their direction was material to guilt or innocence and favorable to appellant," State v. Wright, supra at 6.

This Court has not dealt directly with the prosecution's duty to preserve evidence. In State v. Stewart, 544 P.2d 477, (Utah 1975), this Court acknowledged that the deliberate suppression or destruction of evidence violates due process if such evidence was material. However, in the context of prosecutorial duty to disclose, this Court has acknowledged that good faith is irrelevant where evidence favorable to the accused is suppressed and a specific request for such evidence has been made. See State v. Jarrell, 608 P.2d 218 (Utah 1980).

The Jarrell court stated:

> The overriding concern in cases involving prosecutorial nondisclosure of evidence which tends to exculpate the defendant is the defendant's right to a fair trial in a criminal trial it is essential that evidence which tends to exonerate the defendant be aired as fully as that which tends to exonerate him.

Id. at 225.

This focus on fairness to the defendant rather than prosecutorial misconduct is found throughout the cases dealing with the

duty to disclose as well as the duty to preserve and should be applied in the present situation in determining whether failure to preserve the knife violated appellant's due process right.

In line with decisions in regard to the prosecution's duty to disclose and preserve evidence, appellant urges this Court to consider: (1) the role of the prosecution in regard to the failure to preserve the evidence; and (2) whether there was a reasonable possibility the evidence was material; and (3) whether the evidence was exculpatory.

In this case, the State failed to preserve the pocketknife appellant allegedly used to threaten complainant. The pocketknife had a single small dull blade (T. 203,204). Appellant used it as a screwdriver and to clean his nails (T. 203). Complainant was unintimidated enough by the knife that she returned it to appellant when she found it in the bed, and thereafter paid no attention to its location (T. 56,69,210).

Clearly, the prosecution had custody and control over the knife from the moment it was taken from appellant at the scene. The prosecution brought it as evidence to the preliminary hearing (T. 191). The loss can only be attributed to the prosecution, and good or bad faith of the prosectuion is irrelevant.

The knife is clearly material to the case since the charge of aggravated sexual assault, rather than rape, stems from use of the knife, and much of complainant's testimony revolved around the pocketknife.

There is a reasonable possibility that admission of the pocket-

knife would have tended to exculpate appellant. All of the testimony as to the knife showed it to be small, dull and more like a screwdriver or nail file than a knife. Admission of a small dull pocketknife could have created a less threatening, less frightening impression on the jury and when coupled with the inconsistencies in complainant's story and the other evidentiary problems set forth infra, it is likely that admission of such evidence would have had a significant impact on the jury.

Thus, the prosecution's failure to preserve the knife as evidence but nevertheless introduce testimony in regard to it violated appellant's due process rights and right to a fair trial, and caused prejudicial error, thereby requiring that the verdict be overturned.

POINT III

THERE IS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUSTAIN THE CONVICTION.

A. THE COMPLAINANT'S STORY IS SUFFICIENTLY INCONCLUSIVE OR INHERENTLY IMPROBABLE.

While the issues of whether a complainant consented or succumbed against her will are generally questions for the jury, a conviction must be overturned for lack of sufficient evidence where the evidence is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the appellant committed the crime of which he was convicted," State v. Petree, 659 P.2d 443,444 (Utah 1983)

iting State v. Kerekes, 622 P.2d 1161,1168 (Utah 1980). See also State v. Lamm, 606 P.2d 229,231 (Utah 1980); State v. Horne, 364 P.2d 109 (Utah 1961).

In a case where the charge is rape, the evidence must be carefully scrutinized to avoid unmerited conviction. State v. Stettina, 635 P.2d 74,77 (Utah 1981); see also State v. Herzog, 610 P.2d 1281,1283 (Utah 1980), State v. Horne, supra. The ease of the assertion of the charge and the difficulty of proving the defense other than by the appellant's denial should be considered in determining the sufficiency of the evidence. State v. Horne, 635 P.2d 109 (Utah 1961); State v. Herzog, 610 P.2d 1281, 1283 (Utah 1980). The intent of such scrutiny is "the protection of one who engages in intimate relations with another under the impression that all is proceeding by mutual consent, only to be faced later by a claim of rape," State v. Herzog, supra at 1283.

