

1998

Utah v. Gilbert Lopez : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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**UTAH COURT OF APPEALS
BRIEF**

**IN THE UTAH COURT OF APPEALS
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| STATE OF UTAH, | : | 50 |
| | : | .A10 |
| Plaintiff/Appellee, | : | DOCKET NO. <u>980085</u> |
| | : | Priority No. 2 |
| v. | : | |
| GILBERT LOPEZ, | : | Case No. 980085-CA |
| Defendant/Appellant. | : | |

BRIEF OF APPELLEE

**APPEAL FROM A CONVICTION FOR AGGRAVATED ROBBERY,
A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE
ANN. § 76-6-302 (1995), IN THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNT, THE HONORABLE LESLIE A.
LEWIS PRESIDING**

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FILED

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| Defendant/Appellant. | : | |

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDING

This is an appeal from a jury conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1995).

This Court has jurisdiction of the appeal which was poured over from the Utah Supreme Court (R. 217), under Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Has defendant failed to overcome the strong presumption that trial counsel rendered constitutionally adequate assistance or to show to a demonstrable reality that trial counsel's representation undermines confidence in the guilty verdict?

This claim presents a question of law reviewed on the trial record because defendant raises it for the first time on direct appeal without a prior evidentiary hearing. *State v. Ellifritz*, 835 P.2d 170, 175 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right
... to have the assistance of counsel for his defense.

Utah Const. Art. I, § 7:

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

STATEMENT OF THE CASE

Defendant was charged with aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1995) (R. 1).

A three day jury trial was held 14-16 October 1998 (R. 133-134, 137-138).

Following the presentation of all the evidence, and prior to jury deliberations, trial counsel moved to dismiss the case on grounds that the eyewitness identification testimony of the three victims was so inconsistent as to render evidence of defendant's guilt insufficient (R. 246: 186) (copies of the pertinent transcript pages are contained in addendum F).¹ The trial court denied the motion to dismiss, ruling that any inconsistencies in the identification evidence went to the credibility of the witnesses and that the State had presented sufficient evidence to send the case to the jury (*id.*). The jury

¹Only the first page of the various volumes of transcript is numbered in the record on appeal and subsequent pages retain their original numbering. Therefore, transcript pages will be cited in this brief as "(R. [record number]: [internal page number])."

thereafter convicted defendant as charged (R. 139; R. 231: 14-15).

The trial court imposed the statutory prison term of five years-to-life, which sentence was to be served consecutively to any other sentence defendant was then serving (R. 191). Defendant filed a timely notice of appeal (R. 192).

STATEMENT OF THE FACTS

Rick Bergsma had just purchased three cases of beer and was walking home with his wife and brother-in-law when defendant and a cohort pointed a gun at him and also pressed a gun to his wife's back, demanding the beer or they would shoot.

Aggravated Robbery

At approximately 12:45 p.m., on 21 July 1996, Rick and Brandi Bergsma and Donny Drake were walking west on 2700 South near 700 East, in Salt Lake City, Utah. Rick had just purchased approximately \$56 dollars worth of Budweiser beer at the Circle-K convenience store located at the intersection (R. 230: 97, 99-100; R. 246: 123).² Suddenly, Donny noticed a suspicious car following them and instructed Rick and Brandi to cut through the golf course that runs along the south side of 2700 South exclaiming, "We're about to get robbed or something" (R. 230: 103, 208-209, 224). The suspicious car parked at the Texaco gas station, located across the street and kitty-corner from the Circle-K, with its headlights trained on the Bergsmas and Donny (R. 230: 155, 210, 225;

²While the victims had just purchased beer, they had not been drinking (R. 230: 98, 222; R. 246: 49).

R. 246: 15). Two men got out of the car and headed toward the victims (*id.*). As the two men ran toward them, Rick, Brandi and Donny started into the golf course (R. 230: 104, 156). Donny "knew" instantly what would follow: "I have seen it happen before. They were creeping slow when I noticed they were looking at us" (R. 230: 208).

The robbers caught up with the Bergsmas and Donny and the first robber, identified at trial as defendant, pointed his gun at Donny and then at Rick, stating "Yo, Homes, drop your beer or I'll kill you" (R. 230: 104, 146, 210). Seeing the gun, Rick put the beer down and stepped back one-half step (R. 230: 106). Defendant came within three to four feet of the victims, until "he was right in front of [Rick]" (R. 230: 106, 211; R. 246: 22). He then stuffed his gun down his pants and picked up the beer before running back to his car (R. 230: 108, 157). The second robber, who was holding a gun to Brandi's back, said, "Now, run, bitch," before joining defendant (R. 230: 109; R. 51). While Rick and Brandi ran into the golf course, Donny "snuck (*sic*) around a bush and got the license plate and make of the car" (R. 230: 214). After the car drove off, the victims called police from the Texaco station (R. 230: 108; R. 246: 78).

Eyewitness Descriptions of Robbers

While the robbery occurred at night, all three victims agreed that the area was sufficiently well-light for them to see the robbers and they provided descriptions of the robbers to police five to ten minutes after the robbery (R. 230: 109, 153-155, 187, 226-227; R. 246: 10-13, 110). Officer Michael Johnson, of the Salt Lake City Police

Department, investigated the robbery and agreed that when the Texaco is open, as it was at the time of the robbery, lighting conditions at the intersection are "very good" (R. 246: 80; R. 230: 101). The victims talked with investigating police for 15-20 minutes at the Texaco station immediately following the robbery, spending approximately two minutes filling out written witness report forms (R. 230: 129, 213) (copies of the all three witness report forms are contained in addendum A).

Rick Bergsma. Shaken and scared, Rick was nonetheless able to describe the first robber (defendant) that held a gun to him as a "Spick" or Hispanic, approximately 22 years old, 5'5" tall and 165 pounds (R. 230: 111-112, 145-146, 164-165) (Exh. # 33), add. A. Rick estimated that the robbery lasted 30 seconds and that he looked at the gun for 5-10 seconds and at defendant for 10-15 seconds (R. 230: 145). He particularly focused on defendant's face, whom he described as having short straight brown hair, and no facial hair (Exh. # 33), add. A. However, he also described defendant's clothing as a light shirt and dark pants (R. 230: 106-07, 184). Rick described the second robber as a male Hispanic, having a shaved head and a similar short and stocky build, approximately 5'6" tall and 160-170 pounds (R. 230: 108) (Exh. # 33), add. A.

Brandi Bergsma. Although she was similarly "scared out of her wits," Brandi, who is half Hispanic (R. 230: 196), also described the robbers as Hispanic and noted that the first robber (defendant), the robber that held a gun to her husband, was "short," or approximately 5'1" to 5'5" tall, 145 pounds, with short black hair, no facial hair, and was

wearing a white shirt and blue or dark colored pants (R. 246: 26, 43, 46) (Exh. # 31), add.

A. Brandi described the second robber, or the robber that held a gun to her back as having short fuzzy hair, "almost a buzz" (R. 246: 29).

Donny Drake. Finally, Donny also described the robbers as Hispanic or Mexican (Exh. # 32), add. A. He described defendant as wearing dark shorts, a white t-shirt, and as having short hair (R. 230: 211-212). Donny also similarly described the second robber as approximately 18 years old, 5'7" tall, 150 pounds, and "kind of bald" (R. 230: 214-215). Donny did not mention whether he observed facial hair on either robber (Exh. # 32), add. A.

Eyewitness Descriptions of Robbers' Monte Carlo

The victims also described the robbers' car: A brown or dark colored Cadillac or Monte Carlo (R. 230: 112-113, 208, 214-215; R. 246: 14) (Exh. ## 7-9). Rick thought that the car had a light colored top (R. 230: 155, 182), and could not tell how many people were in the car (R. 230: 183). Donny thought he saw four individuals, including the two robbers, inside the car (R. 230: 208). Brandi thought she saw a female in the car (R. 246: 25).

Robbers' Monte Carlo Located One Half Block from the Robbery

Approximately one half hour after the robbery, Officer Johnson headed back to the police department traveling north on 700 East (R. 246: 81, 124). At approximately 2400 South 700 East, the officer saw a Monte Carlo traveling south on 700 East which fit the

victims' descriptions of the robbers' car down to the license plate (*id.*).³ The Monte Carlo pulled into a four-plex located at 2536 South 700 East, approximately one half block from the crime scene (R. 246: 81, 99).⁴

Showup Identification of Defendant and Alleged Cohort

Officer Johnson approached to talk to a man exiting the Monte Carlo and simultaneously noticed that a fight was breaking out in one of the apartments (R. 246: 82-83, 116). Officer Johnson quickly made his way to the apartment as four men, including defendant, ran down the stairs (R. 246: 83). He drew his weapon and ordered them to stop, but one of the four men fled on foot (*id.*). The three men were detained and handcuffed (R. 246: 83-84). In addition to these individuals, the officer found two females and another male inside the apartment (R. 246: 98). Officer Johnson observed that three of the detained men matched the victims' descriptions of the robbers (R. 246: 85). The officer therefore had the victims brought to the apartment for a showup which included these three men as well as the man who exited the Monte Carlo (R. 246: 86, 125).

