2011

State of Utah v. Echo Marne Kurr : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. ECHO MARNE KURR, Defendant/Appellant.	Case No. 20110879-CA

BRIEF OF THE APPELLANT

Appeal from a conviction for one count of Retail Theft, a Third Degree Felony, in violation of Utah Code Ann. § 76-6-602 in the Second District Court, State of Utah, the Honorable Noel S. Hyde, Judge, presiding.

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NATURE OF THE PROCEEDINGS AND JURISDICTION

Appeal from a conviction for one count of Retail Theft, a Third Degree Felony, in violation of Utah Code Ann. § 76-6-602 in the Second District Court, State of Utah, the Honorable Noel S. Hyde, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-102(2)(j).

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

I. Whether defense counsel ineffectively failed to request the *Long* instruction or to provide expert testimony on false identifications when the only issue in the case involved the potential for mistaken identification.

a. Standard of Review. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Perry*, 2009 UT App 51, ¶9, 204 P.3d 880.

b. Preservation of the Argument. Defense counsel did not raise any of these issues, so this matter must be reviewed under ineffective assistance of counsel.

CONSTITUTIONAL OR STATUTORY PROVISIONS

This appeal is governed by U.S. Const. Amend. V, VI and XIV, Utah Const. Art. I §§ 7, 12.

STATEMENT OF THE CASE

On December 23, 2010, the State filed an information charging the defendant with Retail Theft, a Third Degree Felony. R. 1. On May 11, 2011, the case was tried to a jury, but the court declared a mistrial. R. 62:12. The case was again tried to a jury on August 4, 2011 resulting in a guilty verdict. R. 43, 63. The judgment was entered on September 23, 2011. R. 50. On October 3, 2011, the defendant filed a notice of appeal to this Court. R. 53.

STATEMENT OF THE FACTS

1. Testimony of Chad Wise

Chad Wise was a loss prevention officer for Sears at the Newgate Mall in Ogden. R. 63:14. On November 9, 2010, he was working the security cameras when he saw a suspicious person. R. 63:16. Chad asked another loss prevention officer, Victor Garcia,

to watch this person on the floor, while he, Chad, continued to observe the person with the cameras. R. 63:17. Chad preserved six clips from his surveillance which were shown to the jury, including clips in which the individual selected a boy's hoodie and walked around the store toward the exit. R. 63:19-29, 32. Chad testified that he was able to observe on the camera this individual leaving the store without paying for her items. R. 63:30.

Chad ran down the sidewalk and to the parking lot with the other officer to apprehend this person. R. 63:30. She was in her car with the door still open and he was about 15 yards from her. R. 63:31. He had a "pretty clear, unobstructed" view of the person. R. 63:31. Chad testified that the person in the car and the person on the videotape were the defendant, Echo Kurr. R. 63:32. The white car, which he believed to be a Nissan, drove away quickly, and his partner Victor was able to obtain a license plate number. R. 63:33.

Chad contacted the Ogden police department and he gave a description of the person as well as a video to Detective Allred. R. 63:36-37. Chad did not film events on the outside of the store, even though there were cameras, since he had left the surveillance room. R. 63:38. At no point did defense counsel question Mr. Wise about the accuracy of his identification.

2. Testimony of Victor Garcia

Victor Garcia was also a loss prevention officer at Sears. R. 63:45. He testified that he watched the surveillance footage twice before he came to trial. R. 63:52. Victor was in the surveillance room monitoring cameras, and when they spotted the suspicious person, Victor left to watch her on the floor, taking his two-way radio. R. 63:51-53. Although he was unable to make contact with this person on the floor, he received a radio communication that she was exiting the building. R. 63:53-55. He arrived in time to witness this person leave with a male. R. 63:55.

Outside, right in front of the store's doors, Victor asked her to stop, identifying himself as with Sears' loss prevention department. R. 63:55-56, 57. He was at least an arm's length away from the woman, whom he identified as Echo Kurr. R. 63:56-57. Ms. Kurr had a blue hoodie on her arm. R. 63:57. Ms. Kurr told him that she did not have unpaid items, and the man with her told her to leave. R. 63:58. Victor told them that she needed to come back since she did not pay for items, and the man said that "[s]he doesn't have anything" and the two proceeded to the parking lot. R. 63:58.

