

1981

# State of Utah v. Donald Leon Malmrose : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DONALD LEON MALMROSE,

Defendant-Appellant.

Case No. 17661

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BRIEF OF RESPONDENT

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APPEAL FROM A DENIAL OF APPELLANT'S  
MOTION FOR A NEW TRIAL IN THE SECOND  
DISTRICT COURT, HONORABLE CALVIN GOULD  
PRESIDING.

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

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|-----------------------|---|----------------|
| STATE OF UTAH,        | ) |                |
|                       | ) |                |
| Plaintiff-Respondent, | ) |                |
|                       | ) |                |
| -vs-                  | ) | Case No. 17661 |
|                       | ) |                |
| DONALD LEON MALMROSE, | ) |                |
|                       | ) |                |
| Defendant-Appellant.  | ) |                |

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IN THE SUPREME COURT OF THE STATE OF UTAH

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|                       | ) |                |
| Plaintiff-Respondent, | ) |                |
|                       | ) |                |
| -vs-                  | ) | Case No. 17661 |
|                       | ) |                |
| DONALD LEON MALMROSE, | ) |                |
|                       | ) |                |
| Defendant-Appellant.  | ) |                |

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the conviction and denial of a new trial in the District Court, Second Judicial District, Honorable Calvin Gould presiding.

DISPOSITION IN LOWER COURT

Appellant was convicted by a jury of Forcible Sexual Abuse in violation of Utah Code Ann., § 76-5-404, and was sentenced to the Utah State Prison. His motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction and denial of the request for a new trial.

STATEMENT OF FACTS

On April 16, 1980, Brooke Williams was sexually assaulted while jogging on a running course at Weber State

College (T. 49, 55, 63). She reported the assault to police and gave them a description (T. 73, 74). She was shown some pictures and she picked out four of them that were possible assailants (T. 115, 116). These pictures were returned to the files without a record being kept (T. 118, 119). On July 1, 1980, she was shown seven drivers license photos (T. 130). She picked out two possibilities and asked for a more recent photograph of one (T. 82, 83, 130, 131). Two days later she was shown a more recent photograph of the one (defendant) from a school yearbook (T. 131, 132). She identified the defendant after seeing the more recent photograph (T. 132, 133). She was later informed that defendant had been arrested previously on other sex offenses (T. 688). She later identified defendant at a lineup. That lineup was suppressed because no recording had been made (T. 695, 707). After three days of trial, the jury returned a verdict of guilty (T. 552). The defendant was later sentenced to the Utah State Prison. A motion for a new trial was subsequently denied by Judge Gould and the defendant filed this appeal (R. 639, 640).

## ARGUMENT

### POINT I

DEFENDANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE REPRESENTATION BY COUNSEL.

The standard to be applied in determining whether a criminal defendant is afforded his constitutional right to

effective assistance of counsel was enunciated by the Utah Supreme Court in State v. McNicol, Utah, 554 P.2d 203 (1976):

. . . This court has previously held the right of the accused to have counsel is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. He is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession.

554 P.2d 203, 204. This standard has been repeated in State v. Heaps, Utah Case No. 16264, October 31, 1979, at page 3 of the opinion; in State v. Gray, Utah, 601 P.2d 918, 920, n.5 (1979); and in State v. Ambrose, Utah Case No. 16148, February 7, 1980 at page 3 of the opinion.

The court also established in McNicol, supra, that:

. . . A defendant bears the burden of establishing the inadequacy or ineffectiveness of counsel, and proof of such must be a demonstrable reality and not a speculative matter.

554 P.2d 203, 204. Accord, State v. Forsyth, Utah, 560 P.2d 337 (1977). Respondent submits that the petitioners have not satisfied this burden, as will appear, infra.

Two other general rules are relevant to the inquiry about effectiveness of trial counsel. First, as established in State v. McNicol, supra, it is widely recognized that courts will not, with the benefit of hindsight, second-guess an attorney's "legitimate exercise of judgment, as to trial tactics or strategy." McNicol, supra, 554 P.2d at 205. Second, in the case of Alires v. Turner, 22 Utah 2d 118, 449

P.2d 241 (1969), the Utah Supreme Court recognized that in deciding a claim of ineffective assistance of counsel whether better representation might have had some effect on the result of the trial is important. If such a probable different result does not appear, there is no prejudicial error warranting reversal of the conviction. To the same effect is Jaramillo v. Turner, 24 Utah 2d 19, 465 P.2d 343 (1970) and State v. Forsyth, Utah, 560 P.2d 337 (1977). The following language from State v. Gray, supra, illustrates that a different result is still a vital consideration:

There is the further proposition to be considered: that even if his (Gray's) counsel did not perform as skillfully as the now convicted defendant might have desired, his guilt was so clearly evident that even in the absence of any misjudgment of counsel, we do not believe there is any likelihood that there would have been a different result, wherefore, there should be no reversal of the conviction.

601 P.2d 918, 920 (emphasis added). See also United States v. Coupey, 603 F.2d 1347 (9th Cir. 1979).

Also relevant to this case is the rule announced in Heinlin v. Smith, Utah, 542 P.2d 1081 (1975) that the failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance. This was also cited in State v. Ambrose, supra, decided this year. See also People v. Jones, 158 Cal.Rptr. 415 (Cal. App. 1979).

In Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), the Tenth Circuit stated its view of the constitutional test: "The Sixth Amendment demands that defense counsel exercise the

skill, judgment and diligence of a reasonably competent defense attorney." 613 F.2d at 278. This court has not yet adopted the "reasonably competent assistance of counsel" test.

In order to prevail with this argument, defendant must: (1) establish proof of the ineffectiveness of counsel; (2) show that such ineffectiveness was due to the inadequacy of counsel and not a result of trial strategy; (3) demonstrate that better representation might have had some effect on the result of the trial; and (4) prove that motions and objections which were not made would not have been futile if raised.

First, appellant has failed to establish proof of the ineffectiveness of counsel. In Point I of his Argument, there is no delineation of what errors were committed by counsel. Only by examining other parts of the brief can we find an indication of the errors alleged. These appear to include inadequate voir dire by defense counsel (Point III), a prejudicial statement about defendant by defense counsel (Point IV), and the failure to introduce defendant's polygraph test (Point XIII).

If these are the instances of ineffective assistance relied upon, appellant has still failed to demonstrate the error or harm of these actions. There has been no showing that the supposed inadequate voir dire resulted in a biased or prejudicial jury, or that the statement was indeed prejudicial rather than serving some other purpose, or that failure to introduce the polygraph results damaged defendant's

position. These instances cited were tactical decisions made by defense counsel and are not evidence of incompetence.

Second, even if these instances were error, there has been no showing that the ineffectiveness was a result of inadequacy of counsel rather than a trial strategy which failed to work. An attorney is not incompetent merely because his efforts fail to convince a jury.

It is recognized that counsel has substantial latitude in selecting trial strategy. State v. Pierren, Utah, 583 P.2d 69 (1978). This latitude should not be destroyed by allowing a defendant to appeal by asserting that a different strategy should have been chosen. Appellant has not demonstrated that there was no trial strategy involved in these acts or that no one would have adopted such a trial strategy. Without such a showing by appellant, such actions would properly be seen as part of the defense counsel's trial strategy.

