1970

The State of Utah v. Benton Brian Keith : Appellant's Brief

IN THE SUPREME C
OF THE STATE OF

THE STATE OF UTAH,
Plaintiff and Respond

vs.

BENTON BRIAN KEITH,
Defendant and A

APPELLANT'S

Appeal from the
Court for
Honorable

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

ANNOTATIONS CITED

CASES CITED

TABLE OF CONTENTS (Continued)

ENCYCLOPEDIAS CITED

TREATISES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

BENTON BRIAN KEITH,
Defendant and Appellant.

Case No. 12029

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

The Defendant-Appellant (hereinafter "defendant") was accused of having committed the crime of rape in San Juan County.

DISPOSITION IN LOWER COURT

The defendant was convicted on January 16, 1970, of the rape of Larina Nakai Yazzie. The verdict was filed with the District Court of the Seventh Judicial District on January 19, 1970, and judgment was entered by the Court, the Honorable Edward Sheya presiding, on February 10, 1970. The defendant was sentenced to an indeterminate term in the Utah State Prison of not less

than ten years. From this judgment, the defendant appeals.

RELIEF SOUGHT ON APPEAL

The defendant seeks the reversal of the judgment below.

STATEMENT OF FACTS

On September 22, 1969, Larina Nakai Yazzie (hereinafter "prosecutrix") arrived in Monticello from Blanding at approximately 4:00 p.m. (R. 13). She was accompanied by Mrs. Scotty "Jean" Jones (R. 12). Both of the women were widows (R. 12, 21). They arrived in a pickup truck driven by one Sam Chee, Mrs. Jones riding in the back of the pickup and the prosecutrix riding in the front with Sam Chee and Mrs. Chee (R. 12). After visiting a medical clinic, the prosecutrix rejoined Jean Jones "by the tavern" (R. 13) and together they later went "where the boys were" (R. 57), apparently the same tavern (R. 4, 73), where the prosecutrix first saw the defendant, Benton Brian Keith.

Jean Jones, the prosecutrix' companion, testified that she was with the prosecutrix during the interval between her visit to the medical clinic and her meeting in the tavern with Benton Keith (R. 56, 57). Mrs. Jones testified that during this interval the prosecutrix requested that the two of them purchase beer from a local establishment (R. 56). The prosecutrix denied categorically having had anything to drink during the evening and

early morning of September 22 and 23, 1969, the time of the alleged offense (R. 5, 13, 15, 94). She also denied having purchased beer with Jean Jones (R. 13).

The two women went to the tavern where Benton Keith, a nephew of the prosecutrix, was drinking and shooting pool (R. 73). They requested a ride home to Blanding. The defendant attempted to make excuses but, after repeated urgings, agreed to take Jean Jones, Betty Jones Phillips, the daughter of Jean Jones, and Larina Yazzie home (R. 73, 74).

The prosecutrix testified that the women, Benton Keith and Al Bylilly, a brother-in-law of the defendant, left Monticello at around 5:30 to 6:00 p.m.; that they arrived in Blanding, after a stop at Devil's Canyon Campground, at approximately 7:00 p.m. and that they proceeded directly through Blanding to the city dump outside of the city, arriving there shortly after 7:00 p.m. (R. 16). The prosecutrix lived in the city of Blanding (R. 29). There is no indication in the record that she requested to be taken home or to be let out in the city before the parties proceeded on to the city dump.

Before leaving Monticello, and as their first official act, the parties stopped at a liquor store (R. 57) to purchase wine (R. 58). The wine was purchased, at least in part, with money obtained from the prosecutrix (R. 57). The prosecutrix claimed that the money was furnished to her nephew, the defendant, as consideration for the ride and not for the purchase of wine (R. 14). The defendant, who was driving, testified that there

were two separate stops at the liquor store before the return trip to Blanding, and that the prosecutrix furnished money for purchases on each occasion (R. 74, 76). Both the defendant and Jean Jones testified that all of the parties participated in drinking the wine purchased in Monticello (R. 58, 75).

Charles Farnsworth, an officer of the Utah State Fish and Game Department, called as a witness for the State, observed the prosecutrix and the accused at the Blanding city dump and testified that she appeared to be intoxicated (R. 51).

When the parties arrived at the city dump, outside of Blanding, Jean Jones, Betty Jones Phillips and Al Bylilly left the car taking "one" bottle with them (R. 5). They proceeded "north toward the mountain" (R. 16). The prosecutrix chose to remain in the vehicle with the defendant.

The prosecutrix then testified that Benton Keith made improper advances and that she fled the car and attempted to hide. She testified that he found her; that she fought him with "all her strength" and that he struck her in the face and body (R. 5, 6). She alleged that she then became unconscious (First time). She awakened to discover that the defendant was having sexual intercourse with her and then lost consciousness again (Second time). She regained consciousness long enough to see the defendant putting his trousers back on, was again physically attacked, and again became unconscious (R. 7) (Third time). She then awakened in the auto-

mobile, without knowing how she got there, whereupon she opened the door and ran and hid for a second time (R. 8). She was again located by the defendant, who kicked and choked her so that she lost consciousness (Fourth time). Most propitiously, she awakened to find the defendant engaged in a second act of intercourse, whereupon she lost consciousness (Fifth time), regained consciousness long enough to see the defendant putting on his underclothes, then lost consciousness again (Sixth time).