A careful consideration of the evidence in this case, in light of the case of the assertion and the difficulty of defense of the charge establishes that complainant's story is sufficiently inconclusive or inherently improbable so that reasonable minds would not find beyond a reasonable doubt that appellant committed the offense. The fabric of evidence against the appellant must cover the gap betwen the presumption of innocence and proof of guilt in order to sustain the conviction. State v. Petree, supra. In this case, even stretching the evidence to its limit, it fails to bridge that gap.

First, much of complainant's claim that appellant threatened her with serious bodily injury revolves around the pocketknife. As previously outlined, the only description of the blade of the knife is that it was a small, dull blade which was not in good working order to cut things, but functioned as a tool or screwdriver or for cleaning nails (T. 204). Appellant had used the knife earlier in the evening to clean his nails so complainant should have been aware he had a pocketknife in his possession (T. 203-204). The pocketknife ended up loose in the bed, complainant returned it to appellant (T. 56,210). After that, complainant did not pay attention to where the knife was (T. 69-70).

The description of the pocketknife coupled with the fact that complainant returned it to appellant then paid no attention to where it was shows that complainant was not frightened by the knife. In addition, as previously discussed, in spite of the prosecutorial duty to preserve evidence, the knife was not placed into evidence. Thus, this inconclusive testimony is the only evidence introduced in regard to the knife.

Complainant described scenes at both the front door and in the bedroom. She testified that appellant held a knife to her throat and cheek, but no knife marks were found on her and her clothing was not cut. Complainant also testified that appellant threw her against the floor, walls and headboard, but her arms, legs, back, head and torso were not bruised (T. 62,95-100). Absent any bruising, complainants tale of physical violence is inherently improbable.

As will be discussed later in more detail, complainant made several inconsistent statements at trial. Prior to trial, she stated that the knife did not come out until she was in the bedroom (T. 145-146). At trial, she testified for the first time in great detail that she was threatened with the knife at the open front door (T. 51-54). This major inconsistency in her tale makes the story inconclusive.

Complainant had several opportunities to escape or cry out for help. Her failure to do so when such opportunities presented themselves adds to the improbability of her version. According to complainant, the front door was open when appellant initially pulled the knife (T. 51). There were apartments on either side and numerous over-crowded apartments across the street but complainant did not cry out nor did she try to escape (T. 121-22, 86-87). Later, appellant helped complainant telephone her "father" (T. 68-69). Appellant fell asleep, fully clothed on the bed (T. 71). It took about half an hour for complainant's friend to arrive (T. 26). During that time, appellant slept and complainant moved around the living room and kitchen, but did not try to leave (T. 72,74-78,86-87).

When complainant's friend arrived, she showed him a note through the window, but again did not attempt to leave even though appellant was asleep (T. 27,78-79,112). She chose to stay more than five additional minutes with appellant even though she knew her friend was waiting outside (T. 133). This failure

to cry out or leave when presented with an adequate opportunity to do so enhances the improbability of complainant's story.

Finally, appellant's actions make complainant's story inconclusive. Appellant allegedly threatened and raped her, then helped her find a phone number to call "her father" (T. 21-22, 68-69). Appellant slept peacefully while complainant moved around the apartment and up until the time the officers placed the handcuffs on him (T. 71-73,76,140). This hardly suggests that appellant had just committed the crime charged.

In all, the evidence showing that appellant threatened complainant and that complainant did not consent to the act is sufficently inconclusive that reasonable minds could not find beyond a reasonable doubt that appellant committed the crime and therefore the conviction should be reversed.

B. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THE APPLICABLE LAW ON "CONSENT" AND "AGAINST THE WILL" IN A RAPE CASE.

