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Utah Supreme Court

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Lynn R. Brown; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| THE STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | Case No. 18179 |
| ERVIN BRAFFORD, | : | |
| Defendant-Appellant. | : | |

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# BRIEF OF RESPONDENT

Appeal from a judgment and conviction of Aggravated Robbery, a First-Degree Felony, and Possession of a Dangerous Weapon by a Restricted Person, a Second-Degree Felony, in the Third Judicial District Court in and for Salt Lake County, the Honorable Peter F. Leary, Judge, presiding.

DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

LYNN R. BROWN
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

Attorney for Appellant

FILED
FEB 22 1983
18179
Clerk, Supreme Court, Utah

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DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

LYNN R. BROWN
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| THE STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | Case No. 18179 |
| ERVIN BRAFFORD, | : | |
| Defendant-Appellant. | : | |

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with aggravated robbery in violation of Utah Code Ann., § 76-6-302 (1953), as amended; and possession of a dangerous weapon by a restricted person in violation of Utah Code Ann., § 76-10-503 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant, following a jury trial on November 30 and December 1, 1981, in the Third Judicial District Court in and for Salt Lake County, Utah, the Honorable Peter F. Leary, Judge, presiding, was found guilty of aggravated robbery and possession of a dangerous weapon by a restricted person. On December 21, 1981, appellant was sentenced to the Utah State Prison for an indeterminate term of five years to life for aggravated robbery and an indeterminate term of one to fifteen years for possession of a dangerous weapon by a restricted person; the sentences to run concurrently.

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## RELIEF SOUGHT ON APPEAL

Respondent seeks a judgment and order of this Court affirming the jury's verdict and sentences imposed.

## STATEMENT OF FACTS

Robert Hunter, pharmacist at Southeast Pharmacy in Salt Lake County, on May 11, 1981, was robbed by two men who absconded with the pharmacy's prescription drugs and money. At trial, Mr. Hunter testified that one man entered the pharmacy carrying a gun and ordered him to lie on the floor while he, the first robber, searched for all Schedule A narcotics, consisting for the most part of "severe pain killers and sleeping pills" (T. 135). With Hunter, the victim, lying on the floor, a second robber, appellant, entered the pharmacy (T. 135). Hunter instructed both robbers where such narcotics could be found (T. 135). After both robbers stated that they were not finding the drugs which they desired, Hunter offered to assist them by going through the shelves of the pharmacy (T. 136). Hunter placed the drugs into a brown valise (T. 136) held by the robber with the gun, while appellant opened the cash register which triggered the pharmacy's alarm system (T. 137) and activated a camera located on the north wall of the pharmacy overlooking the prescription department (T. 139). The resulting photographs of that occasion accurately depict the two robbers with Mr. Hunter during a certain period of time of the robbery.

Although Hunter testified that he was unable to identify appellant, he did remember that appellant was wearing



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what seemed to be a belted vest (T. 161). Hunter further testified that the reason he could not identify appellant was he was concentrating exclusively on placing the drugs in the bag (T. 161). Positive identification of appellant, as one of the pharmacy's two robbers, however, was made by Ken Brown, a parole officer who had known appellant since 1979 (T. 169). On the basis of this evidence, the jury found beyond a reasonable doubt that appellant was guilty of aggravated robbery and possession of a firearm by a restricted person.

## ARGUMENT

### POINT I

### THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

Recently, this Court held it will not overturn a jury verdict in a criminal case only if the evidence is so insubstantial that a reasonable man could not have reached the conclusion that the accused was guilty beyond a reasonable doubt. In State v. Johnson, ____ P.2d ____, Case No. 18023 (January 14, 1983), this Court stated that it:

> . . . must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt. . . . [It must] also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it.



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Id. at 2 (Emphasis added). See also: State v. McCardell, Utah, 652 P.2d 942, 945 (1982).

More recently, this standard was again stated in State v. Petree, Case No. 18015 (Utah, February 4, 1983) in which the Court held:

> We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt. . . . [citations omitted] (emphasis added).

In Petree, the Court's majority believed, following a review of the facts of the case, that even the most exaggerated stretch within reason could not close the gap between any and all inferences which could be drawn by the jury and the jury's guilty verdict. In the case at bar, however, there is sufficient evidence to support the verdict.

The only requirement therefore in reviewing sufficiency of the evidence claims under McCardell and its progeny is that when the facts are viewed in a light most favorable to the jury's verdict, there simply must be found a sufficient amount of evidence supporting the judgment of guilt beyond a reasonable doubt.

