

1992

Utah v. Pierre Adams : Petition for Writ of Certiorari

Utah Supreme Court

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THE STATE OF UTAH, :

Appellee/Respondent, :

v. :

PIERRE ADAMS, : Case No. 920270

Appellant/Petitioner. : Case No. 910437-CA

Priority No. 13

PETITION FOR WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS

- - - - -

This Petition for Writ of Certiorari arises out of an appeal from a judgment and conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, Judge, presiding.

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FILED

JUN 8 1992

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Appellee/Respondent,	:	
v.	:	
PIERRE ADAMS,	:	Case No. _____
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TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 7 of the Constitution of Utah provides:

Sec. 7. [Due process of law.]

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

Amendment XIV to the Constitution of the United States provides:

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.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Utah Code Ann. section 76-1-601 (1992) provides in pertinent part:

(5) "Dangerous weapon" means any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:

(a) the actor's use or apparent use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(b) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

Utah Code Ann. section 76-6-203 (1992) provides in pertinent part:

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime; or

(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or

(c) possesses or attempts to use any explosive or dangerous weapon.

Utah Code Ann. section 76-6-301 (1992) provides in pertinent part:

(1) Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.

Utah Code Ann. section 76-6-302 (1992) provides in pertinent part:

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) causes serious bodily injury upon another.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Appellee/Respondent,	:	
v.	:	
PIERRE ADAMS,	:	Case No. _____
Appellant/Petitioner.	:	Case No. 910437-CA
	:	Priority No. 13

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals fail to follow state and federal law when it determined that the eyewitness identification procedure used in this case did not violate the state or federal constitution?

2. Did the Court of Appeals incorrectly decide an important question of statutory construction which should be decided by this Court when it determined that there was sufficient evidence to convict Petitioner of Aggravated Robbery even though the robber did not use an item to threaten the clerks?

OPINION BELOW

The opinion of the Court of Appeals in State v. Adams, 184 Utah Adv. Rep. 72 (Utah App. 1992) (Case No. 910437-CA, filed April 9, 1992) is attached hereto as Appendix A.

JURISDICTION

On April 9, 1991, the Court of Appeals issued its opinion in this case. This Court granted Petitioner an extension of time in which to file this Petition for Writ of Certiorari up to and including June 8, 1992.

This Court has jurisdiction to review this petition pursuant to Utah Code Ann. §§ 78-2-2(3)(a) and 78-2a-4 (1992).

STATEMENT OF THE CASE

Petitioner Pierre Adams filed a pretrial motion to suppress the identification testimony of two witnesses, claiming that the showup identification procedure violated due process under the state and federal constitutions. R. 53-4. After a hearing and argument held on October 23, 1990, prior to this Court's decision in State v. Ramirez, 817 P.2d 774 (Utah 1991), the trial court denied the motion. R. 164.

After the State presented its case, Mr. Adams moved to reduce the charge from aggravated robbery to simple robbery. R. 163:207-8. The trial court denied the motion. R. 163:208.

Thereafter, a jury convicted Mr. Adams as charged. R. 50.

In its opinion, the Court of Appeals affirmed the trial court's rulings. Adams, 184 Utah Adv. Rep. 72.

STATEMENT OF THE FACTS

On the afternoon of August 3, 1990, two clerks who were working in a fast food establishment in Salt Lake City were robbed.

R. 164:2; 163:7,8. When the robber entered the store, one of the clerks was pouring punch into the punch machine and the other clerk was talking on the telephone. R. 163:9,21; 164:3,7.

The clerk who was talking on the telephone in a room which was adjacent to the counter continued talking throughout the robbery. R. 163:22,23; 164:7,66. She did not realize that a robbery had occurred until after it was over and the other clerk told her that she had been robbed. R. 163:23; 164:68.

