

1997

## Utah v. Diane Marie Nelson : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; Attorney General; Marian Decker; Assistant Attorney General; Attorneys for Appellee. Rebecca C. Hyde; Salt Lake Legal Defender Association; Attorney for Appellant.

---

### Recommended Citation

Brief of Appellant, *Utah v. Diane Marie Nelson*, No. 970163 (Utah Court of Appeals, 1997).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/739](https://digitalcommons.law.byu.edu/byu_ca2/739)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**BRIEF**

UTAH  
DOCUMENT  
KFU  
50

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DIANE MARIE NELSON,	:	Case No. 970163-CA
Defendant/Appellant.	:	Priority No. 2

---

.A10  
DOCKET NO. 970163-CA

**BRIEF OF APPELLANT**

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-301 (Supp. 1996) and Utah Code Ann. § 76-6-302 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

REBECCA C. HYDE, #6409  
RICHARD P. MAURO, #5402  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM  
**ATTORNEY GENERAL**  
Heber M. Wells Building  
160 East 300 South, 6th Floor  
P. O. Box 140854  
Salt Lake City, Utah 84114-0854

Attorney for Appellee

**FILED**

**JUN - 2 1997**

**OF APPEALS**

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DIANE MARIE NELSON,	:	Case No. 970163-CA
Defendant/Appellant.	:	Priority No. 2

---

**BRIEF OF APPELLANT**

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-301 (Supp. 1996) and Utah Code Ann. § 76-6-302 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

REBECCA C. HYDE, #6409  
RICHARD P. MAURO, #5402  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM  
**ATTORNEY GENERAL**  
Heber M. Wells Building  
160 East 300 South, 6th Floor  
P. O. Box 140854  
Salt Lake City, Utah 84114-0854

Attorney for Appellee

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
JURISDICTIONAL STATEMENT . . . . .	1
STATEMENT OF THE ISSUES, STANDARD OF REVIEWS AND PRESERVATION OF THE ISSUES . . . . .	1
TEXT OF DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES . . . . .	2
STATEMENT OF THE CASE . . . . .	2
STATEMENT OF THE FACTS . . . . .	3
SUMMARY OF ARGUMENT . . . . .	9
ARGUMENT	
POINT I. <u>THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO MAKE ANY FACTUAL OR LEGAL DETERMINATIONS REGARDING APPELLANT'S MOTION TO SUPPRESS THE EYEWITNESS IDENTIFICATION.</u> . . . .	10
POINT II. <u>THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF AGGRAVATED ROBBERY.</u> . . . . .	23
CONCLUSION . . . . .	26
Addendum A: Text of constitutional provisions, statutes and rules	

## TABLE OF AUTHORITIES

### Page

#### CASES

<u>Neil v. Biggers</u> , 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) . . . . .	10
<u>State v. Crick</u> , 675 P.2d 527 (Utah 1983) . . . . .	24
<u>State v. Fertig</u> , 233 P.2d 347 (Utah 1951) . . . . .	23
<u>State v. Long</u> , 721 P.2d 483 (Utah 1986) . . . . .	10, 11, 14, 15, 21
<u>State v. Perry</u> , 899 P.2d 1232 (Utah Ct. App. 1995) . . . . .	19, 22
<u>State v. Petree</u> , 659 P.2d 443 (Utah 1983) . . . . .	2
<u>State v. Ramirez</u> , 817 P.2d 774 (Utah 1991) . . . . .	9, 10, 12, 13, 15, 16, 17, 18, 19, 21, 22, 23
<u>State v. Robertson</u> , 932 P.2d 1219 (Utah 1997) . . . . .	1, 2, 15, 16
<u>United States v. Dinkane</u> , 17 F.3d 1192, 1195 (9th Cir. 1994) . . . . .	24
<u>United States v. Powell</u> , 929 F.2d 724 (C.A. D.C. 1991) . . . . .	24
<u>United States v. Wade</u> , 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) . . . . .	11

#### STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 76-2-202 (1995) . . . . .	2, 23
Utah Code Ann. § 76-6-301 (Supp. 1996) . . . . .	2
Utah Code Ann. § 76-6-302 (1995) . . . . .	2, 3, 23
Utah Code Ann. § 78-2a-3(2)(j) (1996) . . . . .	1
Rule 12(c), Utah Rules of Criminal Procedure . . . . .	2, 16

	<u>Page</u>
Amendment XIV, United States Constitution . . . . .	2
Article I, section 7, Utah Constitution . . . . .	1, 2, 9, 10, 11, 13, 17

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DIANE MARIE NELSON,	:	Case No. 970163-CA
Defendant/Appellant.	:	Priority No. 2

---

**JURISDICTIONAL STATEMENT**

This is an appeal by a criminal defendant from judgment of conviction entered December 13, 1996 for Aggravated Robbery, a first degree felony. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

**STATEMENT OF THE ISSUES, STANDARDS OF REVIEW  
AND PRESERVATION OF THE ISSUES**

ISSUE I: Did the trial court commit reversible error by failing to make findings of fact or conclusions of law on Appellant's motion to suppress the eyewitness identification on the ground that it was unreliable pursuant to Article I, section 7 of the Utah Constitution?

