1971

State of Utah v. Steven Leon Villiard : Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff and Appellee,	:	
v.	:	Case No. 12631
STEVEN LEON VILLIARD,	:	
Defendant and Appellant.	:	

BRIEF OF APPELLANT

Appeal from the Judgment of the
Fourth District Court for Utah County
The Honorable Allen B. Sorensen

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE AND DISPOSITION OF THE CASE BELOW

Appellant, Steven Leon Villard, is appealing from a conviction of rape under § 76-35-15, Utah Code Annotated 1953, rendered in the Fourth Judicial District Court for Utah County, the Honorable Allen B. Sorensen presiding. Appellant was tried by jury for the above crime, found guilty and sentenced

to imprisonment in the Utah State Prison for a term of not less than ten years.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order dismissing the charges against him or in the alternative an order remanding the case to the lower court for a new trial.

STATEMENT OF MATERIAL FACTS

The appellant was convicted of rape under § 76-53-15, Utah Code Annotated 1953, which provides in essential part as follows:

> "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:
>
> * * *
>
> (3) Where she resists, but her resistance is overcome by force or violence.
>
> (4) Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic or anaesthetic substance administered by or with the privity of the accused.

The testimony of Mary Alice Ivie, the prosecutrix herein, and the appellant are in conflict and fully discussed in the argument under Point VI.

The following are facts not in controversy.

On May 12, 1971, at approximately 10:45 a.m. the prosecutrix was walking on Creek Road towards her school, having sometime earlier that morning not taken the school bus. Then or a short time later she voluntarily entered appellant's automobile. The appellant drove the prosecutrix by her school and then to an area alleged to be in Utah County, Utah, near the town of Cedar Fort. At that time and location appellant allegedly raped the prosecutrix. Thereafter, the appellant part of the way and the prosecutrix most of the way drove themselves back to the prosecutrix's school where the prosecutrix left the appellant's automobile and entered school at approximately 1:00 p.m.

the same day. The prosecutrix then allegedly complained of the incident to a friend and subsequently to school officials. The appellant's arrest followed resulting in the trial below.

ARGUMENT

POINT I

FAILURE OF APPELLANT'S ATTORNEY AT TRIAL TO TAKE EXCEPTIONS TO INSTRUCTIONS DOES NOT PREVENT REVERSAL

The Utah law on the question of appellate review of criminal cases where the attorney representing the appellant at trial did not request or take exceptions to instructions has been stated by this court as follows:

> "We wish not to depart from the rule laid down in this jurisdiction that in ordinary cases on appeal errors relating to instructions or refusing requests to instruct will not be considered or reviewed unless exceptions thereto were properly taken by the party complaining. But in capital cases and in cases of grave and serious charged offenses and convictions of long terms of imprisonment, cases involving the life and liberty of the citizen, we think that

when palpable error is made to appear on the face of the record and to the manifest prejudice of the accused, the court has the power to notice such error and to correct the same, though no formal exception was taken to the ruling." State v. Cobo, 90 Utah 89, 60 P.2d 952, 958 (1936).

"Nor is it always the duty of the court to instruct on the lesser offenses,--for example, where either a conviction or outright acquittal of a particular offense is mandatory, leaving no room to hold an accused for any other offense. Nor must the court always instruct as to lesser offenses whether requested so to do or not.

* * *

"The great weight of authority is to the effect that if no request is made for instructions on lesser offenses, and none is given, such failure to instruct is not reviewable as a matter of right on appeal." State v. Mitchell, 3 Utah 2d 70, 278 P.2d 618, 621 (1955).

It has been applied to the failure to make objections to evidence in a rape case as follows:

"The errors assigned relate to claimed improper admission of evidence. Through counsel on appeal, who did not represent him at the trial, defendant concedes that no proper objections were made to some of the testimony in question. Under those circumstances, giving consideration to such matters on appeal is

done rarely and with caution in an awareness of the importance of the requirement for timely objections. This serves to safeguard correct rulings when made; and to prevent any deliberate delay in making objections to later take advantage of errors committed. However, so long as these factors are given due consideration, we do not disagree with the defendant's contention that in serious criminal cases, under special circumstances, where the interests of justice so require, this court may 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, 175 (1961).

In the instant case the appellant was tried for a serious crime punishable by depriving him of his freedom for a period of not less than ten years and a maximum period of the duration of his life. The errors committed in the trial below, both singularly and in combined effect, are significant and substantially deprivedappellant of a fair trial and due process of law. Where the instructions are palpably erroneous to such an extent, if followed by the jury, they would prevent a fair determination of the case, this court should notice the error without exceptions having been taken.

