1992

State of Utah v. Claude L. Hayes : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. ~~920850CA~~ IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	920850 CA
Plaintiff/Respondent,	:	Case No. ~~92085CA~~
vs.	:	
CLAUDE L. HAYES,	:	Priority No. 1 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from the Second Judicial District Court's conviction of the offense of Aggravated Robbery, a First Degree Felony, UCA Section 76-6-302 on September 3-4, 1992 rendered by a jury with the Honorable Stanton Taylor presiding.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 92085CA
vs.	:	
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Defendant/Appellant.	:	

JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a conviction on the charge of aggravated robbery, a first degree felony, in violation of Utah Code annotated 76-6-302, rendered by a jury impaneled before the Honorable Stanton M.Taylor. Jurisdiction to hear the above entitled appeal is conferred upon the Utah Court of Appeals pursuant to Utah Code annotated, 78-2-2(3)(i) (1953) as amended.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was the evidence sufficient to establish defendants guilt of aggravated robbery, after the misidentification of the Defendant on two prior occasions by the primary witness who testified concerning the robbery.

2. Were the statements of the Defendant obtained by Officer Stubbs imadmissible as a violation of Defendant's rights pusuant to Miranda v. Arizona 384 U.S. 436, 88 S Ct 1602, 16 L. Ed. 2nd 694 (1966).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Annotated 76-6-302 : Aggravated Robbery.

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.

****

STATEMENT OF THE CASE

This is an appeal from a conviction on the charges of aggravated robbery, a first degree felony following a jury trial before the Honorable Judge Stanton M. Taylor on the 2nd and 3rd day of September, 1992. Defendant was sentenced on the charge on the 28th day of September 1993 to serve a term in the Utah State Prison of not less than five (5) and which may be for life at the Utah State Prison.

The Defendant filed for post conviction relief requesting that he be granted an appeal which was received by the Clerk of the Judicial District Court, County of Weber, State of Utah on the 7th day of October, 1992.

This appeal, which was directed to the Court of Appeals for the State of Utah, for which, on the 9th day of October 1992, Geoffrey J. Butler, Clerk of the Court of Appeals, filed a certificate on Appeal No. 92085CA on the 7th day of October, 1992.

That on the 9th day of October 1992 the Defendant signed the affidavit of Impecuniosity which was filed with the Clerk of Weber County, and that counsel, John T. Caine, was appointed to represent the Defendant as the result of the Defendant's motion for appointment of counsel to represent him in this appeal which was

received by the Clerk of the District Court of Weber County.

STATEMENT OF FACTS

On the 16th day of June 1992, at approximately 10:00 o'clock p.m., Mrs. Anthea Benally was employed by Kar Kwik at 710 Washington Blvd, Ogden, Weber County, Utah. Some minutes before 10:00 p.m. Mrs Benally was at the check out counter and her co-worker, Brent Hoth, was working in another part of the store. At that time there was only one other person in the store. Mrs Benally testified that she was in approximately the middle of the store looking over the merchandise. Eventually that person grabbed some chips and brought them over to the counter. That person threw the chips on the counter and asked for a package of cigarettes. (Tp. 17) Mrs. Benally reached for the requested cigarettes and then started to ring up the sale. As Mrs. Benally was ringing up the sale, the customer came beside Mrs. Benally and in a quiet voice said " This is a robbery". Mrs. Benally questioned whether the customer was serious. (Tp. 19) The customer to show he was serious grabbed Mrs. Benally's arm and placed the scissors to a point about five inches from Mrs. Benally's body. Mrs. Benally finally opened up the till and the customer reached in the till, grabbed all the paper money and stuffed it in a side pocket of a jacket he was wearing. The customer warned Mrs. Benally not to call the cops and then walked out the side door and into a dark area, from which neither Mrs. Benally or her assistant were able to see him again. Immediately thereafter, Mrs. Benally called the police. The Police arrived in approximately ten minutes. During

the call she had described the robber to the police.

Approximately twenty minutes later the police take Mrs. Benally to the vicinity of 27th and Monroe, where they showed to her a young black man they had in custody. Mrs. Benally identified that man as the one who had robbed her (Tp. 25). To be sure Mrs. Benally requested that the police have the suspect walk closer to the police car and shine the brighter lights on his face. Mrs. Benally then was sure of the identity of the suspect as the individual who robbed her on the 16th of June (Tp. 48)

Next Mrs. Benally went to the police station in the middle of the 2600 block of Washington Blvd in Ogden at the request of the police. There the suspect walked down the hallway, where Mrs. Benally again identified the same person as the one who held the scissors to her and robbed the store (Tr. 47). However, from the beginning Officer Stubbs of the Ogden City Police Department was talking Mrs. Benally out of identifying the first suspect as the individual who committed the crime. (Tp. 118)

Later Mrs. Benally was asked to identify the Defendant from multiple pictures which she was shown at the preliminary hearing on the 25th of June, 1992. At that time the police did not include the picture of the suspect she had previously identified, but did include a picture of the Defendant. From those pictures Mrs. Benally picked the Defendant as the individual who robbed the store (Tp. 51,52)

Early in the morning of the 17th of June, 1992 one, Gayle Herrera, left the Defendant and went to the police station in

Ogden, Utah. She was directed to officer Stubbs, where she related that she had been with the Defendant prior to and subsequent to the robbery of the Kar Kwik. (Tp. 84). Ms. Herrera indicated to Officer Stubbs that the Defendant and she parked his automobile in back of Kar Kwik on 7th and Washington Blvd, that the Defendant left the car allegedly to borrow some money and when the Defendant came back the Defendant and Ms Herrera drove away (Tp. 84-88).