That these acts were part of the trial strategy may be shown from the record. Considering voir dire in its entirety, evidently defense counsel was satisfied that the jury members had been properly examined. The statement, alleged to be prejudicial, was made in an attempt to demonstrate that the defendant was in jail as a product of circumstances, not as a result of guilt. The decision to not introduce the polygraph results was also a tactical choice. Defense counsel secured the polygraph test for his client and then decided not to use it because to do so would allow the prosecution to introduce

the results of its polygraph examination. Both polygraph tests were suppressed at trial (Supp. Hearing 43).

The issue of trial tactics is a concern of defendant and his counsel, not of the court. State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969). Since such tactics are within the discretion of trial counsel, the defendant is not denied the effective assistance of counsel just because another attorney might have acted differently.

Third, appellant has failed to sustain his burden of showing that the result of the trial might have been different. Absent this showing, no claim of ineffective assistance of counsel can be sustained. State v. Gray, supra, Appellant did not demonstrate any instances where there were indications that, absent these actions, the jury might have decided differently or might have given more weight to some aspect. The record is void of any indication that absent these alleged errors, there might have been a different result.

Even if these isolated actions by defense counsel had been error or tactical choices that did not work out, it would not preclude his assistance from being effective. Mistakes do not constitute grounds for appeal unless they prejudice defendant's case. The record contains no indication that the jury was influenced by any of these instances.

Fourth, appellant also appears to complain of defense counsel's failure to object to evidence and instructions (Points VII, IX, X and XII), but they are not specifically

alleged as instances of error. Again, the appellant has failed to establish that if this failure were error, the motions would not have been futile if made. Heinlin v. Smith, supra.

An examination of the record discloses that defense counsel certainly met the required standard of giving reasonably effective assistance. He was active and involved in the case conducting vigorous cross-examination, calling witnesses, and pursuing all aspects of the case. After the trial, Judge Gould concluded that "defendant had the effective assistance of counsel" (R. 639). The record does not support any other conclusion. There is no indication of any harm, bias, or prejudice as a result of defense counsel's work.

Appellant has failed to establish any of the necessary elements to prove ineffective assistance of counsel. Examination of each allegation will demonstrate that they are unfounded.

In light of the evidence of guilt presented by the State at trial, it is clear that even if appellant had been given better representation, there is no likelihood that there would have been a different result at the trial. See State v. Gray, supra. In the absence of such a showing, appellant has failed to establish that he was prejudiced in any way by counsel's alleged ineffectiveness. He has failed to sustain the burden of showing that he was not represented by a competent member of the Bar, willing to represent the interests of his client and raise any defenses which were ethically

available. The record indicates to the contrary. Thus, under the current standard in Utah, appellant was not denied his right to the effective assistance of counsel and his conviction and sentence should be upheld.

## POINT II

THE CHALLENGE FOR CAUSE OF JURORS  
HUNTER AND WIDDISON WAS PROPERLY  
DENIED.

The failure to excuse a juror for cause and thus compel a party to exercise a peremptory challenge to remove the juror has been held to be prejudicial. Crawford v. Manning, Utah, 542 P.2d 1091 (1975); State v. Moore, Utah, 562 P.2d 629 (1977); Jenkins v. Parrish, Utah Case No. 15905, March 13, 1981.

In this case, only juror Hunter was eliminated with a peremptory challenge. Defense counsel did not feel that juror Widdison exhibited bias that would prejudice his case and he used his peremptory challenges for other jurors. By failing to eliminate juror Widdison with a peremptory challenge, defendant failed to suffer any harm. It was defense counsel's choice to retain Widdison so the defense may not now, on appeal, complain that the juror exhibited prejudicial bias. This was a tactical choice by defense counsel, not to be second-guessed by other attorneys on appeal.

Thus, the appellant can only complain of the alleged bias of juror Hunter. Respondent submits that Hunter did not exhibit sufficient bias to warrant removal for cause.

A juror may be challenged for cause if he or she exhibits "actual bias." The statute defines actual bias as "the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality.". Utah Code Ann., § 77-30-18(2) (Supp. 1981).

In State v. Bailey, Utah, 605 P.2d 765 (1980), this court applied the following test for impartiality:

Light impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him.

605 P.2d at 767.

Examples of the strong and deep impressions which indicate an actual bias include Crawford v. Manning, Utah, 542 P.2d 1091 (1975), where the prospective juror stated she had "strong feelings," and Jenkins v. Parrish, Utah Case No. 15905, March 13, 1981, where a juror indicated that because of her background she would place greater credence in a doctor's testimony simply because of his status as a doctor.

Respondent asserts that there were no such "strong feelings" evident that would indicate actual bias on the part of juror Hunter. When read in context, her comment that it might be better if she didn't hear the case because her son is a school principal (T. 11), is a question to the court as to

whether she should be disqualified. Her comment was volunteered at the beginning of voir dire, in response to a question whether anyone personally knew either of the attorneys in the case. Her comment does not indicate bias or strong feelings that would close her mind to any testimony. Her intent was clarified when she later said she preferred not to hear the case (T. 31).

Later, when asked if she had formed an opinion in the case, she responded that she did not feel that there should be any question involved about teacher propriety (T. 29). She indicated only that there shouldn't be any question and that such questions should be resolved. She had not yet made up her mind. If there was any bias, it could reasonably go either way based on this comment. She could just as easily have been inclined to absolve defendant of any guilt.

Again, with respect to the juror's acquaintance with one of the State's witnesses, no strong feelings showed through. When asked if she would "accord him the same tests that you would that of another witness as to accuracy and truthfulness and things of that nature," she appears to have misunderstood whether she should believe the witness. Her answer was: My acquaintance is casual. I would believe what he said, yes." The court clarified its question by asking: "But would you subject him to the same scrutiny as you would another witness?" Juror Hunter responded, "probably." In addition, that witness's testimony was not crucial. It went only to the weather on the day of the crime and was

corroborated by other witnesses. Thus, even if she would have been inclined to believe his testimony, that alone would not have been damaging. These statements went to demonstrating her relationships, not to evidencing actual bias. She did not indicate any inability to "try this case based on the law and the evidence, and not be influenced by any outside influences" when asked by the court (T. 31).

In State v. Bailey, *supra*, this court recognized that there are light impressions which a juror may have which still leave the mind open to a fair consideration of the facts. These "constitute no sufficient objection to a juror." 605 P.2d at 767 (emphasis added). The United States Supreme Court has indicated that such light impressions should not disqualify jurors. In Irvin v. Dowd, 366 U.S. 717 (1961). That Court stated:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

366 U.S. at 723 (emphasis added).

These standards must control here. No one can be expected to have mindless nonperceptions and nonbiases when summoned for jury duty. If serious biases exist, they must meet the statutory requirements outlined above before a judge must remove a prospective juror for cause. These requirements have not been met in the present case. There were no "strong

and deep impressions" exhibited. The prospective juror had "light impressions," but they cannot be grounds for removal unless actual bias is shown. Here the juror indicated an ability to lay aside those impressions and "render a verdict based on the evidence presented in court." Irvin v. Dowd, supra. The voir dire did not evoke any "strong emotional response" that requires a challenge for cause. State v. Brooks, Utah Case No. 16729, May 28,, 1981 at page 9.

