1984

State of Utah v. Timothy and Mildred Lairby : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. 18998

TIMOTHY and MILDRED LAIRBY, :

Defendants-Appellants.: :

BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENTS RENDERED IN THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE PETER F. LEARY, JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
DAVE B. THOMPSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

TIMOTHY LAIRBY
Pro Se
P.O. Box 250
Draper, Utah 84020

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TABLE OF CONTENTS (Continued)

CASES CITED

Cases Cited (Continued)

Cases Cited (Contineud)

STATUTES CITED

Statutes Cited (Continued)

OTHER AUTHORITIES

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Defendants-Appellants.	:	

STATEMENT OF THE NATURE OF THE CASE

Appellant, Timothy Lairby, was charged with one count of rape, a first degree felony, under Utah Code Ann. § 76-5-402 (1953), as amended; two counts of forcible sexual abuse, a third degree felony, under Utah Code Ann. § 76-5-404 (1953), as amended; and two counts of forcible sodomy, a first degree felony, under Utah Code Ann. § 76-5-403 (1953), as amended.

Appellant, Mildred Lairby, was charged with one count of forcible sexual abuse, a third degree felony, under Utah Code Ann. § 76-5-404 (1953), as amended.

DISPOSITION IN THE LOWER COURT

After a jury trial on October 27, 28, 29 and November 1, 1982 in the Third Judicial District Court in and for Salt Lake County, the Honorable Peter F. Leary, Judge, presiding, Timothy Lairby was found guilty of rape, both counts of forcible sexual abuse, and one count of forcible sodomy. He was sentenced to the Utah State Prison for a term

of five years to life for rape, two indeterminate terms not to exceed five years for forcible sexual abuse, and a term of five years to life for forcible sodomy -- the sentences to run concurrently. Mildred Lairby was found guilty as charged and placed on probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgements and sentences of the trial court.

STATEMENT OF THE FACTS

On May 14, 1981, appellant Mildred R. Lairby was arrested for sexual abuse of her four-year-old step-daughter, Virginia M. Lairby ("Lisa") (R. 6). The victimization occurred on April 18, 1981. Subsequent investigation by Officer Guy Blunck of the Salt Lake City Police Department resulted in the arrest of appellant Timothy M. Lairby on July 22, 1981, for sex crimes involving both his four-year old natural daughter, Virginia Lairby, and his eight-year-old step-daughter, Carri A. Long. Carri is Mildred Lairby's natural daughter.

Wanda Lairby, Virginia Lairby's natural mother, was divorced from Timothy Lairby on December 10, 1980. Wanda retained temporary custody of their children and appellant Timothy Lairby was granted visitation rights each Saturday from noon to six p.m. and from Friday at six p.m. until Sunday at six p.m. on the third weekend of each month (R. 373). It was during these weekend visits at appellants' home that the

sexual abuse of Virginia occurred. Carri Long was residing with Mildred and Timothy when she was victimized.

At her own home following her visit with her father on April 19, 1981, Virginia complained to Wanda Lairby that her "privates" hurt (R. 378). Virginia testified that her privates began to hurt after she slipped and fell onto her bottom in the tub while taking a bath and that the pain reminded her of what Mildred had done to her during Virginia's most recent visit (R. 210, 270). Virginia repeatedly testified that Mildred Lairby stuck a fork in her privates (R. 166, 179, 217, 221, 229, 248, 277) in the bathroom of Timothy and Mildred's home (R. 164, 178, 217) on Easter 1981 (R. 166). Although there is some confusion as to which end of the fork Mildred used, (R. 223, 224), Virginia was emphatic on both direct and cross-examination that Mildred used a fork (R. 166, 179, 217, 221, 229, 248, 277). Virginia further testified that the fork caused her to bleed so that she had to wash the blood out of her panties (R. 167, 168, 275) and that Mildred put an ice cube on her privates to stop the bleeding (R. 168), telling her that she would give her candy to forget the incident (R. 169). Moreover, Virginia stated that Timothy Lairby was present on this occasion and that he helped Mildred hurt her (R. 154, 215, 217, 248).

