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Utah v. Philip Earl Hollen : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

THE STATE OF UTAH	:	
Plaintiff/Respondent	:	
v.	:	
PHILIP EARL HOLLEN	:	
Defendant/Petitioner	:	Case No. 20000585-SC Priority No. 2

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for two counts of aggravated robbery, a first degree felony, in violation of Utah Code Annotated section 76-6-302 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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TABLE OF CONTENTS

INTRODUCTION	1
I. THE TRIAL JUDGE ABUSED HIS DISCRETION IN EXCLUDING THE EXPERT’S OPINION BASED ON A MISAPPREHENSION OF THE LAW AND HIS REFUSAL TO CONSIDER THE NEED FOR EXERT TESTIMONY	2
A. <u>The Trial Judge Erred in Concluding that the Expert Could not Address the Reliability of Eyewitness Identification</u>	2
B. <u>The Trial Judge Further Abused His Discretion in Excluding the Expert’s Opinion Based on His Misunderstanding of the Law and Research on Eyewitness Identification</u>	6
C. <u>Withholding the Expert’s Opinion on the Central Issue in the Case Harmed the Defense</u>	8
II. THE EYEWITNESSES’ IDENTIFICATIONS WERE UNCONSTITUTIONALLY UNRELIABLE	9
CONCLUSION	13

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Burkhart v. Washington Metro. Area Transit Auth.</u> , 112 F.3d 1207 (D.C. Cir. 1997) . . .	2
<u>United State v. Rincon</u> , 28 F.3d 921 (9th Cir.), <u>cert. denied</u> 513 U.S. 1029 (1994)	6
<u>United States v. Fosher</u> , 590 F.2d 381 (1st Cir. 1979)	6
<u>United States v. Kime</u> , 99 F.3d 870 (8th Cir. 1996), <u>cert. denied</u> 519 U.S. 1141 (1997) .	6
<u>United States v. Purham</u> , 725 F.2d 450 (8th Cir. 1984)	6

STATE CASES

<u>Gaw v. State</u> , 798 P.2d 1130 (Utah Ct. App. 1990)	5, 7
<u>Kallas v. Kallas</u> , 614 P.2d 641 (Utah 1980)	8
<u>State v. Adams</u> , 2000 UT 42, 5 P.3d 642	2
<u>State v. Butterfield</u> , 2001 UT 59, 27 P.3d 1133	3
<u>State v. Helmick</u> , 2000 UT 70, 9 P.3d 164	4
<u>State v. Jaeger</u> , 1999 UT 1, 973 P.2d 404	13
<u>State v. Larsen</u> , 865 P.2d 1355 (Utah 1993)	2, 5
<u>State v. Long</u> , 721 P.2d 483 (Utah 1986)	7
<u>State v. Maestas</u> , 1999 UT 32, 984 P.2d 376	12
<u>State v. Mead</u> , 2001 UT 58, 27 P.3d 1115	2
<u>State v. Ramirez</u> , 817 P.2d 774 (Utah 1991)	11, 12

State v. Span, 819 P.2d 329 (Utah 1991) 2

Walker v. Union Pacific R.R. Co., 844 P.2d 335 (Utah Ct. App. 1992) 5, 7

STATE STATUTES

Utah Code Annotated § 76-6-302 (1999) 1

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INTRODUCTION

In refusing to allow an expert witness to express his opinion about the reliability of the eyewitness identifications, the trial judge misapprehended the law on the role of experts and on the fallibility of eyewitness identifications. In doing so, he abused his discretion. He similarly exceeded his discretion when he decided before trial, without even assessing the need for the expert testimony, to bar the expert from giving an opinion on the reliability of the identifications.

The trial judge further erred in admitting the eyewitnesses' identifications. Numerous factors interfered with the eyewitnesses' observations, including a disguise, fear, the presence of guns, repeated exposure to suggestion, and the fact that the identifications occurred two months after the crime. Because this case hinged entirely on the accuracy of the identifications, the trial judge's errors severely harmed the defense.