The clerk at the counter asked the man if she could help him. When he indicated that he had already been helped, she continued to pour punch. R. 163:9; 164:4. The man then asked the clerk if she had any money, and she responded that she did not. R. 163:10. The man then indicated that he wanted all the money in the store, and the clerk realized that she was being robbed. R. 163:11; 164:4. Immediately after the robbery, the clerk at the counter was distraught and crying.

The man told the clerk at the counter to find out to whom the other clerk was talking or he would shoot her. R. 164:7-8. The clerk never saw a gun, but testified that the man touched his back pocket and said he had a gun. R. 164:8. Petitioner did not have a gun when he was arrested, and the officers searched the area and were unable to find a gun. R. 164:134,148.

The robber was a black man whom neither clerk had seen before. Neither clerk was black. R. 163:9,17,; R. 164:4.

After the robber left, the two women discussed his appearance and dress, and together they wrote down a description.

R. 163:26. Officers did not save this written description.

Ten to twenty minutes after the robbery and about a half block away from the fast food restaurant, police arrested Mr. Adams after chasing him and taking him to the ground. They handcuffed him and placed him in a paddywagon. R. 163:27,48.

Police transported the two clerks to the place where other officers had arrested Mr. Adams. R. 164:15. The officers told the clerks that they were holding someone nearby who they thought had committed the robbery. R. 164:46.

Seated together in the back of the police car, the two clerks saw a disheveled and handcuffed black man being held up by two officers either next to or inside the police "paddy wagon". R. 164:75,47. Several police cars and officers were at the scene. R. 164:153,165.

One clerk testified that the clothing the individual wore did not look like the clothing the robber wore. R. 164:46. She had testified at the preliminary hearing that she made the identification based on the clothing that the robber wore. R. 164:48. The clerks' descriptions of the clothing did not match the clothing worn by Mr. Adams when he was arrested.

The clerks testified that the robber's hair was either short or long and curly but without braids. R.164:17,61-2,74,88. Officer Evans testified that Mr. Adams' hair was braided when he was arrested. R. 164:102-3,117.

At a lineup, one clerk selected Mr. Adams but wrote his number on the back of the card, which indicated that she was not

sure. R. 164:92-4,97. The other clerk was not quite sure at the lineup. R. 164:54,57-8.

ARGUMENT

POINT I. THE DECISION OF THE COURT OF APPEALS THAT THE EYEWITNESS IDENTIFICATION PROCEDURE DID NOT VIOLATE DUE PROCESS UNDER EITHER THE STATE OR FEDERAL CONSTITUTION FAILS TO FOLLOW EXISTING LAW.

The due process clause of the fourteenth amendment protects an accused against the use of suggestive and unreliable eyewitness identification procedures. Simmons v. United States, 390 U.S. 377, 184 (1968); Stovall v. Denno, 388 U.S. 293, 303 (1967); Neil v. Biggers, 409 U.S. 188, 199 (1972).

In Biggers, the Court outlined five factors to be considered in determining whether under the "totality of circumstances" the eyewitness identification procedure violated due process. Those factors are:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

In its opinion, the Court of Appeals set forth these factors and acknowledged that

"The court must balance these five factors against the 'corruptive effect' of the identification procedures in order to determine whether the identification testimony should have been suppressed."

Adams, 184 Utah Adv. Rep. at 73 quoting Archuleta v. Kerby, 864 F.2d 709, 711 (10th Cir. 1989) (quoting Mason v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977)).

Although the Court of Appeals set forth the appropriate factors, it did not apply them properly to the facts in this case; nor did it take into account the "corruptive effect" of the procedure utilized. In addition, it inappropriately relied on a much criticized and arguably discarded factor--the certainty of the witnesses--in reaching its decision. See Adams, 184 Utah Adv. Rep. at 73-4; State v. Ramirez, 817 P.2d 774, 780-2 (Utah 1991); State v. Long, 721 P.2d 483, 490 (Utah 1986).