So far as the record shows none of the errors herein were invited by appellant. Appellant requested no instructions and took no exception to the instructions given. (R. 39).

The errors in the instructions of which appellant now complains are each treated separately in the following arguments as though each was itself reversible error. In applying the above rule as to whether this court should review the instructions, the entire case should be considered to determine if appellant in fact received a fair trial on the issues.

POINT II

THE COURT'S FAILURE TO INSTRUCT THE JURY ON LESSER AND INCLUDED OFFENSES IN THE CIRCUMSTANCES OF THIS CASE IS REVERSIBLE ERROR

This court has held that it is reversible error for the trial court to fail to instruct the jury on finding the defendant guilty of a lesser and included offense where

the evidence would justify such a conviction. State v. Hyams, 64 Utah 285, 230 Pac. 349 (1924); State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1934). Where the evidence was overwhelming that the defendant committed the act charged and there was no evidence justifying a conviction of a lesser offense this court has held that it is not reversible error to fail to instruct the jury concerning the lesser offense. State v. Gleason, 17 Utah 2d 149, 405 P.2d 793 (1965). In State v. Gleason, supra, there was no conflict in the testimony as the defendant did not testify in his own behalf. In State v. Hymas, supra, this court stated that not instructing on lesser offenses should be done only in very clear cases. State v. Mitchell, supra, contra. In State v. Barkas, supra, it was reversible error not to instruct on the lesser offense where the evidence of the lesser offense was from the testimony of the State's witness and the evidence on the greater offense from the testimony of the defendant.

In the present case there is direct conflict in the testimony of the prosecutrix and the appellant and the jury could have believed part or all of the testimony of either. By believing anything less than all of the prosecutrix's testimony, the jury might have found the appellant guilty of attempted rape or assault with intent to commit rape, if they had been so instructed.

No instructions were given on the lesser offenses and the jury was given no opportunity to return a verdict that the appellant was guilty of these offenses. Depriving the defendant of having these matters determined by the jury is reversible error.

POINT III

THE COURT BELOW COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY THAT THE LACK OF CONSENT OF THE PROSECUTRIX WAS AN ESSENTIAL ELEMENT OF THE CRIME ALLEGED

The court gave no instruction on the jury's finding that the prosecutrix did not consent to the alleged sexual intercourse. The lack

of consent is an essential element of the crime of rape. 44 Am. Jur. 906, Rape §8; 75 C.J.S. 473, Rape §11. Appellant was entitled to an instruction that the jury should acquit him unless the State had proven beyond a reasonable doubt that the prosecutrix had not consented to the act of sexual intercourse. 75 C.J.S. 577, Rape § 82c. There is substantial evidence of the consent of the prosecutrix to the sexual act. Appellant testified that the incident with the prosecutrix, although not involving intercourse, was with the mutual consent of both parties. (Tr. 61) The jury could have believed the appellant's testimony that any incident with the prosecutrix was with her consent. The prosecutrix testified that she accepted money from the appellant. (Tr. 14) Accepting money may not establish consent by itself, but it is evidence thereof from which the jury could have found the consent of the prosecutrix.

The State established by uncontradicted

evidence that the prosecutrix was fourteen years of age at the time of the alleged act. (Tr. 5) With other proper instructions the State might have obtained a conviction under § 76-53-19, Utah Code Annotated 1953, (statutory rape). Because of the age of the prosecutrix, her consent is not an essential element of that crime. The elimination of the element of consent for conviction of statutory rape does not apply to a charge under § 76-53-15 where the state is required to prove, and the jury must find, lack of consent by the prosecutrix inspite of her age and inability to give legal consent. The jury was not so instructed and that is reversible error.