Wanda Lairby testified that when Virginia told her of this incident on April 19th she wanted to take Virginia to the hospital for an examination, but was unable to do so until

April 20th as she lacked transportation (R. 377, 378, 389, 401) . Dr. Elmo Grewell, the examining physician on April 20th, testified that redness existed around the mucous membrane of Virginia's vagina, but he was unable to categorically state that molestation had taken place (R. 124).

With regard to Timothy Lairby, Virginia testified generally that Timothy hurt her several times (R. 163). Virginia was unable to precisely state the various dates that he hurt her, but she referred to dates shortly before Easter 1981 (R. 166). Notwithstanding her inability to cite specific dates, Virginia had seen appellant's penis (R. 158), she knew its anatomical location (R. 158), she drew it for defense counsel (R. 202), she remembered appellant's penis as being hard when it touched her (R. 169), and she vividly recalled that she was hurt (and cried) when appellant's penis touched inside her vagina (R. 161, 268, 274). Furthermore, Virginia made graphic references to the seminal emission from appellant's penis, describing it as a yellow-brown mix (R. 265) and stating that appellant's penis had "puked" all over her privates so that she had to wash it off herself (R. 171).

Virginia also recounted another episode when Timothy Lairby touched her privates with his finger, which she stated, "felt very awful" (R. 158, 159, 205). Virginia told of yet another incident when Timothy Lairby had sucked her privates in the bathroom of his residence (R. 177, 179, 269).

Dr. William Palmer, a member of the Child Protection

Team of the University of Utah and Primary Children's Medical Center, examined Virginia in May of 1981 (R. 321), and it was his expert opinion that she was a victim of sexual abuse (R. 335). The other victim in the instant case, Carri A. Long, also testified that she was sexually abused by Timothy Lairby. As previously mentioned, Carri is the natural daughter of Mildred Lairby and was living with appellants when she was victimized (R. 462).

Carri testified that she too had seen appellant's penis (R. 466), on one occasion when Virginia was in the room (R. 465), and on another when she observed appellant hold his penis with his fist (R. 469, 520-521). She also testified that on the weekend following her March 15th birthday, appellant laid her on a bed, pulled off her pants and underwear, exposed himself to her, and then touched her vagina (R. 474-478). Moreover, Carri testified that two weeks after her birthday, appellant removed her clothes again and proceeded to touch the inside of her vagina with a plastic object (R. 482-483). The transcript indicates that Carri was visibly upset on the stand and at one point during the proceedings visibly wept when counsel asked if she had seen Timothy Lairby's privates (R. 517).

Timothy Lairby was denied further visitation rights after April 20, 1981 and subsequent to his arrest on July 22, 1981, Carri and Virginia were placed in foster care (R. 533).

POINT I

APPELLANTS HAVE WAIVED ANY OBJECTIONS TO THE LEGALITY OF THEIR ARRESTS.

Appellants contend that there was no probable cause for their arrests, as evidenced by the inadequacies in the informations and the warrants issued for their arrests. However, it is generally held that a defendant's failure to object to the legality of his arrest prior to trial constitutes a waiver of that issue. See, e.g. United States v. Grote, 532 F.2d 387 (5th Cir. 1980), cert. denied, 454 U.S. 819, reh. denied., 454 U.S. 1129 (1981); Massey v. People, 179 Colo. 167, 498 P.2d 953 (1972); Fisher v. State, Okl. Cr., 483 P.2d 1162 (1971); State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968). This waiver rule should apply to appellants, who made no obejection prior to (or even during) trial to the legality of their arrests. This Court should accordingly refuse to consider the issue on appeal. Such a ruling would be consistent with procedural rules already in place which require timely objections to defects in indictments and informations, and to the admissibility of evidence seized incident to an allegedly unlawful arrest. See Rule 12(b), Utah Rules of Criminal Procedure; State v. Hall, Utah, 671 P.2d 201, 202; State v. Lesley, Utah, ___P.2d___, Slip Opin. No. 18038, filed September 14, 1983.

