1982

State of Utah v. Robert Reedy, Jr. : Brief of Appellant

Utah Supreme Court

G. Fred Metos; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent v. ROBERT REEDY, JR., Defendant-Appellant	:	Case No. 18082

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Aggravated Robbery, a felony of the Second Degree in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable David B. Dee, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

The appellant, Robert Reedy, Jr., appeals from a conviction and judgment of Aggravated Robbery, a felony of the Second Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable David B. Dee, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Robert Reedy, Jr. was charged with Aggravated Robbery, a felony of the First Degree in violation of Title 76, Chapter 6, Section 302, Utah Code Annotated, (1953 as amended). Appellant was convicted as charged in a jury trial and was sentenced to incarceration at the Utah State Prison pursuant to Title 76, Chapter 3, Section 402, Utah Code Annotated, (1953 as amended), for the indeterminate term as provided by law for a felony of the Second Degree.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have the conviction and judgment rendered below reversed and to have the case remanded to the Third Judicial District Court for a new trial.

STATEMENT OF FACTS

On June 28, 1980, between 8:15 and 8:30 a.m. two men approached John Palmer, an attendant at a service station located at 200 West on 1300 South. (T. 9-10) They asked for change for a dollar and went to the coke machine. (T. 10-11) The two returned to the cashier's window and pointed a gun through the face hole at Mr. Palmer and demanded the money from the till. (T. 11) On July 10, 1980, Mr. Palmer identified a photograph of the appellant as the person who held the gun during the course of the robbery. (T. 16, 37-38) However, no identification of the appellant was made in court by Mr. Palmer.

ARGUMENT

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE THE APPELLANT'S REQUESTED INSTRUCTION ON THE NATURE OF AND REQUIREMENTS FOR EYEWITNESS IDENTIFICATION EVIDENCE.

The defense raised at trial was that the appellant was not the person who committed the aggravated robbery which was alleged in the Information. The only identification made of the appellant by Mr. Palmer was from a photographic array nearly two weeks after the incident. As a part of his defense, appellant requested an instruction which described the nature and dangers inherent in identification evidence, some factors to consider in

assessing the value of identification evidence and the burden of proof with respect to the defense. (R. 66-67)[1].

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1. That Instruction provided:

INSTRUCTION NO. _____

Identification testimony is an expression of belief or impression by the witness. In this case its value depends on the opportunity the witness had to observe whether or not the defendant was the person who committed the aggravated robbery of John Glen Palmer on June 28, 1980, and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the person at the time will be affected by such matters as how long or short a time was available, how far or close the witness was from the offender, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(2) Are you satisfied that the identification made by that witness subsequent to the event was a product of his or her own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the realiability of the identification.

(3) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a realiable observation on the matter covered in his testimony.

The burden of proof on the State extends to every element of the offense and the identity of the perpetrator is such an element. The State must prove beyond a reasonable doubt that Robert Reedy, Jr., was the perpetrator of the offense in question in this case. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. (R. 66-67).

The trial court refused to give the instruction and exception was taken. (Supplemental Transcript p. 3)

The dangers inherent in eyewitness identification evidence have been the subject of discussion for many years. In an oft-quoted passage, the late Felix Frankfurter, former United States Supreme Court Justice observed:

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure. . . .
>
> Evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury. Frankfurter, The Trial of Sacco and Vanzetti.

The unreliability of eyewitness identification has been well documented in the literature, and numerous law review articles have been written on the subject in recent years.[2] The commentators

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2. Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977); Due Process Standards for the Admissibility of Eyewitness Identification Evidence, 26 Kan. L. Rev. 461 (1978); Eyewitness Identification Evidence: Flaws and Defenses, 7 No. Ky. L. Rev. 407 (1980); Ellis, Davies, Shepherd, Experimental Studies of Face Identification 3 Nat. J. Crim. Def. 219 (1977); Use of Eyewitness Identification Evidence in Criminal Trials, 21 Crim. L.Q. 361 (1979). Loftus, Eyewitness Testimony (1979); Public Defender Sourcebook, pp. 251-57 (S. Singer, ed. 1976); Yarmey, The Psychology of Eyewitness Testimony (1979); Buckhout, Determinants of Eyewitness Performance on a Lineup, 1974 Bull. Psychonomic Soc'y 191; Buckhout, Eyewitness Identication and Psychology in the Courtroom, Crim. Def., Sept.-Oct. 1977, at 5-9; Buckhout, Eyewintess Testimony, Scientific Am., Dec. 1974, at 23; Ellis, Davies & Shepherd, Experimental Studies of Face Identification, Nat'l J. Crim. Def. 219 (1977); Levine & Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. Pa. L. Rev. 1079 (1973); Luce, The Neglected

note that reasons for this unreliability are found in the problems that are associated with human perception and memory, both of which play a vital role in eyewitness identification. A lengthy discussion of those problems are found in a law review article dealing with the problems of perception and memory which are associated with hearsay testimony.[3] With respect to those issues the author noted:

