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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- THEODORE ROBERT BUNDY, Defendant-Appellant.	Case Nos. 14741 and 15534

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of the crime of aggravated kidnapping under Utah Code Ann. § 76-5-302 (Supp. 1975), a first degree felony.

DISPOSITION IN THE LOWER COURT

The matter was tried before the Honorable Stewart M. Hanson, Jr., sitting without a jury, on February 23 through March 1, 1976. Appellant was found guilty as charged and sentenced to an indeterminate term in the Utah State Prison of not less than one nor more than fifteen years. Prior to sentencing, the court reduced the degree of the offense to a second degree felony pursuant to Utah Code Ann. § 76-3-402 (Supp. 1975).

Appellant appealed the conviction to this Court. Briefs were filed by both parties and a reply brief was filed by appellant. (Case No. 14741). The matter was set for oral argument; however, appellant subsequently alleged that he had discovered new evidence

which warranted a new trial. The case was remanded to the Third District Court on appellant's motion. A motion for a new trial or a Petition for Extraordinary Relief was filed August 29, 1977. On October 3, 1977, an off the record meeting was held before Judge Stewart M. Hanson, Jr., and two days later, Judge Hanson recused himself (R.1172). On October 31, 1977, a hearing was held before the Honorable Jay E. Banks. The motion was considered and evidence taken. The motion was denied on November 21, 1977 (R.1050,1238), and from that ruling appellant filed an appeal to supplement his initial appeal. On September 20, 1978, this Court granted respondent leave to withdraw its brief in Case No. 14741 and substitute this brief to cover all points raised on appeal in both cases. Thus, this brief represents respondent's brief in Case Nos. 14741 and 15534.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the order of the judgment of the court below convicting appellant of aggravated kidnapping, and an affirmation of Judge Bank's order denying appellant's motion for a new trial and petition for extraordinary relief.

STATEMENT OF FACTS

At approximately 7:00 p.m. on November 8, 1974, eighteen-year-old Carol DaRonch arrived at Fashion Place Mall in Murray, Utah, to do some shopping (R.370). While inside the mall, in front of Walden's Book Store, in a well lighted area (R.376), she was approached by a man who told her that someone had been seen trying to break into her car (R.374-375). She thought the man identified himself as a police officer (R.375,

380). During the conversation, Miss DaRonch stood face-to-face with the man (R.373), who she later identified as the appellant (R.374). She was asked to accompany the man to her car to see if anything was missing (R.375). They walked side by side toward her car in lighting conditions described by her as "very bright" (R.376,377).

Upon reaching the car, Miss DaRonch looked in, determined nothing was missing, and so advised appellant (R.378). He then told her that the alleged burglar was being held inside the mall (R.379). [Note: testimony by Carol DaRonch at the trial revealed the presence of street lights in the parking lot on the night of November 8, 1974 (R.379).] The two returned to the mall, and once inside, the appellant told Miss DaRonch that "they" must have taken the suspect down to the substation (R.380). They walked out the exit straight across from where they had just entered the mall (R.380), then walked around the building by Castleton's clothing store (R.381). Appellant then asked her how old she was, if she was doing anything later that night, and why she would not be able to "go over there" and sign a complaint against the person who had allegedly tried to break into her car (R.381). This conversation occurred while the two were walking, with Miss DaRonch walking slightly behind appellant (R.381). She testified that she had a chance to observe him as they were walking (R.381), and particularly noticed the way he walked and his green pants (R.381). [Later, at a lineup, Miss DaRonch identified the appellant as her assailant immediately upon his entering the room because of, among other things, his manner of walking (R.412,449,450).] She further testified that she was also "right next to" this man at times while walking (R.381),

and able to observe his facial features (R.382). She also observed that he was wearing dark patent leather shoes* (R.404), was slim, about 160 pounds, had greased back hair (R.388), and had a dark mustache which did not extend past the corners of his mouth (R.389). There was some doubt concerning the presence of the mustache at one point in time; however, this was later clarified by Miss DaRonch, when upon further reflection, she reaffirmed her certainty that he had a mustache on November 8, 1974 (R.427-428,412,876).

Miss DaRonch and appellant proceeded to walk to a nearby laundromat. Appellant tried to open the front door, found it to be locked, walked halfway down an alley between the laundromat and an adjoining building, turned around and came back (R.385-386). During this period of time, Miss DaRonch again observed appellant's facial features as he was standing "right in front" of her in very good lighting conditions (R.387). She became suspicious of the situation, and asked appellant if she could see his badge or some form of identification (R.381). He produced a wallet with a badge inside. She described the badge as "thinking it was silver," kind of oval-shaped (R.386).

Appellant then asked Miss DaRonch to accompany him to the police station and fill out a complaint, since "they probably had him (the alleged burglar) down there" (R.387). They walked to his car, described by Miss DaRonch as a Volkswagen with a rip

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* Charles and Rosemarie Shearer, who lived in the same apartment building as the appellant (R.742), testified that they had seen him wearing dark patent leather shoes on several occasions (R.746,747,752).

on the top of the backseat, rust spots on the front, no license plate, and of light color, white or beige (R.392-393). The rip was described as going "almost all the way across" the top of the backseat (R.391).

They drove a couple of blocks to McMillan School, where appellant abruptly stopped, parking the car partially onto the curb (R.392,394). Miss DaRonch nervously asked him what he was doing and why he was stopping because this was not a police station (R.394). Appellant grabbed her left arm and forcefully placed a pair of handcuffs on it (R.385). Miss DaRonch grabbed the door on her side, managed to open it and get one foot out (R.396). Appellant then grabbed her by the arm and around the neck. She kept screaming, "asking" him what he was doing (R.396). He then pulled a gun out, pointed it at her and said he was "going to blow her head off" (R.396). She managed to get out of the car, but the appellant pursued her (R.397). They struggled outside the vehicle as Miss DaRonch tried to free herself (R.397). She grabbed his arm and right hand and then felt a bar, which she described as having four or six sides, about one half inch thick (R.397-399). Her impression was that the object was a crowbar, since her father had one which she had felt before (R.399). To keep the assailant from striking her with the crowbar, she held the crowbar with her left hand (R.400).

Miss DaRonch continued to scream "as loud as I could." She then testified that she turned away "pulling, scratching" (R.397). Her fingernails, long at the time of the trial, were even longer the night of the incident (R.397). She recalled scratching the assailant during the fighting because she remembered noticing

that all her fingernails were broken (R.426).*

Miss DaRonch finally succeeded in breaking away from her assailant. She ran into the street, the handcuffs still dangling from her arm. She managed to get a car to stop for her. She jumped into the car, occupied by Bill and Mary Walsh (R.401,454,456), related briefly what had occurred, and requested them to take her to a police station (R.401). They drove her directly to the Murray Police Station (R.403).

Note: At trial, the State and appellant's counsel stipulated that up to this point in time, the amount of time that Carol DaRonch would have been with her assailant was between ten to fifteen minutes (R.549).

At the police station, Miss DaRonch was questioned by Officers Jerry Peterson, David Cummings, and Joel Riet (R.469-471). Peterson removed the handcuffs, which were both on the same wrist.

Sgt. Riet testified that three days after the kidnapping, he took a blue suede coat (with a fur collar) that Carol DaRonch had been wearing the night of November 8, 1974, and turned it over to the Weber State Crime Lab for analysis (R.541). Miss DaRonch testified that the coat was relatively new (a couple of weeks old) as of the night of the abduction (R.373-374), and that when she arrived home following the incident, she noticed blood on the fur of one of the sleeves and on the back of the

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* Later in the trial, testimony by Officer Joel Riet and photos of Miss DaRonch taken on the night of November 8, 1974, revealed that on her left hand her fingernails had been broken off just below the skin line (R.542-543), and the middle finger was especially jagged (R.545).

collar (R.413-414). Photos were taken on November 11, 1974, which depicted Miss DaRonch pointing to blood spots on the coat (R.545). The blood spots were located on the right sleeve and back side of the collar (R.545). The blood samples on the coat were found to be human blood type O (R.1281). Blood samples from appellant were taken and found to be type O-positive (R.1243). Carol DaRonch's blood was determined to be type A-positive (R.1245).

In the months following November 8, 1974, Miss DaRonch was shown several thousand photographs, none of which she identified as being her assailant (R.408,487). There were pictures of individuals that she selected as having particular characteristics resembling those of her assailant (R.818,820-821,891-892,908-910, 409-410), but she did not identify any photos as being that of her assailant until September 1, 1975 (R.823,866-867,879).

Approximately nine months after the assault, at 2:30 a.m. on August 16, 1975, appellant was driving his Volkswagen in a residential area in Granger (R.683,946). Sgt. Robert Hayward of the Utah Highway Patrol, sitting in his patrol car, observed the Volkswagen pass him (R.948). Approximately five to eight minutes later, Sgt. Hayward started his car and while rounding a nearby corner, again observed the Volkswagen at the side of the street (R.948). As the patrol car approached, the appellant took off at a high rate of speed with his headlights off (R.948). Officer Hayward gave chase. Appellant subsequently ran a stop sign in an attempt to evade the officer (R.949). Finally, appellant brought his Volkswagen to a stop (R.950).

Sgt. Hayward exited his car, approached the Volkswagen

and observed a "jimmy type pinch bar" (crowbar) behind the front seat on the back floor (R.950). He asked the appellant what he was doing in the area, and then inquired, "Can I look in your car?" Appellant's response was "go ahead." (R.951). Sgt. Hayward stated that at no time did the appellant object to the search (R.952). The appellant was then placed under arrest for evading a police officer (R.952).

Moments later, Deputy Sheriff Twitchell and Sgt. Fife of the Salt Lake County Sheriff's Office arrived on the scene and were advised of the situation (R.954). Deputy Twitchell then asked the appellant "if he would mind if we looked through his vehicle" (R.954-955). Appellant responded that it was okay with him (R.955). Officer Twitchell further testified that to the best of his recollection, he did not remember appellant objecting to the search of his vehicle at any time (R.955). Appellant, a law student, denied giving his consent and testified that he passively stood by because he was intimidated (R.960-963).

A search of appellant's vehicle by Deputy Twitchell and Deputy Ondrak, who arrived subsequent to Deputy Twitchell and Sgt. Fife, produced a pair of handcuffs (R.955,1277), and the crowbar located on the floorboard behind the driver's seat (R.1277). Deputy Ondrak testified that he remembered appellant's Volkswagen as being tan in color (R.1276).*

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* Carol DaRonch had described the Volkswagen driven by her assailant as being a light color (white or beige) (R.381,420); she at one time had said the car possibly could have been light blue, but later eliminated that possibility (R.420). In connection with this, it should be noted that Mary Walsh, the first person to talk with Miss DaRonch following her assault and kidnapping, testified that any confusion regarding (continued on page 9)

When questioned at trial about the evening of August 16, 1975, appellant said the reason that he sped away from Sgt. Hayward was because he was "smoking dope" and did not want to be caught doing something illegal (R.684). After Sgt. Hayward was joined by the other deputies and officers at the scene, they asked the appellant what he was doing in that neighborhood (R.685). The appellant intentionally lied, telling the officers that he had attended a movie and then had gone for a drive (R.685-686). Appellant admitted at trial that this was a lie, and further testified that he had also lied to one of his attorneys concerning the events of the evening of August 16, 1975 (R.687).