STANDARD OF REVIEW: If factual issues are presented to and must be resolved by the trial court, but no findings of fact appear in the record, the reviewing court will "assume that the trier of facts found them in accord with its decision, and [will] affirm the decision if from the evidence it would be reasonable to find facts to support it." State v. Robertson, 932 P.2d 1219, 1224 (Utah 1997). If this assumption is unreasonable, a remand

for a new trial is required. Id.

PRESERVATION OF ISSUE: This issue was preserved at R. 17, 161-69.

ISSUE II: Was there sufficient evidence to sustain a conviction of aggravated robbery?

STANDARD OF REVIEW: This Court will reverse a criminal case for insufficient evidence only when the evidence, viewed in the light most favorable to the verdict, is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." State v. Petree, 659 P.2d 443, 444 (Utah 1983).

PRESERVATION OF ISSUE: This issue was preserved at R. 374-375.

#### **TEXT OF DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

The text of the following constitutional provisions, statutes and rules is included in Addendum A of this Brief:

The Due Process Clause to the Fourteenth Amendment to the United States Constitution;  
Article I, section 7 of the Utah Constitution;  
Utah Code Ann. § 76-6-302 (1995);  
Utah Code Ann. § 76-2-202 (1995);  
Rule 12(c), Utah Rules of Criminal Procedure.

#### **STATEMENT OF THE CASE**

On November 4, 1996, Diane Nelson ("Appellant" or "Diane") was convicted by a jury of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-301 (Supp.



1996) and Utah Code Ann. § 76-6-302 (1995), in the Third District Court, Salt Lake Department, Division I, for Salt Lake County, State of Utah, the Honorable Leslie Lewis presiding. Judgment was entered December 13, 1996. On December 26, 1996, a Notice of Appeal was filed in the Utah Supreme Court. On February 24, 1997, the Utah Supreme Court poured over the case to this Court for disposition.

#### **STATEMENT OF THE FACTS**

On July 1, 1996, Amy Brown ("Mrs. Brown") had been driving around Salt Lake City to "cool off" after having a dispute with her roommates. R. 290, 309-10. At approximately 9:50 to 10:00 p.m., she went back to her apartment at 263 Delmar Court. Delmar runs northbound from 300 South and is located about a block from Pioneer Park between 300 West and 200 West. R. 289, 335. Mrs. Brown parked her truck a few feet from her apartment and began to walk home. R. 311. It was dark, but not pitch black. R. 311, 294, 328. Though there are street lights in that area, only one or two lights were lit. R. 294. Where Mrs. Brown lives there are garages on one side and apartments on the other, and no lighting. R. 294. Because the neighborhood is a high crime area, and it was after dark, Mrs. Brown was trying to get from her truck to the apartment as quickly as she could. R. 325-26. As she walked, she saw two men and a woman standing by a dumpster. R. 312. Mrs. Brown ignored the people as she continued walking to her apartment. R. 136. Mrs. Brown heard

the woman say, "Nice shoes." R. 314. Mrs. Brown did not stop, but ignored the woman and continued walking. R. 313, 314, 325. Mrs. Brown said the woman then turned to one of the men and said, "I like her shoes." R. 314. Mrs. Brown ignored her and continued walking. R. 314. Mrs. Brown looked out of the corner of her eye at the people as she walked by. R. 326. She paid more attention to the two men than she did the woman. R. 323. Mrs. Brown heard the woman say the man's name and then say, "Get them for me." R. 314. Mrs. Brown testified that at that point she was terrified. The man, who was about three feet from the woman and about four feet from Mrs. Brown, pulled a knife from behind his back and pointed it toward her. R. 314-15. At that point, Mrs. Brown's attention was focused on the man with the knife and the weapon. R. 327. At some point, the man told Mrs. Brown to "give her the shoes." R. 329. Mrs. Brown began running away from the people to her apartment. R. 316, 328. She did not look back. R. 328. The man followed but did not chase her up the alley. Instead, he turned toward Pioneer Park. R. 318.

The woman did not say anything after the man came near Mrs. Brown with the knife. R. 317. The woman did not have the knife, touch the knife, or hand a knife to anyone. The woman did not say anything about the knife. R. 327-28. The woman did not chase her. R. 328. She did not say anything else to the man, or encourage or assist him in any other way. R. 329. By the time Mrs. Brown got to her apartment, she was hysterical. R. 291,

298, 319, 339, 344. Mrs. Brown called the police. R. 291. The police arrived about 15 to 20 minutes later. R. 296-97.