POINT II

BECAUSE APPELLANTS DID NOT OBJECT, EITHER BEFORE OR DURING TRIAL, TO ANY ALLEGED DEFECTS IN THE INFORMATIONS FILED AGAINST THEM, THEY ARE PRECLUDED FROM RAISING THAT ISSUE ON APPEAL. ALTERNATIVELY, THOSE INFORMATIONS SATISFIED THE REQUIREMENTS OF THE LAW.

Appellants contend that the trial court lacked jurisdiction because the informations filed against them were mistitled and not signed by a prosecuting attorney. Under Rule 12(b)(1) and (d), Utah Rules of Criminal Procedure,[1] a defendant waives any objections to defects in an information unless he objects to the information either before or during trial. State v. Hall, Utah, 671 P.2d 201 (1983). Because appellants failed to comply with Rule 12(b)(1), they are precluded from raising the issue of defective informations on appeal. Moreover, the informations filed against appellants met all the legal requirements recently outlined by this Court in State, ex rel. Cannon v. Leary, Utah, 646 P.2d 727 (1982).

POINT III

BECAUSE APPELLANTS HAVE NOT PROVIDED THIS COURT WITH AN ADEQUATE RECORD OF THEIR PRELIMINARY HEARINGS, THIS COURT CANNOT RULE ON APPELLANTS' ALLEGATIONS OF ERROR AT THOSE HEARINGS.

Appellants make several allegations of prejudicial error at their preliminary hearings. To support these

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[1] Utah Code Ann. § 77-35-12(b)(1) and (d) (1953)

allegations, appellants refer to uncertified, partial transcripts of their preliminary hearings (see attachment to Appellants' Brief after p. 77). On the title pages of the transcripts appellants state that the master tapes of those hearings have been erased by the Fifth Circuit Court as part of their normal procedure.

As noted in State v. Jones, Utah, 657 P.2d 1263 (1982):

> The burden of showing error is on the party who seeks to upset the judgment. In the absence of record evidence to the contrary, we assume regularity in the proceedings below, and affirm the judgment. (Citations omitted.)

Id. at 1267. The rationale for this position is given in State v. Wulffenstein, Utah, 657 P.2d 289 (1982):

> When a defendant predicates error to this Court, he has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine. This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record. See State v. Jones (1982), 657 P.2d 1263, and cases cited therein. See also McBride v. State , Alaska, 368 P.2d 925, 929 (1962), cert. denied, 374 U.S. 811, 83 S.Ct. 1702, 10 L. Ed. 2d 1035 (1963).

Id. at 293. See also State v. Mitchell, Utah, 671 P.2d 213 (1983). The preliminary hearing transcripts provided by appellants simply are not an adequate record to support their allegations of error, even in the face of appellants'

unsubstantiated claim that the master tapes of their preliminary hearings have been destroyed. Accordingly, appellants' assignments of error cannot be considered by this Court.

POINT IV

APPELLANTS WERE NOT DENIED THE RIGHT TO A SPEEDY TRIAL, NOR WAS TIMOTHY LAIRBY'S PRELIMINARY HEARING UNLAWFULLY DELAYED.

Appellants claim that they were denied their constitutional right to a speedy trial due to the fifteen to seventeen month delay between the dates of their arrests and their trial. They argue that this delay resulted in the imposition of punishment before trial and was improperly used by the prosecution to coach certain child witnesses who would eventually testify at trial.

The Utah and United States Constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Utah Const. art. I, § 12. The right is also guaranteed by Utah Code Ann. § 77-1-6(f) (1953). As noted by this Court in State v. Knill, Utah, 656 P.2d 1026 (1982):

> Whether the federal right [to a speedy trial] as been violated is determined by balancing the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514,530, 92 S.Ct. 2182, 2192, 33 L.Ed. 2d 101 (1972). Similar considerations also apply under the Utah Constitution. State v. Velasquez, Utah, 641 P.2d 115, 116 (1982); State v. Hafen, Utah, 593 P.2d 538, 541 (1979); State v. Giles, Utah, 576 P.2d 876, 879 (1978).