Defense counsel proposed the following instructions:

> An act of sodomy or sexual intercourse is without the consent of the victim when the actor compels the victim to submit or participate by force that overcomes such earnest resistance that her age, strength of body and mind make it reasonable for her to do under the circumstances; or by any threat that would prevent resistance by a person of ordinary resolution. Such force or threats need not be limited to physical violence but may also include psychological and emotional stress or a combination of all three. Furthermore, it is not necessary to show that the victim engaged in heroics or subjected herself to great brutality or suffered or risked

serious wounds or injuries.

The law recognizes a number of factors which should be considered to determine if a sexual act was performed with or without the consent of one of the parties. One factor is evidence of marks or bruising on either party reflecting actual physical violence. Another factor is the opportunity to escape or whether the victim made an outcry. These can be reflected in the time of day of the incident, the isolated location of the incident, the possible sources of assistance in the sexual activity to the victim and any active participation by the victim. Likewise, the ease of assertion of the forcible accomplishment of the sexual act with the attendant difficulties of defending against such an assertion, and the proneness of the victim to assert force or violence when she realizes that her activities are likely to be discovered may also be considered. These factors and any which you may find in the evidence or lack thereof, can be considered by you in determining whether or not the victim consented to the sexual acts alleged to have occurred.

Appellant also requested that the following instruction be given:

> The essential element in rape is the forcing of intercourse upon a woman "without her consent" and "against her will." These terms do not mean the same thing because such an act might occur in circumstances which would be "without her consent" but which would not necessarily involve overcoming her will and her resistance, both of which must be proved. If one of these elements has not been proven beyond a reasonable doubt, then you must find the defendant not guilty of rape.

The court refused to give these instructions, and instead gave the following instructions:

INSTRUCTION NO. 13

> You are instructed that sexual intercourse occurs "without consent" under any one of the following situations:
>
> 1. When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably

be expected under the circumstances, or

2. The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution. [Emphasis added.]

INSTRUCTION NO. 14

In determining whether the victim's will and resistance were overcome, it is appropriate to consider that this may be accomplished by either physical force and violence or by psychological or emtional stress imposed upon her, or by a combination of them. As to the degree of resistance required: The victim need do no more than her age and her strength of body and mind make it reasonable for her to do under the circumstances to resist. It is not necessary that it be shown that she engaged in any heriocs or that she otherwise risked the assailant's brutality or infliction of serious wounds or injuries. [Emphasis added.]

Defense counsel made a timely objection to the Court's refusal to give instructions as requested.

It is well settled that a party is entitled to have his theory of the case submitted to the jury, and it is prejudicial error for the trial court to fail to instruct thereon where there is evidence to support such theory. Watters v. Querry, 626 P.2d 455 (Utah 1981); State v. Maestas, 564 P.2d 1386 (Utah 1977); Elington v. Foust, 618 P.2d 37 (Utah 1980).

The purpose of instructions to the jury is to inform them as to the applicable law and enable them to resolve the issues. Elkington v. Faust, supra at 40.

Where a trial is by jury, the court may not comment on the quality or credibility of the evidence. This means the court may not indicate it favors the position of either the

appellant or the state. State v. Sanders, 496 P.2d 270,275 (Utah 1972); State v. Schoenfeld, 545 P.2d 193,197 (Utah 1976).

The instruction as to consent proposed by appellant outlines the applicable law. The first sentence echoes Utah Code Ann. §76-5-406 (1953 as amended) which states in pertinent part:

> 76-5-406. Sexual intercourse, sodomy, or sexual abuse without consent of victim--Circumstances.--An act of sexual intercourse, sodomy, or sexual abuse is without consent of the victim under any of the following circumstances:
>
> (1) When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or
>
> (2) The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution; or . . .

