1983

State of Utah v. Timothy and Mildred Lairby : Brief of Defendants-Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent.	)	Case No. 18998
	)	
vs.	)	
	)	
TIMOTHY AND MILDRED LAIRBY,	)	
	)	
Defendants-Appellants.	)	
	)	

BRIEF OF DEFENDANTS-APPELLANTS

SUPPLEMENTAL ARGUMENT

POINT I

THE COURT BELOW COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANTS' RIGHT OF CONFRONTATION AS GUARANTEED BY THE UNITED STATES CONSTITUTION, SIXTH AMENDMENT, AND THE UTAH STATE CONSTITUTION, ARTICLE I, SECTION 12.

The right to cross examine, embodied within the right of confrontation, is an invaluable right guaranteed by Article I, Section 12 of the Utah State Constitution and in the Sixth Amendment of the United States Constitution.

In the leading case of Davis vs. Alaska, 415 US 308, 94 S.Ct. 1105 (1974), the importance of one's right to cross examination was explained as follows:

> "Cross examination is the principal means by which the believability of a witness and the truth of his testimony is tested....We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination."

This court stressed the accused's right of cross-examination in State v. Chesnut, 621 P.2d 1228 (Ut. 1980) where Justice Maughn, writing for a unanimous court, stated as follows:

> "The right of cross-examination is an integral part of the right of confrontation, which is guaranteed by Article I, Section 12 of the Constitution of Utah and the Sixth Amendment of the Constitution of the United States. The cross-examination of a witness, testifying against the accused, provides a means of attacking his credibility and thus the substance of his testimony (cites omitted). Furthermore, Section 78-24-1 provides that in every case the credibility of the witness may be drawn in question by his motives. The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination (cites omitted). A trial court should be particularly solicitous of cross-examination intended to disclose bias or prejudice." (Id., at 1233).

See also Hutchings v. State, 518 P.2d 767 (Alaska 1974); State v. Anderson, 612 P.2d 78 (Ut. 1980); State v. Maestas, 564 P.2d 1386 (Ut. 1977).

Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility (3A Wigmore, Evidence (Chadbourne rev.) Sections 943-969; Hale, Bias As Affecting Credibility, 1 Hastings L.J. 1 (1949)). Facts which show bias are not "collateral," and the cross-examiner is not required to "take the answer of the witness," but may call other witnesses to prove them (State v. Day, 95 S.W.2d 1183, 1184; Smith v. U.S., 283 F.2d 16 (6th Cir. 1960); Smith v. Hornkohl, 90 N.W.2d 347 (Neb. 1958)).

Where a trial court has unduly restricted a defendant in the exercise of his constitutional right of cross-examination,

the "harmless error" standard compels reversal, unless the reviewing court can declare a belief that the error was harmless beyond a reasonable doubt (State v. Chesnut, supra, at 1233; Chapman v. California, 386 U.S. 18, 24; 87 S.Ct. 824, 828 (1967)).

Appellants were repeatedly denied their constitutional rights of confrontation and cross-examination in the trial court. On one such occasion (Tr.28), defense counsel, Lionel Farr, was attempting to cross-examine Wanda Lairby as to bias, interest and motive to fabricate, as follows:

QUESTION: "And at the time of the divorce wasn't there a question of custody raised?"

ANSWER: "At the time of the divorce?"

QUESTION: "Yes."

ANSWER: "No."

QUESTION: "Isn't there still a custody hearing pending?"

MR. PAUL FARR: "Your Honor, I object that this is not material to the case."

THE COURT: "Objection is sustained."

MR. LIONEL FARR: "I think that goes to the question of bias or prejudice, your Honor, as to custody, should she have custody of these children, she would have a motive here and so forth."

THE COURT: "As the matter now stands, I don't know that there is any evidence of motive."

Similar denials of Appellants' constitutional rights of confrontation and cross-examination occurred throughout the trial when defense counsel attempted to cross-examine Lisa Lairby (Tr. 172-173), Dr. William Palmer (Tr. 238), Violet Jones, Lisa's grandmother (Tr. 333,334,335), and Richard Long (Tr. 428, 429,431).