Because lighting conditions were otherwise poor, Officer Johnson had several

³Donny had reported that the robbers' license plate number was OL6 JLZ (*id.*). The Monte Carlo Officer Johnson saw bore the plate number 016 JLZ (R. 246: 82).

⁴The Monte Carlo was registered to Linda Trujillo, but her husband Steve drove the car (R. 230: 202-203). Defendant and Steve Trujillo were friends at the time of the robbery (R. 230: 204).

officers train their flashlights on the detained group, as well as patrol car headlights and spotlights (R. 246: 87). When Officer Johnson approached the patrol vehicle in which the victims had arrived, all three started talking at once and identified defendant and an individual named Gary Gomez as the robbers (R. 246: 89; *see* R. 230: 131-134, 137-138; 218-220; R. 246: 32-37, 53). Rick and Donny both noticed that while defendant had worn a white or light colored t-shirt at the time of the robbery, he had a black t-shirt on over a white t-shirt at the time of the showup (R. 230: 134, 219) (Exh. ## 10-11) (copies of the exhibits are contained in addendum B). All three witnesses also identified the Monte Carlo at the four-plex as the robber's car (R. 230: 133, 220-221; R. 246: 55) (Exh. ## 7-9).

According to Officer Johnson, while the victims identified defendant as one of the robbers, it was not until trial that they identified defendant as the robber that held a gun to Rick and Donny (R. 246: 100-101). The victims also initially identified Gomez as the robber which held the gun to Brandi's back (*id.*). Officer Johnson observed that defendant and Gomez were both short and stocky, and were approximately 5'5" tall, and 150-160 pounds (R. 246: 90).⁵

⁵At trial, Rick testified that defendant and Gomez were handcuffed when he identified them at the showup (R. 246: 125-126). Donny did not mention whether any of the suspects were handcuffed (R. 230: 218-220), and Brandi could not recall how many of the suspects were handcuffed (R. 246: 52). Pictures of the suspects at the four-plex show that Gomez at least, and possibly defendant, were handcuffed (R. 246: 102) (Exh. ## 24, 26) (copies of the exhibits are contained in addendum D). Officer Johnson thought it was possible that the pictures of the suspects at the four-plex were taken after the showup

Defendant Admits Being at the Scene of the Robbery

Both defendant and Gomez denied knowledge of the robbery and no weapons were found on them (R. 246: 117-119). Defendant admitted, however, that he had been at the Circle-K convenience store that evening, but claimed that he had only purchased beer (R. 246: 136-137). Police searched the apartment and found three cases of Budweiser beer and saw beer cans spread throughout the apartment, but they found no beer receipts inside the apartment or inside the robbers' Monte Carlo (R. 246: 94, 99).

Victims Identify Defendant and Alleged Cohort in Photo Spread

Officer Cheever of the Salt Lake City Police Department spoke with the victims after the robbery to clarify their identifications of the robbers (R. 246: 139-141). He showed all three victims separately and individually, a photo spread which included pictures of defendant and Gomez and five other individuals with similar characteristics (R. 246: 142) (Exh. ## 12-13, 15-20) (copies of the photos included in the photo spread are contained in addendum E).⁶ Officer Cheever instructed the victims not to feel like they had to identify any of the suspects, that the suspects in the aggravated robbery may or may not be included in the photo spread, and that the suspects may not look exactly the same as they did when the robbery occurred because they may have made changes to

identification and not before (R. 246: 125).

⁶Detective Cheevers folded back booking information appearing on the photos, prior to showing them to the witnesses (R. 246: 143).

their physical appearance (R. 246: 143). All three witnesses immediately picked out photos of defendant and Gomez and identified them as the robbers (R. 246: 144-146) (Exh. ## 12-13), add. E. At this time, all three witnesses similarly agreed that defendant was the robber that held a gun to Brandi's back, while Gomez was the robber that held a gun on Donny and Rick (R. 246: 146-147).

Defendant Leaves Drinking Party to Get More Beer

Crystal Guitierrez is defendant's cousin and attended the drinking party held at the four-plex on the night of the robbery⁷ (R. 246: 63-66). According to Crystal, defendant and his friend Steve Trujillo were also at the party and talked about getting some more beer (R. 246: 71). Defendant and Trujillo then left the party with two girls and returned with beer (R. 246: 72). Crystal was unsure whether defendant was at the party between 12:30 p.m. and 1:00 a.m. (R. 246: 74). She was also unsure how many cases of beer defendant brought with him when he returned to the party (R. 246: 75).

Defense witness Justin Ketterer is another cousin of defendant's that also attended the drinking party the night of the robbery (R. 246: 164-165). Justin claimed that he arrived with his brother, defendant and two girls at approximately 10:30 p.m. (R. 246: 165). He acknowledged that defendant left the party for approximately one half hour with two girls and two guys (R. 246: 166, 173). However, Justin claimed that defendant

⁷Crystal testified as a hostile witness for the prosecution (R. 246: 65).

returned to the party at approximately 11:45 p.m. without the two girls (R. 246: 167). According to Justin, a fight broke out around 12:45 p.m. and that is when he and his brother left (R. 246: 168). Justin saw approximately 3-4 cases of beer before leaving the party (R. 246: 169-170). On cross-examination, Justin admitted that he did not have any special reason to remember the times of defendant's coming and going from the party (R. 246: 175). He also did not know what defendant did while he was absent from the party (R. 246: 178).

Defendant's Alleged Cohort Establishes an Alibi

Crystal also testified that while Gomez attended the party, he did not bring any beer with him (R. 246: 71). Charges against Gomez were ultimately dismissed because he was able to substantiate his alibi at the time of the robbery through four different witnesses (R. 246: 161).

Victims Identify Defendant as One of the Robbers

At trial, all three victims identified defendant as the robber that held a gun on Donny and Rick (R. 230: 104-107, 134, 145-146, 191-192, 211, 240-241; R. 246: 22, 26). Rick initially believed that defendant held the gun in his right hand, but at trial he testified defendant held the gun in his left hand (R. 230: 178). Brandi also thought that defendant held the gun in his right hand, but was unsure when she testified at trial (R. 246: 48). Donny consistently reported that defendant held the gun in his left hand (R. 230: 211, 241). Defendant is left-handed (R. 247: 16).

Additionally, Rick and Brandi initially reported that defendant had no facial hair (Exh. #31, 33), add. A. At trial, however, Rick acknowledged that in looking at pictures of defendant taken at the time of his arrest, defendant's light facial hair was visible to him in the courtroom from a distance of five feet (R. 230: 167-168), and Brandi remembered for the first time that defendant had facial hair on his chin at the time of the robbery (R. 246: 29, 59). *See also* (Exh. ## 10-12) (pictures of defendant taken the night of his arrest) (copies are contained in addendum B). Donny did not mention whether he observed facial hair on either of the robbers (Exh. # 32), add. A.

Despite these minor discrepancies, all three victims were ultimately certain that defendant was one of the robbers and that he had a gun (R. 230: 194, 241; R. 246: 41). They also agreed that defendant's appearance had changed since the robbery: He appeared to weigh less and to have longer hair (R. 230: 107, 192, 212; R. 246: 59). Officer Johnson similarly noted the change in defendant's appearance between the time of the aggravated robbery and the time of trial (R. 246: 93).

SUMMARY OF THE ARGUMENT

Defendant fails to show that trial counsel's decision against attempting to suppress pre-trial the three eyewitness identifications was other than a consciously chosen, reasonable tactic, given the limited chance of success and the overall strength of the evidence. Moreover, the tactic permitted defendant to challenge the strong, consistent identification of the State's strongest witness, whose identification could not be

suppressed under *State v. Ramirez*, 817 P.2d 774 (Utah 1991), by preserving for impeachment the State's weaker witnesses. Given the strength of the witnesses identifications, however, coupled with additional compelling evidence linking defendant to the aggravated robbery, a pre-trial motion to suppress, even if granted with respect to the weaker of the witnesses, would not have resulted in a more favorable trial outcome.

ARGUMENT

DEFENDANT FAILS TO OVERCOME THE STRONG PRESUMPTION THAT TRIAL COUNSEL RENDERED CONSTITUTIONALLY ADEQUATE ASSISTANCE OR TO SHOW TO A DEMONSTRABLE REALITY THAT TRIAL COUNSEL'S PERFORMANCE UNDERMINES CONFIDENCE IN THE JURY'S GUILTY VERDICT

Defendant argues that trial counsel was ineffective in not moving pre-trial to suppress the eyewitness identifications under *State v. Ramirez*, 817 P.2d 774 (Utah 1991). However, defendant fails to show that a pre-trial motion to suppress the identifications would likely have resulted in a more favorable trial outcome, given the motion's limited chance of success and the overall strength of the trial evidence.