The prosecutrix stated that she then walked to her home, approximately one mile away (R. 8), where she found that the door was locked and that her sons "wouldn't answer" (R. 9). She then went to the home of a neighbor, Wesley Oshley, arriving at approximately 3:00 a.m. (R. 9). This was, roughly, eight hours after she arrived at the city dump with Benton Keith, Jean Jones, Betty Phillips and Al Bylilly, and approximately nine hours after she first got in Benton Keith's automobile.

The prosecutrix did not attempt, when allegedly raped, to solicit any assistance from the other occupants of the vehicle who were in the immediate vicinity. She stated that she did not call out for anyone (R. 18). Further, when she allegedly ran from the vehicle, she did not proceed "north toward the mountain" as the others had done but rather in another direction (R. 17).

Larina Yazzie remained at Wesley Oshley's home until approximately 5:00 a.m. (R. 9), when she returned home and notified her son, Billy, a college student (R.

94), what had happened (R. 9). At 7:50 a.m., five hours after her arrival at Wesley Oshley's, the police were notified (R. 29). Dr. Lamar Gibbons, her personal physician, arrived shortly thereafter (R. 31).

ARGUMENT

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION.

This court has clearly indicated that in cases where the State's evidence is so "inherently improbable" as to be unworthy of belief the jury's verdict would not be permitted to stand. Where it appears, upon objective analysis, that reasonable minds could not believe beyond a reasonable doubt that the defendant was guilty, it is the duty of the appellate court to reverse on appeal. *State v. Mills,* 122 Utah 306, 249 P.2d 211. In weighing its role, the Court has appropriately noted that a determination as to whether or not a jury could conclude that the evidence proved the defendant's guilt beyond a reasonable doubt is inescapable. *State v. Williams,* 111 Utah 379, 180 P.2d 551. The necessity for heavy reliance upon the testmony of the victim has, in rape cases, required "a very strict rule of proof". *State v. Horne,* 12 Utah 2d 162, 364 P.2d 109.

In the instant case, the defendant stands convicted on the scanty testimony of the prosecutrix. The physician who examined Larina Yazzie, although finding some dam-

age to her person,[1] could state nothing more than his opinion that she had had sexual intercourse within the prior twenty-four hour period (R. 26). The doctor based his opinion upon the microscopic examination of a swab from the prosecutrix' vagina and on her assertion to him that she had been raped (R. 26). The doctor concluded that there were sperm in the vagina, which were not moving, and which could, theoretically, have been there for as long as two days (R. 26). Apart from the self-serving declarations of the prosecutrix to her own private physician (R. 23), there is little evidence which serves to corroborate her very sketchy and dislocated testimony of the pertinent facts.

The defendant concedes that this court has not always required corroboration for the testimony of a rape

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[1]See the testimony of Evelyn Williams, the Prosecutrix' sister, who testified that she had accompanied Larina Yazzie on September 20, 1969, two days before the rape was alleged to have occurred, to look for Sam Chee (R. 67). The testimony is as follows:

"Q. Ask her to tell the jury what transpired on that day? [September 20, 1969]

A. There was a telephone call on that day. It was from the cafe and she said that she wasn't sick at the time but my sister has spots all over her body from the blows that she got from her son Billy and the problem was over Sam Chee. She said at the time that she wanted to marry Sam Chee" (R. 67).

and, further,

"Q. What did Larina tell you about her family?

A. She said that the boy abused her and created problems for her when she leaves to go somewhere.

Q. Does the boy use fists, or did Larina say anything about how the boy abused her?

A. Yes.

Q. What did she say?

A. She said that he hit me and also, hit me with his fist and also throws her around" (R. 69).

Note also that the prosecutrix informed her son, Billy, of the events of the evening upon returning home on the morning of September 23, 1969, (R. 9) and that she was with him for several hours before the investigating officer arrived (R. 30).

victim as a mandatory prerequisite for conviction. The court has, however, recognized the human frailties which sometimes give rise to fraudulent charges with disastrous consequences for an accused.[2] A number of courts have taken the position that while a conviction may be sustained upon the uncorroborated testimony of the apparent victim, that the court will closely scrutinize the testimony to determine that it is not so "incredible" or "unsubstantial" as to require a reversal. *State v. Goodale,* 210 Mo. 275, 109 S.W. 9.

Where, as here, the testimony of the prosecutrix is on its face improbable, contradictory, and unreasonable, adequate corroboration becomes a mandatory safeguard of the rights of the accused. It is significant to note that the State did not analyze or introduce in evidence the clothing worn by either the prosecutrix or by Benton Brian Keith on the evening of September 22. Failure to present the garments to show either spoiling or disarray, possible seminal stains, or other incriminating evidence, permits the inference that these conditions did not in fact exist. *Brown v. State,* 127 Wis. 193, 106 N.W. 536.