After Ms. Herrera told her story to Officer Stubbs, the officer requested Ms. Hererra help him find where the Defendant lived. Ms. Hererra went with Officer Stubbs to locate the car, a gray Buick Riveria, which they found parked by a tree and some other businesses, and then located the apartment number where the Defendant was staying. (Tp. 92-93, 125)

Subsequently, Officer Stubbs took a surveillance team out to the apartment. Then Officer Stubbs left to obtain search warrants for both the car and the apartment (Tp. 127)

Sometime around 2:00 PM on the 17th of June, 1992, Office Stubbs, with three other Ogden City policeman and one officer from the Clearfied, Utah police Department knocked on the door of the apartment to execute the search warrant. Upon entering the apartment and searching the apartment the officers found the Defendant in the middle bedroom.

At that point Officer Stubbs indicated that "I took him into custody without incident. (Tp. 132). Officer Stubbs believed that he had arrested the Defendant for the robbery of the Kar Kwik store on the evening of the 16th of June, 1992 (Tp. 133).

After the Defendant was taken into custody, Officer Stubbs testified that "Claude appeared quite upset and interrupted me saying. "This is the -- this is the critical phrase - - "The coat was in the closet. He'd been coked up at the time and would plead guilty. He threw the scissors somewhere, but doesn't know where because he was coked up." (Tp. 133-134, 143) Immediately after making the statement Officer Stubbs decided that he had better read him his rights under Miranda v. Arizona, supra. (Tp. 135, 143) After reading the Defendant his Miranda rights, the Defendant made no further statements about the crime (Tp. 136,137, 143)

SUMMARY OF THE ARGUMENT

The evidence of Defendants guilt was insufficient to demonstrate his guilt of aggravated robbery. Given the circumstances involved in this case that the primary witness, who was also the victim in the case, within a short time after the commission of the crime, twice identified, not by photographs, but after personal inspection, first by auto lights, and then in better light at the police station, another person as the perpetrator of the crime, and only after affirmative persuasion and a photo review that did not contain a photo of the prior suspect, did she identify the Defendant as the perpetrator of the crime and also that the only other witness was shown only a photo of the Defendant and not the other suspect, casts doubt as to the validity of their identity of the suspect as the perpetrator of the robbery. Second, the Defendant, after being in custody and being served a search warrant, WHICH CONFESSION RESULTED DIRECTLY FROM THE FUNCTIONAL

EQUIVALENT OF INTERROGATION BY THE POLICE DEPARTMENT, but before his Miranda rights were given, made a confession, which confession was admitted in evidence of the objections of Counsel for the Defendant was harmful error in that it significantly led to the conviction of the Defendant for the crime in question.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED ROBBERY

The standard established for an Appellate review of the sufficiency of evidence is well established. The Utah Supreme Court has stated:

> "It is the prerogative of the jury to judge the credibility of the witnesses and to determine the facts; that the evidence will be reviewed in the lines most favorable to the verdict; and that if when so viewed it appears that the jury acting fairly and reasonably could find the Defendant guilty beyond a reasonable doubt the verdict will not be disturbed."

Citing case State v. Ward, 347 P.2d 865, 869 (1959 footnote omitted.)

The Utah State Supreme Court has held in State v. Booker, 709 P.2d, 342 Utah 1985:

> "That we review the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime of which he was convicted".

See also State v. McCardell, 652 P.2d, 942 (Utah 1982), State v. Martinez, 709 P.2d, 355 (Utah 1985). However, the Utah

Supreme Court has indicated an unwillingness to stretch the inference beyond gaps in the evidence as in the case of State v. Petree, 659 P.2d, 443,444 (Utah 1983), where the Court said:

> "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. The fabric of evidence against the Defendant must cover the gap between the presumption of innocence and the proof of guilt."

The Defendant was convicted of Aggravated Robbery. Section 76-6-302 of the Utah Code Annotated indicates that:

(1) A person commits aggravated robbery 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 to another.

****

Section 76-6-301, UCA defines robbery as " 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."

To convict the Defendant of this charge the jury not only had to find that under the definition of that statute an aggravated robbery actually did occur but also that they were convinced beyond a reasonable doubt that the Defendant actually was present at the scene and perpetrated that offense.

The focus of this appeal is whether the jury could reasonably believe that the Defendant, Mr. Hayes, was the person who actually

committed the robbery, after the victim first had twice identified another suspect as the perpetrator of the crime, and the Ogden City Police Department deliberately and conscientiously convinced the victim that she was wrong in her first and second identification of the perpetrator of the crime.

There is no dispute that Kar Kwik convenience store at 710 Washington Blvd, Ogden, Utah was robbed by a black male wearing a dark blue, slick looking jacket at approximately 10:00 p.m. on the evening of June 16, 1992. At the time of the robbery the principal clerk, Mrs. Benally, was forced to open the till, where the individual grabbed all the bills and departed. Immediately thereafter Mrs. Benally called the Ogden City Police Department to report the robbery. Within approximately one hour after the robbery the Ogden Police Department took Mrs. Benally to the vicinity of 27th and Monroe in Ogden for the purpose to identify a potential suspect. Upon arriving at 27th and Monroe the suspect was standing in front of the police car. After some looking and requesting the suspect to be brought closer to the headlights of the police car for better view, Mrs. Benally identified the suspect as the individual who had robbed her that evening in the said Kar Kwik location. The police then drove Mrs. Benally to the police station in the 2600 block of Washington Blvd in Ogden, where Mrs Benally in full light again saw the suspect walking down the hall. Again after seeing another view of the suspect she again identified him as the perpetrator of the robbery. Mrs. Benally was confident that she had identified the robber, and except for the actions of

Officer Stubbs of the Ogden City Police Department would have been in Court testifying against that suspect rather than the Defendant. This is because at that moment she was convinced that the police had apprehended the right suspect. Shortly afterwards, Officer Stubbs showed Mrs. Benally photographs of other black individuals, including the Defendant, but not the individual Mrs. Benally had previously identified as the perpetrator, for identification. At which time she identified the Defendant as the perpetrator of the crime. Since the Defendants photograph and the initial suspect's photographs were not both included together it is purely conjecture which of the two individuals she would have identified, had the police included both photographs. Moreover, it is further conjecture of whether Mrs. Benally would have remained convinced she had identified the correct suspect, except for the affirmative action of the Ogden City Police Department in convincing her she had identified an innocent suspect.