Appellant contends that the evidence leading to his conviction was insufficient since the victim, Mr. Hunter, could not identify appellant; the photographs were not



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clear enough to ascertain appellant's alleged tatoos on his arm; and the photographs, when admitted into evidence, were not first submitted to the jury for its viewing. Appellant's claims taken either separately or cumulatively are of no consequence when juxtaposed to the sufficient evidence supporting the jury's verdict.

With respect to appellant's first point concerning the supposed requirement that a conviction should be overturned in light of the victim's inability to identify him, there simply is nothing (either statutorily or precedentially) to support this groundless claim. Adopting appellant's victim identification rule would not only emasculate murder and manslaughter cases-in-chief, but also completely eliminate convictions in those areas as well. The victim of the robbery, Hunter, testified that appellant was wearing a vest (T. 161), a fact which is borne out by the photographs from the camera which was activated when appellant opened the cash register The reason Hunter was unable to positively identify appellant as one of the robbers was his exclusive concentration in placing the drugs in the bag (T. 161).

Positive identification of appellant as one of the pharmacy robbers was made by appellant's parole officer, however, who testified that he had known appellant since 1979 and who identified appellant as the man who was reaching into the cash register (as depicted by the photographs of the



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robbery) and identified appellant as the man sitting at the defendant's table at trial (T. 168-170). In addition, the jury, when it retired to consider the evidence, were allowed, because of the admitted photographs, to make an independent comparison of the features of the robber of the cash register with the features of the defendant on trial and therefore could conclude that appellant had robbed the Southeast Pharmacy (See Exhibits 8-21).

Appellant's next contention relating to the quality of the photographs and the victim's resulting inability to identify his supposed arm tattoos is a trivial point. Defense counsel introduced no evidence indicating that appellant had the alleged tattoos during the time of the robbery. Appellant's identification was obtained through the testimony of his former parole officer, who was familiar with his features to such an extent that he had no difficulty whatsoever in identifying appellant as one of the pharmacy robbers (T. 38-40).

Appellant's final contention that the photographs were not directly shown to the jury lacks merit as well. During the parole officer's testimony, in which the parole officer identified appellant as one of the robbers who was photographed, the prosecutor asked the parole officer to indicate to the jury the person he had just identified in the photograph (T. 38-39). This procedure was followed twice



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(T. 38-39). Moreover, all of the photographs were admitted into evidence and both prosecution and defense counsel, during closing argument, encouraged the jury to once again scrutinize the photographs (T. 195-206). Apparently, not only were the photographs of the robbery conclusive evidence tying appellant to the crimes charged, but so was the parole officer's testimony positively identifying his former parolee clearly photographed during the commission of his crimes of aggravated robbery and the possession of a firearm by a restricted person.

## POINT II

THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL JUDGE TO GIVE THE FLIGHT INSTRUCTION TO THE JURY.

Appellant's final contention centers on the trial judge's giving of the flight instruction to the jury. Appellant argues that there was insufficient evidence to support the instruction. The nature of the particular instruction in this case merely makes flight an evidentiary consideration in the jury's determination of guilt. In light of case law defining flight, appellant's claim of prejudicial error cannot be sustained.

In People v. Cannady, 105 Cal. Rptr. 129, 503 P.2d 585 (Cal. 1972), the defendants argued that the evidence



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did not warrant the giving of a flight instruction which was virtually identical to the one given in the case at bar.[1] There the court held that the jury could reasonably infer that defendant's flight reflected consciousness of guilt from the evidence presented at trial. The court went on to state:

> Flight requires neither the physical act of running nor the reaching of a far-away haven. The evidence is sufficient to support the giving of the instruction.

503 P.2d at 593.

In the instant case the instruction read to the jury was:

> The flight or attempted flight of a person immediately after the commission of a crime or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of his guilt or innocence. The weight to which

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[1]The Cannady instruction read:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to deterine.



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> such circumstance is entitled is a matter for the jurv to determine.
>
> You are further instructed that flight affords a basis for an inference of consciousness of guilt and constitutes an implied admission (R. 94).

The Oklahoma courts have approved the giving of similar flight instructions. See Ward v. State, 444 P.2d 255 (Okl. Crim. 1968) and Pyles v. State, 483 P.2d 1185 (Okl. Crim. 1971).

