

1986

# Utah v. John R. Remington : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	RFO 45.9
Plaintiff/Respondent,	:	.89 DOCKET NO. 860031
v.	:	
JOHN R. REMINGTON,	:	Case No. 860031
Defendant/Appellant.	:	Category No. 2

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PETITION FOR REHEARING

Petition for reconsideration of a decision by the Utah Supreme Court, Opinion No. 860031, filed March 31, 1987 in an appeal from a conviction and judgment for Aggravated Robbery, a felony of the first degree and Possession of a Dangerous Weapon by a Restricted Person, a felony of the second degree and of Being a Habitual Criminal, 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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FILED

APR 28 1987

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
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Defendant/Appellant.	:	Category No. 2

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STATEMENT OF THE CASE

This is a petition for rehearing of a decision filed by the Court on March 31, 1987. Originally this case was an appeal from convictions and judgments imposed for Aggravated Robbery, a felony of the first degree and Possession of a Dangerous Weapon by a Restricted Person, a felony of the second degree and of Being a Habitual Criminal, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

STATEMENT OF FACTS

A summary of the facts is set forth in Brief of Appellant (Appellant's Brief 1-4).

ARGUMENT

In its per curiam opinion, State v. Remington, Opinion No. 860031 (Utah 1987), this Court has either overlooked or misapprehended the arguments presented by Appellant and has misstated and overlooked certain facts critical to this case. (See Addendum A).

- I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GIVE APPELLANT'S REQUESTED CAUTIONARY INSTRUCTION REGARDING EYEWITNESS IDENTIFICATION.

This case involves a request for a cautionary eyewitness identification instruction in a jury trial which occurred prior to this Court's decision in State v. Long, 721 P.2d 483 (Utah 1986). This Court followed the standard applicable to such cases as clarified in State v. Jonas, 725 P.2d 1378 (Utah 1986) and State v. Quevedo, Opinion No. 19049 (Utah 1987), both of which were decided after Appellant submitted his brief. The applicable pre-Long standard is as follows:

"Prior to Long, the law was that it lay within a trial judge's discretion whether an eyewitness identification instruction . . . was given. [citations omitted] However, this Court also stated prior to Long that the failure to give an eyewitness instruction might be an abuse of discretion where there were serious questions about the reliability of the eyewitness identification. [citations omitted] (emphasis added).

State v. Quevedo, supra at 2.

In State v. Jonas, supra, this Court held for the first time that a trial judge had abused his discretion in failing to give a cautionary eyewitness identification instruction. In that case, serious questions as to the reliability of the identification arose where: (1) the victim had little opportunity to observe his assailant; (2) the witness initially described his assailant as clean-shaven, but later changed his description to include a mustache; (3) the witness described an assailant with a crooked nose yet selected a photo of the Appellant who did not have a crooked nose; (4) the victim's trial testimony showed that he was uncertain and hesitant in the way in which he selected the defendant during the photo array; and, (5) there were no other witnesses or corroborating evidence.

In State v. Quevedo, supra, this Court did not find serious questions as to the reliability of the eyewitness identification and held that the trial judge did not abuse his discretion in refusing to give a cautionary instruction. In that case, four police officers, trained to make such identifications, positively identified the defendant at trial as the driver of a vehicle fleeing the scene of a robbery. One of the officers had known the defendant for three years. The officers located Quevedo in a nearby apartment, shortly after the fleeing getaway car crashed. An occupant of the apartment stated, "I don't know what he done, he just ran in here." When arrested, Quevedo wore the same jacket that the fleeing driver had worn.

The identification in the present is subject to serious concerns as to its reliability similar to those in Jonas. As was the case with the victim in Jonas, Mr. Cruser, the victim in this case, had little opportunity to view his assailant. Mr. Cruser was unable to get much of a look at his assailant's face. He viewed it briefly as the person entered and left the store (T. 81-82). During most of the three to five minutes that the robber was in the store, Mr. Cruser was lying on the floor and could see only his pants and shoes (T. 72).

Mr. Cruser's trial testimony established his own uncertainty as to the identification of Mr. Remington as the assailant. He never made an in court identification of Mr. Remington even though Remington's appearance on the day of the trial



was the same as it had been on the day of the robbery (T. 152). On direct examination, the prosecutor did not ask Mr. Cruser for an in court identification of his assailant. Instead, the prosecutor focused on Mr. Cruser's identification of Mr. Remington from a photo spread (T. 67-81). On cross-examination by counsel for Mr. Kalisz, Mr. Cruser positively identified Mr. Kalisz as the robber after reviewing the photograph of Mr. Remington which he had previously identified (T. 92).<sup>1</sup> Mr. Cruser also acknowledged that he had told the prosecutor that he was not sure Mr. Remington had committed the crime unless he dyed his hair (T. 91).