As the two walked toward their vehicle, a white Nissan with an odd striped pattern, Victor informed them that he had them on camera, and that it was better for them to cooperate. R. 63:59-60. They got into the car and Victor asked them to at least

return the property. R. 63:60. Ms. Kurr turned, threw the shirt at him and the two left. R. 63:60. Victor read the license plate as they drove away. R. 63:60.

3. Testimony of Collette Allred

Collette Allred was a police officer with the Ogden City police department. R. 63:63. The officer received the video from Sears. R. 63:64. She also ran the vehicle's license plate, which came up as a white Nissan Altima registered to Echo Kurr. R. 63:64-65. After reviewing the tape, the officer compared a photo of Ms. Kurr against the perpetrator and believed them to be the same person. R. 63:66.

Ms. Allred prepared a six photo lineup "how we always do ... where we found people of likeness to this person." R. 63:66. She showed the lineup to Chad Wise who "immediately" picked Ms. Kurr as the person he saw. R. 63:66. She did not show a lineup to Victor Garcia. R. 63:67.

4. Defendant's Statements at Sentencing

At sentencing, Ms. Kurr told the court that "Mr. Gravis has not been conducive to my well being from the get -- he said just outside just a minute ago that my credibility was shot with him right out of the gate ...." R. 64:4. Mr. Gravis said that he did not tell Ms. Kurr that her credibility "was shot with me. I said your credibility was shot—" R. 64:4. Ms. Kurr responded that she begged counsel to fight for her, and that she did not

believe "that I was defended properly at all." R. 64:5. She said that Mr. Gravis told her that her defense "wouldn't work" and that "it was his choices to make what he was going to do at trial." R. 64:5. She told the court that she planned to appeal "because I feel that I've been unfairly -- I haven't even been represented." R. 64:5.

Neither the court, nor defense counsel specifically responded or queried Ms. Kurr about these allegations. The only response came from the prosecutor, who pointed out that Ms. Kurr failed to accept responsibility and wanted to blame her attorney. R. 64:7.

SUMMARY OF THE ARGUMENT

Defense counsel ineffectively failed to attack the eyewitness identifications made in this case. He did not present the *Long* instruction, nor did he present expert testimony as to the flaws of eyewitness identifications. In fact, the record supports the assertion that defense counsel believed the defendant's credibility "was shot," and did little to actually defend her. These failures to even challenge the State's evidence constituted ineffective assistance of counsel and denied Ms. Kurr due process of law.

ARGUMENT

At no point did defense counsel present any evidence, let alone challenge the identification, or argue to the jury that the witnesses may have misidentified Ms. Kurr. In fact, he admitted to the jury that Ms. Kurr was present. R. 63:82. However,

substantial evidence existed justifying arguing that Ms. Kurr was not the person who was present when the offense was committed and defense counsel ineffectively failed to challenge the identification.

I. DEFENSE COUNSEL INEFFECTIVELY FAILED TO CHALLENGE THE EYEWITNESS IDENTIFICATIONS OR REQUEST A *LONG* INSTRUCTION.

"Mistaken eyewitness identification is the leading cause of wrongful convictions in the United States, accounting for 88% of wrongful rape convictions and 50% of wrongful murder convictions between 1989 and 2003." Timothy P. O'Toole & Giovanna Shay, *Manson v. Braithwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109, 110 (2006); see John C. Brigham, Adina W. Wasserman & Christian A. Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 Court Review 12, 12 (1999) ("not only is eyewitness evidence powerful, it is also more likely to be erroneous than any other type of evidence"). The Utah Supreme Court has also recognized serious flaws with eyewitness identification:

> Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness.

State v. Long, 721 P.2d 483, 490 (Utah 1986) holding modified by *State v. Clopten*, 2009 UT 84, 223 P.3d 1103. Given serious problems, coupled with the fact that jurors tend to overvalue eyewitness identifications, the Court opted to craft its own solution:

> [I]n cases tried from this date forward, trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense. Given the great weight jurors are likely to give eyewitness testimony, and the deep and generally unperceived flaws in it, to convict a defendant on such evidence without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law under article I, section 7 of the Utah Constitution.

Id. at 492. This jury instruction became known as the *Long* instruction. In a later case, the Court required trial courts to conduct "an in-depth appraisal of the identification's reliability along the lines laid out by *Long*." *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991) holding modified by *State v. Thurman*, 846 P.2d 1256 (Utah 1993). This "in-depth" *Ramirez* hearing required trial courts to conduct a five-part analysis of the eyewitness identification to determine whether the witness testimony should be admissible. *Id.* at 780-81.