His final version of the events of that evening had him eating dinner and watching television until 12:00 midnight or 12:30 a.m., at which time he decided to visit a friend (R.682). Upon arriving at his friend's house, he noticed the lights were out (R.682). He decided not to awaken her, and proceeded to drive around for a while, and ended up in the Granger area, where he

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* (continued from page 8) the color of the Volkswagen driven by the assailant could be due to the type of lighting in the parking lot at the Fashion Place Mall, which makes a car seem to be a different color than it really is (R.459). Also, Margerith Maughan, who lived downstairs from appellant in the same apartment building at the time of the kidnapping, testified that she had been in the appellant's car two or three times during the months of October and November of 1974, and that the color of appellant's Volkswagen was cream color (R.531). James Dunn, a neighbor of appellant's, testified on his behalf, and although he admittedly may have been "kind of" color blind, he believed the appellant's Volkswagen to be "beige, light-colored" (R.649).

supposedly decided to smoke some dope (R.683). As he finished his smoke, he pulled out and saw the patrol car driven by Sgt. Hayward in the rear view mirror (R.683-684). As he tried to flee from Sgt. Hayward, he claims that he searched for the remainder of the marijuana, found it, then threw it out the window (R.684), while he drove at rather higher than normal speeds. He also claims to have rolled down his car window so as to "air out" the car (R.684).

Sgt. Hayward, a member of the Utah Highway Patrol for twenty-three years, testified that he had come in contact with persons using marijuana on some three hundred to five hundred prior occasions when he worked on a special tactical squad for alcohol and drugs (R.755). He stated that he was familiar with the odor of marijuana, and had previously had occasion to smell the interior of an automobile after a person had smoked marijuana therein (R.755). He related that on the evening of August 16, 1975, he detected no such odor of marijuana on the appellant or in his car (R.756), nor did he observe appellant throw anything from his car during the chase (R.758).

Deputies Ondrak and Twitchell, present at the scene of the arrest on August 16, 1975, both testified to having come in contact with persons in closed areas in which marijuana had recently been smoked on at least one hundred occasions (R.765,767). Neither officer detected the odor of marijuana in appellant's car or on his person (R.765,767). Both officers were inside appellant's car and both had conversation with him (R.765,767,768). Deputy Twitchell said that appellant showed

no signs of glassy eyes which, he said, people smoking marijuana usually exhibit (R.768).

Appellant testified that once he had brought his car to a stop and had been confronted by Sgt. Hayward, he did not recollect any officer asking "if it was all right" if they looked in his car (R.961). He also stated that at no time did he tell or ask the officers to stop searching his automobile (R.963). Appellant furthermore stated that he did make a variation of the statement, ". . . you have got to do your job, go right ahead . . . ." He recalled his exact words being: "I can't stop you from doing what you are doing." (R.964). He also testified that at no time were any guns drawn (R.965).

During the first part of September of 1975, Margerith Maughan had a conversation with the appellant regarding the search of his car during the early morning hours of August 16, 1975. She testified that the appellant told her the police had searched his car. She asked him why, and he said he did not know. He then added, "that he let them search his car." (R.533-534).

At a pre-trial hearing before Judge Hanson, Jr., on January 21 and 22, 1976, appellant moved to suppress the crowbar and handcuffs which were discovered the night of August 16, 1975. After hearing the evidence, Judge Hanson found by a preponderance of the evidence that appellant had consented to the search of his car and denied the motion (R.1288).

On August 21, 1975, appellant was again arrested at his Salt Lake City apartment pursuant to a warrant issued for the offense of possession of burglary tools, to-wit: the items taken

from his car on August 16, 1976 (R.950-952,954-955,1277). Appellant was taken to the Salt Lake County Jail, where he was booked. Shortly thereafter, he was interrogated by Detective Ben Forbes regarding several matters including the abduction of Carol DaRonch. At this time, appellant signed a consent and waiver form which granted permission for a search of his apartment (R.1283-1284). The apartment was subsequently searched in appellant's presence by three detectives (R.1285).

Deputy Thompson stated that while searching appellant's closet, he noticed two or three pairs of "shiny patent leather, loafer type shoes" (R.1285). He also observed the Volkswagen parked in back of the apartment building. He asked appellant if he would mind if some photographs were taken of the car, and appellant stated, "No, go right ahead." (R.1286). Photos of the car were taken from an angle standing behind and from the right side of the vehicle (R.1286).

On September 1, 1975, Carol DaRonch viewed four photographs of appellant's Volkswagen. She remembered the tear in the back seat of the Volkswagen and said that the tear depicted by one particular photograph appeared to be like the tear she remembered, and that the picture of the Volkswagen resembled the one in which she was abducted (R.498,435). She added, however, that she would like to view the vehicle in person (R.498). At trial, she was again shown photographs of the car. She testified that as far as the rip in the seat was concerned, the picture looked exactly

like the car in which she was abducted (R.406). She further said that the dent in the door and in the side of the car were comparable (R.406-407). There was a question at the time of trial whether Miss DaRonch had identified the appellant's car in the photograph as being the car in which she was abducted due to the presence or absence of license plates (R.433-435). She clarified the point, saying that the only time she saw the Volkswagen without a license plate was on November 8, 1974 (R.434-435). She further clarified that she identified the appellant's car in the photograph as being similar to the car in which she was abducted primarily because of her identification of specific characteristics, to-wit: the rip in the backseat* and the dents in the car (R.406,407,433-435). She specifically denied inferences by appellant's counsel that she noticed the missing license plates, not at the time of abduction, but at the time she viewed the car on September 8, 1975 (R.434,438).

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* Margerith Maughan, a neighbor of appellant's who had been in his car several times, corroborated Carol DaRonch's story as to the rip in the back seat of appellant's Volkwagen (R.533).

Charles Shearer, also a neighbor of appellant's during the summer and fall months of 1975, testified he saw appellant's Volkswagen during that period of time and observed a big tear across the top of the back seat (R.744).

Deputy Ondrak, who participated in the search of appellant's vehicle following his arrest on August 16, 1975, testified that during the search he noticed a rip on top of the rear seat (R.764). He, along with Deputy Twitchell, who also participated in the search, testified that neither of them ripped or made the opening in the seat larger, nor did they see anyone do so (R.764,765,768).

Appellant has misinterpreted Miss DaRonch's testimony in appellant's brief on page 5 wherein he states: "Nonetheless, after the victim had committed herself to the identification of the car. . . ." It should be specifically noted that Miss DaRonch in her testimony said that the Volkwagen in the four pictures she was shown "looked a lot like" the one in which she was abducted (R.432,435). Her request to personally view the car itself after she had viewed the photograph further rebuts such inferences that she had "committed" herself to a positive identification at the time she viewed the photos of appellant's car (R.498).

On September 1, 1975, Deputy Thompson also showed Miss DaRonch a stack of twenty-seven photographs of individuals (R.495-496). Before handing her the photographs, he instructed her to look through them and ". . . see if there was anyone in the photographs that resembled or could possibly have been the individual who abducted her." (R.495). She began to review the stack, and when she came to appellant's picture, she set it aside (R.497,409). After reviewing the remainder of the pictures, she returned the stack to Deputy Thompson, saying, "I don't see anyone in there." (R.497). Still holding appellant's picture in her hand, Deputy Thompson asked her about the photograph. She responded something to the effect, "Oh, this one, I don't know. Here," whereupon she handed the picture back to him (R.497,409). Deputy Thompson then asked her why she pulled the photograph (appellant's) out and whether or not there was something significant about it (R.497). She replied,

"Yes, I believe that looks a lot like the individual, but I'm not sure." (R.497). Miss DaRonch testified that the first time she had ever seen a picture of appellant was when Deputy Thompson gave her the stack of pictures (R.408,409). Prior to this occasion, she had viewed thousands of photographs or "mug shots." (R.487). The photograph which Carol DaRonch picked out of the stack was one taken on August 16, 1975, some nine months after the crime (R.496).

On September 4, 1976, Detective Ira Beal of the Bountiful Police Department showed Miss DaRonch a packet of nine photographs, including a driver's license photo of the appellant (R.873,876-877). The photograph had been obtained from Deputy Thompson and was different from the one which Miss DaRonch had picked out on September 1st. It had been taken December 19, 1974, approximately six weeks following the crime (R.877). Deputy Thompson had sought out and found the more contemporaneous photograph because the first photographic identification on September 1st had only been tentative (R.504). While going through the newer stack of photos, Miss DaRonch picked out appellant's picture, saying: "This looks the most like the guy as I remember him." Detective Beal replied: "Are you sure?" She then said, "I'm sure that it looks most like the guy as I remember him, except that he had a mustache at that time." Detective Beal

stated that after he handed the photos to Miss DaRonch and before she looked through them, he asked her to ". . . look through the photographs and see if she found anyone that resembled the individual that abudcted her in November of '74," and to ". . . look clear through them before she made up her mind." (R.526). Miss DaRonch then looked through the entire stack, came back and picked out the picture of appellant (R.526).

Following the two photographic identifications, Carol DaRonch was taken on three different occasions to view the appellant's Volkswagen. On the first two occasions, the vehicle could not be located. The third time, on September 8, 1975, Sgt. Collard of the Bountiful Police Department took her to view the car (R.900,901). When she first saw the car, she remarked: "Yes, yes, that's the car." (R.903). Sgt. Collard then told her to look at the car very carefully to be sure (R.903-904). He also told her to look at the body, the interior, and while viewing the car, to take into account not only the photographs of the vehicle shown to her by Jerry Thompson, but also the car itself as it sat at the time she observed it (R.904). Following this procedure, she stated: "Yes, that's the car." Carol DaRonch had not been informed that the car which she was viewing belonged to appellant. Miss DaRonch also noted specific differences in the car at that time (R.668-669,904). She stated that the seat was no longer torn and the car was not as light in color as she remembered it having been (R.669,905).* She also noticed several

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* In fact, the car had been "fixed up"--painted, upholstery repaired, etc., in order to be sold (R.670-671). The license plate, which Miss DaRonch had testified was missing the night of the abduction, was still missing (R.439,836).

similarities in the car such as the rust on the right door (passenger's side), right rear wheel area, and nose of the car, and the damage to and irregularity of the door on the right side (passenger's side), and the "wrinkled appearance" of the right wheel cover or wheel-well area (R.904-905).

