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

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 18993
JOSEPH LOVATO, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

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,
PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 18993
JOSEPH LOVATO, :
Defendant-Appellant. :

STATEMENT OF THE NATURE OF THE CASE

Appellant, Joseph Lovato, appeals from a conviction and a judgment of Aggravated Sexual Assault, a first degree felony, in violation of Utah Code Ann. § 76-5-405 (1953 as amended).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury in Third Judicial District Court from December 13-15, 1983, Judge Leary presiding. He was found guilty of Aggravated Sexual Assault, a first degree felony, and sentenced to a term of not less than five years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdict and judgment of guilty of Aggravated Sexual Assault.

STATEMENT OF FACTS

Carmelito Romero, the 18 year old victim, moved from Pocatello, Idaho to Salt Lake City in search of employment in December of 1981. Nils Swenson, a long-time friend of hers, allowed her to stay at his apartment rent-free while she looked for work. Mr. Swenson worked in the oil fields of Wyoming and was out of town most of the time (T. 110). When in town, Swenson resided at the Miles Hotel because he was almost 60 years old and had no desire to share an apartment with female teenager (T. 121).

On January 17, 1982, at approximately 1:30 a.m., Carmelito's cousin Julia brought a group of her friends over to meet Carmelito; appellant was among the group (T. 202). The visitors departed around 3:00 a.m. because Carmelito told them she had to work the next morning. After everyone left, Carmelito set her alarm and went to bed wearing a pair of blue sweat pants, a "Highland Rams" jersey shirt and her panties (T. 10).

About ten minutes later, she heard a knock on the door. She opened the door to find appellant standing there alone. Appellant asked Carmelito if he could come in and use her phone to get a ride home (T. 11). Carmelito was hesitant, but reluctantly allowed him to use the phone because he was her cousin's friend (T. 47-48). Appellant went into Carmelito's bedroom and made two phone calls while Carmelito remained in the living room. After he called, Carmelito asked

appellant to leave because she had to work in the morning (T. 11). Appellant asked if he could wait inside, Carmelito suggested that he wait outside on the corner where it was lighted and his ride could more easily find him (T. 12). Appellant complained that it was cold outside and preferred to remain inside. Once again, she asked him to leave (T. 12). At this point, appellant said he didn't want to leave and grabbed her by the throat. Carmelito reached for the door, but appellant shut it. She then realized appellant had pulled a white, pearl-handled pocket knife out and put it to her head and throat. Appellant then told her he wanted sex and, if she refused, he would "cut [her] cunt." (T. 16). Carmelito was frightened and pleaded with appellant not to hurt her (T. 16). While Carmelito struggled to escape, appellant dragged her into the bedroom, and threw her on the bed. Carmelito jumped off, but then appellant threw her against the wall and floor. In the process her neck and lip were bruised (T. 90, 169-170). As the struggle continued, appellant held the knife to her throat and told her to take off her clothes, but Camelito refused. Appellant grabbed a towel, placed it around her throat and attempted to choke her; however, Carmelito managed to pull the towel away from him (T. 19). However, during this struggle, appellant pulled Carmelito's sweat pants down and forced her to have sexual intercourse. Appellant also forced Carmelito to submit to cunnilingus and to perform fellatio (T. 64-65).

After the intercourse occurred, Carmelito kept telling appellant that her "father" was going to be home around 6:00 a.m. She told appellant that Nils Swenson, the lessee of the apartment, was her father (although he is not) and that she must call him because he had to go to work and might have overslept (T. 22). She telephoned Swenson while appellant dozed on the bed. As appellant slept, Carmelito whispered into the phone "come over here right away." (T. 24).

It took Nils Swenson about 20 minutes to arrive. As he walked to the door he noticed a note being held up to the window from inside the apartment. It said, "Call a cop, please." Carmelito had written the note after calling Nils and held it to the window (T. 25). Nils went to a pay phone on the corner, called the police, and waited for their arrival (T. 27-28; 112-113).

Carmelito remained in the apartment until the police arrived. While waiting, she went into the kitchen and grabbed a knife out of the drawer. She was going to enter the bedroom and stab appellant as he lay asleep on the bed. Carmelito changed her mind and put the knife back, believing that she would go to prison if she stabbed him (T. 28). As she put the knife away, the police arrived and she ran out the door (T. 28).

She approached Nils and the officers, told them she had been raped and that appellant was inside, armed with a knife (T. 29). Nils described her as hysterical and in tears

as he tried to comfort her as the officers approached the home to apprehend appellant (T. 114-115).

The officers approached the front door, which was partially open (T. 128). They could see part of the appellant, lying face down, asleep on the bed (T. 128). They quietly approached appellant and, after a struggle, cuffed him and told him he had been accused of raping Carmelito. They read him his rights and asked if he would care to give his side of the story. Appellant denied having intercourse, he stated he was just visiting Carmelito (T. 129). He was searched, and a small pocket knife was seized (T. 130-131). At this point, appellant was placed under arrest for aggravated sexual assault (T. 131).

Carmelito was taken to Holy Cross Hospital for an examination. The examining physician, Dr. Atkinson, noted signs to trauma, specifically a bruised lip and red marks on her neck (T. 90-92). No semen was found in the vaginal specimen taken; however, semen was found in her panties (T. 158-159).

While at the hospital, Carmelito was interviewed by Gae Duersch, a long-time volunteer from the Rape Crisis Center. Carmelito appeared "uptight" and had a red mark on her neck (T. 167-169). As they talked, Carmelito was visibly upset and wept (T. 167). During this interview, Carmelito recalled the details of appellant's attack and answered personal questions, including the date of her last intercourse which the Rape Crisis volunteer recorded as January 15, 1981. (The date actually was January 15, 1982. It appears that the

incorrect year was recorded. Thus, her last consensual sexual intercourse was within 48 hours of the rape).

