

2015

**State of Utah, Plaintiff/Appellee, vs. Santiago Aponte, Defendant/
Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

SANTIAGO APONTE,

Defendant/Appellant

Case No. 20150154-CA

Appellant is incarcerated

BRIEF OF APPELLANT

APPEAL FROM THE CONVICTION, JUDGMENT, SENTENCE AND ORDER FOR COMMITMENT, AND
DENIAL OF APPELLANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION, IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, THE HONORABLE SAMUEL MCVEY,
PRESIDING.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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UTAH APPELLATE COURTS

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
JURISDICTION.....	1
ISSUES, PRESERVATION, AND STANDARDS OF REVIEW	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS MATERIAL TO THIS APPEAL.....	5
ARGUMENT	10
I. THE TRIAL COURT ERRONEOUSLY ADMITTED THE EYEWITNESS IDENTIFICATION EVIDENCE, INCORRECTLY CONCLUDING THAT THE SUGGESTIVE AND THUS UNRELIABLE EYEWITNESS IDENTIFICATION PROCESS WAS JUSTIFIED BY POLICE EXPEDIENCY.....	10
II. THE TRIAL COURT ERRED IN ADMITTING THE 404(b) EVIDENCE AND IN FAILING TO SCRUPULOUSLY EXAMINE IT TO ENSURE IT WAS OFFERED FOR A PROPER NON-CHARACTER PURPOSE.....	17
CONCLUSION	20
CERTIFICATE OF COMPLIANCE	21
CERTIFICATE OF MAILING	21
ADDENDA	
A: Ruling and Order on Motion to Suppress Eyewitness Identification	

TABLE OF AUTHORITIES

Cases

<i>Manson v. Brathwaite</i> , 432 U.S. 98 (1977).....	11
<i>Neil v. Biggers</i> , 409 U.S. 188 (1972)	11
<i>Simmons v. United States</i> , 390 U.S. 377 (1968)	10, 11-13
<i>State v. Clopten</i> , 2009 UT 84, 223 P.3d 1103	15-17
<i>State v. Gurule</i> , 856 P.2d 377 (Utah App. 1993)	1-2
<i>State v. Hubbard</i> , 2002 UT 45, 48 P.3d 953	15
<i>State v. Long</i> , 781 P.2d 483 (Utah 1986)	9, 11, 15
<i>State v. Lopez</i> , 886 P.2d 1105 (Utah 1994)	14
<i>State v. Lujan</i> , 2015 UT App 199, --- P.3d ---	2, 16
<i>State v. Ramirez</i> , 817 P.2d 774 (Utah 1991)	15
<i>State v. Shickles</i> , 760 P.2d 291 (Utah 1988)	18
<i>State v. Thamer</i> , 777 P.2d 432 (Utah 1989)	13
<i>State v. Verde</i> , 2012 UT 60, 296 P.3d 673	2, 18, 19-20
<i>State v. Villarreal</i> , 889 P.2d 419 (Utah 1995)	2
<i>Stovall v. Denno</i> , 388 U.S. 293 (1967)	11

Statutes & Rules

Utah Code Ann. §78A-4-103(2)(e)	1
Utah R. Evid. 404(b)	4, 17, 18, 19

Constitutional Provisions

United States Constitution, Amendment V	11
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BRIEF OF APPELLANT

JURISDICTION

Because this is an appeal in a criminal case not involving a first degree or capital felony, this Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e).

ISSUES, PRESERVATION, AND STANDARDS OF REVIEW

ISSUE 1: Did the trial court err in denying Santiago Aponte's motion to suppress witness identification evidence that was the product of suggestion?

PRESERVATION: This issue was preserved below by Aponte's motion and his renewed objection to this evidence at trial. *See, e.g.,* R:45-50; R328:88.

STANDARD OF REVIEW: In evaluating a trial court's denial of a motion to suppress eyewitness identification evidence, this court reviews factual findings for clear error and legal conclusions for correctness. *State v. Gurule*, 856 P.2d 377

(Utah App. 1993). If this Court concludes that the evidence was improperly admitted, the State bears the burden of proving its admission was harmless beyond a reasonable doubt. *State v. Lujan*, 2015 UT App 199, ¶16. That analysis requires this Court to consider “the importance of the witness[es]’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness[es] on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” *State v. Villarreal*, 889 P.2d 419, 425–26 (Utah 1995) (citation and internal quotation marks omitted).

ISSUE 2: Did the trial court err in admitting 404(b) evidence?

PRESERVATION: This issue was litigated and preserved below. R:187-191; R:218-19; R327:14-16.

STANDARD OF REVIEW: A trial court’s decision to admit evidence of prior bad acts is reviewed for an abuse of discretion, “but the evidence must be scrupulously examined by trial judges in the proper exercise of that discretion.” *State v. Verde*, 2012 UT 60, ¶13, 296 P.3d 673 (citation and internal quotation marks omitted).