To prevail on a claim of ineffective assistance of counsel, defendant must show that trial counsel's performance was objectively deficient, and that there exists a reasonable probability that absent the deficient conduct, he would have obtained a more favorable outcome at trial. *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *State v. Ellifritz*, 835 P.2d 170, 174

(Utah App. 1992) (same). To demonstrate objectively deficient performance, defendant must overcome a strong presumption that trial counsel rendered adequate assistance.

Taylor v. Warden, 905 P.2d 277, 282 (Utah 1995); *State v. Strain*, 885 P.2d 810 (Utah App. 1994) (same). In addition, this Court will give trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them. *Crosby*, 927 P.2d at 644 (citing *Taylor*, 905 P.2d at 282); *State v. Callahan*, 866 P.2d 590, 593 (Utah App. 1993) (same).

A. Defendant Fails to Demonstrate the Likely Success of a Pre-trial Motion to Suppress the Eyewitness Identifications and Therefore He Fails to Demonstrate That Trial Counsel Performed Deficiently

Defendant asserts that in light of *Ramirez*, the eyewitness identifications in this case were fatally flawed and that reasonable trial counsel, therefore, would have moved to suppress them pre-trial. Aplt. Br. at 13-14. However, in evaluating the evidence under the *Ramirez* factors and comparing it with the facts of *Ramirez* defendant has variously omitted facts describing conditions and circumstances of observation superior to those in *Ramirez*, gratuitously presumed the witnesses' compromised mental states throughout the aggravated robbery, and overstated the suggestiveness of the showup in comparison with that in *Ramirez*. In fact, the three eyewitness identifications in this case, are superior to the sole eyewitness identification in *Ramirez*. Therefore, a pre-trial motion to suppress would likely have failed and trial counsel reasonably elected not to exert time on a futile motion. *State v. Hovater*, 914 P.2d 37, 44 (Utah 1996).

1. ***The Eyewitness Identification in Ramirez was Based on Limited Capacity and Opportunity to Observe, Made in Worse Conditions, Inconsistent Over Time, and Uncorroborated by Any Other Witness***

In *Ramirez*, the Utah Supreme Court extended its recognition that eyewitness testimony is both potent yet fallible, *see State v. Long*, 721 P.2d 483, 488-91 (Utah 1986), thereby requiring the trial court, in cases where eyewitness identification was central to the case, to undertake "an in-depth appraisal of the identification's reliability," preliminary to admitting such testimony under article I, section 7 of the Utah Constitution. *Ramirez*, 817 P.2d at 780. Noting that "[t]he ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable," the supreme court listed the following pertinent factors by which reliability must be determined:

(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.

Id. at 781 (quoting *Long*, 721 P.2d at 493).⁸

⁸In *Ramirez*, two armed, masked men robbed a Pizza Hut. *Id.* at 776. Shortly before 1:00 a.m. Kathy Davis, the manager of the Pizza Hut, was preparing to leave the restaurant with her husband, John Davis, and her brother, Gerald Wilson. *Id.* Upon leaving, they were accosted by a man (the "pipe man") wearing a scarf across his face

Applying the above-referenced factors to the eyewitness identification in *Ramirez*, the supreme court found that, although an "extremely close case," the trial court had properly denied the defendant's pre-trial motion to suppress. *Ramirez*, 817 P.2d at 782-84.⁹

who demanded the day's receipts. *Id.* A scuffle followed and the pipe man hit Wilson with the pipe and told a previously undetected robber (the "gunman") to kill Wilson if he moved again. *Id.* The gunman, Ramirez, also wore a scarf covering most of his face, and was crouched near the corner of the building, holding a gun. *Id.* When the Davises returned with the bank bag, the robbers fled. *Id.*

Ramirez was stopped a short time after the robbery and a few blocks from the Pizza Hut, when he was found to match the description of one of the robbery suspects. *Id.* at 776-777. Police brought the Davises and Wilson to the scene of Ramirez's detention, apparently informing them that "the officers had found someone who matched the description of one of the robbers." *Id.* at 777. When the witnesses arrived at the showup, Ramirez, a dark-complexioned Apache Indian, was handcuffed to a chain link fence. *Id.* He was the only suspect, and the spotlights and headlights of patrol cars were turned on him. *Id.* The witnesses viewed him from a patrol car. *Id.* Only Wilson was able to identify Ramirez as the gunman; the other two witnesses were unable to identify him as one of the robbers. *Id.*

⁹Regarding the first factor, the witness's opportunity to view the actor during the event, the supreme court noted Wilson varied in his statements about how long he viewed the gunman, from a "a few seconds" or "a second," to "a minute" or longer. *Ramirez*, 817 P.2d at 782. The evidence indicated that the gunman was crouched by the end of the building, that Wilson viewed him from between ten to thirty feet, that at one point his view was obstructed, that the lighting was variously described from good to poor and the gunman was in a shadowy area, and that Wilson could only determine that the gunman's eyes were small. *Id.* at 782-83.

As to the second factor, the witness's attention to the actor, Wilson was fully aware that a robbery was taking place and claimed to have focused on the gunman to the exclusion of the pipe man, even though he was still threatened by the pipe man when he saw the gunman and gave a much more detailed description of the pipe man than of the gunman at the time of the robbery. *Id.* at 783.

Regarding the third factor, the witness's capacity to observe the actor during the event, the supreme court found that it was reasonable to assume that Wilson experienced

2. *The Three Eyewitness Identifications in This Case Were All Superior to the Sole Identification of the Eyewitness in Ramirez*

Contrary to defendant's claims, see Aplt. Br. at 13-14, the three eyewitness identifications in this case are superior to the sole identification in *Ramirez*, and would

"a heightened degree of stress," since, in struggling with his assailant, the witness was hit once in the stomach with the pipe and almost hit a second time. Wilson described his eyesight as good with his glasses, and "[a]side from the late hour and the injury from the pipe blow," there was no record evidence of any other physical impairments. *Id.*

The fourth reliability factor concerns whether the identification was spontaneous and remained consistent or whether it was the product of suggestion. *Id.* In *Ramirez*, the supreme court found that thirty minutes to an hour between the robbery and the identification as no indication that Wilson's mental capacity affected his identification. *Id.* at 783. Although he was aware that one of the other witnesses had not identified Ramirez, he was not otherwise exposed to other identifications or opinions, and neither of the other two witnesses identified Ramirez as the gunman. *Id.* However, the witness's physical descriptions of the gunman were "confused." *Id.* Wilson gave a very detailed description of the pipe man, but merely described the gunman as "a male Mexican, five feet nine inches to six feet tall, wearing a blue sweater and Levi's, with a white scarf around the lower part of his face." *Id.* John Davis, on the other hand, described Ramirez as five foot six inches tall and wearing a red and white cap. *Id.* at 784. Although Ramirez had readily visible tatoos on his arms, Wilson did not mention them at the time of the robbery or at the preliminary hearing, stating for the first time at trial that he had seen them on the gunman. *Id.* At the time of arrest, Ramirez was wearing Levi's and a blue sweatshirt with paint spattered on the front, but which may have been worn inside out and a brown baseball cap. *Id.* At the suppression hearing, Wilson positively stated that the gunman wore no hat, although at trial he was not sure. *Id.*

Most "troublesome" for the supreme court was the "blatant suggestiveness" of the showup, which, involved the lone suspect, handcuffed to a fence, the target of headlights, surrounded by police who had indicated to witnesses that they had located someone who fit one of the robber's description. *Id.* The suggestiveness of the showup was compounded because none of the witnesses ever saw the gunman without the mask, and the sole identifying witness made his identification based only on the gunman's eyes, a view of which this Court assumed must have been compromised by the gunman's wearing a hat. *Id.* The supreme court somewhat discounted the racial distinction because the identification was based only on the gunman's eyes, physical size and clothing. *Id.*

have been admissible in spite of the fact that the trial court did not have an opportunity to review the evidence pursuant to a pre-trial *Ramirez* motion.

a. Witness's Opportunity to View Defendant. The first *Ramirez* factor takes into account an eyewitness's opportunity to view the suspects. *Id.* at 782. The *Ramirez* robber was masked, crouched down, and viewed from ten to thirty feet away. *Id.* As set out in detail in the Statement of the Facts, *supra*, all three witness's opportunity to observe defendant exceeded that of the lone eyewitness in *Ramirez*, who saw only a portion of Ramirez's masked face. *Id.* at 784.