In this case, although both clerks arguably had an opportunity to look at the robber, the testimony demonstrated that neither clerk paid much attention to him. The prior description was compiled by both and therefore tainted each clerk's memory and was not accurate. The witnesses apparently were not certain at the lineup, and any "certainty" they felt developed as they had repeated opportunities to view Mr. Adams during the court proceedings. Although not much time elapsed between the robbery and the identification, the testimony revealed that the clerk who was at the counter was distraught and crying after the incident.

In addition, the "corruptive effect" of the procedure utilized in this case outweighed any reliability that may have been demonstrated by the application of the Biggers factors. The procedure used in this case was unreliable and had a "corruptive effect" because (1) the two clerks worked together to come up with a

single description, thereby tainting each other's memory of the robber, (2) the two clerks sat together in the police car and together identified Mr. Adams as the robber, (3) no one other than Mr. Adams was present who could have been the robber, (4) Mr. Adams was held by police officers at or near the door of paddy wagon, (5) officers told the clerks that they thought they had the robber, and (6) Mr. Adams is black; neither of the clerks are the same race.

Under the totality of the circumstances, the eyewitness identification procedure violated federal due process.

The eyewitness identification procedure also violated state due process which is guaranteed by Article I, Section 7 of the Utah Constitution. In State v. Ramirez, 817 P.2d at 779-784, this Court set forth a more stringent and updated analysis for determining whether an eyewitness identification procedure violates due process under the state constitution.

The factors to be considered in determining whether the state constitution was violated are:

(1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (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, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.

Ramirez, 817 P.2d at 781 quoting Long, 721 P.2d at 493.

Rather than analyzing these factors as they apply to the present case, the Court of Appeals focused on Ramirez and concluded that "[t]he facts of the present case present a more trustworthy procedure than did Ramirez." Adams, 184 Utah Adv. Rep. at 74. The only application of the facts in the present case was as follows.

[B]oth women had a good opportunity to view the robber. Maestas's attention, in particular, was focused on him throughout the event. The record indicates the women each remembered details of the man's clothing and both appear to be quite observant. The women's descriptions of the man to the police after the robbery, at the motion to suppress hearing and at trial are basically consistent.

Id.

This simplistic analysis misconstrues the evidence and disregards the fact that the clerks worked together in coming up with a description and in identifying Mr. Adams at the paddy wagon. This overwhelmingly prejudicial aspect of the identification procedure in the present case appears not to have been present in Ramirez. Id. at 776.

The Court of Appeals failed to follow the dictates of Ramirez when it determined that Article I, Section 7 of the Utah Constitution was not violated in this case.

Mr. Adams respectfully requests that this Court grant a writ of certiorari on the issues of whether state or federal due process was violated by the eyewitness identification procedure utilized in this case.

POINT II. THE COURT OF APPEALS ERRONEOUSLY
DECIDED AN IMPORTANT ISSUE OF STATE STATUTORY
CONSTRUCTION WHEN IT DETERMINED THAT PETITIONER
HAD COMMITTED AN AGGRAVATED ROBBERY EVEN THOUGH
NO ITEM WAS USED IN THREATENING THE CLERKS.

Neither clerk saw a gun or a facsimile thereof, and the officers did not recover a gun when they arrested Mr. Adams. R. 164:8,134,138. One clerk testified that the robber put his hand on a bulge in his back pocket and said "I don't want to have to shoot." R. 164:31,34. The robber also said that he would come back and shoot the clerk if she were to call the police. R.164:38. The man never said that he had a gun. R. 164:35,38.

The issue presented in this case is whether the current version of Utah Code Ann. § 76-3-302 affects this Court's holding in State v. Suniville, 741 P.2d 961, 963 (Utah 1987), and State v. Bruce, 779 P.2d 646 (Utah 1989).