At trial, appellant chose to testify (T. 201). He changed his story and admitted having sexual intercourse (T. 209). Appellant testified that he talked with Carmelito after calling his aunt for a ride home. Carmelito told him that she was pregnant and that her boyfriend had left her and she was worried about her future (T.208). She then got up and went to the bathroom. When she returned, she was wearing only her white jersey and her panties. She asked him to go to bed. They then went into the bedroom and engaged in consensual sexual intercourse (I. 209). Appellant's theory at trial was that Carmelito fabricated the rape in order to obtain an abortion and medication for venereal disease, which she allegedly suffered from. Appellant admitted he possessed a knife that night (T. 203, 204). He testified that he used the knife to clean his nails that evening as the group socialized with Carmelito.

After all the evidence was presented and the arguments were heard, the jury convicted appellant of aggravated sexual assault in violation of Utah Code Ann. § 76-5-405 (1953 as amended). He was sentenced to an indeterminate sentence of five years to life in the Utah State Prison.

ARGUMENT

POINT I

THE TRIAL COURT'S EXCLUSION OF THE DATE OF THE COMPLAINT'S LAST SEXUAL INTERCOURSE WAS PROPER.

- A. THE DATE OF THE VICTIM'S LAST SEXUAL INTERCOURSE IS IRRELEVANT TO THE ISSUE OF CONSENT.

Appellant asserts that the date of Carmelito's last sexual intercourse, as documented by the Rape Crisis counselor, should have been admitted to show that she had consented to sexual intercourse within forty-eight hours of the alleged rape. He claims that this evidence would have bolstered his theory that Carmelito believed that she was both pregnant and suffering from venereal disease and therefore consented to intercourse with appellant in order to obtain an abortion and medication for the venereal disease by claiming that appellant had raped her. (Brief for Appellant at 9).

The focal point of the trial was the issue of consent. Appellant admitted his return to the apartment after everyone had left. He admitted having the pocket knife which the victim described in his possession that evening and even admitted having the knife open to clean his nails earlier in the evening. Appellant admitted having sexual intercourse with Carmelito but denied that he used his knife to force her to submit to intercourse.

Appellant's attempt to admit into evidence the date of Carmelito's last consensual intercourse presents the issue of whether past specific acts of sexual intercourse by the prosecutrix may be admitted to show consent where the defendant admits sexual intercourse occurred. Inquiry into past specific acts of intercourse with individuals other than the defendant is irrelevant, highly prejudicial and would further deter victims from reporting rapes or other violent sexual assaults.

The inappropriateness of inquiry into the victim's past sexual experience has long been recognized. Courts have been troubled with finding the proper balance between the defendant's right to confront his accuser and senseless interrogation of a rape victim.

In Utah, the case law regarding interrogation of a rape victim was originally set forth in State v. Scott, 55 Utah 553, 188 P. 800 (1920):

Where the defendant admits the sexual act, but contends that the prosecutrix consented thereto, and where as here, she is of lawful age, such evidence (general reputation for chastity or prosecutrix) is relevant and material upon the question of consent. . . .

188 P. 864.

[However], the authorities are very numerous, indeed the great weight of authority is to the effect, that the prosecutrix cannot be interrogated on cross-examination as to whether she had had sexual intercourse with others than

the defendant. The doctrine is based upon the fact, and the great weight of authority is to the effect, that specific acts of intercourse with others than the defendant may not be shown. If it is desired to prove that the prosecutrix is a lewd woman, that may only be done by attacking her general reputation for chastity and morality, and not by showing specific acts of wrongdoing. . . .

(emphasis added)

This principle of limiting inquiry into the victim's general reputation for chastity and honesty was reaffirmed in State v. Smith, Utah, 62 P.2d 1110 (1936). In Smith, the Court explained the logic behind excluding the victim's past isolated instances of intercourse with individuals other than the defendant.

In cases of rape where the prosecutrix is over the age of consent, her bad reputation for chastity is a proper matter for consideration of the jury as affecting her credibility and bearing on the probability of consent. State v. McCune, 16 Utah 170, 51 Pac 818; 1 Wharton's Crim. Evid. 481. . . In some jurisdiction the courts hold that the prosecuting witness may be examined as to previous acts of immorality on her part as affecting her credibility as a witness [cites omitted]. There are grounds for distinction between examination of a prosecutrix as to previous conduct showing her to be a common prostitute and merely as to isolated acts of intercourse. The former conduct would indicate a low state of morals and affect credibility as a witness, while isolated acts might have no such bearing. [cite omitted.] [emphasis added]

The principle of excluding past specific acts of intercourse is still followed by this Court. In State v.

Howard, Utah 544 P.2d 466 (1975) this Court recognized that many rape offenses go unreported due to the "embarrassment and humiliation" that the victim must go through at trial. The Court observed further that all women, regardless of their moral character, deserve to be free from forcible violation of their body. Supra at 469. In an effort to minimize the intrusion into the victim's personal life, the Court followed the majority rule: that it is improper for the trial judge to permit inquiry into specific acts of prior misconduct of the victim. Unless it reasonably appears such evidence would have sufficient probative value to outweigh any detrimental effect. Supra at 469.

To determine the probative value of the evidence, the Howard court found it helpful to distinguish between two types of factual situation in such "consent" cases. First, if there was an unwelcomed intrusion, by force or "some form of trick or deception" then whatever slight probative value the victim's past specific acts of intercourse might have on the issue of consent it is greatly outweighed by the prejudice against the victim. Second, under the circumstances where the parties meet consensually and then the atmosphere changes to violence, then the probative value may be found to outweigh the prejudicial value of admitting prior act of intercourse. Id. at 470. In the instant case appellant returned to Carmelito's apartment after everyone had been told to leave. He gained admittance under the guise of needing a ride home.