Respondent further submits that the case of State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973), is still binding law and has not been overruled. The Bautista test, as set out in that case, states:

No claim is made by the defendants that by reason of the court's failure to excuse the prospective juror they had challenged they were compelled to use the preemptory challenge they might have used to strike another prospective juror's name from the list. Defendants failed to show that any prejudice resulted to them by reason of the court's failure to grant their challenge for cause.

514 P.2d at 532 (emphasis added).

The Utah Rules of Criminal Procedure similarly seem to require "prejudice to the substantial rights of the party challenging . . . ." before a challenge for cause will be allowed. Rule 18(e)(14).

In State v. Durand, the court noted:

. . . our major concern in this, as in any case, is with the lawfulness and justice of a conviction; and notwithstanding a showing of minor impropriety or irregularity, there should be no reversal of a conviction unless it appears that party has been prejudiced in

that in the absence of such impropriety there is a reasonable likelihood that the verdict would have been different.

Utah, 569 P.2d 1107, 1109 (1977).

Appellant has shown no such prejudice in this case. There is no indication that defense counsel was thereby prevented from exercising a peremptory challenge to eliminate another juror who could have been prejudicial to the defense case. There is no evidence that any other juror had bias, influence on other jurors or prejudice which harmed defendant. There has also been no showing that there was any likelihood that the verdict would have been different. In the absence of such a showing, defendant has failed to suffer harm.

Even if defense counsel had also exercised a peremptory challenge for juror Widdison, there would be no ground for reversal. He indicated only his reading of the newspapers (T. 29), and did not exhibit a mind that would be prevented from acting impartially. There is also no indication of any harm or prejudice from his having served as a jury member. Appellant has shown no instances of his bias or prejudice or of any influence on the outcome of the trial. There is no indication that Widdison actually did hurry up the trial or the decision based on his vacation. In short, it seems clear that defense counsel did not exercise a peremptory challenge for juror Widdison because there was no reason to exclude him from the jury.

An examination of the entire voir dire proceeding demonstrates that there was insufficient basis on which to

challenge the jurors for cause. The court recognized this by refusing the challenge saying there was insufficient cause (T. 33). This was repeated in the judge's denial of a new trial (R. 639).

The trial judge is given a great deal of discretion in conducting voir dire. In the case of Ristaino v. Ross, 424 U.S. 589 (1975), the United States Supreme Court held that:

Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion . . . . This is so because the determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.

424 U.S. 589, 594. It is clear from the record that Judge Gould did not abuse this discretion in determining the impartiality of the jurors selected to hear this case. Further, as to the denial of appellant's challenge for cause of two jurors, it is widely recognized that:

There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, than in ruling on challenges for cause in the empaneling of a jury.

United States v. Ploof, 464 F.2d 116, 118 n.4 (2d Cir. 1972). See also United States v. Gullian, 575 F.2d 26 (1st Cir. 1978), and United States v. Freeman, 514 F.2d 171, 174 (8th Cir. 1975).

The record contains no showing of actual bias. Such a finding must be made in the discretion of the trial judge and is not to be reversed absent a showing of an abuse of discretion. Bambrough v. Bethers, Utah 552 P.2d 1286, 1290 (1976).

It is difficult, if not impossible, to determine from the record, that a juror's intent was different than what the trial judge determined. Since appellant has failed to demonstrate that the trial judge was wrong or that he abused his discretion, the trial judge's determination must stand.

### POINT III

VIEWS IN ITS ENTIRETY, THE VOIR  
DIRE EXAMINATION WAS ADEQUATE TO  
ASSURE APPELLANT OF A FAIR AND  
IMPARTIAL JURY TRIAL.

If the voir dire was inadequate, it is the fault of defense counsel. Thus, this would be a complaint of ineffective assistance of counsel, not of inadequate voir dire. Appellant has made no indication that the trial court prevented adequate voir dire, only that it was not realized.

In Utah State Road Commission v. Marriott, 21 Utah 2d 238, 444 P.2d 57 (1968). This court noted that "there is traditionally given to the trial judge considerable latitude of discretion as to manner and form in which he will conduct the voir dire examination to determine the qualifications of jurors . . . ." 444 P.2d at 58 (footnote omitted). See Rule 47(a) U.R.C.P. Unsubstantial errors will be disregarded. Rule 61, U.R.C.P. Other states have emphasized the discretion of the trial court in determining the extent of voir dire. State v. Rose, 589 P.2d 5, 121 Ariz. 131 (1978); Raullerson v. People, 404 P.2d 149, 157 Colo. 462 (1965); State v. Pontier, 518 P.2d 969, 95 Idaho 707 (1974). See 50 C.J.S. Juries, §§ 275, et seq. (1947).

An examination of the record indicates that the trial court made every effort to discover any areas of possible bias or prejudice of the jury members that would prevent a fair and impartial verdict. Most importantly, the court inquired of every juror:

. . . And these counsel are now entitled to know whether or not any of you have any mental reservations about whether or not you can accept an oath of office and try this case based on the law and the evidence, and not be influenced by any outside influences. (T.31).

The areas of potential bias and competency cited by appellant were explored by the court and defense counsel. Appellant incorrectly refers to Ms. Austin as juror Austin. She was not selected as a juror and did not hear the case. Prospective juror Austin had not been assaulted herself, but her teenaged daughter had had some problems with her step-father. These comments were made not to indicate bias, but so that Ms. Austin could disclose everything. the record indicates that she made every attempt to be fair and open and that her experiences would have no influence in this case. She stated: "I would like to be a juror, and if you feel that I am still all right to be a juror, that's fine with me" (T. 26, 27). She offered to be excused if the judge felt she would be biased. When he explained that the purpose of the case was to determine whether or not an assault took place and whether the defendant had done it, she said she would have "no problem with that." She indicated that the family situation had nothing to do with her and occurred years ago. She indicated

that she could base her decision on the law and the evidence and put aside her personal feelings. She said: "I just felt that you needed to know that" (T. 26, 27, 31, 32). Defense counsel did not feel a need for any further examination of juror Austin and declined to ask any more questions of her (T. 32). Ms. Austin did not even hear the case (R. 583).

Juror Stockwell had a brother-in-law on the Highway Patrol. There is no indication that he had any contacts with his brother-in-law or that it might have had any influence on the case. The Highway Patrol had no involvement in this case. His daughter attended Weber State occasionally, but she was not attending Weber that particular quarter (T. 22). While the assault occurred at Weber State and was investigated by its police department, there is no hint as to why juror Stockwell's daughter's prior attendance at Weber was prejudice to the appellant. The record contains no indication of how this might have resulted in bias or prejudice. Absent that showing, there is no reason to now complain about the juror.

Juror Wood lived in the same neighborhood as Mr. Glasmann, the prosecutor. The juror indicated that he did not go out with him socially, did not visit in his home, and that the prosecutor did not come to his home. He didn't think that the prosecutor's participation would make any difference to him. Juror Wood stated he had no problem with that (T. 10). Defense counsel evidently felt no need to pursue that any further. Juror Wood knew of three of the potential State's

witnesses. The court followed that up by asking if he would scrutinize them equally with the other witnesses without giving them any advantage. Juror Wood responded, "I don't think there would be any advantage your Honor" (T. 14). Mr. Wood also knew one of the defense witnesses, but that acquaintance is not complained of.