According to Officer DeGraw's ("DeGraw") report, Mrs. Brown described the woman as black, with curly black hair, five feet, six inches tall. R. 348-49. Despite Mrs. Brown's belief that she had no difficulty seeing, she gave DeGraw no description of the woman's shirt, pants, shoes, body shape, weight, length of hair, or eye color. R. 332-33, 350. After getting a description of the people from Mrs. Brown, the police left to search the area. R. 297.

About 30 to 40 minutes after Mrs. Brown made the call, the police returned asking Mrs. Brown to identify a woman. R. 298, 302, 319-20. Mrs. Brown was so hysterical it took her husband a couple of minutes to coax her off the couch and outside with the police. R. 298. By then, it was completely dark. R. 331. Mrs. Brown said the police took her down the front alley where she saw Appellant, Diane Nelson, handcuffed by a police car. R. 321. Mrs. Brown's husband, Ray Brown ("Brown"), was with her. R. 302-303. Brown also testified that Diane was handcuffed. R. 303. No one else was presented for identification other than Diane. R. 304, 354. Officer Boelter was standing by Diane. R. 354. The police shined a flashlight in Diane's face. R. 298. Mrs. Brown was about fifteen feet away. R. 354. Mrs. Brown became "hysterical," telling the police that Diane was the woman by the dumpster. R. 298.

Diane had been taken into custody as she walked out of an

alley east of Delmar Court, just north of the dumpster. She was very emotional, stating that she had not done anything. R. 343. DeGraw testified that Diane told him, "Maybe Cody or Brad did something, but I didn't do anything." R. 345. She had no weapon. R. 351.

Mrs. Brown testified that she ignored the people by the dumpster throughout most of the incident. R. 313, 314, 324, 325, 327. Mrs. Brown believed the entire incident lasted less than thirty seconds. R. 328. At trial, Mrs. Brown testified that the woman by the dumpster was "nicely dressed" and "not wearing shorts or anything like that" but had "pants and a shirt on. At the preliminary hearing, Mrs. Brown testified that she could not recall what the woman was wearing, only what one of the men was wearing because she was looking more closely at the men than she was the woman. R. 323. Mrs. Brown testified that the woman by the dumpster was slightly taller than herself. R. 329. Mrs. Brown told the police the woman was five-feet six-inches tall. R. 160-61. Diane is five-feet two-inches tall, two inches shorter than Mrs. Brown. R. 349. Mrs. Brown testified that the knife was a large hunting knife, eighteen inches to two feet long. R. 315. In Officer DeGraw's report, Mrs. Brown described the knife as a large pocket knife. R. 347. Delmar Court is close to Pioneer Park, a well known high crime area. R. 335. Many low income and homeless people frequent the area, milling about and congregating on street corners. Delmar Court is also near the Broadway and LeFrance Hotels. There are a number of

low-income, African American and Hispanic people living in those hotels. R. 300-301, 325-26, 351-52.

Dr. Dodd, a professor of psychology with the University of Utah and expert in eyewitness identification, testified on behalf of Diane. Dr. Dodd testified that identification involves three stages--acquisition, retention and recall. R. 385. Because attention is selective, what a person notices and remembers may be inaccurate. R. 384. Acquisition is the most critical stage. R. 386. Factors that affect acquisition include the ability to perceive and whether the person is paying attention. R. 386. People who are anxious or stressed are likely to have poorer abilities to acquire information. R. 389. The greater the stress, the poorer the performance in all cognitive activities. R. 389. The longer the time for observation, the more likely the witness will remember what she has seen. R. 390. It takes a considerable amount of time to take up enough information to remember a new face. R. 402. It is very unlikely that 10 to 15 seconds of observation is sufficient to remember a new face. R. 403. Witnesses, however, tend to remember fast-moving, stressful events as taking longer than they in fact did, typically exaggerating the duration of time by anywhere from two to four times. R. 390-91. Dr. Dodd testified that walking past a dumpster was a very brief period of time in which to see three faces. 391-92. If the witness focuses on one person, she is less likely to focus on the others. R. 391-92. If a weapon is involved, the witness is more likely

to focus on the weapon and not the perpetrator's face.

R. 406-07.

The reliability of an eyewitness identification is not measured by the honesty or level of certainty of the witness.

R. 388. While height estimates are not typically very accurate, it is easy for most witnesses to determine if the person was taller or shorter than themselves. R. 392. Cross-racial identifications are more unreliable. R. 393.