The court also unduly restricted defense counsel's questioning when he attempted to attack the credibility and establish the bias of the State's witnesses through his own witnesses (Tr. bottom 531, top 532; bottom 532, 533 (Mildred Lairby); 641, 642 (Timothy Lairby)).

The prejudicial violations of Appellants' constitutional rights of confrontation, outlined above, constitute reversible error according to the standard established in Chapman v. California, supra, and adopted by this court in State v. Chesnut, supra.

POINT II

APPELLANTS WERE DENIED THEIR RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTION 12, UTAH STATE CONSTITUTION.

Appellants' right to effective assistance of counsel is guaranteed under the Sixth Amendment to the United States Constitution as well as Article I, Section 12 of the Utah State Constitution. Until recently, the common law standard of ineffective assistance of counsel was that "on appeal it must appear that counsel's lack of diligence of competence reduced the trial to a farce or a sham." (People v. Ibarra, 386 P.2d 487 (Cal. 196 State v. McNicol, 554 P.2d 203 (Ut. 1976); State v. Pierren, 583 P.2d 69 (Ut. 1978)). Due to widespread criticism that the "farce or sham" standard was not stringent enough to protect an accused's right to effective assistance of counsel, a new standard has been adopted by this court and by the majority of

courts throughout the nation (See, for example, People v. Pope, 590 P.2d 859 (Cal. 1979) (en banc).) In the recent case of Codiannna v. Morris, 660 P.2d 1101 (Ut. 1983) this court adopted the new standard, which is as follows:

> "The Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney." (emphasis added)

In adopting this new standard this Court stated that it "includes all of the requirements the Court of Appeals for the Tenth Circuit identified in its recent redefinition of the constitutional requirements of effective assistance of counsel." The case to which this Court referred was Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc).

The Tenth Circuit took the opportunity to further clarify the standard it laid down in Dyer, supra, in the case of U.S. v. Porterfield, 624 F.2d 122 (10th Cir. 1980), at 124, 125, where it stated as follows:

> "The government argues that a showing of prejudice is essential, but we disagree. In passing, we mentioned (in the Dyer opinion) that the defendant in Dyer v. Crisp had not suffered prejudice. It is not accurate, however, to conclude that 'prejudice' is a second tier in the test of incompetency. Reasonable diligence and skill is the test! It would be a mockery in this case to say that the defendant was clearly guilty and that the incompetence of counsel made no difference. Where, as here, the incompetence of counsel is pervasive, the defendant ought not to be required to prove prejudice on top of the inadequacy. The burden should be on the government to establish the lack of prejudice. See Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978)....We need only conclude that the trial counsel's representation of the defendant failed to meet the requirements of the Constitution and constituted a failure to exercise the reasonable skill and diligence of a reasonably competent defense lawyer. We need not measure the extent of the prejudice or the extent of lack of effective assistance of counsel." (Id., at 124, 125.)

As stated above, once the Defendant has met his burden of establishing ineffective assistance of counsel, the burden should be upon the government to prove lack of prejudice due to such ineffective assistance. See also Bazelon, 42 U.Cin.L.Rev. 1; Finer, 58 Cornell L.Rev. 1077, 1093.

Ineffective assistance of appellant's counsel in the court below was apparent from the moment trial began. When the court asked if defense counsel was ready to proceed on the morning of trial, defense attorney Lionel Farr indicated he was not prepared because he had not had any opportunity to interview or depose two of the State's witnesses (Tr. 122). When the court invited defense counsel to make an opening statement, he reserved that right until the opening of his case in chief (Tr. 7, 8). At the opening of the Defendant's case in chief, defense counsel made his opening statement (Tr. 469-471), which was, in part, as follows:

> "Lady and gentlemen of the jury and Your Honor and counsel and everybody else I'm supposed to acknowledge, comes time now for the defense to present evidence as to what they feel is important in this case....As you have heard the evidence, we intend now to present the defense that we have mainly because of the facts that until you have made your decision, the defendants that I represent are not guilty and I hope that you have not made that decision at this point. That is the main inquiry I make at the beginning, that you be able to withhold any feeling of decision whatsoever until we have had a chance to make our consideration and that you were given that opportunity at that time to decide whether or not you could go through the whole trial and withhold any judgment whatsoever. It may have been hard to do. I don't know. For me it is hard sometimes to jump to a conclusion.
>
> "But anyway, our case now will be to present the defendants, let them speak. I don't think we're going to try and claim

silence and have you speculate whether or not their silence means anything.

"And also character witnesses. We try to--we will present basically the defense that these things did not happen, that--

"Can I comment on my evidence?

"The Court: No. Just tell us what you think it's going to be.

"Mr. Lionel Farr: Well, I guess just to make a statement to try to introduce myself and try to establish some rapport with you so that I can feel that I'm part of the program, too. But that is the limitation of my opening statement. I can't go into evidence.

"The Court: Mr. Farr, you can tell the evidence, what you think the evidence is going to be, but don't comment on it.

"Mr. Lionel Farr: Well, we'll let the witnesses testify then, and that will be--that will be the same, Judge. Thank you."

The above excerpt shows that Appellants were denied the opportunity to present the jury with an intelligent, cohesive description of their case in the manner to be expected of a reasonably competent defense attorney.

Ineffective assistance of counsel was also evidenced during the State's case in chief, when defense counsel failed to make a motion to strike the testimony of four of the State's witnesses. The State called Craig Duvall, a police officer from the Provo Police Department, Christine Swanson, a clinical psychologist for Granite School District and once employed at Primary Children's Medical Center; Finia Feuiaki, an employee of the Division of Family Services in Provo; and Kelly Powers, a protective service worker from the State Department of Social

Services, Division of Field Services. Each of these four state officials testified that they had seen and talked to Lisa Lairby. Beyond that, they offered no probative testimony as to the truth of the allegations. Although a reasonably competent defense attorney would have made a motion to strike the testimony of each of these four witnesses and requested an admonition that the jury disregard the fact that these witnesses were called, Appellants received no assistance in this regard (Tr. 179-250).

Ineffective assistance of Defendants' trial court counsel was also apparent when defense counsel attempted to impeach a State's witness based on prior inconsistent statements from the preliminary hearing (Tr. 391, 411, 418). Unfortunately, defense counsel had never requested transcripts of the preliminary hearing and consequently he was unable to use prior inconsistent statements from that hearing to impeach any of the State's witnesses.

Another example of the ineffective assistance of counsel afford to Defendants is evidenced by the following dialogue (Tr. 445), which defense counsel allowed to take place without objection:

(redirect examination by Mr. Paul Farr)

QUESTION: "Detective Blunck, did you ever ask Mildred Lairby if she would talk to you?"

ANSWER: "I did one time."

QUESTION: "What was her response?"

ANSWER: "That she wanted to talk and consult with her attorney."

Not only did the above dialogue proceed without objection by defense counsel, defense counsel reinforced the highly prejudicial inference from this dialogue on recross-examination (Tr. 447), when he asked:

> QUESTION: "So, after the Miranda warning was given she did not say anything to you; is that correct?"
>
> ANSWER: "No sir. She requested her attorney."

As noted later by the trial court (Tr. 685), testimony that an accused has exercised his constitutional rights is ordinarily reversible error and would have resulted in a mistrial had there been an objection by defense counsel.

Defense counsel also failed to exercise the skill, judgment and diligence of a reasonably competent defense attorney in eliciting character witness testimony (Tr. 481-583). Although it will subsequently be argued in this memorandum that some admissible character witness testimony did come into evidence, the prejudice resulting from defense counsel's inept approach to examination of these character witnesses is manifest in the court's withdrawal of a jury instruction on character evidence (Tr. 673).

