1983

State of Utah v. Claude A. Bundy : Appellant's Supplemental Brief

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	Case No 19013
CLAUDE A. BUNDY,	:	
Defendant-Appellant.	:	

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from Final Judgment and Sentence of the Third Judicial District Court in and for Salt Lake County, Utah, Honorable Dean E. Conder, Judge

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STATE OF UTAH

[illegible] UTAH,	:	
[illegible]laintiff-Respondent,	:	
vs.	:	Case No 19013
[illegible]DDE A. BUNDY,	:	
Defendant-Appellant.	:	

APPELLANT'S SUPPLEMENTAL BRIEF

[illegible]MENT I. THE TRIAL COURT ERRED IN NOT IMMEDIATELY GRANTING DEFENDANT'S ORIGINAL MOTION FOR MISTRIAL.

Immediately preceeding the calling of defendant's wife, [illegible]ori Bundy, to the stand as a prosecution witness, defendant's [illegible]ttorney requested and was granted an opportunity to discuss [illegible]th the Court whether it would be appropriate to permit her [illegible] be called as a witness against the defendant. (See trial [illegible]anscript, p. 23.) The actual discussion occurring at the [illegible]me, however, is lost due to the failure of counsel, both for [illegible]e state and for the defendant, to request that the discussion [illegible]made a part of the record. The only available references [illegible]the record to this discussion arise at the time of defendant's [illegible]ginal motion for mistrial which was later made. (See trial [illegible]ript, pp. 74-82.) At the time of this original motion [illegible]ade, however, there appeared to be substantial disagreement [illegible]as to substance of the above off-the-record discussion.

The fundamental issue presented however, is pri
It is: Whether, in a criminal prosecution under the circums
demonstrated in the record of this action, defendant's w
should be permitted to testify against him.

In common law jurisdictions, since prior to the time
Blackstone, the basic position of the law has been that:

> In criminal prosecutions . . . the wife may be indicted and punished separately . . . But, in trial of any sort, they are not allowed to be evidence for, or against, each other. I Blackstone, Commentaries on the Laws of England 431 (1st Ed., 1765)

It is recognized that, while many changes have occurr
since the time of Blackstone, the fundamental policies for th
above rule have remained as a source of current law. It i
not the purpose here to challenge or analyze the possible poli
issues here involved, but only to present for later considerat
the application of any such policy concerns in determining th
status of Utah law concerning these issues.

The new Utah Rules of Evidence (effective September 1
1983) provide (Rule 501) that:

> Privilege is governed by the common law, except as modified by statute or court rule.

This rule is accompanied by the following committee note
Rule 501 which states:

> The committee recommended a substantial revision of the privileges to be applied by the courts, and that all statutory provisions to the contrary be superceded. The Supreme

> court declined to adopt this recommendation, indicating that it was "disposed to delete Article V, 'privileges,' from the proposed rules and thus leave the current statutory privileges in full force and effect." The court decided instead to invite the legislature to address such statutory additions, deletions, or modifications.

In Utah then, the rights belonging to a defendant in a criminal action regarding the admissibility of the testimony of a spouse originate in a number of sources, as well as the common law traditions. The Utah Constitution, Article I, §12, provides in pertinent part, that:

> In criminal prosecutions . . . a wife shall not be compelled to testify against her husband, nor a husband against his wife . .

The Utah Judicial Code, Witnesses, §78-24-8(1) additionally specifies that a person cannot be examined as a witness in the following circumstances:

> A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communications made by one to the other during the marriage . . . [exceptions not involved here] . . .

The Utah Rules of Evidence, which were in effect until September 1, 1983, (Rule 23), further provide that:

> An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while

> they were husband and wife, excepting only . . . [exceptions not involved here] . . .

and, in Rule 28, that:

> Subject to Rule 37 and except as otherwise provided in paragraphs (2) [exceptions] and (3) [termination] of this rule, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action. The other spouse or the guardian of an incompetent spouse may claim privilege on behalf of the spouse having the privilege.

and, finally, in Rule 37, that:

> A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specific matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by anyone.

The above collectively provide the basic sources of defendant's rights to make the claim that his spouse should not have been permitted to testify against him in the instant action, and further, that to have permitted her to do so is grounds for a mistrial.