In 2009, the Supreme Court recognized that *Long* had actually discouraged courts from allowing the introduction of expert testimony in identification cases. *Clopten*, 2009 UT 84 at ¶¶ 8-14. Consequently, after an extremely thorough review of the literature, the Court opted to

> hold that, in cases where eyewitnesses are identifying a stranger and one or more established factors affecting accuracy are present, the testimony of a qualified expert is both reliable and helpful, as required by rule 702. Such eyewitness expert testimony should therefore be routinely admitted, regardless of whether the trial judge decides to issue a cautionary instruction.

Id. at ¶ 49.

Defense counsel did not present a *Long* instruction nor did he challenge the identification of the defendant through the use of expert testimony, a *Ramirez* hearing, or even cross-examination. To demonstrate ineffective assistance of counsel, the defendant must show that his counsel's "performance both falls below an objective standard of reasonableness and prejudices his client." *Adams v. State*, 2005 UT 62, ¶ 25, 123 P.3d 400 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

> An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. To prove ineffective assistance of counsel, defendant must show: (1) that counsel's performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial. To satisfy the first part of the test, defendant must overcome the strong presumption that [his] trial counsel rendered adequate assistance.

State v. Ott, 2010 UT 1, ¶ 22, 647 Utah Adv. Rep. 19 (internal quotations and citation omitted).

1. Counsel's Performance was Objectively Deficient

Two years prior to Ms. Kurr's trial, the Utah Supreme Court decided *State v. Clopten*. Defense counsel never formally filed a motion for a *Ramirez* or *Clopten* hearing. He never moved to present expert testimony on the pitfalls of eyewitness identification. He never introduced the *Long* instruction. He failed to take these steps, despite the Supreme Court's opinion that cross-examination of witnesses and cautionary instructions "suffer from serious shortcomings when it comes to addressing the merits of eyewitness identifications" and that expert testimony "has been shown to be the best method for educating the jury about factors that can contribute to mistaken eyewitness identifications." *Clopten*, 2009 UT 84 ¶¶ 16-17 (including header in between the paragraphs).

The literature is replete with the conclusion that juries do not understand the phenomenon of misidentifications and that cautionary instructions or cross-examination are woefully inadequate to convey to the jury the fundamental flaws in eyewitness testimony. *See Clopten*, 2009 UT 84, ¶¶ 15-38. There can be no conceivable benefit to the defendant for failing to present expert testimony or to challenge the identifications. "[I]f the evidence ha[s] no conceivable beneficial value to [the defendant], the failure to object to it cannot be excused as trial strategy." *State v. Ott*, 2010 UT 1, ¶ 38, 247 P.3d 344, 354, reh'g denied (June 11, 2010), cert. denied, 131 S.

Ct. 1472, 179 L. Ed. 2d 360 (U.S. 2011) (quoting *State v. Hovater*, 914 P.2d 37, 42 (Utah 1996)). As the Supreme Court articulated, anything other than expert testimony would not adequately convey the problems to the jury. Ms. Kurr's case hinged entirely on witness's identifications and there can be no conceivable trial strategy in choosing to totally disregard any challenge to them.

In *State v. Maestas*, 1999 UT 32, 984 P.2d 376, the Utah Supreme Court held that defense counsel was ineffective for failing to request a jury instruction or to challenge the eyewitness identifications. Witnesses identified Maestas as a robbery suspect while he was surrounded by police officers. *Id.* at ¶ 23. Maestas's "only defense ... was the unreliability of the eyewitness identifications." *Id.* at ¶ 25. The Court summarized *Long* and defense counsel's obligations given that decision:

> Our decision in *Long* leads to the conclusion that, unless obvious tactical reasons exist to forego an instruction, trial counsel faced with seven eyewitnesses who, with varying degrees of certainty and consistency, all identify his client as the perpetrator, should request a cautionary eyewitness instruction.

Id. at ¶ 28. In Maestas's case, the witnesses had a limited opportunity to see the perpetrator, whose face was covered; for some of the witnesses, the identification was cross-racial; some focused on the weapon; and all of the witnesses' "identifications were tainted by a highly suggestive show-up." *Id.* at ¶ 29.

Defense counsel in *Maestas*, like counsel in this case, did nothing to attack the identifications:

> Trial counsel did nothing to focus the jury's attention on the limitations of eyewitness identification. He did not educate the jury with respect to the factors set forth in *Long*, which affect eyewitness identification, nor did he argue how each of those factors could have affected particular eyewitnesses. Counsel did not present expert testimony regarding the unreliability of eyewitness identification. In sum, the record is devoid of evidence or argument that would adequately inform the jury regarding the problems inherent in eyewitness identifications.

