

2006

## State of Utah v. Andrew Brink : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeffrey S. Gray; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorneys for Plaintiff/Appellee.

Debra M. Nelson; John West; Salt Lake Legal Defender Association; Attorneys for Defendant/Appellant.

---

### Recommended Citation

Reply Brief, *Utah v. Brink*, No. 20060954 (Utah Court of Appeals, 2006).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/6890](https://digitalcommons.law.byu.edu/byu_ca2/6890)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 ANDREW BRINK, : Case No. 20060954-CA  
 :  
 Defendant/Appellant. :

---

**APPELLANT'S REPLY BRIEF**

Appeal from a final judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (2003), entered by the Honorable Sheila K. McCleve, Third District Court, Salt Lake County, Utah. Appellant is incarcerated.

DEBRA M. NELSON (9176)  
JOHN WEST (4440)  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Attorneys for Defendant/Appellant

JEFFREY S. GRAY (5852)  
Assistant Attorney General  
MARK L. SHURTLEFF (4666)  
UTAH ATTORNEY GENERAL  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854  
Attorneys for Plaintiff/Appellee

FILED  
UTAH APPELLATE COURTS  
SEP 07 2007

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 ANDREW BRINK, : Case No. 20060954-CA  
 :  
 Defendant/Appellant. :

---

**APPELLANT'S REPLY BRIEF**

Appeal from a final judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (2003), entered by the Honorable Sheila K. McCleve, Third District Court, Salt Lake County, Utah. Appellant is incarcerated.

DEBRA M. NELSON (9176)  
JOHN WEST (4440)  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Attorneys for Defendant/Appellant

JEFFREY S. GRAY (5852)  
Assistant Attorney General  
MARK L. SHURTLEFF (4666)  
UTAH ATTORNEY GENERAL  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854  
Attorneys for Plaintiff/Appellee

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
SUMMARY.....	1
POINT. A TRIAL COURT ABUSES ITS DISCRETION WHEN IT FAILS TO PROPERLY EVALUATE THE PARTICULAR FACTS AND CIRCUMSTANCES OF THE CASE IN DETERMINING WHETHER EXPERT TESTIMONY WOULD ASSIST THE JURY IN MAKING A CORRECT DECISION.....	2
CONCLUSION.....	6

**TABLE OF AUTHORITIES**

Page

**Cases**

State v. Butterfield, 2001 UT 59, 27 P.3d 1133 .....6

State v. Hubbard, 2002 UT 45, 48 P.3d 953 .....2, 3, 5

State v. Long, 721 P.2d 483 (Utah 1986) .....3

State v. Maestas, 2002 UT 123, 63 P.3d 621 .....2, 3

**Other Authorities**

Warren D. Wolfson, “That’s the Man!” Well, Maybe Not: The Case for Eyewitness  
Identification Expert Testimony, 26 No. 2 Litig. 5 (2000) .....4

**Rules**

Utah R. Evid. 704 .....4

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 ANDREW BRINK, : Case No. 20060954-CA  
 :  
 Defendant/Appellant. :

---

**SUMMARY**

To properly exercise its discretion in determining whether to admit or exclude expert testimony regarding the fallibility of eyewitness identification, a trial court must evaluate the particular facts and circumstances of the case. Analysis of the particular factors of the case is necessary to show that the trial court's decision to admit or exclude expert testimony was guided by case law that has avoided per se rules of admissibility or inadmissibility. Some important factors to be considered by trial courts in determining whether to admit or exclude expert testimony include the nature of the testimony offered by the expert, whether the expert testimony addresses the specific facts of the case, the circumstances surrounding the eyewitness testimony, the presence of the factors testified to by the expert affecting identification, the background of the jurors, and other relevant information about jurors. A proper evaluation of the factors existing in this case where the accuracy of the eyewitnesses' testimony was the central issue, would have resulted in

the admission of Dr. Dodds' testimony as necessary to assist the jury in understanding the evidence and reaching a correct decision.