Further, the State pointedly failed to call Wesley Oshley, Larina Yazzie's neighbor, as a witness, although she was at his home from 3:00 a.m. till 5:00 a.m. on Sep-

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[2]See *State v. Horne, supra* at 112, where Justice Callister writing the opinion for a unanimous court stated:

> "However, in determining the sufficiency of the evidence, there must be considered the ease of assertion of the forcible accomplishment of the sexual act, with impossibility of defense except by direct denial, *or of the proneness of the woman, when she finds the fact of her disgrace discovered or likely of discovery to minimize her fault by asserting force or violence, . . .*" (Emphasis supplied)

tember 23, 1969 (R. 9). Mr. Oshley could have testified as to his observations of the prosecutrix' condition and as to her contemporaneous representations to him, including the presence or absence of complaints against Benton Brian Keith. The State also failed to call Mrs. Tina Willy, or Mr. Willy, who were present at the Yazzie residence when the Chief of Police arrived (R. 30).

The State, relying on the Chief of Police and a medical doctor, chose to avoid, with a single unhelpful and very limited exception,[3] the testimony of a single lay witness for confirmatory or corroborating proof of the alleged victim's testimony. The list of exclusions included Wesley Oshley, Mr. and Mrs. Willy, Jean Jones, Betty Jones Phillips and Al Bylilly, all of whom were more or less involved in the events surrounding the evening and early morning of September 22 and 23, 1969. Perhaps more understandably, the omissions included the prosecutrix' own adult children.[4]

Assuming without conceding that an act of intercourse occurred at some indeterminate time prior to the medical examination by Larina Yazzie's physician, there is still no adequate legal corroboration for the testimony of the prosecutrix that the crime of rape occurred. There is evidence in the record that the prosecutrix, the 36-year old mother of eight children, was in the company of Sam Chee during the early afternoon of September 22, 1969,

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[3]The testimony of Charles Farnsworth (R. 48), which was, for all intents and purposes, devoid of corroborating effect.

[4]Who were presumably home and with their mother for approximately three hours before the Chief of Police, Gordon Hawkins, was notified at 7:50 a.m. (R. 9, 29).

less than 12 hours before the rape is supposed to have occurred (R. 12, 13), and that she considered her relationship with Sam Chee as more than casual.[5]

A. *The Testimony of The Prosecutrix Was So Unreliable, Contradictory and Inherently Improbable As To Be Unworthy of Belief.*

Larina Yazzie was with the defendant, and with their mutual friends, from approximately 6:00 p.m. on the evening of September 22, 1969, until shortly before 3:00 a.m. (R. 9) in the early morning of September 23, a period in excess of eight hours. It is clear that the series of events which preceded the Complaint were initiated by the prosecutrix and by her companion, Jean Jones, who located the defendant in a local tavern and solicited a ride. The defendant was drinking before leaving the tavern; "everybody was feeling happy" and the first stop on the eventful ride home was the local liquor store (R. 74). There is no evidence that Larina Yazzie objected to the conduct of her friends and no indication that she did anything but participate in the activities which started in Monticello and ended at the city dump in Blanding.

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[5]Note the testimony of Jean Jones who accompanied Larina Yazzie and Sam Chee to Monticello on September 22, 1969.

"Q. Did you have any conversation about Sam Chee?
A. She talked about him while I was with her.

Q. What did she say.
A. She said he was her — Said he was her husband" (R. 60).

See also the testimony of Evelyn Williams, the prosecutrix' sister, who testified that she was told by the prosecutrix that the prosecutrix intended to marry Sam Chee, who was already married (R. 12), "for sure" (R. 68).

There is not the slightest hint in the record that the prosecutrix objected to the purchase or use of alcohol or to the parking of the car at the San Juan County dump, over a mile from her home. Further, when Jean Jones, Betty Jones and Al Bylilly, who were drinking together, left the car, she chose to remain in the car, alone, with the accused. There is no indication that during the interim period, between the time the other occupants left the car and the offense allegedly occurred, that the prosecutrix requested to be taken to her home. During the time that the prosecutrix was, according to her testimony, being forcibly raped by the defendant on two separate occasions, there was no outcry (R. 18) and no other attempt to alarm or notify the other occupants of the vehicle who were presumably located nearby and within easy shouting distance. The prosecutrix testified that while her companions went one direction toward the mountain, she went the other when she "ran" from the car (R. 17). None of the occupants of the Keith vehicle were called by the State which chose to rely on Larina Yazzie's testimony *exclusively.*

While it is the responsibility of this court to view the evidence in a light favorable to the prosecutrix, there are several compelling examples of its unreliability. One concerned the issue of her drinking. The prosecutrix repeatedly denied having had anything to drink on the evening in question (R. 5, 13, 15, 94).

Jean Jones, Larina Yazzie's companion,[6] who testified at the request of the defendant, stated that she and Larina went to the store where, at Larina's request, they purchased beer in "long" cans (R. 56). They then proceeded to go behind the store and drink the beer, having at least three apiece (R. 56). This occurred prior to the time they met Benton Keith at the tavern which was before 6:00 p.m. Mrs. Jones confirmed the testimony of the defendant that all of the people in the car were drinking and that the prosecutrix' money was used to make the purchase (R. 57).