Id. at ¶ 30. Given these deficiencies, the Court held that "trial counsel rendered objectively deficient performance by failing to request a cautionary eyewitness identification instruction that would have informed the jury of the unreliability of eyewitness identifications." *Id.* at ¶ 31.

Ms. Kurr has a right under due process to present evidence in support of her theory of the case. *See State v. Stephens*, 667 P.2d 586, 589 (Utah 1983) (Stewart, J., dissenting) ("The right of a defendant to produce evidence in his own behalf is one of the most fundamental aspects of a fair trial"); *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 353, 34 L.Ed.2d 330 (1972) (same); *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the

right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

In the case at hand, however, at no point during the trial did defense counsel present a *Long* instruction or challenge the eyewitness identifications. Essentially, these failures deprived the defendant of the right to present her defense and violated due process. The accuracy of the eyewitness identifications was the only issue in the case. If the security officers accurately viewed Ms. Kurr commit the offense, then she could legitimately be convicted. However, if their identifications were in any way inaccurate or tainted, then a substantial possibility exists that Ms. Kurr did not commit the offense in question. Defense counsel had a duty to present at a minimum the *Long* instruction, and even better, expert testimony to educate the jury about the phenomenon of false identifications. His failure to do so deprived the defendant, not only key material, but of the essence of her defense.

2. The Deficient Performance Prejudiced the Defense

Identification was the primary issue in the case. The State's entire case hinged on the testimony of two witnesses. Yet, "[t]he most troubling dilemma regarding eyewitnesses stems from the possibility that an inaccurate identification may be just as convincing to a jury as an accurate one." *Clopten*, 2009 UT 84 at ¶ 17.

Clearly, given the fact that the jury heard none of this evidence, they were left with a false impression that the eyewitness identifications were stronger than they actually were. Defense counsel's failure to call an expert, or present the *Long* instruction, prejudiced the defendant and made it significantly more likely that the jury convicted her of this offense.

Expert testimony is "the best method" for educating juries about the problems in eyewitness cases. *Clopten,* 2009 UT 84 at ¶¶ 16-17; *see also State v. Hales*, 2007 UT 14, 152 P.3d 321 (defendant was prejudiced by ineffective counsel's failure to secure an expert to analyze CT scans in a shaken baby case). Additionally, cross-examination is one of the least-effective methods of discrediting eyewitness testimony. *Id.* at ¶ 16, 21-22. Juries, the court said, are completely unaware of the problems in eyewitness identification. *Id.* at ¶ 15. The Supreme Court emphasized that "expert testimony has been shown to substantially enhance the ability of juries to recognize potential problems with eyewitness testimony." *Id.* at ¶ 25. In fact, in stranger identification cases, trial courts should "routinely admit expert testimony." *Id.* at ¶ 33; *see also id* at ¶ 49 ("eyewitness expert testimony should therefore be routinely admitted ...."). The Court emphasized that if the case involves one of stranger identification and "one or more" of some twenty-seven factors were present, then expert testimony, as a matter of law, will assist the trier of fact as required by Rule 702. *Id.* at ¶ 32.

In this case, at least one of the factors occurred.[1] The identification of the theft occurred after a relatively short view on a security camera, rather than in person. R. 63:16-32. The identifications were later made from a photo lineup, rather than in person, with only one of the witnesses. R. 63:61, 66-67. The photo lineup may well have been tainted. The officer said only that, "we found people of likeness to this person." R. 63:66. If all of the people in the lineup looked like the defendant, rather than from the witnesses' descriptions, there is a substantial likelihood that the photo lineup was tainted. *See State v. Lopez*, 886 P.2d 1105, 1112 (Utah 1994) ("The key is whether the descriptions of the subjects in the photo array match the description of the suspect."); 92 Am. Jur. Proof of Facts 3d 379 (Originally published in 2006) ("For a fair line-up, the fillers should generally match the description of the suspect given by the witness.") There also exists the potential, though defense counsel did not develop this on the record, that the identifications were cross-racial. The Supreme Court expressed a very real fear that potentially occurs in this case: "[i]f unreliable identifications *are not addressed properly at trial*, then there exists an unacceptable risk of the innocent being punished and

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[1] The identification was cross-racial; the victim was under stress or fright; there were distractions; a weapon was present (weapon focus); attention given by the witness; length of time between the event and identification; inconsistent descriptions; the value of lineups compared to showups, the value of photo identifications compared to in-person identification; potentially suggestive conduct, such as the instructions given to the eyewitness by police, the composition of the lineup, the way in which the lineup was carried out, and the behaviors of the person conducting the lineup. *Id.* at ¶ 32, n. 22.

dangerous criminals remaining at large." *Id.* at ¶ 49 (emphasis added). Since at least one of the factors is present, the Supreme Court has held that expert testimony should have been admissible, which did not happen in this case.