Defense counsel did not pursue examination of these relationships, either because he felt no need to do so or because he felt a possible advantage in retaining juror Wood.

There is also no indication that juror Poulter's hearing problem prejudiced appellant. She gave notice of her impairment so that defense counsel and others would know they would have to speak up. Her apparent failure to hear one question, as alleged by appellant was not repeated in the course of the trial and thus there is no indication that she "could not hear the proceedings." Appellant's Brief, at p. 15.

Defense counsel at trial evidently felt no need to pursue these topics further. The record shows no indication of any biases left unexamined or instances where defense counsel ignored possible bias. He likely felt that the possibility of antagonizing the jury members, or of revealing information that might be prejudicial to his client's case, did not justify any further examination of these areas.

The purpose of voir dire is to ascertain whether there are grounds to challenge for bias and to permit the

intelligent exercise of peremptory challenges. Palmer v. State, Ore., 532 P.2d 85 (1975); Jones v. State, Ore., 508 P.2d 280 (1973); State v. Wilson, 555 P.2d 1375, 16 Wash. App. 348 (1976); Lopez v. State, Wyo., 544 P.2d 855 (1976). Defense counsel fulfilled this purpose. Possible grounds for bias were ascertained as evidenced by the attempted challenge for cause (T. 32). The record also indicates that defense counsel was able to intelligently exercise peremptory challenges. The trial court made every effort to discover possible bias and defense counsel was able to adequately explore those possible biases. The purposes of voir dire were fully met in this case.

In addition, appellant has pointed to no actual prejudice that resulted because of the manner in which the voir dire was conducted. Defense counsel did not exercise peremptory challenges for these jurors now complained of. The record would seem to indicate, although it is not clear, that all the peremptory challenges were not used, and that appellant was not prevented from removing persons he thought would be disadvantageous. If defense counsel felt no need to exercise a peremptory challenge or to even conduct further voir dire examination in those areas, appellant may not, on appeal, claim that the voir dire was inadequate. Also, juror Austin was not even selected to hear the case. Consequently, she could not have harmed appellant. There is also no showing of harm by the inclusion of jurors Wood, Stockwell and Poulter.

The court exercised its discretion in the voir dire and concluded it was adequate. To allege otherwise requires appellant to show an abuse of discretion of the court -- which has not been even alleged in this case. The record shows that the areas of possible bias were adequately covered by the court and by defense counsel. The purposes of the voir dire were fully realized and appellant has suffered no harm as a result of the voir dire.

#### POINT IV

#### DEFENSE COUNSEL'S OPENING STATEMENT WAS WITHIN THE BOUNDS OF PROPER TRIAL TACTICS.

Appellant alleges that part of defense counsel's opening statement was prejudicial to Mr. Malmrose. Respondent asserts that this statement was part of defense counsel's trial strategy. The record clearly shows his intent in making the statement. Defense counsel stated: "The only reason that Mr. Malmrose is before you is through a series of coincidences." He then explained the coincidences and continued: "And because of these series of coincidences here -- he is not here because there is any direct evidence other than the witness" (T 45).

This statement was part of trial strategy not intended to prejudice appellant. It was done to make defendant's arrest seem only a product of circumstances rather than because of his guilt of the crime. The fact his car had been in that area did not imply involvement in other sexual

offenses. The owners of cars parked in that area may have had legitimate reasons for being there. The statement was not made to risk associating the defendant with any other offenses. In fact, there was no mention, at trial, of appellant's prior arrests, and no indication that the jury knew of them as a result of defense counsel's statement. The statement was intended, and indeed appears, to be more exculpatory than inculpatory.

As the statement was made by defense counsel, the defendant may not now complain of it on appeal. His only complaint could be that it was ineffective assistance of counsel. However, this statement seems to be a clear example of the trial strategy used by the defense counsel.

In addition, the opening statement is not considered evidence. The jury was instructed not to consider it as such (T. 35 R. 583, R. 596). Consequently, the jury members, even if they thought the statement was a reference to other criminal conduct, would not have considered it as evidence of any such conduct.

The case of United States v. Bosch, 584 F.2d 113 (1st Cir. 1978), relied on by appellant is not applicable here. Here, unlike Bosch, no prior convictions were disclosed and there is no indication that the jury knew of, or considered, appellant's prior arrests.

Even if the statement were held to have been a reference to prior unlawful conduct, it did not deprive appellant

of the effective assistance of counsel. In State v. Pierren, Utah, 583 P.2d 69 (1978), in a prosecution for distribution of pornography, closing remarks made by defense counsel admitting that the material was offensive and lacking in artistic value did not deprive the defendants of effective assistance of counsel since it was part of defense counsel's trial strategy. Thus, the opening statement by defense counsel was not inappropriate here. The statement was not prejudicial and did not disclose involvement with any other crimes. It was a tactical choice of defense counsel designed for a definite purpose. The statement was not considered as evidence by the jury. Also, the statement does not constitute ineffective assistance of counsel. Finally, appellant has shown no harm resulting from the statement. There is no indication that the statement was understood or considered, or that it influenced the jury's decision. This statement gives no reason for disturbing the judgment of the trial court.

#### POINT V

THE TRIAL COURT PROPERLY REFUSED TO  
ADMIT EXPERT TESTIMONY AS TO THE  
RELIABILITY OF EYEWITNESS IDENTIFI-  
CATION.

Appellant contends that the trial court erred in refusing to admit the expert testimony of Dr. David Dodd. This court has consistently recognized the discretion of the trial court in deciding whether to allow such expert testimony. This precise question was answered in State v. Griffin, Utah Case No. 16388, February 20, 1981, where this court said:

Defendants' assignment of error denying their right to compel the attendance of witnesses relates to the trial court's refusal of an offer to call Dr. Marigold Lintin, a psychologist, as an expert witness to testify about the credibility of eye-witness identification. There should be no question but that an accused has the right to have witnesses testify in his behalf. But this is usually and fairly interpreted as applying to witnesses who have knowledge of the facts about the crime alleged or of facts or circumstances which have a direct bearing thereon.

The calling of expert witnesses to testify as to matters which would apply to any crime or any trial does not in the true sense offer testimony of a witness who has knowledge of the facts of the case. Rather it would be in the nature of a lecture to the jury as to how they should judge the evidence. The subject matter of the proffered testimony of Dr. Lintin would be to evaluate the credibility of the state's witnesses in their identification of the defendants. The question of credibility of the testimony as to the identification of the defendants was for the jury to determine. Respective counsel were at liberty to argue as to the credibility and sufficiency of the evidence. There is always the possibility of calling expert witnesses to testify to various matters relating to the trial. This could include the merits of the jury system itself, or any of numerous aspects thereof.

Defendants' counsel himself took the position which we regard as correct: that whether expert testimony should be allowed as to the merits of eye-witness identification is within the discretion of the trial court.

Opinion pp. 3-4 (footnotes omitted). See United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Collins, 395 F. Supp. 629 (M.D. 1975).

This court has held, as did the trial court, that such testimony was within the ordinary intelligence of jurors. As such, the testimony may be properly excluded.