POINT IV

THE COURT BELOW COMMITTED REVERSIBLE ERROR IN NOT GIVING A PRECAUTIONARY INSTRUCTION TO THE JURY CONCERNING CONVICTING THE APPELLANT ON THE TESTIMONY OF THE PROSECUTRIX

There is a split of authority on whether the defendant in a rape case is entitled to

a precautionary instruction with regard to the prosecutrix's testimony. 44 Am. Jur. 979, Rape § 123. This court has held that the failure to give a precautionary instruction in a rape case is reversible error. State v. Scott, 55 Utah 553, 188 Pac. 860 (1920). In the Scott case, supra, this court stated as follows:

> "It is then pointed out that the prosecutrix necessarily has a greater interest in the result of the case than a disinterested witness would have, and that the jury should be instructed to consider and weigh her testimony with that fact in mind. Indeed, it should require no argument to show that the prosecutrix, under circumstances like those disclosed by this record, is vitally interested in the result of the case. Her future reputation to a large extent may be affected by the result, say nothing about the fact that she has a vital interest in vindicating herself and the attitude she has assumed respecting the prosecution. The jury should therefore be plainly told that they should consider and weigh the testimony of the prosecutrix in view of her interest in the result and also in connection with and in the light of all the other evidence in the case, including all the facts and circumstances as they appear from the evidence, and if after considering and weighing her testimony in the light aforesaid they are satis-

fied beyond a reasonable doubt and have an abiding conviction that all of the elements of the crime charged against the defendant have been thus established, they may find him guilty upon her testimony alone. In this jursidiction, where no corroboration of the statements of the prosecutrix is necessary to convict, it is of the utmost importance that the jury be carefully instructed with regard to how her testimony should be considered and weighed; and that is especially true where, as here, her testimony stands practically alone, and must be taken as against what, judging from the record, seems to us to be strong countervailing evidence."

State v. Scott, supra, at Utah 569-70, Pac. 867. In State v. Rutledge, 63 Utah 546, 227 Pac. 479 (1924) this court held the refusal to give a precautionary instruction was not error where there was corroboration of the prosecutrix's testimony, consent was not an issue and the trial court properly advised the jury of "their right to consider the bias, interest, or motive of any witness".

In this case appellant was convicted on the sole and uncorroborated testimony of the prosecutrix. Consent, although there was

the testimony of the prosecutrix exactly like that of any other witness in the case. This is exactly the situation considered by this court in the Scott case, supra, and held to be reversible error.

POINT V

IN THE CIRCUMSTANCES OF THIS CASE THE FAILURE OF THE COURT TO INSTRUCT THE JURY CONCERNING THE USE OF THE APPELLANT'S TESTIMONY OF HIS PRIOR CONVICTION OF A FELONY IS ERROR

Appellant was placed in the position of either not testifying as to his version of the incident with the prosecutrix or testifying and having disclosed to the jury the fact that he had been previously convicted of a felony and that felony was for attempted rape. Appellant elected to testify and the trial court allowed cross-examination as to the nature of the felony of which the appellant was convicted. The case was already incipited with passion and prejudice against appellant because of the age of the prosecu-

trix and his admitted conduct with her. In these circumstances, appellant was entitled to have the evidence limited when introduced and to an instruction that his testimony on this matter bears only on his credibility as a witness and is not probative of the question of his guilt in this case. Appellant did not request such an instruction or take exception to the instructions given. In State v. Peterson, 121 Utah 229, 240 P.2d 504 (1952) this court has held that it will not reverse a conviction where such an instruction was not given and not requested. In that case, however, the subject instruction was the only omitted instruction claimed as error. In the instant case, the failure to give this instruction together with the failure to give the instructions heretofore discussed and the potential prejudice involved in the case results in appellant's having been deprived of a fair trial and is reversible error.

POINT VI

THE EVIDENCE DOES NOT SUPPORT THE VERDICT OF THE JURY

The appellant was charged and convicted of the crime of rape requiring the jury to find beyond a reasonabe doubt that all elements of that crime had been committed by the appellant. The only witnesses for the State were Mary Alice Ivie, the prosecutrix herein, Miss Dawn Aoki, a fourteen year old friend of the prosecutrix, Deputy Sheriff John R. Llewelyn and Deputy Sheriff Mack Holley. John R. Llewelyn testified to the area shown to him by the prosecutrix as where the crime allegedly occurred (Tr. 43-53, 69-71) and identified certain pictures marked as Exhibits 3, 4 and 5 obtained from the defendant upon his arrest. (Tr. 42-3, 53) Mack Holley testified to the area shown to him by the prosecutrix as where the crime allegedly occurred. (Tr. 54-87)

The only attempt to corroborate the testimony of the prosecutrix was by the testimony of Miss Dawn Aoki. Corroboration

of a prosecutrix's testimony need not establish or tend to establish all of the essential acts of the crime of rape but it must be sufficient to show that a crime in fact was committed. The State's attempt to corroborate the prosecutrix's testimony through the testimony of Miss Aoki fails. The State failed to ask Miss Aoki of what the prosecutrix had complained to her. The record shows the following:

"Q. Then where did you go?