Additionally, as the Supreme Court articulated in *Maestas,* even though an "abundance" of evidence linked Maestas to the crime, defense counsel's failure to present a "cautionary instruction seriously undermined the fairness of this trial." *Maestas*, 1999 UT 32 at ¶¶ 33-34. The *Long* instruction, the Court held, "went to the heart of the defense-the theory that Maestas was mistakenly identified." *Id.* at ¶ 34. Consequently, "trial counsel's failure to request a cautionary eyewitness instruction rendered his performance constitutionally deficient and prejudiced Maestas."

Similarly, the heart of Ms. Kurr's case very well could have been a mistaken identification, but counsel failed to present any evidence toward this potential defense. At sentencing, Ms. Kurr refused to accept responsibility, as noted by the prosecutor. R. 64:7. In fact, she alleged that defense counsel told her that "what really happened" would not work as a defense. R. 64:5. Perhaps even more disturbing, and extremely illustrative of ineffective assistance, is counsel's statement to the court at sentencing that he told Ms. Kurr that her credibility was shot. R. 64:4. If Ms. Kurr's counsel did not believe her, then he failed to truly function as an advocate. "[A]n attorney who adopts and acts upon a belief that his client should be convicted fail[s] to function in any meaningful sense as

the Government's adversary." *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988) (quoting in part *United States v. Cronic*, 466 U.S. 648, 666, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984))). An "attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition." *Osborn*, 861 F.2d at 629. In fact, it appears from the record that defense counsel and the defendant were laboring under difficulties which might have affected her ability to have a fair defense.

"An accused is entitled to be assisted by an attorney ... who plays the role necessary to ensure that the trial is fair." *Strickland,* 466 U.S. at 685, 104 S. Ct. at 2063. *See also Kryger v. Turner,* 479 P.2d 477, 480 (Utah 1971) ("The right of an 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."); *see also Alires v. Turner*, 449 P.2d 241, 243 (Utah 1969). "The accused is entitled to the assistance of a competent member of the Bar, who demonstrates a willingness to identify himself with the interests of the defendant and who will assert such defenses as are available to him under the law and consistent with the ethics of the profession. *Kryger*, 479 P.2d at 480. "The failure of such representation constitutes a departure from due process of law." *Id.*

Because a violation of the right to counsel is so entwined with the right to a fair trial, it cannot be harmless error. *Chapman v. California*, 386 U.S. 18, 23 n.8, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)).

Defense counsel engaged in only minimal questioning. Of the State's three witnesses, defense counsel questioned them for a combined total of seven pages. R. 63:38-40, 61-62, 67-68. His questions barely challenged the State's witnesses as to any aspect of their testimony. The State, on the other hand, questioned witnesses for forty-four pages. R. 63:14-38, 45-61, 63-67. These combined failures, accompanied with defense counsel's statement that Ms. Kurr's credibility was shot, support a finding that defense counsel did not function as a true advocate, which is a firm requirement of due process.

The State might argue that both witnesses confidently identified the defendant in court. Chad Wise testified that he had a clear, unobstructed view of Ms. Kurr from 15 yards away. R. 63:31-32. Victor Garcia testified that he was "at arm's length" from the defendant. R. 63:56-57. Detective Allred testified that after her review of the video, Ms. Kurr appeared to be the same person who was in the store. R. 63:66. However, as the Court in *Clopten* articulated, "juries seemed to be swayed the most by the confidence of an eyewitness, even though such confidence correlates only weakly with accuracy."

Clopten, 2009 UT 84 at ¶ 15. In fact, there was a very real danger that the jury in this case was over persuaded by the witnesses' confident assertions to believing that Ms. Kurr was the person depicted in the videotape. Expert testimony and the *Long* instruction are precisely the solutions the Utah Supreme Court has promulgated to remedy this problem, and counsel's failure to use them critically deprived the defendant of the most persuasive evidence of her innocence.