It is scarcely possible that the prosecutrix could, under the circumstances, have entertained herself during the lengthy trip to Blanding and over an eight-hour period without having personally imbibed. In this regard, it is worth noting that she did not call the investigating officer for approximately five hours after her arrival at the home of Wesley Oshley (R. 9, 29). The failure to immediately report the incident was not explained. It is probable, considering the testimony of Jean Jones, Charles Farnsworth and the defendant, that the prosecutrix required some time to eliminate the evidence of her own intoxication. The State's failure to call Wesley Oshley, or Mr. and Mrs. Willy, as witnesses, should permit the inference that their testimony would have been harmful to the State's case. They were friends of the prosecutrix to whom the State had superior access. No tests to determine whether or not the prosecutrix had been drinking were applied. Clearly, it would have been as easy for the doctor to take a blood

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[6]Who was close enough to the prosecutrix to refer to her in the tribal tongue as "daughter" (R. 95).

sample, in an effort to affirm or contradict the prosecutrix' testimony on this point, as to take a vaginal swab.

The prosecutrix testified that upon her arrival home she could not get her children to open the door and let her in (R. 9). Her statement that "the boys *wouldn't* answer" (R. 9) (Emphasis supplied) was compatible with the testimony of Jean Jones, who stated that the prosecutrix told her that she was drinking because her children had scolded her (R. 59). Evelyn Williams stated that the source of the disagreement with the children was Sam Chee (R. 67).

The prosecutrix seemed to concede that her case rose or fell on the issue of her drinking when she categorically stated that,

> "I did not drink any wine, and if I had drank that much wine *I wouldn't have known what went on and I wouldn't have filed this complaint*" (R. 15, 16) (Emphasis supplied).

B. *The Prosecutrix' Medical Background Made Adequate Corroboration, Where Available, Mandatory. The State Failed to Produce Adequate Corroboration For the Testimony of The Prosecutrix.*

The State called Dr. Lamar J. Gibbons, who had known and treated the prosecutrix since March of 1966, as a medical witness. The doctor, based upon his past observations of Larina Yazzie, indicated that she was, under conditions of emotional stress, inclined to enter what he referred to as "the fugal state" (R. 25). The fugal state

was described as being a semiconscious or stuporous condition (R. 28) characterized by a loss of apparent consciousness and physical movement, without an actual blacking out (R. 25, 28). The doctor suggested that "financial problems" and "illness" were typical of the kinds of stressful situations which could induce an abnormal reaction in the prosecutrix. The death of her husband caused such a condition, and "fights" in the family were capable of doing so (R. 27). While in such a condition, the doctor conceded that the prosecutrix was capable of hallucinations, although he had not observed her hallucinate (R. 28). Although the doctor, when interrupted by the prosecutor in his analysis of the effects of such a condition (R. 25), was quick to affirm that in his opinion the prosecutrix was not in such a state of mind at the time of his examination, it must be remembered that the examination took place more than five hours after the alleged incident.

There is substantial indication in the testimony of the prosecutrix that she was in precisely such a disordered state of mind when the events which she purports to remember supposedly took place. (See Statement of Facts, p. 4, 5, this Brief, also R. 7).

In describing the conduct of the prosecutrix when in such a condition, the doctor indicated that she was basically in a state of amnesia as "to everything going on" (R. 28). He further indicated that Larina Yazzie had a tendency, when under emotional stress, to mentally move "to another world". In such instances, he stressed, *"Reality*

just ceases for her" (R. 25). (Emphasis supplied) The doctor also conceded that the occurrence of such stress was usually "magnified by her [i.e. the prosecutrix] to be something more serious usually than it is" (R. 27).

The State's medical witness then concluded that the basic cause of such a condition was a form of hysteria peculiar to people who were not highly sophisticated in responding to stressful situations (R. 26).

The defendant does not accede to the view that because of such irregularities, the prosecutrix was incapable of making complaint against one by whom she was abused. It must nonetheless be stressed that, given such a history, it was incumbent upon the State to produce the best available evidence to substantiate and corroborate the generally suspect testimony of the prosecutrix. To fail to call any occupant of the defendant's vehicle, to fail to call any of the lay persons who first observed the prosecutrix and heard her recital of the facts and to rely upon her *solely* and *exclusively* for the facts surrounding the incident itself, was to cynically deny the defendant the basic elements of due process of law, including the *full* and *fair* presentation of the case to a jury.[7] It does not suffice to say that the defendant had the opportunity to call such witnesses and failed to do so, because it is the State's burden to prove its case beyond a reasonable doubt and, specifically, in a rape situation, where such proof is available, to provide adequate corroboration for the testimony of the accusing witness. This is particularly true of

[7]*State* v. *Neal* (Utah), 262 P.2d, 756.

lay facts which can be recounted from memory as opposed to expert observation or opinion, discernible by inference and deduction.

