

2000

Utah v. Darryl Hubbard : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH,

:

Plaintiff/Appellee,

:

Case No. 20000233-SC

v.

:

DARRYL HUBBARD,

:

Priority No. 2

Defendant/Appellant.

:

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1995), AGGRAVATED BURGLARY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-203 (1995), AND AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (Supp. 1998), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PAT B. BRIAN, PRESIDING

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DARRYL HUBBARD,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for aggravated robbery and aggravated burglary, both first degree felonies, and aggravated assault, a third degree felony. This Court has jurisdiction over appeals from convictions for first degree felonies pursuant to Utah Code Ann. § 78-2-2(3)(i) (1996).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. Did the trial court err in excluding expert lecture testimony on eyewitness identification where the substance of that testimony was conveyed to the jury through a *Long* instruction?

A trial court's exclusion of expert testimony on eyewitness identification is reviewed for abuse of discretion. *State v. Butterfield*, 2001 UT 59, ¶ 43, 425 Utah Adv. Rep. 8. An appellate court "can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court." *Id.* at ¶ 28.

II. Was the photo lineup impermissibly suggestive where the trial court found that five of the six photographs were consistent with the victims' description of the perpetrator and the presenting officer did nothing to draw the victims' attention to defendant?¹

In reviewing a ruling on the suggestiveness of a photo lineup, this Court reviews the trial court's findings of fact for clear error and reviews its conclusions of law for correctness. *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991).

III. Was the eyewitness identification testimony properly admitted under *Ramirez* where each witness clearly saw defendant on the date of the crime and never wavered from their descriptions thereafter?

Because defendant invited any error in the admission of the witnesses' identification testimony, no standard of review applies.

IV. Did defendant waive his right to be present at sidebar conferences in which the court and counsel questioned individual jurors off the record where defendant did nothing to assert his right at the time?

Because defendant did not raise this challenge below, it is reviewed only for plain error. To establish plain error, defendant must demonstrate that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) defendant would have obtained a more favorable result absent the error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

¹In his brief, defendant addresses both his state and federal constitutional challenges to the eyewitness testimony in Point II. For ease of argument, the State separates defendant's claims, addressing his federal claim in Point II and his state claim in Point III.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional provisions are attached at Addendum A:

U.S. Const. amend. XIV;
Utah Const. art. I, §§ 7, 12.

STATEMENT OF THE CASE

Defendant was charged by information with aggravated robbery, aggravated burglary, theft, possession of a dangerous weapon by a restricted person, and two counts of aggravated assault (R. 22-25). After a preliminary hearing, defendant was bound over on the aggravated robbery, aggravated burglary, and theft counts and on one count of aggravated assault (R. 227:62-63). The theft count was later dismissed (Cf. R. 148-49).

Before trial, defendant filed a motion to suppress eyewitness identification testimony (R. 43-45). That motion as well as defendant's motion to allow expert eyewitness identification testimony were denied (R. 59-60, 62, 82-94, 132-34).

After a jury trial, defendant was found guilty of aggravated robbery, aggravated burglary, and aggravated assault (R. 191-94). He was sentenced to five-years-to-life for his aggravated robbery and aggravated burglary convictions, and one-to-five years for his aggravated assault conviction (R. 199-200). He received a consecutive term of one-to-five years for use of a dangerous weapon during the aggravated robbery (R. 194, 200).

Defendant timely appealed (R. 203).

STATEMENT OF THE FACTS

On January 24, 1999, defendant knocked on an apartment door in North Salt Lake. When Jeff Gunderson opened the door, defendant forced himself in, shot a hole in Gunderson's leg, and then held Gunderson, his girlfriend, and three friends at gunpoint as he collected money, a gun, a knife, several ounces of marijuana, and various other items from Gunderson's apartment.

Jeff Gunderson was hanging out with three friends smoking pot in his basement apartment living room when he heard a knock on the door (R. 229:80, 81, 101, 114, 120, 129, 130). Jeff asked who was there, and defendant identified himself as "Sixty-nine" (R. 229:115, 131). As Jeff opened the door, the stranger began to enter (R. 229:131-32). When Jeff put his hand to defendant's chest to try to stop him, defendant pulled out a small semiautomatic gun and shot Jeff in the leg, causing him to fall (R. 229:116, 131-32). The bullet ripped a hole in Jeff's left leg between his ankle and knee (R. 229:131-32). Blood gushed from the wound (R. 229:131-32).

Defendant then stuck the gun in Jeff's face, pulled him up by his hair and told him he knew there were two safes, two guns, drugs and cash in the apartment, and that he wanted it all (R. 229:85, 133). Meanwhile, Jeff's friend Mike had hidden himself and was trying to load Jeff's pistol grip shotgun (R. 229:89, 117, 136). Jeff's friends Ayza and Travis were also trying to hide (R. 229:85, 117, 135-36). Jeff's girlfriend, Cheryl,

who had been listening to music in the bedroom, heard the gun shot, grabbed a knife, and came out into the living room (R. 229:81, 134).

As soon as he noticed her, defendant pointed his gun at Cheryl and told her to drop the knife (R. 229:84, 88, 133). Defendant then ordered her to lay on the kitchen floor and duct-taped her arms behind her back (R. 229:88-89, 135). Defendant stuffed the knife in his pocket (R. 229:91).

Defendant then demanded Jeff's wallet (R. 229:90). Jeff threw his wallet to the ground (R. 229:90). Defendant picked up the wallet and took out all the money (\$500-\$800) (R. 229:90, 138, 159). He then ordered Jeff and Cheryl back into the living room (R. 229:91). Along the way, defendant took the shotgun from Mike, as well as a calculator and pocket knife from off the kitchen table (R. 229:91).

Defendant then demanded to know where the safes were (R. 229:136). Jeff told him the safe was in the front room but had nothing important in it (R. 229:136). Defendant ordered Cheryl to get that safe and Jeff to open it (R. 229:91-92). Defendant took the approximately four grams of marijuana and \$100 cash inside (R. 229:138, 159).

