1984

State of Utah v. Jose Dejesus : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
JOSE DeJESUS,	:	Case No. 19014
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Aggravated Robbery, a felony of the First Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

The Appellant, Jose DeJesus, appeals from a conviction and judgment of Aggravated Robbery, a felony of the First Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Jose DeJesus, was charged with Aggravated Robbery, a felony of the First Degree, in violation of Title 76, Chapter 6, Section 302, Utah Code Annotated (1953 as amended). Appellant was convicted as charged in a jury trial and was sentenced to incarceration at the Utah State Prison for the indeterminate term of not less than five years nor more than life.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

The facts relevant to the issues on appeal are that on May 2, 1982, at approximately 2:10 p.m. three men entered Fankhauser Jewelery Store located at 1111 East 2100 South, Salt Lake City, Utah, where the co-owner, Mrs. Miriam Davis, and her daughter, Shauna, were working (T.15). The men were described as being dark-skinned, wearing trench coats with one carrying a shotgun (T.24). They were described as being between twenty and twenty-eight years old. The Appellant was identified at trial by Mrs. Davis as being the individual carrying the shotgun (T.2 and forcing her to lie face down behind the back counter (T.27 Although the Appellant was identified as the person who continue to hold the shotgun on Mrs. Davis, testimony of a Salt Lake Pol Identification Technician was that fingerprints belonging to the Appellant were found on the glass counter of a showcase across the room from where the Appellant was identified as standing (T.107-110). Jewelry valued at some $50,000.00 to $60,000.00 was taken before the men left (T.33).

ARGUMENT

POINT I

THERE WAS INSUFFICIENT EVIDENCE PRESENTED BY THE STATE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT AS TO ANY OFFENSE.

The jury found the Appellant guilty of Aggravated Robbery, a felony of the First Degree. The evidence presented at trial was insufficient to support the jury's verdict of guilty of Aggravated Robbery beyond a reasonable doubt. Appellant asserted throughout the trial that he was in New York at the time the robbery occurred and, therefore, could not have participated in the robbery.

Evidence was presented at trial that Mr. DeJesus was convicted of burglary, a second degree felony and was placed on probation by Judge Durham (T.160). As part of that probation, an interstate compact transfer was arranged. On January 22, 1982, Mr. DeJesus was released from the county jail to go to the State of New York (T.161). On May 17, 1982, a ticket was issued at the LaGuardia Airport in New York to Mr. DeJesus (T.169), indicating that he was still in New York at that time, two weeks after the robbery at issue had taken place.

In State v. Petree, 659 P.2d 442, 444 (1983), this Court stated, ". . . notwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict." Further, the

Court noted:

> We reverse a jury conviction for insufficient evidence only when the evidence (viewed in the light most favorable to the verdict) is sufficiently inconclusive or inherently improbable that reasonable doubt that the defendant committed the crime for which he was convicted. Id. (Citations ommitted.)

In State v. Lamm, 606 P.2d 229, 234-35 (1980), the dissent note

> If the circumstances essential for conviction, are ambiquous and consistent with the innocence of the accused, then this Court must hold as a matter of law that there is no usbstantial evidence to support the guilt of the accused.

This standard restates the Due Process requirements which prohi a criminal conviction in all cases except upon proof beyond a reasonable doubt of every fact necessary to constitute the crim with which a defendant is charged. Jackson v. Virginia, 443 U.S 307 (1979); In re Winship, 397 U.S. 358 (1970).

Viewed against this background, Appellant contends that there was insufficient evidence presented to place him in Utah, much less in Salt Lake City robbing a jewelry store on May 3, 1982. No evidence was presented by the State to rebut the evidence that Mr. DeJesus had purchased an airplane ticket in New York fully two weeks after the robbery. Given this evidence the jury could not have found Appellant guilty beyond a reasona doubt and the conviction for aggravated robbery cannot stand.

POINT II

THE COURT ERRED IN FAILING TO GIVE A SEPARATE INSTRUCTION REGARDING IDENTIFICATION.

The Appellant requested a separate instruction regarding eyewitness identification. The issue was raised at trial as to the descriptions of the robbers given by the victims shortly after the incident. Two of the victims, Mariam and Shauna Davis, independently described the robber as Iranian (T.49 & 77). The Appellant in this case is of Spanish decent. Despite this discrepancy, the trial court refused to give the requested instruction regarding identification.

This Court has articulated the standard for when an instruction should be given. In State v. Eagle, 611 P.2d 1211, 1213 (Utah 1980), this Court stated:

> A defendant's entitlement to a jury instruction on his theory of the case is not absolute. It is necessarily conditional upon the existence of a reasonable basis in the evidence to justify the giving of the proposed instruction. (Citations ommitted).

The Appellant in the instant case claims that he was not the robber, that he was in New York at the time of the incident and so the eyewitnesses identification was mistaken. Based on the testimony that he had purchased an airline ticket in New York after the robbery had taken place in Salt Lake City (T.169), there would seem to be the necessary evidence to justify the instruction regarding identification.