The doctrine of marital privilege in Utah has at least four different branches with somewhat different rules governing each branch, although all branches basically serve the judicial policy of providing for the privilege itself.

absolute prohibition," is founded in the common law [illegible] and §78-24-8, U.C.A., above-referenced. This absolute [illegible] is the doctrine which is most fundamentally involved [illegible] action.

A second branch, "non-compulsion," is supported by the [illegible] Constitution, Article I, §12 and §77-6-1, U.C.A., and deals [illegible] instances involving attempts to coerce or force a spouse [illegible] testify against the other party to the marriage who is, additionally, [illegible] party to the specified action. In the matter before this [illegible] court, defendant's spouse has not raised this issue [illegible] is apparently more than over-eager and willing to testify. This second branch of the doctrine is therefore not applicable herein.

A third branch, "confidential communications," founded [illegible] Rules 23 and 28, Utah Rules of Evidence, as well as §78-24-8, U.C.A., though potentially involved, is not directly applicable [illegible] the claim herein made is not that a confidential communication only was disclosed, but the much broader claim that no testimony at all should have been permitted.

The fourth and final branch, that of "waiver" pursuant [illegible] Rule 37, Utah Rules of Evidence, and judicial decisions concerning [illegible] is critical in this action. There is potential concern [illegible] defendant's rights may have been waived through his attorney

and that defendant, though not aware of such waiver, may have been bound by said attorney's actions.

This court, in State v. Brown, 14 U.2d 324, 383 P.2d 932 at 932 (1963) stated that:

> Clearly, our Constitution and statutes give both the husband and the wife a privilege that the wife shall not testify under these circumstances (in a criminal prosecution of the husband) without the consent of both the husband and the wife.

Though one statute cited in Brown, supra, footnote 2, (i.e. §77-44-4, U.C.A.) has subsequently been repealed (L. 1980, ch. 15 §1), the pertinent text of §78-24-8(1) remains the same as was at the time of the decision in Brown, and specifically provides that before a spouse may testify in a criminal prosecution both the husband and the wife must consent.

In Brown, supra., the defendant prevailed on appeal and was granted a second jury trial at which he was convicted, and from which he appealed alleging that comments on the claim of marital privilege by the prosecuting attorney were in error. In affirming the verdict below, the Court in State v. Brown, 16 U.2d 57, 395 P.2d 727, at 729, (1964) stated:

> The defense could either claim the privilege or waive it, whichever it thought would be to its best advantage. But it could not engage in halfway measures by waiving the privilege and obtaining the benefit of having her (the wife) testify and still claim some of the protection refusal to testify affords . . . if the privilege is claimed, it should be scrupulously protected.

State v. Trusty, 28 U.2d 317, 502 P.2d 113 (1972), this [illegible] faced with comments by a prosecuting attorney as [illegible] defendant's spouse would say if asked, pointed out that [illegible] the circumstances (in addition to other requirements) [illegible] cautionary instruction could overcome possible prejudicial [illegible] effects of the prosecutor's alleged statement violative of the [illegible] marital privilege and, in footnote, pointed out that:

> any comment by the prosecutor which in a substantial way will impair or disparage a claim of privilege is improper and therefore is error . . . Trusty, supra., at 114.

and concluded that:

> if it (the comment) be such that there is a possibility that it prejudiced the defendant, in the sense that there is any likelihood that there may have been a different result, then the error should be deemed prejudicial and another trial granted. id.

The court went on to state that the fact that the trial court had given what was deemed to be an appropriate "cautionary instruction" coupled with the determination that, under the circumstances, the statement was not prejudicial justified the affirmation of the verdict of the trial jury.

Defendant herein claims; First, that he is entitled to [illegible] privilege not to have his wife testify against him; second, [illegible] notwithstanding his attorney's unrecorded statements to [illegible] (whatever they may have been), he scrupulously protected [illegible] privilege to the best of his ability under the circumstances

and did not knowingly waive his privilege; third, [illegible] a timely motion for mistrial, correctly preserved defendant's right to assert the privilege; fourth, the trial court erroneously overruled the motion for mistrial; fifth, the testimony of defendant's spouse did, in fact, prejudice[1] defendant to the extent that there is a likelihood of a different result in the event a new trial is granted; and finally, defendant is entitled to a new trial for the reason that the trial court erred in not immediately granting defendant's original motion for mistrial.