The Washington Supreme Court in an earlier case offered a liberal definition of what is meant by "flight." In State v. Wilson, 174 P.2d 553 (Wash. 1946) the Court explained:

> To constitute flight it is not necessary that there should be an escape from jail or from an officer, but it may consist in a departure from the place of the crime by one conscious of gult even before suspected of the crime.

Id.

Later, the Missouri Supreme Court in State v. Aubuchon, 394 S.W.2d 327 (1965), stated:

> The term "flight" denotes the act of leaving the scene or vicinity of the crime, and the act of flight may be shown on the issue of guilt.

Id. at 335. See also: State v. Ward, 518 S.W.2d 686, 689 (Mo. App. 1975).



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Instructions, as the one given in this case, assume neither the guilt nor innocence of the defendant. See People v. Daener, 96 Cal. App. 2d 827, 832-833, 216 P.2d 511, 514 (1950). Thus, the flight instruction as it was given by the trial judge in this case, is generally interpreted as simply leaving the scene of a crime and is a factor, if proven at trial, which should be considered by the jury. Flight, with nothing more, is circumstantially insufficient to sustain a guilty verdict. Instruction No. 19 did not contain this prejudicial defect, but rather contained the necessary caveats to guard against any misguided conclusions which the jury might have drawn as to what evidence of flight there was.

Mr. Hunter testified that following the robbery, appellant left the pharmacy and thus there was sufficient evidence to support both the flight instruction and the reasonable inference that departure from the place of the crime could constitute "flight" (T. 151).

Assuming arguendo that the trial court did err in instructing the jury as to flight, the error still does not approach the degree of substantiality which would justify reversal of appellant's conviction in this case.

Rule 30 of the Utah Rules of Criminal Procedure states, in pertinent part:

> Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.



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Utah Code of Criminal Procedure, § 77-35-30(a) (Supp. 1981). This standard has been applied by this Court in Ortega v. Thomas, 14 Utah 2d 296, 383 P.2d 406 (1963). In Ortega, the Court, in considering alleged errors contained in jury instructions, inter alia, held:

> In order to justify reversal, the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different.

Id. at 408.

It is therefore incumbent upon appellant to demonstrate that but for the defective instruction, the jury would have reached a different conclusion. Appellant has failed to carry this burden and therefore, even assuming error on the part of the trial judge in giving the instruction, such error was harmless.

## POINT III

### APPELLANT'S FAILING TO COMPLY WITH UTAH RULES OF CIVIL PROCEDURE, 75(p)(2)(d) CONSTITUTES A SEPARATE AND INDEPENDENT BASIS FOR AFFIRMANCE OF HIS CONVICTION.

Appellant ignores the requirement that his brief, pursuant to Utah Rules of Civil Procedure, 75(p)(2)(d), must contain ". . . a concise statement of the material facts of the case citing the pages of the record supporting such statement."



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This Court, in State v. Tucker, Case No. 17944 (December 29, 1982), recently held:

> A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the record that factually supports his contentions on appeal. This court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of Rule 75 . . . as to making a concise statement of facts and citation of the pages in the record where they are supported.

Id.

In light of appellant's failure to make such citations, this Court should affirm his conviction.

## CONCLUSION

Appellant seeks reversal of his conviction on the grounds that the victim could not positively identify him as the pharmacy robber, the photographs depicting a period of time during his crimes were of such low quality tht positive identification of him as one of the robbers was impossible, the photographs were not submitted properly for the jury's perusal, and finally the flight instruction could not be sustained by the evidence. Victim identification is not an essential factor in the prosecutor's case-in-chief in light of other means leading to positive identification such as a parole officer identifying appellant as the photographed



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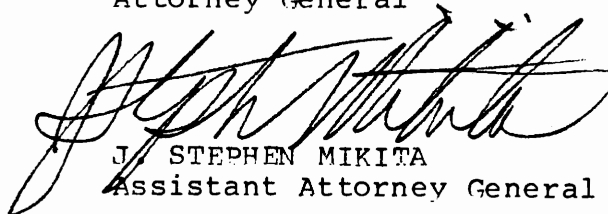
pharmacy robber. The jury did observe the photographs on several occasions during the course of the trial, and took the photographs when they retired to deliberate. There was sufficient evidence to the effect that appellant had departed from the pharmacy which was sufficient to support the trial judge's flight instruction. In light of this evidentiary support, respondent urges this Court to affirm appellant's convictions and sentences.

Respectfully submitted this 22 day of February, 1983.

DAVID L. WILKINSON
Attorney General



J. STEPHEN MIKITA
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Lynn R. Brown, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 22 day of February, 1983.

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