In Suniville and Bruce, this Court held that an individual must use a firearm or a facsimile thereof in order to be convicted of an aggravated robbery.¹ In Suniville, the teller testified that the defendant had his coat up over the counter and that "something was pointing at [her] in his pocket." Suniville, 741 P.2d at 962. The robber threatened to turn the incident into a homicide and to

1. The robberies in Suniville and Bruce involved threats to shoot. The statute in effect at the time provides that:

A person commits aggravated robbery if in the course of committing a robbery, he:
(a) uses a firearm or facsimile of a firearm, knife or facsimile of a knife or a deadly weapon

"blast" anyone who tried to follow him. In Bruce, a man called and claimed to have a gun pointed at the clerk, then the defendant entered the store and pointed his pocket at the clerk. In each case, this Court held that there was insufficient evidence to sustain a conviction for aggravated robbery.

In Suniville, this Court observed the "critical distinction between robbery and aggravated robbery where the evidence is only of verbal threats and intimidating gestures." In so doing, it prevented the "erosion" of distinction between the two crimes. Suniville, 741 P.2d at 965.

The current version of Utah Code Ann. § 76-6-302 provides in relevant part:

A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or

Section 76-1-601 defines a dangerous weapon as:

. . . any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:

(a) the actor's use or apparent use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(b) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

Utah Code Ann. § 76-6-301 which defines simple robbery has not changed.

Petitioner argued that § 76-1-601, when read together with § 76-6-302, required that a robber use an item and not merely threaten to shoot in order to commit an aggravated robbery.

In reaching its decision that threatening to shoot was sufficient to elevate the crime to aggravated robbery, the Court of Appeals relied on this Court's decision in State v. Hartman, 783 P.2d 544 (Utah 1989).

In Hartman, this Court held that an individual is guilty of an aggravated burglary where he verbally threatens the use of a dangerous weapon during the course of a burglary. Hartman is not dispositive of the issue in this case for two reasons: (1) the language of the aggravated burglary statute is different than that of the aggravated robbery statute, and (2) the distinction between a simple burglary where no one is confronted or no verbal threat to use a weapon is made is much greater than the distinction between a simple robbery and an aggravated robbery after the decision in Adams.

All robberies involve direct contact between the victim and the robber, and threats and fear. Not all burglaries involve direct contact between the burglar and the dweller; those that do involve direct contact do not always involve threat or fear. While this Court's decision in Hartman preserved a distinction between burglary and aggravated burglary, the decision of the Court of Appeals eroded the distinction between robbery and simple robbery.

Because this issue involves an important question of statutory construction, Mr. Adams respectfully requests that this Court grant a writ of certiorari on this issue.

CONCLUSION

Petitioner Pierre Adams respectfully requests that this Court grant this Petition for Writ of Certiorari on the issues set forth herein.

SUBMITTED this 8th day of June, 1992.

Joan C. Watt
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Attorney for Appellant/Petitioner

LYNN R. BROWN
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Attorney for Appellant/Petitioner

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 8th day of June, 1992.

Joan C. Watt
JOAN C. WATT

DELIVERED this _____ day of June, 1992.

APPENDIX 1

therefore, cannot be presumed negligent. He further argues that even if the presumption applies, the presumption was rebutted.

When the bailment is for the mutual benefit of the bailor and the bailee, and the property cannot be accounted for, "a presumption of negligence is imposed on the bailee once the bailor proves the fact of bailment and damage to [or absence of] the bailed goods. The bailee must then come forward with evidence that the loss or damage was not due to the bailee's negligence." *Staheli v. Farmers' Coop.*, 655 P.2d 680, 682 (Utah 1982); *accord Romney*, 111 P.2d at 546. The reason for the presumption is the bailee, as the party in possession of the property, "is in a better position to control the conditions that may cause loss or damage and to know, or at least to be able to ascertain, the cause of any actual loss or damage." *Staheli*, 655 P.2d at 683; *accord Sumsion v. Streater-Smith, Inc.*, 103 Utah 44, 132 P.2d 680, 687 (1943). Therefore, for the presumption to apply, the bailee must be in exclusive possession of the property. *Staheli*, 655 P.2d at 683.