Thus, he deceived Carmelito into allowing him in. Once inside Carmelito's apartment, appellant's use of force and threats of force coerced Carmelito into having intercourse with him. Under these facts, the Howard test indicates that the probative value of the victim's last intercourse is not sufficient to outweigh the prejudicial effect of such evidence.

Later in State v. Johns, Utah, 615 P.2d 1260 (1980) this Court established the current standard for admitting evidence of a rape victim's past promiscuity. In Johns, the victim was giving the drunken defendant a ride home when he pulled a knife, put it to her throat and demanded she stop the car. Once the car was stopped, the defendant forcibly sodomized and raped her. The defendant admitted intercourse, but claimed consent. This Court concluded that evidence of the victim's past sexual relations was properly excluded. The Court then stated that such evidence should not be admitted unless the "probative value outweighs the inherent danger of unfair prejudice to the prosecutrix." 615 P.2d at 1264. In balancing these competing considerations, the Court explained that trial judges should consider various factors, including; (a) relevancy and probative value; (b) prejudicial effect; (c) confusion of the issues and undue consumption of time; and (d) substantial justice. 615 P.2d at 1263. The ruling of the trial court as to these factors will not be reversed on review unless an abuse of discretion is proved. Id. After considering these factors in Johns, the Court concluded that "specific evidence

of the prosecutix's prior sexual activity is not relevant to the issue of her consent or any other material issue." Id. at 1264. In reaching this conclusion, the Court stressed the particular circumstances of the case, noting that the defendant did not know the victim prior to the incident. The Court also stressed that the defendant admitted he drew a knife, but denied holding it to the victim's throat, and also admitted engaging in sodomy and sexual intercourse. Under these circumstances, the Johns court concluded that specific acts of past consensual intercourse with another had no bearing on consent in this instance. Id.

The factors which led to the exclusion of the evidence in Johns are all present in the instant case as well. Here, appellant had never met Carmelito prior to the evening that he sexually assaulted her. Like the defendant in Johns, appellant admitted having his knife out that night but claimed he only used it to clean his nails. Appellant also admitted engaging in sodomy and sexual intercourse. Just as this Court concluded in Johns, Carmelito's past sexual activity with other men has absolutely no bearing on whether she consented to sexual act on this particular occasion with appellant, who was a total stranger. See State v. Geer, 13 Wash. App. 71, 533 P.2d 389, 391-92 (1975).

The appropriateness of excluding evidence of Carmelito's last intercourse is apparent when the factors specified in Johns are examined. First, the evidence lacked

relevance and probative value. As noted in Johns, "[t]he fact that a woman consented to sexual intercourse on one occasion is not substantial evidence that she consented on another. . . ." 615 P.2d at 1263 (quoting State ex. rel Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976)). Accordingly, in the instant case, the victim's previous act of sexual intercourse with others "has little if any relevancy to the question of her consent in the situation involved here." Johns, 615 P.2d at 1263 (footnote omitted). At trial, appellant conceded that coitus occurred; therefore, there was no need to admit evidence of Carmelito's last intercourse to explain the presence of semen. The only purpose served by admitting such evidence was to inflame the jury and possibly acquit the defendant in spite of overwhelming evidence of guilt. State v. Geer, 533 P.2d 389. Even if relevant, the probative value of her previous acts of intercourse was so slight as to warrant exclusion in the trial judge's discretion. The appellant contends this information was necessary to prove to the jury that Carmelito thought herself pregnant and, therefore, framed the appellant in order to obtain an abortion and treatment for the venereal disease that she allegedly suffered from. Yet the topic of Carmelito's possible pregnancy and the motive to lie were discussed throughout the trial (T. 70, 80, 146-147, 208). Judge Leary properly limited inquiry into Carmelito's past sexual activities because such evidence had little or no probative value given the already thorough

presentation of appellant's theory. Judge Leary properly excluded this evidence which lacked relevance and probative value.

Second, the evidence would have been highly prejudicial. Johns, supra. Appellant sought to combine the date of Carmelito's last intercourse with the allegation of pregnancy and the presence of a loathsome social disease to portray the victim as a harlot. The prejudicial nature of this line of questioning is clear. Even if appellant's unfounded acquisitions were true, this line of inquiry is improper. As noted in Howard, even the most morally bankrupt woman deserves protection from forcible violation of her body. 544 P.2d at 469. Appellant presented testimony of the possibility of Carmelito being pregnant, there was no need to put her on trial and further humiliate her.

Third, admitting evidence of Carmelito's past sexual activity would have needlessly confused the issue and resulted in unnecessary delay. Even one question concerning her last intercourse would have confused the jury. While appellant claimed that only one or two questions would be asked, it is clear that the examination would not end there. The state would then be forced to present evidence to rebut appellant's character attack. This would have placed Carmelito on trial, confusing and inflaming the jury while disorting attention away from the innocence or guilt of the individual actually on trial.

Fourth, if substantial justice is to be done victims of violent sex crimes must feel free to report the crime without fear of unwarranted harrassment and senseless publication of the most private aspect of their lives. Appellant suffered no hardship by excluding this evidence; he was able to testify that Carmelito said she was pregnant and unsure of what to do. Substantial justice would not be achieved by placing the victim on trial.

As in Johns, the appellant met the victim for the first time, admits the possession of a knife and admits intercourse. Under these facts, consensual intercourse on other occasions with men other than the defendant is irrelevant to consent in this situation. Even if relevance is found, the evidence is not probative given the other evidence in the record. Clearly whatever slight benefit this evidence may have had for the appellant, the harm to the victim clearly outweighs the speculative benefit to the defendant. Johns, supra.