Retrieval can be influenced by suggestions one picks up from the environment. R. 386. Suggestions can be in the form of a question that suggests a new piece of information about events or a characteristic of the face of the person. R. 394. A witness's memory is especially vulnerable to suggestion if the original acquisition is weak. R. 395. Any suggestion by law enforcement that they have the right person is likely to lead to retrieval of misinformation. R. 396. Showups are by nature extremely suggestive because they convey a strong suggestion that the police have the right person. R. 397. Dr. Dodd testified that there are many experts, British and American, who maintain that showups are such suggestive procedures that they should not be used at all. R. 413. The witness is more likely to be influenced by suggestion when the witness is motivated to see that the wrongdoer is apprehended. R. 397.

The fact that the witness did not identify another individual in a subsequent showup is not significant without knowing how similar the individual was to the original

participant. R. 411.

Dr. Dodd testified that given all the factors of this case, the brief time period for observation, the darkness, stress, and cross-racial identification, among others, there was a "strong likelihood that the person who saw the perpetrator could not identify them later, even several minutes later."

R. 398.

#### SUMMARY OF THE ARGUMENT

Prior to trial, defense counsel moved to suppress the eyewitness identification on the grounds that the showup was prejudicially suggestive and the identification unreliable under Article I, section 7 of the Utah Constitution. The trial court refused to address the reliability of the identification under the factors laid out in State v. Ramirez, 817 P.2d 774 (Utah 1991), but instead let the issue go to the jury. The trial court's failure to make the necessary legal and factual findings to determine as a constitutional matter whether the identification is sufficiently reliable under Article I, section 7 constitutes reversible error. There are unresolved factual conflicts and inconsistencies in the evidence material to the admissibility of the eyewitness identification. Absent the eyewitness identification, the State has no case against Appellant. The remedy for the trial court's failure to make the necessary legal and factual determinations is a remand for a new trial.

The State presented insufficient evidence to support a

conviction of Aggravated Robbery. In order to convict Appellant as an accomplice to Aggravated Robbery, the State must prove that she knew that the principal would use a dangerous weapon in the commission of the offense. The State failed to present any evidence to support this conclusion.

### ARGUMENT

#### POINT I: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO MAKE ANY FACTUAL OR LEGAL DETERMINATIONS REGARDING APPELLANT'S MOTION TO SUPPRESS THE EYEWITNESS IDENTIFICATION.

When the reliability of an eyewitness identification is challenged under Article I, section 7 of the Utah Constitution, the trial court must determine whether, under the totality of the circumstances, the identification was reliable. State v. Ramirez, 817 P.2d 774, 781 (Utah 1991). The trial court's failure to make a preliminary determination of the reliability of an eyewitness identification is reversible error and a new trial is warranted. Id. at 787-88.<sup>1</sup>

It has long been recognized that the reliability of an eyewitness identification can be affected by a range of factors such as the race of the individuals or suggestive identification procedures. State v. Long, 721 P.2d 483, 489 (Utah 1986).

---

<sup>1</sup>. Appellant also challenges the admissibility of the eyewitness identification under the Due Process Clause of the United States Constitution. Because the analysis under Article I, section 7 of the Utah Constitution is "as stringent as, if not more stringent than, the federal analysis" required under Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), Appellant has focused his analysis on the state constitutional claim. Ramirez, 817 P.2d at 784.



Research has shown popular notions regarding eyewitness identifications are often untrue. For example, the confidence of the individual making the identification is not a reliable indicator of the accuracy of his or her memory. Id. It is a common misconception that a victim of a crime will have a greater ability to recall details because of the significance of the event. But research has long shown that when people are under stress, their ability to acquire information is diminished. Id. at 488-89, R. 389.

Despite the acknowledged frailties of eyewitness identifications, jurors still give such testimony a great deal of weight. Long, 721 P.2d at 490. One study involving a simulated criminal trial showed that even when "presented with an eyewitness who was quite thoroughly discredited by counsel," 68% of the jurors still voted to convict. Id. The Utah Supreme Court, in recognition of the fact that the "annals of criminal law are rife with instances of mistaken identification," has fashioned a rigorous analysis testing the reliability of eyewitness identifications under Article I, section 7 of the Utah Constitution. Id. at 491 (quoting United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967)).

In fashioning this analysis under the Utah Constitution, the Court stated:

Of central importance is the burden that rests on the prosecution and the distinction between the role of the judge, as the arbiter of the constitutional admissibility of an identification, and the role of the jury, as the ultimate finder of fact. A failure to keep this

burden and this distinction in mind can fatally flaw any conviction obtained through the admissibility of any eyewitness identification.

Ramirez, 817 P.2d at 778. The burden is on the prosecution to demonstrate the admissibility of the eyewitness identification.