Further ineffective assistance of counsel occurred when defense counsel allowed a highly prejudicial document to be admitted into evidence without ever having seen, or even requested to see, the document (Tr. 627).

Additionally, Defendants were denied their right to effective assistance of counsel during closing arguments (Tr. 703-726). Defense counsel's closing argument fell far below the level

of quality expected from a reasonably competent defense attorney.

Although not exhaustive, the above examples are sufficient to illustrate the pervasive ineffective assistance of counsel received by Appellants in the court below. A review of the trial transcript reveals that not only was defense counsel's assistance ineffective as measured by the new "reasonably competent defense attorney" standard, the assistance was also ineffective according to the less stringent "farce or sham" test. While Appellants maintain that they have no burden to show prejudice resulting from the ineffective assistance of counsel, the prejudicial effect is unmistakable.

POINT III

THE COURT BELOW ERRED BY REFUSING TO SECURE THE ATTENDANCE OF AN OUT-OF-STATE WITNESS PURSUANT TO UTAH CODE ANNOTATED SECTION 77-21-3.

The Uniform Act to Secure the Attendance of Witnesses From Without of State in Criminal Proceedings, as adopted in Arizona (Ariz. Rev. Statutes Annot. Section 13-4092) (1956), and in Utah (Utah Code Annotated Section 77-21-3, 1953), vests the Court with authority to compel the attendance of witnesses located outside the forum state. The Court is free to invoke the compulsory process of the Uniform Act in behalf of either the prosecution or the defense (State v. Leggroan, 389 P.2d 142 (Ut. 1964)). Furthermore, Article I, Section 12 of the Utah State Constitution guarantees that "in criminal prosecutions the accused shall have the right...to have compulsory process to compel the attendance of witnesses in his own behalf...."

The record shows that defense counsel informed the Court of its desire to call Tracy Long to testify immediately after learning that the State had decided her testimony was not useful. (Tr. 125, 126) The court erred in disclaiming all authority by which to compel her attendance, especially in light of the materiality and relevance of Tracy Long's anticipated testimony.

POINT IV

APPELLANTS WERE DENIED THEIR RIGHTS TO PRESENT CHARACTER WITNESS EVIDENCE TO THE JURY, AND TO A JURY INSTRUCTION ON CHARACTER WITNESS EVIDENCE.

To be admissible, character witness testimony as to an accused's reputation must be confined to the particular traits which are relevant to the offense charged (State v. Thompson, 199 P 161 (Ut. 1921)), and the witness giving such testimony must have personal knowledge of the general reputation of the accused in the community in which he resides or has resided (State v. Thoemke, 92 NW 480 (No.Dak.); Halley v. Tichenor, 94 NW 472 (Ia.)). The "community" in which one lives is not necessarily a geographical unit, but is rather composed of those relationships with others which arise where one works, worships, shops, relaxes, and lives, as explained in U.S. v. White, 225 F Supp 514 (D.D.C. 1963), reversed 349 F.2d 965. See also State v. Miller, 628 P.2d 444 (Or. 1981); State v. Buckner, 214 NW 2d 164 (Ia. 1979).) The point in time at which the accused's character is relevant is at a time at or prior to the date of the commission of the alleged offense (State v.

Rivera, 612 P.2d 526 (Ha. 1980); U.S. v. Null, 415 F.2d 1178, 1180 (4th Cir. 1969); People v. Bascord, 392 N.E.2d 1130, 1132 (Ill. 1979).)

The record of the proceedings in the trial court below reveals that despite defense counsel's inept approach to eliciting admissible character evidence, some admissible character evidence did come in (Tr. 486, 493 (lines 13-15), 514), thereby entitling Defendants to a jury instruction on character evidence (character evidence jury instruction withdrawn over defense counsel's objection, Tr. 673). More importantly, however, the transcript reveals that the court below unduly restricted the character evidence sought to be elicited by defense counsel (Tr. 486, 511, 512, 577). The ineffective manner with which defense counsel attempted to lay foundation for character evidence, together with the court's unduly narrow interpretation of admissible character witness evidence combined to constitute a denial of Appellants' rights to present evidence in their own behalf.