STATEMENT OF THE CASE

In September 2013, Aponte was charged by Information with Theft by Receiving Stolen Property, a second degree felony; Failure to Respond to Officer’s Signal to Stop, a third degree felony; Theft by Receiving Stolen Property, a class B misdemeanor;

Reckless Driving, a class B misdemeanor; Failure to Stop at Injury Accident, a class A misdemeanor, and Driving on Suspended or Revoked Operator's License, a class C misdemeanor. R:1-3. These charges were later amended such that the felony theft by receiving charge was dismissed. R:7-9; R329:256.¹

After the preliminary hearing the trial court found sufficient probable cause to bind all of the charges over for trial. R:36-39; R324:26. Aponte filed a Motion to Suppress Eyewitness Identification evidence on the ground that that evidence was the product of suggestion and thus was unreliable because the responding officer showed only Aponte's photo to eyewitnesses on the night of the incident. R45-54.

Ten months after the crime, the court conducted an evidentiary hearing on the motion to suppress. R:45-52. Just prior to this hearing, the State attempted to remedy the tainted initial identification by showing two eyewitnesses a photo lineup of six individuals, including Aponte. *Id.* In response, Aponte filed a Supplemental Motion to Suppress Eyewitness Identification, arguing that the initial taint was irreparable and the State's remedial effort to correct the tainted identifications was also impermissibly suggestive. R:54-59. On September 4, 2014, the trial court issued its Ruling and Order on Motion to Suppress Eyewitness Identification, wherein it denied Aponte's motion and

¹ Before trial, the State dropped the second degree felony charge for theft by receiving and the charges were presented to the jury as follows: Count I, failure to respond to an officer's signal to stop, a third degree felony; Count II, reckless driving, a class B misdemeanor; Count III, failure to stop after injury/accident, a class A misdemeanor; Count IV, driving on a suspended or revoked license, a class C misdemeanor; and Count V, theft by receiving stolen property, a class B misdemeanor. R329:256

allowed the eyewitness identification evidence to be presented to the jury. R:96-102; Addendum A; *see also*, R:222-29, State's Motion in Limine to allow eyewitnesses Miller and Smith to testify.

Prior to trial, the State filed notice of its intent to admit 404(b) evidence involving two other cases when Aponte fled from police. R:114-121. Aponte objected to the motion on the ground that the evidence's prejudicial effect outweighed its probative value. R:187-191. After oral argument the court granted the State's motion for the limited purposes of showing intent, absence of mistake or accident, and showing identity "because it shows that what the witnesses observed was something that this person would not do by accident." R:218-19; R327:14-16. The limiting jury instruction given stated in pertinent part, "You may only consider this evidence, if at all, for the limited purposes of absence of mistake or accident, knowledge, opportunity, and the doctrine of chances." R:264. However, the jury was not instructed on the meanings of these limited purposes or how to apply them. Further, the only contested issue in this case was identity.

Trial was conducted on December 17-18, 2014. R:230-31; 288-89; 328, 329. Because Aponte had notice of the proceeding yet failed to appear, the trial court found that he had "voluntarily absented himself and waived his right to be at trial[.]" R328:85. The trial proceeded in absentia over Aponte's counsel's objection. *Id.* The jury found Aponte guilty on all counts except Theft by Receiving Stolen Property. R:290-291; R329:256. Aponte failed to appear at his sentencing and the court issued a nonbailable warrant for his arrest. R:311-12, 330. Aponte was sentenced in absentia to the Utah

State Prison for an indeterminate term not to exceed five years, based on his felony conviction for Failure to Stop or Respond at Command of Police, with the maximum allowable terms for his misdemeanor convictions to run concurrent. R:306, 330.

Aponte timely filed a Notice of Appeal. R:314.

STATEMENT OF FACTS MATERIAL TO THIS APPEAL

On August 31, 2013, Sergeant Todd Huff of the American Fork Police Department terminated pursuit of a stolen silver Chevy Impala after losing sight of it in the vicinity of State Street in American Fork. R324:4-8, 15; R328:105, 140. A few minutes later, a passing motorist told Huff that the fleeing vehicle crashed at a nearby Hart's gas station. R324:8, 20; R328:134-35, 141, 143. When Huff arrived at the station, witnesses informed him that the Chevy's driver had jumped out the driver's side window and fled on foot. R324:9. However a female passenger, Rebecca Robertson, was still at the "chaotic" scene. R324:9, 13; R328:143-44. Several witnesses, the gas station owners, and police were "coming and going." R324:13. Huff testified he "was on the radio constantly" such that he neglected to have "Karen" Smith² sign her witness statement. R324:11-13.

Robertson told Huff that the driver was the defendant, Santiago Aponte. R324:9, 20. Another officer sent Huff a large electronic color copy of Aponte's photograph, which he accessed on his laptop computer and showed to witnesses, asking them "if this was the one they [had] seen run from the vehicle." R324:9, 18; R328:147; R328:157,

² The witness was actually a Mr. Warren Smith who testified at the hearing on the motion to suppress eyewitness identification. *See, infra.*

196. Two eyewitnesses, Eileen Miller and Warren Smith, both viewed the “fairly large” “paper size” computer image of Aponte. R324:9-10, 19; R325:12, 16-17, 28; R328:179, 191. Miller testified at the hearing on the motion to suppress that the computer image of Aponte “seemed to be the gentlemen” she had seen. R325:13; *see also* R328:175 (at trial Miller testified, “[...] I observed from where I was standing the picture on the screen in the squad car, and I noticed that the picture that was up on the screen was the gentleman that just ran in front of me.”). Smith later testified that he “got a really good look at” the suspect and was “highly confident” he was the same man that Sergeant Huff showed him in the photo. R325:38-9; R328:191. Smith noted that the photo from the computer image “was just a little bit different” than the man he saw, but he knew it was the same individual. R328:196. No other photos were shown to any of the witnesses at that time. R324:18, 37. Huff testified that in a case like this it is “standard procedure” to show witnesses only the suspect’s photo. R328:155.

