1983

# The State of Utah v. Jay Richard Newton : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff-Respondent. | : | |
| vs. | : | |
| JAY RICHARD NEWTON, | : | Case No. 19065 |
| Defendant-Appellant. | : | |

# BRIEF OF APPELLANT

Appeal from a judgment in the Third District Court in and for Salt Lake County, State of Utah, rendered by the Honorable Dennis Frederick, Judge presiding.

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| [illegible] | : | |
| [illegible] | : | |
| [illegible] RICHARD NEWTON, | : | Case No. 19065 |
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| [illegible] | : | Case No. 19065 |
| JAY RICHARD NEWTON, | : | |
| Defendant-Appellant. | : | |

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, JAY RICHARD NEWTON, 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 Dennis Frederick, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, JAY RICHARD NEWTON, 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 pursuant to Title 76, Chapter 3, Section 402, Utah Code Annotated, (1953 as amended), for the indeterminate term as provided by [illegible] for a felony of the First Degree.

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

On May 6, 1980, [illegible] was robbed at gunpoint by a man with a handgun entered [illegible] 1980 East, located at [illegible] South 1980 East, and [illegible] drive from the [illegible], Ms. Shepard (T. 7-8). Ms. Shepard was shown a photo array some days later and a second photo array one to two weeks after the robbery (T. 11-12). On the second ocassion Ms. Shepard identified a photograph of the appellant as the person who had committed the robbery (T. 13-14). A number of previous in-court identifications by Ms. Shepard preceded her in-court identification at trial (T. 11, 30).

## ARGUMENT

### THE TRIAL COURT COMMITTED PREJUDICIAL ERROR REFUSING TO GIVE THE APPELLANT'S REQUESTED INSTRUCTIONS ON THE NATURE OF AND REQUIREMENTS FOR EYEWITNESS IDENTIFICATION EVIDENCE.

The defense raised at trial was that the appellant was not the person who committed the aggravated robbery which was alleged in the Information. The testimony of Ms. Shepard in this particular case left grave doubts about the adequacy of her identification. She characterizes her initial description to the police as "very sketchy" (T. 24). She further says that she did not observe very much and that she was not that well trained in giving descriptions of people (T. 24); could not tell what color the robber's eyes were and she described him as being 5'4" or 5'5" and 140 pounds (T. 27). She later identified the defendant by photographs in open court even though his actual height is 5 inches taller and his weight is 40 pounds heavier than the initial description. The initial identification made of the appellant by Ms. Shepard was from a photographic

... and to two weeks after the incident. As a part of his ... applicant requested alternative instructions which ... the nature and dangers inherent in identification ... factors to consider in assessing the value of ... identification evidence and the burden of proof with respect ... the defense.

... [1]

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... Those Instructions provided:

INSTRUCTION NO. _____

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The State has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness you should consider the following:

1. Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(In general, a witness bases any identification he makes on perception through the use of his senses. Usually the witness identifies an offender by the sense of sight - but this is not necessarily so, and he may use other senses).

2. Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was pre-

(Footnote No. 1 continued)

sented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

(You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.)

3. (You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.)

4. Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

The burden of proof on the State extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. (R 95-96)

INSTRUCTION NO. _____

One of the most important issues of this case is the identification of the defendant, JAY RICHARD NEWTON. The State has the burden of proving identity beyond a reasonable doubt.

Identification testimony is an expression of belief or impression by the witness. In this case, some of the witnesses have testified that they recognized the defendant as a participant in the crime. You must decide whether there is a reasonable doubt in this identification. In appraising the identification testimony of the witnesses you should consider the following:

1. Did the witnesses have the capacity and opportunity to observe the offender.

2. Is the identification made by the witness a product of his own recollection.

3. Has the witness been consistent in recognizing the defendant as a participant in the offense.

If after considering these factors you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. (R. 97)

... trial court refused to give the instruction and exception ... [illegible].

... dangers inherent in eyewitness identification evidence ... the subject of discussion for many years. In an oft-... 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.[2]

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... 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. ... L. Rev. 407 (1980); Ellis, Davies, Shepherd, Experimental Studies of Face Identification 3 Nat. J. Crim. Def. 219 (1977); ... of Eyewitness Identification Evidence in Criminal Trials, ... L.Q. 741 (1979). Loftus, Eyewitness Testimony (1979); ... Defender Sourcebook, pp. 251-57 (S. Singer, ed. 1976); ... The Psychology of Eyewitness (1979); Buckhout, ... Determinants of Eyewitness Performance on a Lineup, 1974 Bull. ... Psychonomic Soc'y 191; Buckhout, Eyewitness Identification and Psychology in the Courtroom, Crim. Def., Sept. - Oct. 1977, ... R. Buckhout, Eyewitness Testimony, Scientific Am., Dec. ... Ellis, Davies & Shepherd, Experimental Studies of

The commentators note that reasons for this unreliability are found in the problems that are associated with human perception and memory, both of which play a vital role in eyewitness identification. A lengthy discussion of these problems is found in a review article dealing with the problems of perception and memory which are associated with hearsay testimony.[3] 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.
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> * * *
>
> 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.