Mr. Cruser's description of his assailant did not fit Mr. Remington, just as the initial description of his assailant by the victim in Jonas did not fit the defendant in that case. Cruser described a sandy haired man with a light moustache and selected Kalisz. (T. 89-90, 92, 96). Mr. Remington has dark brown hair (T. 52).

Clearly, Mr. Cruser's in court identification of Kalisz, not Remington, as his assailant coupled with his failure to identify Remington at all in person even though Remington's appearance had not changed, raised serious doubts as to the reliability of Cruser's identification of Remington from a photo spread.

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<sup>1</sup> The record as to which defendant is being identified by witnesses is slightly confusing. Mr. Cruser identifies the man in the tan coat as looking more like his assailant than anyone else (T. 92). Officer Faraone later clarifies that the defendant in the caramel colored jacket is Kalisz (T. 123).

Mr. Cruser testified that he thought his assailant had been in the store earlier in the day (T. 69-70). Linking this testimony to Mr. Remington raises the same serious doubts as to reliability since Mr. Cruser did not positively identify Mr. Remington as the robber and demonstrated his own inability to accurately perceive, recall and identify an individual.

Corroborating evidence sufficient to overcome the serious doubts as to the identification of Mr. Remington as the robber did not exist in this case. In its opinion in this case, the court focused on Malidina Engelhardt's identification of Mr. Remington as the man in her store twenty minutes before the robbery as an important factor in showing the reliability of Mr. Cruser's identification of Mr. Remington from the photo spread. However, Ms. Engelhardt's identification does not place Mr. Remington in the Cruser jewelry store and is as susceptible to problems with eyewitness identification as the testimony of Mr. Cruser. Ms. Engelhardt was talking to her boyfriend when a man entered her store (T. 43). The man stood ten feet away and wore a baseball cap and sunglasses (T. 44). He was in the store three to four minutes, but she did not really look at him (T. 51). Clearly, Ms. Engelhardt did not have much of an opportunity to view the man in her store.

After the robbery, officers took Ms. Englehardt to view Mr. Kalisz. She looked at him for three to four minutes, then told officers he was not the man who had been in her store because Mr. Kalisz was thinner, had long blonde hair and wore a blue terry cloth rather than cotton shirt. After inspecting Mr. Kalisz for up to four minutes on the day of the robbery, she did not remember him at

trial (T. 60-61). Her own testimony showed her ability to recall faces and persons was subject to scrutiny and emphasized the need for a cautionary instruction in regard to her identification of the man in her store. Her identification twenty minutes before the incident in a location other than the scene of the crime is in stark contrast to the identification made by four trained police officers immediately after following a fleeing suspect in Quevedo.

In its opinion in this case, the Court stated that the man in Ms. Engelhardt's store asked her what time it was. The record reveals that the man never asked her what time it was; instead, he asked her what time the store closed, at which point Ms. Engelhardt looked at her watch (T. 45).

The Court also stated that Remington left in the direction of Cruser Jewelry. The record reveals that Ms. Engelhardt testified that approximately twenty minutes before the robbery, the man exited her store to the north, but that she did not watch where he went (T. 58-59). The record does not establish that the man in Ms. Engelhardt's store went towards Cruser Jewelry.

In its opinion, this Court stated that "a robbery had taken place in the Brickyard Plaza and that the search centered on a black Monte Carlo getaway car which had spun out and hit the curb before leaving the Brickyard Plaza." State v. Remington, supra at 2. The record reveals that two independent investigations occurred simultaneously immediately after the robbery. One investigation involved an attempt to locate Mr. Remington and the Monte Carlo he had borrowed from Mr. Argyle's car lot (T. 118-120). The other involved a search for a suspect in the Cruser Jewelry robbery and

included information that some children saw a black car spin on gravel at the Brickyard Plaza (T. 134, 187). Neither the children nor anyone else who allegedly saw a black getaway car testified at trial. The statement that the getaway car hit the curb and was a Monte Carlo appear to be Officer Faraone's embellishment of the broadcast regarding a black getaway car at Brickyard Plaza.