Several months later and prior to a June 9, 2014 hearing on Aponte’s motion to suppress the eyewitness identification evidence, Huff showed eyewitnesses Miller and Smith a photo lineup of six individuals including Aponte. R325:19-20, 29, 37; R328:160-61, 181, 192-93; State’s Exhibits 5 & 6. He “prefaced [...] showing the lineup by saying, ‘I have a lineup with whoever the driver was of that vehicle in the lineup. Can you look at it and tell me if you recognize the driver of the vehicle in the lineup.’” R328:164. Thus he let the witnesses know that the lineup contained a photo of the person who he “believed was the driver.” R328:164-65, 182.

Miller “immediately” identified Aponte’s photograph with 99 percent certainty after taking “a long look at it”, placing a sticky note on his head in lieu of the blue bandana the suspect wore at the time of the crime, and engaging in a “process of elimination to make doubly sure[.]” R325:20-1. Miller testified that the accident happened 20-25 feet in front of her; and because the crashed vehicle was “spewing smoke[.]” her “first thought was “we’re going to have a fire” and that the occupants might be injured. R328:171. She watched the driver struggle with the airbag, communicate with the passenger, unroll and crawl out the car window, run behind the building where he scaled an eight-foot fence, then slide down a trailer parked on the other side. R325:6-7; R328:169-173. She said he was about five feet away when he ran past her. R328:173. Miller pursued the suspect when she realized he was running from the scene. R328:172. She testified the suspect wore a blue bandana on his head; and that after he jumped out of the car window he looked scared and also gave her a look as if to warn her off. R325:7-9; R328:173, 179. Miller believed she observed the suspect for approximately three minutes from the time of impact until he scaled the fence. R325:9. Her recollection that another eyewitness, Warren Smith, was the driver of a red Oldsmobile at the scene was inaccurate, as Smith was actually the passenger, not the driver. R328:170-71, 186.

Smith also identified Aponte in the June 9, 2014 lineup as the suspect, with a reported 99 percent certainty. R325:29-30. However, between being shown the first photo of Aponte at the scene and being presented with the photo lineup several months

later, Smith looked Aponte up on the internet. R328:197. Smith stated that in both the photo lineup and the computer image he was shown on the night of the incident the suspect had a shaved head, "although that wasn't [...] significant. It was his eyes, his mouth, his – just his overall facial features that made it really easy." R325:34. Smith testified that he was a passenger in a vehicle that suffered a minor impact during the crash. R325:23; R328:187, 191. He also saw the suspect driver struggle with the airbag then jump from the driver's side window. R325:24; R328:189-190. The suspect wore a blue bandana and made eye contact with Smith before running behind the station and scaling the fence. R325:25. Smith testified that he observed the suspect "very, very clear" for perhaps five to ten seconds before he fled the scene. R325:27-8, 33; R328:194. However, Smith's immediate concern was some "steam or smoke" coming from the crashed stolen vehicle and whether there might be a fire. R325:35.

Both Miller and Smith testified that the accident happened around 9:30 p.m. when it was dark but the area around the gas pumps was well lit. R325:10, 27-8; R328:169-170, 185.

Rebecca Robertson was uncooperative with police; and an officer noted in his report that she was unwilling to tell him the truth because she "was covering" for someone else. R328:118-19. She was also in possession of "a prescription pill" and was under the influence of a narcotic at the time of the accident. R328:119, 126. Robertson testified at trial that Aponte was the driver of the stolen vehicle. R328:121-22, 146. She testified she pled guilty to charges arising from the case and had four prior felony

convictions. R328:123-24. Robertson also had a prior conviction for giving false information to a police officer. R328:126. She testified, "You don't tell on your friends. You have a loyal code, your friends." R328:127. When asked on cross-examination if she would lie to protect a friend, she responded, "Back in the day, yeah, I probably would, you know. I got pretty messed up in - [.]" R328:128. On redirect she stated that her testimony was truthful. R328:128.

Aponte moved to suppress the eyewitness identifications of both Miller and Smith on the ground that that evidence was the product of suggestion and violated his right to due process. R326:2-4. The trial court denied Aponte's motion, finding that the eyewitness identification evidence was reliable under the five factors set forth in *State v. Long*, 781 P.2d 483, 493 (Utah 1986), *infra*. R96-102. The court specifically found that showing the eyewitnesses a single photograph of the defendant did not create "an unconstitutional risk of taint" because police needed to identify the suspect quickly as he had fled the scene. "The on-scene identification was characterized by non-ambiguity and strength of the identification." R99.