It is frightening to conceive that on such inherently improbable, inconsistent, incomplete, casual and uncorroborated testimony that the defendant should be sentenced to prison for a minimum term of ten years.

C. *The State Failed to Prove Essential Elements of Its Case.*

The State must prove, in order to sustain a conviction for rape, the absence of consent on the part of the accusatory party. Stated more affirmatively, the State must prove resistance overcome by force as an essential element of the crime. See: 76-53-15 (3) U.C.A. 1953, *Morris v. State* (Utah) 131 P. 731. Sexual intercourse, if consentual, is not rape. This is true even though such intercourse may be accomplished by somewhat tumultuous means.

There is evidence in the record that the prosecutrix was jesting with the defendant in an inviting manner prior to their arrival in Blanding.[8] The prosecutrix' recital of the events surrounding the offense suggests, charitably, the absence of complete lucidity (R. 6, 7).

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[8]See the defendant's comment, "Well, this side of Devils Canyon there is a corral there and we went in there. I drove off there and we, she was talking out, you know, kind of a strange girl. I know she's always talkative and joking and always saying something all funny all the time, but this was something else, you know" (R. 75).

The State did not contend that the defendant bore evidences of resistance. The absence of such evidence strongly contradicts the prosecutrix' statement that "she fought with him with all her strength" (R. 6). As one court succinctly stated,

> It is hardly within the range of reason that a man should come out of so desperate an encounter . . . without signs thereof upon his face, hands or clothing. Yet this prosecutrix, . . . mentions no single act of resistance or reprisal. It is inconceivable that such efforts should have been forgotten if they were made, or should fail of prominence in her narrative." *Brown* v. *State,* 127 Wis. 193, 106 N.W. 536.

Aside from her general assertions that she fought the defendant and resisted him physically, and attempted to hide, the prosecutrix offered no specific examples of resistance. The Supreme Court of Wisconsin appropriately stated in this regard,

> "Further, it is settled in this state that no mere general statements of the prosecutrix involving her conclusions, that she did her utmost and the like, will suffice to establish this essential fact, ***but she must relate the very acts done,*** . . . " *Brown* v. *State, supra.* (Emphasis supplied)

Without such proof, the State failed to establish resistance overcome by force, the "sine qua non" of the crime of rape. There is no showing of such resistance as the prosecutrix' age and strength, together with the attending circumstances, might have led one to expect.[9]

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[9]The criteria as to what constitutes sufficient resistance are analyzed in *State* v. *Horne,* 12 Utah 2d 429, 361 P.2d 174.

Summarizing the facts, without conceding that an act of intercourse between the defendant and the prosecutrix ever occurred, it is apparent that the defendant was, at the time of the alleged offense, intoxicated.[10] So were the other occupants of the vehicle. The prosecutrix, who claimed that she was in and out of consciousness, was, if Jean Jones and the defendant are to be believed, also drinking. The defendant, who like the prosecutrix was "unsophisticated", may have legitimately interpreted the absence of resistance to be the presence of consent. The preliminary conduct of the prosecutrix, both prior to and after the arrival at the Blanding City dump, was clearly consistent with the notion of consent.

While outrage to the feelings of the victim is at the heart of the crime of forcible rape, *State* v. *McCune* 16 Utah 170, 51 P. 818, it is also clear that the wilful intent of the accused is a vital element. 76-1-20 U.C.A. 1953. If an act of sexual intercourse actually occurred, and if the prosecutrix did not expressly or impliedly consent, it would not have been unreasonable, under the circumstances, for the defendant to have assumed that she did. The defendant was not capable of drawing a suitable dis-

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[10]Where intent is a necessary element of a particular crime, the jury may consider the intoxication of the accused in determining the "purpose, motive or intent" with which the act was committed. 76-1-22 U.C.A. 1953. To deprive the defendant of the full benefits of this provision is reversible error. *State* v. *Dewey*, 41 Utah 538, 127 P. 275, explained in *State* v. *Cerar*, 60 Utah 208, 215, 207 P. 597. While the defendant did not request an instruction on the issue of his intoxication, and while the court did not deny such an instruction, the cumulative effect of the instructions given was to treat the defendant as if he were fully in control of all of his faculties. This created an erroneous impression which injured the defendant and constituted error. Without some clarification of this critical point, the jury was insufficiently advised of the issues to be determined and misled to the prejudice of the defendant.

tinction between nonresistance based on consent, nonresistance based on a unique and unusual medical problem (See Point 1 (B), this Brief) or nonresistance based on the use of alcohol.

The defendant contends that reasonable minds could not conclude beyond a reasonable doubt that the prosecutrix sufficiently resisted, or that the defendant wilfully intended to commit the crime of rape.

POINT II

THE COURT PERMITTED THE INTRODUCTION OF INADMISSIBLE EVIDENCE AND EXHIBITS WHICH MISLED THE JURY AND PREJUDICED THE DEFENDANT.