On October 2, 1975, Carol DaRonch attended a lineup at the Metropolitan Hall of Justice (R.411). Present in the lineup were seven deputies and the appellant (R.863). Captain Pete Hayward of the Detective Division, Salt Lake County Sheriff's Office, was in charge of the lineup (R.931). He testified that in an effort to make the lineup as fair as possible, he decided to use deputies from within the department instead of inmates at the jail for two reasons: (1) to provide participants who were very well-dressed, nice-looking, well-kept, and well-spoken, keeping in conformity with the information he had received concerning the appellant's appearance, stature, caliber, and behavior (R.932,933); (2) to insure that there was no misbehavior such as was common when inmates were used in a lineup (such as directing undue attention to themselves or a suspect during the lineup procedure) (R.934).

When the appellant appeared for the lineup, his hair had been changed from the previous night when Officer Thompson had served the subpoena on him to stand in the lineup (R.934). (His hair had been changed from long to rather short.) This necessitated a change in the lineup to insure fairness, therefore some officers with hair cut quite short were used (R.934).

Prior to the lineup, Miss DaRonch was told to watch the participants, what they did, not to talk to anyone, and if she recognized anyone as being her assailant, to write his number down (R.411). Once the lineup procedure began, she immediately identifed the appellant as her assailant as soon as he walked into the room (R.412). She particularly noticed the way he walked, his face, and his well-educated manner of speaking (R.412-413,449,450). She also noted some differences. She said he now looked more clean-cut, his hair was shorter, and he no longer had a mustache (R.412).

The defense presented the testimony of Dr. Elizabeth Loftus, an experimental psychologist doing research in the field of perception and memory, especially as it applies to eyewitness identification. She testified that this particular area of psychology involves the study of very complex events and real life situations, and that most psychologists avoid this area because it is so very difficult to study (R.617).

Dr. Loftus explained several of her theories on perception and memory, but admitted that none of the experiments in the field involved actual victims of crime (R.615,622). She admitted she had not interviewed or studied actual crime victims, such as the case at bar (R.615,619,622). Much of her testimony was based on experiments other psychologists had performed and in which she had not participated (R.590,596-598,601-604,614-615).

Dr. Loftus was questioned regarding the effect of having an "authority" figure such as a law enforcement officer question a person, i.e., whether the fact that a person was viewed as an "authority" by the person being questioned would have an effect on the answers given (R.608). She responded that it is possible that a witness would be more likely to accept the information than if it were to come from someone of less "authority" (R.609). However, when asked by the court whether there was more than just a possibility of this happening, Dr. Loftus could not say this was so, only that it would be a factor of some importance(R.609).

Dr. Loftus explained how interrogation can alter memory by the most subtle and unintentional "curing" (R.605-610), although in the trial there was no evidence whatsoever presented that this had occurred during the questioning of or during conversation with Carol DaRonch.

Dr. Loftus also testified that her laboratory experiments led her to believe that extreme stress may have an adverse effect on memory. The court then asked her to comment on a situation where a victim initially feels no stress, then stress begins to build as the victim starts suspecting trouble and later becomes sure that in fact there is a real problem (the factual situation in the case at bar). Dr. Loftus testified that under both no-stress and high-stress situations the memory is not as good as under moderate stress conditions. She further stated that when stress is moderate, one could expect optimal performance from the memory (R.623-626).* She admitted that all her theories were based on the assumption that victims of crime were operating under extreme stress (R.625), and that under the circumstances described by the court, one could expect a more accurate identification (R.626).

Dr. Loftus also testified that exposure time is another factor in eye-witness identification, and the longer one has to look at someone, the more likely that person is of making a correct identification (R.626).

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* If Dr. Loftus' theory holds true, Carol DaRonch's memory would have been functioning at optimal level for at least one half the period of time she was with appellant the night of November 8, 1974, since she would have been under moderate stress from the time she became suspicious in the mall until the time the handcuffs were placed on her at McMillan School where appellant threatened to "blow her head off."

The defense also called Edward Barton, an experienced criminal investigator. Although appellant claims Mr. Barton corroborated Dr. Loftus' testimony, the fact is the two spoke of different subjects with very little overlap. Mr. Barton was not allowed to testify as to the number or percentage of mistaken identifications in police lineups because he admitted he would only be guessing (R.631,639). However, he did offer his opinion that although misidentifications in lineups occur with some frequency, there are more correct identifications than incorrect ones (R.639). Mr. Barton never testified, as claimed by appellant, that it was "not good practice" to use more than one photograph while showing photos to witnesses in an attempt to obtain an identification. He did say that he personally would not use such a procedure (R.633-636). He did add, however, that it is generally best to get a photo identification of a suspect before requesting a lineup (R.640-641).

Mr. Barton further testified that it had been his experience that in many cases, when the victim of a crime makes a lineup identification, it is usually immediately upon viewing the suspect in the lineup (R.640-641), which occurred in the case at bar (R.412).

Attention is hereby called to appellant's brief on page 10, wherein certain unsupported inferences and innuendos are made concerning a statement made by Captain Pete Hayward at the motion to suppress hearing. The subject of examination was lineup procedures. Captain Hayward was asked by appellant's counsel the following question:

> "Q. And if they pick the wrong individual, you think, well, that's the way it goes; but if they pick the suspect, then it's a good identification; isn't that the rule that you go by?
> A. Well, I would imagine that is, yes, sir." (R.939).

Appellant has "misconstrued" this statement by alleging in his brief that ". . . when the victim supports the police he is right; when he does not, he is wrong." Captain Hayward's testimony in no way reflected appellant's "interpretation" of the testimony. Captain Hayward testified that in a lineup such as the one in which appellant appeared, the suspect will stand alongside seven deputies or known prisoners (R.932-934). If the suspect is picked, there has been a good identification. If the suspect is not picked, there has been no identification (R.939). Thus, either way the victim could be correct.

At trial, appellant testified as to his version of the evening of November 8, 1974. He denied having any contact with Carol DaRonch,claiming that on the night of the abduction he went to a movie at Trolley Square, then proceeded to a tavern called "The Pub," where he had a beer (R.676,710). There were no witnesses to substantiate or corroborate his testimony regarding these assertions.

Appellant also claimed that his Volkswagen was not running very well on November 8, 1974 (R.673). He offered a cancelled check made out by him to a Texaco gas station near Cottonwood Mall as evidence that he had taken his car in for service (R.673). Regarding this alleged service to his car, appellant said:

> "They did seem to be having quite a bit of trouble starting it. They hooked up a number of wires to it and tried to turn it over and get it to run. It just wasn't cooperating too well.
>
> Finally, they just took a big machine and hooked it up and turned it over a number of times, and it ran, but it was running very badly. As I recall, they also recharged the battery." (R.674).

The check itself did not contain any language indicating for what purpose it had been drawn. In an attempt to explain why the check was made out for only $2.50, appellant said:

"I thought the man was really reasonable. I thought it was going to be more. . . ." (R.722).

"He apparently did not feel it was necessary to charge me for the work." (R.723).

Appellant denied unequivocally that the check for $2.50 was for a gas purchase, yet had trouble remembering whether or not there was a mechanical or labor charge for starting his car (R.722). He also testified that the part of the car not functioning well was the ignition system, i.e., points, plugs, coil, etc. (R.674).

Appellant's claim that his Volkswagen was not running properly was rebutted by the State with the introduction into evidence of several gas purchase receipts charged to appellant's account and verified by him (R.705-706). This evidence revealed that appellant purchased specific amounts of gas on the following dates: October 25, 1974 (8.2 gallons); October 26, 1974 (6.3 gallons); October 28, 1974 (8.2 gallons) (R.705). When totaled, the receipts showed that 22.7 gallons of gasoline were purchased during this four day period (R.705). Appellant also testified that his Volkswagen got between 20 to 28 miles per gallon (R.705). He purchased additional gas on November 8, 1974 (R.707-708). Subtracting the gas purchased on November

8, 1974, it becomes apparent that appellant's Volkswagen traveled somewhere between 454 and 635 miles during the two week period immediately preceding November 8, 1974 (R.705-706,732). Appellant did testify that he drove to Ogden to visit some friends during the latter part of October (R.732), returning home by way of Coalville and back down through Parley's Canyon (R.732).* No witnesses corroborated or substantiated this testimony.

Appellant's testimony also revealed that he applied for and received Utah license plates on February 18, 1975 (license No. LJB 088) (R.735). He supposedly lost the plates between February 18, 1975, and April 11, 1975, thereby necessitating new plates which he received on April 11, 1975 (license No. LJE 379) (R.735). Gas receipts show that on April 14, 1975, and May 3, 1975, appellant used the supposedly first license plate number (LJB 088) on his gas charge slip (R.7350737), while on April 17, 1975, he used his new license plate number (LJE 379) (R.736). Appellant denied using two sets of license plates in his travels (R.737), claiming that when charging gas, the old license plate number would come to mind instead of the new one (R.736).

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* The mileage from Salt Lake City to Ogden and back, returning via Coalville and Parley's lanyon, would be substantially less than 454 miles.

Appellant testified that the handcuffs found in his car on August 16, 1975, were "just junk" which he had picked up in a dump yard (R.678,695). (There were no witnesses to verify this fact.) He also told Officer Forbes on August 21, 1975, that he kept the handcuffs so that he could use them at a future date to apprehend criminal suspects and restrain people (R.698-699). This contradicted the statement he made to Officer Ondrak the night of August 16, 1975, that the handcuffs were "just junk" that he had collected (R.695).

The crowbar found in appellant's Volkswagen was described by him as a "useful tool" (R.692). He could not recall exactly what he said to the officers the night of August 16, 1975, concerning his possession of the crowbar (R.692).

Other testimony by appellant corroborated Carol DaRonch's testimony concerning the rust spots on the right front of his Volkswagen and the dents and rough spots on the right rear fender (R.712-713).

Regarding the question of whether or not appellant had been wearing a mustache on the night of November 8, 1974, he testified that at one time he had worn a false mustache (R.714-715).

Following appellant's conviction on March 1, 1976, he appealed his conviction to this Court (Case No. 14741).

Thereafter, appellant filed a motion for a new trial or in the alternative a petition for an extraordinary writ claiming that new evidence had surfaced which he felt was exculpatory and which had been suppressed by the state prior to and during trial. This Court remanded the case to the Third District Court to consider appellant's claim, and that court subsequently denied his requested relief. The complete facts surrounding appellant's claim of suppressed evidence are set forth within Point VII of this brief.

ARGUMENT

POINT I

APPELLANT WAS IDENTIFIED AS A RESULT OF SOUND POLICE PROCEDURES WHICH COMPORTED WITH THE DUE PROCESS REQUIREMENTS OF THE UNITED STATES CONSTITUTION AND THE UTAH CONSTITUTION.

A

THE PHOTOGRAPHIC IDENTIFICATION OF APPELLANT AND THE PROCEDURES USED TO OBTAIN SUCH WERE NOT VIOLATIVE OF DUE PROCESS REQUIREMENTS OF THE UNITED STATES OR UTAH CONSTITUTIONS.

Appellant contends that the police obtained his identification by Carol DaRonch, the victim of this crime, as a result of "unnecessarily suggestive" police procedures which resulted in "irreparable mistaken identification." Respondent submits, under the circumstances of this case, the police identification procedures fully comported with due process requirements as outlined by this Court and the Federal Courts.