Additional material facts will be cited herein as warranted.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY ADMITTED THE EYEWITNESS IDENTIFICATION EVIDENCE, INCORRECTLY CONCLUDING THAT THE SUGGESTIVE AND THUS UNRELIABLE EYEWITNESS IDENTIFICATION PROCESS WAS JUSTIFIED BY POLICE EXPEDIENCY.

In its Ruling and Order on Motion to Suppress Eyewitness Identification (R:96-102; Addendum A), the trial court concluded that the initial photo identification of Aponte, where only his photo was shown to eyewitnesses, presented no “unconstitutional risk of taint” based on the totality of circumstances. R:99. Relying upon and quoting *Simmons v. United States*, 390 U.S. 377, 383 (1968), the court concluded that Sergeant Huff’s action of showing only Aponte’s photograph to witnesses was “necessary and did not violate defendant’s rights to due process” because Huff had “no time to prepare a photo lineup” and the suspect was “at large and fleeing.” R:99. “The Constitution surely did not contemplate putting the public at physical risk [...] as *Simmons* confirms.” R:99. Therefore, the trial court dismissed any risk of misidentification and unreliability created by the suggestive presentation on the ground of police expediency. The court further determined that based on its analysis, Aponte’s claim that “the initial photo identification tainted the subsequent photo lineup” was “largely render[ed] moot[.]” R:99.

The trial court’s conclusion that under *Simmons*, police expediency allows a suggestive identification process is incorrect. Moreover, it runs counter to the more stringent standards created and applied by Utah appellate courts.

The Due Process Clause of the federal constitution provides, “No person shall be held to answer for a capital, or otherwise infamous crime ... without due process of law.” U.S. Const., Amend. V. This provision requires that eyewitness identification evidence must be sufficiently reliable before it can be admitted into evidence. *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972); *see also*, *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (discussing whether an eyewitness confrontation was “so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] was denied due process of law”).

Reliability is “the linchpin in determining the admissibility of identification testimony[.]” *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). Therefore, trial courts must perform a gatekeeping function in keeping unreliable evidence from a jury. “Although research has convincingly demonstrated weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness. Moreover, common knowledge that people do possess often runs contrary to documented research findings.” *State v. Long*, 721 P.2d 483, 490 (Utah 1986).

Here, the trial court failed in its gatekeeping role. Neither the facts nor the Court’s analysis in *Simmons* support the trial court’s findings and conclusions in this case. In *Simmons*, the factual context involved two unmasked gunman who robbed a bank then fled the scene. Though the Court’s analysis briefly noted the necessity of identifying and

apprehending the suspects who were still at large when eyewitnesses were shown photographs of Simmons and the codefendant, the Court's ultimate focus was on the reliability of that identification process based on the totality of the circumstances in that case:

[T]here was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well lighted bank. The robbers wore no masks. *Five bank employees* had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. *At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with Simmons and Andrews each appearing several times in the series. Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.*

Simmons, 390 U.S. at 385 (emphasis added).

These facts do not support the trial court's findings and conclusions in this case. Here and contrary to the circumstances in *Simmons*, witnesses were shown only one photograph of Aponte, then asked "if this was the one they [had] seen run from the vehicle." R324:9, 18; R328:147; R328:157, 196. The witnesses were milling around the chaotic scene and at some point – or several – grouped around Huff's police car where the "fairly large" image of Aponte was displayed on Huff's laptop computer. R324:9-10, 19; R325:12, 16-17, 28; R328:179. The witnesses clearly understood that police believed the individual in the single photograph shown to them was the driver of the stolen vehicle and he was presented to them as such. R328:155. This process was impermissibly

suggestive. Indeed, the proper application of *Simmons* on these facts would have required the exclusion of the tainted eyewitness identification evidence in this case:

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 identification. *This danger will be increased if the police display 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. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.* Regardless of how the initial misidentification comes about, *the witness thereafter is apt to retain in his memory the image of the photograph, rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.*

Simmons, 390 U.S. at 383-84 (emphasis added). The trial court's analysis of *Simmons* was incorrect as that case requires that a conviction based on eyewitness identification following an impermissibly suggestive photographic identification procedure, such as that utilized in this case, be set aside. *Id.*

Moreover, because showing the eyewitnesses only Aponte's photograph while asking them if he was the driver was impermissibly suggestive, that identification process gave "rise to a very substantial likelihood of irreparable misidentification" that would taint any future identifications. *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989). But aside from this irreparable taint created by the initial and impermissibly suggestive identification, the subsequent photo lineup was also impermissibly suggestive because

the witnesses were again told that Sergeant Huff believed the array of six photos shown to them at that time included the suspect. R325:19-20, 29, 37; R328:160-61, 164-65, 181-82, 192-93; *see also*, State's Exhibits 5 & 6.

Indeed, the identification procedures utilized here provide a textbook case of everything law enforcement should *not* do when gathering eyewitness identification evidence. "The words and actions of law enforcement officials who present the photos should convey an attitude of disinterest, and the photographs themselves should not be selected so as to give greater prominence to one photograph. [...] Any manipulation indicating that the police believe one of the photographs portrays the accused could lead to a finding of suggestiveness." *Id.* Added to the impermissible suggestiveness of these procedures is the fact that in the interim, eyewitness Warren Smith unilaterally went to the trouble of locating Aponte's image on the internet, further solidifying his identification of Aponte's *photograph* at the crime scene. The trial court did not address these material facts in its ruling. *See, State v. Lopez*, 886 P.2d 1105, 1111 (Utah 1994) ("Subsequent identification must be based on [an] untainted, independent foundation to be reliable") (citation omitted).