> At a basic level, perception is determined by objective structural factors such as the nature of the stimulus, the impact of the stimulus on the sense organs according to various physical laws, the operation of the afferent neural pathways from the sense organs to the brain, and the cortical projection or reconstruction of the stimulus. However, the neurological system operates to transduce physical energy into a sensation, it is clear that interpretation is required to transform sensation into meaning.
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> * * *
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> In organizing raw sensory input, the central nervous system is not a photographic recorder. . . . Injury, pathology, drugs, youth, and senility can seriously impair the accuracy of these processes. 1970 Utah Law Rev. at 9.

In United States v. Barber, 412 F.2d 517 (3rd Cir. 1971), the court gave a similar description of the processes involved in human observation, perception and memory. It then went on to state, with respect to eyewitness identification,

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2. (continued) Dimension in Eyewitness Identification, Crim. Def., May-June 1977, at 5-8; Tyrrell & Cunningham, Eyewitness Credibility: Adjusting the Sights of the Judiciary, 37 Ala. Law. 563, 575-85 (1976).

3. Stewart, Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah Law Rev. 1.

> Eyewitness identification testimony, therefore, is an expression of a belief or impression by the witness. If there is a high degree of precision and certainty in his expression, which is consistent with any prior statements and unshaken on cross-examination, the statement of the witness may be regarded as a statement of fact. If certainty is lacking, the expression is deemed to possess an evidentiary quality of inferior rank. Thus, where the circumstances surroudning the criminal act gave limited opportunity for observation or utilization of the sensory perception, or where uncertainty is expressed by the witness himself, or exposed by a past history of the witness' statements or demonstrated by cross-examination, the statement of identity should be considered as only an expression of opinion and should be accompanied by appropriate instructions as to its sufficiency and weight. To be sure, the courts have been generous in the admission of eyewitness identification in order to permit the jury to make its own assessment. The emphasis has been on inclusion of evidence, rather than exclusion; on credibility, rather than admissibility. [footnotes omitted] 412 F.2d at 527.

In this case, the only identification evidence that was produced was that of the appellant's photograph being picked out of a group of six pictures. This identification did not occur until nearly twelve days after the robbery occurred. In Simmons v. United States, 390 U.S. 377 (1968), the United States Supreme Court addressed the issue of whether a photographic array was impermissibly suggestive in violation of the petitioner's right to Due Process of Law. In doing so, the court discussed the dangers associated with the use of photographic identifications, stating,

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identifi-

> This danger will be increased if the police desplay to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. [footnote omitted] 390 U.S. at 383.

The Supreme Court of Kansas, in State v. Warren, 635 P.2d 1263 (Kan. 1981), discussed those general problems at length which are associated with the use of eyewitness identification evidence. The court then took note of the particular problems that arise in the courtroom with that evidence.

> In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it. The trouble is that many judges have assumed that an "eyeball" witness, who identifies the accused as the criminal, is the most reliable of witnesses, and, if there are any questions about the identification, the jurors, in their wisdom, are fully capable of determining the credibility of the witness without special instructions from the court. Yet cases of mistaken identification are not infrequent and the problem of misidentification has not been alleviated.
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> We note, for example, a 1979 unreported prosecution in Wilmington, Delaware, against Rev. Bernard T. Pagano, a Roman Catholic priest, accused of robbing six Delaware stores in the winter of 1978. At the trial, he was falsely identified by several state witnesses as the robber. After the State rested its case, the prosecution was dismissed on motion of the State because another man confessed to the crime. Closer to home is the case of Ronald Quick, who was twice tried and convicted of aggravated robbery of a liquor store in Hutchinson. At both trials two eyewitnesses positively identified defendant as the perpetrator of the crime. These two convictions were reversed for trial errors in State v. Quick, 226 Kan. 308, 597 P.2d 1108 (1979) and 229 Kan. 117, 621 P.2d 997 (1981). The case was dismissed by the State during the third trial after another man, who looked like the defendant, confessed to the crime.