The initial identification of appellant as the perpetrator of the crime was made by Carol DaRonch through the use of photographic display procedures. Case law on the use of such procedures is extensive.

The United States Supreme Court set forth the modern rule concerning out-of-court identifications as relating to due process in Stovall v. Denno, 388 U.S. 293 (1967). In that case, a man stabbed a woman eleven times. The defendant was taken to

a hospital where the victim had undergone surgery. There, with the defendant handcuffed and surrounded by five police officers, an identification was made. The Court upheld the conviction, establishing the rule to be followed in deciding subsequent cases:

> "[Is the] confrontation . . . so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." 388 U.S. at 301-302. (Emphasis added.)

The Court further stated the basis on which due process violation claims were to be decided:

> " . . . a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . ." 388 U.S. at 302.

While elaborating on the "totality of the circumstances" test, the Court upheld the use of a "show up" single identification procedure, saying:

> "'Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" could have resulted in freedom for Stovall . . . No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that [she] could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room . . .'" 388 U.S. at 302.

Thus, the Supreme Court of the United States enunciated the steps to be followed in ascertaining whether or not a due process violation claim is valid: (1) the "totality of the

circumstances" must be considered; (2) in viewing the identification procedures in light of the totality of the circumstances, were they "unnecessarily suggestive"?; (3) if the procedures are found to be unnecessarily suggestive in light of the totality of the circumstances, were they so unnecessarily suggestive and conducive so as to cause "irreparable mistaken identification"?

In Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court extended the Stovall rule to include identifications secured through the use of photographs. The case involved a bank robbery after which witnesses were shown some group snapshots of defendant and others the day following the robbery. The defendant was identified. At a later date, an indeterminate number of pictures of defendant were again shown to some of these same witnesses, and the defendant was again identified. At trial, the Government did not introduce any of the photographs, but relied upon in-court identification by the eyewitnesses, each of whom identified the defendant as one of the robbers.

In rejecting Simmons' claim that the pretrial identification by means of photographs under the circumstances was so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, the Court explained that the use of photographs in and of itself as a means of identification was very exceptable:

> "Despite the hazards of initial identification by photographs, this procedure has been used widely and effectively in criminal law enforcement, . . . The

> danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial . . . We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement." 390 U.S. at 384.

In extending the Stovall rule to photographic identification procedures, the Court said:

> " . . . we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384.

The Supreme Court then listed several factors it took into consideration in applying the above standard to the Simmons case: (1) a serious felony had been committed; (2) the perpetrators were still at large; (3) the inconclusive clues pointed toward the possible involvement of the defendant; (4) it was necessary to act quickly to determine if they (police officials) were on the "right track"; (5) the scene of the crime was well-lit; (6) the perpetrator wore no mask; (7) the witnesses had observed the perpetrators for up to five minutes; (8) the photographs were shown one day later; (9) at least six photographs were shown to each witness; (10) each witness was alone when viewing the photographs; (11) there was no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that FBI agents in any way suggested which

persons in the pictures were under suspicion. 390 U.S. at 384, 385. In a footnote to its opinion at 390 U.S. 386, the Court noted four ways in which the identification procedure used in Simmons could have been more reliable and perhaps "ideal":

> " . . . by allowing only one or two of the five eyewitnesses to view the pictures of Simmons. If thus identified, Simmons could later have been displayed to the other eyewitnesses in a lineup, thus permitting the photographic identification to be supplemental by a corporeal identification; which is normally more accurate. [Citation omitted.] Also, it probably could have been preferrable to the witnesses to have been shown more than six snapshots, for those snapshots to have pictured a greater number of individuals, and for there to have been proportionally fewer pictures of Simmons." [Citation omitted.] (Emphasis added.)

Respondent will show, infra, that virtually all factors mentioned in the main body of Simmons and in the Simmons footnote were substantially met in the case at bar.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court again addressed the subject of identification procedures. A woman was raped. She was able to view her assailant for a considerable amount of time (approximately one hour and fifteen minutes) but could only give police a "general description" of him. She was thereafter shown several photographs (thirty or forty) and picked out a man as having features similar to those of her assailant, but positively identified none of the suspects. Approximately seven months after the commission of the crime, the victim was brought to the police station to view the

defendant, who was being held on another charge. Unable to conduct a lineup due to the inability to locate persons who fit the defendant's unusual description, a showup was conducted, at which time the defendant was told to repeat the words "shut up or I'll kill you." The defendant was identified as the assailant and was subsequently convicted. On appeal, defendant claimed that his identification and the circumstances surrounding it failed to comport with due process requirements.

In rejecting the defendant's misidentification claim, the Court reaffirmed the rules set forth in Stovall and Simmons, supra. The Court also said that unnecessary suggestions in identification procedures followed in the case did not in and of itself require the exclusion of evidence. Instead, the Court declared that the "central question" to be answered was " . . . whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." 409 U.S. at 199. The Court then enumerated "factors to be considered in evaluating the likelihood of misidentification":

> " . . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation . . . " 409 U.S. at 199, 200.

The latest Supreme Court decision dealing directly with issues of photographic identification is Manson v. Brathwaite, 432 U.S. 98 (1977). To a degree, Manson can be regarded as a "landmark" case since the Court established guidelines for determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. An undercover narcotics agent purchased contraband from the defendant. They stood face-to-face, and the agent observed the defendant for at least five to seven minutes. A single photograph was later shown to the agent two days after the confrontation and he made a positive identification. Seven months later, he identified the defendant at trial as being the purchaser of the drugs. The defendant was convicted in the Connecticut state courts, but subsequently had his conviction reversed by a Federal Court of Appeals. In reversing the Court of Appeals, the Supreme Court affirmed the guidelines set forth in Biggers, supra, therefore solidifying the test to be used for all identification confrontations, both pre- and post-Stovall:

> "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in Biggers [citation omitted]. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

> Against these factors is to be weighed the corrupting effect of the suggestive identification itself."

The Court said that any defects in the identification procedures would go to the weight of the evidence and not to the admissibility.

Turning now to the law set forth by the Utah Supreme Court, it is without question that this Court has approved the use of photographs as a proper police method for searching out those suspected of crime. State v. Jenkins, 523 P.2d 1232 (Utah 1974); State v. Perry, 27 Utah 2d 48, 492 P. 2d 1349 (1972).

This Court has also adopted a test very similar to that used by the United States Supreme Court when questions of pretrial identification procedures are raised. In State v. Perry, supra, this Court said:

> " . . . the circumstances of the individual case should be scrutinized carefully by the trial court to see whether in the identification procedure there was anything done which should be regarded as so suggestive and persuasive that there is a reasonable likelihood that the identification was not a genuine product of the knowledge and recollection of the witness, but was something so distorted or tainted that in fairness and justness the guilt or innocence of an accused should not be allowed to be tested thereby." 492 P. 2d at 1352.

This Court has cited Simmons with approval several times. See State v. Perry, supra; State v. Wettstein, 28 Utah 2d 295, 501 P. 2d 1084 (1972); State v. Volberding, 30 Utah 2d 257, 516 P. 2d 359 (1973).

In Wettstein, supra, this Court cited several questions suggested by Simmons to be considered in an evaluation of the totality of the circumstances:

> "First, was there justification for the procedure; was there a necessity for using the type of identification employed; were the circumstances of an urgent character? Second, under the circumstances, was there a chance that the procedure utilized would lead to misidentification?" 501 P. 2d at 1087.

The Court went on to allude to several other factors set forth in Simmons and which are to be considered in evaluating the "totality of the circumstances":

> " . . . the opportunity and length of time that the witness had to observe the accused, and the period of time that had elapsed from the time of the incident to the identification, i.e., was the memory still fresh?" 501 P. 2d at 1087.

The Court also approved in Wettstein the "totality of the circumstances test" set forth in Stovall. 501 P. 2d at 1087.

This Court in Volberding, supra, also discussed with approval other factors mentioned in Simmons in determining the "totality of the circumstances" question:

> " . . . the necessity of using photographs, i.e., the perpetrator was still at large; the opportunity the witness had to observe the perpetrator; the interim between the event and the photographic identification by the witness." 516 P. 2d at 360.

Turning now to the facts as they exist in the record, this Court must decide whether the trial judge abused his discretion in finding that based upon the evidence, the photographic

identification procedures used were not violative of due process.

Testimony presented at trial showed that Carol DaRonch spent at least ten to fifteen minutes with appellant prior to and during the incident (R. 549). During this period of time, she had several face-to-face confrontations with him in well-lit areas (R. 373, 376, 377, 379, 381, 382, 385, 386). Later, during the assault, she fought and resisted him while face-to-face (R. 397). She was able to notice several distinguishing characteristics of appellant on the night of November 8, 1974: (1) his manner of walk (R. 381); (2) his facial features (R. 382); (3) his dark patent leather shoes (R. 404); (4) his slim build - about 160 lbs. (R. 388); (5) "greased back" hair (at that time) (R.388); (6) his dark mustache (R. 389).

During the months following the night of the crime, she was shown several thousand photographs, none of which she identified as being her assailant (R. 408, 487). There were photographs of individuals that she selected as having particular characteristics resembling those of her assailant (R. 818, 820-821, 891-892, 908-910, 409-410), but she never identified any photograph as being that of her assailant until September 1, 1975 (R. 823, 866-867, 879). Respondent submits this shows that Miss DaRonch had a good picture in her mind as to what her assailant looked like because: (1) she was able to view so many photographs, positively eliminating so large a number of people; and (2) she was able to pick out people who possessed characteristics similar to

those of appellant, yet also positively eliminating them as not being her assailant.

On September 1, 1975, Carol DaRonch made her first tentative identification of appellant while viewing a stack of twenty-seven photographs given her by Detective Thompson (R. 495-496). The testimony of Detective Thompson, of which it was the prerogative of the trial court to believe or disbelieve either in whole or in part, went as follows:

> "Q. Did you have occasion on that date [September 1, 1975] to show her any photographs?
>
> A. Yes, sir.
>
> Q. What, if anything, was said to Miss DaRonch before you asked her to look at a group of photographs?
>
> A. I asked her that I had a group of photographs I would like her to look at them, that I knew she had looked at many others a long time ago, but I'd like her to look at these and see if there was anyone in the photographs that resembled or could possibly have been the individual who abducted her. (R. 495).
>
> * * *
>
> Q. After she looked at the photographs, what did she do with them?
>
> A. She took a picture [appellant's] out of the stack and held it in her hand. She went through the rest of the pictures, handed me the stack. She stated, 'I don't see anyone in there.'
>
> I then asked her how about the photograph that was in her hand. She stated something to the effect, 'Oh, this one, I don't know. Here.' And handed it back to me.

> I then asked her why she pulled that photograph out, if there was something significant about it. She states, 'Yes, I believe that looks a lot like the individual, but I'm not sure.'" (R. 497).

The photograph she picked out was one taken of appellant the night of August 16, 1975, some nine months after the crime. (R. 496).