Perhaps the most critical piece of evidence is the store surveillance footage. Of course the jury itself could compare the face in the surveillance footage to the defendant. However, the record does not reflect that it actually was the defendant's face in the footage. At one point, the record shows that the camera focused on the person's face. R. 63:25, 26. But the person is never actually referred to as the defendant. She is called "an individual," R. 63:24, and "the individual," R. 63:25, 26, 27, leading one to conclude that her identity was not certain. Only once is the perpetrator referred to as Ms. Kurr in reference to the videotape and that was in the prosecutor's question, not in the answer. R. 63:28.

The prosecutor took great pains to establish through the testimony of both witnesses that the person depicted and Ms. Kurr were one and the same. R. 63:32, 56-57, 66. He would not have had to make these arguments had the tape clearly depicted the defendant. In other words, the witness testimony appears to have been used to clarify or

elucidate information which wasn't clear from the tape, namely the identity of the perpetrator.

Thus, the record does not establish that Ms. Kurr was actually the person depicted in the surveillance. Any argument that somehow the jury relied on the surveillance footage to make the identification presupposes that they did not rely on the solely on the security officers' representation of the defendant's identity—which appears to have been the key factors in the State's case. The eyewitness identifications, however, suffered from clear problems which may well have undercut the jury's reliance on their representations of what occurred in the footage.

Counsel presented no defense contending that Ms. Kurr was not the person who committed the offense or that security personnel mistakenly identified her. Ms. Kurr had no other defense available to her. His failure in such circumstances to challenge the identifications or to present the *Long* instruction is constitutionally defective and entitles Ms. Kurr to a new trial with effective counsel. Because the identifications were the heart of the State's case against Ms. Kurr, and because counsel did nothing to challenge them, one cannot say with any confidence that the verdict would not have been affected had the identifications been adequately challenged. Ms. Kurr has met her burden to show prejudice in this matter.

CONCLUSION

Based on the foregoing, Ms. Kurr asks this Court to find that her counsel ineffectively failed to challenge the eyewitness identifications in this case, and that had he done so, Ms. Kurr would have received a not-guilty verdict. She asks this Court to remand for a new trial.

RESPECTFULLY SUBMITTED this 16 day of April, 2012.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

RULE 24 CERTIFICATE OF COMPLIANCE

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Garamond Premier Pro 14 point, and contains 4860 words, excluding the table of contents, table of authorities, and addenda.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on 16 April, 2012, I have caused to be

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450 South State Street
Salt Lake City, Utah 84114-0230

I certify that on 16 April, 2012, two copies of the foregoing brief were

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PO BOX 140854
Salt Lake City, Utah 84114-0854

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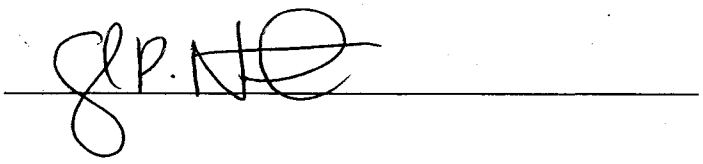

ADDENDUM A

Constitutional Provisions

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defen(s)e.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CONSTITUTION

Article 1, Section 7

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

Article 1, Section 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

ADDENDUM B

Sentencing Transcript

IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ECHO MARNE KURR, Defendant.	Case No. 101902904 FS

Sentencing
Electronically Recorded on
September 13, 2011

BEFORE: THE HONORABLE NOEL S. HYDE
Second District Court Judge

APPEARANCES

For the Plaintiff:

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PROCEEDINGS

(Electronically recorded on September 13, 2011)

MR. GRAVIS: The last matter I have is No. 51, Echo Kurr.

THE COURT: This is in the matter of State of Utah vs. Echo Marne Kurr, case No. 101902904. This is time set for sentencing. Is there any legal reason why we cannot proceed with sentencing in this case today?

MR. GRAVIS: No, your Honor.

THE COURT: All right. Let me hear then, Counsel, any input you have. I have reviewed the pre-sentence investigation report. I'll also hear any input from the State.

MR. GRAVIS: Yes, your Honor. You heard the trial. In fact, she came to trial twice. Actually, it was lucky for the State because they got a witness that they didn't have the first time that may have made quite a difference in the case that was available for the second time we came to trial. We'd ask the Court to reduce the jail time down to 120 days, otherwise follow the recommendation.

THE COURT: All right. Input from the State?