I. THE TRIAL JUDGE ABUSED HIS DISCRETION IN EXCLUDING THE EXPERT'S OPINION BASED ON A MISAPPREHENSION OF THE LAW AND HIS REFUSAL TO CONSIDER THE NEED FOR EXPERT TESTIMONY

A. The Trial Judge Erred in Concluding that the Expert Could not Address the Reliability of Eyewitness Identification

The trial judge erroneously concluded that the expert witness would invade the jury's province by addressing the reliability of the eyewitness identifications. This Court and the federal Circuit Courts of Appeal have plainly established that experts may offer an opinion "as to facts that, if found, would support a conclusion that the legal standard at issue was [or was not] satisfied." Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1212-1213 (D.C. Cir. 1997); see State v. Larsen, 865 P.2d 1355, 1363 (Utah 1993) (experts may render opinion on "a factual issue to be determined by the jury."). In fact, this Court has consistently allowed expert opinions on factual matters that the jury must ultimately decide. State v. Mead, 2001 UT 58, ¶41, 27 P.3d 1115 (medical examiner properly "applied" physical evidence to the facts in concluding death was a homicide); State v. Adams, 2000 UT 42, ¶¶13-14, 5 P.3d 642 (approving of opinion on mentally impaired person's cognitive capacity to fabricate); State v. Span, 819 P.2d 329, 332 (Utah 1991) (allowing opinion on whether fire had been intentionally set).

The reliability of the eyewitness identifications below was a factual issue, not a legal conclusion, upon which the expert could offer an opinion. This Court recently ruled

that trial judges may properly admit expert testimony on the reliability of a specific eyewitness identification. In State v. Butterfield, 2001 UT 59, ¶44, 27 P.3d 1133, this Court held that the trial court properly excluded expert testimony on an eyewitness identification because the expert did not have knowledge about the specific facts of the case. Id. Specifically, the expert only intended to "lecture to the jury as to how they should judge the evidence." Id. at ¶43. This Court reasoned that the trial court acted properly because the expert did not offer "'an opinion concerning whether any witness' identification was accurate.'" Id. at ¶44 (quoting the trial court's ruling).

In contrast, the expert in this case sought to offer the very type of opinion evidence that this Court endorsed in Butterfield. In particular, the expert was prepared to give "an opinion as to whether the process of identification in this case raises serious question as to it's reliability." R. 317: 216. The trial judge misapprehended the expert's and the jury's roles in excluding the expert's opinion. Butterfield, 2001 UT 59, ¶44, 27 P.3d 1133.

The State attempts to justify the trial judge's decision by speculating that the judge excluded the expert's opinion for a variety of possible reasons. State's Brief at 9-15. The State proposes that the judge may have concluded that the expert might have confused the issues, delayed the case, or caused the jury to attach too much weight to the expert's testimony. State's Brief at 12-14.

Mr. Hollen does not dispute that trial judges have such discretion. Nevertheless, the State's arguments are ineffectual. In the first place, because the State raises the

possible grounds for the trial judge's decision for the first time in this appeal, the State waived consideration of those issues. State v. Helmick, 2000 UT 70, ¶8, 9 P.3d 164.

Even if this Court could consider the State's claims, the record does not support that any of the listed grounds for exclusion ever factored into the trial judge's decision. The trial judge's cursory decision indicates that he believed that it was the jury's role to decide the reliability of eyewitness identifications:

Q [defense counsel]: Based on all these factors and what you know about the case, Dr. Dodd, do you have an opinion as to whether the process of identification in this case raises serious question as to it's reliability?

Mr. Shepherd [prosecutor]: I'm going to object to that, your Honor. I think these are matters the jury can decide.

The Court: Objection is sustained. This is within the province of the jury, Counsel.

R. 317: 216-17.

The only other insight into the trial judge's decision occurred at the hearing on the motion for new trial, almost two years after the trial. There, in denying the motion, the trial judge expressed his personal contempt for the need for expert testimony on eyewitness identification:

The Court: As I recall, we gave the so-called eye witness identification instruction, did we not? That two or three page piece of work from Zimmerman? From the Supreme Court?