Although decided before Johns, this Court held that it was proper to forbid the defendant from questioning the prosecutrix about her pregnancy and abortion, where the defendant argued that the rape was fabricated as a justification for the abortion. See State v. Van Dam, Utah, 554 P.2d 1324, 1326 (1976). There, the Court noted that it is "elementary that the trial court has wide discretion as to the extent of [cross] examination." Id. at 1326. In Van Dam, the

fact of the victim's pregnancy at the time of the rape was established. The jury was also informed that the victim obtained an abortion after the rape occurred. Beyond that, the court reasoned, the history of the pregnancy was no part of the incident or crime, but was "a fishing trip where the trip was unnecessary and impertinent Id. The jury was informed of the motive to fabricate the rape but did not believe the defendant's scenario. The court concluded the defendant's argument was without merit.

In the instance case, appellant's argument is equally without merit. The jury was apprised of the possibility that Carmelito was pregnant and in need of an abortion (T. 70, 80, 146-147, 208). The jury was also informed that Carmelito was in fact given the mandatory medication administered to all rape victims which induces an abortion and protects against venereal disease (T. 102). The jury was fully aware of appellant's contention that the victim was perhaps fabricating the rape as a pretense for obtaining an abortion. The jury choose not to believe appellant's argument. Going into the details of the intercourse which led Carmelito to believe that she was pregnant would have been irrelevant and immaterial. Moreover, it is unlikely the information would have aided appellant; the intercourse occurred just two days before the rape. The jury, justifiably, would find it doubtful that anyone would be so certain of their pregnancy after only two days.

As in Van Dam, the appellant brought out the victim's motive to lie. There was no need to delve into

details that would only inflame the jury, confuse the issue and possibly result in grave injustice. Judge Leary properly exercised his discretion in limiting the scope of cross examination.

Other jurisdictions have dealt with the admissibility of past specific acts of intercourse by the victim. People v. Martinez, Colo., 634 P.2d 26, 31 (1981); State v. Jones, Hawaii, 617 P.2d 1214 (1980); Interest of Nichols, Kan. App., 580 P.2d 1370 (1978); State v. Ryan, New Jersey, 384 A.2d 570 (1978); State v. Cosden, Wash. App., 568 P.2d 802 (1977); Pack v. State, Wyo., 571 P.2d 241 (1977). From a review of the cases, there appears to be a consensus that evidence of past specific acts of intercourse are admissibly only when the defendant denies having sexual intercourse yet semen is found in or around the victim's vagina. If semen is found, then the defendant needs to inform the jury that the complainant had sexual intercourse recently in order to explain the presence of semen when he denies intercourse occurred. Where the defendant admits intercourse, there is no dispute as to who deposited the semen. In this case appellant admits intercourse; had he denied it, he would have perhaps been entitled to admit evidence which suggests that another deposited the semen. Such is not the case here. The appellant sought to elicit the date of Carmelito's last consensual intercourse, combine it with the allegations of pregnancy and venereal disease to make Carmelito appear to be

a lewd woman, not to offer an explanation of who deposited the semen.

In People v. Martinez, supra, the Colorado Supreme Court concluded that evidence of a prior sexual act with another that could explain the presence of semen in the victim's vagina was admissible where the defendant claimed no sexual intercourse occurred. The Colorado court noted in footnote that had consent been claimed the evidence would have been excluded under Colorado's "rape shield" statute which precludes inquiry into past specific acts of intercourse, as does Utah case law. 634 P.2d at 31 n. 7. Thus, the Colorado court recognized the limited circumstances where prior sexual intercourse has probative value -- where such information is need to explain the presence of seminal fluid when the defendant claims that he never had intercourse with the prosecutrix.

In State v. Jones, Hawaii, 617 P.2d 1201 (1980), the Supreme Court of Hawaii held that, in a prosecution for forcible rape and sodomy, evidence that the prosecutrix consented to intercourse with another man within forty-eight hours of the alleged rape was irrelevant and not probative of the issue of consent where the defendant admits intercourse. The Jones court further noted that had the defendant denied intercourse and offered the evidence to refute the source of the semen then a different result might have been reached. 617 P.2d at 1220-1221.

Similarly, the Kansas Court of Appeals held that the trial court did not abuse its discretion in excluding evidence that the prosecutrix had sexual intercourse shortly before the incident. In re Nichols, 580 P.2d at 1374. The court reasoned that because the defendant admitted intercourse, showing that the semen came from another source would have no relevance. Cf. 580 P.2d at 1374.

The New Jersey Supreme Court reached a similar result in State v. Ryan, New Jersey, 384 A.2d 570 (1978). The court held that evidence showing that the complainant had sexual intercourse the night before the alleged rape was of such low probative value that it was within the discretion of the trial judge to exclude the evidence. 384 A.2d 570. In Ryan, the defendant admitted intercourse, but claimed consent. The court discounted the logically flawed notion that consent on one occasion with another person creates an inference of consent in another instance.

The Court of Appeals of Washington has also addressed the issue of the admissibility of specific act of intercourse which the victim engaged in shortly before the alleged rape. State v. Cosden, Wash. App., 568 P.2d 802 (1977). The court concluded that if the defendant denies sexual contact, yet the post rape examination shows evidence of recent sexual contact, then all recent partners which could account for those test results become relevant and admissible within the trial court's discretion. The court found it

unfair to deprive the defendant of the opportunity to show the test results were not inconsistent with his denial of sexual intercourse. Id at 806. The court held, however, that the trial court did not abuse its discretion in excluding the evidence because the probative value of the evidence was weak and unpersuasive in light of the overwhelming evidence of the defendant's guilt.

The Supreme Court of Wyoming ruled that evidence of recent sexual intercourse is admissible if combined with medical evidence that sperm could live for the period between sex and the time of the postrape examination, if such evidence would tend to prove that the semen present resulted from an earlier consensual sexual relationship. Pack v. State, Wyo., 571 P.2d 241, 245 (1977). Again, this evidence would only be helpful where the defendant denies any sexual contact. Id. 245. The source of the semen is not at issue where the defendant concedes that coitus occurred; the only issue remaining is whether the coitus between the defendant and the prosecutrix was consensual.