**POINT. A TRIAL COURT ABUSES ITS DISCRETION WHEN IT FAILS TO PROPERLY EVALUATE THE PARTICULAR FACTS AND CIRCUMSTANCES OF THE CASE IN DETERMINING WHETHER EXPERT TESTIMONY WOULD ASSIST THE JURY IN MAKING A CORRECT DECISION.**

It is well established that a trial court "has wide discretion in determining the admissibility of expert testimony." State v. Maestas, 2002 UT 123, ¶72, 63 P.3d 621; State v. Hubbard, 2002 UT 45, ¶14, 48 P.3d 953. However, rules, statutes and case law exist to help guide and instruct a trial court in exercising its discretion properly. A trial court abuses its discretion if rather than using the law to guide its decision making process, it simply uses it as a mechanism to exclude expert testimony and bypass a careful analysis of the particular facts and circumstances of the case. Contrary to the state's assertions, Brink does not advocate a per se rule of admissibility of expert testimony regarding eyewitness identification. Rather, Brink argues that the trial court abused its discretion when it failed to properly evaluate the particular facts and circumstances of this case before excluding the expert's testimony.

To properly exercise its discretion, a trial court's decision to admit or exclude expert testimony must be made on a case-by-case basis after thoroughly considering the particular facts and circumstances of the case. Under the state's theory, a trial court could never be found to have abused its discretion in excluding expert testimony on eyewitness identification, regardless of whether the testimony would assist the trier of fact in evaluating the accuracy of the identifications, so far as it gives the mandated Long

instruction to the jury. See Appellee Brief 18-20; State v. Long, 721 P.2d 483, 492 (Utah 1986). However, even where a Long instruction is given, expert testimony may still be necessary to adequately assist the jury in making a correct decision. The fundamental problem with the argument that a Long instruction is always sufficient in lieu of expert testimony is that it is based on the faulty premise that expert testimony regarding eyewitness identification is within the common knowledge of the jury. As Long noted, research indicates that the average juror is unaware of the problems regarding the fallibility of eyewitness identifications. Long, 721 P.2d at 490. Human perception and memory are complicated and “juries have a fundamental misunderstanding of the reliability of eyewitness identification” believing their common sense is enough to weigh the accuracy of the testimony even though their common knowledge is often counterintuitive. State v. Maestas, 1999 UT 32, ¶26, 984 P.2d 376.

The state’s theory highlights Brinks’ argument regarding the trial court’s failure to properly consider the facts and circumstances of this case in determining whether Dr. Dodds’ testimony was necessary for the jury to properly weigh the accuracy of the eyewitness identifications. While the state supports its argument by citing to such things as the dilemma of dueling experts noted by the supreme court in Hubbard and the risk that the jury would defer its judgment to the expert, such dilemmas and risks exist essentially every time expert testimony is offered by opposing sides at trial. Appellee Brief 16; Hubbard, 2002 UT 45, ¶15. While it is true that use of expert testimony could lead to dueling experts regarding the accuracy of eyewitness identification, “[g]iven the high stakes in criminal cases and the proven ability of judges to tailor issues and limit

witnesses, a little extra time does not seem wasteful even if expert witnesses are competing for the jury's attention." Warren D. Wolfson, "That's the Man!" Well, Maybe Not: The Case for Eyewitness Identification Expert Testimony, 26 No. 2 Litig. 5, 8 (2000).

Furthermore, the argument concerning risks that an expert's testimony will usurp the jury's task of weighing the credibility of eyewitness testimony is unfounded as Utah Rule of Evidence 704 essentially does away with such an argument. Rule 704 states "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Utah R. Evid. 704; see also Wolfson, *supra*, at 8. Expert witnesses do not endeavor to tell jurors whether a particular witness's identification is actually accurate or not.