Defendant then grabbed Jeff's hair again and, demanding to see the other safe, dragged Jeff to the back bedroom and ordered him to sit on the bed (R. 229:92, 139). Defendant then left the room (R. 229:139). After a few minutes, Jeff hobbled back to the living room (R. 229:139). Defendant had fled (R. 229:95, 139). Jeff tried to go after defendant but collapsed at the door (R. 229:95, 141). Cheryl then called 911 (R. 229:95).

SUMMARY OF ARGUMENT

Point I. The trial court did not err in excluding defendant's expert witness where his testimony would have merely constituted a lecture to the jury, and the trial court gave a comprehensive *Long* jury instruction that addressed the reliability of eyewitness identification testimony.

Point II. Defendant's claim that the photo lineup was impermissibly suggestive fails because defendant reargues the facts but neither addresses the trial court's factual findings nor marshals the evidence that supports them.

Moreover, a photo lineup in which five of the six photos match the description given by the witnesses and the presenter does nothing to focus attention on defendant's photo is not impermissibly suggestive.

Point III. Defendant's challenge to the eyewitness identification testimony under the Utah constitution fails because it was consciously abandoned below.

In any case, the claim fails because, under the totality of the circumstances, the identifications were reliable.

Point IV. Defendant waived his right to be present at the sidebar jury voir dire by failing to exercise it. Moreover, defendant has not demonstrated that he was prejudiced by his absence.

ARGUMENT

I. EXCLUSION OF AN EXPERT’S LECTURE TESTIMONY WAS NOT IMPROPER WHERE A *LONG* INSTRUCTION, CROSS-EXAMINATION, AND ARGUMENT PROVIDED DEFENDANT WITH ADEQUATE MEANS BY WHICH TO CHALLENGE EYEWITNESS TESTIMONY

Defendant claims that the trial court abused its discretion in excluding expert testimony on the fallibility of eyewitness identifications. Aplt. Br. at 25. This Court’s recent decision in *State v. Butterfield*, 2001 UT 59, 425 Utah Adv. Rep. 8, is dispositive.

“Whether expert testimony on the inherent deficiencies of eyewitness identification should be allowed is within the sound discretion of the trial court.” *Id.* at ¶ 43. Moreover, “the exercise of discretion . . . necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court.” *Id.* at ¶ 28.

A. Proceedings below.

Before trial, defendant filed a notice of intent to call Dr. David Dodd as an expert on the factors affecting the reliability of eyewitness identifications (R. 63-65). In his supporting memorandum, defendant explained that the expert testimony “pertains to research and theory concerning memory, the reporting of memory, and the variables known to influence memory and memory reports” (R. 83). The purpose of the testimony was to “outline for the jury the general principles of psychological knowledge which illuminate the problems of eyewitness performance” (R. 94). At a hearing on the matter,

defendant reaffirmed that the purpose was to “properly educate the jury . . . on mistakes that can be made in eyewitness identification” (R. 240:15). At no time did defendant indicate that his expert had any knowledge of the facts of this case or of the witnesses involved.² The State opposed the expert testimony (R. 74-79).

After argument, the trial court excluded Dr. Dodd’s testimony, ruling:

[The] education of the jury is a judicial function, best accomplished through instruction, rather than one to be delegated to an expert who would, in fact, merely lecture the jury. Second, the Court is concerned that allowing an expert witness on the subject of reliability of eyewitness testimony would have a significant tendency to cause the jury to abdicate its role as fact finder.

(R. 134). At the end of trial, the court gave the jury a comprehensive *Long* instruction (R. 176-79; Addendum B). Defense counsel then used that instruction to argue the unreliability of the witnesses’ identifications in closing argument (R. 230:263-66).

B. The trial court did not abuse its discretion in excluding expert testimony that would amount to nothing more than a lecture on the factors generally affecting eyewitness identifications.

Defendant asserts that the trial court abused its discretion in excluding Dr. Dodd’s testimony because “identification is the central issue, there is no other evidence other than the identification testimony linking Appellant to the crimes, [and] Appellant presented an alibi defense.” Aplt. Br. at 22, 25.

²Although defendant stated in his notice of intent that Dr. Dodd would “make an evaluation and prepare a report” as soon as he received “copies of line-up photographs to be provided by the state,” no report was ever entered into the record (R. 64).

In *State v. Butterfield*, 2001 UT 59, 425 Utah Adv. Rep. 8, this Court addressed whether lecture expert testimony, such as that at issue here, must be admitted despite the presence of a comprehensive *Long* instruction. This Court held that Utah precedent does not require such a result:

Because of the inherent deficiencies in eyewitness identification recognized in *Long*, trial courts are required to give a cautionary jury instruction when eyewitness identification 'is a central issue in a case and such an instruction is required by the defense.' However, as the Utah Court of Appeals correctly noted in *State v. Kinsey*[, 979 P.2d 424, 427 (Utah App. 1990)], this court has not extended the cautionary instruction requirement to include additional expert testimony concerning eyewitness identification.

Butterfield, 2001 UT 59, at ¶ 42 (citations and internal quotation marks omitted).³

³The majority of jurisdictions addressing the issue have similarly concluded that expert testimony is not necessary where a jury instruction concerning the reliability of eyewitness identifications is given. See *State v. McClendon*, 730 A.2d 1107, 1116 (Conn. 1999); *McMullen v. State*, 714 So. 2d 368, 372 (Fla. 1998); *People v. Tisdell*, 739 N.E.2d 31, 43 (Ill. App. 2000); *State v. Gaines*, 926 P.2d 641, 647-49 (Kan. 1996); *Commonwealth v. Kent K.*, 696 N.E.2d 511, 518 (Mass. 1998); *People v. Carson*, 553 N.W.2d 1, 5 (Mich. App. 1996); *State v. NMN Miles*, 585 N.W.2d 368, 372 (Minn. 1998); *State v. Whitmill*, 780 S.W.2d 45, 47 (Mo. 1989) (en banc); *State v. Calia*, 514 P.2d 1354, 1356 (Ore. App. 1973); *State v. Coley*, 32 S.W.3d 831, 837-38 (Tenn. 2000). Cf. *Johnson v. State*, 526 S.E.2d 549, 552-53, 555 & n.6 (Ga. 2000); *State v. Alger*, 764 P.2d 119, 127 (Idaho App. 1989); *State v. Robinson*, 754 A.2d 1153, 1158 (N.J. 2000); *State v. Long*, 575 A.2d 435, 463 (N.J. 1990); *State v. Brannon*, 533 S.E.2d 345, 347 (S. C. App. 2000); *State v. Wilson*, 508 N.W.2d 44, 51 (Wis. App. 1993); *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir.), cert. denied, 527 U.S. 1029 (1999); *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997).