The instant robbery lasted 30 seconds and occurred after dark; however, the intersection was sufficiently lit from street and business lights for the witnesses to see defendant's *unmasked* face (R. 230: 153-155, 226-227; R. 246: 10-13, 80). Indeed, nothing in the record indicates the witnesses were unable to see defendant's face during the robbery: He came within three to four feet of the victims until he was right in front of Rick (R. 230: 106, 211; R. 246: 22). Rick estimated that he looked at defendant's gun for five to ten seconds, and that he looked at defendant for 10-15 seconds (R. 230: 145). *See State v. Willett*, 909 P.2d 218, 220, 224 (Utah 1995) (finding eyewitness's "few seconds" observation of defendant "sufficiently reliable" to be admitted). Moreover, unlike the eyewitness in *Ramirez* who identified Ramirez by his eyes, the three eyewitnesses in this case provided information regarding defendant's clothing, race, hair color and style, and they were also able to get some idea of his age, height, and weight (R. 246: 110). Their

descriptions were close to the official description made when defendant was booked later that night (Exh. # 12), add. A.¹⁰

Defendant places emphasis on the fact that the witnesses described the robber as wearing a light shirt and dark pants, yet he was apprehended wearing a dark shirt over a light shirt, a religious pendant around his neck, and khaki colored pants. Appt. Br. at 19. Because nearly one half hour away passed from the time of the robbery until defendant was apprehended, it is possible that he changed his clothing in that time (R. 246: 124). In any event, any discrepancies between the witnesses individual descriptions of defendant's appearance and/or between defendant's appearance at the time of his arrest, do not render the identifications inadmissible, but do bear on the individual eyewitness's credibility and weight the jurors may give the identification testimony. *State v. Mincy*, 838 P.2d 648, 658 (Utah App. 1992), *cert. denied*, 843 P.2d 1042 (Utah 1992); *State v. Perry*, 899 P.2d 1232, 1234-35 (Utah App. 1995) (upholding eyewitness identification describing Perry as clean shaven, 5'6" to 5'7" tall and weighing approximately 150 pounds, when at the time of his arrest a short while later, Perry was 5'9" tall, 170 pounds and had a slight

¹⁰Defendant's booking photo indicates that he is a male Hispanic, born 16 March 1972, 5'4" tall, 180 pounds, with short straight dark hair, and thin or light facial hair (Exh. #12), add. A. As for the any slight discrepancies between the eyewitnesses descriptions and information listed on defendant's booking photo, Detective Cheever cautioned that the "jailers" do not weigh the individual being booked, but rather ask the arrested person what they weigh (R. 246: 148-149). He also pointed out that if a suspect has been previously booked into jail at a certain weight and then loses weight and is booked into jail on a later occasion, the jailers typically go by the suspect's criminal history and do not update the information (*id.*).

mustache).

b. Witness's Degree of Attention and Capacity to Observe Defendant. The witnesses' degree of attention to, and capacity to observe defendant were also superior to that of the one eyewitness in *Ramirez* for purposes of the second and third *Ramirez* factors. Donny's attention was drawn to the occupants of the Monte Carlo even before the robbery, when he first noticed their suspicious behavior (R. 230: 208-209, 224). All three witness's attention was drawn to the robbers by at least the time the robbers instructed Rick to hand over the beer or be shot (R. 230: 104, 145-146, 180). Rick, in particular, concentrated on remembering defendant's face as defendant held a gun on him (R. 230: 184). Although the witnesses were frightened and agitated, nothing in the record suggests their natural anxiety at being robbed hindered their ability to see defendant clearly. Nor were there other distracting noises or activity in the intersection at the time of the robbery. *Ramirez*, 817 P.2d at 782. Identification of the *Ramirez* robber, on the other hand, was hindered by the fact that his accomplice was physically assaulting the eyewitness in that case with a pipe. 817 P.2d 783. Finally, the record is also devoid of indication that the witnesses acted under any personal motivation, bias, or prejudice, or that their vision was poor, or that they were impaired by fatigue, injury, drugs or alcohol. *Ramirez*, 817 P.2d at 783.

Defendant points to Rick's use of the ethnic slur "Spick" on his witness report form (Exh. # 33), add. A, and claims that it indicates' Rick's bias. Aplt. Br. at 16. Rick

explained his use of the slur was based on his anger at being robbed, and cramped space on the form (R. 230: 164-65). The prosecutor brought out that Rick's wife, Brandi, is half Hispanic and that Rick's business partner is Hispanic (R. 230: 196-197). Additionally, all of the suspects at the showup were Hispanic (R. 246: 84-85). Under these circumstances, Rick's use of the ethnic slur is of "relatively little importance." *Ramirez*, 817 P.2d at 784.

c. Witness's Spontaneity and Consistency in Identifying Defendant. The fourth *Ramirez* factor takes into account the spontaneity and consistency of eyewitness identifications. 817 P.2d at 783. The three eyewitnesses individually described defendant immediately following the robbery at the Texaco station (R. 246: 110). They also unhesitatingly identified defendant in a showup a little over one-half hour after the robbery and their identification of him as one of the robbers remained consistent at a later photo spread, and ultimately, at trial (R. 246: 89-90, 100, 144-146). *See Ramirez*, 817 P.2d at 783 (noting that elapsed time of 30 minutes to an hour between crime and witness identification was minimal). Their initial descriptions of the robbers and their subsequent identifications of defendant in the photo spread were independently obtained (*see, e.g.*, R. 230: 227; R. 246: 44, 141). The only time the witnesses as a group identified defendant was on their initial arrival at the showup, when they excitedly blurted out that they recognized two of the suspects detained at the four-plex, even before the patrol car came to a halt, and before police could point out who the actual suspects were (*see, e.g.*, R. 230: 132-133, 238; R. 246: 89-90). Under these facts, this spontaneous outburst supports,

rather than undermines, the reliability of the identifications.

With regard to the consistency of the identifications, Rick, Brandi and Donny, consistently identified defendant as one of the robbers, varying only as to his level of participation in the aggravated robbery. They variously described defendant's participation as that of an alleged third robber without a gun (R. 246: 101), the robber that held a gun to Brandi (R. 246: 146-147), and the robber that a held a gun to Donny and then to Rick (R. 230: 105-107, 211; R. 246: 22). However, because the victims did not vary as to their identification of defendant as one of the robbers, and because the jury was instructed as to defendant's liability as a party to the aggravated robbery, this variance is relatively insignificant (*see* R. 156) (Jury Instruction #16) (a copy is contained in addendum G).

Additionally, for the first time at trial, Brandi recalled that defendant had facial hair at the time of the robbery (R. 246: 29, 59). Rick also acknowledged that while he had not noticed defendant's slight facial hair during the robbery, defendant's facial hair was visible to him from a distance of five feet in the courtroom (R. 230: 167-168). Compare *Ramirez*, 817 P.2d at 783 (upholding eyewitness identification even though witness failed to mention until trial that he had seen readily visible tattoos on Ramirez's arms), with *Perry*, 899 P.2d at 1234-35 (upholding eyewitness identification which misdescribed Perry as clean shaven when he in fact had a slight mustache). Trial counsel also brought out that Rick and Brandi had initially thought the robber that held a gun on

Rick was right-handed but that Rick had described the robber as left-handed at trial and that Brandi was uncertain (R. 230: 178; R. 246: 48). As noted earlier, these and any other minor inconsistencies do not render the victims' identification of defendant as one of the robber's inherently inadmissible; rather, it goes to weight of their testimony. *Mincy*, 838 P.2d at 658. The jurors were instructed accordingly (*see* R. 145) (Jury Instruction # 6) (a copy is contained in addendum G).

d. Suggestibility of Showup Less Egregious Than *Ramirez* Showup. The final and most critical *Ramirez* factor concerns the suggestibility of the showup itself. Like the showup in *Ramirez*, both Ramirez, and the group detained at the four-plex were illuminated by police flashlights and patrol car headlights and spotlights. Like Ramirez, defendant was likely identified in handcuffs, at night, in close proximity to police officers, and Brandi, at least, was told that police thought they had "the people" they were looking for (R. 230: 131, 138, 187; R. 246: 32). *Ramirez*, 817 P.2d at 784. However, unlike Ramirez, defendant had the benefit of being picked out from among several other Hispanic suspects (R. 230: 131; R. 246: 85-86). Because the circumstances surrounding the instant eyewitness identifications of defendant are less problematic than those in *Ramirez*, the admission of the testimony was proper in spite of the fact that the trial court was not given the opportunity to review the evidence. *Accord Ramirez*, 817 P.2d at 784.