As noted above, Utah appellate courts apply an even more stringent standard to ensure that eyewitness identification evidence is reliable before it can be presented to a jury. With jurisprudence dating at least as far back as 1986, the Utah Supreme Court explained the scientific research demonstrating that despite the inherent unreliability of eyewitness identifications, juries are unaware of these problems and place great weight

on this evidence. *State v. Long*, 721 P.2d at 490. A few years after *Long*, in *State v. Ramirez*, 817 P.2d 774 (Utah 1991), the Court further developed and clarified the non-exhaustive five-part analysis that currently applies to this evidence. *Id.* at 781 (analyzing reliability of eyewitness identification evidence based on (1) the opportunity to view the actor during the event; (2) the witness's degree of attention to the actor; (3) the witness's capacity to observe; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive and remember it correctly, which perception may be adversely affected if the observer's race is different from the race of the actor); *see also*, *State v. Hubbard*, 2002 UT 45, 48 P.3d 953, 963, 965 (noting that when acting as a gatekeeper and determining whether out-of-court identification violates due process and should be excluded, a court must "examine the procedural actions taken by law enforcement officials in assembling and presenting a photo array to witnesses"; and "make a preliminary determination on whether the identification is sufficiently reliable such that its admission and consideration by the jury will not violate defendant's right to due process.").

The Utah Supreme Court revisited the issue in 2009 in *State v. Clopten* wherein it reiterated the problems associated with the false perception that eyewitness identifications are reliable and even infallible. "[J]uries seem[] to be swayed the most by the confidence of an eyewitness, even though such confidence correlates only weakly with accuracy." 2009 UT 84, ¶15, 223 P.3d 1103. Moreover, cautionary instructions are

ineffective at educating the jury on the unreliability of eyewitness identification. *Id.* at ¶¶23-24.

This Court recently applied Utah's more stringent standard in *State v. Lujan*, 2015 UT App 199, where the defendant's conviction was reversed and the case remanded for a new trial because the trial court erroneously admitted unreliable eyewitness testimony. *Id.* at ¶1. In *Lujan*, the eyewitness saw an Hispanic suspect at a very close range, because the suspect stole the witness's car literally out from under him as the witness sat in the driver's seat in his own driveway. A short time later Police apprehended Lujan at a nearby school and brought the eyewitness to the scene to positively identify him – which he proceeded to do, though Lujan was bald and had a goatee, unlike the witness's initial description of the suspect. *Id.* at ¶14.

As this Court again explained, “[T]he scientific literature [...] is replete with empirical studies documenting the unreliability of eyewitness identification.” *Id.* at ¶10 (citations and internal quotation marks omitted). And because jurors give eyewitness testimony great weight and do not understand its fallibility, “Utah applies a more stringent standard in making reliability determinations than that employed in the federal system.” *Id.* Moreover and contrary to the trial court's ruling in this case, this Court's analysis in *Lujan* makes clear that the totality of circumstances test goes to the question of reliability, not to police expediency, which exception would swallow the rule in any event as police expediency could almost always be used to justify an impermissibly suggestive identification. *Id.*

Based on the applicable law, the trial court erroneously admitted the eyewitness identification evidence in this case. The improper and impermissibly suggestive procedures employed ensured that the identification of Aponte was not spontaneous but rather the product of suggestion. See, *Id.* at ¶11.

Moreover, this error was harmful. Aside from the fact that juries are unaware of the proven fallibility of an honest eyewitness's identification and therefore are more likely than not to give that evidence more weight than it warrants, the only other direct evidence that Aponte was the suspect driver came from Rebecca Robertson, a long-term drug user and felon with an extensive criminal history who was under the influence of narcotics, had a history of lying to the police, and was untruthful with police in this case. Therefore, "[w]hen [Miller's and Smith's] identifications of [Aponte] are removed, the State's case is severely weakened." *Id.* at ¶17.

II. THE TRIAL COURT ERRED IN ADMITTING THE 404(b) EVIDENCE AND IN FAILING TO SCRUPULOUSLY EXAMINE IT TO ENSURE IT WAS OFFERED FOR A PROPER NON-CHARACTER PURPOSE.

Over Aponte's objection, the State presented evidence of Aponte's two prior convictions for evading for the express purposes of showing the absence of mistake, "the doctrine of chances", and identity – expressly stating that the evidence would show that the eyewitnesses' identifications were correct. R:327:3, 6-7, 9-10, 12; *see also*, State's Exhibits 7 & 8 (certified copies of prior convictions admitted into evidence). At oral argument on the State's motion to allow this evidence, the prosecutor explained, "We show identity because [the prior convictions] are similar in nature to [... the] prior

offenses[.] [...] That works with the doctrine of chances. That's showing identity, because if he's done this twice before, the law of probabilities would suggest, it's not an accident." R327:10. The prosecution also argued that the evidence would show "a lack of accident or mistake on the part of the witnesses" in identifying Aponte. R327:12.