Appellant asserts that the judge did not believe he had the discretion to allow the testimony. Respondent submits that the judge knew that he had the discretion and exercised that discretion in refusing to allow the testimony. He stated: ". . . if this type of testimony is to be allowed in a trial, it seems to me that we could reach the point then where we would be forever hearing experts testify about the reliability of testimony of other witnesses" (T. 169). In his Memorandum Decision denying the motion for a new trial, Judge Gould reiterated the feeling that: "The calling of an 'expert' witness such as Dr. Dodd only amounts to a lecture to the jury about how they should perform their duties" (R. 639). The jury already knew that it must decide whether to believe the witness and how much weight her testimony should be accorded (R. 598).

Appellant further asserts that the court abused its discretion in refusing to allow that testimony. To prove an abuse of discretion, appellant must establish that no reasonable person can take the view adopted by the trial court. State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (1978); Jankelson v. Cisel, 3 Wash. App. 139, 473 P.2d 202 (1970).

The record simply cannot support such a claim of abuse of discretion. The trial judge did not feel the testimony would be helpful (R. 639). He indicated that he was "not

personally satisfied that the opinions of Dr. Dodd are of sufficient soundness for me to allow them in this trial" (T. 169). At the suppression hearing, a different judge noted that the witness "pursue[d] the attitude of an advocate . . . ." He continued: "I think he has totally abandoned his position as a scientist in this case and is nothing but a person from another discipline hired to argue a case" (T. 108).

As support for appellant's claim, he states that Judge Wahlquist at the suppression hearing believed that the witness' characteristics enhanced her capacity to perceive and recall. The finding of fact complained of by appellant is not contrary to the proffered expert testimony. There is no evidence that Judge Wahlquist believed that the witness had a superior capability to recall and there is no indication that other jurors believed the same way. In addition, the finding of fact was not made available to the jury and would have had no influence on them. Even if the jury believed that the witness's intelligence made her more capable of later identifying appellant -- such a belief is not contrary to Dr. Dodd's proffered testimony. He stated that intelligence does correlate with accuracy (T. 158).

Even if such testimony was erroneously excluded, Rule 5, U.R.E. requires a showing that the excluded evidence would probably have had a substantial influence in bring about a different verdict or finding. In the instant case, there has been no such showing.

The proffered expert testimony was properly excluded by the trial judge exercising his discretion. The record contains no support for a claim of abuse of discretion and appellant failed to show that no reasonable person could adopt such a view. The finding of fact was not contrary to the testimony and did not give rise to a need for such testimony. Even if Dr. Dodd's testimony was erroneously excluded, appellant has made no showing of harm or that its inclusion would have had a substantial effect on the verdict.

#### POINT VI

THE COMPLAINING WITNESS'S IDENTIFICATIONS OF DEFENDANT WERE FREE FROM TAINT AND WERE PROPERLY ADMITTED.

Appellant asserts that the witness's identifications of appellant from the photographs, at trial, and at the hearings were tainted and should have been suppressed.

It should first be noted that defense counsel failed to object to any of the identifications at the trial (T. 72, 82-84). Rule 4, U.R.E., states that absent evidence that timely objections were made at trial, objections to admission of evidence should not be considered on appeal. Thus, this allegation of error is not properly before this court. State v. Wilson, Utah, 608 P.2d 1237 (1980).

Should this court decide to consider the merits of this allegation, respondent asserts that the trial court did not err in admitting the identifications.

Appellant has not shown that the identification was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he [the defendant] was denied due process of law." State v. Jackson, 112 Ariz. 149, 539 P.2d 906, 911 (1975), quoting Stoval v. Denno, 388 U.S. 293, 302 (1967). By failing to show that the identifications were unnecessarily suggestive, appellant has no grounds to seek reversal of the trial court's judgment.

While caution must be observed to see that injustice does not result, "peace officers should not be unduly hampered in legitimate attempts to investigate crimes and to seek out and identify those who have committed them." State v. Perry, 27 Utah 2d 48, 492 P.2d 1349 (1972). While some of the police efforts in this case may have been less than perfect, the circumstances leading up to the identifications were fair, reasonable and impartial. State v. Jenkins, Utah 523 P.2d 1232 (1974).

The test to be used in evaluating the admissibility of identifications was set down in Neil v. Biggers, 409 U.S. 188 (1972). See also Manson v. Braethwaite, 432 U.S. 98 (1977). There, five factors were set down to evaluate the reliability of the identification. The identification must be examined considering the "totality of the circumstances." Neil v. Biggers, 409 U.S. at 199.

Applying these factors to the present case, it is clear that the identifications were not tainted:

1. Opportunity to view the criminal. The witness testified that appellant was at very close proximity for seven and a half or eight minutes (T. 72). The attack took place in the daytime with appellant being very close. This was certainly sufficient opportunity to view appellant. In State v. Wilson, Utah, 608 P.2d 1237 (1980), a similar time period was held to be sufficient.

2. Degree of attention. The victim watched appellant's face and his "whole being" (T. 70). He was very close to her during this period, and there was constant physical contact between the two. There was nothing in the area to distract her attention. She does not know what color his eyes were, but regularly does not observe the color of eyes (T. 96, 97). Considering the nature of the crime, the witness was able to pay scrupulous attention to the appellant and many details about him. The judge noted that she was alert and there were no distracting forces (T. 705, 706). The trial judge found that there was good eyewitness identification (R. 639).

3. The accuracy of the description. Even though the witness was struck, there was no evidence of any unconsciousness. She gave a description to police within minutes of her attack. That description was complete and accurate. The only "discrepancies" complained of by appellant are matters of semantics and the words used in the description. The witness gave one description to police at that time, with the help of

the police. She wrote out another one, the next day, on her own. The description included his height, his build, characteristics of his hair, facial features, age, and clothing.

She testified that her assailant was six feet, three inches, to six feet, four inches tall. Appellant is actually six feet, one inch tall, without any shoes (T. 364). On that day, he had shoes on and was standing slightly higher than her on a hill. The two-inch discrepancy is certainly understandable in view of appellant's shoes, his standing on a hill and the nature of approximations. She testified that he was lean, in good shape and appeared to be outdoors a lot. Appellant is a school gym teacher. He is outdoors a lot and is lean and in good shape as is evident in his pictures (T. 341, 344). She described his hair as having body, parted on the right side (T. 77). At trial, she indicated that this was mostly due to his leaning towards her and his hair fell forward (T. 76, 80). Appellant admitted that his hair gets long enough to fall over his ears (T. 364). That would also be long enough for it to fall forward while leaning over.

She also testified that he had lines on his face and that the skin fell forward when he leaned forward (T. 93). At trial, appellant leaned forward so the jury could see that his skin did fall forward revealing lines on his face (T. 364, 365, 512, 516). She described her assailant as being 45 to 50 years old. Appellant is 51. She described his apparel as being blue sweat pants. At least one witness recalled seeing him in blue sweat pants (T. 261).

The description given by the witness describes the appellant well. The discrepancies cited by appellant are due to the wording involved and the difficulty in verbalizing a description. The witness stated that she used the officer's words in mentioning the acne (T. 77).

4. Level of certainty of witness. The witness identified appellant in court and said there was no doubt in her mind (T. 72). While she examined many photographs, she never made an identification until locating appellant's picture. She had indicated several photos that looked like the assailant but the only actual identification was of appellant.