3. Any Motion to Suppress the Eyewitness Identifications Would Have Been Futile

"The failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance." *Hovater*, 914 P.2d at 44 (citations omitted). Based on the above, the three eyewitness identifications in this case were all more reliable than Wilson's unsuppressed identification in *Ramirez*. Indeed, the witnesses' observations of defendant were made in intrinsically better lighting conditions, and generally from within a few feet. While the witnesses were threatened at gunpoint, and Brandi had a gun held to her back, none of them were physically assaulted and injured as was the lone eyewitness in *Ramirez*. Moreover, the uniformity of the witnesses descriptions of defendant's race, approximate height, weight, and hairstyle lends weight to the accuracy of the their individual observations. Finally, while the showup in both this case and in *Ramirez* were virtually identical, significantly, defendant was picked out from among several other Hispanic suspects. Accordingly, the eyewitness identifications in this case were superior to Wilson's unsuppressed identification in *Ramirez*. This Court should not therefore second-guess trial counsel's decision not to have wasted valuable preparation time in attempting to suppress identifications that would have been held constitutionally admissible. *Hovater*, 914 P.2d at 44.

Defendant broadly maintains, without specifying which, that at least one of the identifications was suppressible under *Ramirez*. Aplt. Br. at 23. Even assuming one of

the identifications was suppressible under *Ramirez*, trial counsel acted reasonably in not moving to suppress any of the identifications. A motion to suppress the identifications would have risked succeeding only as to the weakest, leaving trial counsel with only the strongest identifications at trial. If only the strongest identifications were admitted, trial counsel would not have been able to substantially impeach the identifications in cross-examination and effectively argue against the identifications in closing. See *Commonwealth v. Conceicao*, 446 N.E.2d 383, 389 (Mass. 1983) (no ineffective assistance in declining to file motion to suppress, alleging suggestive photographic identification with "minimal chance of success," or based on tactical choice to instead cross-examine witnesses extensively and strenuously argue the weakness of the identification testimony); *Commonwealth v. Levia*, 431 N.E.2d 928, 933 (Mass. 1982) (tactical decision to forego attempted suppression of weaker of two identification witnesses and seek "spillover" effect from impeachment on cross-examination, and noting, in support of that strategy, that the defense counsel cross examined the weaker witness extensively and argued the weaknesses of his identification testimony in closing).

In the circumstances of this case, it was therefore reasonable trial strategy to forego suppression entirely, a tactic which the Utah Supreme Court and others have found sufficient to rebut claims of ineffective assistance of counsel. See *State v. Villarreal*, 889 P.2d 419, 427 (Utah 1995) (upholding court of appeals' conclusion that trial counsel's not objecting to references to seemingly prejudicial evidence of defendant's probationary

record, dismissed criminal charges or victim's testimony, was "deliberate strategy falling will within the standard of reasonable professional performance"); *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989) (reasonable strategy in foregoing attempt to exclude conceivably inadmissible, videotaped child hearsay statements and focus instead on "less sympathetic" adult psychologist who could be shown to have employed "techniques akin to brainwashing"), *cert. denied*, 497 U.S. 1024 (1990). Indeed, trial counsel extensively cross-examined Rick and Brandi on any limitations of their observations, inconsistencies in their identifications, the suggestiveness of the showup and any uncertainty in their in-court identifications (R. 230: 152-170, 166-191, 198-200; R. 246: 43-53), which he developed to show asserted distinctions from defendant's actual appearance (R. 230: 166-176; R. 246: 43, 47-48, 50; R. 247: 30), and highlighted in closing argument (R. 247: 28-51).¹¹ In particular, trial counsel emphasized that all three witnesses had identified Gomez as defendant's alleged cohort, yet charges against Gomez were dismissed because he had established an alibi (R. 247: 31, 41, 46). He also emphasized jury instruction #18 regarding the potential pitfalls in eyewitness identifications (R. 247: 47).¹² Although trial counsel's strategy did not produce the desired result, "an unfavorable result is not

¹¹Trial counsel was less successful in regards to Donny's testimony which was relatively free from inconsistency (R. 230: 223-238, 241).

¹²Jury instruction #18 (R. 158-162) (a copy is contained in addendum G), constituted a combination of the parties requested instructions based on *State v. Long*, 721 P.2d at 488-91 (*see* R. 231: 5-6).

sufficient for and does not give rise to a conclusion of ineffective assistance of counsel."

State v. Tyler, 850 P.2d 1250, 1258 (Utah 1993) (citation omitted).

B. Defendant Fails to Show that He was Prejudiced as a Result of Trial Counsel's Performance

In claiming that he was prejudiced by trial counsel's performance below, defendant complains that this case "is in a different posture" than *Ramirez* was because it lacks a trial court's findings of fact and conclusions of law on admissibility of the eyewitness identifications. Aplt. Br. at 23-24. He mistakenly and illogically argues that it would be inappropriate for this Court to make its own findings and conclusions in the absence of those of the trial court. Aplt. Br. at 24.

As set out above, this case is not nearly as "close" as *Ramirez*, since there is no reasonable probability that the trial court would have suppressed the eyewitness testimony.¹³ This case is also not like *Ramirez*, where the supreme court held that the trial court had "abdicated its duty to rule and make findings "when the issue of suppression of illegal search and seizure was] raised." *Ramirez*, 817 P.2d at 787 (emphasis added).¹⁴ In

¹³See *State v. Branch*, 743 P.2d 1187, 1189 (Utah 1987) (finding no abuse of discretion in trial court's refusal to exclude equivocal eyewitness testimony of identifications made in less than opportune circumstances under pre-*Long* standard), *cert. denied*, 485 U.S. 1036 (1988); *Perry*, 899 P.2d at 1238 (finding eyewitness identification reliable even though victim, during a nighttime assault where threatened with a knife, viewed her assailant by street lights and possibly the dome light of her car for about 20 seconds and later at a suggestive showup).

¹⁴See also *State v. Nelson*, 950 P.2d 940, 944 (Utah App. 1997) (conviction vacated where, following motion to suppress and proffer of expert, trial court

this case, the trial court was never asked to consider a pre-trial *Ramirez* motion. However, at the conclusion of all the evidence, trial counsel did move to dismiss on grounds that the eyewitness identifications were so inconsistent as to render evidence of defendant's guilt insufficient to go to the jury (R. 246: 186), add. F. The trial court disagreed, ruling that any inconsistencies in the identifications went to the witness's credibility and that the State had presented sufficient evidence to send the case to the jury (*id.*). The trial court was thus granted an opportunity to rule on the quality of the witness identifications and found nothing inherently unreliable therein (*id.*). The absence of *Ramirez* findings and conclusions here therefore, does not present the same difficulty as in *Ramirez*. In any event, defendant explicitly begs this Court to rule without findings and conclusions, since he has argued that the record is adequate to review the admissibility of the identifications, even though the claim of ineffective assistance was not raised in the trial court. *See* Aplt. Br. at 1 (citing *Hovater*, 914 P.2d at 40).

Furthermore, in addition to the corroborative and consistent identifications of defendant as one of the robbers, there was Donny's observation of the robbers' license plate number (R. 230: 214-215; R. 246: 82). In fact, the robbers' Monte Carlo was discovered about one half block from the crime scene (R. 246: 80-82, 99), and defendant was discovered in attendance at the beer party being held at that same address (R. 246:

"sidestepped its gatekeeping responsibility by failing to determine the constitutional admissibility of the eyewitness testimony").

90). Defendant, moreover, left the party for approximately one half hour that evening for the purpose of obtaining more beer (R. 246: 71). Defendant's cousin Crystal was not sure whether defendant was present at the party between 12:30 p.m. and 1:00 a.m., the approximate time of the robbery (R. 246: 74).¹⁵ When the police arrived approximately one half hour after the robbery, only 7 or 8 people were present (R. 246: 98).

Additionally, the robbers' Monte Carlo was registered to the wife of a friend of defendant's, Steve Trujillo, who resembles Gary Gomez, the robbery suspect identified by the witnesses, but against whom charges were dismissed when he established an alibi (R. 230: 202-204) (*compare* Exh. # 13 (Gomez' booking photo)), add. E, and (Exh. ## 14, 37) (copies of Trujillo's booking photos are contained in addendum C).

Finally, defendant admitted being present at the scene of the robbery, claiming he had purchased the Budweiser beer he brought back to the party at the same Circle-K where Rick Bergsma purchased the Budweiser beer that was stolen from him that night (R. 246: 136-137). No beer receipts were recovered from inside the Monte Carlo, or the apartment where the drinking party was held (R. 246: 99). In sum, even if one or two of the eyewitness identifications had been suppressed, it would not have resulted in a more favorable verdict, considering the additional compelling evidence.


¹⁵Defendant's cousin Justin testified for the defense and claimed that defendant returned to the party at approximately 11:45 p.m., but acknowledged on cross-examination that he had no special reason to accurately recall the time of defendant's return (R. 246: 167, 175).

CONCLUSION

This Court should reject as unsubstantiated, defendant's allegations of ineffective assistance of trial counsel, and affirm his conviction for aggravated robbery.

RESPECTFULLY submitted on 5 ^{February} ~~January~~ 1999.