A notable exception is the case cited by defendant, *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000). However, that case involved two witnesses who identified defendant at trial despite being unable to pick him out of a photo lineup two days after the crime. *Id.* at 309. The Sixth Circuit was also disturbed by the trial court's ruling that

Thus, a trial court's exclusion of testimony based on its determination that the testimony "would amount to a lecture to the jury as to how they should judge the evidence . . . 'is not an abuse of discretion'" unless defendant can show "that the excluded evidence would probably have had a substantial influence in bringing about a different verdict.'" *Butterfield*, 2001 UT 59, at ¶ 59 (quoting *State v. Malmrose*, 649 P.2d 56, 61 (Utah 1982)); see also *Ex Parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992) (upholding exclusion where expert was not familiar with facts of the case and had no personal contact with witness); *State v. Suddreth*, 412 S.E.2d 126, 133 (N.C. App. 1992) (same). Cf. *People v. Enis*, 564 N.E.2d 1155, 1165 (Ill. 1990) (upholding exclusion of eyewitness expert where opinion "is based on statistical averages. The eyewitness in a particular case may well not fit within the spectrum of these averages."); *State v. Trevino*, 432 N.W.2d 503, 520 (Neb. 1988) (same).

Here, the trial court found that Dr. Dodd's testimony "would, in fact, merely lecture the jury" (R. 134). The record supports the trial court's finding. Both in his supporting memorandum and at oral argument, defendant stated that the purpose of the expert testimony was to "outline for the jury the general principles of psychological knowledge which illuminate the problems of eyewitness performance" and "properly educate the jury . . . on mistakes that can be made in eyewitness identification" (R. 94; R.

"I'm also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case. I recognize it's the defendant's fate that's at stake, but you can always argue for a new trial if he's convicted.'" *Id.* at 310.

240:15). The record does not indicate that Dr. Dodd was familiar with either the facts of this case or the eyewitnesses involved.

Under *Butterfield*, then, the trial court's decision was an abuse of discretion only if defendant can show "that the excluded evidence would probably have had a substantial influence in bringing about a different verdict." *Butterfield*, 2001 UT 59, at ¶ 43 (quoting *Malmrose*, 649 P.2d at 61).

Defendant has made no such showing here. First, although he argues that "[t]he use of a cautionary instruction does not fully address the concerns regarding the fallibility of eyewitness identification and does not provide a substitute for expert testimony," Aplt. Br. at 11, he at no point explains why this is so. *Cf. Butterfield*, 2001 UT 59, at ¶ 44 (concluding defendant had made no showing of prejudice "especially considering the fact that the jurors in this case were presented with a cautionary instruction that met the requirements of *Long*, adequately and thoroughly explaining how to evaluate eyewitness identifications presented at trial").

Second, defendant's assertion that the expert testimony was necessary because the eyewitness testimony was the only evidence linking him to the crime is unpersuasive. Although it is true that defendant's conviction rested solely on identification testimony, it did not rest solely on one witness or on witnesses whose identifications were varied and inconsistent. Two different witnesses consistently identified defendant as the man who had forced his way into Jeff Gunderson's apartment on the night of the crime. Both Jeff

and Cheryl Moss independently provided police with similar descriptions of defendant on the night of the crime; independently picked defendant out of a photo-lineup a few weeks later; and positively identified defendant at both the preliminary hearing and at trial (R. 229: 98-100, 143, 160-61). A third witness also identified defendant at trial (R. 229:120).

Even if defendant's expert could have successfully challenged one of those witnesses' identifications, it is unlikely that his testimony would have undermined all three. *Cf. Reed v. State*, 687 N.E.2d 209, 212 (Ind. App. 1997) (noting number of witnesses is relevant factor in determining whether court must provide funding for expert on eyewitness identification); *White v. State*, 926 P.2d 291, 292 (Nev. 1996) (noting number of witnesses and strength of their identifications was relevant factor); *Rodriguez v. Commonwealth*, 455 S.E.2d 724, 725 (Va. App. 1995) (noting eyewitnesses may serve as corroborating evidence for each other). *See also* cases cited by defendant, *State v. Chapple*, 660 P.2d 1208, 1223 (Ariz. 1983) (finding error in excluding expert testimony where eyewitnesses were inconsistent and unsure of their identification); *People v. McDonald*, 690 P.2d 709, 711 (Cal. 1984) (in bank) (finding error in excluding expert testimony where "seven eyewitnesses . . . identified defendant as [the perpetrator] with varying degrees of certainty and one . . . categorically testified that defendant was *not* the [perpetrator]").

Thus, defendant has failed to show that he was prejudiced by the trial court's ruling even if it were erroneous. Consequently, defendant's claim fails.

II. THE PHOTO LINEUP WAS NOT IMPERMISSIBLY SUGGESTIVE WHERE FIVE OF THE SIX PHOTOS MATCHED THE PERPETRATOR'S DESCRIPTION, AND NOTHING WAS DONE TO FOCUS ATTENTION ON DEFENDANT'S PHOTO

Defendant claims that the trial court's denial of his motion to suppress the photo identification violated his due process rights under the federal constitution. Apl't. Br. at 38. Specifically, he argues that the photo lineup "was impermissibly suggestive . . . because the witnesses' attention was improperly focused on [his] photograph." *Id.*

In reviewing a trial court's ruling on a motion to suppress, this Court "defer[s] to the trial court's fact-finding role by viewing the facts in the light most favorable to the trial court's decision . . . and by reversing its factual findings only if they are against the clear weight of the evidence." *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991). However, whether those facts are sufficient to support the trial court's legal conclusions presents a question of law, which this Court reviews for correctness. *Id.*

A. Proceedings below.

Before trial, defendant filed a motion to suppress evidence concerning a photo lineup at which Jeff Gunderson and Cheryl Moss independently identified defendant as the perpetrator (R. 43-44). Defendant requested an evidentiary hearing to "determine whether the photo array itself and the means by which it was presented was unduly suggestive, and if so, whether that unreliable identification tainted any subsequent identification so that there was no independent foundation upon which it could be made" (R. 44-45).