5. Length of time between the crime and confrontation. The witness identified appellant on July 1, 1981, two and a half months after the assault. She then made later identifications at the lineup, suppression hearing preliminary hearing and in court.

Considering the totality of the circumstances, the identification certainly satisfies the five criteria of Neil v. Biggers, supra.

Appellant argues that irrespective of reliability, the identifications were tainted and should not have been admitted. Respondent submits that the identifications were all made from the witness's observations independent of any suggestive influences. This issue was raised at the suppression hearing and ruled on there.

While there is some dispute as to when the witness first identified appellant's picture, such uncertainty is not a misidentification, but is a failure to recall when the photo lineup occurred. Any discrepancies such as this go only to the credibility of the testimony -- not to its competency. State v. Long, 29 Utah 2d 177 506 P.2d 1269 (1973). State v. Gosby, 85 Wash. 2d 758, 539 P.2d 680 (1975). Here the discrepancies noted by appellant only affect credibility which has already been determined by the jury.

The fact that the exact composition of a group of photographs shown to the witness could not be recalled does not prevent a determination as to suggestiveness and any resulting identification may still be used. State v. Volberding, 30 Utah 2d 257, 516 P.2d 359 (1973). In Volberding, as here, the pictures used had been returned to police files. There was no evidence of negligence nor was there a showing of any intentional suppression of evidence in order to undermine the rights of the appellant. In Volberding, this court ruled there was no taint. The same rule should apply in this case.

The police officers did make some unfortunate comments regarding persons whose pictures were shown to the witness. Respondent avers that those comments had no influence on the witness and were not sufficient to taint the identifications.

Even after the comments of the police officers, the witness refused to make a positive identification, asking instead for a more recent photograph of one, to assure that he

was the assailant. The witness is intelligent, with a Masters degree in Criminal Justice, and is not likely to be influenced by such comments. Comments similar to those made by the police officers will taint an identification only if they are so "suggestive or persuasive that there is a reasonable likelihood that identification was not a genuine product of knowledge and recollection of the witness, but was something so distorted or tainted that defendant should not be identified because of fairness." State v. Perry, 27 Utah 2d 48, 492 P.2d 1349, 1352 (1972).

Examination of the identifications in the case reveals no such showing here. There is no reasonable likelihood of an identification that was a product of the comments. In Manson v. Braethwaite, supra, the United States Supreme Court stated that due process does not compel the exclusion of pretrial identification evidence obtained by a suggestive and unnecessary police identification procedure so long as, under the totality of the circumstances, the identification is reliable. 432 U.S. at 114. Here none of the photos, or men in the lineup were singled out by the police. Their comments did not go towards the identification of any one person. The unfortunate comments were directed not at appellant's photograph, but at all the photos. Thus, they did not taint the identification of appellant. In State v. Wilson, Utah 608 P.2d 1237 (1980, this court, commenting on a similar situation said: ". . . even if the process helped in identifying defendant, it would

not be impermissible unless it could be shown that some external, suggestive influence tainted the identification." 608 P.2d at 1239.

The yearbook photograph was not suggestive. It was shown to the witness only after she asked for a more recent photograph of one of the men. It was not shown to her as part of a photo lineup and was not suggestive because of its use for a limited purpose.

It should be noted that the identification at the lineup was suppressed -- not because of any taint or suggestiveness, but because police officers failed to record the proceeding as required by Utah Code Ann., § 77-8-4 (Supp. 1981) (T. 707).

There was no taint in the pretrial identifications. Judge Wahlquist ruled that the photos were look-alikes as required (T. 705). He ruled that they were within the standards set down by the United States Supreme Court and were sufficient (T. 706). He also ruled that the later identification at the preliminary hearing was not a product of the lineup, but a product of the look-alike characteristics (T. 707), and the confrontation at the scene of the crime.

Since the lineup was suppressed because of the failure to make a record and not because of any taint, there was no taint which carried over to the in-court identification. The encounter with the defendant at the time of the crime provided an adequate, independent source on which the witness could

base the in-court identification. In State v. Harris, 26 Utah 2d 365, 489 P.2d 1008 (1971), this court ruled such an in-court identification admissible when the record showed, as here, that the identification was based on observations from a source independent of the lineup. Even if there was taint from the lineup or photo identifications, that taint was overcome. See Wong Sun v. United States, 371 U.S. 471 (1963).

United States v. Wade, relied on by appellant, is inapposite. The Wade decision only requires that the state prove the lack of taint of an in-court identification if the illegal lineup was due to the lack of counsel at the lineup -- not the failure to keep a record. State v. Peyton, 493 P.2d 1393 (Ore. App. 1972). Here the appellant was not arrested until after the lineup and he had no counsel to represent him at the lineup.

Finally, respondent submits that even if there was some "suggestiveness," there was no harm from that suggestiveness. The photographic identifications were harmless error if error at all. The issue is whether the identification appreciably affects the jury verdict; what the error might have meant to the jury. Love v. State, Alaska, 457 P.2d 622 (1969). Here there is sufficient evidence to sustain the conviction without the photographic or pretrial identifications.

Appellant failed to object at trial to the identifications by the witness, and may not now complain on appeal. The

identifications were not unnecessarily suggestive and conducive to irreparable misidentification. They were reliable and meet all tests required to establish freedom from taint. There were no errors that justify reversal.

#### POINT VII

THE LABORATORY REPORT WRITTEN BY  
JAMES GASKILL WAS PROPERLY ADMITTED  
INTO EVIDENCE.

Respondent submits that the written report in dispute was not objected to at trial and was properly admitted. Defense counsel failed to object to the introduction of this report into evidence. In fact, defense counsel affirmatively stated, after examination of the report, that he had no objection to its introduction (T. 150). Even hearsay is competent where no objection is made. Rule 4, U.R.E.

The reason that defense counsel had no objection is because the report was properly admissible into evidence. The report merely stated in writing the facts testified to by Mr. Gaskill. The report would be admissible under Rule 63(13), U.R.E. as a business records entry. This report was made during the laboratory examination as part of the normal procedure, and its circumstances indicate its trustworthiness.

The failure to object appeared to be a tactical choice of the defense attorney. He was offered an opportunity to object. He had previously stipulated to Mr. Gaskill's qualifications as an expert witness and apparently did not feel that making the futile objection would be beneficial.

However, even if the report was erroneously admitted into evidence, it will be treated as harmless error absent a showing that it had substantial influence in bringing about the verdict. Rule 4, U.R.E.

In State v. Echevarrieta, Utah 621 P.2d 709 (1980), this court reiterated the following rule:

That the trial court has considerable discretion as to the admissibility of evidence and that the erroneous admission of evidence, standing alone, is insufficient to set aside a verdict unless it "had a substantial influence in bringing about the verdict," see Bambrough v. Bethers, Utah, 552 P.2d 1286 (1976).

621 P.2d at 713 n.11.

Appellant has made no showing that the admission of this evidence, even if erroneous, had a substantial influence on the verdict. this report was not, as appellant claims, the only physical evidence that had any connection to the defendant. Other physical evidence which was also available to the jury included photographs, the police report, the witness's own written report, the cotton swab and other items.