Id. at 1029.

Because neither appellant asserted his right to a speedy trial in the lower court, their claim that they were denied that right is foreclosed from consideration by this Court. See State v. Sparks, Utah, ___P.2d___, Slip Opin. No. 18780 P.3, filed October 14, 1983.

Even if appellants had not waived this issue, they were not harmed by the delays in bringing their cases to trial and, therefore, cannot claim error. The purposes behind statutes protecting the constitutional right to a speedy trial are to prevent an accused from being held in custody for unreasonable periods of time absent a determination of guilt by an impartial tribunal and to prevent law enforcement officials from holding undisposed charges over the head of a prisoner. State v. Weddle, 29 Utah 2d 145, 147, 506 P.2d 67, 68 (1973); State v. Velasquez, Utah, 641 P.2d 115, 116 (1982). These abuses are manifested only when a defendant is in custody. In the instant case, both appellants were granted pretrial release, and thus were not harmed by the delay in that way.

Furthermore, this court in Velasquez said that a defendant who acts to delay the disposition of pending charges has indicated "his willingness to temporarily waive [the] protection [of the constitutional right to a speedy trial]." In this situation, "the purpose behind the statute . . . no longer exists." 641 P.2d at 116. The record indicates that every continuation of appellants' trial dates was based either on the state's motion as stipulated to by appellants, or on a

defense motion (see R. 32, 33, 34, 37, 43, 53-55, 62, 72, 78).[2] It is well-settled that:

> The granting of a continuance of a case is a matter resting in the sound discretion of the trial judge, and that discretion will not be interfered with on appeal except where the court clearly abused its discretion in the matter. Thompson v. United States, 372 F.2d 826 (5th Cir. 1957); United States v. Green, 497 F.2d 1068 (7th Cir. 1974).

State v. Moosman, Utah, 542 P.2d 1093, 1094 (1975). Under these circumstances, appellants cannot now claim that they were denied a speedy trial.

Timothy Lairby makes the additional argument that the delay between his initial appearance in the circuit court and his preliminary hearing was unreasonable and without good cause. The record indicates that an information was filed and an arrest warrant issued against him on July 20, 1981 (R. 4). He was arrested on July 22, 1981 (R. 3). A preliminary hearing was scheduled in circuit court for July 30, 1981 (within the ten day period required by Utah Code Ann. § 77-35-7(c) for defendants in custody); however, on stipulation of both parties, the court adjourned and the hearing was continued to September 17, 1981 (R. 4). According to his brief, Mr. Lairby arranged bond after thirteen days in

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[2] One exception appears in the record. In Mildred Lairby's case, the court, on its own motion, reset her trial date from September 28, 1981 to February 9, 1982 (see R. 8, 20-21). However, there is nothing to indicate that this was an unreasonable or prejudicial delay.

custody (see Appellants' Brief at p. 21). At that point the thirty day and extended time period provisions of § 77-35-7(c) became operative. The record indicates the date for preliminary hearing was continued until January 7, 1982 by court order based on stipulation of both parties (R. 5). There is nothing to indicate that the court's further continuances of the preliminary hearing date to March 11, 1982 were an abuse of discretion or prejudicial to Mr. Lairby. Moreover, it does not appear that Mr. Lairby made any objection to the district court concerning the alleged unreasonable delay by the circuit court in holding a preliminary hearing.

POINT V

APPELLANTS', DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE TRIAL COURT DENIED A DEFENSE MOTION TO COMPEL THE PRETRIAL DEPOSITION OF TWO POTENTIAL PROSECUTION WITNESSES.

Appellants contend that it was improper for the trial court to deny a defense motion to compel the deposition of two of the prosecution's potential witnesses, Carri and Traci Long, prior to trial (R. 26-36, 39). This contention is based on the premise that the potential witnesses they desired to depose were about to leave the state and thus the issue would fall within the ambit of Utah Code Ann. § 77-35-14(h)(1953), as amended, which reads:

> Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that he will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

Although appellants assert that the witness were about to leave the state, they provide no factual basis for that assertion (See Appellants' Brief at p. 28). Moreover, while appellants suggest in hindsight that this was the purpose of the motion to compel, the motion itself makes no mention of this fact (See R. 26). Quite simply, the trial court could not be expected to apply § 77-35-14(h), since it had not been advised at the time the motion was presented that the witnesses were about to leave the state.