At the hearing, Officer Karl Craig Merino was the sole witness called and provided the following testimony:

As part of his investigation into the January incident, Merino interviewed both Jeff Gunderson and Cheryl Moss (R. 228: 6, 10). At that time, Jeff told Merino that the perpetrator, a man who identified himself as “Six Nine,” was a muscular, medium complected black man approximately “six foot nine inches” tall who sported “a light mustache and goatee” (R. 228:7, 9, 32). Cheryl gave Merino “roughly the same description” (R. 228:10, 32).

Based on this information, Merino contacted personnel at the Salt Lake County jail to determine whether they were familiar with anyone using the name “Six-Nine” (R. 228:10). Merino was told that defendant used that name (R. 228:10). Merino then pulled a mug photo of defendant and, upon determining that the photo matched the descriptions given by Jeff and Cheryl, prepared a photo lineup of black men having similar facial features (R. 228:10-11). Because Jeff had indicated that the perpetrator was wearing a hat at the time, Merino “didn’t view the hair, the actual hair style as critical because it wasn’t seen” (R. 228:46).

Along with defendant’s photo, the lineup contained five other photos chosen from about seventy-five mug shots of black men on record (R. 228:12, 46). Although differing slightly in complexion in part because of the lighting, five of the persons chosen shared the facial features described by Jeff and Cheryl (R. 228:12, 35, 48; St. Exh. 1-6). In

particular, each had a similar skin tone and each had a mustache and goatee or beard, although some of the persons' facial hair was darker and fuller than others (R. 228:12, 34-35, 48; St. Exh. 1-6).

One of the men depicted was significantly heavier than the rest and possibly of Pacific Islander descent; however Jeff had not given Merino any information concerning the perpetrator's weight (R. 228:34, 37, 38, 47; St. Exh. 5). Another, according to defense counsel, appeared Hispanic (R. 228:47). However, each of the persons depicted was classified as black under the jail system (R. 228: 39, 46).

On February 15, approximately three weeks after the crime, Merino met Jeff and Cheryl at their home in broad daylight to conduct the photo lineup (R. 228:16, 42). Jeff looked at the photos first, while Cheryl stood beyond viewing distance (R. 228:16). When Jeff was done, he left and Cheryl viewed the photos (R. 228:17-18).

In each case, Merino arranged the photos to ensure that defendant's was neither the first nor the last in the group (R. 228:14, 33). He then explained to each witness that the suspect "may or may not be in the stack"; that the hair and facial hair "may be different"; and that the witness was "under no pressure to identify anybody" (R. 228:15, 26, 28). Then, after giving the photos to the witness, Merino stepped back "half a step or so, . . . , hands to the side or folded or crossed," and let the witness look through them (R. 228:17, 20). Merino never did anything to draw either Jeff's or Cheryl's attention to any

particular photo (R. 228:17-18; 21). None of the photos, when shown to the witnesses, displayed any identifying information about the persons depicted (R. 228:13).

Jeff “instantly” identified defendant as the perpetrator (R. 228:16-17). “He just said he’s positive” (R. 228:18). Merino then asked Jeff to sign the back of defendant’s photo and, after telling Jeff not to say anything to Cheryl, asked him to send Cheryl over (R. 228:19). Cheryl then looked through the stack and also “right away picked [defendant’s] photo as the suspect” (R. 228:20-21). She too signed the back of defendant’s photo (R. 228:21).

Based on this evidence, the trial court found:

- (1) “that Detective Merino conducted this photo lineup quite scrupulously and without any conduct that would, in any way, influence either of the witnesses in their identification”;
- (2) that “[t]his was a well selected and well presented photo lineup” with “the possible exception of number five,” the larger, lighter complected man; that “four [of the photos] are clearly Black on their face and within a quite acceptable range”; and that “[t]here is one that is a little closer and one that, at first glance, I wouldn’t think he was Black”;
- (3) that “there are four or five who are Black in appearance and generally within the perimeters of the appearance of the defendant”

(R. 60; R. 228:56-57). Based on these findings, the trial court concluded that five of the photos “are sufficient and present faces, characteristics, hair color that would make this far from an overly suggestive or suggestive photo array” (R. 60; R. 228:57).

B. Because defendant does not marshal the evidence supporting the trial court's findings, this Court should refuse to consider his claim.

Defendant argues that the trial court erred in holding that the photo lineup was not impermissibly suggestive. Aplt. Br. at 38. However, he does not claim that the trial court's ruling is unsupported by its factual findings. *See id.* Instead, he reargues the evidence on which those findings are based. *See id.*

"To demonstrate that a finding of fact is clearly erroneous, the defendant 'must first marshal all the evidence that supports the trial courts findings'" and then "show that, even when viewing the evidence in a light most favorable to the trial court's ruling, the evidence is insufficient to support the trial court's findings.'" *State v. Widdison*, 2001 UT 60, ¶ 60, 425 Utah Adv. Rep. 27 (quoting *State v. Gamblin*, 2000 UT 44, ¶ 17 n.2, 1 P.3d 1108) (emphasis omitted).

Here, defendant does not even acknowledge the trial court's findings, let alone marshal the evidence supporting them. *See* Aplt. Br. at 38-43. Therefore, defendant has failed to meet his marshaling burden, and this Court should reject his challenge to the trial court's ruling. *Decorso*, 1999 UT 57, at ¶ 41.

C. The photo lineup was exemplary: five of the six photos depicted black men whose skin tone and facial features matched the description of the perpetrator, and nothing drew attention to defendant's photo.