There was no objection at trial and there is no ground for objection at this stage of appellant's appeal.

#### POINT VIII

THE QUESTION BY THE PROSECUTOR AS TO WHETHER DEFENDANT TOLD POLICE HE WAS A VOYEUR WAS NOT A REFERENCE TO PRIOR CRIMINAL MISCONDUCT AND THE COURT'S REFUSAL TO GIVE A CAUTIONARY INSTRUCTION WAS NOT ERROR.

Appellant relies heavily on, and quotes extensively from, United States v. Diaz, 585 F.2d 116 (5th Cir. 1978).

Respondent asserts that such reliance is misplaced and the case is inapplicable. Diaz deals with reference to a prior conviction of the defendant for the same offense. Information about that prior conviction was elicited by his own defense counsel. The prosecutor questioned the defendant further concerning the convictions for the limited purpose of showing intent and to attack defendant's character which was put in issue. Neither counsel requested a limiting instruction by the court so the issue on appeal was whether in such a case, the trial judge should give such a limiting instruction, sua sponte. None of these factors are present in the case at bar. Appellant complains tha the judge should have granted defense counsel's motion for a cautionary instruction.

In State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973), this court stated that counsel are to be afforded wide latitude in their arguments to the jury. The Valdez court also set forth the test to determine whether a given remark is prejudicial:

The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks. The determination of whether the improper remarks have influenced a verdict is within the sound discretion of the trial court on motion for a new trial. If there be no abuse of this discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment.

Id. at 426 (emphasis added).

There is no indication that the jurors were influenced by the prosecutor's comment. The lack of prejudice to appellant is demonstrated by the trial judge's refusal to grant a new trial. He stated in his Memorandum Decision that at that point when the statement was made: "The jury had already been instructed that counsel's statements were not evidence. To have granted a cautionary admonition would only have drawn further attention thereto. Defendant's counsel did not want a mistrial order made based on that question" (R. 639).

It is important to note that it is the responsibility of the trial court to determine if improper arguments were prejudicial or harmless. The Supreme Court has reiterated continuously that they will give great deference to the judgment of the trial court. In State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974), the prosecutor asked a question which was clearly objectionable. Defense counsel moved for a mistrial. The trial court ruled that the prosecutor's conduct was not so prejudicial as to violate the defendant's right to a fair trial, and denied the motion. The defendant appealed. After commenting that, "[the action of the prosecutor] is certainly not to be commended," the Utah Supreme Court noted that the real issue on appeal was whether to sustain the judgment of the trial court. Before affirming the conviction, the court said:

Due to his advantaged position and consistent with his responsibilities as the authority in charge of the trial, the inquiry is necessarily addressed to the sound discretion of the trial court . . . . Inasmuch as

this is his primary responsibility, when he has given due consideration and ruled upon the matter, this court on review should not upset his ruling unless it clearly appears that he has abused his discretion.

30 Utah 2d 367, 369-70.

Appellant has not alleged, nor shown, that the trial court abused its discretion in refusing to grant the cautionary instruction and in refusing to grant a new trial.

The prosecutor stated that his intent was not to get into defendant's past criminal record. He only wanted to discuss defendant's character, which was put at issue when the defendant took the stand in his own defense. He did not intend to mention the prior convictions (T. 358). The prosecutor certainly did not use this statement as evidence of defendant's guilt in this case.

The trial court, exercising its discretion, refused a cautionary instruction. The court did not feel there was error sufficient to warrant a new trial. Furthermore, the jury was cautioned in its instructions to not consider such statements as evidence of fact (R. 599). Respondent asserts that the error was not prejudicial and does not warrant a new trial.

#### POINT IX

THE PROSECUTION'S USE OF WITNESSES  
TO REBUT DEFENDANT'S ALIBI WAS  
PROPER.

Utah Code Ann., § 77-14-2 (Supp. 1981), provides:

Alibi--Notice requirements--Witness lists.--(1) A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten days before trial or at such other time as the court may allow file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi. The notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi. The prosecuting attorney, not more than five days after receipt of the list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him, of the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence.

(2) The defendant and prosecuting attorney shall be under a continuing duty to disclose the names and addresses of additional witnesses which come to the attention of either party after filing their alibi witness lists.

(3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However, the defendant may always testify on his own behalf concerning alibi.

(4) The court may, for good cause shown, waive the requirements of this section.

Defense counsel failed to disclose the names of all of the alibi witnesses before the ten-day period expired. He also failed to give notice under subsection two, which imposes a "continuing duty to disclose." Now appellant complains that the prosecution failed to give notice of witnesses to rebut the alibi.

Defense counsel did not object to the testimony of the prosecution's witnesses because the court had allowed him to

use a witness that had not been properly listed (T. 320-324). Since defense counsel failed to complain at trial, this issue was not preserved for purposes of this appeal. Furthermore, appellant cannot complain that the prosecution failed to comply with a statute that the appellant himself did not fully obey.

The trial court did not exclude the additional alibi witnesses and did not exclude the State's witnesses to rebut the alibi. The court did not specifically waive the requirements of this statute because it was not made an issue at the trial. Had it been made an issue, the court would likely have made the finding of "good cause" and waived the requirements of the statute (See T. 320-324).

Defense counsel justified his noncompliance with the statute because the prosecution had been on notice for almost four months that an alibi would be established (T. 322). This same reason justified the prosecution's failure to give notice of the rebuttal witnesses. Defense counsel knew they would be called, they were listed at trial as possible witnesses (T. 13), and then were later introduced. Defense counsel never objected to those witnesses because he had notice that they would be called.

Since the defense had made the weather a crucial element of the alibi, he could not have been surprised at the substance of the testimony of the witnesses. He certainly would have known the substance of Mark Eubank's testimony as a

rebuttal witness. Having known about these witnesses in advance, defense counsel had opportunity to talk to each of them prior to trial and he skillfully cross-examined each of them. In short, the purposes of the notice state were met even though the strict requirements were not followed by either side.

Even if this failure were to constitute error, it is harmless error, as the appellant did not suffer any prejudice resulting from the failure to strictly comply with the requirements of the statute. The trial judge specifically found that there was no harm because "trial counsel had actual knowledge well before the trial commenced as to who those witnesses were and how they would be used" (R. 640). Appellant claims he was prejudiced by the testimony of the witnesses, but there is no indication, and he has not shown, that the prejudice resulted from the failure to give notice in the required manner rather than from the testimony itself.

The prosecution's witnesses used to rebut defendant's alibi were properly allowed to testify and appellant was not prejudiced as a result.

#### POINT X

THE TESTIMONY OF THE STATE'S WITNESS, MARK EUBANK, WAS PROPERLY ADMITTED.

Appellant contends that the testimony of Mark Eubank was hearsay and therefore inadmissible.

It should first be observed that appellant has not met the requirement that in order to complain of the admission of evidence, there must be a clear and definite objection stating the grounds therefore. Stagmeyer v. Leatham Brothers, Inc., 20 Utah 2d 421, 439 P.2d 279 (1968); White v. Newman, 10 Utah 2d 62, 348 P.2d 343 (1960); U.R.E. Rule 4.

Even if there had been an objection made to Mark Eubank's reliance on other person's reports as a basis for his opinion, respondent contends that such testimony would still be competent under the circumstances.