Furthermore, criminal defendants do not enjoy an absolute right to depose prospective prosecution witnesses. In the absence of a state statute to the contrary, it is generally held that a person accused of a crime in a state court is not entitled as a matter of right to take the depositions of prospective witnesses before trial. See, e.g., State v. Ashley, Fla. App., 393 So. 2d 1168 (1981); People v. Bowen, 22 Cal. App. 2d 267, 99 Cal. Rptr. 498 (1971); State v. Polsky, 82 N.M. 377, 482 P.2d 241, cert. denied 404 U.S. 1015

(1971). This Court has taken a less restrictive approach and has given the trial court the discretion to grant the deposition of prospective witnesses. See State v. Sims, 30 Utah 2d 257, 517 P.2d 1315 (1974).

Although this Court has not addressed the constitutionality of this discretionary deposition process, many courts have held that the denial of a motion to compel a deposition does not violate a defendant's Fourteenth Amendment due process rights. People v. Municipal Court for Pasadena Judicial Dist., 143 Cal. Rptr. 609 (1978); Kardy v. Shook, 237 Md. 524, 207 A.2d 83 (1965); Dixon v. State, 27 Md. App. 443, 340 A.2d 396 (1975); State v. Tate, 47 N.J. 352, 221 A.2d 12 (1966). Nor is a defendant's right to compulsory process violated because he is not allowed to depose prospective prosecution witnesses. People v. Bowen, 99 Cal. Rptr. at 506. The common rationale in dismissing these constitutional challenges is that a defendant will be able to confront the witnesses at trial and if the prosecution ultimately chooses not to call a particular witness, a defendant certainly has the right to call that witness in his own behalf.

When appellants discovered that the prosecution was not going to call Traci Long, they could have called her as their own witness. If she was not in Utah, it was appellants' responsibility to use the Uniform Act to compel the attendance of witnesses from outside the state. See People v. Carter, 37 N.Y. 2d 234, 333 N.E. 2d 177 (1975). Both Arizona (where

Traci apparently was located) and Utah have adopted the Uniform Act. See Ariz. Rev. Stat. Ann. § 13-4092 (1956), as amended; Utah Code Ann. § 77-21-3 (1953). It was appellants' failure to implement this procedure, not something the trial court or prosecution did or did not do, that resulted in their inability to examine any witnesses they felt were necessary to their defense. In short, "[t]he duty to present a defense devolves upon the defendant who . . . is responsible for the production of witnesses in his behalf." State v. Stewart, Ariz. App., 641 P.2d 895, 897 (1982), citing Ferrari v. United States, 244 F.2d 132 (9th Cir. 1957), cert. denied, 355 U.S. 873 (1957). See also State v. Goodman, 207 Kan. 155, 483 P.2d 1040 (1971). In any event, the trial court did not abuse its discretion in denying appellants' motion to compel the deposition of prospective prosecution witnesses.

POINT VI

IT IS NOT UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION TO HAVE A JURY COMPRISED OF EIGHT MEMBERS IN A NON-CAPITAL CRIMINAL CASE.

Utah Code Ann. § 78-46-5 (Supp. 1983) reflects the mandate of Art. I § 10 of the Utah Constitution for an eight person jury in a non-capital criminal case. Although appellants cite a number of United States Circuit Court of Appeals and United States Supreme Court cases in arguing that an eight member jury is constitutionally improper, none of the

cited cases is applicable. In Williams v. Florida, 399 U.S. 78 (1969), the United States Supreme Court ruled that a jury of six persons in a criminal case is constitutional. By analogy, a greater number would also pass constitutional muster. Furthermore, in Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970), the Tenth Circuit Court of Appeals specifically ruled, in light of the Williams holding, that the eight jurors required under the Utah Constitution was constitutional. Appellants therefore have no valid Sixth or Fourteenth Amendment claim.