JAN GRAHAM
Utah Attorney General

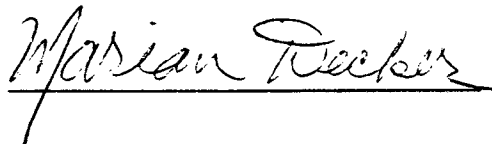

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 5 ^{February} ~~January~~ 1999, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of the *BRIEF OF APPELLEE* to:

ROBERT K. HEINEMAN
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant



ADDENDA

ADDENDUM A

WITNESS REPORT

| | | | |
|--|---|---|---|
| DATE AND TIME: 1-21-96 / 00:40 | | TYPE: AGG 2033027 / ASSAULT | |
| ADDRESS: 980 E 2700 S | | CASE NO. (Original - Detective Div.; Copy - Records) 96-110057 | |
| REPORTING OFFICER: 12 Johnson | IBM NO. 127L | ASSISTING OFFICER: S. W. R. J. G. E. | IBM NO. 129L |
| ADDITIONAL OFFICERS/IBM 90L / J13L / J24L / J33L | IBM NO. | SERGEANT Sgt. Anderson | IBM NO. 647L |
| PHOTO LAB | IBM NO. | SOCIO | IBM NO. |
| STOPS - REVIEW | | | |
| IDENTS | YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> | PHOTOS | YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> |
| | | EVIDENCE | YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> |
| NAME Brandi Lei Bergsma | | DOB 12/4/73 | |
| ADDRESS - HOME 784 S. 500 E Apt B | | PHONE NO. 466-2798 | |
| ADDRESS - WORK | | PHONE NO. | |
| ADDITIONAL ADDRESS/PHONE NO. WHERE YOU CAN BE REACHED | | | |

LOCK #1 WHAT WERE YOU DOING PRIOR TO THIS INCIDENT? (If additional space is needed - use Witness Continuation Form)

walking to a gas station

LOCK #2 WHAT DID YOU FIRST OBSERVE?

dark maroon car/men staring at us.

LOCK #3 DESCRIBE THE INCIDENT:

They jumped out of the car ran across the street pointed a gun at us and said drop everything or your gonna die we dropped the stuff and the said know run or well kill ya & he said run you Bitch.
They stole 3 cases of Budwieser Beer.

LOCK #4 WHAT CONVERSATION DO YOU RECALL BEFORE, DURING, AND AFTER THE INCIDENT:

STATE'S EXHIBIT
 31

CK #5 DESCRIBE THE SUSPECT:

RACE Hispanic AGE 22 HEIGHT 5.5
145 lbs EYE COLOR brown HAIR COLOR black

BE THE FOLLOWING:

HAIR short hair FACIAL HAIR no
no BODY DESCRIPTION short
no SHIRT white
no PANTS blue
yes

BE UNUSUAL SMELLS, MANNERISMS, SPEECH, ETC.

no mannerisms

CLOTHING, ETC.

#2 & #3 are same

CK #6 DESCRIBE THE VEHICLE:

dark red white top BODY STYLE large 4 door

#montecarlo?

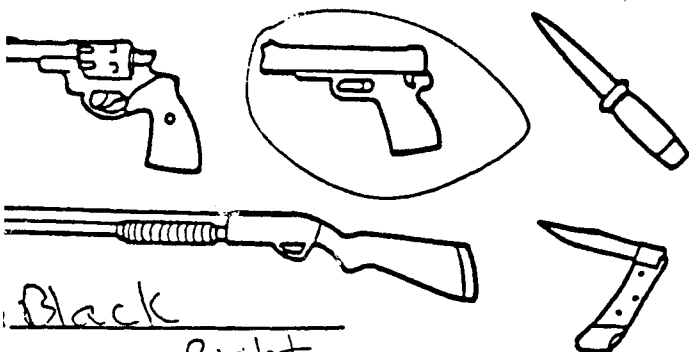
LIC. PLATE # or
DESCRIBE PLATE

or
(x.)

ADDITIONAL COMMENTS:

USE THIS AREA TO DRAW ANY UNUSUAL FEATURES, i.e., DAMAGE, DESIGN, EXTRA EQUIPMENT, ETC.

CK #7 CIRCLE THE WEAPON:



Black

SUSPECT'S RT/LT HAND Right

ADDITIONAL DESCRIPTION:

USE THIS AREA TO DRAW AND DESCRIBE WEAPON'S BARRELL LENGTH, UNUSUAL FEATURES, STOCK, ETC.

short Black/maybe a hand
gun/automatic

CK #8 ANY ADDITIONAL COMMENTS:

CK #9 CAN YOU IDENTIFY THE SUSPECT:

YES

NO



Digitized by the Howard W. Hunter Law Library, Robert Clark Law School, BYU.

Machine-generated OCR may contain errors.

BLOCK #10

SIGNATURE:

Bandi Dargema

DATE/TIME:

WITNESS REPORT

| | | | |
|---|---|---|---|
| DATE AND TIME: 21-9-100:40 | | TYPE: AGG 2033027 / 2333007 | |
| ISS: E 2700 S | | CASE NO. (Original - Detective Div.; Copy - Records) 96-110857 | |
| AL OFFICER: 2 THOMSON | IBM NO. 1976 | ASSISTING OFFICER S. WOLFE | IBM NO. 1291 |
| ADDITIONAL OFFICERS/IBM | | SERGEANT | |
| LAB | IBM NO. | SOC | IBM NO. |
| PHOTOS | | EVIDENCE | |
| YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> | YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> | YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> | YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> |

| | | |
|-------------------|-----------|---------------|
| NAME: Donny Drake | | DOB: 10/17/78 |
| ESS - HOME | 42-1372 | PHONE NO. |
| 6011 Pierson Ct. | CG. 80004 | 466-2798 |
| ESS - WORK | | PHONE NO. |

| | |
|--|------------------------------|
| ADDITIONAL ADDRESS/PHONE NO. YOU CAN BE REACHED | 2849 S. 500 E "B" / 466-2798 |
|--|------------------------------|

LOCK #1 WHAT WERE YOU DOING PRIOR TO THIS INCIDENT? (If additional space is needed - use witness Continuation Form)

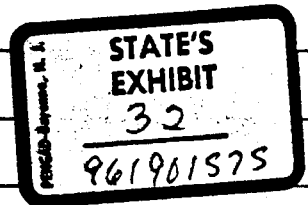
walking home from the store from circle K 2700 South 900 East

LOCK #2 WHAT DID YOU FIRST OBSERVE?

I observed them when they were pulling out of Teraco, so we tried to hurry back through the golf course when they ran up to us

LOCK #3 DESCRIBE THE INCIDENT:

2 mexicans got out of a car and held us up at gun point, and took the beer my sister + her husband were carrying



LOCK #4 WHAT CONVERSATION DO YOU RECALL BEFORE, DURING, AND AFTER THE INCIDENT:

they said give us your beer before we kill you

K#5 DESCRIBE THE SUSPECT:1 RACE hispanic AGE 18 HEIGHT 5'7"150 EYE COLOR _____ HAIR COLOR _____

THE FOLLOWING:

E ~~kind of~~ kind of hair FACIAL HAIR _____

BODY DESCRIPTION _____

SHIRT darkPANTS dark

UNUSUAL SMILLS, MANNERISMS, SPEECH, ETC. _____

USE THIS AREA TO DRAW ANY UNUSUAL FEATURES, i.e., DAMAGE, DESIGN, CLOTHING, ETC.

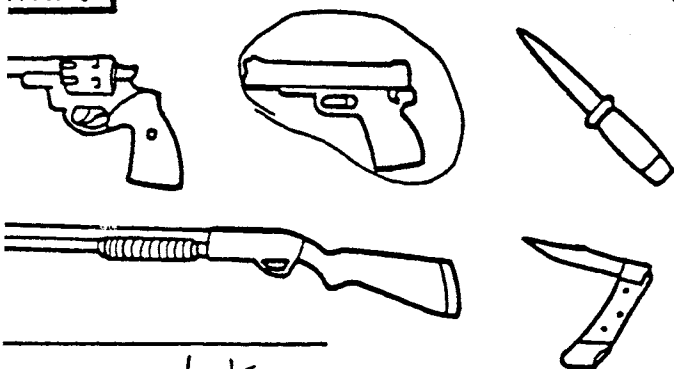
#2 suspect similar ~~to~~ to first

Driver stayed in car with someone in back seat

K#6 DESCRIBE THE VEHICLE:brownish BODY STYLE neonty carlsor carls lowriderLIC. PLATE # or 11th plate
DESCRIBE PLATE 0L6 TL2

INAL COMMENTS: _____

USE THIS AREA TO DRAW ANY UNUSUAL FEATURES, i.e., DAMAGE, DESIGN, EXTRA EQUIPMENT, ETC.