No further action was taken until Gayle Herrera, an admitted drug addict, came voluntarily to Officer Stubbs and tells her story, implicating the Defendant as the perpetrator of the crime.

Gayle Herrera visits Officer Stubbs at approximately 4:00 a.m. and tells the officer a story about the robbery of the Kar Kwik the previous evening. She admits that she had known the defendant only a couple of days, during which they had both been using drugs and, in fact, were both high on drugs the evening of the Sixteenth of June. Never did Ms. Herrera see the Defendant enter the Kar Kwik which was robbed, nor did the Defendant admit that he had just

robbed the convenience store. In fact, the Defendant told Ms. Hererra that he was going to borrow some money. Ms. Hererra had no personal knowledge that, in fact, the Defendant either intended to or did rob the said Kar Kwik.

However, she did have personal knowledge of the make, color, and partial license plate of the car the defendant was driving, and also where the Defendant was residing. With that knowledge Ms. Hererra showed Officer Stubbs the location of the automobile and also where the Defendant was staying.

Based upon that information Officer Stubbs put a surveillance on the automobile and the apartment house, and also obtained a search warrant to search the car and the apartment for both scissors and a blue jacket.

Taking three other Ogden City Police Officers plus one Clearfied, Utah Police Officer to the apartment, he knocked on the door, was admitted into the apartment by another black male, believed to be the Defendant's brother and began a search of the apartment. Pursuant to that search the Defendant was located in a middle bedroom. First, Officer Stubbs took the Defendant into custody. Second, Officer Stubbs identified himself as Detective Stubbs from the Ogden City Police Department. Third, informed the Defendant he was investigating the Kar Kwik robbery at 7th and Washington and that he believed that the Defendant did it. In fact, Officer Stubbs told the Defendant that the person driving his car had given him up. Fourth, that he was there with a search warrant, was going to search the house for the coat and the

scissors used in the robbery.

Next, Officer Stubbs testified that the Defendant appeared quite upset at that time, and interrupted what he was saying by telling him the coat was in the closet. The Defendant had been coked up at the time and would plead guilty. The Defendant said that he had thrown the scissors somewhere, but he doesn't know where because he was coked up.

Finally, Officer Stubbs testified that he interjected with the Miranda warnings and the Defendant said nothing else after receiving the Miranda warnings.

The United States Court of Appeals for 7th Circuit ruled in Webster v. Duckworth, 767 F.2d, 1206, (1985),:

> "That the absence of competence substantive evidence to support a verdict of guilty beyond a reasonable doubt, whether the result of prosecutorial inability, judicial error or recalcitrant witness requires acquittal either at trial or on appeal."

The Supreme Court of Washington considered this general rule in the case of State v. Allen, 574 P.2d, 1182, (1978) where the Court ruled that:

> "Doubt of guilt cannot co-exist with conviction of guilt; any fact in evidence may, under particular circumstances, raise doubt of guilt which would not otherwise exist, if doubt is raised, it follows that jury is not convinced beyond a reasonable doubt of guilt of Defendant and must acquit."

The Supreme Court of the State of Utah confirmed the Defendant's theory in the case of State v. Mecham, 456 P.2d 156, (1969); where although the Court affirmed the Defendant's conviction, the Court indicated that:

"Not withstanding the fact that exact date of indecent

> assault was never made a particular issue at the trial by notice of alibi or otherwise, except as witnesses were questioned as to what happened on that date, State had the burden to prove Defendant's guilt beyond a reasonable doubt, and this evidence of Defendant's being elsewhere was sufficient to raise a reasonable doubt as to his being involved in the crime, he should be acquitted."

This language relates to the present case and shows that the Supreme Court is cognizant of the potentiality of a jury conviction when the facts seem to preclude the possibility of the Defendant actually committing the offense. The Court is clear in its assertion that in such a case the Defendant is to be acquitted.

The Utah Supreme Court stated the rule to be used in Utah regarding sufficiency of the evidence in State v. Romero, 554 P.2d, 216, 1976:

> "The status is of the standard for determining sufficiency of evidence is whether it is so inconclusive or inherently improbable that reasonable minds could not reasonably believe the Defendant had committed a crime."

In the present case the jury gave unreasonable credibility to the testimony of Mrs. Benally in believing her identification of the Defendant after she had first been convinced of the innocence of the first suspect. Further, the second and only other witness to the commission of the crime, Brent Hoth, despite the fact that he was in the police station at the same time as the first suspect, never was asked to view that suspect to determine if he believed said individual committed the crime. (Tp. 72, Lines 11-33). Further, Mr. Hoth was shown pictures of the Defendant and other black individuals, but did not include a photo of the first suspect. (Tp. 74 Lines 16-18) Mr. Hoth admitted that he did not

get a good look at the perpetrator of the crime, (Tp. Lines 20-21) and further described the perpetrator only in generic terms, black male 5'9", 5' 10", medium build, average features with no distinguishing marks, or identity (Tp. 75, Lines 9-11). This description would fit many black individuals. Further, Mr. Hoth is not very helpful in describing the jacket the perpetrator wore the night of the robbery. He described it merely as "long sleeve, something on, Navy blue". (Tp. 76, Line 10) This description could also fit numerous jackets and contains no specific identifying features.

The Defendant defends his position with the basic rule that a conviction without evidence of guilt clearly violates his rights to due process of law.

The Defendant points to the precedence set in United States Supreme Court in Sandstrom v. Montana, 442 US 510, 1979; in which the Court ruled that jury may not be instructed that:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

Because of the 14th Amendment Due Process requirement, that the State must prove each and every element of a defense beyond a reasonable doubt and to accept the quoted presumption conflicts with the stronger and overriding presumption of innocence, which everyone accused of offense is entitled to.

The Utah Supreme Court followed this ruling in the case of Utah v. Walton, 646 P.2d 689 (1982). The Defendant argues that this line of cases precludes situations, such as in the current case, where the Defendant is not clearly identified as the

perpetrator of the robbery and that, therefore, the jury is being expected to presume that because he was tenuously identified as being the robber, that he must have in fact committed the robbery charged by the State. Such a presumption without any direct evidence is clearly violative of the Defendants right to due process.