Instead, the experts provide scientific information about the human memory process, analyze how it is shaped and affected, and explain factors that fit the important evidence. Jurors are left to decide whether and how the information applies to their judgments of eyewitness credibility. That is not usurpation. That is assistance.

Wolfson, *supra*. As with other witnesses, jurors are completely capable of evaluating the testimony of an expert witness and rejecting it after weighing the expert's opinion on the factors that affect the accuracy of the memory process.

Despite the state's assumption to the contrary, prior case law from the Supreme Court affirming the trial court's exclusion of expert testimony regarding eyewitness identification should not be viewed as a rubber stamp on every trial court's decision to exclude expert testimony. Such a reading of the case law creates the very thing the Supreme Court was determined to avoid, a per se rule of inadmissibility. Hubbard, 2002

UT 45 at ¶14 (Utah has “not adopted a per se rule of inadmissibility of expert testimony regarding eyewitness identification[.]”). Instead, circumstances exist where expert testimony can and will assist a jury in reaching a correct decision. This Court should ensure that a trial court’s decision to exclude an expert’s testimony has been based on sound analysis stemming from the particular facts and circumstances of the case and guided by case law. Some of the relevant factors that are critical for the trial court to consider in determining whether admitting expert testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue,” are (1) the testimony offered by the expert, (2) whether it addresses the specific facts of the case, (3) the circumstances surrounding the eyewitnesses testimony, (4) the presence of the factors testified by the expert affecting identification, (5) the background of jurors, and (6) other relevant information about jurors that would aid in determining whether the testimony would meet the helpfulness standard.

A trial court does not properly exercise its discretion simply by citing key phrases from appellate case law without analysis regarding its application to the case. In granting the state’s motion to exclude Dr. Dodds’ testimony, the court failed to include any analysis that explains its decision of the factors that led to its determination that Dr. Dodds’ testimony would constitute a lecture to the jury. Analysis of the particular facts and circumstances of the case is necessary to show that the trial court properly exercised its discretion rather than blindly excluding expert testimony knowing that its decision would not be overturned. Such scrutiny of a case is especially critical where eyewitness identification is key in linking the defendant to the criminal offense.

Expert testimony on eyewitness testimony would have assisted the jury in this case. Brink's defense was that the witnesses had mistaken him for Jeff Crisp who is similar in age, build and has similar facial features. Therefore, accuracy of the eyewitness's identification was the central issue in the case. The testimony that Dr. Dodds would have offered to the jury related directly to the facts and circumstances particular to this case. Dr. Dodds' testimony would have been helpful to the jury in weighing potential problems which were associated with the accuracy of the witnesses' identification testimony without directly commenting on the witnesses' credibility. Dr. Dodds' testimony would have been especially beneficial to the jury when considering Martucci's testimony that she became increasingly more certain of Brink's identity as the robber each time she saw him in court as well as the evidence that Warnock was not able to identify Brink until trial. Given these and other factors more fully discussed in Appellant's opening brief, exclusion of the expert's testimony likely had "a substantial influence in bringing about a different verdict." State v. Butterfield, 2001 UT 59, ¶43, 27 P.3d 1133 (citations omitted).

Therefore, the trial court abused its discretion in failing to properly analyze the facts and circumstances of this case in determining whether Dr. Dodds' testimony would have assisted them in making a correct decision.

**CONCLUSION**

For the reasons stated above and more fully set out in Appellant's opening brief, Brink respectfully requests this Court to reverse his conviction for aggravated robbery.

SUBMITTED this 7<sup>th</sup> day of September, 2007.

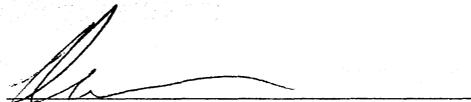


---

DEBRA M. NELSON  
JOHN WEST  
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 7<sup>th</sup> day of September, 2007.

  
DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_\_ day of September, 2007.

\_\_\_\_\_