In determine whether a photo lineup is impermissibly suggestive under the federal due process clause, courts apply a two-part test. *State v. Lopez*, 886 P.2d 1105, 1111

(Utah 1994). First, the court must determine “whether the ‘pretrial photographic identification procedure used . . . was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’” *Id.* (quoting *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989)). Then, if the lineup was impermissibly suggestive, the court must determine whether there is an “untainted, independent foundation” for any subsequent in-court identification. *Lopez*, 886 P.2d at 1111.

In this case, the trial court did not reach the second part of the test because it concluded that the photo lineup was not unduly suggestive (R. 60; R. 228:56-57). The record supports the trial court’s ruling.

In determining whether a photo lineup is impermissibly suggestive, “the main question is whether the photo array emphasized the defendant’s photo over the others.” *Lopez*, 886 P.2d at 1111. Factors relevant to that determination include “whether the words and body language of the police officers who presented the array conveyed an attitude of disinterest, whether the officers manipulated the photos to indicate their belief that one of the photos portrayed the perpetrator, and whether the photos themselves were selected so that the defendant’s photo stood out from the rest.” *Id.* at 1111-12.

Here, Officer Merino’s “words and body language . . . conveyed an attitude of disinterest.” *Lopez*, 886 P.2d at 111. He specifically told both Jeff and Cheryl before they examined the photos that the person they were looking for “may or may not be in the stack” (R. 228:15, 26). In addition, he specifically told them that they were “under no

pressure to identify anybody” (R. 228:15, 26). Finally, after handing the photos to each of them, Officer Merino stepped back “half a step or so, . . . , hands to the side or folded or crossed,” and let the witness look through them (R. 228:17, 20).

In addition, before presenting the photos to either witness, Officer Merino made sure to place defendant’s photo into the middle of stack, so that his photo would not be emphasized over any other (R. 228:14). By pre-arranging the photos in this manner and then telling the witnesses that the perpetrator may or may not be one of the people depicted, Merino ensured that the presentation of the photos did nothing “to indicate [his] belief that one of the photos portrayed the perpetrator.” *Lopez*, 886 P.2d at 1112.

Finally, Merino’s testimony makes clear that the photos were not purposefully selected “so that . . . defendant’s photo stood out from the rest.” *Id.* Merino began the process by first contacting personnel at the Salt Lake County jail to determine whether they were familiar with anyone using the name “Six-Nine” (R. 228:10). Upon learning that defendant used that name, Merino pulled defendant’s mug photo and determined that the photo matched the descriptions of the perpetrator given by Jeff and Cheryl (R. 228:10-11). He then went through the seventy-five photos of black men contained in his office’s photo bank to find five other people who looked similar to defendant and matched the descriptions given by Jeff and Cheryl (R. 228:10-12, 35, 48; St. Exh. 1-6). In choosing which photos to use, Merino indicated that he tried to make sure that the people did not “all look alike” but “are similar” (R. 228:38).

Merino focused on skin tone and facial hair because it was difficult to tell a person's build from a photo of their face and neither Jeff nor Cheryl had given any indication whether the perpetrator's face was slim or round (R. 228:11-12, 32, 37). Because Jeff had indicated that the perpetrator was wearing a hat, Merino "didn't view the hair, the actual hair style as critical because it wasn't seen" (R. 228:46). Thus, Merino looked for people with a medium skin tone who had a mustache and a goatee or beard (R. 228:12, 37). He compensated for any slight differences in facial hair by specifically telling Jeff and Cheryl before they looked at the photos to remember that the facial hair might be different (R. 228:15, 26).

As defense counsel herself acknowledged, "medium can be anywhere from pretty light African American or darker African American" (R. 228:35). Thus, not surprisingly, each of the men in the photos had a skin tone slightly lighter or darker than the others (R. 228:12, 35, 48). Even then, some of the difference was due not so much to differences in complexion but to different lighting at the time the photos were taken (R. 228:12, 35, 48).

This evidence supports the trial court's findings and conclusion that "[t]his was a well selected and well presented photo lineup" and that five of the photos were "sufficient and present faces, characteristics, hair color that would make this far from an overly suggestive or suggestive photo array" (R. 60; R. 228:56-57). Thus, the photo identification procedure used here was *not* "so impermissibly suggestive as to give rise to

a very substantial likelihood of irreparable misidentification.” *Lopez*, 886 P.2d at 111 (quoting *Thamer*, 777 P.2d at 435)).

Consequently, defendant’s challenge to the photo lineup fails on the merits.

III. THE EYEWITNESS IDENTIFICATION TESTIMONY WAS PROPERLY ADMITTED WHERE THE WITNESSES COULD CLEARLY SEE THE PERPETRATOR’S FACE ON THE NIGHT OF THE CRIME AND CONSISTENTLY IDENTIFIED DEFENDANT AS THE PERPETRATOR THEREAFTER

Defendant claims that the trial court violated his due process rights under the Utah constitution because the eyewitness identification testimony admitted in this case was unreliable. Aplt. Br. at 26. Because defendant invited any error on the trial court’s part, this Court should refuse to consider defendant’s claim. In any case, the claim fails on the merits.

A. Defendant waived this claim by failing to pursue it below despite the trial court’s invitation to do so.

This Court has “‘held repeatedly that on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.’” *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996) (quoting *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) (footnote omitted)). Thus, “‘if a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, [this Court] will then decline to save that party from the error.’” *State v. Bullock*, 791 P.2d 155, 158 (Utah 1989).

Before trial, defendant filed a motion to suppress alleging that admission of the photo lineup and subsequent identifications of defendant violated his “right to federal and state due process” (R. 43). He requested an evidentiary hearing to “determine whether the photo array itself and the means by which it was presented was unduly suggestive, *and if so*, whether that unreliable identification tainted any subsequent identification so that there was no independent foundation upon which it could be made” (R. 44-45) (emphasis added).