POINT VII

APPELLANTS HAVE WAIVED THE ISSUE OF MISJOINDER OF OFFENSES AND DEFENDANTS.

Appellants argue that the single information filed against Timothy Lairby improperly joined the several charged offenses and that appellants were improperly joined for trial.

Rule 12(b)(1), Utah Rules of Criminal Procedure, requires a defendant to make a timely objection to any defects in an information. See State v. Hall, Utah, 671 P.2d 201 (1983). Rule 12(b)(4) requires a defendant to make requests for severance of charges at least five days prior to trial. See also Rule 9(d), Utah Rules of Criminal Procedure.[3]

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[3] Utah Code Ann. § 77-35-9(d) (1953)

Timothy Lairby, who made no objection to the information as required by Rule 12(b)(1) and who made no request for severance of charges as required by Rule 12(b)(4) and Rule 9(d), has waived the right to raise the issue of misjoinder of offenses on appeal. See State v. McCumber, Utah, 622 P.2d 353, 355-356 (1980), interpreting former Utah Code Ann. § 77-23-10 (1953), as amended. And, because no pretrial motion for severance of defendants was made, appellants have waived the issue of misjoinder of defendants at trial under Rule 9 (d) and Rule 12 (b)(4) and (d).

Finally, appellants knowingly and voluntarily waived any due process right to a severance of offenses or defendants when they stipulated to a joinder of offenses and defendants (see R. 89-90). Cf. State v. McCumber, 622 P.2d at 355-356.

POINT VIII

THE ADMISSION OF ONLY A PORTION OF A LETTER WRITTEN BY TIMOTHY LAIRBY WAS PROPER.

Appellants contend that the trial court improperly admitted selected portions of a letter written by Timothy Lairby and argue that the letter should only have been admitted in its entirety. The prosecution did not offer the portions of the letter to prove the truth of any statement under an exception to the hearsay rule. See Rule 63, Utah Rules of Evidence. Rather, the prosecution offered the selected portions under Rule 22, Utah Rules of Evidence, for

the purpose of impeaching Timothy Lairby's credibility (R. 740). See Smith v. State, Md., 328 A.2d 274, 279 (1974). Since the text of the entire letter was apparently unnecessary for puposes of impeachment, the trial court excluded the inappropriate segments. Later, when defense counsel attempted to introduce these remaining segments, the trial court found them inadmissible clearly because defense counsel did not show how as hearsay they might fall within one of the recognized exceptions in Rule 63, or why they should be accepted for any non-hearsay use.

POINT IX

THE TRIAL COURT DID NOT ERR IN REFUSING TO INCLUDE REQUESTED JURY INSTRUCTIONS OR IN ITS PHRASING OF THE INSTRUCTIONS IT ULTIMATELY SUBMITTED TO THE JURY.

In Point Eighteen of their brief, appellants allege that the trial court erred in its handling of the jury instructions. Appellants argue either that the court refused to include an instruction on an issue they deemed pertinent or that the instruction given by the court was inaccurate, incomplete, or patently misleading. Appellants' contentions regarding a defendants' theory instruction and a character witness instruction fall into the former category, while the burden of proof, child competency, rape, and sodomy instructions come under the latter category.

First, in order for this Court to consider a defendant's claim on appeal that the trial court improperly refused to give a proposed jury instruction, that proposed instruction must be included in the record on appeal. State v. Knill, Utah, 656 P.2d 1026, 1029 (1982). The record in the instant case does not contain the proposed defendants' theory and character witness intructions appellants claim were improperly denied. Thus, this Court cannot consider appellants' assignments of error in that regard.