Vaughn Belnap argues his case is similar to *Staheli*, where the Utah Supreme Court refused to presume negligence because the bailee was not in exclusive possession of the property. *See id.* at 684. However, in *Staheli*, the plaintiffs and others, including transients, had unlimited access to the bailed property. *Id.* at 682. Therefore, the bailee did not have such control over the property so as to be in a better position than plaintiffs to determine or prevent the cause of the loss. *Id.* at 684. In the instant case, McPhersons did not have access to their property, nor were they in a position to prevent or determine the cause of the theft. We have already concluded that Vaughn Belnap had the right and the power to control McPhersons' property. He allowed Jeffrey Belnap to use the property, as permitted by the bailment agreement, but he remained responsible for its safety. A bailee cannot escape the presumption of negligence by electing to turn over the care of the property to another. Therefore, we conclude the trial court properly applied the negligence presumption to Vaughn Belnap.

To rebut a presumption of negligence, a defendant must present some evidence of due care. Once a defendant presents evidence to prove due care, the presumption of law disappears, but an inference of negligence remains for the trier of fact to weigh along with the defendant's evidence. *Wyatt v. Baughman*, 121 Utah 98, 239 P.2d 193, 195 (1951). The only evidence Vaughn Belnap presented to show due care was that there were normal locks on the doors, and Jeffrey Belnap remembered locking the doors because of an incident with his wife. The trial court characterized Jeffrey Belnap's testimony as to locking the doors as merely a self-serving statement.

McPhersons showed that the investigating officer found no evidence of forcible entry, suggesting the circumstances were suspicious. After reviewing the evidence, we cannot conclude the trial court erred in finding Vaughn Belnap negligent.

CONCLUSION

We conclude the trial court did not err in finding: (1) McPhersons and Vaughn Belnap entered a bailment agreement, (2) the bailment was for the mutual benefit of the parties, and (3) Vaughn Belnap was negligent in caring for the goods. We, therefore, affirm.

Judith M. Billings Associate Presiding Judge

WE CONCUR:

Norman H. Jackson, Judge
Leonard H. Russon, Judge

Cite as
184 Utah Adv. Rep. 72

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Pierre ADAMS,
Defendant and Appellant.

No. 910437-CA
FILED: April 9, 1992

Third District, Salt Lake County
Honorable John A. Rokich

ATTORNEYS:

Joan C. Watt and Lynn R. Brown, Salt Lake City, for Appellant
R. Paul Van Dam and Judith S.H. Atherton, Salt Lake City, for Appellee
Before Judges Bench, Greenwood, and Orme.

This opinion is subject to revision before publication in the Pacific Reporter.

GREENWOOD, Judge:

Defendant Pierre Adams appeals his conviction of aggravated robbery, a first degree felony, in violation of Utah Code Ann. §76-6-302 (1990). We affirm.

BACKGROUND

At approximately 4:30 p.m. on August 3, 1990, a man approached the drive-up window at the Taco Time restaurant on 1000 West and North Temple in Salt Lake City, and ordered two tacos. He then told the clerk he had changed his mind and would come in the restaurant and order. Two young women, Robyn Maestas and Jennifer Greenwell, were

working at the restaurant at the time. Maestas was at the counter pouring punch when the man walked in. Greenwell, who had helped him at the drive-up window, was in the office talking to her father on the telephone. The office is approximately five feet from the counter and the office door was open.

The man stood across the counter, about twelve inches from Maestas, and demanded all of the money in the store. Maestas opened the cash registers and gave him the money. Still on the telephone, Greenwell was unaware the store was being robbed. The man repeatedly asked Maestas to whom Greenwell was talking on the telephone. He became upset and told Maestas that if she did not find out, he would shoot her. He also told her not to tell Greenwell about the robbery or call the police or he would come back and shoot her. Maestas never saw a gun but testified that the man touched a bulge in his pocket and said he had a gun. He remained in the restaurant a total of ten to fifteen minutes. When he left, he walked slowly south on 1000 West. Maestas and Greenwell immediately wrote down a description of the robber and Greenwell called the police. The police officers did not save the written description, however.