> The Kansas procedure does provide certain safeguards to prevent the conviction of an innocent accused on the basis of unreliable eyewitness identification. Our trial courts have the power to suppress eyewitness testimony, if the eyewitness identification procedure rendered the testimony unreliable. Cross-examination and argument by defense counsel afford some protection. Unfortunately, these procedures have not solved the problem. Able defense counsel have attempted to combat unreliable eyewitness identification by two additional methods: They have called to the witness stand expert witnesses in the field of psychology to testify as to the various factors which may cause eyewitness identification to be unreliable. They have also requested the trial court to give a cautionary instruction stating the factors to be considered by the jury in weighing the credibility of eyewitness testimony. 635 P.2d at 1241.

In that case, the trial court refused to allow the defense to take either of these actions. Elizabeth Loftus, an expert on eyewintess identification, was not allowed to testify and the court refused to give the same instruction as appellant requested in this case.[4] After a lengthy discussion on the use of expert testimony to solve the problems associated with the eyewitness testimony, the Kansas court stated,

> After considering these cases and the literature on the subject, we have concluded that requiring trial courts to admit this type of expert evidence is not the answer to the problem. We believe that the problem can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony. Such an instruction, coupled with vigorous cross-examination and persuasive argument by defense counsel dealing realistically with the shortcomings and trouble spots of the identification process, should protect the rights of the defendant and at the same time enable the courts to avoid the problems involved in the admission of expert testimony on this subject. 635 P.2d at 1243.

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4. See footnote 1, supra.

The instruction that the Kansas court held should be given was that framed by the United States Court of Appeal for the District of Columbia in United States v. Telfaire, 469 F.2d 552 (D.C. Cir., 1972).[5] The Telfaire court described the need for such an instruction, stating,

> The presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise. In pursuance of that objective, we have pointed out the importance of and need for a special instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt. This need was voiced in 1942 in McKenzie v. United States, [126 F.2d 533] and it has been given vitality in our opinions of recent years -- following the Supreme Court's 1966 Wade-Gilbert [v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967)] Stovall [v. Denno, 388 U.S. 293] trilogy focusing on the very real danger of mistaken identification as a threat to justice. We refer to our post-Wade opinions in Gregory [v. United States, 369 F.2d 185 (1966)] and Macklin [v. United States, 409 F.2d 174 (1969)]. These opinions sought to take into account the traditional recognition that identification testimony presents special problems of reliability by stressing the importance of an identification instruction even in cases meeting the constitutional threshold of admissibility. [footnotes omitted] 469 F.2d at 555.

In State v. Warren, supra the court held that the model instruction from the Telfaire case was more appropriate than a general instruction dealing with an identification

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5. This same instruction was cited with approval by Justice Stewart in his dissenting opinion in State v. Malmrose, 649 P.2d 56 at 63 (Utah 1982), and as requested by appellant in this case.

defense.[6] The Kansas court required the Telfaire instruction be given, stating,

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6. The general instruction given in that case provided:

INSTRUCTION NO. _____

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general in considering the testimony of each witness. You also may take the following factors into consideration when weighing a witness' testimony:

(a). The witness' ability and opportunity to observe and know the things about which he had testified;

(b) The clarity and accuracy of the witness' memory;

(c) The witness' manner and conduct while testifying;

(d) Any interest the witness may have in the result of the trial; and

(e) The reasonableness of the witness' testimony when considered in light of all the evidence in the case; and

(f) Any bias, interest, prejudice or motive the witness may have.

If you find that any witness has wilfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause." 635 P.2d at 1245.

> . . . we have considered the fact that trial courts are often required to determine the admissibility of eyewitness testimony where issues of unreliability are raised. As pointed out by Chief Justice Schroeder in State v. Ponds, 227 Kan. 627, 608 P.2d 946, in testing the reliability of identification testimony, the five factors mentioned in Neil v. Biggers [490 U.S. 188 (1972)] should be considered by the trial court. If these five factors should be considered in determining the admissibility of the testimony, it would seem even more appropriate to require the jury to consider the same factors in weighing the credibility of the eyewitness identification testimony. Otherwise the jury might reasonably conclude that the admission of the evidence by the trial court vouched for its reliability. We think it clear that, in order to prevent potential injustice, some standards must be provided the jury so that the credibility of eyewitness identification testimony can be intelligently and fairly weighed. The giving of such an instruction will take only a couple of minutes in trial time and will be well worth it, if some future injustices can be avoided. 635 P.2d at 1244 [Emphasis by court]

In Neil v. Biggers, supra, the United States Supreme Court was addressing the issue of the admissibility of eyewitness identification evidence based on a showup procedure.[7] In determining the admissibility of the evidence the court initially noted that you must consider the totality of the circumstances. The court then listed several factors to consider, stating,

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. 409 U.S. at 199.