In granting the State's motion, the trial court concluded that under the language of 404(b), *State v. Shickles*, 760 P.2d 291 (Utah 1988), and *State v. Verde, infra*, the prior bad act evidence was admissible to show intent, "in other words his intent was in leaving the area." R327:14-16. It was also admissible "to show an absence of mistake or accident, in that he wasn't just leaving because he didn't know better. It would also show knowledge about what he was doing." R327:14.

The trial court initially had "a hard time [] making the bridge from prior similar incidents to identity." R327:14. However, the court ultimately concluded the evidence was admissible "for purposes of showing identity, because it shows that what the witnesses observed was something that this person would not do by accident." R327:16. However and as noted in the Statement of the Case, *supra*, the limiting jury instruction did not address identity, stating in pertinent part, "You may only consider this evidence, if at all, for the limited purposes of absence of mistake or accident, knowledge, opportunity, and the doctrine of chances." R:264. The jury received no further instruction on this evidence, no definitions for these limited purposes, and no meaningful guidance on how to apply them to the facts. Incidentally and contrary to the State's repeatedly expressed primary purpose, the evidence was not offered to prove identity.

The trial court's analysis of the 404(b) evidence is incorrect, as was its decision to allow it. "Under this rule, the admissibility of prior misconduct evidence depends on its avowed purpose. When such evidence is offered to suggest action in conformity with a person's alleged bad character, it is inadmissible under the rule. When past misconduct evidence is offered for any other purpose, on the other hand, it is admissible." *State v. Verde*, 2012 UT 60, ¶15.

As per the jury instruction given, the avowed purpose of the 404(b) evidence was to establish (1) lack of mistake or accident; (2) knowledge; (3) opportunity; and (4) the doctrine of chances. Aside from the fact that the jury was not apprised of the legal meanings of these limited purposes, none are legitimate bases for admitting the prior bad acts evidence under the facts of this case, as the only contested issue was the identity of the suspect. That the driver of the stolen vehicle had the opportunity and knowledge of what he was doing, and that he did not mistakenly or accidentally flee from police and the crime scene, were not contested facts and are readily inferred from the evidence.

As the *Verde* court explained, where elements of a crime are "uncontested and readily inferable from other evidence, 404(b) evidence is largely tangential and duplicative. It is accordingly difficult to characterize its purpose as properly aimed at establishing [those elements]. In context, it seems much more likely that it was aimed at sustaining an impermissible inference that [the defendant] acted in conformity with the bad character suggested by his prior bad acts." *Id.* at ¶26. "Such evidence may be worse than immaterial to a legitimate narrative. It may risk creating an alternative, illegitimate

narrative—that the defendant has a reprehensible character, that he probably acted in conformity with it, and that he should be punished for his immoral character in any event.” Id. at ¶29.

As for the legal doctrine of chances, aside from the fact that the jury was never instructed on what it was or how to apply it, the trial court also misunderstood the doctrine, referring to the evidence admissible thereunder as “‘good’ propensity evidence [...] rather than ‘bad’ propensity evidence.” R327:16. In other words, the trial court misinterpreted *Verde* as allowing evidence showing that a defendant has the propensity or bad character to commit the charged crime, which was the true purpose for the prior bad act evidence offered in this case – to show that Aponte had a propensity to evade police.


Based on the foregoing facts and law, the trial court abused its discretion in admitting evidence of Aponte’s prior bad acts.

CONCLUSION

Because the trial court erred in admitting tainted eyewitness identification evidence and prior bad acts, Aponte’s conviction should be reversed and this case remanded for a new trial.

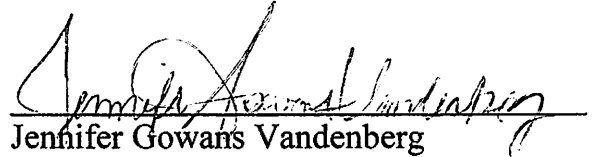
Submitted this 26th day of October, 2015.

JENNIFER K. GOWANS, P.C.


Jennifer Gowans Vandenberg
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

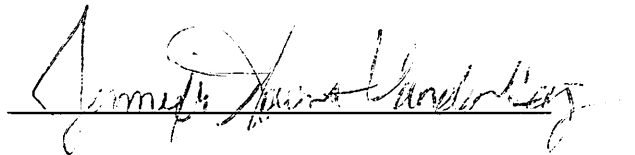
I hereby certify that in accordance with the applicable Rule of Appellate Procedure, this Brief of Appellant complies with all formatting requirements and contains 5,306 words, excluding tables.


Jennifer Gowans Vandenberg

CERTIFICATE OF MAILING

I certify that on this 26th day of October, 2015, I caused to be mailed, postage prepaid, two true and correct hard copies and one electronic copy of the foregoing Supplemental Brief of Appellant to the following:

Sean Reyes
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Appeals Division
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PO Box 140854
Salt Lake City, Utah 84114-0854



Tab A

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

FILED
SEP 9 2014
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

STATE OF UTAH,

Plaintiff,

vs.