At the suppression hearing, the State called Officer Karl Merino to testify as to the suggestiveness of the photo lineup (R. 228:4). After argument, the trial court ruled that the photo lineup was not unduly suggestive under the federal constitution and thus denied that part of defendant’s motion (R. 228:57). The court then asked: “Ms. Ames, anything further on the identification that you want to address independent of the photo array?” (R. 228:57). Counsel responded, “No, Your Honor” (R. 228:57). Thus, defendant made a conscious decision to refrain from pursuing his state constitutional claim below.

Because defendant “[is] not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal,” *Bullock*, 791 P.2d at 159, this Court should refuse to consider his claim now.

B. The identification testimony was reliable where the witnesses viewed the perpetrator's uncovered face in a well-lit room over a period of several minutes and consistently identified defendant as the perpetrator thereafter.

Because defendant did not pursue this claim below, it should be reviewed, if at all, only for plain error. To establish plain error, defendant must show that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) defendant would have obtained a more favorable result absent the error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

“The ultimate question” in determining whether eyewitness identification testimony is admissible under article I, section 7 of the Utah Constitution “is whether, under the totality of the circumstances, the identification was reliable.” *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991). Factors relevant to that determination include:

(1) The opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

Id. at 781; *State v. Hoffhine*, 2001 UT 4, ¶ 18, 20 P.3d 265; *State v. Decorso*, 1999 UT 57, ¶ 42, 993 P.2d 837, *cert. denied*, 528 U.S. 1164 (2000).

Considering those factors here, the trial court committed no error in admitting the eyewitness identification testimony.

Opportunity to view the actor during the event. Pertinent circumstances under this factor “include the length of time the witness viewed the actor”; “the distance between [them]”; “whether the witness could view the actor’s face”; the level of lighting; “whether there were distracting noises or activity during the observation; and any other circumstances affecting the witness’s opportunity to observe the actor.” *Ramirez*, 817 P.2d at 782.

Here, Jeff testified that the whole event lasted between ten and fifteen minutes (R. 229:139). Cheryl testified that once she came out of the bedroom she was in defendant’s presence for three to five minutes (R. R. 227:47; R. 229:102). At their initial contact, Jeff was close enough to defendant to be able to place his hand on defendant’s chest (R. 227:7; R. 229:131-32). Cheryl testified that when defendant first looked at her, he was about eight feet away (R. 229:87). Ayza testified that he saw defendant “face to face” from about four feet away (R. 229:118-19). Defendant wore nothing over his face; thus, the witnesses’ view of his face was unobstructed (R. 227:31; R. 228:8). Although the event occurred at night, both Cheryl and Ayza testified that the room was well-lit (R. 229:84, 118). Outside of the initial shooting of Jeff in the leg, no one testified to any distracting noises or activity during the period.

Witnesses’ degree of attention to the actor at the time of the event. The testimony of all three eyewitnesses indicates that they were aware that a robbery was taking place and that they were attentive to defendant’s actions. Although both Cheryl

and Ayza testified that they avoided looking directly at defendant after a point, both Jeff and Cheryl were able to describe the perpetrator's height, build, complexion, and facial hair on the night of the crime (R. 229:102, 126). Ayza was apparently not asked to give a description.

Witnesses' capacity to observe the event, including his or her physical and mental acuity. "Here, relevant circumstances include whether the witness's capacity to observe was impaired by stress or fright at the time of the observation, by personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol." *Ramirez*, 817 P.2d at 783. As their testimony reflects, none of the witnesses were so impaired by stress or fright during the event that they could not perceive what was going on. Despite Jeff's and Ayza's admissions that they had been smoking marijuana for several hours, each witness gave a detailed description of what was happening around them on that night. (R. 227:21-23; R. 229:120, 140). Cheryl was not under the influence of either drugs or alcohol that night and had not been for some time (R. 229:101). In addition, although Jeff was shot during the crime, the officer who interviewed him later that night stated that he was alert and understood the officer's questions (R. R. 229:189-90). Finally, nothing in the record indicates any personal motivations or biases, or any uncorrected visual impairments.

Whether the witnesses' identifications were made spontaneously and remained consistent thereafter. Here, relevant circumstances include the length of time

between the event and the identification of defendant; the witness's mental state at the time of the identification; the witness's exposure to information from other sources; whether the witness, or any other witness, has ever failed to identify defendant or gave inconsistent descriptions; and the circumstances under which defendant was identified. *Ramirez*, 817 P.2d at 783.

In this case, both Jeff and Cheryl gave similar descriptions of the perpetrator to police on the night of the crime (R. 227:28-29; 34, 47-48; R. 229:98, 185, 190). The two gave the same description to Officer Merino two weeks later (R. 228:6-7, 10; R. 229:164). They then independently identified defendant out of a non-suggestive photo lineup three weeks after the crime occurred (R. 228:16, 20; R. 229:164, 170-71). They positively identified defendant both at the preliminary hearing and at trial (R. 227:8, 52; R. 229:84, 144, 160). Although Cheryl did at one point discuss the perpetrator with neighbors, she had already given a description to the police by that time; moreover, the only information she gained from them was about defendant's height (R. 227:44-47).

The nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.. "This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed and whether the race of the actor was the same as the observer's." *Ramirez*, 817 P.2d at 781. Nothing in the record supports the proposition that this was an ordinary event for these witnesses. Moreover, although the perpetrator was black, Jeff's

and Cheryl's ability to pick defendant out of a photo lineup suggests that they were able to distinguish between black men based on their facial features (R. 229:98-100, 112).

Under this totality of circumstances, the witnesses' testimony "met the threshold test for constitutional reliability." *Hoffnine*, 2001 UT 4, at ¶ 19 (holding evidence admissible where, despite it being dark and the incident happening "very quickly," the witness was able to describe the perpetrator and then during a showup of two people shortly thereafter indicate that defendant looked more like the perpetrator than the other person); *see also Decorso*, 1999 UT 57, at ¶ 47 (holding evidence admissible despite witness's exposure to photographs of defendant prior to the lineup and being told by reporter that he was a suspect where defendant did not wear mask, witness testified her fear did not distract her, and her description of defendant remained consistent); *Ramirez*, 817 P.2d at 784 (holding evidence admissible despite "[t]he blatant suggestiveness of the showup" and inconsistencies in witnesses' descriptions where gunman was wearing mask over lower part of face; lighting was poor to good; witness, though injured, viewed gunman for few seconds to minute or longer from distance of ten feet).