In its opinion, this Court focused on the alleged scuff mark on the Monte Carlo as corroborating evidence which rendered Mr. Cruser's failure to identify Remington at trial negligible. Officer Faraone testified that there was no indication the Monte Carlo was damaged from hitting a curb, but that on the right rear tire there was a scuff mark (T. 136). Mr. Argyle, the car's owner, did not mention a scuff mark and did not establish that if there were a scuff mark, it was not present when the car left his lot. He testified that other than the possibility that the stickers might have been removed and reapplied, nothing about the car was amiss (T. 26). As previously outlined, no one testified who had allegedly seen the car leave the brickyard and hit the curb. Where the state presents no evidence that the mark was not there when the car left the lot and no foundational evidence as to what exactly was seen in regard to a getaway car and damage to that car, the jury could only speculate as to whether the scuff mark tied Mr. Remington to the robbery. This is not evidence which overcomes the serious doubts raised by Mr. Cruser's inconclusive identification testimony.

In addition, in the opinion in State v. Kalisz, Opinion No. 860032 (Utah 1987), (See Addendum B), this Court stated that nothing in the evidence tied Mr. Kalisz to the getaway car. If Mr. Kalisz

who was positively identified by numerous witnesses as the person who drove the Monte Carlo into Steve's Used Car Lot, cannot be tied to the getaway car, then, conversely, the getaway car cannot be linked to the Monte Carlo and its alleged scuff mark. Based on the decision in Kalisz that Kalisz could not be linked to the getaway car, any evidence relating to the Monte Carlo should be disregarded.

The opinion in this case points out that Kalisz' statement that he had taken Remington to the hospital for an appendicitus attack, coupled with evidence that the statement was false, is evidence on which the jury could have relied. However, the state did not establish that Mr. Remington had not checked into the hospital. The prosecutor asked a hearsay question in an attempt to establish that Mr. Remington had not gone to the hospital. Defense counsel objected and the answer was stricken (T. 143-144). The jury should not have considered the answer as evidence, nor should this court in determining whether corroborating evidence sufficient to outweigh the serious concerns raised by Mr. Cruser's testimony existed.<sup>2</sup>

As outlined in Appellant's brief, the watch found on Mr. Remington's person provides very little evidence. The watch is a very common brand without serial number. Noone knew whether Mr. Remington had the watch with him when he left the prison that morning.

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<sup>2</sup> The State in its brief asked the Court to speculate that Mr. Remington had not been to the hospital since he showed up at prison later that evening (Respondent's Brief at 8). However, absent evidence as to the time Remington allegedly checked in, the length of time one generally spends in the hospital with an appendicitus attack, or evidence that an individual who incorrectly believes he has appendicitus and goes to the hospital is never released the same day, the court simply cannot make such a leap in the evidence.

Finally, the timing involved in this incident enhances the doubt caused by Mr. Cruser's failure to identify Mr. Remington in court. The robbery occurred at approximately 5:20 p.m.; Cruser's alarm at his Brickyard Plaza store went off at 5:31. The Monte Carlo arrived downtown several miles away, in the midst of rush hour traffic at 5:46. According to the state's theory, in approximately sixteen minutes, Kalisz picked up Remington, dropped off both Remington and all the items taken in the robbery and drove to Steve's Car Lot.

A careful review of the facts in this case establishes that they are aligned with those in Jonas. Mr. Cruser, the only person to witness the robbery, raised some very serious concerns as to the reliability of his photo identification of Mr. Remington. The remaining evidence presented by the State failed to corroborate that identification and did not overcome the serious doubts that Mr. Remington was the person in Cruser Jewelry Store. Because of this, the trial judge abused his discretion in failing to give the requested cautionary identification instruction.

## II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

Although the State argues that it presented sufficient evidence to convict Remington, it concedes that "the evidence presented by the State at trial was not overwhelming." State v. Remington, Respondent's brief at 7.

In the per curiam opinion in State v. Kalisz, Opinion No. 860032 (Utah 1987), this Court held that insufficient evidence existed to convict Mr. Remington's co-defendant, Stephen Kalisz, of Armed Robbery. In that case, this Court noted that that:

"The state failed to present any evidence that placed Kalisz at the scene of the robbery or in the get away car or linked him to the crime through the possession of any of the stolen goods. Nonetheless, the prosecutor argued that Kalisz provided transportation to and from the scene of the robbery and should therefore be convicted as Remington's accomplice."

State v. Kalisz, supra at 3.