Several days later on September 4, 1978, Officer Beal of Bountiful showed the victim another set of pictures which contained appellant's photograph (R. 873, 876, 877). The appellant's picture was a drivers license photo which had been taken December 19, 1974, much closer in time to the date of the crime than the August 16, 1975 picture. Detective Thompson did not have a copy of the December 19th driver license photo at the time the victim viewed the twenty-seven photographs. He stated that he came across it following the tentative identification she made on September 1st, and decided to order a copy since he reasoned that a photo of appellant taken so close in time to the date of the crime would probably assume a close likeness of the way he looked on November 8, 1974 (R. 504).

Detective Beal testified about the showing of the nine photographs:

> "Q. On September 4 of '75, when you showed her [victim] those photographs, can you tell me what she did and said about the photographs you showed her?
>
> * * *

A. After I handed them to her, asked her to go through them, she went through the pictures, then came back to the way I had them established, picked number 4, which was that of Ted Bundy.

Q. She went all the way through?

A. Yes.

Q. Then she came back. How did she come back? What did she say or do?

A. She just took the rest of them back off the top; picked that picture out, and said that 'This looks the most like the guy as I remember him.' I says, 'Are you sure?' And she says, 'I'm sure that it looks most like the guy as I remember him, except that he had a mustache at that time.'" (R. 875-876) (Emphasis added)

A more detailed account is given on p. 525-526 of the record where Detective Beal testified:

" . . . I had them [pictures] folded in half like they are here. I had them stacked in a stack. I handed them to Miss DaRonch, and asked her to look through the photographs and see if she found anyone that resembled the individual that had abducted her in November of '74. She took the photographs--I also told her to look clear through them before she made up her mind.

* * *

After she looked through them all, she went back to no. 4 photograph [appellant's] . . ."

Appellant claims that the above procedures were "unnecessarily suggestive." Respondent strongly submits this is not so, but even if found to be unnecessarily suggestive, appellant must show that " . . . under the totality of the circumstances,

the identification was [unreliable] even though the confrontation procedure was suggestive." Neil v. Biggins, supra, 409 U.S. at 199. Showing that the confrontation procedure was in itself unnecessarily suggestive, is not enough. United States v. Ivory, 563 F.2d 887 (8th Cir. 1977). Appellant must also show that the procedure produced " . . . some unfairness . . . from which there would be a likelihood of a mistaken identification.. . ." State v. Perry, supra at 492 P. 2d 1352; and that the " . . . suggestive elements in the identification procedure made it all but inevitable that the witness would identify [the] defendant. . . ." State v. Wettstein, supra, at 501 P. 2d 1084.

Respondent can find nothing in the remarks of either Detective Thompson or Beal which would give the trial judge basis for finding that the procedures were suggestive. Detective Thompson merely asked the victim to do what any police officer would do when handing a victim of a crime a stack of photographs of possible suspects, i.e., look through them and see if anyone is recognizable as being the assailant. She did, and picked out appellant's photograph. Nothing more had been said to this point. She followed the detective's very neutral instructions and tentatively identified the appellant. Once handing the pictures back, she apparently forgot to return the one in her hand [appellant's picture], whereby Officer Thompson then asked her why she had picked out the photo. She responded that it looks like the assailant.

Detective Beal followed basically the same procedure. He asked the victim to look through the pictures and see if she found anyone that resembled the individual who had abducted her. She again looked through the photographs and picked out appellant's picture, stating that "This looks the most like the guy as I remember him."

Certainly these colloquies are not suggestive. It must be remembered, as was stated in Fells v. State, 65 Wis. 2d 525, 223 N.W. 2d 507 (1974), that:

> "In the very act of handing photographs to an attack victim it is implied that the attacker's picture could be any of them . . ." 223 N.W. 2d at 514.

Even bearing this in mind, there is no suggestion by Officer Thompson or Officer Beal that appellant's photo was present in either array of photographs. The victim had never seen the appellant or his picture (other than the night of November 8, 1974) prior to the tentative photographic identification on September 1, 1975; thus, she would have no reason to single out appellant's photo other than the fact that she recognized the face as being the same one or similar to the one she saw on November 8, 1974.

Respondent submits that the facts here show less likelihood for inherent prejudice than in other cases where much more suggestive remarks have been held not violative of due process. In Fells v. State, supra, a detective showed a victim seven photographs and said: "I believe the person [suspect] would be in these." The court held that the statement was not

unnecessarily suggestive. In Drewry v. Commonwealth, 213 Va. 186, 191 S.E. 2d 178 (1972), a police officer showed a group of six photographs to the victim and remarked that "the assailant was among those pictured." The court again held the remarks not to be "impermissibly suggestive." See also State v. Davis, 25 N.C. App. 256, 212 S.E. 2d 680 (1975), where an officer indicated to a victim that he had a possible suspect among photographs to be viewed. This was found not to be impermissibly suggestive.

Appellant further alleges that the showing of two photographs of appellant was "not proper police practice" relying on Edward Barton's testimony that it was basically his personal procedure not to use two photographs (R. 634), but to follow-up a tentative identification of a suspect with a line-up (R. 635-636). However, case law supports the position that it is legally permissible to show more than one photograph of the same suspect at different times. Simmons v. U.S., supra, (pictures of defendant shown to same witnesses at different times); United States v. Marchand, 564 F. 2d 983 (2nd Cir. 1977) (multiple photos of suspect shown); United States v. Falange, 426 F.2d 930 (2d Cir.), cert. denied, 400 U.S. 906 (1970) (three photos of defendant taken years apart were shown); Dixon v. Commonwealth, 505 S.W. 2d 771(Ky. App. 1974) (two pictures of defendant shown in same group of 10-12 photos); United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970) (7 of 14 photos shown of defendant). Also in State v. Miner,

546 P. 2d 252 (Mont., 1976), witnesses were shown three sets of photographs, the first two sets contained photographs of defendant. Witnesses were not able to positively identify the defendant in the first set, but made an identification in the second set. In applying the Simmons and Stovall test, the court said:

> "Unless the error is obvious and the prejudice clear, the defendant's remedy is in effective cross examination with the identification question then becoming one of weight to be determined by the [truth of fact] and not one of admissibility." 546 P. 2d at 256.

This Court has also upheld the use of multiple photographs of a defendant. State v. Wettstein, supra.

The record in the instant case clearly shows the reason for displaying two photographs of appellant: (1) Officer Thompson, after receiving a tentative identification of appellant through a photo taken some nine months after the crime, wanted to obtain a photo taken closer in time to the occurrence of the crime, so as to either eliminate the appellant as a suspect or proceed further with the investigation; (2) at the time of the first photographic identification, Officer Thompson was not aware that another photo of appellant was available; upon discovery of the photo taken closer to the date of the crime, the idea of displaying the newly discovered photo would tend to either enhance or discredit the reliability of the first photo identification.

Based upon the foregoing, respondent submits that no unnecessarily suggestive procedures were used in the photographic

identification process. Should this Court find otherwise, however, respondent submits that under the "totality of the circumstances test set forth in Simmons and Manson, supras, the reliability of the photographic identification was established.

First of all, the guidelines set forth in Simmons were established with the exception of one. A felony was committed; the perpetrator was still at large; clues were pointing toward appellant; it was necessary to act quickly; the crime scene was well-lit; the perpetrator wore no mask; the witness had observed the perpetrator for more than five minutes; at least six photos were shown to Carol DaRonch; she viewed the photos alone; the police did not indicate whether any of the persons in the photos were under suspicion.

The only Simmons guideline not met is the time element. Miss DaRonch viewed the photographs about nine months after the crime. However, as the court said in United States v. Hurt, 155 U.S. App. D.C. 217, 476 F. 2d 1164 (1973): "Although the delay [one year] was regrettable, it is not decisive." Referring to the seven month delay in the identification in Biggins, supra, the court said:

> "There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a serious negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one . . . we find no substantial likelihood of misidentification." 93 S. Ct. at 383.

Respondent submits that this reasoning applies in the instant case. Miss DaRonch was shown thousands of photos. Yet she never made an identification until she saw the appellant. Thus, the nine month lapse of time is not determinative.

Such was the reasoning of the Tenth Circuit Court of Appeals in United States v. Roby, 499 F. 2d 151 (10th Cir. 1974), where the eyewitness identified defendant's picture five months after the crime. The Court said:

> " . . . the delay in itself should not be determinative . . . The eyewitness here had sufficient time to observe the manner of the theft, described in detail the coat worn by the thief, . . . identified only Roby in a photographic showup of more than one photograph, and unequivocally identified Roby at trial . . . There is no evidence that the thief was masked or that the grocery store was poorly illuminated." 499 F. 2d at 154.

Applying this language to the case at bar, Carol DaRonch had sufficient time to observe the appellant. She described her assailant, identified him and him only from the photographs, and absolutely identified him at the hearings and trial.

Upon examination of the factors set forth in Biggins, supra, at 409 U.S. 199, 200, it is readily seen that the reliability in light of the total circumstances is established: Carol DaRonch had ample time and opportunity to view the appellant at the time of the crime; her description of the appellant and his particular mannerisms the night of the crime show that her attention was focused on the appellant [the testimony of Dr. Loftus as to a person's memory being more precise when operating

under moderate stress corroborates Miss DaRonch's memory of appellant's characteristics the night of the crime (R. 623-626)]; she was positive that appellant was her assailant at the line-up and at trial; her description of appellant's manner of dress was corroborated at trial.

When viewing the "totality of the circumstance," there is no justifiable reason for concluding that the photographic identifications were not reliable. As this Court said in State v. Ervin, 22 Utah 2d 216, 451 P. 2d 372 (1969), it is the discretion of the trial judge as to whether there was any "tainting" of identification procedures. The trial judge had the opportunity to observe the demeanor of the witnesses and thereby assess their creditibility and reliability. The function of the reviewing court is not to determine guilt or innocence, nor to determine the weight to be given conflicting evidence, credibility of witnesses, or the admission of evidence. State v. Romero, 554 P. 2d 216 (Utah 1976); State v. Tuggle, 28 Utah 2d 284, 501 P. 2d 636 (1972). As such, the ruling of the trial judge should be indulged with a presumption of correctness, and should not be disturbed unless it clearly appears that he was in error. State v. Criscola, 21 Utah 2d 272, 444 P. 2d 517, 519 (1968), State v. Perry, supra.

B

THE LINEUP IDENTIFICATION OF APPELLANT AND THE PROCEDURES USED TO OBTAIN SUCH WERE NOT VIOLATIVE OF DUE PROCESS REQUIREMENTS OF THE UNITED STATES OR UTAH CONSTITUTIONS.