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

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

The unreliability of eyewitness identification has been well documented in the literature, and numerous law review articles have been written on the subject in recent years.[1] The commentators

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

that reasons for this unreliability are found in the problems associated with human perception and memory, both of which play a vital role in eyewitness identification. A lengthy discussion of those problems are found in a law review article dealing with the problems of perception and memory which are associated with hearsay testimony.[2] With respect to those issues, the author noted:

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

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[1] (continued) Identification: The Gap from Wade to Kirby, 121 U. Pa. L.Rev. 1079 (1973); Luce, The Neglected Dimension in Eyewitness Identification, Crim. Def., May-June 1977 at 5-8; Tyrrell & Cunningham, Eyewitness Credibility: Adjusting the Sights of the Judiciary, 37 Ala. Law. 563, 575-85 (1976).

[2] Stewart, Perception, Memory and Hearsay: A Criticisim of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah Law Rev. 1.

In United States v. Barber, 412 F.2d 517 (3rd Cir. 19[illegible] the court gave a similar description of the processes involved in human observation, perception and memory. It then went to state, with respect to eyewitness identification:

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

In Simmons v. United States, 390 U.S. 377 (1968), the United States Supreme Court addressed the issue of whether a photographic array was impermissibily suggestive in violation of the petitioner's right to Due Process of Law. In doing so, the court discussed the dangers associated with the use of photographic identifications, stating:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single indivdual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. (Footnote omitted.) 390 U.S. at 383.

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

> In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it. The trouble is that many judges have assumed that an "eyeball" witness, who identifies the accused as the criminal, is the most reliable of witnesses,and if there are any questions about the identification, the jurors, in their wisdom, are fully capable of determining the credibility of the witness without special instructions from the court.

Yet cases of mistaken identification are not infrequent and the problem of misidentification has not been alleviated.

We note, for example, a 1979 unreported prosecution in Wilmington, Delaware, against Rev. Bernard T. Pagano, a Roman Catholic priest, accused of robbing six Delaware stores in the winter of 1978. At the trial, he was falsely identified by several state witnesses as the robber. After the State rested its case, the prosecution was dismissed on motion of the State because another man confessed to the crime. Closer to home is the case of Ronald Quick, who was twice tried and convicted of aggravated robbery of a liquor store in Hutchinson. At both trials two eyewitnesses positively identified defendant as the perpetrator of the crime. These two convictions were reversed for trial errors in State v. Quick, 226 Kan. 308, 597 P.2d 1108 (1979) and 229 Kan. 117, 621 P.2d 997 (1981). The case was dismissed by the State during the third trial after another man, who looked like the defendant, confessed to the crime.

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

> by the jury in weighing the credibility of eyewitness testimony. 635 P.2d at 1241.

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

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

The instruction that the Kansas court held should be given was that framed by the United States Court of Appeals for the District of Columbia in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).[3] The Telfaire court described the need

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

for such an instruction, stating:

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

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

general instruction dealing with an identification defense.[4]

> . . . we have considered the fact that trial courts are often required to determine the admissibility of eyewitness testimony where issues of unreliability are raised. As pointed out by Chief Justice Schroeder in State v. Ponds, 227 Kan. 627, 608 P.2d 946, in testing the reliability of identification testimony, the five factors mentioned in Neil v. Biggers, [490 U.S. 188 (1972)] should be considered by the trial court. If these five factors should be considered in determining the admissiblity of the testimony, it would seem even more appropriate to require the jury to consider

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[4] The general instruction given in that case provided:

INSTRUCTION NO. _____

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

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

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

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

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

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

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

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

> the same factors in weighing the credibility of the eyewitness identification testimony. Otherwise the jury might reasonably conclude that the admission of the evidence by the trial court vouched for its reliability. We think it clear that, in order to prevent potential injustice, some standards must be provided the jury so that the credibility of eyewitness identification testimony can be intelligently and fairly weighed. The giving of such an instruction will take only a couple of minutes in trial time and will be well worth it, if some future injustices can be avoided. 635 P.2d at 1244. [Emphasis by court.]

In Neil v. Biggers, supra, the United States Supreme Court was addressing the issue of the admissiblity of eyewitness identification evidence based on a showup procedure.[5] In determining the admissibility of the evidence the court initially noted that you must consider the totality of the circumstances. The court then listed several factors to consider, stating:

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

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[5] That procedure involved two detectives walking the petitioner past a rape victim.