Thus, the trial court did not err in admitting the witnesses' testimony at trial, and defendant's plain error claim fails.

IV. DEFENDANT WAS NOT DENIED THE RIGHT TO BE PRESENT AT SIDEBAR JURY VOIR DIRE; HE SIMPLY FAILED TO EXERCISE IT

Defendant claims that, by holding sidebar conferences with some of the venirepersons out of his presence, the trial court violated his right to be present under article 1, section 12 of the Utah constitution and under section 77-1-6 (1995) of the Utah Code. Aplt. Br. at 45. Because defendant did not raise this claim below, it is reviewed only for plain error. *See* Aplt. Br. at 50. To establish plain error, defendant must demonstrate that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) defendant would have obtained a more favorable result absent the error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

A. Proceedings below.

During jury voir dire, the trial court held a total of ten side-bar conferences during which the court and counsel conducted off-the-record questioning of nine different venirepersons (R. 229:30-32; R. 229:32-33; R. 229:35-36; R. 229:40-41; R. 229:41; R. 229:41; R. 229:42; R. 229:43-44; R. 229:45; R. 229:63). After several of the sidebars, defense counsel confirmed that she had “ask[ed] whatever questions you wanted to ask of the Prospective Juror in private” (R. 229:32, 43, 45). At no point did defendant or his counsel object to this procedure.

Toward the end of voir dire, the trial court invited both defense counsel and the prosecutor to ask on the record any follow-up questions “relating to the matters that the

court has discussed with [jurors] at the bench” (R. 229:53). Upon completion of voir dire, defendant, through counsel, passed the jury for cause (R. 229:68). After the jurors were named, defendant, through counsel, accepted the jury as constituted (R. 229:70).

Of the nine jurors with whom sidebars were held, only two, Emanuel Spencer and Paula Vernon, sat on the jury that convicted defendant (R. 144, 145). Defendant never challenged either juror for cause or peremptorily.

B. Absent a firmly established and universally accepted rule of law, plain error cannot be established by reliance on state cases from outside of Utah.

Defendant asserts that “there is no case law in Utah bearing directly on the issue of whether side-bar voir dire[] conducted outside the presence of the defendant violated his statutory and constitutional rights.” Aplt. Br. at 46. Thus, defendant cites to cases from New York, North Carolina, and West Virginia to support his argument. Aplt. Br. at 46.

Utah appellate courts have consistently held that a trial court cannot commit obvious error until there is settled appellate law or a universally accepted rule on the issue. *State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997) (“Utah courts have repeatedly held that a trial court’s error is not plain where there is no settled appellate law to guide the trial court.”) (citing *State v. Eldredge*, 773 P.2d 29, 35-36 (Utah 1989); *State v. Braun*, 787 P.2d 1336, 1341-42 (Utah App. 1990)); *see also State v. Emmett*, 839 P.2d 781, 786 (Utah 1992); *State v. Baker*, 963 P.2d 801, 805 (Utah App. 1998).

Caselaw from three jurisdictions outside of Utah does not establish settled appellate law or a universally accepted rule. Thus, defendant cannot establish plain error.

Consequently, defendant's claim fails.

C. Defendant waived his right to be present at the sidebar by failing to assert it at the time.

While Utah lacks a swell of case law on a defendant's right to be present during criminal proceedings, this Court's decision in *State v. Glenny*, 656 P.2d 990 (Utah 1982) (per curiam), and the Supreme Court's decision in *United States v. Gagnon*, 470 U.S. 522 (1985) (per curiam), demonstrate the absence of plain error in this case.

"Utah Constitution article I, section 12 guarantees the right of an accused to appear and defend in person against any cause against him." *State v. Anderson*, 929 P.2d 1107, 1109-10 (Utah 1996). Thus, a defendant has a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *State v. Burk*, 839 P.2d 880, 887 (Utah App. 1992) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934); citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam)).⁴

However, "[i]t is not only the right of the defendant to be present, but is a duty which the [law] imposes upon him." *Anderson*, 929 P.2d at 1111 (quoting *State v.*

⁴As in this case, the defendant in *Burk* raised a state constitutional claim but failed to provide any independent analysis to support it; thus, the court of appeals addressed Burk's claim only under the federal constitution. *Burk*, 839 P.2d at 886 n.6.

Aikers, 87 Utah 507, 514, 51 P.2d 1052, 1056 (1935)). Thus, a defendant may waive the right by his own inaction. *See Anderson*, 929 P.2d at 1111 (holding defendant waived right to be present at sentencing when, after waiving presence at trial, defendant failed to keep in touch with pre-trial services and attorney as to date of sentencing hearing).

In *State v. Glenny*, 656 P.2d 990, 992 (Utah 1982) (per curiam), the defendant was removed prior to jury voir dire because he was “so intoxicated . . . that it would have been detrimental to his own interests to be present.” This Court found no constitutional violation of the defendant’s right to be present where “[n]o motion for a continuance had been made prior to the selection of the jury, and defendant’s absence at the selection was not noted as a reason for a new trial or in arrest of judgment, nor was any showing offered specifically to demonstrate that defendant’s absence was other than voluntary.” *Id.*

The Supreme Court reached a similar result in *United States v. Gagnon*, 470 U.S. 522 (1985) (per curiam). During that trial, the bailiff informed the court that a juror was concerned because he had noticed the defendant sketching portraits of the jurors. *Id.* at 523. The trial court then announced, “still in open court in the presence of . . . [defendant] and his counsel: ‘I will talk to the juror in my chambers and make a determination.’” *Id.* The juror and defendant’s counsel then retreated with the judge to his chambers. *Id.* at 524. At no time did defendant object to the in camera proceeding or move for the juror’s disqualification. *Id.* He filed no post-trial motion challenging the trial court’s action. *Id.*

Under these facts, the Supreme Court held that the defendant had waived his right to be present at the in camera proceedings: “[F]ailure by a criminal defendant to invoke his right to be present . . . at a conference which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right.” *Gagnon*, 470 U.S. at 529; *see also United States v. Brown*, 923 F.2d 109, 112 (8th Cir. 1991) (holding defendant waived right to presence at in camera discussion with jurors where counsel attended and defendant “did nothing in the district court by way of request, objection, or motion to assert any rights [he] may have had to attend”).