Appellant's effort to admit evidence of the prosecutrix's prior specific sexual contacts runs contrary to Utah case law and, indeed, the case law of a majority of other jurisdictions that have addressed the issue. Judge Leary did not abuse his discretion in refusing appellant's attempt to inflame the jury and divert attention away from the relevant issue -- whether appellant forced Carmelito to have sexual

intercourse against her will.

B. THE DATE OF THE VICTIM'S LAST SEXUAL
INTERCOURSE IS IRRELEVANT TO THE
CREDIBILITY OF HER TESTIMONY.

Appellant also asserts that evidence of Carmelito's past specific acts of intercourse should have been admitted in order to attack her credibility.

In putting forth this assertion, appellant concedes that the issue of consent and credibility overlap somewhat in a rape case. For that reason, Respondent's argument under Section A of this Point is applicable here, because the only attack made on Carmelito's credibility is that she actually consented to sexual intercourse with the appellant.

It should be noted early on that appellant's counsel, Brooke Wells, conducted a long and thorough cross-examination of Carmelito and had ample opportunity to attack her credibility. In fact, the transcript contains fifty-six pages of intense cross-examination of the victim (T. 31-87).

"It is elementary that the trial court has a wide latitude of discretion as to the extent of [cross-examination]." Van Dam, supra; See also, State v. Anderson, 27 Utah 2d 276, 495 P.2d 804 (1972). The longstanding rule has been that a defendant may attack the credibility of the prosecutrix by showing evidence that her

reputation in the community is that of a prostitute. Scott supra at 865. However, specific acts involving the prosecutrix may not be admitted. Id; see also State v. Goodliffe, Utah, 578 P.2d 1289, 1291 (1978). Appellant seeks to circumvent this rule and delve into specific acts of intercourse.

In State v. Johns, supra, this Court stated that "the law does not and should not recognize any connection between the veracity of a witness and her sexual promiscuity." 615 P.2d at 1264. The fact that Carmelito engaged in consensual sexual intercourse before being raped has no relevancy to the truthfulness of her testimony.

The lack of logical connection between one's sexual conduct and their ability to truthfully testify was well explained in State ex rel. Pope v. Superior Court, Ariz. 545 P.2d 946 (1976). The court noted that if the sexual activities of a rape victim are admissible to impeach her credibility in a rape prosecution, then her sexual history would be admissible to impeach her credibility in any case in which she testified. Id. at 950. No jurisdiction has adopted such a rule.

If Carmelito's past acts of intercourse affected her credibility, then the appellant was free to admit extrinsic evidence to show she had a bad reputation for truth and veracity. None such extensive evidence was proffered. Appellant simply sought to inflame the jury by creating the appearance that Carmelito was a harlot by a single

act of intercourse, because he was unable to impeach her through allowable cross-examination. Appellant's argument is without merit. The trial judge did not abuse his discretion in limiting the cross-examination to relevant evidence.

C. APPELLANT'S RIGHT TO CONFRONT HIS
ACCUSER WAS NOT UNCONSTITUTIONALLY
IMPINGED BY LIMITING THE SCOPE OF
CROSS-EXAMINATION.

Appellant asserts that the trial judge's limitation on the scope of cross-examination of the prosecutrix violated his Sixth Amendment right to confrontation. Davis v. Alaska, 415 U.S. 308 (1974).

Appellant's argument is wholly without merit. The victim, Carmelito Romero, was present at trial, testified in open court in the presence of appellant, and was subjected to thorough cross-examination by appellant's counsel. The Sixth Amendment, as applied to the states through the Fourteenth Amendment, requires only that the defendant be able to introduce relevant and admissible evidence. Johns supra; see also United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978). Appellant was permitted to adduce evidence so as to challenge the victim's assertion that the intercourse was against her will. Appellant extensively cross-examined Carmelito as to any bias or motive she might have had to fabricate this sexual assault. The jury did not accept this argument. A review of Carmelito's most recent consensual

intercourse would have added nothing relevant.

It is a well settled principle of law that the extent of cross-examination lies within the sound discretion of the trial judge. State v. Anderson, 27 Utah 2d 276, 495 P.2d 804 (1972). This discretion will not be interfered with by the reviewing court unless there is an abuse of discretion to the actual prejudice of the defendant. State v. Belwood, 27 Utah 2d 214, 494 P.2d 519 (1972).

There was no abuse of discretion here. Judge Leary allowed the prosecutrix to be asked whether she told the defendant she was pregnant (T. 20). The judge also allowed appellant to testify that Carmelito said she was pregnant and concerned about her future. Thus, her motive for fabricating the rape were clearly before the jury with ample opportunity for consideration by them during deliberation. Cf. State v. Howell, Utah, 649 P.2d 91, 97 (1982). Furthermore, appellant has offered no proof of actual prejudice, only unsubstantiated conjecture.

POINT II

THE LOSS OF APPELLANT'S KNIFE WAS NOT A VIOLATION OF DUE PROCESS AS A DELIBERATE SUPPRESSION OR DESTRUCTION OF MATERIAL EVIDENCE.

Appellant contends that he was denied Due Process by the loss of his pocket knife which occurred after the preliminary hearing but before the trial. Appellant makes

this assertion even though he admits that he had the knife with him that evening, but testified that he only used it to clean his nails (T. 203, 204). Appellant brandished the knife shortly after reentering Carmelito's apartment (T. 15). Appellant told her that he wanted to have sex and if she refused he would use the knife. At this point, Carmelito pleaded with appellant that he not harm her. She was dragged into the bedroom and raped.