SANTIAGO AVILA APONTE,

Defendant.

**RULING AND ORDER ON MOTION TO
SUPPRESS EYEWITNESS
IDENTIFICATION**

Case No. 141400333

Judge Samuel D. McVey

Defendant moved to suppress evidence of eyewitness identifications from a single photo and a photo lineup array. The parties submitted the matter on the evidence of the preliminary hearing, supplemented by the actual photo array. The Court heard arguments of counsel and reviewed their memoranda. Counsel submitted the matter for decision.

FACTS

On August 31, 2013, Sergeant Huff was attempting to stop a vehicle reported as stolen. The vehicle accelerated and fled. A witness told Huff the vehicle had crashed at a local gas station. Huff arrived at the station and saw the vehicle. The driver had fled the scene.

A passenger in the car remained and told Huff the driver was Defendant, Aponte. Huff obtained a photo of a man named Aponte from public files and showed it to two witnesses at the scene. Each witness identified defendant as the driver of the car from this photograph. Each witness also reported getting a good, sustained look at the driver of the vehicle while he was running away. They saw the photos shortly after witnessing the accident. Based on this positive identification, and witness information on where defendant was headed, police later apprehended him.

About 10 months later on June 9, 2014, Huff created a photo array of six individuals, including defendant, and showed it to three witnesses, including the two who had identified his

photo at the scene. Those two witnesses identified defendant as the driver with "99%" certainty. Another witness narrowed the list down to defendant (30% certainty) and another person's photo (70% certainty).

DISCUSSION

Defendant argues each photo identification at the scene should be suppressed as suggestive and, since showing the photos at the scene tainted the subsequent identification, and all of the photo demonstrations would taint any further identification at trial, any eyewitness identification should be suppressed. The Court addresses these points as a gatekeeper for determining whether the identifications are sufficiently reliable and non-tainted to be presented to the jury. *State v. Hubbard*, 2002 UT 45, ¶ 30, 48 P.3d 953, 963. See also *State v. Guzman*, 2004 UT App 211, ¶ 18, 95 P.3d 302, 307.

A. IDENTIFICATION AT TRIAL

In *State v. Hubbard*, 2002 UT 45, ¶ 30, 48 P.3d 953, 963, our Supreme Court stated:

Since *State v. Long*, 721 P.2d, 483 (Utah 1986) we have used five factors as a test for analyzing, as a preliminary constitutional matter, whether an eyewitness identification is sufficiently reliable to be presented to the jury. See, e.g., *Hollen*, 2002 UT 35, ¶¶ 26-63; *State v. Hoffhine*, 2001 UT 4, ¶ 18, 20 P.3d 265 (quoting *Ramirez*, 817 P.2d at 781 (quoting *Long*, 721 P.2d at 493)); *State v. Decorso*, 1999 UT 57, ¶ 42, 993 P.2d 837 (quoting *Long*, 721 P.2d at 493). The factors are as follows:

(1) the opportunity of the witness to view the actor during the event; (2) the witness' degree of attention to the actor at the time of the event; (3) the witness' capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

Long, 781 P.2d at 493. "While these factors provide guidance, the list is certainly not an exhaustive or exclusive list of factors that may be considered in determining whether an identification is reliable, and, therefore, not violative of due process." *Hubbard*, at ¶27-29. See also *Guzman*, at ¶ 18, 95 P.3d 302, 307.

In this case, the witness identifications at the crime scene satisfy these elements. There seems to be no real dispute on this point. The witnesses each had a good look at the suspect, being within 25 feet in an extremely well-lit area. One witness was within a half car length of the suspect and the suspect looked right at him. They both saw him for a period of twenty to thirty seconds or more, so it was not a quick glance. The witnesses actually focused on the suspect with the expressed intent of making sure they could identify him in the future. Both witnesses were very clear in their identification at the preliminary hearing and indicated they were likewise mentally acute at the scene. They identified the suspect to the officer and were consistent in their identification thereafter. The event was an unusual one, drawing attention to the suspect. Of course, their identification was corroborated by the passenger in the stolen car who accompanied defendant and was a good enough acquaintance to know his name.

B. THE INITIAL PHOTO IDENTIFICATION

The reasonableness of use of photos to obtain identification must be considered "in light of the totality of the circumstances." *Simmons v. United States*, 390 U.S. 377, 383, 88 S.Ct. 967, 970 (1968). Further, in cases where police use a photograph in attempting to apprehend a suspect after a crime, "despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement from the standpoint of both apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." *Id.* at 384.

Here, Officer Huff heard from an apparent acquaintance of defendant that defendant was driving the stolen vehicle when it crashed, spectacularly the Court might add, at the gas station. The driver may have risked a serious fire or explosion and bystander deaths by crashing at a high speed in the area of the gas pumps. Huff was justified in trying to verify defendant was indeed the driver and apprehend him as quickly as possible. Using all means at his disposal, and verifying the fortunately obtained photo with the witnesses allowed him to do this. He was thus able to avoid arresting an innocent suspect, and protect the public from similar acts by defendant in the form of stealing another car in his flight and again putting the public at fatal risk. A person such as defendant could avoid such a purported, but legally distorted, constitutional concern he is now expressing by not leaving the scene of an accident. The law requires drivers in accidents

to stay at the scene.