For these same reasons a number of other jurisdictions found that the model instruction from United States v. Telfaire, supra, should be given when warranted by the circumstances of a particular case.[6]

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

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[6] The Telfaire instruction specifically has either recommended or approved for use in numerous jurisdictions as reflected by the following cases: United States v. Holly, 502 F.2d 273 (4th Cir. 1974); United States v. Hodges, 515 F.2d 650 (7th Cir.1975); State v. Benjamin, 363 A.2d 762 (Conn. 1976); State v. Calia, 514 P.2d 1354 (Or. App. 1973), cert. den. 417 U.S. 917 (1974); Commonwealth v. Rodriquez, 391 N.E. 2d 889 (Mass. 1979); United States v. Kavanaugh, 572 F.2d 9 (1st Cir. 1978); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976) cert. den., 429 U.S. 1099 (1977); United States v. Masterson, 529 F.2d 30 (9th Cir.) cert. den., 426 U.S. 908 (1976); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974); United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972); State v. Guster, 66 Ohio St. 2d 269, 421 N.E. 2d 157 (1981); State v. Payne, 280 S.E. 2d 72 (W. Va. 1981); United States v. Cueto, 628 F.2d 1273 (10th Cir. 1980); People v. Guzman, 121 Cal. Rptr. 69, 47 Cal. App. 3d 380 (Cal. App. 1975); State v. Motes, 215 S.E. 2d 190 (S.C. 1075); State v. Payne, 280 S.E. 2d 72 (W.Va. 1981); State v. Malmrose, 649 P.2d 56 (Utah 1982) (Stewart, J. dissenting).

61. Justice Stewart wrote a dissent to that part of the court's opinion and Justice Durham concurred in that dissent.

Previously, this court had decided that it was not reversible error to give an instruction similar to that given in State v. Warren, supra, State v. Schaffer, 683 P.2d 1185 (Ut. 1981). It is interesting to note that State v. Schaffer, supra, was not even cited in the Malmrose case. In Schaffer, the court did not say there was no error in refusing to give the instruction but rather, the court reasoned that because other general instructions on credibility and burden of proof were given, the jury was adequately advised on what the law was. Secondly, the court noted that there were two eyewitnesses who had abundant opportunity to observe the defendant, thus alleviating any prejudice. The court concluded that the refusal to give the instruction did not constitute "reversible error" [emphasis added]. 638 P.2d at 118

Similarly in State v. McCumber, 622 P.2d 353 (Utah 1980) the issue of the refusal to given an instruction on eyewitness identification was raised.[7] With respect to that issue this court stated:

> A criminal defendant is entitled to have ajury instructed on his theory of the case if there is any substantial evidence to justify such an instruction. Where, however, the requested instruction is denied, no prejudicial error occurs if it appears that the giving of the requested instruction would not have affected the outcome of the trial. Moreover, a defendant is not entitled to an instruction which is redundant

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[7] The test of the instruction was not included in the op-

> or repetitive of principles enunciated in other instructions given to the jury. The principal points of defendant's proposed instruction dealt with the State's burden of proof and the factors to consider in weighing the testimony of an eyewitness. All of these factors were adequately dealt with in other instructions presented to the jury by the trial court. As a result, we cannot agree that the denial of the proposed instruction constituted reversible error. [Footnote ommitted.] 622 P.2d at 359.

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

Several other principles of Utah law which were dealt with only in passing or not mentioned at all in those cases, must be discussed here. Under the law of Utah a criminal defendant is entitled of have his theory of the case presented to the jury in the form of written instructions, State v. Stenbeck, 78 U.S. 350, 2 P.2d 1050 (1931), State v. McCumber, supra. With respect to defenses, a criminal defendant is entitled to have the jury instructed that the defense need only raise a reasonable doubt. State v. Wilson, 565 P.2d 66 (Utah 1977); State v. Torres, 619 P.2d 694 (Utah 1980); and State v. Starks, 627 P.2d 88 (Utah 1981).

The mere fact that the court gave general instructions on the presumption of innocence and burden of proof does not alleviate the prejudice in refusing to instruct the jury with respect to the defendant's burden in establishing his defense. This court has held that a jury need not

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

In this case there was no instruction given which explained to the jury what the defense was, nor was there any instruction given which explained to the jury what the burden of proof was with respect to a defense. Consequently, it was error not to give an instruction explaining to the jury what the defense was, and relating that portion of the evidence to the reasonable doubt standard. The policies above, are substantial and compelling. That instruction is clearly a necessary and proper one and it was error to refuse to give it to the jury.

CONCLUSION

The Appellant maintained that he could not have been the perpetrator of the robbery as he was in New York at the time the robbery occurred. The only testimony that refuted this was the identification of the Appellant by the victims. Despite the accepted problems inherent in eyewitness identificaiton, the court failed to give a separate instruction regarding eyewitness

identification and the problems with such identification. Because the cumulative error of insufficient evidence to maintain the conviction based on the alibi defense and the failure to give the eyewitness identification instruction, the trial court committed reversible error and this conviction cannot stand.

Respectfully submitted this 27 day of March, 1984,

Brooke C. Wells

BROOKE C. WELLS
Attorney for Appellant

DELIVERED copies of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 28 day of March, 1984.