A. We went out into the hall to our lockers and then started out to our 6th period class.

Q. Did you have a conversation with Mary at that time?

A. Yes.

Q. Then answer this yes or no: Did she tell you what had happened?

A. Yes.

Q. All right. Then what did you do after that?

A. After she was through telling the story?

Q. Yes." (Tr. 39)

There is no further testimony concerning what the prosecutrix told Miss Aoki. From the state of this record there is no corroboration that the prosecutrix told her that she had been raped. The testimony of Miss Aoki is as consistent with the prosecutrix having told her she was hit by an automobile on the way to school, or had just returned from playing around with a man, as that she had been raped. The failure of the State to pursue this questioning might be construed as misinterpretation of the law as described by this court in State v. Christensen, 73 Utah 575, 276 Pac. 163, 165 (1929) as follows:

> "It undoubtedly was competent to give testimony that the prosecutrix complained of an injury or outrage inflicted upon her and the nature and character ot it, where and when it occurred, and that some one forcibly and against her will and consent had sexual intercourse with her, had ravished her."

However, in view of the fact the State failed to call any other witness to corrobor-

ate the complaint of the prosecutrix and the fact the record as it stands indicates that at least one teacher was told the story by the prosecutrix and at least one other observed the condition of the prosecutrix does not justify a presumption in favor of the State that such omission was by inadvertance. The other potential witnesses not called by the State would be persons trained or at least experienced in determining the veracity of a complaint or possible complaint made to them by a fourteen year old. The failure of the State to call these witnesses to prove the prosecutrix's complaint is fairly a presumption that whatever evidence such witness would have given would have been unfavorable to the case of the State.

Regardless of the lack of corroboration of the prosecutrix's complaint, this court has held that a defendant may be convicted of the crime of rape on the uncorroborated testimony of the prosecutrix. State v. Horne, 12

Utah 2d 162, 364 P.2d 109 (1961). In cases found by appellant's counsel, this court has not confirmed a conviction based on the uncorroborated testimony of the prosecutrix. E.g., State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959), medical evidence of forceable intercourse; State v. Glispy, 10 Utah 2d 13, 347 P.2d 562 (1959), medical testimony; State v. Montgomery, 37 Utah 515, 109 P. 815 (1910), prosecutrix was pregnant.

The prosecutrix's testimony is substantially that while she was walking to school on Creek Road she first saw the appellant when he asked her for directions to the water treatment plant in the area. The appellant then offered her a ride to school which she declined and the appellant left (Tr. 5, 6). She next saw the appellant parked on the opposite side of Oak Crest Drive about eight or ten minutes later when she was walking to school. (Tr. 7, 27) The appellant again offered her a ride to school and she volun-

tarily accepted the ride, knowing that he was alone in the car. (Tr. 7) The appellant then asked her if she knew a named individual who was cousin of his and she said that the person was a neighbor of hers. (Tr. 8) The appellant then drove her by her school and grabbed the back of her hair and told her to get down on the floor, threatening physical violence. The appellant continued to drive until they reached the Canyon Inn at which time he ordered her to get on the seat and tied her hands behind her back with a strap from her purse and gagged her by stuffing one of her socks in her mouth and tying the other around her head. (Tr. 8-10) Appellant then ordered her back down on the floor where the prosecutrix stayed while the defendant drove to the location of the alleged act in Utah County. While driving, the defendant threatened the prosecutrix, ordered her to turn over and when she could not, pushed her over on her stomach and fondled her over sub-

stantially her entire body. (Tr. 11) Upon arriving at the alleged area the appellant untied her hands and removed the gag and after ordering her to engage in some preliminary sexual activities, ordered her to get into the back seat where the sexual intercourse allegedly took place. (Tr. 12-13) The appellant then drove from the location to somewhere on Redwood Road where he appeared to be getting sick and he let the prosecutrix drive his car from that point back to her school and in effect giving her a driving lesson on the way. The appellant and prosecutrix engaged in conversation including a description of the appellant's family, the showing of pictures, the giving to her of $20.00 and the borrowing back of her lunch money so that he could buy some cigarettes. When the prosecutrix arrived back at her school she started crying, left her class and told her friend, Dawn Aoki, what had happened. She and her friend were

dismissed from class and at the suggestion of her friend, she told a teacher, Mrs. Boggess, what had happened. (Tr. 13-17, 26)