Actually, the facts in this case are similar to those in *Simmons, supra*, where the suspect fled the scene and was still at large, making it necessary for police to determine quickly whether they were on the right track and looking for the right person. Officer Huff's actions were necessary and did not violate defendant's rights to due process which Defendant was actively engaged in compromising by fleeing. Under defendant's theory, police could never show a single photo to eyewitnesses in an attempt to solve a recently committed crime when time is of the essence, and there is no time to prepare a photo lineup because the suspect is at large and fleeing. The Constitution surely did not contemplate putting the public at physical risk in the manner suggested by defendant, as *Simmons* confirms.

At the scene of the crime, the witnesses matched defendant's picture to someone they had seen minutes before. They made it a point to look at his face when he got out of the car and took off. It was a strong identification, tantamount to a situation where the police would have brought him back a few minutes later and asked, "is this the guy?" The Court cannot see an unconstitutional risk of taint. Under the facts of this case, defendant's theory would require virtually any prior look at a suspect to be deemed unreliable and an identification-tainting occurrence.

C. THE PHOTO LINEUP

The above analysis largely renders moot defendant's argument that the initial witness photo identification tainted the subsequent photo lineup. The on-scene identification was characterized by non-ambiguity and strength of the identification.

However, following filing of his motion to suppress, defendant raised another issue attacking the reliability of the photo lineup itself. The Court will thus address whether the photo array was unreliable. It is not clear to the Court why there was a need for photo lineup, ten months after the event, when there were already strong eyewitness identifications. The Court in any event is inclined to exclude the photo lineup at trial because it is cumulative to much stronger identifications.

However, defendant now argues that the pretrial photo identification procedure used by Officer Huff was impermissibly suggestive in its own right, even without reference to the photo

identification at the scene, and will taint any in-court identification by the witnesses. Thus, the Court will evaluate the impact of the lineup in light of all the surrounding circumstances to see if the photo array emphasized defendant's photo over the others, *State v. Lopez*, 886 P.2d 1105, 1111 (Utah 1994) *Lopez*, and whether the witnesses have been poisoned beyond repair as a result.

Regarding the lineup itself, as noted, the trial court is the gatekeeper to determine whether identification information is sufficient to be presented to the jury. *State v. Hubbard*, 2002 UT 45, ¶ 30, 48 P.3d 953, 963. See also *State v. Guzman*, 2004 UT App 211, ¶ 18, 95 P.3d 302, 307. The Court must determine, given the totality of the circumstances, whether a pretrial photo identification procedure used by law enforcement was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Lopez*, 886 P.2d 1105, 1111 (Uta 1994) (*quoting State v. Thamer*, 777 P.2d 432, 435 (Utah 1989) (citing *Simmons v. United States*, 390 U.S. 377, 383 (1968))). If the photo array was impermissibly suggestive, a subsequent in-court identification may still be admissible, but it "must be based on [an] untainted, independent foundation to be reliable." *Lopez*, 886 P.2d at 1111 (*quoting Thamer*, 777 P.2d at 435).

Although defendant has an Hispanic surname, like many people of Latino ancestry he is fairly light complected. The photos Huff assembled were all photos of males with light complexions, although three appear lighter than defendant. Defendant has a goatee, although it is not clear whether he had a goatee on the day of the crime. He is balding. Three of the other photographed males had goatees, the other two appear to have some facial hair and four out of the five are balding. Defendant's photo was neither first nor last in the group. Defendant is the only one wearing a "wife-beater" shirt, to use the vernacular of his generation, but the others have on a variety of shirts, including one with a white t-shirt. Defendant's shirt is not a reason to single him out—it is just different but all the other candidates' shirts are different. This is not the safest lineup the Court has ever seen. However, while not all in the photographs had characteristics identical to defendant, the Court cannot say the lineup was impermissibly suggestive.

Even if it was impermissibly suggestive, the Court concludes in-court identifications by the two witnesses will not only have an untainted independent foundation for reliability, as discussed in the strength of the on-scene identifications described *ante*, but a strong foundation as

outlined above. Those identifications at the scene may be admitted as exceptions to the hearsay rule under Rule 801(d)(1)(c) of the Utah Rules of Evidence as well. (See also, *State v. Vazquez*, 451 P.2d 786, 787 (Utah 1969). Still, as noted, the Court is inclined to exclude the photo identification lineup itself as cumulative and unnecessary given the strength of the other eyewitness evidence and the name identification by defendant's confederate at the scene under a variety of evidentiary rules.

WHEREFORE IT IS ORDERED: The Motion to Suppress Eyewitness Identification is denied. However, the photo lineup evidence will likely be excluded at trial as cumulative, although it will be necessary for the Court to evaluate it in light of the other evidence actually presented.

DATED this 4th day of September, 2014.

BY THE COURT



SAMUEL D. MCVEY, JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 141400333 by the method and on the date specified.

EMAIL: JEFFREY R BUHMAN

EMAIL: SPENCER A THOMAS

Date: 09/04/2014

/s/ CALLI STEPHENSEN

Deputy Court Clerk