Yet in this case, the Court held that there was sufficient evidence to convict Mr. Remington and to overcome the serious doubts raised by Mr. Cruser's testimony. As previously outlined, this Court linked Mr. Remington to the robbery through the black Monte Carlo returned to Steve's car lot by Kalisz. However, in the Kalisz opinion, this Court stated that the evidence did not link Kalisz to the getaway car. This is an inconsistent view of the same evidence. If the evidence was insufficient to link Kalisz to the getaway car, it was equally insufficient to link Remington to the Monte Carlo, and the evidence relating to the Monte Carlo should be disregarded.

As previously outlined in Point I of this Petition and Point II of Appellant's brief, Mr. Cruser failed to identify Mr. Remington in court as his assailant and, in fact, identified Kalisz as the robber. Mr. Cruser had a limited view of the robber's face, yet his only identification of Mr. Remington consists of a head shot black and white photograph. Clearly, a photograph does not present the same details as to height, weight and body build and is more subject to error than an in person view of an individual.

The prosecutor was willing to ignore as unreliable Mr. Cruser's in court identification of Mr. Kalisz as the robber and argue that Kalisz was in the getaway car. However, the State then


relied on the photograph identification to establish that Mr. Remington was in the store. The identification testimony of Mr. Cruser was wholly inconclusive and insufficient as a matter of law to establish that Mr. Remington was the robber.

As previously outlined in this Petition and Appellant's brief, the remaining evidence was replete with flaws and failed to place Mr. Remington in Cruser's Jewelry Store. No stolen property was recovered from either defendant or the Monte Carlo. No fingerprints belonging to either man were found at the crime scene. As previously stated in Appellant's brief, several gaps in the evidentiary fabric exist and the gaps may be crossed only by sheer speculation. Speculation is insufficient to sustain a conviction for armed robbery. Absent sufficient evidence to sustain the conviction for armed robbery, the convictions for Possession of a Weapon by a Restricted person and Being an Habitual Criminal necessarily fail.

#### CONCLUSION

Because this court overlooked and misstated critical issues of fact and law in this case, the Appellant respectfully petitions this Court to reconsider its decision in this case and reverse his conviction and remand his case to the district court for either dismissal of the charges or a new trial.

Respectfully submitted on this 27<sup>th</sup> day of April, 1987.

  
KHARIS HARROLD  
Attorney for Petitioner



CERTIFICATE OF SERVICE

I, KRIS HARROLD, hereby certify that a four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114, this 27<sup>th</sup> day of April, 1987.

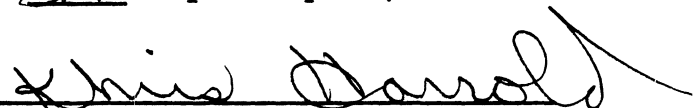
  
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KHRIS HARROLD  
Attorney for Petitioner

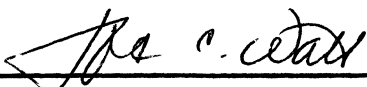
I, KHRIS HARROLD, do hereby certify the following:

(1) I am the attorney for appellant/petitioner in this case; and,

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this 27<sup>th</sup> day of April, 1987.

  
\_\_\_\_\_  
KHRIS HARROLD  
Attorney for Appellant

DELIVERED by  this 28 day of April, 1987.

## ADDENDUM A

IN THE SUPREME COURT OF THE STATE OF UTAH

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The State of Utah,  
Plaintiff and Respondent,

No. 860031

v.

F I L E D  
March 31, 1987

John R. Remington,  
Defendant and Appellant.

Geoffrey J. Butler, Clerk

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PER CURIAM:

Defendant John R. Remington appeals from convictions of aggravated robbery, a first degree felony, possession of a dangerous weapon by a restricted person, a second degree felony, and of being a habitual criminal. Before this Court, Remington claims error in the trial court's refusal to give a cautionary jury instruction concerning eyewitness identification and in the jury's conviction on insufficient evidence. We affirm.

On Saturday, August 17, 1985, between 2:00 and 2:30 p.m., Remington and a friend, John Kalisz, arrived at a used car lot at Eighth South and Main Streets in Salt Lake City, Utah. Remington asked the owner if he could test drive a black 1978 Monte Carlo around the block. He left the truck in which he had arrived behind on the lot. When he did not return by 5:00 p.m., the owner searched Remington's truck, found a Utah State Prison pass bearing Remington's picture, and contacted the prison and then the police. Officer Faraone arrived at the car lot at 5:30.