MR. SHAW: Yes. If we're going to impose jail and terminate, then she should be sent to prison and let the board of pardons deal with this matter. Clearly her record is horrendous. It's property crime after property crime, forgery, false info. I mean it's ugly from March of '96 through the present.

So my view is if the recommendation out of the Farmington Office of Adult Parole and Parole is jail and termination, then she ought to go to prison and let the board of pardons determine how best to handle her. Otherwise -- certainly it won't hurt her record to go out to prison, but if this Court's going to put her in jail in lieu of prison, then she is the type of individual that needs to be on probation and it should be a zero tolerant probation. This record is absolutely replete with similar offenses and recurrent behavior. That's my view.

THE COURT: All right. Does defendant wish to make any statement before sentence is imposed?

MR. GRAVIS: Your Honor, in response to that --

THE COURT: Sure.

MR. GRAVIS: -- I (inaudible) probation determined that they did not feel that prison was appropriate in this case, and that supervision, they -- because of her -- I can't remember where it said exactly in here, but it did -- they did indicate, "After reviewing the present case, Adult Probation and Parole staffing committee feels the present offense does not warrant a prison recommendation." They feel that she wouldn't be -- do well on probation either, and they just want -- think a jail sentence and termination is the most appropriate sentence. That's their position.

MR. SHAW: Well, in my view then what happens is one is punished and has no accountability for a conviction of a felony

offense given her record. I mean that sends the wrong message not only to Ms. Kurr, but to each and every person in similar shoes. This is the kind of behavior that's gone on for what, 15 years. So she violates or she gets out and does it again and there's no consequences. What will hopefully keep her from recurring behavior is facing consequences on probation if this Court chooses to do that.

THE COURT: All right. Ms. Kurr, anything you wish to say before the Court imposes sentence?

(Ms. Kurr stands away from microphone and is inaudible)

MS. KURR: I've had a lot (inaudible) consequences. I have (inaudible), but I (inaudible) prosecution is (inaudible) I don't want to go to prison.

I feel like I haven't been -- Mr. Gravis has not been conducive to my well being from the get -- he said just outside just a minute ago that my credibility was shot with him right out of the gate, and I don't know why he didn't stop --

MR. GRAVIS: I didn't say --

MS. KURR: -- defending me if --

MR. GRAVIS: -- it was shot with me. I said your credibility was shot --

MS. KURR: No, he said -- he did not -- I said, "Please fight for me. Please fight for me." I want (inaudible) out of this whole entire time, fight for me one time. He says, "Well, because you -- of your credibility, you and your husband's

credibility was shot from the get go," because of a misunderstanding I had from the court exchange court date. Because of the court date on the court exchange said that I was in jail. So when I got the charges I was like -- I was in jail, because I was in my head.

I don't believe that I was defended properly at all. Like I -- just to clarify, I didn't take it to trial twice to tell you that maybe I paid for it, because I didn't. I (inaudible) pay for it. It was nothing like that, but Mr. Gravis believed that what really happened wouldn't be conducive to my well being and that they wouldn't -- it wouldn't be -- it just wouldn't work. He -- exactly what he said, it wouldn't work. It just wouldn't go, so -- and he said it was his choices to make what he was going to do at trial.

So I don't -- no matter what, if you do agree with the recommendations, please (inaudible) send me to prison. I have five kids, and they're growing up and I don't want to sit in jail and stagnate in jail for (inaudible) something I've done (inaudible). I just don't want to be stagnant in jail.

I plan on appealing the matter because I feel that I've been unfairly -- I haven't even been represented. I mean right out of the gate this guy says -- he stood up in court -- the prosecuting attorney stood up in court and said, "How did you even know about this court date?" Like I wasn't supposed to know about court dates. I just don't know.

If you agree with them, please -- I don't want the recommendation. I don't want to stay in jail for nine months until -- while my family is growing. I would rather be somewhere where I could go to school or work or something instead of being a burden on my husband and my kids.

THE COURT: What's your current employment situation, ma'am?

MS. KURR: Right now we are -- we haven't had a home, but we've been living with family for a year, and we have -- I'm doing -- what is it called? I'm sorry.

MR. GRAVIS: Vocation --

MS. KURR: No. It's a transitional housing program. We just got a house as of last week. We're moving into it current right now. So they're just -- I'm doing (inaudible) programs through voc-rehab, through (inaudible). I don't understand all of it yet. Everything has been kind of really hectic right now. We finally got a home after a year (inaudible).