Id. "The defendant then is entitled to a determination by the court of the evidence's constitutional admissibility." Id. at 778. In making that determination, the trial court must resolve certain factual issues. Many of those same factual issues will also be addressed by the jury when it determines the credibility of the evidence, if admitted. Id. For example, the court will have to resolve certain factual matters such as whether the witness had a sufficient opportunity to perceive the perpetrator in order to determine whether, as a constitutional matter, the evidence meets the threshold requirement of reliability. If the evidence is admitted, the jury will also have to decide the issue again in determining the weight to give the evidence. Id.

Potential for role confusion and for erosion of constitutional guarantees inheres in this overlap of responsibility of judge and jury to determine the same issue. Because the jury is not bound by the judge's preliminary factual determination made in ruling on admissibility, the trial court may be tempted to abdicate its charge as gatekeeper to carefully scrutinize proffered evidence for constitutional defects and may simply admit the evidence, leaving all questions pertinent to its reliability to the jury. But courts cannot properly sidestep their responsibility to perform the required constitutional admissibility analysis. To do so would leave protection of constitutional rights to the whim of a jury and would abandon the courts' responsibility to apply the law. The danger of such an abdication of responsibility is particularly serious where the admissibility of an eyewitness identification is concerned because

of the probability that such evidence even though thoroughly discredited has a powerful effect on a jury.

Id. at 778-79 (citations omitted).

The trial court, in this case, succumbed to the very temptation of which Ramirez gives warning. The court abdicated its role as the gatekeeper and guardian of constitutional protections and refused without review of the facts to fairly determine the necessary issues. Prior to trial, defense counsel filed a motion to suppress the eyewitness identification in this case on the grounds that it was not reliable under Article I, section 7 of the Utah Constitution. R. 17. At the motion to suppress hearing, defense counsel indicated that it was his understanding that the State intended to submit the preliminary hearing transcript. Defense counsel indicated that he intended to also rely on portions of the preliminary hearing transcript and the testimony of Dr. Dodd. R. 161-62. The trial court then stated:

And frankly, I'll be honest with you [defense counsel], unless there's something highly unusual, here, it's an issue of fact as to whether or not the eye witness is reliable. Dr. Dodd can certainly say what he thinks, but he's not the finder of fact, the jury would be. So what I'd be inclined to do is let it go to the jury, and not suppress the identification, give the Long instruction, let Dr. Dodd testify, let the state call an expert if they wish to.

R. 162-63.

After some discussion about discovery and notice of the use of an expert witness, the court stated:

Assuming foundation can be laid consistent with the curriculum vitae, I would allow the witness to be called at trial to testify to the general unreliability, or the factors that lead to unreliability in eyewitness testimony. Given my ruling, I don't think you can gain anything by putting him on, [defense counsel]. I guess [the State] has the option of calling him if he wishes to.

R. 167-68.

Defense counsel indicated that the purpose of his motion to suppress was to ask the trial court to determine as a matter of law, prior to trial, the reliability of the identification.

R. 168. Counsel then made a proffer as to some of the subject matters Dr. Dodd would have testified about. The court responded by denying the motion without having heard any evidence, or making any findings of fact, instead relying on the jury to determine the reliability of the identification.

Trial Court: Right. And again, either side can argue this with or without testimony. But absent any further information that persuades me, I'm inclined to allow the identification to stand, to deny the motion to suppress, but to instruct the jury fully on the issue of eyewitness identification pursuant to Long, to allow the State to call a witness on eyewitness identification of their own if they wish to.

R. 169.

It is clear from the above statements that the trial court erroneously believed that the reliability of the eyewitness identification was an issue of fact for the jury, and not for the trial court. The State never submitted the preliminary hearing transcripts or any other evidence in support of its burden of establishing the reliability of the identification. The court

apparently believed that instructing the jury on the factors articulated in Long for assessing the reliability of an eyewitness identification was sufficient to protect Appellant's due process rights under the Utah Constitution. This assumption was incorrect. Ramirez requires the trial court apply the factors articulated in Long to determine as a constitutional matter whether the identification is sufficiently reliable. The Long factors are as follows:

(1) [T]he 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. 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 (quoting Long, 721 P.2d at 493). The trial court made no attempt to apply the factors articulated in Ramirez to the facts of this case, or resolve any factual disputes.

Generally, when factual issues must be resolved by the trial court but no findings of fact can be found in the record, the reviewing court will assume that the trial court found them in accord with its decision, and will affirm the decision if the evidence reasonably supports the court's ruling. There are some cases where that assumption is inappropriate. State v.

Robertson, 932 P.2d 1219, 1224-25 (Utah 1997); Ramirez, 817 P.2d at 787. A remand for a new trial is required in cases where there are conflicts in the evidence critical to the issues raised. Ramirez, 817 P.2d at 787.