Approximately ten to twenty minutes after Greenwell called the police, police officers arrested defendant about a half block away from the Taco Time. A police officer then took Maestas and Greenwell to identify defendant, whom they said fit the women's description of the robber. Defendant was handcuffed and standing between two police officers in the doorway of a police van. Both women sat together in the back of the police car and identified defendant from a distance of about thirty feet. Defendant was arrested and charged with aggravated robbery. He did not have a gun when the officers arrested him.

Before trial, defendant made a motion to suppress testimony regarding the eyewitness identification, claiming the procedure violated his due process rights. The trial court denied the motion. Following a jury trial, defendant was convicted of aggravated robbery.

ISSUES

Defendant appeals his conviction on the basis that the witness identification process was improper and that the aggravated robbery charge should have been reduced to simple robbery.

WITNESS IDENTIFICATION

The constitutionality of an identification procedure is a mixed question of law and fact. *Sumner v. Mata*, 455 U.S. 591, 598, 102 S. Ct. 1303, 1306 (1982). The trial court's conclusion that defendant's due process rights were not violated is reviewed de novo. *Archuleta v. Kerby*, 864 F.2d 709, 711 (10th Cir. 1989). The factual findings underlying the

conclusion are, however, entitled to a presumption of correctness. *Id.*

Defendant's motion to suppress the identification was based on both the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Utah Constitution. However, at the hearing on the motion, defense counsel did not make separate arguments under each constitutional provision or differentiate between them.

Determining the constitutionality of an out-of-court eyewitness identification procedure under the Federal Constitution involves a two-step analysis. *Archuleta*, 864 F.2d at 711. First, the court must determine whether the identification procedure was unnecessarily suggestive so as to give rise to the possibility of irreparable misidentification. *Neil v. Biggers*, 409 U.S. 188, 198-200, 93 S. Ct. 375, 381-82 (1972); *Simmons v. United States*, 390 U.S. 377, 383-84, 88 S. Ct. 967, 970-71 (1968); *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967).

Second, the court must determine "whether under the totality of the circumstances, the identification was reliable." *Biggers*, 409 U.S. at 199, 93 S. Ct. at 382; see also *Mason v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977) ("reliability is the linchpin in determining the admissibility of identification testimony"). The Supreme Court set forth five factors to be considered when evaluating the reliability of an identification procedure:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness's degree of attention;
3. The accuracy of the witness's prior description of the criminal;
4. The level of certainty demonstrated by the witness at the confrontation; and
5. The length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199-200, 93 S. Ct. at 382-83 (1972). "The court must balance these five factors against the 'corruptive effect' of the identification procedures in order to determine whether the identification testimony should have been suppressed." *Archuleta*, 864 F.2d at 711 (quoting *Mason*, 432 U.S. at 114, 97 S. Ct. at 2253); *United States v. Thurston*, 771 F.2d 449, 453 (10th Cir. 1985).

Applying the *Biggers* factors to the facts of this case, we find that the identification procedure was not unnecessarily suggestive. We also conclude that the procedure was reliable under the totality of the circumstances. The identification occurred a short time after the robbery took place. Both women had the opportunity to observe the robber. Greenwell observed him when he approached the drive-up window. Maestas observed him from a

twelve inch distance for ten to fifteen minutes while he was robbing the restaurant. Maestas testified that she was looking "at him most of the time." Immediately after the robber left, Greenwell and Maestas together wrote down a description of him. At the suppression hearing, Maestas testified that the man was black and was wearing a navy blue or black shirt that was open in the front and a baseball cap. She testified that Adams "had the same clothing on, and the same ball cap on, and everything," when she first identified him for the police. Both Greenwell's and Maestas's testimony at the suppression hearing and at trial indicate that they were certain Adams was the robber. We conclude that the eyewitness identification procedure did not violate defendant's due process rights under the Federal Constitution.