POINT II

Miranda Issue

THE TRIAL JUDGE ERRED IN FAILING TO EXCLUDE THE DEFENDANTS CONFESSION OF GUILT MADE TO OFFICER STUBBS, IN VIOLATION OF THE MIARANDA RULE (Miranda v. Arizona (1966) 384 US 436, 16 L.E. 2nd 694, 86 S. Ct. 1602

A fundamental right under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 12 of the Constitution of the State of Utah is, no person shall be compelled to give testimony against himself (self incrimination). In the case of Miranda v. Arizona, supra the United States Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the Defendant, unless is demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Rhode Island v. Innis (1980) 446 U.S. 291, 64 L.Ed. 2nd 297, 100 S. CT 1682, L ED at Page 305.

Based on the following uncontroverted facts it is argued that the prosecution in using the Defendants admission of guilt violated the Defendants right against self incrimination, as set forth in the constitutions of the United States and the State of Utah. On

the afternoon of June 16, 1992, Office Stubbs of the Ogden City Police Depart, at approximately 2:00 p.m. with three other officers of the Ogden Police Department and one Officer of the Clearfied, Utah Police Department knocked on the door of an apartment in Clearfied, Utah where they believed the Defendant was residing. A black male answered the door and Officer Stubbs asked for Claude Hayes. Officer Stubbs was told by the male that Claude wasn't there. However, Officer Stubbs executed the search warrant, secured the house, place the black male and either his wife or girlfriend in the living room, and found Claude Hayes in the bedroom with a sleeping child (Tp. 128, Lines 4-22).

Officer Stubbs next stated that he took the Defendant into custody without incident. (Tp. 132 Line 12-13). Officer stubbs states that he next began explaining to Claude who he was and exactly why he was there and that he had a search warrant for the coat and scissors. Officer Stubbs testified that "there should have been no doubt in his mind he was under arrest for that robbery (kar Kwik on 7th and Washington in Ogden) and I (Officer Stubbs) believed he did it (Tp. 133, L 10-12). Officer Stubbs then testified "Claude appeared quite upset and interrupted me saying - - - the coat was in the closet. He'd been coked up at the time and would plead guilty. He threw the scissors somewhere, but doesn"t know where because he was coked up" (Tp. 134, Lines 2-5_. After making the above statement Officer Stubbs read him his Miranda rights (Tp. 135 Lines 12-23). After hearing the Miranda rights, the Defendant made no further statements (Tp. 136, Lines 15-24)

The Defendant's Counsel made a motion to exclude the testimony of the confession, which motion to suppress was denied (Tp. 140 Lines 17-23)

In the instant case there is no question that at the time the Defendant made the admission of guilt he was in custody, nor is there any question that such confession was orally relayed to the Jury by Officer Stubbs. (Tp. 143 Lines 14-19).

The only questions are one, whether the confession was made as a result of interrogation and two, whether such statement was voluntary.

The United States Supreme Court in the case of Rhode Island v. Innis, supra at Page 300 states:

> "We conclude, that the Miranda safeguards come into play whenever a person in custody is subject either to express questioning or its functional equivalent. That is to say, the term "Interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of suspect, rather than the intent of the police."

Here you have five police officers in an apartment, first telling the other occupants in the apartment to stay away from the suspect and then in a relatively small apartment, Officer Stubbs, first, places the Defendant under arrest, second, explains to the Defendant who Officer Stubbs was, third, tells the Defendant that he believes the Defendant committed the robbery of the Kar Kwik at 7th and Washington Blvd in Ogden, fourth, tells the Defendant that he believed he used a pair of scissors in the commission of the

crime and fifth, that he has a search warrant for the coat and scissors.

In accordance with the standards established in Rhode Island v. Innis, supra, his course of conduct was likely to elicit an incriminating response from the Defendant. Moreover, the conduct of Officer Stubbs was as close as asking the Defendant, "Where are the coat and scissors that you used to commit the robbery on the night of June 16th at the Kar Kwik on 7th and Washington in Ogden "without actually asking the question".

Moreover, as contrasted with State v. Kelly, 718 P 2nd 385 (1986) this contact by Officer Stubbs was accusatory rather than investigatory. The Defendant was in sequence, taken into custody, told he had committed a crime, defined the exact crime he was accused of, served a search warrant for a coat and scissors used in the crime, made an incriminating statement and then read his Miranda rights.

The last question raised is whether the confession of the Defendant was given voluntarily. The Utah Supreme Court in the case of State v. Bishop, 753 P 2nd 439 (1988) at Page 463 states:

> "When the State seeks to use an allegedly involuntary confession against a criminal defendant at his or her trial, he or she is "entitled to a reliable and clear-cut determination that the confession was voluntarily rendered." Lego v. Twomey 404 US 417, 92 S. Ct 619, 627, 30 L.Ed. 2nd 618 (1972). In this regard, the State bears the burden of proving by at least a preponderance of the evidence that the confession was voluntarily given.

In the instant case the Defendant was induced by accusatory conduct of Officer stubbs into giving the involuntary confession of the robbery of the Kar Kwik, which confession was testified to by

Officer Stubbs over the objection of Defendant's Counsel. (Tp. Pages 138-140) The confession served as the king-pin of the States case and without it, given the conflict existing in the evidence, it is reasonable to conclude that the Defendant would have been acquited.

CONCLUSION

The Defendant Claude L. Hayes was improperly charged and convicted of aggravated robbery in violation of the due process clause of the 14th Amendment of the United States Constitution. The Defendant alleges that the jury convicted him on no substantial evidence that he in fact committed this crime, and that the evidence presented at trial cast doubt on the initial identity of the individual who committed the robbery and further the Court admitted the Defendant's involuntary confession, given before his Miranda rights were read to him. That, therefore, because of the faulty identification and if his confession is disregarded he is entitled to an acquittal on this charge. Inherent within this insufficiency of the evidence argument is if the primary witness had not been coached by the police as to the identity of the perpetrator of the crime and if no confession would have been admitted the jury in this case would not of had sufficient evidence to convict him of aggravated robber.