At 5:00 p.m., Remington entered Earth's Originals, a jewelry store at Brickyard Plaza, where Malinda Engelhardt, an employee, was talking to a friend. Remington placed himself in a corner, looked out the window, and asked Engelhardt what time it was and when the store closed, as he was bringing his wife in later. Remington then left in the direction of Crusier Jewelry. Engelhardt testified that Remington wore a light blue shirt, washed Levis, a baseball cap, and sunglasses. She did not notice what shoes he wore. Four days after the robbery, Engelhardt identified Remington from a photo spread as the man who had been in her store.

Reed Crusier, the seventy-eight-year-old owner of Crusier Jewelry, testified that the man who robbed him had been in his store around 2:00 p.m. that day and entered a second time around 5:20 p.m., displaying a gun and ordering Crusier to go to a back room and lie face down before he swept into a large plastic sack jewelry and watches from drawers and the display case. Crusier's burglar alarm went off at 5:31 p.m.

At 5:46 p.m., Officer Faraone at the used car lot received word from dispatch that a robbery had taken place at the Brickyard Plaza and that the search centered on a black Monte Carlo getaway car which had spun out and hit the curb before leaving the Brickyard Plaza. Within minutes, Kalisz arrived at the used car lot in the Monte Carlo without Remington and was asked where Remington was. Kalisz reported that he had taken Remington to St. Mark's Hospital with an attack of appendicitis. A check with the hospital revealed that that statement was false. The Monte Carlo had a scuff mark on the side wall of the right rear tire. The price stickers had been removed and replaced, but no incriminating evidence was found inside the car. A backup officer at the scene testified that Kalisz wore a light blue shirt and high boots, but could not recall whether he wore Levis or corduroy pants.

Cruser was brought to the used car lot to confront Kalisz. Cruser testified that when the robber entered his store, he wore a blue shirt, tan pants, and gym shoes. He stated that he did not get a good look at the robber's face because he could see only the tan pants and gym shoes after he lay down on the floor. At the car lot, Cruser thought Kalisz might be the man who robbed him, but noticed that he wore brand new boots instead of gym shoes and was dressed differently. Two or three days after the robbery, Cruser identified Remington from the same photo spread that was shown to Engelhardt for identification, but was unsure and confused at trial whether Remington was the robber. Remington and Kalisz were tried together, and some of the confusion may have been caused by the prosecution, who identified the two defendants by their respective counsel.

Remington returned to the prison late on the day of the robbery. He wore tan pants, gym shoes, and a white t-shirt, as well as a Bulova watch which bore a stamped "P3" and fresh glue from a removed price tag on the back. Cruser testified that he had recently returned to the display case an older-model Bulova watch that had been laid away and never picked up by a customer and that the "P3" on the back meant it was a 1983 model. Cruser stated that the watch was a commonly available watch that he carried in his store. The prison warden did not know whether Remington had worn the watch on the morning of the robbery when he left the prison on a work release.

In State v. Long, 721 P.2d 483, 492 (Utah 1986), we abandoned our theretofore discretionary approach to cautionary jury instructions and directed "that in cases tried from this date forward (June 20, 1986) trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." In Long, the State's case hinged on uncorroborated eyewitness testimony of a single witness, the victim of the crime. In State v. Jonas, 725 P.2d 1378 (Utah 1986), this Court

was again faced with a case in which the victim of the crime was the only eyewitness on whose uncorroborated testimony the jury had convicted the defendant without the aid of a cautionary instruction on eyewitness identification. We noted there, as we do here, that the holding in Long could not be applied retroactively to the case before us, as it was tried before our decision in Long was rendered. We then continued in Jonas:

In each of our pre-Long cases involving the refusal of a trial court to give a cautionary instruction, we have held that the trial court did not abuse its discretion under the particular circumstances presented, although we did expressly recognize "that under suitable circumstances a cautionary instruction of the type requested would be required." State v. Tucker, 709 P.2d at 316.

We then distinguished State v. Jonas as presenting a classic example of circumstances under which a cautionary instruction on reliability of eyewitnesses was necessary, reciting the particular facts of that case.