In Ramirez, the trial court did not rule on a pretrial motion to suppress evidence obtained as a result of an illegal seizure, but refrained from passing on the issue letting the evidence go to the jury instead. R. Id. at 786. That evidence included the eyewitness identification. Id. The Ramirez court held, "[T]he trial court bears the responsibility to resolve preliminary constitutional issues as to the admissibility of evidence, and it cannot abdicate this responsibility by de facto leaving the question to the jury." Ramirez, 817 P.2d at 787. The court also noted that Rule 12(c) of the Utah Rules of Criminal Procedure required the court make findings of fact on the record. Id. at 787. Because there were conflicts in the evidence material to the suppression motion, the Ramirez court could not assume that findings had been made. Id. at 788. Most troubling to the court was the fact that these conflicts existed among the State's own witnesses. Id. at 787. One critical factual issue left unanswered by the trial court was whether Ramirez was handcuffed prior to the officers receiving information about the crime. Id. at 787.

Having determined that the trial court had not committed a "mere technical oversight," but had failed to "address the factual questions and to make the legal determinations that were

a prerequisite to the admission of the eyewitness identification essential to the conviction," the court turned to the issue of an appropriate remedy. Id. at 788. The court vacated the conviction and remanded for a new trial before a different judge.

The Ramirez court reasoned:

To asked the trial court to address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of this pivotal evidence. Such a mode of proceeding holds too much potential for abuse. The only fair way to proceed is to vacate defendant's conviction and remand the matter for retrial. This will permit a trial judge to address properly the constitutional admissibility question and enter appropriate findings and conclusions.

Id. at 789.

It would be unreasonable to assume that the court in this case made any factual findings in light of the fact that the court indicated from the outset its belief that the reliability of the identification was a matter for the jury. Subsequently, the court never reviewed any of facts of the case and indicated a marked unwillingness to do so. The trial court failed to address the issues presented to it in any meaningful way. This is not simply a case where the court made a reasoned ruling but failed to make specific findings of fact to support it. In this case, the trial court never considered the critical issue of whether the identification met the threshold level of reliability required by Article I, section 7.

Indeed, as in Ramirez, a review of the trial transcripts reveal a number of conflicts in the evidence critical to the

determination of the admissibility of the identification. These factual issues are central to the issue of the reliability of the identification. For example, it was unclear how dark it was at the time of the incident or how well lit the area was.

Mrs. Brown testified that at 9:50 or 10:00 p.m., it was almost dark, but that there were street lights along the sidewalk.

R. 311-12. Her husband testified that it was "pretty dark," but that some of the street lights were out so that only one or two lights were working. R. 294. It was unclear whether the working lights were near the dumpsters. Mrs. Brown's husband also testified that the dumpsters were located on the alley near Third South. R. 295. He indicated that in the area near Third South there is no lighting. R. 294-95. Officer DeGraw testified that it is not a well lit area. R. 338. Perhaps the most troubling conflict in the evidence left unresolved by the trial court involves the issue of whether Appellant was handcuffed during the showup. Officer DeGraw claimed that Appellant was not handcuffed during the showup. R. 354. However, his testimony was contradicted by the State's other witnesses. Mrs. Brown testified that Appellant was handcuffed. R. 321. Her husband also testified that Appellant was handcuffed during the showup. R. 303. The resolution of this factual issue is critical to a fair and reasoned determination of the reliability of the eyewitness identification.

In Ramirez, the defendant was handcuffed to a fence, he was the only suspect presented for identification, lights were



shined in his face, and he was surrounded by police. 817 P.2d at 777. The court stated that the showup was blatantly suggestive. Likewise, in State v. Perry, 899 P.2d 1232, 1234 (Utah Ct. App. 1995), the defendant was standing on the porch of his apartment. He, too, was alone save for several police officers standing near him while the patrol car lights were shined into his face. The court held that the trial court's finding that the showup was not blatantly suggestive was clearly erroneous. Id. at 1238.

The showup in this case is likewise prejudicially suggestive. Appellant was the only suspect presented for identification. R. 304, 354. It was dark. R. 331. She was standing by a police car with Officer Boelter by her side. R. 321, 354. The police shined a flashlight in her face. R. 298. If Appellant were also handcuffed, the prejudicial impact of this already blatantly suggestive showup is heightened. Most people associate the use of handcuffs with an arrest. And most people would assume that the police would arrest someone only if they believed he or she had committed a crime. Most importantly, people tend to have confidence in the police and their judgment in such matters, so the suggestion that the right person has been found is even stronger. If Appellant were handcuffed, the clear implication would be that the police had already arrested her because they believed they had the right person. Given the fact that the circumstances surrounding the incident call into serious question the reliability of the identification, this cannot be ignored and left unresolved.

Looking at the evidence presented at trial, the record does not clearly support a ruling that the eyewitness identification was reliable. The incident took place in the length of time it took Mrs. Brown to walk past the three people by the dumpster. She was trying to get to her apartment as quickly as possible.