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[1]At the time of trial, defendant and his wife were involved in a bitter divorce action in which defendant was seeking custody of their children. (trial transcript, pp. 224, 226-228.)

The state's witnesses at trial, other than Dr. Lillis Teigland (whose testimony was extremely brief and indirect), consisted of members of defendant's wife's family, namely:

Lori Bundy's father:	David Christiansen
Lori Bundy's sister:	Sherry Christiansen
Lori Bundy, herself:	the wife of the defendant

and two police officers whose investigation information came generally from Lori Bundy's family.

Defendant contends that, under the circumstances, any testimony given in trial by Lori Bundy would be prejudicial.

COUNTS I AND II OF THE INFORMATION ARE FATALLY DEFECTIVE BECAUSE THEY FAIL TO ALLEGE A SPECIFIC DATE ON WHICH THE ALLEGED OFFENSES OCCURRED AND ADDITIONALLY ARE CONSTITUTIONALLY DEFECTIVE.

In the instant action, the information, as read to the [illegible] included, as to the alleged time of the offense: Count I: "[illegible] or about June, 1981, and January, 1982," a period of approximately eight (8) months and; Count II: "on or about June, 1981, and August, 1981," a period of approximately three (3) months. The "probable cause" provision of the information alleges a substantial number of possible opportunities providing a basis for the prosecution of some one or more charges in the information. There does not appear, either in the two counts themselves, or in the probable cause provision, specific information alleging any specific date or time on which any of the alleged offenses may have occurred.

During the trial, the complaining witness, in response to the question of whether she had sexual intercourse with the defendant during the "latter part of June, early part of July, 1981" (trial transcript, p. 41) described events purportedly occurring during that period of time, and when <u>again</u> <u>asked</u> by the prosecutor as to the time of the alleged events, the following occurred:

> Prosecutor: All right. Now do you know when it was in terms of which month and which day?

witness: I ain't sure, but I think it was the end of June or the beginning of July, I ain't sure. (trial transcript, p. 42)

Later in the trial, the complaining witness was asked why she had sexual intercourse with the defendant prior to the above time, and the following took place: (trial transcript, p. 64)

witness: Yeah.

prosecutor: What was the time just before that?

witness: May. I mean the month of May.

prosecutor: You don't know the date?

witness: Uh uh.

prosecutor: Can you remember the very first time?

witness: No.

prosecutor: You don't remember the first time?

witness: Uh uh.

The complaining witness was later requested to describe the "last time" she alleges sexual intercourse occurred with defendant. She responded that it was "December" and when asked, "Do you know what day?", responded, "No, but it was between Christmas vacation in our school." (trial transcript, p. 65)

As a result of the above circumstances, as well as others relating to the trial of this action, defendant did not, in fact, know which alleged acts of sodomy and/or rape were to be charged. The record does not reflect that defendant

have such knowledge at any time. The failure to charge with specific acts violates his right to be informed charges against him and denies him due process of law contemplated by the Sixth and Fourteenth Amendments to the United States Constitution. For a similar ruling on a State level, see New Mexico v. Foster, 530 P.2d 949, at 951 (New Mex., A. 1974).

Pursuant to the Utah Rules of Criminal Procedure, Rule 4(b), U.R.Cr.P., §77-13-4(b) states:

> Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. [emphasis added]

At no time prior to trial testimony of the complaining witness was defendant presented with information indicating to him anything closely resembling the "time" of the commission of any alleged offense.

The Utah Constitution, Article I, §13, provides in relevant part, that:

> Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the state . . .