Moreover, a review of the record indicates that at no point during the discussion in the trial court about jury instructions did appellants make known their desire to have a defense theory instruction given. And, with respect to a character witness instruction, the record clearly shows that the trial court denied that instruction because the precise issue of reputation for good character (a requirement of Rule 63 (28), Utah Rules of Evidence) was not established by the testimony given at trial (see R. 784-786). Appellants' "character" witnesses testified about their personal feelings concerning appellants, not about appellants' reputation for good character (see R. 587, 610, 618, 686). Since a character witness instruction could not be supported by the evidence, the trial court properly denied any such requested instruction. See State v. Ricci, Utah, 655 P.2d 690 (1982); State v. Minnish, Utah, 560 P.2d 340 (1977).

Second, with respect to appellants' assertion that the trial court failed to instruct the jury on the State's burden to prove guilt beyond a reasonable doubt, Instruction No. 15 (R. 116) adequately advised the jury of the requisite standard of proof. In addition to the specific "reasonable doubt" language in paragraph three of the instruction, when read as a whole, the primary purpose of the instruction is to insure that the jury clearly understands the concepts of "burden" and "reasonable doubt." With an entire instruction devoted to this purpose, there is little doubt that the jury was aware of the degree of proof required for conviction.

Third, appellants' contention that Instruction No. 10 (R. 111) was improper is without merit. Citing State v. Wilkerson, Utah, 612 P.2d 362 (1980), they argue that the fourth line of that instruction should read "has a moral duty to tell the truth . . . ," rather than just "has a duty to tell the truth , . . ." In quoting the standard for competency of child witnesses from an earlier case -- State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965), the Wilkerson Court used the phrase "sense of moral duty . . . ." 612 P.2d at 364 (emphasis added). However, the significance of that language is to emphasize that a child witness must recognize the obligation to testify truthfully; it was not intended to prescribe the exclusive wording to describe that obligation. Instruction No. 10, with the word "duty" unmodified by the word "moral," adequately informed the jury of the importance of a child witness's recognition of his obligation to testify

truthfully, and thus was not inconsistent with the standard reiterated in Wilkerson.

Finally, with respect to appellants' argument that there was some irregularity in the rape and sodomy instructions (Nos. 17 and 18; R. 117 and 118), those instructions expressly adhered to the requirements of Utah Code Ann. §§ 76-5-402 and 76-5-407 (1953), as amended, for rape, and of Utah Code Ann. § 76-5-403 (1953), as amended, for sodomy. Appellants' remaining arguments regarding the jury instructions are pure conjecture.

POINT X

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO DISMISS, MOTION FOR ARREST OF JUDGMENT, AND MOTION FOR A NEW TRIAL.

Appellants' contention that the trial court's denial of their motion to dismiss was a denial of due process is based entirely on their view that the evidence was not sufficient to support a conviction of any of the offenses with which they were charged. As shown in Point XI of this brief, substantial credible evidence supporting appellants' convictions was introduced at trial. Thus, the trial court properly denied the motion to dismiss.

Appellants' claim respecting the trial court's denial of their motion to arrest judgment is equally unmeritorious. Rule 23, Utah Rules of Criminal Procedure, which provides in pertinent part:

> At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment.[4]

Appellants simply did not satisfy the requirements of this rule (see their motion at R. 145-146).

Finally, the trial court did not abuse its discretion in denying appellants' motion for a new trial. Rule 24, Utah Rules of Criminal Procedure,[5] provides in pertinent part:

> The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party. [Emphasis added.]

Appellants' motion for a new trial (see R. 161-162) failed to establish any error or impropriety which had a substantial adverse effect upon their rights. The errors they alleged in that motion have been addressed and disposed of as meritless in this brief.

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[4] Utah Code Ann. § 77-35-23 (1953)

[5] Utah Code Ann. § 77-35-24 (1953)

POINT XI

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANTS' CONVICTIONS.