Appellant in his cross-examination at trial and in his brief implies that the initial identification of appellant was "tainted", therefore every subsequent identification is tainted under the "fruit of the poisonous tree doctrine." This Court forcefully rejected this argument in State v. Spencer, 24 Utah 2d 361, 471 P. 2d 873 (1970):

> "This is a most inane argument, although the defendant claims to base his contentions upon some cases decided by the Supreme Court of the United States, he says those cases hold that an improper line-up is so likely to effect the sub-conscious mind of one who views it that when that person later says positively that he recognized the defendant, the testing cannot stand and the defendant must be freed of any charges which depend upon an identification.
>
> This specious argument completely ignores the functions of jurors, who weigh testimony and give such effect to it as under all the circumstances they deem proper. Whether the witness really recognizes a defendant in court . . . is, of course, a matter for the jury to decide. . . ." 471 P. 2d at 874, 875.

Using the logic expressed above for determining the validity of in-court identification, it necessarily follows that whether a line-up identification is "tainted" by a prior suggestive photographic display would also be a decision for the

trier of fact. Respondent has already shown that the photographic procedure was reliable. However, should this Court find otherwise, it is still possible for the line-up identification of the appellant by Miss DaRonch to be sustained as having a source independent of the photographs. This is particularly true, since the victim identified the appellant at the line-up immediately upon his entering the room, basing her identification on her recollection of November 8, 1976, as to the way he walked, his face, and his well-educated manner of speaking. (R. 412-413, 446, 449, 450). None of these characteristics, with the exception of the facial features, would have been discernable in a prior photographic display.

Thus, for this Court to find that the line-up identification was "tainted" from prior impermissibly suggestive photo identification procedures, it would have to find that first, the photo identification procedures were in fact impermissibly improper and; second, that the trial judge abused his discretion in finding that the line-up identification had a source independent of the tainted prior identification such as the victim's recollection of the night of the crime.

Moreover, respondent submits there were no irregularities at the line-up. Extreme care was taken by Captain Hayward to ensure that the line-up was conducted as fairly as possible. He explained that he decided to use deputies in the line-up with appellant because he wanted to use persons who were as close as

possible in looks, height, weight, mannerisms, etc., to the appellant's. Even had there been substantiated variations in the line-up, error would not have been present, as long as the procedure was not contrived to be unduly suggestive. State v. Cummings, 27 Utah 2d 365, 496 P. 2d 709 (1972).

The question then is: was the line-up conducted in a fair, reasonable and impartial manner. State v. Jenkins, 523 P. 2d 1232 (Utah 1974). Respondent submits that under the heretofore mentioned guidelines, and based upon the evidence as the trial judge found it to be, the line-up was conducted in a fair and reliable manner, and the positive identification secured thereby should not be disturbed. State v. Ervin, supra.

C

THE IN-COURT IDENTIFICATION OF APPELLANT WAS NOT VIOLATIVE OF APPELLANT'S DUE PROCESS.

Carol DaRonch was able to identify appellant as her assailant not only at the line-up, but at the trial itself (R. 412, 446, 449, 450). The question to be resolved is: If the pre-trial photographic and line-up procedures are found to be "tainted", was the in-court identification based upon "tainted" pre-trial identifications, or was there evidence of an independent source of identification based on evidence or observations other than the pre-trial procedures?

Both the United States Supreme Court and the Utah Supreme Court have ruled that where there are improperly

suggestive pre-trial identification procedures which are found to be unreliable, the prosecution must show by "clear and convincing" evidence that the in-court identification was based upon observations of the suspect other than the pre-trial identification. United States v. Wade, 388 U.S. 218 (1967); State v. Vasquez, 22 Utah 2d 277, 451 P. 2d 786 (1969); State v. Harris, 26 Utah 2d 365, 489 P. 2d 1008 (1971); State v. McGee, 24 Utah 2d 396, 400, 473 P. 2d 388 (1970). Whether the in-court identification has an independent source other than the photographic displays or line-up is a matter of discretion for the trial judge. State v. Ervin, 22 U. 20 216, 451 P. 2d 372 (1969).

In U.S. v. Wade, supra, the United States Supreme Court set forth factors to be observed and considered when determining whether the in-court identification was based upon observations of the suspect other than the pre-trial identification:

> " . . . the prior opportunities to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by pictures of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and lapse of time between the alleged act and the lineup identification." 388 U.S. at 240.

Applying these standards to the instant case, it can be seen that the victim's in-court identification had sources independent of the pre-trial identification procedures, though respondent has shown that the pre-trial photographic and line-up

procedures were not in the least way "suggestive" or "unnecessarily suggestive", much less "tainted" or "unreliable."

Her description of appellant was adequate, yet some courts have even held that merely because a person is unable to provide the police with a detailed description of an assailant prior to an identification, this does not render the identification impermissibly suggestive. People v. Hill, 117 Cal. Rptr. 393, 528 P. 2d 1, 28 (1974). Carol DaRonch described her assailant as being slim, about 160 pounds, "greased back" hair, a dark mustache, wearing dark patent leather shoes, and having a well-educated manner of speaking (R. 382, 388, 389, 404). She also remembered that he had a distinctive manner of walking (R. 412, 449-450). Appellant at page 3 of his reply brief alleges that the victim did not say anything to the police in a taped interview following the crime about appellant's walk or manner of speaking. As was announced in State v. Long, 29 Utah 2d 177, 506 P. 2d 1269 (1973), however, any discrepancies or variations in a witnesses' testimony concerning identifications go to the credibility of the identification and not the competency, and as such, is a matter for the trial judge to weigh and determine. State v. Casias, 567 P. 2d 1097 (Utah 1977); State v. Wilson, 565 P. 2d 66 (Utah 1977). On appeal, this Court should not weigh conflicting evidence, credibility of witnesses or weight to be given any witness' testimony. State v. Logan, 563 P. 2d

811 (Utah 1977). It is important to note that the accuracy of Carol DaRonch's memory as to appellant's appearance is made even clearer when at the line-up she commented that he had changed his appearance from the way he looked on the night he kidnapped her in that he looked more "clean-cut", his hair was shorter, and he no longer had a mustache (R. 412).

Applying other factors specified in Wade concerning reliability of in-court identifications, respondent submits that Miss DaRonch's in-court identification meets the remaining "criteria" or guidelines. First, she had ample opportunity to observe her assailant (10 to 15 minutes at least). Second, she never identified any person other than appellant as being her assailant. Third, she tentatively identified appellant twice (different pictures of appellant) in photographic displays. Fourth, she had viewed thousands of photographs prior to identifying appellant, never once identifying anyone as her assailant, though she picked some people out as having some characteristics similar to those of appellant. Finally, there was a time lapse of approximately nine months between the crime and the identification at line-up and photographic displays, but this was due to the fact that she had not been confronted with either appellant or his picture prior to that time.

When viewing all of these factors together and even singly, it becomes apparent that Carol DaRonch's in-court identification had sources independent of the pre-trial identification procedures, particularly when looking closely at the amount of

time she had to view him. See Warner v. Howard, 416 F. Supp. 754 (D.C.M.D. Pa. 1976), where it was held that an in-court identification had a basis independent of any impermissibly suggestive line-up when the witness had an opportunity to view the accused five to ten minutes in a well-lighted room, particularly observing his facial features.

The trial judge's finding should not be disturbed. This Court should not substitute its judgment in lieu of the findings of the trial court as to credibility of witnesses. State v.Howard, 544 P.2d 466 (Utah 1975). As was said in United States v. Scriber, 499 F.2d 1041 (10th Cir. 1974):

> "The finding by the trial court that the eyewitness in-court identifications were based on an independent source is entitled to great deference on appeal, particularly since the trial court had the opportunity to observe the demeanor of the witnesses and thereby assess their credibility and reliability."

D

THE VIEWING OF APPELLANT'S CAR AND SUBSEQUENT TESTIMONY THEREON WAS NOT VIOLATIVE OF APPELLANT'S DUE PROCESS.

Photographs of appellant's Volkswagen were taken with the consent of appellant on August 21, 1975, by Detective Thompson. He subsequently showed them to the victim on September 1, 1975. At that time she stated, after looking at the pictures, that certain characteristics depicted in the pictures appeared very

much like those of the car in which she was kidnapped (R. 498, 435). She added, however, that she would prefer to view the car in person (R. 498). It is important to note that she did not know who the car belonged to at this time.

On September 8, 1975, she viewed the car (R. 900, 901). Upon seeing the car, she exclaimed: "Yes, yes, that's the car." (R. 903). Sgt. Collard then told her to look at the car very carefully to be sure. He also reminded her to look at the entire body and the interior, taking into account not only the picture shown to her by Detective Thompson, but also the car itself as it sat at the time she observed it the night of November 8, 1974 (R. 903-904). Having followed this procedure, she stated, "Yes, that's the car." Again this time, she was not aware that the car belonged to the appellant.

When viewing the pictures of the car on September 1, 1975, she noted that the tear in the upholstery of the seat depicted in the pictures resembled and appeared to be like the tear she remembered in the back seat of the car (R. 498, 435), and that the picture of the Volkswagen resembled the one in which she was abducted.

When viewing the car on September 8, 1975, she noted a difference in the car, specifically, the seat was no longer torn and the car was not as light in color as she remembered it having been (R. 669, 905). She also noted similarities,

specifically, rust areas and damage to the door on the passenger's side and the right rear wheel area (R. 904-905). The differences she noted are explainable by the fact that the car had been "fixed up"--painted, upholstery repaired, etc., in order to be sold (R. 670-671).

At trial, Miss DaRonch was again shown photographs of appellant's car. When asked how the pictures compared with the vehicle in which she was abducted, she replied that as far as the rip in the seat was concerned, the pictures looked exactly like the car (R. 406). She also said that the dent in the door and in the side of the car was comparable (R. 406-407). She then stated that she identified the car in the photograph as being similar to the car in which she was abducted primarily because of her identification and recollection of specific characteristics, to wit: the rip in the back seat and the dents in the car (R. 406, 407, 433-435). Several witnesses corroborated her testimony concerning not only the rip in the back seat of appellant's car, but also the color. [R. 533, 744, 764 (rip); 391, 420, 531, 649 (color of car).]

Viewing the evidence and whatever inferences may be fairly and reasonably drawn therefrom in accordance with the findings of the trial court, State v. Simpson, 541 P. 2d 1114 (Utah 1975), it is evident that the trial court believed Ms. DaRonch's testimony concerning the viewing of the car and her recollection of the car on the night of November 8, 1974. This Court should assume

that the trial court believed those aspects of the evidence supporting its findings, and should not disturb the exercising of the trier of facts' prerogatives. State v. King, 564 P. 2d 767 (Utah 1977).

E

INNUENDOS AND FALSE ALLEGATIONS BY APPELLANT CONCERNING IDENTIFICATION PROCEDURES CANNOT BE REVIEWED BY THE UTAH SUPREME COURT WHEN THERE IS NO BASIS IN THE RECORD TO SUPPORT SUCH ASSERTIONS.