The Utah Supreme Court, in State v. Jensen, 96 P. 1085, at 1086 (Utah, 1908) defined the purpose of this section. In a conviction for fornication, the court stated:

> The purpose of this provision of the Constitution is to secure to the accused, before he is brought to trial under an information, the right to be advised of the nature of the accusation against him and to be confronted with and given an opportunity to cross-examine the witnesses testifying on behalf of the state. He is thus enabled, if he so desires, to fully inform himself of the facts upon which the state relies to sustain the charge made against him and be prepared to meet them at the trial. [emphasis added]

In State v. Nelson, 176 P.2d 860, (Utah, 1918), defendant was convicted upon an information charging him with carnal knowledge alleged to have occurred July 13, 1917. A mistrial resulted and, before proceeding with a second trial, the prosecutor represented to the court that not one, but two, acts of intercourse had occurred and that the state would elect to prosecute the act alleged to have been committed on July 15, 1917, two (2) days subsequent to the date of the alleged act for which defendant was prosecuted in the earlier trial. Defendant was convicted and appealed, alleging constitutional protection under the above Article I, §13, involving the date of the alleged offense. Upon examination, and in response to the prosecutor's contention that the date of the offense was not material, this court, in reversing the conviction, concluded that:

> While the date as alleged is immaterial, the actual transaction charged as constituting the offense is always material, and, if controverted, must be established by the evidence before the accused can be convicted. supra., at 861.

[illegible] above, it is arguable that, under the circumstances [illegible]tion now before the court, the allegations of time [illegible] occurrence of the offenses alleged are material to the [illegible]on in that they constitute the actual transaction charged. The fundamental issue here presented is that the actual [illegible]osecution charged, as well as the time concerned, is material [illegible]the information. To permit the prosecution to convict defendant [illegible] an information which on its face contains an allegation so [illegible]ad as to deny to the defendant any opportunity to consider [illegible]en the vestiges of the very critical defense of alibi by so [illegible]structuring the information language to prevent defendant from [illegible]owing with any degree of accuracy, when the alleged offenses were to have occurred or to determine whether double jeopardy [illegible]isions are violated is contrary to the Sixth and Fourteenth [illegible]endments of the United States Constitution due process provisions as well as the laws of the State of Utah.

The Utah Code of Criminal Procedure, §77-14-1, provides:

> The prosecuting attorney, on timely written demand of the defendant, shall within ten days, or such other time as the court may allow, specify in writing as particularly as is known to him the place, date and time of the commission of the offense charged.

[illegible]s was not done in the instant case. Cases in which the above [illegible]tute or its predecessors have, in general, held that the [illegible] of "time of the offense" is material only where the defense [illegible]i is advanced or there is danger of double jeopardy.

State v. Waid, 67 P.2d 647 (Utah, 1937); State v. Cooper, P.2d 764 (Utah, 1949). The Utah Code of Criminal Proced §77-14-2 (1), provides in relevant part, that:

> A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten days before trial or at such other time as the court may allow, file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi . . . [compliance provisions follow]

A similar code provision, §77-14-2 (4), further provides that:

> The court may, for good cause shown, waive the requirements of this section,

indicating that the rule as to alibi defenses is not, on its face, intended to be a hard and fast rule, demanding strict compliance. (See also, Utah Criminal Code, §76-1-106, Strict Construction Rule Not Applicable.)

Given the circumstances above described, the date of the alleged offense becomes an essential and material issue. Defendant further contends that an allegation of a specific date is necessary to give him notice of the crime charged. Defendant contends further that, without a proper allegation of a specific date of the alleged offense, defendant would not be able to plead his conviction as a bar to further prosecution.

... notwithstanding the fact that defendant did not raise the ... issue in the trial court, this court is empowered ... and decide the matter as indicated in this brief, pursuant ... decisions citing State v. Cobo, 60 P.2d 952 (Utah, 1936) ..., as palpable error.

Defendant is entitled to a reversal for the reason that the information on file herein fails to allege a specific date on which the alleged offenses occurred and is void under both federal and state provisions.

As this court has pointed out, Nelson, supra., at 861:

> When the pleader draws an information as contemplated by the Constitution, he must have in mind a particular transaction having the elements of time, place, and circumstance, which transaction in his judgment is unlawful. [emphasis added]

POINT III. THE TRIAL COURT ERRED IN FAILING TO DISCHARGE DEFENDANT FOR INSUFFICIENT EVIDENCE PRIOR TO PUTTING DEFENDANT TO HIS DEFENSE.

At the commencement of the second day of trial in this ...ction, the prosecution rested it case in chief. (trial transcript, ... 159.) At this point no evidence had been introduced to demonstrate ...hat the alleged victim had not consented to participate in ...e acts alleged to be the basis of this prosecution. Pursuant ... provisions of the Utah Code of Criminal Procedure, §77-17-2 ...ended by L. 1980, ch. 15, §2):

> When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.