POINT V

THE COURT BELOW ERRED IN RULING ON THE ADMISSIBILITY OF EXPERT TESTIMONY AND IN QUASHING A SUBPOENA OF APPELLANTS' EXPERT.

During the course of testimony given by Dr. William Palmer, a pediatrician, he was allowed over the repeated objections of defense counsel to give his opinion that Lisa Lairby had been sexually abused. (Tr. 226) Although Dr. Palmer conducted a physical examination, he expressly stated that no part of his opinion was based upon the physical examination (Tr. 228).

Rather, the opinion of Dr. Palmer was admitted as being explicitly based on what Lisa Lairby said to him. (Tr. 229) The record reveals that there was no foundation laid as to whether such words, phrases or vocabulary was used by Lisa Lairby are typically relied upon by others in Dr. Palmer's field of expertise, in the course of determining whether sexual abuse has occurred. No foundation was laid as to the trustworthiness of the factual predicates upon which Dr. Palmer relied in forming his opinion. No foundation was given as to Dr. Palmer's qualifications in determining the occurrence of sexual abuse by oral evaluations. And finally, no foundation was given to show why Dr. Palmer would be more qualified to give an opinion as to whether Lisa Lairby was telling the truth based on what she said than would be the average juror.

The leap of faith required to accept Dr. Palmer's opinion without further foundation is analogous to that discussed by the court in Machera v. Garfield, 434 P.2d 756 (Ut. 1967). During that case, which involved an automobile accident, an Ogden City Police lieutenant was asked to give his opinion as to the speed of a vehicle at the time of impact, based upon his examination of the damage to the vehicle. The court refused to allow the lieutenant's opinion because it was no more trustworthy than would be the opinion of any one of the jurors when equally informed as to the extent of damage to the vehicle. (Id., at 759) See also, Frye v. U.S., 293 F 1013, 54 App. D.C. 46 (1923); and Tice v. Richardson, 644 P.2d 490 (Ks. 1983). The qualifying

of a witness as an expert does not render his every conclusion immune from challenge. U.S. v. Ragano, 476 F.2d 410 (5th Cir. 1973); Tennessee Valley Authority v. An Easement and Right of Way, 537 F.Supp 3 (E.D.Tenn. 1981). Such is the case with Dr. Palmer's opinion. There is no foundation in the record to show that a pediatrician's "finding" of sexual abuse based solely on what the alleged victim said is trustworthy. Furthermore, any supposed probative value of Dr. Palmer's opinion was outweighed by its prejudicial impact on the factfinder under Rule 45, Utah Rules of Evidence.

Finally, Rule 56(2) Utah Rules of Evidence states in part as follows:

> "If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are....(b) within the scope of the special knowledge, skill, experience or training possessed by the witness."

From the above authorities it is evident that Dr. Palmer's opinion should never have been admitted in evidence.

While the court admitted Dr. Palmer's opinion that a particular witness was telling the truth based on what she said to him (Tr. 221, lines 8-10; 229), the trial court prohibited defense counsel from eliciting an opinion on the same issue from a licensed psychologist, Dr. Barbara Liebroder. In the words of the court:

> "There is no law I know of that permits somebody to come into this court and usurp the prerogative of the jury and tell the jury whether or not someone is telling the truth or whether they are fantasizing, or whether they were able to influence someone else." (Tr. 467)

The above statement by the court is directly inconsistent with the recent holding by this court in State v. Miller, __P.2d ____, Utah S.Ct., Feb. 16, 1984, No. 17914, where a psychiatrist's opinion concerning the credibility of a witness and the witness' tendency to fantacize was held admissible. The mere fact that the conclusion of a qualified expert trenches upon a jury issue does not compel its exclusion. U.S. v. Milton, 555 F.2d 1198 (5th Circ. 1973). Where an expert's specialized knowledge with regard to a person's credibility or believability will assist the tryer of fact, such evidence is admissible (State v. Miller, supra; U.S. v Hiss, 88 F.2d 559 (S.D.N.Y. 1950))