The appellant's testimony is substantially in conflict with the prosecutrix's testimony. The appellant testified that he on a local business trip, picked up the prosecutrix as she was thumbing a ride. As he was driving her to school they engaged in friendly conversation and mutually decided to take a ride out towards Utah Lake. The friendly conversation continued. They reached a spot in Tooele County where they stopped and necked and the prosecutrix acted like she wanted sex. After they both disrobed, she appeared that she did not want to do anything more so they put their clothes back on and started on the return trip to Sandy. The subject of money was discussed and the appellant gave the prosecutrix $20.00. The appellant let the prosecutrix drive most of the way back to her school in Sandy where she left him. (Tr. 59-62)

In considering the sufficiency of the evidence, the total picture as presented by the record must be kept in mind in evaluating the result reached by the jury. In the instant case the prosecutrix's testimony is so palatally unblievable and contradictory it is not sufficient to support the verdict.

From the prosecutrix's own testimony it is unquestioned that she was truant from school at the time of the alleged crime. She testified that her mother was not at home and that she had stayed home to finish some assignments from school. Favoring the prosecutrix's story that she was enticed into the appellant's automobile by his first asking her directions to the water treatment plant in the area and then subsequently, after that purported introduction, offering to give her a ride, rather than her thumbing a ride, hurts the prosecutrix's story. It shows an intent from the beginning to perpetrate some offense against the prosecu-

trix. The appellant identified himself to her by asking her if she knew by name a cousin of his who was a neighbor of hers. This hardly appears the type of admission a person intent upon rape would immediately tell his potential victim.

On cross examination the prosecutrix testified when being probed concerning whether or not the appellant attempted to hide his identity from her as follows:

> "One time he said that he would rather not tell me. As we were driving out he said he would rather not tell me and then he said that his name was Steve." (Tr.2

Interestingly, the prosecutrix had previously testified that she was gagged while they were driving out to the area where the act allegedly occurred. The prosecutrix testified that she undid the appellant's pants (Tr. 12) and later on testified that he unzipped them himself. (Tr. 17) In addition, the physical activities of the parties while the appellant was driving appear from common sense improbable. Even more im-

probable is the friendly conduct on the return trip.

Significant in examining the prosecutrix's testimony is what the State failed to attempt to prove. The State did not introduce any medical evidence that the prosecutrix had been bruised or otherwise injured or had had sexual intercourse. The State did not introduce any physical evidence of the act which allegedly occurred on the back seat of defendant's car at a time when the prosecutrix was in her period giving rise to a reasonable assumption that if the act had in fact occurred there would have been physical evidence of it in the appellant's car. The State did not produce testimony or even ask Miss Aoki if she saw the defendant after the incident with the strap torn off her purse. In addition, as stated before, the State failed to corroborate the prosecutrix's alleged complaint by any adult witness which witnesses were unquestionable available.

In addition the State's evidence from the testimony of the prosecutrix is insufficient to support the finding of the verdict beyond a reasonable doubt. On direct examination the prosecutrix testified to the facts indicating sexual intercourse and penetration. On further direct examination the record reveals the following:

"Q. All right. Are you sure that he did have intercourse with you?

A. Yes.

Q. How do you know?

A. I could--I don't know. It hurt me.

Q. It hurt there?

A. Yes." (Tr. 17)

The State itself introduced from the prosecutrix reasonable doubt concerning the act of sexual intercourse and it was incumbent on the State to pursue this line of questioning to resolve the issue. In addition, a review of the entire record fails to show that the State ever asked the prosecutrix if she consented to whatever was done.

The appellant's story is nothing to brag about, but it is consistent with all evidence in the record except the testimony of the prosecutrix and the torn purse strap which was in the prosecutrix's possession. It is consistent with the State's failure to prove the previously mentioned items. And when coupled with the age of the defendant it is a story that would cause the jury to be guided by passion and prejudice in determining the possible guilt of the appellant.

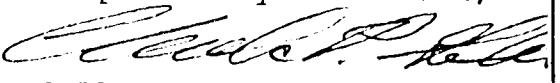
A careful evaluation of the entire record shows the testimony of the prosecutrix is so inherently improbable as to be unworthy of belief and that reasonable persons could not find beyond a reasonable doubt that the defendant did rape the prosecutrix.

CONCLUSION

Appellant is entitled to have his conviction vacated and the case remanded with directions to dismiss the charge against the appellant or in the alternative to have the

case remanded for a new trial.

Respectfully submitted,



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