The second and third sentences of the proposed instruction state that force or threats need not be limited to physical violence but may also include psychological stress, and that the victim need not show that she engaged in heroics. This language is found in State v. Studham, 572 P.2d 200 (Utah 1977). Thus, the first paragraph makes it clear that physical violence is not necessary to show a woman did not consent.

The second paragraph of the proposed instruction balances against the concerns of the first paragraph, and sets forth factors which may be considered to show whether the act was with consent. The second sentence would have informed the jury that bruising or other physical evidence may be taken into account.

See State v. Horne, 365 P.2d 109 (Utah 1961). Escape, outcry, source of assistance may also be considered in determining whether a woman consented. State v. Herzog, 610 P.2d 1231 (Utah 1980).

The Court chose to instruct the jury that the woman's will could be overcome by psychological stress rather than just physical force, that a victim must only act reasonably and need not engage in heroics. While these statements are found in case law, it is important that the jury be instructed as to factors it can take into account in determining whether a woman consented. As the instruction stands, it serves as an improper comment on the evidence. It essentially tells the jury the woman, referred to throughout as "victim" (which creates initial prejudice) need not be forced physcially or act in any specific manner or engage in heroics. Had the Court instructed the jury as requested, the jury would have been informed as to factors it could consider and not directed in their decision making process by weighted instructions suggesting that the complainant had acted properly.

The Court also refused to make it clear to the jury that forcing intercourse upon a woman "without her consent" or "against her will" are two distinct concepts. This distinction is set forth in State v. Studham, 572 P.2d 700 (Utah 1977).

Instructions to the jury as to the factors it could consider in determining whether the complainant consented and clarifying

that "against the will" is a different concept than consent could probably have had a substantial impact on the jury's decision.

As previously outlined, the complainant's story was inherently improbable and inconclusive. Had the jury not been given an instruction weighted in favor of the complainant, it is likely that the verdict would have been different. Therefore, it was reversible error for the court to instruct the jury in the manner set forth above.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT INSTRUCTING THE JURY AS TO THE LAW APPLICABLE TO INCONSISTENT STATEMENTS MADE BY A WITNESS.

Defense counsel requested that the following instruction be given to the jury:

> You are instructed that if a witness has made statements prior to the trial which are inconsistent with the testimony at trial, and that at the time of his prior statements he had adequate opportunity to perceive the event or condition his prior statements narrates, explains, or describes, you may consider such prior statements to be substantive evidence in this case of the truth of those prior statements and that the declarant of such statements has spoken falsely either at the trial or on that prior occasion.

The Court refused, and defense counsel made a timely objection to such refusal.

While the credibility of witnesses is generally a question

for the jury, the Court must instruct the jury as to the applicable law. Elkington v. Faust, supra at 40. State v. Matters, 645 P.2d 254 (Colo. 1982). In addition, a party is entitled to have his theory presented to the jury. Watters v. Querry, supra, State v. Maestas, supra.

Evidence Code Rule 63 (Utah Code Ann. 1953 as amended), applicable at the time of trial in this matter states in pertinent part:

> Hearsay Evidence Excluded - Exceptions
>
> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
> (1) Prior statements of witnesses. A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement, or (c) it will support testimony made by the witness in the present case when such testimony has been challenged.

Thus, prior inconsistent statements by a witness are admissible for purposes of impeachment and as substantive evidence of the truth of the matters stated. The instruction offered by defense counsel restates this rule of law.

The evidence shows that complainant, the principal and virtually sole witness against appellant, made several statements at reial which were not consistent with statements had made earlier. At the outset of her testimony, complainant stated that she had readily admitted appellant into her apartment when he

returned to use the phone (T.11). However, immediately after the incident she told police officers that she had not wanted to let him in (T. 145-146).

Complainant testified in depth as to the knife being drawn at the door and the way in which appellant held the knife to her throat while still at the door, whereas she had previously told the police that the knife was not drawn until after she and appellant were in the bedroom and she was on the bed (T. 14,50-54,145-146).