In contrast, the case before us today fits easily into the rubric of all those pre-Long cases that we cited in Jonas. Corroborating evidence of Remington's presence at the Brickyard Plaza around the time of the robbery came from Engelhardt, who positively identified him from a photo spread. There was other inculpatory, albeit circumstantial, evidence that rendered the discrepancies in Cruser's testimony negligible when balanced against the demonstrable evidence, such as the scuff mark on the car and the items worn by Remington upon his late return to the prison. The sighting of the Monte Carlo at the Brickyard Plaza immediately after the robbery, the return of that car to the used car lot within a short time thereafter, the absence of Remington in the Monte Carlo and at the hospital, all constituted evidence from which the jury could have concluded that Remington was the man who had robbed Cruser. Under the circumstances, the trial court's refusal to give the jury Remington's requested cautionary instruction<sup>1</sup> may not be regarded as an abuse of discretion.

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1. We note the State's request that we not address Remington's claimed error with respect to the requested jury instruction as he failed to object to the trial court's refusal to give the instruction. We generally decline to review claimed error under those circumstances, State v. Evans, 688 P.2d 566 (Utah 1983), and notice failure to give an instruction without objection only when that failure would plainly result in a miscarriage of justice. State v. Leslie, 672 P.2d 79, 81 (Utah 1983). Though the trial court's failure in this case did not result in a miscarriage of justice, we have addressed the issue here only because of our intervening decision in Long.

In light of what has just been said, our deferential review of the jury's verdict precludes us from substituting our judgment for that of the jury so long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime could be reasonably made. State v. Booker, 709 P.2d 342 (Utah 1985).

The convictions are affirmed.

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Stewart, Associate Chief Justice, concurs in the result.

## ADDENDUM B

IN THE SUPREME COURT OF THE STATE OF UTAH

-----ooOoo-----

State of Utah,  
Plaintiff and Respondent,

v.

Stephen John Kalisz,  
Defendant and Appellant.

No. 860032

F I L E D  
March 31, 1987

Geoffrey J. Butler, Clerk

---

PER CURIAM:

Defendant Stephen John Kalisz appeals from his conviction of aggravated robbery, a first degree felony under section 76-6-302 of the Utah Criminal Code. Kalisz's conviction stems from the same aggravated robbery charge that resulted in the conviction of John R. Remington, State v. Remington, slip op. 860031, filed March 31, 1987. Kalisz's appeal raises the same legal issues advanced in Remington: (1) failure of the trial court to give a cautionary eyewitness instruction, and (2) insufficiency of the evidence to convict Kalisz of aggravated robbery. We reverse the conviction for insufficiency of evidence and do not reach the remaining issue.

The State concedes that under our standard of review of jury verdicts in criminal cases, the evidence presented at trial appears to have been insufficient to support defendant's conviction. State v. Johnson, 663 P.2d 48 (Utah 1983); State v. Petree, 659 P.2d 443 (Utah 1983). In reviewing a defendant's conviction, we do not substitute our judgment for that of the jury. "So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." State v. Booker, 709 P.2d 342, 345 (Utah 1985). However, our narrow independent review of the record in this case leads us to conclude that here there was no evidence from which findings of all the requisite elements of the crime could reasonably have been drawn. We therefore reverse.

The facts of this case are stated at length in Remington and will be repeated here only briefly. Remington was accompanied by Kalisz when he arrived in his truck at a used car lot at 8th South and Main Streets in Salt Lake City, Utah, to test drive a 1978 Monte Carlo. Kalisz was the man who returned the Monte Carlo to the used car lot hours later and



within minutes after a robbery had been reported at the Brickyard Plaza. Kalisz admitted to the police officer at the used car lot that he had been the man who was with Remington when they picked up the Monte Carlo and that he had driven around with Remington for "a couple of hours." Kalisz also claimed to have taken Remington to a local hospital with an attack of appendicitis. That statement was proven to be untrue. Kalisz was arrested and searched. No incriminating evidence was found on his person or in the car. A search of Kalisz's residence turned up no evidence of the robbery.

(The State failed to present any evidence that placed Kalisz at the scene of the robbery or in the getaway car or linked him to the crime through possession of any of the stolen goods.) Nonetheless, the prosecutor argued that Kalisz provided transportation to and from the scene of the robbery and should therefore be convicted as Remington's accomplice. U.C.A., 1953, § 76-2-202 (1978 ed.).<sup>1</sup> The circumstantial evidence connecting Kalisz to Remington and the crime is insufficient to prove that Kalisz was with Remington during or immediately after the robbery and that he had the requisite mental state for the crime with which he was charged. Accordingly, the conviction is reversed, and Kalisz is ordered discharged.

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1. Section 76-2-202 provides:

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.