United States v. Agurs, 427 U.S. 97 (1976) held that destruction of evidence violates Due Process when the prosecutor receives a specific and relevant request for evidence that is "material," not in the sense of might have effected the outcome, but rather "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112. The good faith of the police officer is not examined because it is not relevant. The focus is on the harm done to the defendant. Brady v. Maryland, 373 U.S. 83 (1963). In short, appellant must prove that the lost evidence is so vital to the issue of appellant's guilt or innocence as to constitute a fundamental unfairness. State v. Stewart, Utah, 544 P.2d 477 (1975). To prevail, appellant must show, therefore, that the presence of the misplaced knife would have created a reasonable doubt as to his guilt, not otherwise present, and that the knife was so vital to his case that a fundamental unfairness resulted from proceeding without the knife present.

In State v. Nebeker, Utah, 657 P.2d 1359 (1983), the defendant claimed a denial of Due Process because of the disassembly of photo arrays. The defendant argued that the arrays were prejudicial or exculpatory in that the credibility of the victim's subsequent identification of him from a lineup would have been weakened if defendant's picture was included in the first array.

This Court in Nebeker, supra quoted from State v. Hudspeth, 22 Wash. App. 292, 593 P.2d 548 (1978) in rejecting appellant's argument; "The mere possibility that an item of undisclosed evidence might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Nebeker, supra at 1363.

Similar to the defendant's argument in Nebeker, supra, appellant's claim is based on the mere possibility that the lost knife might have affected the outcome of his trial. Appellant merely contends that because the knife had only a small dull blade, the admission of the knife would have had a less frightening and less threatening impact on the jury (Brief for appellant at 18). Apparently appellant fails to realize that any knife, no matter how dull, is a dangerous weapon when placed against one's throat. The sharpness of the knife is not at issue; the only issue is whether the knife was used to coerce Carmelito into submitting to sexual intercourse. The jury found this to be the case.

It is incredible to suggest that the presence of the knife would have been helpful to appellant. If a small, dull knife is less frightening than a large, sharp knife, then no knife at all would be even better for appellant's case. It requires a fancifull imagination to conclude that the presence of the knife would even be "material" to the apellant's defense. Agurs, supra at 112. It requires still greater mental gymnastics to conclude that the knife was so vital to the issue of appellant's guilt or innocence that its loss would constitute a fundamental unfairness. Stewart, supra at 479. There was no showing of actual prejudice to the appellant, only tenuous speculation of some nebulous benefit. See Codianna v. Myers, Utah, 660 P.2d 1101, 1106 (1983); United States v. Agurs, 427 U.S. 97, 103-113 (1978); Brady v. Maryland, 373 U.S. 83 (1963). The knife was in no way material. In fact, the absence of the knife probably was beneficial to the appellant and thus this argument clearly lacks merit.

POINT III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT
APPELLANT'S CONVICTION.

Appellant was convicted of Aggravated Sexual Assault in violation of Utah Code Ann. § 76-5-405 (1953 as amended), which provides, in pertinent part, (1) A person commits aggravated sexual assault if:

(a) In the course of a rape or attempted rape or forcible sodomy or attempted forcible sodomy:

(i) The actor causes serious bodily injury to the victim; or

(ii) The actor compels submission to the rape or forcible sodomy by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person.

Appellant contends that the evidence was insufficient, as a matter of law, to convict him of aggravated sexual assault. Appellant does not deny having sexual intercourse with Carmelito, who, by his own admission, he had never met before. Nor, does he deny he had a knife in his possession. Therefore, the only issue on appeal is whether the evidence was sufficient to prove that appellant compelled Carmelito to submit to sexual intercourse by threats of serious bodily injury.

Utah Code Ann. § 76-5-406 (1953 as amended), provides that an act of sexual intercourse takes place without the victim's consent in either of the following circumstance:

(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;

Applying this standard in State v. Herzog, Utah, 610 P.2d 1287 (1980), this Court stated:

The determination of whether, given the above legal standard, consent was present or absent in any given case is factual in nature, and is thus a matter for determination by the finder of fact. This Court will hence no overturn any determination in that regard unless there appears of record such evidence that reasonable minds could not agree with the verdict reached.

Id. at 1283. See also State v. Myers, Utah, 606 P.2d 250 (1980).

The standard to be applied in insufficient evidence cases was recently set forth in State v. Petree, Utah, 659 P.2d 443 (1983):

[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

Id. at 444; see also State v. Kerekes, Utah, 622 P.2d 1161, 1168 (1980); State v. Lamm, Utah, 606 P.2d 229, 231 (1980).

On review, this Court is obligated to accept the version of the facts which supports the verdict. State v. Redford, Utah, 550 P.2d 728 (1976); State v. Howard, Utah, 544 P.2d 466 (1975). Thus, it is not the function of this Court

to reassess the credibility of the witnesses. This was recognized and well-stated in State v. Lamm, supra. The Court stated:

It is the exclusive function of the jury to weight the evidence and to determine the credibility of the witness, and it is not within the prerogative of this Court to substitute its judgment for that of the fact-finder. This Court should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

Id. at 231. (emphasis added). See State v. Simms, Utah, 517 P.2d 1315 (1974).

The evidence at trial was clearly sufficient to support the jury's verdict. The evidence shows that appellant compelled Carmelito to submit to sexual intercourse by holding a knife to her throat and threatening her with serious bodily harm. These threats were coupled with appellant striking Carmelito in the mouth and by throwing her around the room when she resisted. The appellant's violence and threats of violence overcame Carmelito's reasonable resistance.

Carmelito was grabbed by the throat when she asked appellant to leave. Her testimony was corroborated by the examining physician and the experienced volunteer from the Rape Crisis Center who both noticed red marks on her neck (T. 90-92, 167-169).

Appellant continued to choke Carmelito as he put the knife to her throat and told her, in his vernacular, that he wanted to have intercourse and would cut her vagina if she refused (T. 16). He then dragged her into the bedroom and threw her on the bed. Carmelito jumped off but was repeatedly thrown around the room and struck in the head and back (T. 19). As the struggle continued, the knife was lost and appellant grabbed a towel, and put it around her throat and attempted to choke her (T. 19). She managed to pull the towel away only to find appellant had removed his pants. Carmelito submitted to sexual intercourse out of fear for her life (T. 20).