R. 325-26. Mrs. Brown estimated the incident lasted less than thirty seconds. R. 328. But, it must be remembered that according to Dr. Dodd, people tend to exaggerate the duration of a stressful and fast moving event. R. 390-91. Dr. Dodd testified that it was very unlikely that 10 to 15 seconds of observation was sufficient to remember a new face. R. 403.

Mrs. Brown testified no less than five times at trial that she ignored the people by the dumpster as she walked by them.

R. 313, 314, 324-25, 327. Mrs. Brown admitted that she paid more attention to the two men than she did the woman. R. 323. She testified that she looked out of the corner of her eye at the people as she walked by them. R. 326. At the point in time that the man pulled out the knife, her focus was on him and the weapon, not the woman. R. 327. Then she ran and did not look back. R. 328.

The lighting was poor at best. R. 294, 311, 325-26, 328. Mrs. Brown was completely hysterical after the incident and during the showup. R. 291, 298, 319, 339, 344. Though Mrs. Brown testified that she identified Appellant at the showup based on her face and clothing, Mrs. Brown apparently gave Officer DeGraw no description of the woman's clothing immediately

after the incident. R. 321, 332-33. Mrs. Brown admitted that at the preliminary hearing, she stated that she could not remember what the woman was wearing because she paid more attention to the two men. R. 323. Mrs. Brown testified at trial that the woman was taller than herself. R. 329. She told Officer DeGraw immediately after the incident that the woman was five-foot six-inches tall, two inches taller than herself. R. 348-49. Appellant is two inches shorter than Mrs. Brown. R. 349. The most troubling aspect of the identification in this case is the fact that the eyewitness is Caucasian and Appellant is African American. R. 393. It is a well documented fact that cross-racial identifications tend to be less accurate. Long, 721 P.2d at 489. In conjunction with the blatantly suggestive showup procedure, the reliability of the identification in this case is highly questionable even if Appellant were not handcuffed during the showup. If she were handcuffed, the prejudicial impact of the showup undermines the reliability of the identification even further.

This case is distinguishable from other cases where despite a suggestive showup, the court has found that under the totality of the circumstances, the identification was reliable. Ramirez is the leading case in this area. Ramirez was described by the court as "an extremely close case." 817 P.2d at 784. The Utah Supreme Court was clearly troubled by the contradictions in the eyewitness's testimony, the cross-racial identification, and the witness's lack of opportunity to view the gunman's face.

Despite these concerns, the court in Ramirez deferred to the trial court's resolution of the factual inconsistencies and its ability to appraise demeanor evidence and upheld the identification. Id. at 784.

The court in this case does not stand in the same position as the reviewing court in Ramirez because the trial court did not review the evidence, resolve conflicts in the evidence, make findings of fact, or make any meaningful legal determination whatsoever. The deference to the trial court relied upon in Ramirez is not applicable to this case. Absent that reliance on the trial court's ability to assess and weigh evidence, the court in this case cannot so easily dismiss the evidentiary problems surrounding this identification. See also State v. Perry, 899 P.2d 1232, 1239 (Utah Ct. App. 1995).

As in Ramirez, the failure of the trial court to make findings of fact in this case amounts to prejudicial error. The State relied heavily on the showup identification at trial. R. 320-22. The in-court identification was not based upon reliable, independent observations and was tainted by the unduly suggestive showup procedure. There was no corroborating evidence connecting Appellant to the crime save a highly ambiguous remark Appellant made to the police that "Maybe Cody or Brad did something, but I didn't do anything." R. 345. Absent the identification, the State has no case against Appellant. The failure of the trial court to make the necessary factual and legal findings to determine the reliability of the identification

under the circumstances of this case warrants a reversal and orders for a new trial. Ramirez, 817 P.2d at 788-89.

POINT II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF AGGRAVATED ROBBERY.

There was insufficient evidence to establish that Appellant intended the use of a deadly weapon in this case. Appellant was convicted as an accomplice to Aggravated Robbery pursuant to Utah Code Ann. § 76-6-302 (1995). Section 76-6-302 requires as an element of the offense that the actor use or threaten to use a dangerous weapon. Utah Code Ann. § 76-2-202 (1995) states:

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.

While no Utah case has directly addressed the issue of whether an accomplice to armed robbery must have knowledge that the principal will use a dangerous weapon, it has long been recognized that the defendant must specifically intend to bring about the commission of the offense.

An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime. The cooperation in the crime must be real, not merely apparent. Mere presence combined with knowledge that a crime is about to be committed or a mental approbation while the will contributes nothing to the doing of the act, will not of itself constitute one an accomplice.

State v. Fertig, 233 P.2d 347, 349 (Utah 1951). While party

liability enables the law to hold a defendant criminally responsible for the actions of another, "the degree of his responsibility is determined by his own mental state in the acts that subject him to such responsibility, not by the mental state of the actor." State v. Crick, 675 P.2d 527, 534 (Utah 1983).