K#7 CIRCLE THE WEAPON:T'S RT/LT HAND LTONAL DESCRIPTION: smaller size34in

USE THIS AREA TO DRAW AND DESCRIBE WEAPON'S BARRELL LENGTH, UNUSUAL FEATURES, STOCK, ETC.

CK#8 ANY ADDITIONAL COMMENTS:**CK#9** CAN YOU IDENTIFY THE SUSPECT:

YES

NO

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Machine-generated OCR may contain errors.**BLOCK#10**

SIGNATURE: _____

DATE/TIME: _____

WITNESS REPORT

| | | | | | |
|---|--|--|--|---|--|
| DATE AND TIME: -21-90 00:40 | | | | TYPE: ACC 2-3321 / ASHUT | |
| ISS: 20 E 2700 S | | | | CASE NO. (Original - Detective Div.; Copy - Records) 96-110857 | |
| OFFICIAL OFFICER: J. T. JONES | | IBM NO. 1976 | | ASSISTING OFFICER S. W. WILSON | |
| ADDITIONAL OFFICERS/IBM J. L. JONES | | IBM NO. J241 | | SERGEANT S. A. JONES | |
| LAB STEVE MATFIELD | | IBM NO. J331 | | IBM NO. 6476 | |
| PHOTOS | | EVIDENCE | | | |
| YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> | | YES <input checked="" type="checkbox"/> NO <input checked="" type="checkbox"/> | | | |

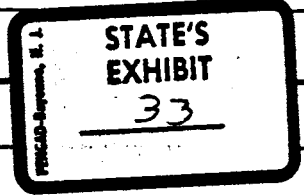
| | | | |
|---|--|-------------------|--|
| NAME - HOME Rick Bergsma 8-1367 (21) | | DOB -4-1-27-48 | |
| ADDRESS - HOME 7849 S. 500 E. APT # B | | PHONE NO. | |
| NAME - WORK S/A | | PHONE NO. | |
| ADDITIONAL ADDRESS/PHONE NO. RE YOU CAN BE REACHED Cell Phone 557-0249. | | | |

LOCK #1 WHAT WERE YOU DOING PRIOR TO THIS INCIDENT? (If additional space is needed - use Witness Continuation Form)

walking Home from store.

LOCK #2 WHAT DID YOU FIRST OBSERVE?

2 men crossing the street.



LOCK #3 DESCRIBE THE INCIDENT:

2 Hispanic males Held me & wife & Brother in Law up with 2 Handguns.
got in car and Drove off.
- TOOK 2 15-ROUNDS OF BULLETS.
- CAR WAS PARKED IN TEXACO PARKING LOT ON TRAIL 2700 S.
SWB. THEY WALKED ACROSS TRAIL STREET, WALKED
BACK TO CAR AND LEFT WESTBOUND ON 2700 S.

LOCK #4 WHAT CONVERSATION DO YOU RECALL BEFORE, DURING, AND AFTER THE INCIDENT:

CK #5 DESCRIBE THE SUSPECT:

ale RACE Sp'ck AGE 22 HEIGHT 55
165 EYE COLOR Brown HAIR COLOR Brown
 IE THE FOLLOWING:
Short straight FACIAL HAIR none
none BODY DESCRIPTION short & stocky
no SHIRT tan
no PANTS Brown or Black
sneakers
 BE UNUSUAL SMELLS, MANNERISMS, SPEECH, ETC. Sp'cks

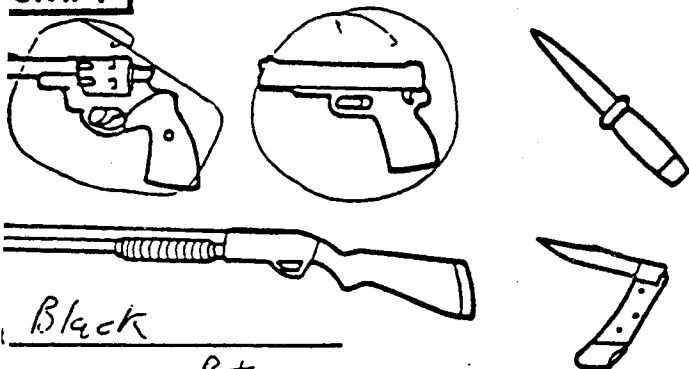
CLOTHING, ETC.

CK #6 DESCRIBE THE VEHICLE:

Brown BODY STYLE 2 door
Ford
monte carlo? LIC. PLATE # or
84 to 87 DESCRIBE PLATE
 (ix.)
 IONAL COMMENTS: Lo-2002 / CLEANS 2ms

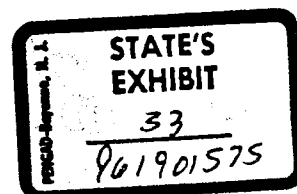
USE THIS AREA TO DRAW ANY UNUSUAL FEATURES, i.e., DAMAGE, DESIGN, EXTRA EQUIPMENT, ETC.

CK #7 CIRCLE THE WEAPON:



Black
 CT'S RT/LT HAND RT
 IONAL DESCRIPTION: Held to Back of
wife.

USE THIS AREA TO DRAW AND DESCRIBE WEAPON'S BARRELL LENGTH, UNUSUAL FEATURES, STOCK, ETC.



OCK #8 ANY ADDITIONAL COMMENTS:

OCK #9 CAN YOU IDENTIFY THE SUSPECT:

YES

NO



BLOCK #10

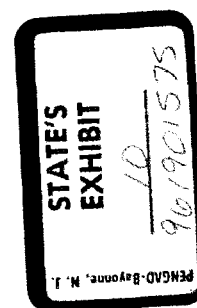
SIGNATURE:

DATE/TIME:

7-20-96

ADDENDUM B

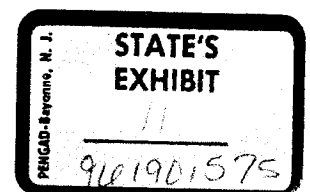




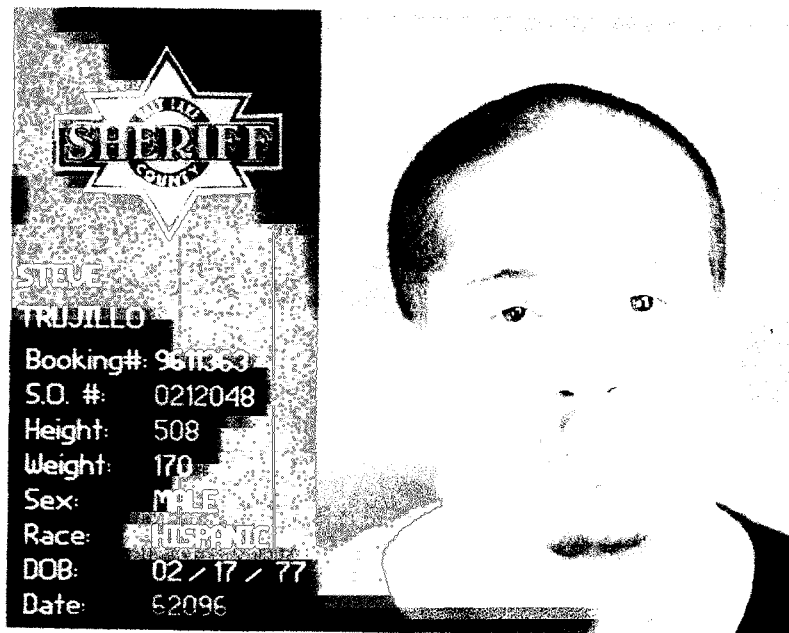


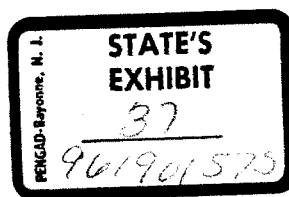
0688 6- NN 0+20+20+20-

0 4Z 80-0 5000 50+



ADDENDUM C





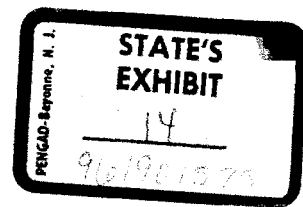
Panasonic VIDEO PRINTER



STEVE
TRUJILLO

Booking#: 835056
S.O. #: 0220-8
Height: 503
Weight: 170
Sex: MLE
Race: HISPANIC
DOB: 02/17/77
Date: 8385