Ms. Stam: Yes. I think it was a unanimous decision.

The Court: I'm not prepared, Ms. Stam, at this time to reconsider a ruling during the course of trial. My thinking, I think that if it warrants appeal, and certainly in your judgment I suppose it does, they ought to get on about it.

But at that time, and as of this time, even having learned quite a bit since then, I'm not persuaded we need to have someone come down and tell us that witnesses don't know what they see. So your request is denied as to the motion for a new trial.

R. 318: 4-5.

Both of these rulings evince the trial judge's personal dislike for expert opinions on the reliability of eyewitness identification and his misunderstanding of the role of experts and the jury in assessing the accuracy of that evidence. But, the rulings do not mention any concern for avoiding confusion, waste of time, or attaching too much value to the expert's opinion as the State proposes. Because these matters were not at issue in this case, they served as no grounds for excluding the expert's opinion. At the very least, Mr. Hollen deserves the benefit of the doubt on discerning the trial judge's reasoning since the trial judge refused to allow defense counsel to raise her objections at trial.

Given the trial judge's misunderstanding of the law, his decision "exceed[ed] the limits of reasonability." Larsen, 865 P.2d at 1361. When trial judges exclude expert testimony based on "a misperception of the law," an abuse of discretion results. Walker v. Union Pacific R.R. Co., 844 P.2d 335, 343 (Utah Ct. App. 1992); see also Gaw v. State, 798 P.2d 1130, 1134 (Utah Ct. App. 1990). Here, the trial judge mistakenly assumed that the rules of evidence prevented experts from addressing the reliability of eyewitness

identification. That false belief exceeded the trial judge's discretion.

The State cites several cases that it claims supports the trial judge's decision. But, those cases are premised on the now discredited assumption that expert testimony on eyewitness identification does not constitute scientific knowledge and that the weaknesses in eyewitness identification are a matter of common sense for the jury. United States v. Kime, 99 F.3d 870, 883-84 (8th Cir. 1996), cert. denied 519 U.S. 1141 (1997) (because eyewitness identification is not a specialized field of study, jury alone decides reliability); United State v. Rincon, 28 F.3d 921, 924-25 (9th Cir.), cert. denied 513 U.S. 1029 (1994) (defendant failed to show expert eyewitness testimony constituted scientific knowledge); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984) (expert testimony not needed because jurors understand intricacies of eyewitness identification); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (finding expert testimony on eyewitness identification unreliable and ruling that jury adequately appreciated the problems with that evidence). These holdings contradict current understanding and the present state of the law. Thus, they serve as no basis for justifying the trial judge's decision.

B. The Trial Judge Further Abused His Discretion in Excluding the Expert's Opinion Based on His Misunderstanding of the Law and Research on Eyewitness Identification

Aside from the trial judge's misapprehension of the law on the role of experts, his

misunderstanding of the science and the law on eyewitness identification and his contempt for that field of study constituted an abuse of discretion. Throughout the proceedings, the trial judge doubted the need for expert testimony and viewed the limitations of eyewitness identification as "common knowledge." R. 316: 9. Given the extensive law that holds directly to the contrary, the trial judge's false notions were an abuse of discretion. Walker, 844 P.2d at 343; Gaw, 798 P.2d at 1134.

The State contends that the trial judge properly exercised his discretion and that his personal views on eyewitness identification evidence did not amount to a misunderstanding of the law. State's Brief at 16-18. Admittedly, the trial judge allowed the expert to testify and he instructed the jury on the limitations of eyewitness identification. But, at every stage of the proceedings, he also belittled the research into eyewitness identification and he expressed doubt about the need for expert testimony. Thus, although the judge appears to have felt compelled to follow this Court's precedents on eyewitness identification evidence, he doubted its validity.