When the police arrived, Carmelito immediately ran out of the house. Mike Davis, one of the officers present, described Carmelito as "very upset" and "on the verge of tears." (T. 127). As the officer entered the apartment to apprehend appellant, Carmelito remained with her friend Nils Swensen as he tried to calm her. Mr. Swenson described her as hysterical and in tears (T. 114).

After appellant was apprehended, the officers transported Carmelito to Holy Cross Hospital for a post rape examination. The post rape examination showed evidence of trauma. In addition to the two red marks on her neck, she sustained a bruise to her lip during the struggle (T. 90-91). See State v. Studham, Utah, 572 P.2d 700, 701 (1977). The injured lip was also observed by the volunteer from the Rape

Crisis Center (T. 169-170).

The volunteer from the Rape Crisis Center also noticed signs of emotional injury. Carmelito first appeared "uptight" (T. 168). As the volunteer counseled her, she grew "weepy and upset." (T. 167). The volunteer, Gal Duersch, said that it was typical for a rape victim to change their mood during the conversation, as the rapport is established between the victim and the counselor (T. 167-168). She further observed that in her six years as a volunteer at the Rape Crises Center she found the lack of physical evidence normal, finding only emotional evidence was the normal situation (T. 171).

At this point, it is clear that sufficient evidence supports the verdict of guilty of aggravated sexual assault. The evidence viewed in the light most favorable to the jury's veridict establishes that Carmelito submitted to intercourse only after making a reasonable effort to resist even though appellant had threatened to slit her throat (T. 21). There was clearly sufficient evidence to find that appellant forced Carmelito to submit to sexual intercourse under threats of death or serious bodily harm.

Moreover, there is nothing inherently improbable about the victim's testimony. Appellant's brief merely pointed out discrepancies in the evidence. It is the jury's task to resolve such conflicts. The jury observed the

witnesses and judged their credibility. They chose to believe Carmelito's version of the events. Her testimony was substantially corroborated by Nils Swenson, Officer Davis, Dr. Atkinson and Gae Duersch. There was substantial evidence to support the verdict and there is nothing inherently improbable about her corroborated version of the facts. Hence, this Court should not disturb the verdict because the evidence was clearly sufficient for reasonable minds to conclude that consent was absent. Herzog, at 1283.

POINT IV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE APPLICABLE LAW.

A. THE APPELLANT WAS NOT ENTITLED TO AN INSTRUCTION DISTINGUISHING BETWEEN "CONSENT" AND "AGAINST THE WILL."

Appellant's counsel submitted the following instruction, here labeled "Proposed Instruction A," which was refused:

Proposed Instruction A

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 earned 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

it 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 actually physical violence. Another factor is the opportunity to escape of whether the victim made an outcry. These can be reflected in the time of the 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. [emphasis added].

The trial court also refused the following instruction offered by appellant:

Proposed Instruction B

The essential element in rape in 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 jury was instead instructed as follows:

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 earned resistance as might reasonably be expected under the circumstances; or

2. The actor compels the victim to submit or participate by and threat that would prevent resistance by a person of ordinary resolution,

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 emotional 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 heroics or that she otherwise risked the assailant's brutality or infliction of serious wounds or injuries.

Though not mentioned by appellant, the jury also received the following instruction:

INSTRUCTION NO. 3

Where there is a conflict in the evidence you should reconcile such conflict as far as you reasonably can. But where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are. There are no definite rules governing how you shall determine the weight or convincing force of any evidence, or how you shall determine what the fact

in this case are. But you should carefully and conscientiously consider and compare all of the testimony, and all of the facts and circumstances, which have a bearing on any issue, and determine therefrom what the facts are.

Appellant asserts that he was precluded from presenting his theory of the case by the trial courts failure to instruct the jury on the difference between "consent" and "against the will" and what factors the jury may wish to consider in deciding the issue of consent.

Appellant made a timely objection to the trial court's refusal (T. 251-252) but was not entitled to the proposed instructions. The jury was adequately instructed as to the elements of the offense and of the definitions involved. Appellant's proposed instructions constituted an unwarranted judicial comment on the evidence and were properly refused.

The first paragraph of appellant's instruction, which has been included and labeled as "Proposed Instruction A," is fair summation of the law. It is substantially equivalent to Instruction 14, which was given to the jury. Instruction 14 closely follows the language of Utah Code Ann. § 76-5-406 (1953 as amended), which provides:

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;

Instruction 14 also states that both physical threats and psychological coercion can be used to overcome the victim's resistance. This language is found in State v. Studham, Utah, 572 P.2d 200 (1977). The gist of Instruction 14 is that physical violence is not necessary to have the intercourse be against the victim's will. The first paragraph of appellant's proposed instruction, included as "Proposed Instruction A," supra, also conveys this statement of the law.

The second paragraph of appellant's Proposed Instruction A is totally unacceptable. It allegedly "informed the jury" what factors it "can" take into account in determining whether Carmelito consented to sexual intercourse. The second paragraph is nothing more than an attempt to have the judge argue the defendant's case from the bench. It directs the jury to consider the lack of bruising, the opportunity for escape and the possible advantage to the victim in consenting to intercourse, all of these "factors" were amply argued by the appellant; there was no need to have the judge help in appellant's argument

Judge Leary properly refused this instruction as a comment of the evidence. Judicial comments on the evidence were condemned in State v. Sanders, Utah, 496 P.2d 270, 275 (1972) and State v. Schoenfeld, Utah 545 P.2d 193, 197 (1976).

The jury was instead given Instruction 3, supra, which accurately stated the law, directing the jury to "carefully and conscientiously consider and compare all of the testimony, and all of the facts and circumstances which have a bearing on any issue, and determine therefrom what the facts are." This is a proper summation of the law; anything more would be an improper comment of the evidence.