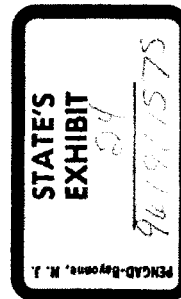


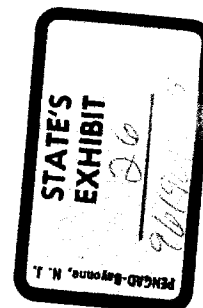


Panasonic VIDEO PRINTER

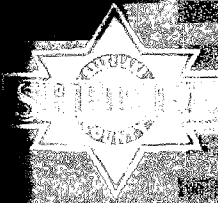
ADDENDUM D

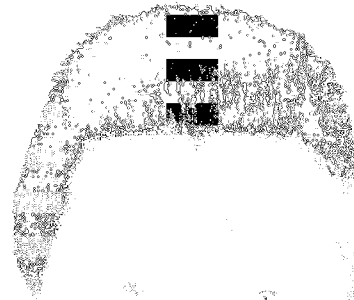


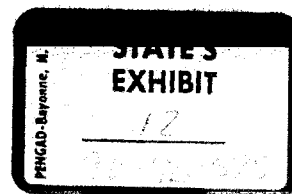




ADDENDUM E

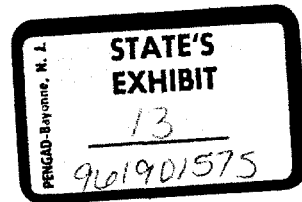

GILBERT
LOPEZ
Booking#: 961379
S.O. #: 0190720
Height: 504
Weight: 180
Sex: MALE
Race: HISPANIC
DOB: 03 / 16 / 72
Date: 72196



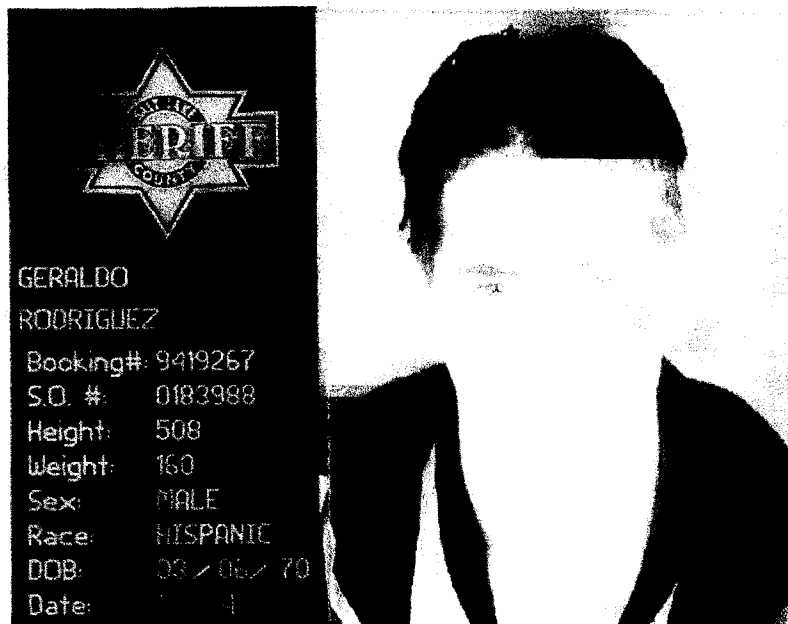


Panasonic VIDEO PRINTER

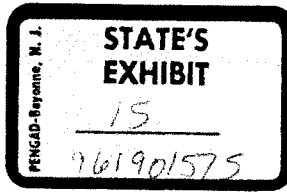




Panasonic VIDEO PRINTER



Panasonic VIDEO PRINTER

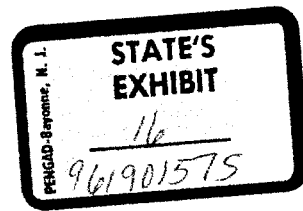




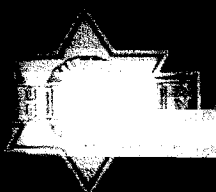
DAVID
DELGATO

Booking#: 9609785
S.O. #: 0210757
Height: 510
Weight: 150
Sex: MALE
Race: HISPANIC
DOB: 04 / 11 / 68
Date: 51996

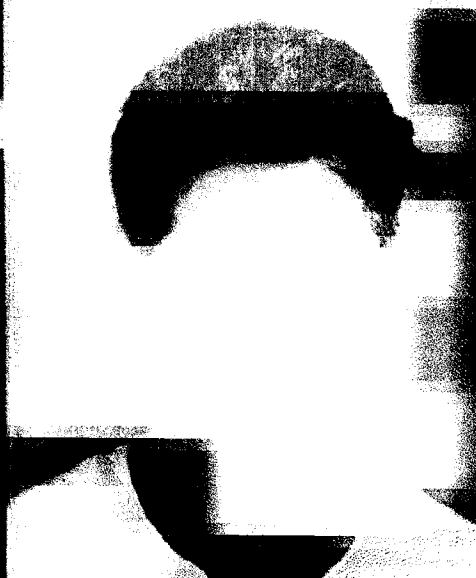




Panasonic VIDEO PRINTER



EMILIO
PACAS
Booking#
S.O. #: 0105011
Height: 507
Weight: 150
Sex: MALE
Race: UNK/ONTC
DOB: 11/11/1971
Date: 42294



Panasonic VIDEO PRINTER





KELLY

VALDEZ

Booking#: 9406814

S.O. #: 0117956

Height: 600

Weight: 200

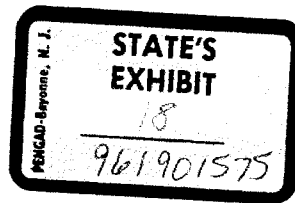
Sex: MALE

Race: HISPANIC

DOB: 12 / 16 / 64

Date: 41694

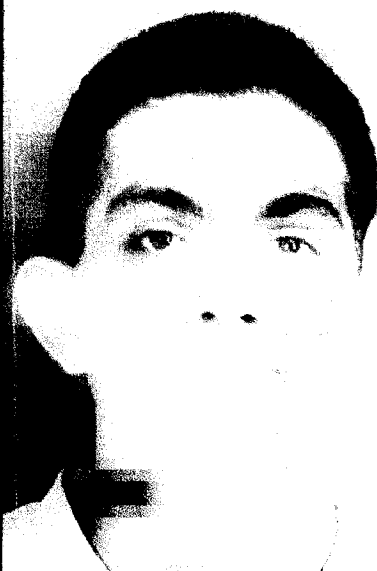






ISAAC
GONZALES

Booking#: 9606115
S.O. #: 0194057
Height: 508
Weight: 150
Sex: MALE
Race: HISPANIC
DOB: 06 / 12 / 75
Date: 31896





Panasonic VIDEO PRINTER



REUBEN

HERNANDEZ

Booking#: 9611890

S.O. #: 0212214

Height: 508

Weight: 140

Sex: MALE

Race: HISPANIC

DOB: 01 / 05 / 75

Date: 63096





Panasonic VIDEO PRINTER

ADDENDUM F

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

Defendant.

* * * * *

* * *

FILED
Utah Court of Appeals
SEP 25 1998
Julia D'Alesandro
Clerk of the Court

1 we'll have them order lunch when they come in at 10:30,
2 and have it delivered at 11:30 or whatever, so they can
3 start their deliberations on a good note, feeling that
4 the state's done one little thing for them, if nothing
5 else. Anything else that we need to discuss? Do you
6 want to make your motion now, Mr. Garcia, on the record?

7 MR. GARCIA: For the record, Your Honor, at
8 the end of the state's case in chief I'd make a motion
9 to dismiss. There is not sufficient evidence, given the
10 contradictory nature of all of this testimony, to send
11 the case to the jury.

12 THE COURT: All right. I understand the
13 motion. The motion is denied, this is a jury issue.
14 Whether they find the witnesses credible, despite some
15 inconsistencies, if they find they exist, is up to the
16 jury. It's certainly enough to go to them at this
17 juncture, in my opinion.

18 So we will take a break, give my court
19 reporter and counsel and the court at least fifteen
20 minutes. So we'll come back at about quarter after and
21 see whether you've got a rebuttal witness you want to
22 call.

23 (Brief recess.)

24 THE COURT: Are we putting on a rebuttal
25 witness?

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

FILED
Utah Court of Appeals
AUG 20 1999
Julia D'Alesandro
Clerk of the Court

CAROL CLAWSON
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

PALMER DEPAULIS
Chief of Staff

**UTAH COURT OF APPEALS
BRIEF**

August 20, 1999

UTAH
DOCUMENT

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DOCKET NO. —

981085

Julia D'Alesandro
Clerk of the Court
Utah Court of Appeals
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Re: *State v. Lopez*, Case No. 981085-CA

Dear Ms. D'Alesandro:

In preparing for the oral argument in this matter, scheduled to be held on 27 August 1999, the State became aware of pertinent authority concerning the argument set out in the brief at pp. 20-23. Accordingly, the State cites as supplemental authority, *State v. Rivera*, 954 P.2d 225, 227-229 (Utah App. 1998).

This supplemental authority is submitted pursuant to rule 24(h), Utah Rules of Appellate Procedure.

Sincerely,

Marian Decker
MARIAN DECKER
Assistant Attorney General

cc: Robert K. Heineman