At the hearing on the motion for new trial, the trial judge eliminated any doubt that his personal views affected his decision to exclude the expert's opinion. There, he described this Court's opinion in State v. Long, 721 P.2d 483 (Utah 1986), as a "piece of work." R. 318: 4. The State conspicuously fails to mention this comment in its brief. The trial judge similarly stated that even though he had learned a lot about eyewitness identification evidence since the trial he still believed that the jury did not "need to have

someone come down and tell us that witnesses don't know what they see." R. 318: 5.

Clearly, the trial judge's misapprehensions on eyewitness identification influenced his refusal to allow the expert to render an opinion.

Further contrary to the State's protestations, an abuse of discretion also results when trial judges render decisions without considering all "pertinent facts." Kallas v. Kallas, 614 P.2d 641, 646 (Utah 1980). This basic concept is not "tangential[]" or confusing as the State's claims. State's Brief at 15. Rather, a decision before trial to exclude an expert's opinion regardless of the state of the evidence and without knowing whether any need exists for that testimony certainly qualifies as an abuse of discretion. Judges properly exercise their discretion by making "fully informed" decisions, rather than deciding whether to exclude an expert's opinion even before any facts are presented at trial. Id. at 646.

C. Withholding the Expert's Opinion on the Central Issue in the Case Harmed the Defense

Because this case hinged on the reliability of the eyewitness identifications, the exclusion of the expert's opinion harmed the defense. The State presented no evidence at all to link Mr. Hollen to the crime other than the eyewitness identification testimony. But, without the expert's opinion, the jury had no means of weighing the competing evidence on the identifications. The jurors only knew that despite numerous problems with the

eyewitness observations, four eyewitnesses had identified Mr. Hollen as the robber. Had the jury known that the expert concluded that the identifications were unreliable, it would have had an evidentiary basis for an acquittal. Instead, the jurors were forced to rely on the eyewitnesses' credibility and their stated beliefs in the accuracy of their identifications. Given jurors' unfamiliarity with eyewitness identification problems, they needed expert testimony to reconcile the competing evidence and to explain that the eyewitnesses were sincere but wrong. Without expert guidance on reliability, the jury reached the only reasonable conclusion it could in the absence of an expert's opinion.

II. THE EYEWITNESSES' IDENTIFICATIONS WERE UNCONSTITUTIONALLY UNRELIABLE

The trial judge also erred in admitting the eyewitnesses' unreliable identifications. Significant problems plagued the eyewitnesses' perceptions. First, the heavy set robber's disguise seriously interfered with all of the eyewitnesses' observations. As Dr. Dodd explained, research has shown that "the concealment by disguise is particularly disruptive of the ability to remember" faces. R. 315: 98. Additionally, all of the eyewitnesses' memories were influenced by the composite sketch of the disguised man. Further, the use of guns and an unusual disguise coupled with the presence of two assailants created significant distractions and divided the eyewitnesses' attention. And, the fact that the eyewitnesses did not identify the robbers until two months after the crime diminishes the

reliability of their memories.

Each of the eyewitnesses also had a limited ability to perceive the disguised man. Oscar divided his attention throughout the encounter, experienced an extremely high degree of fear, identified Mr. Hollen in a suggestive photo array that included only three pictures that matched the assailant's description, took several minutes to identify Mr. Hollen's picture, believed beforehand that the disguised man's picture was included in the array, was informed by the police that he had picked the correct picture, and gave inconsistent reports about whether he had accurately identified Mr. Hollen.

Likewise, Channing only saw the assailants clearly for 20 to 30 seconds while Dave Peterson fetched the key to the vault room. Initially, he was unaware that a robbery was taking place. Channing also experienced sufficient fear to cause him to cry. Two months later, he observed Mr. Hollen on television under highly suggestive circumstances. Channing also identified Mr. Hollen in a suggestive photo array after which the police violated identification procedure guidelines and confirmed the accuracy of his photo identification. Then, at the line-up and at subsequent court proceedings he was repeatedly exposed to Mr. Hollen.