The second paragraph on Proposed Instruction A also includes the warning that the charge of rape is easily made and difficult to defend against. See Proposed Instruction A, supra. This court has held that a defendant is not entitled to such an instruction. State v. Studham, Utah, 572 P.2d 700, 702 (1977). The Studham decision correctly observed that such an instruction is not favored because it is actually a directive to the jury as to how they should view the evidence. Id. Judge Leary properly refused this instruction.

Appellant also requested an instruction on the difference between "without her consent" and "against her will," this instruction has been included here and for the sake of reference labeled proposed Instruction B, supra. Studham, supra, states in dicta that the two above phrases are not of the same meaning. Id. at 702. The notion is that intercourse could occur without the victim's consent yet not involve overcoming her will by force or threat. Id. at 702. Appellant sought to have an instruction echoing the language

found in Studham. He received an instruction summarizing this distinction in Instruction 14, supra. The language in Instruction 14 parallels the language in Studham. The instruction correctly states that either force or threat may be used to overcome the victim's resistance. This follows Utah Code Ann. § 76-5-406 (1953 as amended) and Studham. 572 P.2d at 702. The remainder of the instruction is directly from Studham and states the degree of resistance required to prove both "without her consent" and "against her will." Thus, Instruction 14 fully informed the jury of the meaning of "intercourse . . . without her consent" as Utah Code Ann. § 76-5-402 (1953 as amended) defines rape and as explained in Studham, supra.

The jury was properly instructed of the relevant law. The appellant's proposed instruction on the factors relevant in determining consent were properly refused.

B. THE TRIAL COURT PROPERLY REFUSED
APPELLANT'S PROPOSED INSTRUCTION ON THE
LAW OF INCONSISTANT STATEMENTS.

Appellant's counsel submitted the following instruction, here labeled "Proposed Instruction C," which was refused by judge Leary:

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 has spoken falsely either at the trial or on that prior occasion.

The proposed instruction was rightfully rejected.

The topic was covered in both preliminary instructions and Instruction 3, supra. It is possible that this actual purpose behind the proposed instruction was to have the judge draw attention to the alleged inconsistencies in Carmelito's testimony, thereby leaving the impression with the jury that the judge thought Carmelito's testimony deserved little weight.

It is axiomatic that the credibility of witnesses is a jury question. The court instructed the jury that they were to reconcile any conflict in testimony where possible and decide which testimony is truthfull if the conflict in testimony cannot be reconciled in Instruction 3, and in the Preliminary Instructions (R. 49). This is all the guidance necessary. Proposed Instruction C, if accepted, would have amounted to a judicial attack on the victim's credibility in the guise of a jury instruction.

Appellant's assertion that an instruction was necessary to inform the jury that past inconsistent statements could be considered as substantive evidence is without merit. The jury was instructed to consider all of the evidence; they were free to believe any inconsistent statements that defense counsel may have brought out to impeach Carmelito. The

preliminary and final instructions conveyed to the jurors the importance of carefully analyzing all of the evidence in deciding what was fact rather than fiction.

The general rule is that jury instructions are considered as a whole. State v. Brooks, Utah, 638 P.2d 537 (1981). On review, the trial court's ruling will be reversed only when the failure to give a proposed instruction denies the defendant of a fair trial. State v. Shabata, Utah, 678 P.2d 785 (1984). The refused instructions did not deny appellant a fair trial. Judge Leary's refusal of the proposed instructions merely eliminated unwarranted judicial comments on the evidence. The instructions which Judge Leary gave to the jury properly conveyed to the jurors the relevant law of the case without suggesting any favoritism towards either the state or appellant.

CONCLUSION

The trial court did not abuse its discretion by excluding the date of the complainant's last consensual sexual intercourse. The rule in Utah has long been that it is improper to inquire in past specific acts of intercourse. Specific acts of intercourse are irrelevant to the issue of consent in the instant case and inquiry into past acts of intercourse is also highly prejudicial. Moreover, this would only serve to further deter rape victims from reporting rape. This Court recently held that such inquiry should be forbidden

unless the probative value of the evidence outweighs the unfair prejudice to the prosecutrix. Johns, supra. Here, the appellant was not prevented from presenting his theory of the case to the jury. Inquiry into the date of the intercourse would have had little, if any, probative force.

The loss of the knife did not violate appellant's due process rights. Appellant fails to demonstrate how the knife was so vital to his case that proceeding without it resulted in a fundamentally unfair trial. Stewart, supra.

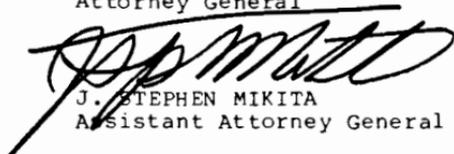
Additionally, there was overwhelming evidence to support the verdict of guilty of aggravated sexual assault. Appellant admitted having sexual intercourse with Carmelito and further admitted that he was carrying a knife on the night of the attack. Carmelito's testimony that appellant used force and threats of force was substantially corroborated by the testimony of the examining physician and the volunteer from the Rape Crisis Center. Disinterested third parties noted her bruised lip and red marks on her neck along with her distraught demeanor. The appellant's version, however, was supported by only his self-interested testimony. The jury's verdict was supported by substantially corroborated evidence and, therefore, should not be disturbed on appeal.

Finally, the trial court correctly instructed the jury as to the applicable law. Appellant's proposed instructions constituted unwarranted judicial comments on the evidence and were properly refused. The instructions given,

when considered as a whole, were more than adequate. The appellant is unable to show that the failure to give his proposed instructions denied him of a fair trial. The appellant had a fair trial and was represented by competent counsel. His conviction and sentence should be affirmed.

RESPECTFULLY submitted this 1st day of August, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Joan Watt, Attorney for Appellant, 333 South 2nd East, Salt Lake City, Utah 84114, this 1st day of August, 1984.

Kathleen Duga Kellersberg