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7. That procedure involved two detectives walking the petitioner past a rape victim.

For these same reasons a number of other jurisdictions have found that the model instruction from United States v. Telfaire, supra, should be given when warranted by the circumstances of a particular case.[8]

In Utah, the Telfaire instruction was cited with approval by Justice Stewart in his dissenting opinion in State v. Malmrose, 649 P.2d 56 (Utah 1982). In that case the majority opinion did not squarely address the issue of the requirement of such an instruction. The court did not find reversible error in the trial court's refusal to give the instruction. The primary reason the court gave for that holding was that defense counsel failed to take exception to the trial court's refusal to give the instruction. The court then stated, "we have not heretofore held that such an instruction is required. We believe the giving of it should be left to the discretion of the trial court" 649 P.2d at 61. Justice Stewart wrote a dissent to that part of the court's opinion and Justice Durham concurred in that dissent.

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8. The Telfaire instruction specifically has either recommended or approved for use in numerous jurisdictions as reflected by the following cases: United States v. Holly, 502 F.2d 273 (4th Cir. 1974); United States v. Hodges, 515 F.2d 650 (7th Cir. 1975); State v. Benjamin, 363 A. 2d 762 (Conn., 1976); State v. Calia, 514 P.2d 1354 (Or. App. 1973), cert. den. 417 U.S. 917 (1974); Commonwealth v. Rodriquez, 391 N.E. 2d 889 (Mass. 1979); United States v. Kavanaugh, 572 F.2d 9 (1st Cir. 1978); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976) cert. den., 429 U.S. 1099 (1977); United States v. Masterson, 529 F.2d 30 (9th Cir) cert. den., 426 U.S. 908 (1976); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974); United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972); State v. Guster, 66 Ohio St. 2d 269, 421 N.E. 2d 157 (1981); State v. Payne, 280 S.E. 2d 72 (W. Va. 1981); United States v. Cueto, 628 F.2d 1273 (10th Cir. 1980); People v. Guzman, 121 Cal. Rptr. 69, 47 Cal. App. 3d 380 (Cal. App., 1975); State v. Motes, 215 S. E. 2d 190 (S.C., 1975); State v. Payne, 280 S.E. 2d 72 (W. Va. 1981); State v. Malmrose, 649 P.2d 56 (Utah 1982) (Stewart, J.

Previously, this court had decided that it was not reversible error to give an instruction similar to that given in State v. Warren, supra, State v. Schaffer, 683 P.2d 1185 (Utah 1981). It is interesting to note that State v. Schaffer, supra, was not even cited in the Malmrose case. In Schaffer the court did not say there was no error in refusing to give the instruction, but rather, the court reasoned that because other general instructions on credibility and burden of proof were given, the jury was adequately advised on what the law was. Secondly, the court noted that there were two eyewitnesses who had abundant opportunity to observe the defendant, thus alleviating any prejudice. The court concluded that the refusal to give the instruction did not constitute "reversible error" [emphasis added] 638 P.2d at 1187.

Similarly in State v. McCumber, 622 P.2d 353 (Ut. 1980) the issue of the refusal to give an instruction on eyewitness identification was raised.[9] With respect to that issue this court stated;

> A criminal defendant is entitled to have a jury instructed on his theory of the case if there is any substantial evidence to justify such an instruction. Where, however, the requested instruction is denied, no prejudicial error occurs if it appears that the giving of the requested instruction would not have affected the outcome of the trial. Moreover, a defendant is not entitled to an instruction which is redundant or repetitive of principles enunciated in other instructions given to the jury. The principal points of defendant's proposed instruction dealt with the State's burden of proof and the factors to consider in weighing the testimony of an eyewitness.

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9. The text of the instruction was not included in the opinion.

> All of these factors were adequately dealt with in other instructions presented to the jury by the trial court. As a result, we cannot agree that the denial of the proposed instruction constituted reversible error. [footnote omitted] 622 P.2d at 359.

The general conclusions that can be reached about these cases are: First of all, this court has never said that such an instruction is improper and should not be given. Secondly, the court has clearly implied that under certain circumstances the identity instruction would be proper. Finally, the court in all of these cases spoke in terms of no reversible error indicating that due to the nature of the cases, even though there may have been error, there was no prejudice to the appellants.