In United States v. Barber, 412 F.2d 517 (3rd Cir. 1971), the court gave a similar description of the processes involved in human observation, perception and memory. It then went on to state, with respect to eyewitness identification,

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2. (continued) Face Identification, Nat'l J. Crim. Def. 219 (1977); Levine & Tapp, The Psychology of Criminal 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, 575-58 (1976).

3. Stewart, Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah Law Rev. 1.

> 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' 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 this case, the initial identification was that of the appellant's photograph being picked out of a group of six pictures. This identification did not occur until one to two weeks after the robbery occurred. In Simmons v. United States, 390 U.S. 377 (1968), the United States Supreme Court addressed the issue of whether a photographic array was impermissibly 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 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. [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 error in State v. Quick, 226 Kan. 308, 597 P.2d 1198 (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 identification 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 take either of these actions. Elizabeth Loftus, an expert on eyewitness identification was not allowed to testify and the court refused to give the same or a similar instruction as approved and requested in this case.[4] After a lengthy discussion of the use of expert testimony to solve the problems associated with eyewitness testimony the Kansas court stated,

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[4] See footnote 1, supra.

> 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 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)[5] The Telfaire court described the need 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 emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt. This need was voiced in 1942 in McKenzie v. United States, [112 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 St. Ct. 1951, 18 L.Ed.2d 1178 (1967)] Stovall [v. Denno, 388 U.S. 293] trilogy focusing on the very real danger of mistaken identification as a threat to justice. We refer to our post-Wade opinons in Gregory [v. United States, 409 F.2d 174 (1969). These opinions sought to take into account the traditional

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5. 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 was alternatively requested by appellant in this case.

recognition that identification testimony presents special problems of reliability by stressing the importance of an identification instruction even in cases meeting the constitutional threshold of admissibility. [footnotes omitted] 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.[6] The Kansas court required the Telfarie instruction be given, stating,

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6. 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;

(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, but you may give it such weight as you think it deserves. You should not reject any testimony without cause." 635 P.2d at

> . . . we have considered the fact that trial courts are often required to determine the admissibility of eyewitness testimony where issues of unreliability in State v. Ponds, 227 Kan. 627, 608 P.2d 948, in testing the unreliability of identification testimony, the five factors mentioned in Neil v. Biggers [409 U.S. 188 (1972)] should be considered by the trial court. If these five factors should be considered in determining the admissibility of the testimony, it would seem even more appropriate to require the jury to consider 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 admissibility of eyewitness identification evidence based on a showup procedure.[7] 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. 490 U.S. at 199.

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7. That procedure involved two detectives walking the petitioner past a rape victim.

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7. That procedure involved two detectives walking the petitioner past a rape victim.

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, [illegible] It is interesting to note that State v. Schaffer, supra, was not even cited in the Kilgrose 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 1187.

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

> A criminal defendant is entitled to have a jury 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 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.

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9. The text of the instruction was not included in the opinion.

> 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 omitted] 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 to have his theory of the case presented to the jury in the form of written instructions, State v. Stenbeck, 78 U. 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 (Ut. 1977); State v. Torres, 619 P.2d 694 (Ut. 1980); and State v. Starks, 627 P.2d 1311 (Ut. 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 a 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. The only instructions that were submitted on these issues were defendant's alternative instructions which are the subject of this appeal.[10] 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 that support the giving of the Telfaire model instruction, discussed 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.

The error in refusing to give the instruction on identification was prejudicial requiring a new trial. A criminal conviction must be reversed if there is a reasonable likelihood that the verdict would be different if the requested instruction had been given. State v. Mitcheson, 560 P.2d 1120 (Ut. 1977). The only issue at trial was the identification of the defendant as the perpetrator of the aggravated robbery. The initial description of the robber given by Ms. Shepard was very general. She was able to describe the clothing and approximate height and weight of the perpetrator. The only distinguishing features she noticed was that of "light brown hair, sort of long"

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10. See footnote 1, supra.

T. 251). Ms. Shepard's opportunity to observe the robber was [illegible] (T. 247). The fact that much of Ms. Shepard's observation was directed at the gun is borne out by the description [illegible] of it and her continuing awareness of its presence [illegible]. There were obvious problems in this case with respect to the opportunity to observe, the potential for suggestive procedures with photographic identification, the state of mind of Ms. Shepard at the time the observations were made and the complete absence of any evidence to corroborate the identification of the defendant. An instruction on how to weigh the evidence was necessary to inform the jury of these problems. If the instruction had been given, there is a reasonable likelihood that the verdict would have been different. Consequently, the error was prejudicial and a new trial should be ordered.

## CONCLUSION

The only evidence connecting the appellant to the aggravated robbery which is the subject of this case, was the identification made of the appellant from a photographic array. The dangers inherent in eyewitness identification evidence have been recognized for many years. One of the methods that courts have required to be used to eliminate some of these dangers is to give the jury an instruction that describes the nature of identification evidence, factors to be considered in weighing such evidence and the burden of proof that evidence must meet.

Such an instruction was requested here and the refusal to give it was prejudicial error requiring a new trial.

RESPECTFULLY SUBMITTED this 22ND day of July, 1983.

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CERTIFICATE OF DELIVERY

I DO HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was hand-delivered to the office of the Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 on this 22ND day of July, 1983.