The standard for appellate review of an insufficiency of evidence claim is stated in State v. Petree, Utah, 659 P.2d 443 (1983):

> We 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. Kereckes, Utah, 622 P.2d 1161, 1168 (1980); State v. Lamm, Utah, 606 P.2d 229, 231 (1980). The evidence against appellants regarding their victimization of Virginia Lairby is as follows. Virginia Lairby repeatedly testified that on Easter 1981 her "privates" had been penetrated by a fork wielded by Mildred Lairby in the bathroom of Mildred and Timothy Lairby's home. On both direct and cross-examination, Virginia asserted that she had not fabricated the incident or been told what to say by another (R. 52, 54, 66, 67, 106, 110, 118, 138, 168). Although he was unable to categorically state that moslestation had occured, a physician who examined Virginia shortly after the incident testified that he observed redness around the mucous membrane

of her vagina (R. 124). This evidence is sufficient to support appellant Mildred Lairby's conviction of forcible sexual abuse under Utah Code Ann. § 76-5-404 (1953), as amended, which at the time she was charged read in pertinent part:

> A person commits forcible sexual abuse if, under circumstances not amounting to rape or sodomy, or attempted rape or sodomy, he touches the anus or any part of the genitals of another or otherwise takes indecent liberties with another, . . ., with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other.

The intent required by that statute could properly be inferred by the jury from the actions of appellant. See State v. Murphy, Utah, __P.2d__, Slip Opin. No. 18814 at p.4, filed October 31, 1983.

Appellant Timothy Lairby's conviction of rape and forcible sodomy is also amply justified in light of the evidence adduced at trial. He relies heavily on the assumption that in order for Virginia to have been raped, physical damage would have had to occur to her vaginal tissues. Appellant speculates as to the physiological consequences of the rape of a small child without any evidentiary basis for his conclusions. On direct and cross-examination, Virginia testified that she knew the shape and size of an adult male's penis by observing Timothy's (R.

158) and that Timothy's penis was hard and that it hurt when it touched inside her vagina (R. 161, 169, 205, 251, 268, 274). Virginia also vividly described how Timothy's emission had "puked" all over her so that she had to wash it off herself (R. 265, 171). Utah Code Ann. § 76-5-407 (1953), as amended, states that "any sexual penetration" is sufficient for rape, and Virginia testified that she was certain Timothy's penis had touched inside her vagina (R. 161, 205). Virginia also told of another time when Timothy "sucked" her privates in the bathroom of his residence (R. 177). Utah Code Ann. § 76-5-403 (1953), as amended, defines first degree forcible sodomy as a sexual act involving the genitals of one person and the mouth or anus of another person under the age of 14, without the other's consent. Again, there is clear and undisputed evidence based on Virginia's testimony that Timothy made oral contact with her genitals, obviously without her consent.

Futhermore, the evidence was sufficient to support appellant Timothy Lairby's conviction for the forcible sexual abuse of his step-daughter, Carri Long. Carri testified that on approximately March 22, 1981, appellant laid her on a bed, pulled down her pants and fondled her genitals (R. 474-479). This uncontradicted evidence could easily support the jury's conclusion that appellant was guilty of forcible sexual abuse under Utah Code Ann. § 76-5-404 (1953), as amended. Again, the jury could properly infer the intent required by that

statute from appellant's actions. See State v. Murphy.

In conclusion, an appellate court will only overturn a verdict challenged on insufficieny of the evidence "when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt." State v. McCardle, Utah, 652 P.2d 942, 945 (1982). It is the exclusive function of the jury to weigh the credibility of the witnesses and the weight of the evidence; that an appellate court might view the evidence as less than wholly conclusive is not sufficient to overturn a verdict on appeal. State v. Howell, Utah, 649 P.2d 91, 97 (1982). Because the evidence adduced at trial, viewed in the light most favorable to the verdict, was not sufficiently inconclusive or inherently improbable that the jury must have entertained a reasonable doubt that appellants were guilty of the crimes with which they were charged, appellants' insufficiency of evidence claim should be rejected and their convictions should be affirmed.

CONCLUSION

Respondent has endeavored to respond to every point in appellants' pro se brief that it believes merits a response. Based upon the foregoing, the judgments and sentences of the trial court should be affirmed.

Respectfully submitted this 9th day of January, 1984.

DAVID L. WILKINSON
Attorney General

Dave B. Thompson

DAVE B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Timothy and Mildred Lairby, P.O. Box 250, Draper, Utah 84020 this 9th day of January, 1984.

Kathleen Billesbergen