This court has frequently stated we will not analyze issues under the Utah Constitution when the trial court did not have the opportunity to do so. "[T]he proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court, not ... for the first time on appeal." *State v. Bobo*, 803 P.2d 1268, 1273 (Utah App. 1990)(citation omitted). "Nominally alluding to such different constitutional guarantees without any analysis before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal." *State v. Johnson*, 771 P.2d 326, 328 (Utah App. 1989) *rev'd on other grounds* (citing *James v. Preston*, 746 P.2d 799, 801 (Utah App. 1987)).

We note, however, that in *State v. Ramirez*, 817 P.2d 774 (Utah 1991), the Utah Supreme Court, applying the Utah Constitution, affirmed the denial of defendant's motion to suppress an out-of-court eyewitness identification that was much less reliable than that in the instant case. In *Ramirez*, the defendant was convicted of aggravated robbery. The incident occurred out of doors at about 1:00 a.m. Defendant was one of two robbers and wore a mask which covered most of his face. The eyewitness was one of the victims. He was held at gun point and had only a few minutes to observe defendant. When defendant arrived with the police to identify him, defendant was handcuffed to a chain link fence. He was the only suspect present and was surrounded by police officers. The eyewitness identified him from the back seat of the police car. The eyewitness was the only one of three victims who was able to identify defendant. The supreme court held that the eyewitness identification procedure did not violate defendant's due process rights under either the Utah or federal constitutions. *Id.* at 784.

The facts of the present case present a more trustworthy procedure than did *Ramirez*. As discussed above, both women had a good opportunity to view the robber. Maestas's

attention, in particular, was focused on him throughout the event. The record indicates the women each remembered details of the man's clothing and both appear to be quite observant. The women's descriptions of the man to the police after the robbery, at the motion to suppress hearing and at trial are basically consistent. We conclude that these facts constitute a reliable identification under the Utah Constitution.

AGGRAVATED ROBBERY CHARGE

Defendant argues the trial court erred in failing to dismiss the aggravated robbery charge. He claims that because he was not in possession of a dangerous weapon during the robbery, he could only be charged with and convicted of simple robbery. The elements of aggravated robbery are codified in Utah Code Ann. section 76-6-302 (Supp. 1990) which reads in pertinent part:

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon

Simple robbery is defined in Utah Code Ann. section 76-6-301 (1990) as:

[T]he unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will accomplished by means of force or fear.

Defendant argues one must actually possess an item which is a dangerous weapon in order to be charged with and convicted of aggravated robbery.

"The appropriate standard of review for a trial court's interpretation of statutory law is correction of error." *State v. James*, 819 P.2d 781, 796 (Utah 1991); *State v. Swapp*, 808 P.2d 115, 120 (Utah App. 1991).

We find *State v. Hartman*, 783 P.2d 544 (Utah 1989), dispositive of this issue. In *Hartman*, the supreme court held that threatening to use a dangerous weapon while committing a burglary or an assault is sufficient to fit within the aggravated burglary or aggravated assault statutes respectively. "Use or display of such a weapon is not required; threat of such use is sufficient." *Id.* at 547.

In enacting section 76-6-302, the legislature specified the crime of aggravated robbery included robberies during which the robber "uses or threatens to use a dangerous weapon." Utah Code Ann. §76-6-302(1)(a). Threatening to use a dangerous weapon during the commission of a robbery, regardless of whether one actually possesses such a weapon, is sufficient for a charge of aggravated robbery under section 76-6-302. Such a construction reflects the legislative

intent in enacting the statute. See *Hartman*, 783 P.2d at 547.