At trial, complainant testified that appellant threw her against the bed, floor, walls and headboard (T.18). She had not mentioned being thrown against the walls to police immediately after the incident (T. 146) or to the rape crisis volunteer who spoke with her immediately after the incident (T. 175).

Complainant implied by her testimony at trial that she was not pregnant on the night of the incident, but on the night in question she told both the officers and appellant that she was pregnant (T. 70,84,146-147,208).

Clearly, complainant made numerous statements at trial which were inconsistent with statements she had made to officers and others. Her credibility was of major importance since the evidence essentially consisted of her testimony against that of appellant.

In such a situation, it was imperative that the jury be instructed as to how to deal with such inconsistent statements and that such statements could be considered as substantive evidence in addition to raising questions about the credibility

of the complainant. Had the jury been instructed in this manner it is probable that they would have evaluated the evidence differently and found that the evidence did not show beyond a reasonable doubt that appellant was guilty of aggravated sexual assault.

The fact that complainant was pregnant, or believed herself to be pregnant on the night of the incident, was critical to appellant's theory that complainant agreed to have sexual intercourse with him and subsequently accused him of aggravated sexual assault to shield herself. Thus, it was critical to appellant's case that the jury understand that complainant's statements to officers and appellant that she was pregnant could be considered substantively for the truth of the matter stated.

Complainant's lengthy description of the knife scene at the front door was damaging to appellant; it was critical that the jury not only understand that she had previously made statements which were substantially different, but also that this statement and other inconsistencies should be looked at to determine the overall credibility of the witness.

Similarly, the story at trial as to how appellant threw her against walls and floors should have been evaluated in light of her overall credibility. Her changing story as to whether she voluntarily admitted appellant into her apartment raised additional questions as to her credibility, and the jury needed guidance as to how to evaluate her testimony.

In all cases where a witness makes inconsistent statements, the jury should be instructed as to how it can evaluate such inconsistencies. However, in a rape case where the complainant is essentially the sole witness against a defendant and some of the inconsistences, if looked at for substantive purposes, support the appellant's theory, it is essential that the jury be instructed as requested by defense counsel in order to adequately evaluate the evidence.

The trial court's failure to instruct the jury as to how to view inconsistent statements by a witness amounted to reversible error and the verdict should therefore be overturned.

CONCLUSION

Evidence that complainant had sexual intercourse within forty eight hours of the incident should have been admitted. Such evidence was relevant to the issues of consent and credibility of the complainant, and did not present any other overriding concerns which would have precluded such admission. Had such evidence been admitted, it is likely that the jury would have reached a different verdict. In addition, failure to admit such evidence violated appellant's constitutional rights to confront witnesses against him.

The right to due process of law is guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Utah Constitution. The appellant's due process right was violated when the State failed to preserve

the pocketknife which appellant alledgedly used to threaten complainant.

There was insufficient evidence to sustain the conviction. In a rape case, the evidence must be carefully scrutinized to avoid unmerited conviction. The State's case does not survive such scrutiny. Complainant's story was inherently improbable and inconclusive. In addition, the jury was not properly instructed on the law of consent.

Finally, the trial court failed to properly instruct the jury as to the law regarding inconsistent statements by a witness. In this case, complainant's credibility was an essential issue since she was the principal witness. In addition, the jury should have been made aware that her prior statements could be considered substantively. Failure to do so, where, as here, prior statements supported appellant's case, is reversible error.

While each of these errors, standing alone, was significant enough to require reversal, the cumulative effect of such errors magnifies the unfairness at trial and is sufficient to mandate reversal of the conviction or a remand for a new trial.

For all of the foregoing reasons, and all of the reasons to be presented at oral argument, if any, appellant respectfully requests that the conviction in this case be reversed or, in the alternative, the matter be remanded for new trial.

Respectfully submitted this ____ day of April, 1984.

JOAN C. WATT

DELIVERED two copies of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this ____ day of April, 1984.