The trial court also questioned the admissibility of Dr. Liebroder's anticipated testimony due to an alleged psychologist-patient privilege (Tr. 460). As generally recognized at common law, however, such a privilege arises only when the purpose of the examination was for giving curative advice or treatment, and communications made to an examiner invited to the consultation at the opponent's instance is not privileged (City and County of San Francisco v. Superior Court, 234 P.2d 26 (Cal. 1951); Wigmore, Evidence (Chadbourne rev.) Section 2382) The record shows that Wanda Lairby's psychological evaluation by Dr. Liebroder was not for the purpose of curative treatment, and it was at the instance of the defendants in this action (Tr. 340, 341). No privilege ever arose concerning Dr. Liebroder's examination of Wanda Lairby. Neither was the court justified in quashing the subpoena of Dr. Liebroder based on the alleged

insufficiency of the witness fee, as explained in City and County of San Francisco v. Superior Court, 231 P.2d 26, at 29, and authorities cited therein.

Although the court questioned the relevance and materiality of Dr. Liebroder's anticipated testimony (Tr. 463), the long-acknowledged legal standard with regard to relevance and materiality of expert testimony is whether such testimony would assist the jury in weighing the evidence. (Machera v. Garfield, 434 P.2d 756 (Ut. 1967)) Based on this standard, Dr. Liebroder's psychological findings certainly would have been relevant and material in assessing the credibility of Wanda Lairby and any influence she may have exercised over her daughter's testimony, as will be discussed shortly. The quashal of Dr. Liebroder's subpoena was a denial of Appellants' constitutional right to present evidence in their own behalf.

POINT VI

THE COURT BELOW ERRED IN DENYING APPELLANTS' MOTION FOR A PSYCHIATRIC EVALUATION.

A leading case on the issue of when a court should order psychiatric examination of a complaining witness in a sex offense case is Ballard v. Superior Court, 410 P.2d 838 (Cal. 1966). The following passage from the Ballard opinion is relevant at this point;

> "A number of leading authorities have suggested that in a case in which a defendant faces a charge of a sex violation the complaining witness, if her testimony is uncorroborated, should be required to submit to a psychiatric examination... In urging psychiatric interviews for complaining witnesses in sex cases, some prominent psychiatrists have explained

> that a woman or girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge. Such a charge may likewise flow from an aggressive tendency directed to the person accused or from a childish desire for notoriety...Professor Wigmore, in a widely quoted passage, stated, 'No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician (cites omitted).'...This concern is stimulated by the possibility that a believable complaining witness, who suffers from an emotional condition inducing her belief that she has been subjected to a sexual offense, may charge some male with that offense. Thus, the testimony of a sympathy-arousing child may lead to the conviction of an unattractive defendant, subjecting him to a lengthy prison term."

The standard adopted by the Ballard court, together with the majority of courts who have dealt with this issue, was that the trial judge should order a psychiatric examination of the complaining witness in a case involving a sex violation if the defendant presents a compelling reason for such an examination (Id, at 91).

Evidence of a "compelling reason" to order a psychiatric evaluation of Wanda and Lisa Lairby pursuant to defense counsel's repeated motions is found throughout the trial record (see especially Tr. 82, 84, 85, 86, 134, 136, 143, 150, 151, 157, 239). A brief review of the record reveals that if ever there was a compelling reason for a psychological evaluation in a sex offense action, the case at bar was it. Despite this widespread evidence of influence upon Lisa Lairby's testimony at trial, the trial judge concluded that "there is nothing before the Court that indicates that child was influenced in any manner whatsoever by her mother as to her testimony." (Tr. 124)

While counsel acknowledges the trial court's discretion to order a psychiatric evaluation, it is the defendant's position when faced with the compelling reasons as outlined heretofore, the court below abused its discretion in denying defendant's motion for such psychiatric evaluation. Although the court based its reasoning, in part, on lack of timeliness in making such motion, the Supreme Court Clerk's Record on Appeal indicates that Defendant's first motion for psychiatric evaluation occurred on July 11, 1981, almost one and a half years prior to trial (Supreme Court Clerk's Record on Appeal, p. 9).