The investigating officers made plaster casts of footprints found in the viciinity of the city dump in Blanding (R. 36). The identification of the plaster casts followed testimony which indicated that the prints were found in an area where there were "definite" signs that a "struggle" had occurred (R. 35). After the preliminary identification of the plaster casts, a shoe owned by the defendant was marked for identification (R. 37). The casts were marked as Exhibits 4 and 5 and the shoe was marked as Exhibit 6 (R. 37). The State then moved for the introduction of the Exhibits (R. 40). At the time that the State moved for the introduction of the Exhibits, there had been no evidence presented which connected the shoe of the defendant to the plaster casts, or the plaster casts to the defendant. Further, there were "other prints" in the area which were selectively omitted and not encasted (R. 33).

The failure to connect the proposed Exhibits to the defendant was called to the prosecutor's attention by the Court (R. 40). The prosecutor then again submitted the Exhibits, without connecting evidence, claiming that they had "probative value" (R. 40). The Court then asked whether a comparison had been made of the shoe and the footprint and whether the testimony would establish that the footprint was made by the shoe, to which the prosecutor answered, "No" (R. 40). The prosecutor then, in the presence of the jury and without the benefit of the connecting testimony of the identifying witness, proceeded to delineate in detail the *factual* basis for his claim that the evidence was admissible. Having, by means of such testimony, suggested the pertinent answers to his witness, the Chief of Police, the prosecutor then proceeded to attempt to connect the two Exhibits through the witness and tie them to the defendant (R. 41, 42). The witness then testified that the Exhibits were "similar" and "about" or "approximately" the same size, whereupon the Court received the Exhibits in evidence (R. 42).

The rule of relevancy requires that evidence must logically tend to establish the proposition which it is offered to prove. *Plumb* v. *Curtis,* 66 Conn. 154, 33 Atl. 998. To say that a pair of men's shoes is "similar" to or "about" the same size as a plaster cast made of a print selected from among other prints at the scene of an alleged crime is singularly unhelpful. It does not render the inference for which it is offered more probable than the other possible inferences or hypotheses. If one starts with the proposition that nothing which is not logically relevant is ad-

missible,"[11] then it must be conceded that Exhibits 4, 5 and 6, because they were of insufficient probative value to sustain the proposition for which they were offered, were not properly admitted. Their connection to the defendant was so slight, conjectural and remote as to require their rejection.

Further, and more critically, assuming for the sake of argument that the Exhibits had some probative value or some logical relevance, it is clear that such criteria are, where the connecting evidence is tenuous, more than counterbalanced by other factors which call for their exclusion. Most prominent among these factors was the danger that the evidence aroused the jury's emotions of prejudice or hostility. Where evidence, though relevant, excites prejudice which over-balances the assistance it renders in advancing the inquiry, it should be excluded. *Rogers* v. *Rogers,* 80 N.H. 96, 114 Atl. 270. See also, 31 C.J.S. 869, note 21.

While the defendant did not deny that his car was parked on a dirt road west of Blanding (R. 78), the net effect of the Exhibits, which were only remotely tied to him, was to place him at the precise spot where the prosecutrix alleged the rape occurred and where the officer stated that he had found "definite" signs of a "struggle".

This court has previously stated that,

> "There are some criminal offenses that by their inherent nature are so repulsive or even so abhorrent to most people *that the mere accusation,*

[11]Thayer, Preliminary Treatise on Evidence, 264-266 (1898).

> *unless accompanied by every precaution of law, creates a prejudice.* Rape is among these." *State* v. *Whittinghill,* 109 Utah 48, 163 P.2d 342. (Emphasis supplied).

It must be presumed that the admission of such evidence was prejudicial to the defendant. Further, the attempt to elicit connecting testimony from Officer Hawkins was prejudicial to the defendant in light of the prosecutor's extensive personal attempt to bridge the factual gaps in the testimony of the witness (R. 40, 41). The argument, made in the presence of the jury, anticipated and suggested the later answers of the witness and was hence improper. This court has stated that,

> "Both the court and the prosecutor should be zealous in protecting the rights of an accused, and should carefully refrain from doing or saying anything from which it might be inferred that an unfair advantage was taken of a defendant." *State* v. *Jameson,* 103 Utah 129, 134 P.2d 173.

It is important to note that the major part of the officer's investigation (as well as the major part of his testimony, R. 31 to 42), was devoted to preparing and substantiating the various Exhibits. With the possible exception of the testimony of Dr. Gibbons, the little scientific method applied in this case reposed in Exhibits 4 and 5. To lay all the groundwork for the introduction in evidence of such Exhibits without once connecting them to the defendant, while clever, was unfair to the defendant. Such unfairness had a substantial and prejudicial effect on the jury. The jury is particularly impressionable where the witness is, as in this case, the Chief of Police. This

court recognized the pervasive influence of such a witness in a civil case in the following terms:

> "It is only fair to assume that a jury would be impressed by and give considerable weight to the testimony of a patrolman with 24 years experience in accident investigations. There is a reasonable likelihood that in the absence of such testimony the jury might have reached a different result." *Day* v. *Lorenzo Smith and Son Inc.,* 17 Utah 2d 221, 408 P. 2d 186. See also: *Joseph* v. *W. H. Groves Latter-day Saints Hospital,* 7 Utah 2d 39, 318 P.2d 330.