Lou suggestively learned from Channing that Mr. Hollen had been arrested. Even though Lou arguably had the best opportunity to observe the disguised man, he could not affirmatively identify Mr. Hollen at the line-up. Also at the line-up, Lou overheard victims from other robberies mention Mr. Hollen's alleged involvement in other crimes,

suggesting that Mr. Hollen was the perpetrator. Despite being in position to see the disguised man, Lou mistakenly believed that the other assailant wore the sweatshirt.

Similar problems arose with Jill's testimony. She did not perceive that a robbery was occurring until well after the group entered the vault room and after she experienced prolonged confusion. Her only opportunity to view the disguised man occurred in the vault room when she was confused, experiencing a high level of fear, and was distracted by emptying the safe and observing the other victims being tied up. She had a poor memory of the disguised man's clothes because she consciously tried to suppress her memory of the crime. Suggestion also infected her line-up identification. Before viewing the line-up, Jill overheard the victims of the Million Dollar Saloon robbery discussing that crime. She also believed the disguised man would be in the line-up and she admitted that Mr. Hollen's appearance most closely matched her description of the assailant.

These facts distinguish this case from State v. Ramirez, 817 P.2d 774 (Utah 1991). Most notably, the identifications here occurred two months after the crime when memories had faded as opposed to less than an hour in Ramirez, 817 P.2d at 784. Suggestion also permeated the identifications. Although the witnesses in Ramirez identified that defendant at a suggestive show-up, the fact that the identification occurred within a short time after the crime outweighed the suggestiveness. Id. The identifications in this case were much more suggestive given the lengthy time gap, Channing's spotting Mr. Hollen under highly incriminating circumstances on television, the incriminating photo array that included only

three possible choices, and line-up procedures that violated Justice Department guidelines. National Institute for Justice, U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999).

This Court also apparently was not aware in Ramirez of the potent effect a disguise has on eyewitness identification. Although this Court expressed concern in that case that the defendant wore a scarf over his face except his eyes, there was no evidence on the current research on altering a person's appearance. Ramirez, 817 P.2d at 782-84. As Dr. Dodd testified, alterations by use of a disguise have an "enormous influence" on witnesses' ability to encode a face. R. 317: 205, 217. Had this Court known of this research, its decision may well have been different.

This case is much more similar to the facts in State v. Maestas, 1999 UT 32, 984 P.2d 376. The concerns this Court expressed in that case are equally relevant here. Specifically, the witnesses (1) had a limited opportunity to view the assailant; (2) divided their attention on the use of guns; (3) offered conflicting reports about the assailants' clothing; (4) experienced fear; and, (5) failed to agree on whether the defendant was the robber. Id. at ¶¶23-24, 29. Suggestion also infected both cases, including the eyewitnesses' learning that the defendant was accused of other crimes and their discussing their observations among each other. Id. at ¶¶23-24. The use of a disguise in both cases further connects them and weakens the reliability of the identifications. Id. at ¶23.

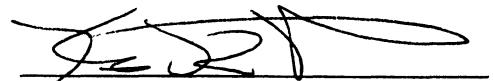
Because the only evidence linking Mr. Hollen to the crime was the eyewitness

identification evidence, the erroneous admission of the eyewitnesses' testimony harmed the defense. The absence of evidence prevents the State from establishing harmlessness beyond a reasonable doubt. State v. Jaeger, 1999 UT 1, ¶30, 973 P.2d 404.

CONCLUSION

Because the trial judge prejudiced the defense in refusing to allow admissible expert testimony and in admitting unreliable eyewitness testimony, reversal and a remand for a new trial are required.

SUBMITTED this 1~~st~~ day of October, 2001.

A handwritten signature in black ink, appearing to read 'K. R. Hart', is written over a horizontal line.

KENT R. HART

Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, KENT R. HART, certify that I have caused to be delivered ten copies of this brief to the Utah Supreme Court, 450 South State, 5th Floor, P.O. Box 140210, Salt Lake City, Utah 84114-0210, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of October, 2001.


KENT R. HART

DELIVERED to the Utah Supreme Court and the Utah Attorney General's Office as indicated above this ____ day of October, 2001.