In this case, defendant was present in the courtroom when the trial court met with the venirepersons at the bench (R. 229:41, 44). Defendant “did nothing in the [trial] court by way of request, objection, or motion” to assert his right to attend those meetings. *Brown*, 923 F.2d at 112. He therefore waived any right he had to be present at them. *Glenny*, 656 P.2d at 992; *Gagnon*, 470 U.S. at 529; *Brown*, 923 F.2d at 112; *see also Campbell v. State*, 999 P.2d 649, 662 (Wyo. 2000) (finding waiver under similar facts where defendant’s “presence in the courtroom [when the sidebar jury voir dire was held] permitted either her or defense counsel to object to her exclusion; however, both were silent”).

Consequently, defendant’s claim fails.

D. Defendant has not demonstrated that he was prejudiced by his absence.

Even if defendant did not waive his right to be present by his silence, he must still demonstrate prejudice to succeed on his plain error claim. *See Dunn*, 850 P.2d at 1208-09 (holding that defendant must show prejudice to establish plain error claim). *Cf. Anderson*, 929 P.2d at 1111 (holding that “a showing of prejudice is necessary to uphold a due process challenge against an in absentia proceeding”) (quoting *Dasher v. Stripling*, 685 F.2d 385, 387-88 (11th Cir. 1982)). Defendant has not shown prejudice here.

Dispositive is the fact that defendant raises no claim of ineffectiveness of counsel. Specifically, defendant does not challenge counsel’s decision to keep Mr. Spencer and Ms. Vernon on the jury panel. “[T]rial counsel’s lack of objection to, or failure to remove, a particular juror is presumed to be the product of a conscious choice or preference.” *State v. Litherland*, 2000 UT 76, ¶ 20, 12 P.3d 92. In addition, “because the process of jury selection is a highly subjective, judgmental, and intuitive process, trial counsel’s presumably conscious and strategic choice to refrain from removing a particular juror is further presumed to constitute effective representation.” *Id.*

Because defendant presents no argument to overcome these presumptions, he cannot show that his absence from the sidebars “[had] a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Burk*, 839 P.2d at 887 (citation and internal quotation marks omitted). *Cf. State v. Taylor*, 676 N.E.2d 82, 93

(Ohio 1997) (citing “the *Snyder* principle that an accused’s absence from a hearing at which counsel were present does not necessarily offend due process”).

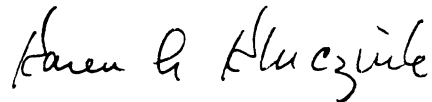
Thus, even if defendant did not waive his right to be present, he has not demonstrated that he was prejudiced by his absence. Consequently, his plain error claim fails.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant’s convictions and sentences.

RESPECTFULLY SUBMITTED 10 August 2001.

MARK L. SHURTLEFF
Utah Attorney General

A handwritten signature in black ink, appearing to read "Karen A. Klucznik". The signature is written in a cursive, flowing style.

KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 10 August 2001, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this **BRIEF OF APPELLEE** to Janet M. Miller and Stephen R. McCaughey, 10 West Broadway, Suite 650, Salt Lake City, Utah 84101, Attorneys for Appellant.

Naren A. Huczick

ADDENDA

ADDENDUM “A”

U.S. Const. amend. XIV:

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Const. art. I, § 7:

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. art. I, § 12:

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

ADDENDUM “B”

INSTRUCTION NO. 25

One of the most important questions in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt, not only that the crime was committed, but also that the defendant was the person who committed the crime. If, after considering the evidence you have heard from both sides, you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The identification testimony that you have heard was an expression of belief or impression by the witness. To find the defendant not guilty, you need not believe that the identification witness was insincere, but merely that the witness was mistaken in his/her belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proved beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

1. Did the witness have an adequate opportunity to observe the criminal actor? In answering this question, you should consider:

- a) the length of time the witnesses observed the actor;
- b) the distance between the witness and the actor;
- c) the extent to which the actor's features were visible and undisguised;

(cont.)

- d) the light or lack of light at the place and time of observation;
- e) the presence or absence of distracting noises or activity during the observation;
- f) any other circumstances affecting the witness' opportunity to observe the person committing the crime.

2. Did the witnesses have the capacity to observe the person committing the crime?

In answering this question, you should consider whether the witness' capacity was impaired by:

- a) stress or fright at the time of observation;
- b) personal motivations, biases or prejudices;
- c) uncorrected visual defects;
- d) fatigue or injury;
- e) drugs or alcohol.

You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.

3. Was the witness sufficiently attentive to the criminal actor at the time of the crime?

In answering this question, you should consider whether the witness knew that a crime was taking place during the time he/she observed the actor. Even if the witness had adequate opportunity and capacity to observe the criminal act, he/she may not have done so unless he/she was aware that a crime was being committed.

(cont.)

4. Was the witness' identification of the defendant completely the product of his own memory?

In answering this question, you should consider:

- a) the length of time that passed between the witness' original observation and his identification of the defendant;
- b) the witness' capacity and state of mind at the time of the identification;
- c) the witness' exposure to opinions, descriptions of identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification;
- d) any instances when the witness, or any eyewitness to the crime, failed to identify the defendant;
- e) any instances when the witness, or any eyewitness to the crime, gave a description of the actor that is inconsistent with the defendant's appearance;
- f) the circumstances under which the defendant was presented to the witness for identification.

You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness.

You may also take into account that identifications made from seeing the person are generally more reliable than identification made from a photograph.

I again emphasize that the burden of proving that the defendant is the person who committed the crime is on the prosecution. If, after considering the evidence you have heard from the prosecution and from the defense, and after evaluating the

(cont.)

eyewitness testimony in light of the considerations listed above, you have a reasonable doubt about whether the defendant is the person who committed the crime, you must find him not guilty.