Several other principles of Utah law which were dealt with only in passing or not mentioned at all in those cases must be discussed here. Under the law of Utah a criminal defendant is entitled to have his theory of the case presented to the jury in the form of written instructions, State v. Stenbeck, 78 U. 350, 2 P.2d 1050 (1931), State v. McCumber, supra. With respect to defenses, a criminal defendant is entitled to have the jury instructed that the defense need only raise a reasonable doubt. State v. Wilson, 565 P.2d 66 (Ut. 1977); State v. Torres, 619 P.2d 694 (Ut. 1980); and State v. Starks, 627 P.2d 88 (Ut. 1981). The mere fact that the court gave general instructions on the presumption of innocence and burden of proof does not alleviate the prejudice in refusing to instruct the jury with respect to the defendant's burden in establishing his defense. This court has held that a jury need not

> . . . go through such a tortuous process when that result could have been achieved by giving the defendant's requested instruction, or one of that substance." State v. Torres, supra at 696.

In this case there was no instruction given which explained to the jury what the defense was, nor was there any instruction given which explained to the jury what the burden of proof was with respect to a defense. The only instruction that was submitted on these issues was that which is the subject of this appeal.[10] Consequently, it was error not to give an instruction explaining to the jury what the defense was, and relating that portion of the evidence to the reasonable doubt standard. The policies that support the giving of the Telfaire model instruction, discussed above, are substantial and compelling. That instruction is clearly a necessary and proper one and it was error to refuse to give it to the jury.

The error in refusing to give the instruction on identification was prejudicial requiring a new trial. A criminal conviction must be reversed if there is a reasonable likelihood that the verdict would be different if the requested instruction had been given. State v. Mitcheson, 560 P.2d 1120 (Ut. 1977). The only issue at trial was the identification of the defendant as the perpetrator of the aggravated robbery. The victim never identified the appellant in court as the person who committed the offense. (T. 9-30). The only identification that was made of the appellant was from a photographic array that the victim

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10. See footnote 1, supra.

observed some twelve days after the commission of the crime. (T. 16, 36-38). There was no other evidence to corroborate the identification made by Mr. Palmer. (See, United States v. Cueto, supra; State v. Payne, supra). The initial description of the robber given by Mr. Palmer was very general. He was able to describe the clothing, height and weight of the perpetrator. The only distinguishing features he noticed was that of a moustache and dark brown, shoulder length hair. (T. 33) Mr. Palmer's opportunity to observe the robber was very limited. He stated that the robber asked for change for a dollar prior to the offense (T. 11). That transaction as well as the opportunity to observe lasted only a matter of seconds. (T. 19) The robber then reapproached the window and put the gun through the hole in the window at face level where he was able to observe only the gun. (T. 22) The fact that Mr. Palmer was able to observe only the gun is born out by the detailed description that he gave of it. He stated that it was a .22 caliber revolver with an eight inch barrell. (T. 11) Finally, it is important to note that the officer who observed Mr. Palmer immediately after the robbery found him to be obviously upset and very badly scared (T. 34).

It is hard to imagine a case where there would be a greater need for an instruction describing what eyewitness identification evidence is, how it is to be evaluated, and the burden of proof it must meet. In rejecting this instruction requested by the appellant the trial court noted on the instruction "not given use as argument". (R. 66) However, the court also instructed

the jury that "statements of counsel are not evidence and should not be considered as such by you". (R. 34) There were obvious problems in this case with respect to the opportunity to observe, the potential for suggestive procedures with photographic identification, the state of mind of Mr. Palmer at the time the observations were made and the complete absence of any evidence to corroborate the identification of the defendant. An instruction on how to evaluate eyewitness identification evidence and how to weigh the evidence was necessary to inform the jury of these problems. If the instruction had been given, there is a reasonable likelihood that the verdict would have been different. Consequently, the error was prejudicial and a new trial should be ordered.

CONCLUSION

The only evidence connecting the appellant to the aggravated robbery which is the subject of this case, was the identification made of the appellant from a photographic array. The dangers inherent in eyewitness identification evidence have been recognized for many years. One of the methods that courts have required to be used to eliminate some of these dangers is to give the jury an instruction that describes the nature of identification evidence, factors to be considered in weighing such evidence and the burden of proof that evidence must meet. Such an instruction was requested here and the refusal to give it was prejudicial error requiring a new trial.

DATED this 6 day of December, 1982.

G. FRED METOS
Attorney for Appellant

Delivered a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this _____ day of December, 1982.

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