The defendant in this action, Claude A. Bundy, in a two count information, was charged as follows:

> Count I. Rape, first degree felony at Salt Lake County, State of Utah, on or about June, 1981, and January, 1982, in violation of Title 76, Chapter 5, Section 402, Utah Code Annotated, 1953, as amended, in that the defendant, Claude A. Bundy, had sexual intercourse with Sherry Christiansen, a female under 14 years of age, not his wife without her consent. [italics added] (trial transcript, p. 8)
>
> Count II. Forcible sodomy, a first degree felony in Salt Lake County, State of Utah, on or about June, 1981, and August, 1981, in violation of Title 76, Chapter 5, Section 403, Utah Code Annotated, 1953, as amended, in that defendant, Claude A. Bundy, engaged in a sexual act involving the genitals of the defendant and the anus of Sherry Christiansen, a female under 14 years of age, without the consent of said Sherry Christiansen, and engaged in sexual acts involving the genitals of Sherry Christiansen, a female under 14 years of age and the mouth of defendant without the consent of said Sherry Christiansen. [italics added] (trial transcript, pp. 8 and 9)

Section 76-5-402(1), 403(1), and 403(2), Utah Criminal Code, as amended in 1979 (L. 1979, ch. 73, §§2 and 3) provide that:

> 402(1) A person commits rape when the actor has sexual intercourse with another person, not the actor's spouse, without the victim's consent. [italics added]

> 403(1) A person commits sodomy when the actor engages in any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.
>
> 403(2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent. [italics added]

In the case of either rape or forcible sodomy, the elements of the offense (in addition to intent requirements of §76-1-501(2)(b), Utah Criminal Code) are: first, the prohibited sexual act; second, involving a specified victim; and third, nonconsent on the part of the alleged victim.

Sections 76-5-402(2) and 403(3), Utah Criminal Code, as amended in 1979 (L. 1979, ch. 73, §§2 and 3) provide:

> 402(2) Rape is a felony of the second degree unless the victim is under the age of 14, in which case the offense is punishable as a felony of the first degree.

and:

> 403(3) Sodomy is a Class B misdemeanor. Forcible sodomy is a felony in the second degree unless the victim is under the age of 14, in which case the offense is punishable as a felony of the first degree.

These paragraphs clearly contain provisions for the enhancement of punishment in the event the victim meets the specified age requirement. They do not, however, alter the elements of the crime itself. Notwithstanding the age of the alleged victim, the elements of the offense remain the same--only the severity

of the punishment is altered. For guilt purposes whether the alleged victim is under the age of 14 or not does not alter the necessity of proof of the above stated elements of the offense. Specifically, the statutes and information above reference require the element of lack of consent as a necessary element--regardless of the age of the victim.

At trial in the instant action, Mr. Carvel R. Harward, the prosecuting attorney (absent defense objections) declared in his opening statement that:

> . . . it's because she (the alleged victim) was under 14 that the acts were without consent. It will be our position in the case it doesn't matter whether she was a willing participant. The fact that she was under 14 makes it without her consent. (trial transcript, p. 11)

This statement is doubly significant in that first: it indicates the prosecutor's position that the alleged victim was, in fact, a "willing participant," and second, that under his perception of the law, her willing participation was of no significance.

Defense counsel Dean P. Mitchell, in his opening statement apparently conceded that the prosecution statement was correct and stated:

> Her (the alleged victim's) age, in determining her credibility, really is not that much a factor and yes, if you believe her, the fact that she was under 14 at the time negates the problem of the State having to prove consent. (trial transcript, p. 15)

This apparent misunderstanding on behalf of both prosecution and defense counsel is probably grounded in a misreading of U.C.A. 76-5-406, Utah Criminal Code, as amended in 1973, (L. 1983, ch. 196, §76-5-406) which provides, in relevant part, that:

> An act of sexual intercourse, sodomy, or sexual abuse is without consent of the victim under any of the following circumstances: . . .
>
> (7) The victim is under fourteen years of age.