RESPECTFULLY SUBMITTED this 14 day of April, 1993.

JOHN T. CAINE
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the above and foregoing Brief to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid this 14 day of April, 1993.

JOHN T. CAINE
Attorney for Appellant

ADDENDUM

Q. Okay. And this one's for the -- is this one for the outside --
A. The drive-up?
Q. -- the drive-up window?
A. The drive-up window and then there's the gas till right here which is right by it. And then there's the other till.
Q. So there's yet another -- so there were three tills?
A. Yeah, except for the one you don't ring in. It's just to put the gas money in.
Q. Okay.
A. And he came up and he threw a bag of chips on the counter and --
Q. When you say "he", let me ask you, is that person here in the courtroom today?
A. Uh huh.
Q. Would you point him out to the jury, please?
A. He's right there.
MR. DAROCZI: Indicating the defendant, for the record, Your Honor.
THE COURT: Yes.
Q. (By Mr. Daroczi) Okay.
A. He threw them on the counter and then he asked for a pack of cigarettes. I thought he said Kool

was about right here. And he said real quietly, he said: This is a robbery.

And I looked at him and laughed because I thought that he was just joking. And then he goes: I'm serious, this is a robbery and I want you to open up the till now.

And he just said that he wanted me to open up the till now. And -- and then after that it was like I could see him starting to -- you know, he had a pair of scissors which he had held --

Q. Let me stop you here, Anthea.

A. Okay.

MR. DAROCZI: Do we have a pair of scissors here? Maybe you could show us. Let's see if we have a pair here. (Clerk gives Mr. Daroczi scissors.)

Q. (By Mr. Daroczi) Would this be something similar?

A. Yeah.

Q. Okay. Why don't you be -- why don't you be him and show us how this was -- this was held. And, let's see, I'll be you then. Okay?

A. Okay.

Q. Did he hold them in the right hand?

A. Yeah, he had them in the right hand.

Q. Okay. What denominations, roughly?
A. Just twenties, tens, and whatever was in the twenties drawer, I think.
Q. Okay. Did the police come shortly thereafter?
A. Yeah.
Q. Okay. And did you describe the person who robbed you?
A. I described him on the phone to them whenever I called.
Q. Right on the phone?
A. Yeah.
Q. Okay. And did they also come to the store?
A. Uh huh.
Q. Okay. Were you taken to a location at 20 -- was it 23rd and Monroe?
A. 27th and Monroe.
Q. 27th and Monroe, rather?
A. Yeah.
Q. Okay. There was a young black man there?
A. Yeah.
Q. Okay. You identified that person as your -- as the person who robbed you; is that correct?
A. I did.
Q. And then you did that again when you were taken to the station, the police station; is that right?

Now, let's look down at the specific questions on page two, if you would. And if you would look to about the top of that -- I think it's the third question down after you have given a description. The question is, "Since the robbery, have you seen this person tonight?"

Is that the question?

A. Uh huh.

Q. And what was your answer?

A. I put "Yes".

Q. All right. Second question, "Where did you see him at?"

And what was your answer?

A. I put, "Where the police took me to identify, and walking through here."

Q. "Where police took me to identify him" -- that's 27th and Monroe -- "and walking through here."

A. Uh huh.

Q. "Here" means the station?

A. Which was the hallway that he walked down.

Q. Next question, "The person that you identified, is it the same person that held the scissors to you and robbed the store?"

And your answer was?

A. I put, "Yes".

Q. Okay. "What happened when police showed you this person?"

And your answer was:

A. "I looked at him and I didn't think it was him because the clothing and the lighting was different. He definitely changed his jacket. Then he walked closer with -- walked closer with the brighter lights on his face, then I recognized him as the same person."

Q. Okay. Let's stop right there.

A. Okay.

Q. "Then he walked closer with the brighter light on his face, then I recognized him as the same person."

When you're relating that in your statement, is that the incident up at 27th and Monroe --

A. Uh huh.

Q. -- you've just told us about?

A. Uh huh.

Q. Okay. Go to the next part of your answer.

A. "Then when I saw him here in the office he looked over -- he looked over here and I knew it was him."

Q. "Then when I saw him here in the office he looked over here and I knew it was him."

A. Uh huh.

Q. Are those your words?

A. Uh huh.
Q. Became more sure of your identification after he was placed in the headlights of a vehicle, and then when he came down here to the station in the full light of the police office, became even more certain --
A. Uh huh.
Q. -- of your identification, and that's reflected in your statement. Isn't that true?
A. It's true.
Q. Not only -- you not only talk about height and size and color and that sort of thing, but especially getting into the specifics of a smirk on his face and distinguishable eyebrows.
A. Uh huh.
Q. Right? And the only time after that -- so that the jury is clear, you were never shown photographs of any other individuals.
A. Between what time?
Q. Between that evening and a preliminary hearing that was held on the 25th of June. Were you shown some photographs?
A. Yeah, I was shown some photographs.
Q. Okay. Did you pick anyone out there?
A. Yeah, I did.

Q. When did you do that?
A. Shoo. I -- oh, gol. I can't remember the exact date.
Q. Okay. Was it within weeks of this or a month later or when was it?
A. It was shortly after.
Q. Okay. And who showed you these photographs?
A. Stubbs did.
Q. Uh huh. And did he tell you at the time that the individual that you had previously identified, he felt wasn't the man?
A. No, he didn't.
Q. Did he tell you he felt he had an alibi?
A. No.
Q. If you'd already made an identification, did they tell you why they were asking you to look at other photographs?
A. Just to make sure -- make certain.
Q. Just to make certain. Okay.
Do you know whose picture you picked out of there?
A. The second time?
Q. Yeah.
A. The second time I picked his picture (indicating).