In all due respect to the zeal with which appellant submits his allegations of error, respondent submits that he has made innuendos and false allegations which are not supported by the record. This Court has repeatedly said that it will not go outside the record in reversing a case on appeal. State v. Starlight Club, 17 Utah 2d 174, 406 P. 2d 912 (1965). Even if appellant's allegations and innuendos concerning his interpretation of the facts were true, this Court has said it " . . . cannot consider facts stated in the briefs which may be true but absent in the affirmed record." Cooper v. Foresters Underwriters, Inc., 123 Utah 215, 257 P. 2d 540 (1953).

Some of the many innuendos found in appellant's briefs are as follows: On page 13 of Appellant's Brief, he states:

> " . . . , Deputy Thompson went alone to visit the victim."

Appellant apparently finds something mysterious in that Detective Thompson went alone to visit Miss DaRonch. Yet, appellant attempted to show in his defense that the victim's identification was influenced in part by the presence of "authoritative figures" (See Dr. Loftus' testimony, R. 608-609). He thus contradicts himself by trying to suggest some impropriety by having Detective Thompson show the victim the photographs alone, since it would seem by his defense experts' argument that the fewer "authority figures" present during the identification, the less the chances of impropriety or suggestiveness. At page 13 of appellant's brief, he states:

> "What is extraordinary is that he chose to have her identify appellant's automobile before showing the photo spread containing appellant's photograph. That anyone could identify, from polaroid photographs, an old Volkswagen she had ridden in, for two minutes, nine months before defies belief, but Deputy Thompson succeeded in obtaining such an identification from the victim.
>
> Immediately after the victim so committed herself to the vehicle . . ."

Appellant implies that the trial judge's judgment in believing Carol DaRonch's testimony concerning the car was incredulous, even though this Court has enumerated on many occasions that the credibility of witnesses is exclusively the prerogative of the trier of fact. State v. Howard, supra; State v. Casias, supra. Secondly, Appellant's allegation that Deputy Thompson succeeded in obtaining an identification of the car and that

Miss DaRonch had committed herself to the car is simply not true. The record reflects that Miss DaRonch made no such identification at that time, but merely said the rip in the seat of the car in the picture resembled the one in the car in which she was abducted, and that she would prefer to view the car in person before making any identification (R. 498, 435). She also said there were similarities in the dents in the passenger's side of the car door in the picture and the car in which she was abducted (R. 406-407).

On pages 14 and 15 of appellant's brief, he makes several unsupported innuendos:

> "The victim, confident that the police would not show her the wrong car, dutifully identified it . . ." (p. 14)

There is absolutely nothing in the record to substantiate the allegation that the victim felt the police would not show her the wrong car or that she "dutifully identified the car." Appellant states at page 15 that:

> " . . . the victim was fully aware [at the lineup] of the association between the appellant's photographs and the automobile she had identified and the conviction of the officers that appellant was a hot suspect . . . it was obvious to her which person in the lineup was the suspect and she dutifully did what was expected of her." (Emphasis added)

Again, nowhere in the record is it stated that it was "obvious" to her which person in the lineup was the suspect or that she "dutifully" did what was expected of her.

On page 16 of appellant's brief, he becomes personal in his attack when he says:

> "Given the intense bias of the law enforcement officers, . . ."

The only comment this allegation merits is that, again, such a matter was for the trial judge to decide. State v. Casias, supra.

In Appellant's Reply Brief, pp. 1-2, he alleges:

> " . . . the police officers induced her to believe that the pictures she had seen were of the individual the police 'knew' to be guilty."

No evidence exists in the record to support a charge that Carol DaRonch was "induced" to believe that the pictures she had seen were of appellant, nor is there any indication that the police "knew" appellant to be guilty.

Also, on page 2 of appellant's reply brief, he complains that when the victim was shown a second photograph of appellant, she should have been shown photos of other individuals she had selected as having characteristics similar to those of the assailant. Respondent submits this would not have been proper since Ms. DaRonch, in selecting the photos of individuals having similar characteristics specifically eliminated them as definitely not being her assailant. (R. 409-410, 818, 820-821, 823, 866-867, 879, 891-892, 908-910).

Finally, Appellant says at page 3 of his reply brief that the victim's claim that she identified appellant at the lineup because of, among other characteristics, his distinctive walk and "educated manner of speaking is . . . somewhat incredulous . . . ." Here again, this was the trial judge's prerogative to make such a determination. State v. Howard, supra; Larrabee v. Turner, 25 Utah 2d 248, 480 P. 2d 134 (1971).

POINT II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE TAKEN FROM APPELLANT'S CAR IN THAT THE ITEMS WERE LAWFULLY SEIZED PURSUANT TO A LAWFUL SEARCH.

A

THE TRIAL COURT APPLIED THE PROPER STANDARD OF PROOF IN DETERMINING THAT THE SEARCH AND SEIZURE OF THE ITEMS FOUND IN APPELLANT'S CAR WERE CONDUCTED PURSUANT TO A VALID CONSENT.

At the hearing on appellant's motion to suppress evidence seized from his car, the following testimony was offered: On August 16, 1975, appellant was stopped by Sgt. Robert Hayward of the Highway Patrol at 2:30 a.m. in a residential area in Granger (West Salt Lake) (R.683,946). Prior to being stopped, appellant had been pursued by Hayward who observed appellant drive at a high rate of speed without his lights on, run a stop sign and attempt to evade a police officer (R.949). After bringing appellant to a stop, Officer Hayward noticed, through the window, a crowbar lying on the backseat floor of appellant's car (R.950). The officer testified that he asked appellant if he could look in his car. Appellant responded, "Go ahead." (R.951). Officer Hayward further testified that at no time did appellant object to the search in any way (R.952). Appellant was arrested for evading a police officer (R.952).

Moments later Deputy Twitchell and several other officers arrived. Deputy Twitchell testified that he asked appellant "if he would mind if we looked through his vehicle," and that appellant said it was okay with him (R.954-955). The deputy also testified that to the best of his recollection he

did not recall appellant ever objecting to the search of his vehicle (R.955). During the search a pair of handcuffs were found in the trunk of appellant's car (R.942).

Appellant, a law student, denied giving his consent and testified that he passively stood by because he was intimidated at the time (R.960,963). On cross-examination at the suppression hearing, appellant, when asked if he at any time requested the officers to cease searching his automobile, answered: ". . . I felt the answer would be no." (R.963). Further cross-examination revealed the following colloquy at the hearing regarding the issue of consent:

> "Q. (Mr. Yocum) Do you remember making the statements to the officer, the officers present on the scene, that you have to do your job, go right ahead, at that point?
> A. (Appellant) The question is unclear. From what point?
> Q. (Mr. Yocum) The question is: At any time did you make that statement.
> * * *
> Q. (Mr. Yocum) At any time before Sgt. Hayward got into your vehicle, or reached into your vehicle, did you make any statement of that nature to him?
> A. (Appellant) No, sir.
> Q. (Mr. Yocum) And after the other officers arrived and apparently your truck was also searched, do you remember making that statement to any of the officers?
> A. (Appellant) Well, I don't know if those are my exact words. I made a variation of that statement. (Emphasis added.)
> Q. (Mr. Yocum) What do you recall stating to them?
> A. (Appellant) 'I can't stop you from doing what you are doing,' and that I was in no position, I felt, to make any demands on them.
> Q. (Mr. Yocum) Were any guns ever drawn and pointed at you?
> A. (Appellant) No." (R.964-965).

The trial court found by a "preponderance of the evidence" that consent for the search had been given by appellant (R.1288-1289).

The Court stated:

> "On the record. What you request that we determine with regard to the search issue was that was a consent, taking into account all of the testimony including the Defendant's, and I took into account the fact that the Defendant testified that he stood passively while the search was made without raising any apparent question about it, the Court being aware that he is a law student, at least at some level in law school. That was not determinative, that was merely a factor that I took into account. I found that the search was a consent search." (R.1288-1289).

Appellant misconstrues the Court's remarks, at page 25 of appellant's brief, where he states: "The court below in this case relied heavily on appellant's education." The record speaks for itself. The trial judge at no time in the record said or indicated that he relied heavily on any one factor or combination thereby, but rather "[took] into account all of the testimony including defendant's. . . ." Moreover, in answer to appellant's claim that the trial court heavily relied on appellant's education, it should be noted that most jurisdictions do not require the trial court, in a suppression hearing, to make or write down formal findings of fact and conclusions of law. United States v. Bates, 533 F.2d 466 (9th Cir. 1976); State v. Braun, 209 Kan. 181, 495 P.2d 1000 (1972), cert. den. 409 U.S. 991; State v. Agee, 15 Wash.App. 709, 552 P.2d 1084 (1976).

Appellant also asserts at page 28 of appellant's brief that "standing by passively" is not a voluntary consent. Respondent agrees. However, that factor alone was not the basis for the court's finding that the search was based upon appellant's consent. It was merely one of many factors considered in determining whether there was a valid consent, and respondent will

show, infra, that the United States Supreme Court has held such factors to be permissible.

Appellant's main contention is that the trial court used an improper standard of proof in determining that a valid consent was given by appellant for the purpose of searching his automobile. He bases this contention on the theory that in suppression hearings the standard of proof for consent searches must be viewed and dealt with, in the same light as those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. In other words, appellant asserts that the Utah Supreme Court should adopt a minority view which says that the standard of proof to be relief upon in Fourth Amendment suppression hearings is one of "clear and convincing" evidence rather than the widely accepted standard of "preponderance of the evidence." Respondent will show, infra, that appellant's theory has been expressly rejected by the United States Supreme Court and by a majority of federal and state courts.

Appellant frames his argument at page 26 of appellant's brief as follows:

> ". . . It is hard to imagine that if the lower court believed every word of Officer Hayward and Officer Twitchell and disbelieved every word of appellant that the lower court would state that the finding was based upon a preponderance of the evidence. If the court disbelieved appellant and believed the State's testimony he would believe beyond a reasonable doubt the testimony of the State. Thus, the burden of proof which was applied by the lower court becomes all important in this case as it is not clear from the lower court's finding that it entirely rejected appellant's testimony that no consent was asked for or given."

The implications of appellant's statement are far reaching and clearly contrary to existing law: First, appellant is implying that because the court used a "preponderance of the evidence" standard, the evidence itself met only that standard and not a higher one such as "clear and convincing" or "beyond a reasonable doubt." This allegation is ludicrous, since the evidence as found by the judge could have indeed met the higher standards, but since the only quantum necessary is "preponderance of the evidence," the court stated that the evidence as he found it did indeed meet this minimum requirement; second, appellant seems to be pre-empting the trial judge's function to judge the credibility of the evidence and the witnesses themselves wherein he says that "It is hard to imagine that if the lower court believed every word. . . ." The court is not required to state which witnesses and what evidence it believes in a suppression hearing. United States v. Bates, supra; State v. Braun, supra; State v. Agee, supra. It was held by the court in People v. James, 137 Cal.Rptr. 447, 561 P.2d 1135 (1977), that the trial court, by denying a motion to suppress, impliedly found that the officer's testimony concerning circumstances of his entry into defendant's house was true and that defendant voluntarily consented to the search, contrary to defendant's testimony that the officer had neither asked for nor received permission to enter defendant's home. Such could be the situation in the case before this Court. The trial judge, in denying the motion to suppress, could easily have believed all of the State's evidence or any portion thereof, and could have believed a portion of appellant's

evidence, yet the evidence presented by the State was sufficient to meet at least the minimum standard, and possibly even a higher standard. The trial court, when making the statement that he found by a preponderance of the evidence that the search was conducted pursuant to a valid consent, merely stated that the minimum standard of preponderance of the evidence was met. He did not preclude himself from a finding that the evidence was sufficient to meet a higher standard.