Exhibit 1, a moccasin found at the scene of the alleged crime, which presumably belonged to the prosecutrix, was admitted in evidence though never identified by Larina Yazzie or tied to her by the later testimony of Chief Hawkins. Further, the Chief did not connect the moccasins to the "running" "female" footprints found among other footprints near where he testified that physical indications were that a "struggle" had *definitely* occurred (R. 33, 35).

Defendant's counsel objected to the admission of the Exhibits in general terms (R. 40, 41). Had he not so objected, or if the objection is now deemed to be somewhat ambiguous, it is nevertheless clear that this court will, subject to necessary precautions, in "serious criminal cases" under "special circumstances" where "the interests of justice so require", notice palpable and significant error even though proper objections were not taken at the trial. *State* v. *Sanchez,* 11 Utah 2d 429, 361 P.2d 174, See also: *State* v. *Cobo,* 90 Utah 89, 60 P.2d 952.

POINT III

THE TRANSLATION WAS INACCURATE, CONFUSED AND PREJUDICIAL TO THE DEFENDANT.

Throughout the trial, there were examples on the record of the difficulty of translation. The critical testimony of Larina Yazzie, Jean Jones and Evelyn Williams was heard through an interpreter. One of the kinds of problems encountered by the defendant was evidenced by the repartee between counsel, the court and the interpreter which is reflected on page 62 of the record and which involved the cross-examination of Jean Jones, a witness for the defense. The exchange is as follows:

"Q Now, Mrs. Jones, did Benton Keith ask you to come here today?

A. They came over to my place and I came with them.

Q. Who talked to her about coming here to tell her story today?

A. Well, they asked me to come and it was Benton.

Q. That is, Benton Keith asked her to come?

A. Yes.

Q. Did he ask you what you were going to say here today and talk to you about it?

A. Yes.

MR. HALLIDAY: What did she say again?

MR. BUNNELL: She said yes.

MR. HALLIDAY: *My client indicates it was the wrong translation.* I don't know, your Honor, I have to go by what he says. (Emphasis supplied).

THE COURT: Well, we can't argue with the interpreter I don't suppose, is there any misunderstanding about the last question or answer?

INTERPRETER: That's just translated what he said and she may have misunderstood what I said. But that's the, I just put it the way it was asked."

Repeated inaccuracies in the translation of the testimony substantively affected the proceedings below. The cumulative effect of the errors reflected on the record in the testimony of Larina Yazzie, Jean Jones and Evelyn Williams was to distort the accuracy of the facts. Such distortions operated to the prejudice of the defendant and materially affected his substantial rights. An Appendix of some of the most obvious errors is included at the back of this Brief (Brief, 31).

There is some indication on the record that the interpreter, George Lameman, was either a material witness to certain facts, a relative of material witnesses, or identifiable as a friend of the prosecutrix. Note the following testimony of Dr. Gibbons in that regard:

MR. BUNNELL: "Q. When you arrived there [i.e. Larina Yazzie's home] about 7 a.m. who was there at the house besides Larina?

DR. GIBBONS: A. I believe Gordon Hawkins was there. And I am not sure whether it was — Willy I think.

MR. BUNNELL: Q. Would that be another Navajo?

DR. GIBBONS: A. Yes.

MR. BUNNELL: Q. That you refer to?

DR. GIBBONS: A. Yes, *I am not sure whether it was him or Mr. and Mrs. Lameman.* I think it was Willy though (R. 23)." (Emphasis supplied)

In any event, however the interpreter was privately characterized, the net effect of the translation was to confuse and distort the facts, depriving the defendant of a fair trial. It is the responsibility of the interpreter to be "absolutely impersonal *putting the questions of counsel with no added remarks of his own and giving back the witness' answer in the witness' own words." Prokop* v. *Nebraska,* 148 Neb. 582, 28 N.W.2d 200, (Emphasis supplied). See also: 172 A.L.R. 91. On numerous occasions the interpreter in the instant case made observable errors (See: Appendix) or recited the answers of the prosecutrix and of other witnesses in the third person. Because the prosecutrix testimony was not verbatim as spoken, but colored and *interpreted* in the translation, the defendant was deprived of his right to a clear and impartial presentation of the evidence. The proper rule with respect to interpretation is that the testimony should be repeated by the translator *literally* and *in the first person. Gregory v. Chicago, R.D. and P.R. Co.,* 147 Iowa 715, 124 N.W. 797.

This court has many times indicated that the facts on appeal are to be considered in a light favorable to the respondent and that it will not lightly interfere with the fact finding function of the jury. *Larson v. Evans,* 12 Utah 2d 245, 364 P.2d 1088, *Hillyard v. Utah By-Products Co.,* 1 Utah 2d 243, 263 P.2d 287.

It is, however, apparent, that the reasons why this court should not interpose itself into the fact finding process, are far less compelling where translation difficulties have deprived the jury of those certain innate advantages which it conceptually enjoys. The value of so called "list"[12] evidence is substantially minimized where the jury cannot understand the witness' testimony or inflections and where it must take the analysis second-hand through an interpreter. This is doubly true where, as here, the quality and impartiality of the translation are open to serious question.