In the instant case, defendant told Maestas that he would shoot her if she told Greenwell of the robbery, called the police, or if she did not find out to whom Greenwell was speaking on the phone. While he made these threats, he put his hand on his bulging pocket, leading Maestas to believe he had a gun and reasonably fear for her physical safety. It is not clear whether defendant actually had a gun at the time of the robbery, although he did not have a gun when he was arrested. Because defendant threatened the use of deadly force, we conclude that the trial court did not err in failing to dismiss the aggravated robbery charge.

CONCLUSION

For the foregoing reasons, we find that the eyewitness identification procedure did not violate defendant's due process rights under either the federal or Utah constitutions. We also conclude that the trial court did not err in failing to dismiss the aggravated robbery charge. Defendant's conviction is affirmed.

Pamela T. Greenwood, Judge

I CONCUR:

Gregory K. Orme, Judge

I CONCUR IN RESULT ONLY:

Russell W. Bench, Judge

Cite as
184 Utah Adv. Rep. 75

IN THE UTAH COURT OF APPEALS

Phyllis FARRELL,
Plaintiff and Appellee,

v.

Deanne Farrell PORTER, David Jonathon
Farrell, and Lori P. Farrell,
Defendants and Appellants.

No. 910463-CA
FILED: April 9, 1992

Third District, Salt Lake County
Honorable Homer F. Wilkinson

ATTORNEYS:

Duane R. Smith, Salt Lake City, for
Appellants

Robert H. Wilde and Kelly De Hill, Midvale,
for Appellee

Before Judges Billings, Jackson, and Russon.

This opinion is subject to revision before
publication in the Pacific Reporter.

BILLINGS, Associate Presiding Judge:

This is an appeal from a grant of summary judgment in a probate proceeding. The trial court held that appellee Phyllis Farrell (Phyllis) is the surviving spouse of Russell Farrell (Russell). Appellants, Russell's adult children from a previous marriage, claim the trial court erred. We affirm.

FACTS

Phyllis and Russell Farrell married April 22, 1978. No children were born of the marriage, but both had children from previous marriages. In early 1989, Phyllis and Russell separated, and Phyllis filed a complaint for divorce on or about April 7, 1989. Russell signed a document entitled "Acceptance of Service, Appearance, Consent and Waiver" on April 8, 1989, stipulating to the entry of a default divorce. Russell then moved to Alaska and never returned to Utah.

The default divorce was set for hearing in July 1989. Because Phyllis failed to appear, the hearing was rescheduled for August 21, 1989. Russell died August 15, 1989 when the fishing vessel upon which he was employed capsized. Because neither Phyllis nor appellants had been notified of Russell's death by August 21, 1989, the divorce hearing proceeded. After learning of Russell's death, Phyllis moved to have the divorce decree vacated nunc pro tunc. Her motion was granted October 2, 1989.

Phyllis filed a "Petition for Determination of Heirs" in the probate proceedings for Russell's estate. By this petition, Phyllis sought a court order declaring her to be Russell's widow because she and Russell were married at the time of his death. Appellants objected to the petition, claiming Phyllis is not Russell's surviving spouse due to the divorce action. The trial court granted Phyllis's motion for summary judgment, determining that she is Russell's widow and an heir to his estate.

On appeal, appellants contend the trial court committed reversible error because, pursuant to Utah Code Ann. §75-2-803(2)(a) (1978), a provision of the Utah Uniform Probate Code, Phyllis should not be considered Russell's surviving spouse.

SURVIVING SPOUSE

Appellants claim Phyllis is not Russell's surviving spouse because she filed a complaint for divorce before his death and had a decree of divorce entered after his death. The Utah Supreme Court addressed the effect of a party's death during a divorce proceeding in *Daly v. Daly*, 533 P.2d 884 (Utah 1975). The court held that "when the death of one of the parties occurs after the entry of a divorce decree and before the decree is final the decree becomes ineffective." *Id.* at 885. In *Nelson v.*