Q. It's a different fellow.
A. Yes.
Q. Does the name "Zaugg" --
A. Yes.
Q. -- ring a bell with you?
A. Yeah.
Q. All right. Now, let me have you take a look at that, just so, again, that the jury understands. The first part of that statement is a narrative, is it not?
A. Yeah.
Q. In other words, you were just asked to describe what happened and you did so in your own words; is that correct?
A. Yeah.
Q. And then you were asked some specific questions and you responded to that. Is that, also, true?
A. Yeah.
Q. And then after this was all done, it was typed up. Were you given an opportunity to read this before you signed it?
A. Yeah.
Q. Did you read it?
A. Yeah.
Q. And does it accurately reflect your words -- this

that same evening that may have been in the vicinity -- one of whom had a blue jacket on -- and asked to look at any of them?

A. No.

Q. All right. So the only time you made an identification then was after this incident, you were shown some photographs; is that right?

A. Yeah.

Q. You picked one out; is that correct?

A. Yeah.

Q. And then you went to a preliminary hearing where this defendant was seated there in the courtroom, basically, ready to go to hearing at that time, and you picked him out then; is that right?

A. I don't think I went to the preliminary.

Q. You didn't go to the prelim. So all you've done is seen some photographs; is that right?

A. Yeah.

Q. Not asked to make any other identifications?

A. No.

Q. Until today.

A. Yeah.

Q. All right. There are no other black males in this courtroom today, are there?

A. I don't believe there are.

Q. Take a look around just to make sure.
A. No.
Q. Okay. Now, let's take a look at your statement for a minute, if you'll follow down with me to the specific questions, down there I believe it's the fourth question. It says, question, "Can you describe the person who robbed the store?"
And will you read your answer, please?
A. "He was a black male, 5'9", 5'10", medium build, average face. I don't remember if he had facial hair."
Q. Okay. Stop right there. That's your total description, isn't it? "5'9", 5'10", medium build, average face. I don't remember if he had facial hair."
A. Well, the other --
Q. Well, we'll talk about -- then we're talking about what he had on.
A. Okay.
Q. But in terms of physical description of the individual, that's all you said, isn't it?
A. Yes.
Q. Average face, 5'9" or 5'10", medium build. I don't know if he had any facial hair. That's it.
A. Yeah. I think I said that I think he might have

had some facial hair, but --
Q. Well, this says I don't remember if he had facial hair. Is that --
A. Yeah.
Q. -- what you signed, at least?
A. Uh huh.
Q. Okay. That's it. Then you say -- well, go ahead. Read on. What did you -- what did you next say?
A. "Long sleeve something on, navy blue."
Q. Okay. Stop right there. That's your only description of any kind of a jacket, isn't it? "Long sleeve something on, navy blue"?
A. Yeah.
Q. Now, Mr. Daroczi has stood up in the courtroom today and waved State's Exhibit Number Two at you, and you said, that's it. Right?
A. Yeah.
Q. Did you tell them, in your statement, that it had a hood on it?
A. No.
Q. Did you tell them that it had a lining that looked like that in it?
A. No.
Q. Okay. All you said is you saw something long

have to tell the truth?
A. Yeah.
Q. Otherwise, you'll be committing a perjury.
A. Right.
Q. Which would be another felony.
A. Right.
Q. You don't want to do that, do you?
A. No.
Q. All right. On the morning of June 17th, about four o'clock, did you come into the police station and talk to Detective Stubbs?
A. Yes.
Q. At that point, how long had you known the defendant seated there, approximately?
A. A couple of days.
Q. Okay.
A. We had been -- we'd been kicking it together.
Q. What does that mean?
A. Hanging around with each other, getting high together.
Q. Okay. What are you down here -- down at the prison for now? What are you in for?
A. Because I'd been to prison before, and drugs.
Q. Okay. You ran into an undercover agent this time, did you?

A. Yeah, uh huh.
Q. What happened the evening of June 16th, a few hours before you came in and talked to Detective Stubbs, sometime after nine o'clock? Would you tell this jury here?
A. Would it be all right if I went and told you guys before I went in, and tried to clear my name from this stuff?
Q. I'm sorry. Are you asking me a question?
A. Do you mean the night before or the night that I went to talk to Stubbs? You mean a few hours before that?
Q. The evening before.
A. Okay. I was really high. Me and Claude was out cruising around in his car.
Q. Claude, meaning this gentleman here (indicating the defendant)?
A. Yeah.
Q. Okay. His car. What kind of car?
A. You know, the Riviera, gray Riviera.
Q. Buick Riviera?
A. Yeah.
Q. Okay.
A. We had been cruising around in his car getting high together. Okay. Right before I went and told

Stubbs what happened, Claude pulls over on the side of the road and tells me that I have to have sex with him. I says -- I didn't want to because I was high and I was -- but I needed the drugs so he -- we had sex. Put it that way.

And then it made me mad, so I went and told Stubbs what he did at the Kar Kwik.

Q. All right. What did he do at the Kar Kwik? Tell us about that.

A. Parked in the back of Kar Kwik. He told me to wait for him, that he was going to go borrow some money. He didn't tell me the truth that he was going to go rob it. He came back --

Q. Who drove up there towards that part of -- the north part of town?

A. I drove the car away after the -- away after he did it.

Q. Okay. Now, who drove as you were going up there, up to the north part of town?

A. Claude drove up there and then I drove -- he drove away by the park that the river runs by.

Q. Park Boulevard there?

A. Yeah.

Q. Okay.

A. And then I drove the rest up the hill.

Q. Okay. And did you park -- okay. Tell us now, you're near Kar Kwik. What happened? Did you park or did he park or how did --