The question here presented is: Whether, in a prosecution for rape and forcible sodomy under §§75-5-402 and 403, Utah Criminal Code, an information which alleges as an element of each of the offenses lack of consent on behalf of the alleged victim and which, at the same time fails to allege or indicate subsequent reliance upon a general statute (§76-5-406, Utah Criminal Code) not referenced in the information and which by its own terms is in conflict with the elements of the offenses as alleged in the information, is an information sufficient to support first degree felony convictions on both of the alleged offenses.

The basis of the conflict presented is that, on the one hand, the general statute (§406), covering specified prohibited acts, purportedly eliminates, in the event the alleged victim is under the age of 14, lack of consent as an element of the sexual offense. On the other hand, the specific statutes (§§402 and 403) specifically require lack of consent of the alleged

victim as an element of the offense--regardless of the
the alleged victim--and include an additional enhanced
punishment provision in the event the alleged victim is
the age of 14. Remaining provisions of the Utah Code, Part
Sexual Offenses, (specifically §§401, 404, and 405) make
such distinctions as to punishment enhancement.

No claim in the information was made that the state, direct
or indirectly, intended to rely upon the provisions of §76-5-4.
Notwithstanding the fact that the court was on notice of a misunder-
standing and/or confusion on behalf of both prosecution and
defense trial counsel, no cautionary instructions were given
that would overcome the prejudicial effects of the eliminati
of the critical and material element of lack of consent as
trial issue. State v. Trusty, 28 U.2d 317, 502 P.2d 113 (197
No cautionary instructions were made to the jury indicati
that, contrary to the charge stated in the information, th
defendant was to be tried for an offense different from tha
charged and subject to the provisions of §406, a provision wh
could have been easily pleaded as part of said indictmen

It may be argued that the responsibility for such matter
do not reside with the trial court but the Utah Criminal Co
§76-1-104 provides, in relevant part, that:

> The provisions of this code shall be construed in accordance with these general purposes.
>
> (1) . . .

(2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal.

Further, in §76-1-106, that:

> All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of section 76-1-104.

In order to appropriately construe the above provisions during the course of trial before a jury, it would be unreasonable not to place upon the trial judge the responsibility to respond to matters such as those here presented. Sections 77-35-4(c) and (d), Utah Rules of Criminal Procedure (Rule 4) provide that:

> (c) The court may strike any surplus or improper language from an indictment or information.
>
> (d) The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

These provisions authorize a trial judge to amend the indictment or information in the event a "different offense is charged or the substantial rights of the defendant are not prejudiced" as well as to "strike any surplus or improper language from the indictment or information." Application of either of these

remedies was available and within the power of the trial Had the court been of the opinion that the element of lack intent on the part of the victim was not a requisite elem of the offense, the court was empowered to strike such phras from the information. Had the court been of the opinion tha a charge different from the one charge was being tried, the court was empowered to amend the information. The fact tha the court neither amended the information nor struck from the information the language regarding consent of the alleged victi under circumstances in which such power and obligation were present is strong evidence that, in the mind of the court, the element of lack of consent was an issue of the offense charged.

Notwithstanding errors on behalf of other participant in the trial arena, the trial judge is additionally bound t act, without motion on behalf of any party and "forthwith" t protect a criminal defendant from going forward with his defens when insufficient evidence has been presented to so requir The trial court therefore erred in failing to discharge Defendan Claude A. Bundy for insufficient evidence prior to putting hi to his defense.

CONCLUSION

indicated herein and in defendant-appellant's original ... defendant Claude A. Bundy contends that he was wrongfully ... ted and that he is entitled to a reversal of said conviction ... that the trial court erred in failing to grant his original motion for mistrial; the information on which he was tried was defective for the reasons that it fails to allege a specific date and is violative of due process as required by the United States Constitution; and, finally, that the trial court erred in failing to discharge defendant for insufficient evidence prior to putting to his defense.

The Utah Supreme Court should remand this action to the Third District Court with instructions for a new trial.

RESPECTFULLY SUBMITTED, this the 14th day of October, 1983.

GUYON & GUYON

By _____
Edwin F. Guyon, Attorney for
Defendant Claude A. Bundy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing Defendant-Appellant's Supplemental Brief were mailed this 21st day of October, 1983, to:

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