The failure of trial counsel to clearly formulate his objections to the translator's interpretation of the testimony should not defeat his right to claim error on appeal under the principles enunciated in *State* v. *Sanchez, supra,* and *State v. Cobo, supra.*

POINT IV

THAT THE ERRORS OF THE COURT WERE CUMULATIVE AND WHEN VIEWED IN CONNECTION WITH EACH OTHER RESULTED IN PREJUDICE TO THE DEFENDANT.

It is a fundamental rule that even though the errors of the court, if they were considered to be separate and isolated instances, may not amount to the deprivation of a fair trial, if the various errors combine to reach that result, prejudice to the defendant may be shown. *State* v.

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[12]*Broadcast Music* v. *Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2nd Cir.).

Moore 111 Utah 458, 183 P.2d 973. This is especially true of the crime of rape. It is mandatory that this court superintend the trial process by requiring that every "precaution of law" be required in a case of this kind. *State* v.*Whittinghill, supra.*

It is submitted that the errors enumerated were such as to cumulatively prejudice the defendant and that they did in fact deprive him of a fair trial.

CONCLUSION

The conviction of the defendant, who is married and the father of three children (R. 102), was accomplished on flimsy evidence. The testimony of the prosecutrix, upon whom the State principally relied was not clear and convincing. See: *Morris* v. *State,* (Utah) 131 P. 731. Careful analysis of the critical facts demonstrates, for instance, that the prosecutrix testified that during the course of the alleged offense she became unconscious six times. On each of the two occasions involving separate offenses she testified, most propitiously, that she awakened to find the defendant engaged in acts of sexual intercourse. On each occasion, again most propitiously, she awakened to observe the defendant putting on his clothes. Such incredible and unlikely observations must, as this court has previously observed, raise a strong presumption that her testimony is false and feigned. *State* v. *Halford,* 17 Utah 475, 54 P. 819. Further, given the contradicting testimony of the prosecutrix' companion and tribal "mother", Jean Jones, and the abnormal findings of her personal

physician, Dr. Gibbons, it was incumbent upon the State to present adequate corroborating evidence to substantiate her claims.

While one must view the evidence on appeal in a light favorable to the prosecutrix, it is apparent that Larina Yazzie spent nearly nine hours with the defendant during the evening and early morning of September 22 and 23, 1969. Approximately eight of these hours were spent near the city dump in Blanding. She furnished the money which was used to purchase alcohol. She accompanied others, all of whom were drinking, on a lengthy round of activities without making any objection. She drove past her home in the city of Blanding and went directly to the city dump without complaint. She remained in the automobile with the defendant when all of its other occupants, including two women companions, departed. She made no outcry when the offense allegedly occurred although the other occupants of the vehicle were in the immediate area and presumably within the sound of her voice. When purportedly trying to escape she ran in a direction other than the one taken by her companions. She engaged in no specific acts of resistance or reprisal and the defendant bore no marks from the alleged encounter. She waited five hours to notify the police. She had been in the presence of Sam Chee less than two hours before asking the defendant, her own nephew, for a ride home.

It is submitted that the Court permitted the introduction of inadmissible evidence and exhibits and that the effect of the State's testimony, when taken in context, was

to unfairly deprive the defendant of a fair, "full" and impartial trial. The verdict of the jury was influenced by the translation which, because it was on many occasions in third person and inaccurate, confused and distorted the evidence and permitted its improper interpretation. The jury was not presented with evidence which was sufficient to satisfy reasonable minds beyond a reasonable doubt that the crime of rape occurred.

The defendant, with the consent of the Court and of the County Attorney for San Juan County, has been free on his own recognizance since the trial, a period exceeding seventeen months (R. 104). He is no threat to society and should be released.

The matter should be reversed.

Respectfully Submitted,

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APPENDIX

Substantial parts of the testimony were in third person. Despite the admonition of the Court (R. 11) there were repeated instances of third person translation. In this regard see R. 4, 5, 6, 7, 8, 9, 10, 18, 19, 20, 57, 61, 62 and 70.

There were numerous errors in the translation which, in some instances, made the record almost unintelligible. Examples:

Q. "Who else was in the car?
A. In the car were Mrs. Jones. Scotty Jones, the widow of Scotty Jones. Billy Jones and the brother-in-law to Benton and Benton was also in the car." (R. 4)[13]

Q. "What happened at the city dump?
A. When they stopped at the city dump then two women got, were sitting by her . . ." (R. 5).

Q. "Is Scotty Jones wife, is that Jean Jones?
A. Yes. He was in back of the pickup when he came to Monticello." (R. 12)

On several occasions the translator was simply confused.

Q. "You, well lets see. Will you tell the jury how you got over to Monticello from Blanding?
A. Let me get it straight now. I can't tell what she's saying. . ." (R. 12).

For further examples of the translation problems check R. 5, 9, 62-63, 65.

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[13]Note that Betty Jones Phillips not "Billy Jones" was the passenger (R. 73). Later Betty Jones Phillips was referred to as "Buddy Jones" (R. 5).