A. He parked the car and told me to wait for him. I waited --

Q. Did he say what he was going to do?

A. He said he was going to go borrow some money from some cousins, family members.

Q. All right.

A. He went in -- he went in wherever he went. I was still pushing my pipe.

Q. Did you see a place down the street? Could you see?

A. I wasn't looking.

Q. But I mean, could you?

A. Yeah. After I seen there was one Kar Kwik there.

Q. All right.

A. Which was the only store around.

Q. Okay.

A. But I wasn't worried about what he was doing. I was more worried about pushing my pipe.

Q. I understand.

A. And when he came back he was all sweaty and stuff and like scared and telling me --

Q. How much longer -- how long was he gone?

A. About 15 minutes.
Q. All right.
A. He was -- he came back really fast.
Q. When you say "he came back really fast", was he walking or was he running?
A. Basically running --
Q. Okay.
A. -- back. He was all sweaty like he'd been doing something. So, anyways --
Q. Was he wearing any -- what was he wearing?
A. He was wearing his blue jacket.
Q. Blue jacket.
A. It looks like that's it right there.
Q. State's Exhibit Two?
A. Yeah.
Q. Blue jacket?
A. Yeah. Because I wore it for a while.
Q. Okay.
A. I was cold.
Q. Okay. So when you unsnap this, there's a hood that comes out?
A. Uh huh.
Q. Was it up or was the hood -- was this buttoned down or was the hood showing? Was the hood up on his head or how was it?

construction.
Q. Did you point that car out to Stubbs?
A. Yeah. Yeah, and then Stubbs ran -- ran the name and said Gayle, could it be Claude? And I -- I kind of -- you know what? I thought it was Bonnie -- you know Bonnie and Clyde?
Q. Yes.
A. Because I went to C.C. and I told C.C., this guy, he told me his name was Claude -- Clyde -- no, Claude, and I -- anyway, I told Stubbs I think it was Claude.
Q. Claude or Clyde?
A. Clyde.
Q. Clyde. Okay.
A. And then when it came back as Claude, then I said, yeah, that's it.
Q. Were you there when the registration was checked on and came back?
A. Yeah.
Q. Came back as Claude Hayes?
A. Uh huh.
Q. And then you remembered the name?
A. Yeah. I told Stubbs he had a real short last name.
Q. Okay. Okay. And so you spot the car, and what

about his -- the apartment or -- was this an apartment or a house?

A. It was an apartment.

Q. Okay. Was this an apartment complex?

A. Yeah, but we didn't know the number, so I got out and went and looked at it.

Q. Did you go with Stubbs?

A. Un uh. Stubbs stayed in the car.

Q. Okay.

A. But Stubbs told me not to get out because it was dangerous, and I told him that I wanted to do this.

Q. Okay. So what did you do?

A. I went out and got the apartment number.

Q. Okay.

A. I can't remember what it was, but I came back and I told Stubbs. When I was walking across the street, we couldn't find the car. We were like surveying -- whatever. The car was over by a tree.

Q. Surveillance car? Oh, you mean his car was over by a tree.

A. Yeah.

Q. Okay. Was there any mention or did you see any -- any weapons, anything that might be a weapon?

A. No. When Claude got in the car though he said, "What did I do with them scissors?".

A. Correct.
Q. Okay. So Melvin White is also brought to the station?
A. Correct.
Q. You talked to Anthea?
A. Yeah.
Q. Did you have some -- what feelings did you have about her identifying Melvin White?
A. Well, initially, I didn't, really. Understand, witness descriptions in one case will be excellent, the person will be right on. In others, they won't be. Witness descriptions are probably our least strong -- weakest -- weakest link in a case. It's not always that way, but on an average it is. Sometimes identifications are excellent.

So I don't give them a whole lot of weight right off the bat, and with -- it's also my understanding that Mr. -- Melvin had been giving an alibi which we were starting to check out.

So I tried to shake her identification before I even talked to Melvin -- when I talked to her in my office -- and was successful. By the time I had finished talking with her, her identification was no longer positive, though she felt it may well be him still.

this suspect, this person who she was talking about?
A. Correct. On the morning of the 18th, I believe.
Q. All right. Tell us how that went.
A. I had her in the office the morning of the 18th and she was straight -- excuse me -- at that time. And I told her I needed her to take me to where this apartment that she had been to. She seemed confident that she could find it. So I put her in the car and followed her lead to the Clearfield area, the Windsong Apartments, I believe. It's actually right on the border of Clearfield and Layton.
Q. Okay.
A. And we were looking both for the car, because she had remembered the license plate had a three eight zero, but she could not remember the rest of it.
Q. This is before going down there she remembered the three eight zero?
A. Correct. This is the first time I talked to her she remembered the three eight zero.
Q. Okay.
A. But she couldn't remember the rest of it. And she felt confident it was also a gray Riviera, but not a brand new one. And she took me to the area of the Windsong Apartments and immediately -- we couldn't originally find the car because the entire

apartment. Records did show that that was listed officially as his residence. And that if his car was there, the chances are that he was there. So I wasn't going to let him disappear.

So I put a surveillance team on both the apartment and the car, with instructions that if anyone came out and got in the car, they took the car with whoever was in it. But they weren't to approach until I returned. While they sat on the car and the house -- or the apartment, I came back in and obtained a search warrant for both the car and the residence.

Q. Looking for -- what did you put down that you were going to look for, search for?

A. I was looking for a blue coat and a pair of scissors.

Q. Okay.

A. And I think that's primarily what I put down.

Q. Okay. Any money -- or did you -- okay.

A. I don't think I -- I don't think I put money because it was generic, as we call it.

Q. Okay.

A. There's nothing -- nothing to distinguish it from other money -- any money anywhere that I could determine, so --

that where it is?
Q. Yeah, I'm about --
A. Okay. I've got that marked on my computer copy.
Q. Do you?
A. Yeah.
Q. Okay. The statement is, initially, "I found Claude attempting to blend with the fixtures in the north bedroom."
Do you see where we are now?
A. Yes. Yes.
Q. All right. Now, at that point -- the next statement, "I took him into custody without incident."
A. Yes.
Q. I assume from that that, in effect, you placed him under arrest.
A. Yes.
Q. Is that right?
A. Yes.
Q. And made that clear that that's what you were doing?
A. He was in custody, under arrest. Yes.
Q. All right. Did you tell him that he was under -- you go on in that same sentence saying, "I began explaining to Claude who I was and exactly why I was

there, and that I had a search warrant for the coat and scissors."