I'd like to also ask you that no matter what the sentence, my kids -- my husband works full time, and I do love my kids. We haven't taken -- registered them from the old school to the new school, and I was wondering if you would give me time to put them in there, to register them in (inaudible) school.

MR. GRAVIS: Yeah, we were going to ask to let her check into jail on Monday.

THE COURT: All right. According to the report, the

time that's been served in this case is 17 days; is that correct?

MR. GRAVIS: Yes.

MS. KURR: It was actually 30, but -- I was arrested for (inaudible).

MR. SHAW: Your Honor, I want to say one more thing, if I may.

THE COURT: All right.

MR. SHAW: As I looked at the report, the record reflects a total of I believe seven felonies whereas the matrix only accounts for four and assigns two points -- or two and assigns four points, rather. So I mean this matrix has been miscalculated to give her the benefit of the doubt.

MS. KURR: You've got (inaudible). You have to (inaudible).

MR. SHAW: All I'm trying to point out is what I'm hearing here is there's not an acceptance of responsibility, it's Mr. Gravis' fault. This case was tried in front of a jury. This Court watched a video tape. This jury rendered its verdict after a very short period of time, and again, we have recurrent behavior for years and years and years and years. Ms. Kurr has to stop.

THE COURT: Is there anything further, Ms. Kurr, that you wish to say or that anyone else wishes the Court to consider before sentence is imposed?

MR. GRAVIS: Just one thing, your Honor. Although

Mr. Shaw counts them right, there was a series of separate forgeries, they're all the same conviction date.

MR. SHAW: Yeah, but they're three --

MS. KURR: That's all of them.

MR. SHAW: -- different agencies. There's North Ogden, Ogden --

MS. KURR: Because I --

MR. SHAW: -- and Riverdale.

MS. KURR: Because I did (inaudible) and I had my (inaudible) consequences for that, and I went to jail for a year and lost my kids and had to get them back and work my way up the ladder, and do everything. I did it, and I did it awesome. But all of -- they spread them out and they don't put them all together, but there is -- they was all the same time, and I admitted to everything I did. I took every hit on all of them, because I did accept my (inaudible) consequences and my responsibility for what I had done. I have done (inaudible) from that also. My whole entire family has, as a matter of fact.

THE COURT: All right. Is there anything further?

MR. SHAW: No.

THE COURT: All right. The Court is prepared to impose sentence in this case. For the defendant's conviction on the charge of retail theft, a 3rd Degree Felony, the Court is going to impose a sentence of incarceration in the Utah State Prison for zero to five years. It's an indeterminate length. I am going to

suspect that prison sentence, however, upon the successful completion of court probation.

The court probation is going to be for a period of two years. The Court will require as the conditions of probation that there be no violations of the law, federal, state, local or otherwise, other than minor infractions during the period of incarceration.

The Court is going to further require that the defendant serve a period of 200 days in the Weber County Jail. I will give you credit for time served, which is the 17 days. Also authorize adjustments for good time, and further provide that the final 45 days of that sentence may be served through the day reporting program.

Ma'am, do you have any employment at this point that's available to you?

MS. KURR: Yes, sir.

THE COURT: I will authorize work release as well, then, subject to qualifying for the work release program as set forth at the jail. The probation period will continue following the defendant's release from custody for a period of two years from today's date. That will be a zero tolerance court probation, so that any further violations of the law will result in the imposition of the sentence -- the prison sentence originally imposed by the Court. That will be the sentence.

MR. GRAVIS: Can she check in Monday so she can --

THE COURT: Yes. She may check in on Monday. That is September 19th, 2011 at or before 5 p.m. So before 5 p.m. on Monday will be the check in time. Ma'am, as in all sentencing matters, you do have a right of appeal from the sentence. That right continues for a period of 30 days.

MR. GRAVIS: She had previously filed a pro se motion notice of appeal. I explained to her that we need to redo that and we'll take care of that.

THE COURT: All right. Thank you.

MR. GRAVIS: That's all the matters I have at this time, your Honor.

THE COURT: Thank you, Counsel.

MR. SHAW: Thank you, your Honor.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have authorized Natalie Lake to prepare said transcript, as an independent contractor working under my license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

_____
Natalie Lake
Official Court Transcriber

WITNESS MY HAND AND SEAL this 13th day of November 2011.

My commission expires:
February 24, 2012

_____
Beverly Lowe
NOTARY PUBLIC
Residing in Utah County