Mark Eubank, the expert witness, has testified at many trials (T. 475). Defense counsel volunteered to stipulate to his expertise (T. 471). Now, however, appellant disputes the records relied on by Mr. Eubank in forming his opinion.

Respondent asserts that the records relied on were made in the regular course of business as required by Rule 63(13), Utah Rules of Evidence. The records included official government documents (T. 476), which were sent to Weatherbank, reports from State reporting stations (T. 478), and reports from the Intermountain Weather Network (T. 484). All of these records were made in the course of business of the different sources, on the day of the assault. These sources and method of preparation certainly indicate their trustworthiness. The reports are relied on by government agencies, weather reporters and a host of private users (T. 474). The documents were not made in the regular course of his business as appellant

points out, but they were prepared in the regular course of business of each particular entity which prepared them and then sent to Weatherbank.

Judge Gould stated that the testimony "was founded upon regular entries made in the course of the business known as 'Weather Bank' and are clearly admissible as an exception to the hearsay rule" (R. 640).

In addition, Mr. Eubank relied on information from his personal journal. Appellant relied on information contained in a journal for one of its witnesses, yet now contends that such a source is inadmissible for the State. Clearly, the testimony and the records used in that testimony are admissible under recognized exceptions to the hearsay rule.

Appellant claims that meaningful cross-examination and confrontation was impossible. Yet, appellant makes no showing of why. The record indicates that defense counsel cross-examined Mr. Eubank very forcefully.

The court itself is under no duty, as asserted by appellant, to enter its own objection to the introduction of evidence. Such a duty would arise only if the evidence was clearly inadmissible -- which is not the case here.

Defense counsel failed to object because the testimony was clearly admissible. That decision should not be reversed on appeal.

## POINT XI

THERE WAS NO PROSECUTORIAL MISCONDUCT IN THE EXAMINATION OF FLORENCE STOWE WHEN SHE WAS CALLED AS A REBUTTAL WITNESS.

The prosecution recalled Mrs. Stowe to the stand to determine the dates of journal entries that she had testified to earlier. Her journal entry mentioned a party on the day of the assault and that entry had helped her recall the day.

When she was recalled, the prosecution asked: "Does it reflect there in that journal? What date have you made that entry upon that you have referred to this party?" (The party on April 16th). Mrs. Stowe replied: "April the 26th." The previous journal entry had been March 30th (T. 470).

The purpose of this examination was to establish that the journal entry was made some ten days after the event she described. The prosecutor was not attempting to show that Mrs. Stowe was mistaken about the date, only that the entry was made later. Defense counsel declined to cross-examine her, apparently feeling that there was nothing to clarify. If any false impression was created, it should have been corrected by defense counsel.

In his Memorandum Decision, Judge Gould said: "It cannot be concluded that the prosecution intended to mislead the jury." He also commented that "her journal was with her and at that point of her being recalled, she was available for cross-examination by defendant's counsel" (R. 640).

The record contains no evidence that a false impression was created or that it was knowingly fostered by the prosecutor. In the absence of these showings, there is no prosecutorial misconduct. Respondent submits that there was no error in this testimony.

#### POINT XII

##### THERE WERE NO REVERSIBLE ERRORS IN THE INSTRUCTIONS TO THE JURY.

Appellant appears to complain that the court did not give an instruction that he now feels would have been helpful. The Utah Rules of Criminal Procedure provide that:

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

Rule 19(c), Utah Code Ann., § 77-35-19(c) (Supp. 1981).

Appellant has not charged that a required instruction was not given -- only that he thinks an additional instruction would have been helpful. Respondent submits that the instruction stated by appellant is improper for this case. First, that instruction is not required in this State. All of the cases cited by appellant are from other jurisdictions. He has shown no instance where a similar instruction has been given or required in this State. Second, the instruction is inapplicable because the eyewitness identification was not the sole basis for conviction in this case. Appellant was

convicted due to the identification, the laboratory tests, and the rebuttal of defendant's alibi. Third, the essence of the requested instruction was contained in jury instruction six (R. 598). This instruction was given to the jury emphasizing the need to weigh the identification. Fourth, appellant has not shown how manifest injustice resulted from the absence of the instruction. There is no showing of jury prejudice, misinterpretation of the instructions or ignorance of their duties as jurors. There is no showing of manifest injustice to allow consideration of this alleged error, since there was no objection at trial.

Appellant claims error because the jury instructions were not reread at the close of the case. There is no evidence of any prejudice resulting from the failure to reread those instructions. In fact, the written instructions were available to the jury -- to take into their deliberations (T. 504). The trial judge properly exercised his discretion in declining to reread the first eleven instructions.

The trial judge, in his Memorandum Decision, stated that such a cautionary instruction, especially sua sponte, would have been an improper comment on the evidence (R. 640). Even if the instruction had been given, there is no indication that it would have made any difference in the verdict or that it would have had any influence on the jurors.

### POINT XIII

#### THE DEFENSE COUNSEL'S FAILURE TO INTRODUCE RESULTS OF POLYGRAPH TEST IS NOT EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The results of defendant's polygraph test were not introduced into evidence at trial because they had been declared inadmissible at the Suppression Hearing (Supp. Hearing 43). The judge declared that the tests had not been properly conducted.

Even if they had been properly conducted, the results would still not be admissible at trial. In State v. Collins, Utah, 612 P.2d 775 (1980), this court stated: "A vast majority of courts which have ruled on the issue, however, hold unstipulated polygraph examinations inadmissible." 612 P.2d at 778. See State v. Abel, Utah 600 P.2d 994 (1979); State v. Jenkins, Utah 523 P.2d 1232 (1974).

Appellant claims that defense counsel should have developed an adequate evidentiary record to allow the use of the polygraph test under the guidelines of Collins, supra. Appellant reads Collins erroneously, however. Collins does not state that polygraph results would be considered if there was an adequate evidentiary record. The court said: ". . . it is impossible to address the issue of the admissibility of polygraph results without an adequate evidentiary record . . . ." 612 P.2d at 778. Even with such a record, there is no indication that the results would have been considered.

If appellant claims that the results were erroneously excluded, he must prove an abuse of discretion by Judge Wahlquist at the Suppression Hearing. This he has failed to do. If he claims that defense counsel erred in not developing an adequate record, he is complaining that defense counsel did not expend his efforts gathering information that has not been allowed as evidence. See Collins, supra. Defense counsel decided to not use the results because it was prohibited at the Suppression Hearing, likely would not have been admissible, and would have allowed the prosecution to use the results of its polygraph test.

Respondent submits that the failure to introduce the polygraph results is not evidence of the ineffective assistance of counsel.

#### CONCLUSION

Appellant's conviction should be affirmed because no reversible errors occurred at trial. Any improprieties which may have occurred did not have a substantial adverse effect on the defendant. The trial was conducted fairly and within the limits required by law, and appellant suffered no prejudice which justifies or requires a new trial.

Respectfully submitted this 30 day of July, 1981.

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of  
Respondent to Mr. Brian R. Florence and Mr. John Blair  
Hutchison, Attorneys for Defendant-Appellant, 818 - 26th  
Street, Ogden, Utah 84401, this 30 day of July, 1981.

Robert N. Parrish  
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