A. That's correct.

Q. All right. I'm assuming in that -- and correct me if I'm wrong -- you, in effect, said, you're under arrest because I believe you committed the robbery at Kar Kwik on -- at 7th and Washington in Ogden.

Or is that --

A. Whether or not I would have used those exact words, I don't know, but there should have been no doubt in his mind he was under arrest for that robbery and I believed he did it, yes.

Q. Okay. Well, that's what I'm getting at. It was clear not only that he was under arrest, but that it was for a robbery at Kar Kwik.

A. Correct.

Q. Okay. And that you believed that he'd used a pair of scissors.

A. He definitely should have got that impression, yeah.

Q. All right. All right. And this is after he was taken into custody, correct?

A. Yes.

Q. He got that impression. All right.

You then say, "Claude appeared quite upset and

interrupted me saying," this is the -- this is the critical phrase -- "The coat was in the closet. He'd been coked up at the time and would plead guilty. He threw the scissors somewhere, but doesn't know where because he was coked up."

A. That's just about right.

Q. All right. All right. That's what he said to you. And what I'm interested in is prior to saying that, did you, in fact, say to him, tell me where the scissors are because I know you've got them?

A. No. I was still explaining why we were there, what I was looking for and what our intentions were.

Q. All right. That's what I want to be clear on. We're here because I believe you committed a robbery at Kar Kwik and you used a pair of scissors. And I have a search warrant for those scissors. And I think you had on a blue jacket, and I've got a search warrant for that.

A. I don't know if I described the jacket, but I would have said the coat you were wearing.

Q. Okay. And I'm here -- I've got a warrant -- I've got a search warrant to look for those.

A. Correct.

Q. Okay. Did you, in fact, say to him either show me where the jacket is -- where is the jacket? Where

are the scissors?
A. No.
Q. You did not. You simply explained you were there looking for those things.
A. Yes. And that was my intention.
Q. Okay. What I'm -- what I'm interested in, did you ask him a direct question concerning either the coat or the scissors as to where they are, turn them over to me, I want them, where are they, anything like that?
A. No.
Q. All right. So that what you're telling me is that in the course of explaining to him why you were there, then he made this statement. And immediately upon making that statement, you then determined that you should Mirandize him, at least as I read the next sentence.
A. I figured I'd better.
Q. Yeah. The next -- the next sentence says, "At that point I interrupted." I think it's -- or interjected, I think is what that says -- "Interjected with Miranda."
A. Yes.
Q. All right. So, in effect then, you knew he was in custody. No question in your mind about that.

A. That's correct.
Q. You were telling him that you believed he committed a robbery and that you were, in fact, there to look for two particular items: A pair of scissors that would have been the weapon; and a coat that he had on.
A. Correct.
Q. And then he makes a comment which you immediately recognized as a significant comment. At that point you decide, I better Mirandize him.
A. *At the first break I says, you know, wait a* minute. We've got to do this by the numbers.
Q. Okay. And at that point you did Mirandize him.
A. Yes.
Q. And gave him what you would routinely give someone that you were about to interrogate. At that point then, he said nothing further after that; is that right?
A. Well, he thought about it.
Q. But he didn't make any other statements.
A. *And then thought that he -- told me that he* thought that he better not say anything further.
Q. Until he talked to a lawyer.
A. Basically, yes.
Q. I think is what you said. So, in effect then,

once you Mirandized him in the context of this circumstance that we've just discussed, he made no further statements concerning his involvement, allegedly, in the Kar Kwik robbery.

A. Correct.

Q. All right. And no further statements were taken from him by you at a later date.

A. Correct.

Q. In connection with this.

MR. CAINE: That's all I have, Your Honor.

Do you have some questions?

MR. DAROCZI: No.

THE COURT: Okay.

MR. CAINE: Having said that, in the time between that I had, the small time at lunch -- and I didn't get a chance to eat, which I'll discuss with the Court later --

THE COURT: Well, you've been saving up for that for years.

MR. CAINE: Yes, I know. I knew it wouldn't break your heart, Your Honor.

I had a chance to review the -- what I believe at least to be -- the current view of the United States Supreme Court and the Utah Supreme Court in

this area. And I'll acknowledge that the Court's preliminary view this morning is accurate to this extent, and that is that clearly the courts have said that extemporaneous or -- or expostulative type statements that are just thrown out are not considered to be in violation of Miranda.

But these cases also -- particularly Gates against Illinois which was the big -- the big one where they talk about making some changes and some others -- the clear implication is that police officers need to be very careful in these areas, and that the courts have the right to look at all of the totality of what happened and make a decision as to whether in this case it did violate Miranda.

And I would suggest in this case that while it's clearly -- at least as described by Detective Stubbs -- it's clearly in the nature of -- of something coming out, not necessarily in response to a direct question, you do have the other elements that are significant. You have a person who's clearly placed under arrest. No question about that. This isn't even a detention situation. He's under arrest.

Secondly, he's told, I believe, in effect, you committed a robbery. Not only do I believe you

confrontation at that point. No question about it. This wasn't just a, well, you may be a suspect, and then it comes out.

You're it, I'm here, I got you, in effect. And then a statement is made and then immediately we go to Miranda. It seems to me that this does fall within the gambit of requiring that Miranda should have been given as soon as that arrest was made and the defendant was told exactly why they were there.

It's my view then that anything he said subsequent to that time, even though it was in the nature of a spontaneous kind of remark, we should suppress it. And that's our motion.

MR. DAROCZI: I'll submit it, Your Honor.

THE COURT: Very well.

I don't think it would be appropriate for the Court to extend Miranda beyond the boundaries that have been laid down by both federal and state courts. Since this was not in response to interrogation, and even though it was clearly a custodial situation, the Court believes that since it was not in response to interrogation, the Motion to Suppress is denied.

MR. CAINE: Thank you.

MR. DAROCZI: Your Honor, I do