POINT VII

THE COURT BELOW ERRED BY ADMITTING ONLY A PORTION OF A DOCUMENT TAKEN OUT OF CONTEXT.

It is defendant's position on appeal that the court below committed reversible error in admitting only a portion of a document which was highly prejudicial when admitted out of context from the remaining portions of that document (Tr. 619-658). The confusion, indecision, and lack of direction at this point of the proceedings, as evidenced from the record, placed undue emphasis on a highly prejudicial portion of a document which should have been clearly inadmissible under Rule 45, Utah Rules of Evidence to begin with. When, however, the trial court admitted the partial document into evidence the prejudicial impact was aggravated since the context from which the admitted statements were taken was excluded. It is Appellants' position that this was an abuse of discretion. U.S. v. Walker, 652 F2d 708, 713 (7th Cir. 1981)

POINT VIII

THE COURT BELOW COMMITTED REVERSIBLE ERROR BY ALLOWING INTO EVIDENCE TESTIMONY SO INHERENTLY PROBABLE AS TO AMOUNT TO NO EVIDENCE AT ALL.

Although the question of credibility is ordinarily one for the tryer of fact, that rule must give way when testimony is viewed on appeal as incredible as a matter of law. People v. Quinones, 402 NYS 2d 196 (1978). A reviewing court will overturn the jury on the question of credibility of the witnesses when evidence presented is so improbable, unbelievable, or unsatisfactory as to raise a serious question as to the guilt of the defendant. People v. Dunn, 365 NE2d 164 (Ill. App. 1977). Generally, there must exist either a physical impossibility that it is true, or its falsity must be apparent without resorting to inferences or deductions. People v. Duncan, 171 Cal. Rptr. 406, 115 C.A. 3d 418 (1981). See also, People v. Moore, 222 NE 2d 95 (Ill. App. 1966); People v. Porter, 422 NE 2d 213 (Ill. App. 1981).

The record of the trial court proceedings reveals that several aspects of the uncorroborated testimony of Lisa Lairby were inherently improbable. For example, when asked, "Do you know how many times you were hurt at Tim 's house?", Lisa responded, "Almost a hundred" (Tr. 51). Lisa also testified that "puke" came out of Timothy Lairby's "winky" and that it looked like "little green spots" (Tr. 58), and that "it was yellow and brown mixed,...lots of yellow and brown" (Tr. 155). Lisa stated that Timothy Lairby's winky touched "the inside" of her privates, although Dr. Palmer, who examined Lisa, testified that there had

been nothing larger than 1/2 to 1 centimeter in diameter penetrate Lisa's vaginal opening (Tr. 236, 237). Lisa testified that around Easter time in 1981 Mildred Lairby put the tines of a fork into her privates and caused her to bleed (Tr., 55), however, Elmo Grewell, a hospital physician who examined Lisa on April 20, 1981, testified that nothing had caused any bleeding in Lisa's vaginal area (Tr. 15). The above excerpts from Lisa's testimony render her credibility seriously suspect. Applying the aforementioned legal standards of credibility to the testimony, the court should conclude as a matter of law that Lisa's testimony was inherently incredible, so much so that it raises a serious question as to the guilt of the Defendants.

CONCLUSION

The record of the proceedings in the trial court below proves that Appellants did not receive a fair trial. They were denied their right to cross examination, their right to present evidence in their own behalf, and their right to effective assistance of counsel. Based upon the foregoing points and authorities, the decision of the trial court should be reversed.

Respectfully submitted this 1st day of May, 1984.

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Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellants' Supplemental Memorandum of Points and Authorities was delivered this 12 day of May, 1984, to:

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