Federal courts that have considered this issue have held that the accomplice must at least know that a weapon would be carried or used. United States v. Powell, 929 F.2d 724, 727 (C.A. D.C. 1991). This standard puts the accomplice on the same level of culpability as the principal. Id. Requiring knowledge that a weapon will be carried or used creates a reasonable and fair moral divide. If the defendant sets out on a project which she knows involves the use of a deadly weapon, she is equally blameworthy for its use. Id. Absent knowledge that a weapon will be used, the accomplice should not be equally punished for the principal's conduct. See also United States v. Dinkane, 17 F.3d 1192, 1195 (9th Cir. 1994) (government must show the defendant knew the principal had and intended to use a dangerous weapon in order to sustain a conviction of armed robbery).

In Powell, the court held that the evidence was insufficient to support a firearms charge on a theory of accomplice liability where the defendant offered to sell an undercover police officer narcotics, and took him to the basement of an apartment where there were several other men, one of whom was holding a gun. 929 F.2d at 725. Likewise, in Dinkane, the court held there was insufficient evidence to support a

conviction of armed robbery against the getaway driver because the driver remained in the vehicle during the robbery, there was no evidence that use of a gun was discussed, the driver had no weapon, and there was no evidence that the guns used by the principals were visible until after they entered the bank. 17 F.3d at 1197-98.

In this case, the State presented no evidence that Appellant knew or had reason to know that the principal would use a knife.<sup>2</sup> The knife was not in view prior to the time the woman told her companion to get her the shoes. R. 315. The man had the knife secured behind his back. R. 315. There is no evidence that it was visible prior to his pulling it out to threaten the victim. The woman did not use any words that would indicate that she knew the principal had a knife. Unlike a bank robbery, this is not the type of crime that normally entails use of a weapon. Also, unlike a robbery of a bank or store, this was not a planned crime, but appeared to be a spontaneous act in response to the victim's walking past the trio. There is no evidence that the

---

<sup>2</sup>. The following evidence was presented at trial regarding the use of the knife. A complete recitation of all the facts can be found in the Facts section of this brief:

1. The woman was standing with two men, and they appeared to be together. R. 312-13.

2. She asked one of the men to get the victim's shoes for her. R. 312-13.

3. The man approached the victim, reached behind his back, and pulled out a knife. R. 315.

4. The man with the knife was about three feet away from the woman. R. 315.

5. The woman and second man were about four feet from the victim. R. 315.

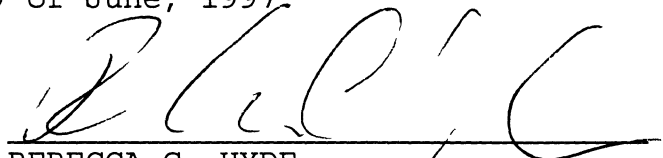
woman approached the victim with the man. R. 315. The woman did not hand the knife to the principal, say anything about the knife, or chase the victim. R. 327-28.

Viewed in the light most favorable to the verdict, the State failed to present any evidence to support the conclusion that Appellant knew or had any reason to know that a dangerous weapon would be used and is thus insufficient to support a conviction of Aggravated Robbery.

#### CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court reverse her conviction and remand with orders for a new trial.

SUBMITTED this And day of June, 1997.


  
REBECCA C. HYDE  
Attorney for Defendant/Appellant

\_\_\_\_\_  
RICHARD P. MAURO  
Attorney for Defendant/Appellant



CERTIFICATE OF DELIVERY

I, REBECCA C. HYDE, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, 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 2nd day of June, 1997.



REBECCA C. HYDE

DELIVERED this \_\_\_\_\_ day of June, 1997.

\_\_\_\_\_

## ADDENDUM A

THE DUE PROCESS CLAUSE OF THE FOURTEENTH  
AMENDMENT TO THE UNITED STATES CONSTITUTION

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 . . .

ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION

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

UTAH CODE ANN. § 76-6-302 (1995)

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

UTAH CODE ANN. § 76-2-202 (1995)

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.

RULE 12, UTAH RULES OF CRIMINAL PROCEDURE

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court otherwise permits. It shall state with particularity the grounds upon which it is made and shall set forth the relief sought. It may be supported by

affidavit or by evidence.

(b) Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion. The following shall be raised at least five days prior to the trial:

(1) defenses and objections based on defects in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense, which objection shall be noticed by the court at any time during the pendency of the proceeding;

(2) motions concerning the admissibility of evidence;

(3) requests for discovery where allowed;

(4) requests for severance of charges or defendants under Rule 9; or

(5) motions to dismiss on the ground of double jeopardy.

(c) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(d) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(e) Except in justices' courts, a verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(f) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.