Appellant later concedes that he does not argue with the facts as the court found them, but that the quantum of proof should have been one of "clear and convincing evidence." This was rejected by the United States Supreme Court in Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972). There, the voluntariness of a confession was challenged at a pre-trial hearing. The defendant argued that evidence offered against him at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt, no doubt a higher standard than one of "clear and convincing" evidence. However, in declaring that the prosecution must prove that a confession was voluntary at least by a preponderance of the evidence, the court said:

> ". . . from our experience . . . no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. Petitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard. Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries and by reversing the standards applicable in collateral proceedings. Sound reason for

> moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." 404 U.S. at 488-489. (Emphasis added.)

Thus, the Court specifically set the minimum quantum of proof to be followed in suppression hearings involving Fourth and Fifth Amendment claims.

The Supreme Court reaffirmed this standard of proof in United States v. Matlock, 415 U.S. 164 (1974):

> "It appears to us . . . that the Government sustained its burden of proving by the preponderance of the evidence that [the] voluntary consent to search . . . was legally sufficient . . . ." 415 U.S. at 177.

In a subsequent footnote to Matlock, at 415 U.S. 177-178, the Court, in responding to the Government's claim that the Court of Appeals imposed an unduly strict standard of proof on the Government by ruling that its case must be proved "to a reasonable certainty, by the great weight of the credible evidence," declared:

> ". . . there was an inadvertance in articulating the applicable burden of proof, but it seems to have been occasioned by a similar inadvertance by the Government in presenting its case. In any event, the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence. See Lego v. Twomey, 404 U.S. 477, 488-489 (1972). . . ." 415 U.S. at 177-178, footnote 14. (Emphasis added.)

The "prepondernce" standard is subscribed to by most Federal courts[1] and by a majority of state courts.[2]

Referring to appellant's argument wherein he attempts to equate a consent to search with a waiver of constitutional rights, the United States Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), dealt with a consent to search situation; and specifically rejected the concept that a "consent" is a "waiver" of a person's rights under the Fourth and Fourteenth Amendments, and thus did not require that the State, in order to establish such a waiver, demonstrate an "intentional relinquishment or abandonment of a known privilege."

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1 See United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975); United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973); United States v. O'Looney, 544 F.2d 385 (9th Cir. 1976), cert. denied 429 U.S. 1023; United States v. Haskins, 536 F.2d 775 (8th Cir. 1976); United States ex rel. Rigsbee v. Parkinson, 407 F.Supp. 1019, affirmed 545 F.2d 56 (8th Cir. 1976); Burbank v. Warden, 535 F.2d 361 (7th Cir. 1976); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976); United States v. Buie, 538 F.2d 545 (4th Cir. 1976); United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976); United States v. House, 524 F.2d 1035 (3d Cir. 1975); United States v. Boston, 508 F.2d 1171 (2d Cir. 1974), cert. denied 421 U.S. 1001.

2 See State v. Caproni, 19 Or.App. 789, 529 P.2d 974 (1974); State v. Stephenson, 535 P.2d 940 (Kan. 1975); People v. Shearer, 508 P.2d 1249 (Colo. 1973); State v. Arrendondo, 526 P.2d 163 (Ariz. 1974); State v. Braun, 509 P.2d 742 (Wash. 1973); People v. Pickerd, 336 N.E.2d 778 (Ill. 1975); Watson v. State, 330 N.E.2d 781 (Ind. 1975); State v. Iowa Dist. Ct., 236 N.W.2d 54 (Iowa 1975).

In its opinion, the Court made several specific declarations which refute appellant's argument that this Court should adopt the "knowing, intelligent and intentional waiver of rights" approach to a consent search.[3] At 412 U.S. 237, the Court said:

> "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. . . ."

Continuing, the Court said:

> ". . . There is a vast difference between those rights that protect a fair trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures . . . ." 412 U.S. at 218.
>
> "The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. . . Nor can it even be said that a search, as opposed to an eventual trial, is somehow 'unfair' if a person consents to a search. . . ." 412 U.S. at 242.
>
> ". . . a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions. . . ." 412 U.S. at 245.
>
> ". . . In short, there is nothing . . . that justifies, much less compels, the easy equation of a knowing waiver with a consent search. . . ." 412 U.S. at 246.

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3 Appellant cites Blain v. Pitchness, 486 P.2d 1242 (Calif. 1971); State v. Harwood, 495 P.2d 160 (Idaho 1972); Lightfoot v. State, 520 P.2d 955 (Nev. 1974), which adopts the "clear and convincing" test based on a "knowing, intelligent and intentional waiver approach."

> ". . . We [therefore] hold. . . that unless the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. . . ." 412 U.S. at 248-249.

Thus, the Court not only refused to equate a knowing waiver of a constitutional right with a consent search, but also declared that the voluntariness of consent is to be determined from the totality of the surrounding circumstances.

In United States v. Watson, 423 U.S. 411, 424 (1976), the United States Supreme Court set forth several factors to be considered in determining whether a consent was voluntary; were there overt acts or threats of force proved or claimed; were any promises made or subtle forms of coercion used; was the consent given on a public street, and not in the confines of a police station; was the defendant a newcomer to the law; was he mentally deficient; was he unable in the face of custodial arrest to exercise a free choice?

Respondent submits that not only did the trial court use the proper standard in determining whether the consent of appellant was voluntary, but also, under Scheckloth and Watson, supra, in light of the totality of the surrounding circumstances, evidence was presented which would substantiate the court in finding that appellant's consent was voluntary. The credibility was for the judge who saw the witnesses. His findings must stand

unless shown to be clearly erroneous.

B

BASED ON EVIDENCE CONTAINED IN THE RECORD, THE SEARCH AND SEIZURE CAN BE SUSTAINED ON GROUNDS OTHER THAN A CONSENT SEARCH.

Appellant argues in his reply brief that even if the trial court is sustained in its ruling that a valid consent was given, the consent to search is different from a consent to seize, and the items seized (crowbar and handcuffs) which were used as evidence against him were inadmissible as an unlawful seizure. He further says that there were no "exigent circumstances" to justify a search based on probable cause or based upon the "plain view" theory.

Respondent submits that the evidence contained in the record establishes not only a consent to search and seize, but also justifies the search and seizure on grounds of (1) plain view; (2) search incident to arrest; and (3) probable cause.

The Utah Supreme Court has spoken on many occasions to the subject of warrantless searches, specifically automobiles. In State v. Farnsworth, 30 Utah 2d 435, 519 P.2d 244 (1974), this Court said:

> ". . . constitutional protections are against an 'unreasonable' search, that is, one which is without adequate justification and would constitute some offensive intrusion upon a person's sense of peace, dignity and security, in respect to his person, property or effects. . . ." 519 P.2d at 246.

The Court then quoted from State v. Richards, 26 Utah 2d 318, 489 P.2d 422 (1971):

> "'The question to be answered is whether under the circumstances the search or seizure is one which fair-minded persons, knowing the facts, and giving due consideration to the rights and interests of the public, as well as to those of the suspect, would judge to be an unreasonable or oppressive intrusion against the latter's rights . . . ." 519 P.2d at 246.

The Court also noted and recognized, as have courts of all federal[4] and state jurisdictions, that:

> ". . . for obvious reasons, the search of an automobile is permitted more liberally than a home or other stationary structure. . . ." 519 P.2d at 247.

Bearing this in mind, respondent submits that the crowbar observed by Sgt. Hayward upon his approach to appellant's Volkswagen was in plain view and could, in light of the totality of the circumstances of the existing situation, be seized on the theory that the item was in plain view and was possible contraband, and no search occurred.

The facts reveal that the appellant had tried to "outrun" the officer at 2:30 a.m., with no headlights on, in a residential area. After bringing the appellant to a halt, the officer noticed from his view outside the car that a crowbar was lying on the floor of the back portion of the car and the backseat was in a state of disarray. Officer Hayward could easily have suspected that a crowbar[5] could have been

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4 United States v. Chadwick, 433 U.S. 1, 3 (1977); Cardwell v. Lewis, 417 U.S. 583, 590 (1974); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

5 Under the old burglary statute, Utah Code Ann. § 76-9-8 (1953), now repealed, "crowbar" was specifically mentioned as a burglary tool. The new section specifies "instrument, tool, device, article,"etc. Utah Code Ann. § 76-6-205 (Supp. 1977).

used in the "burglary business" or that the crowbar might be used as a weapon against him, particularly under circumstances such as existed. Be that as it may, this Court has held that articles of contraband or other incriminating evidence in plain view are subject to seizure. State v. Kaae, 30 Utah 2d 73, 513 P.2d 435, 437 (1973); State v. Martinez, 28 Utah 2d 80, 498 P.2d 651, 652 (1972); State v. Sims, 30 Utah 2d 251, 516 P.2d 354, 357 (1973); State v. Wettstein, supra at 501 P.2d 1088; State v. Folkes, 565 P.2d 1125 (Utah 1977). In Sims, this Court stated:

> ". . . no constitutionally protected right of privacy was violated when the officers looked through the window of the vehicle. . . ." 561 P.2d at 1088.

Officer Hayward had a right to look through the window of the car, and even to search the immediate area of the car which may have contained weapons which could be used to aid the appellant in escaping or in harming Officer Hayward, or other instrumentalities of crime. Chimel v. California, 395 U.S. 752 (1969); Chambers v. Maroney, 399 U.S. 42 (1970). Officer Hayward had a right to be where he was. Goldman v. United States, 316 U.S. 129 (1942); Harris v. United States, 390 U.S. 234 (1968). Having observed the crowbar, the "wedge was opened" whereby he could search for further contraband. United States v. Johnson, 506 F.2d 674 (8th Cir. 1974); cert. denied 95 S.Ct. 1579 (1975). See also 10 A.L.R.3d 314-354, and annotations for numerous state and federal cases

holding that the search of an automobile following an arrest for traffic violations is valid, particularly in circumstances such as the present case where contraband was seen in plain view under suspicious circumstances, and a further search revealed more contraband. Also see State v. Walker, 490 S.W.2d 332 (Mo.App. 1973), where defendant was stopped for a traffic violation and the officer noticed contraband on the front seat. The court upheld the resulting search of the car and the persons in it.

By observing the crowbar and the disarray of the back seat interior of the car, particularly in light of the fact that it was 2:30 a.m. in the morning and Officer Hayward had just chased appellant with his red light on after observing appellant "speed away from him" without his headlights on, probable cause existed not only for the further search which revealed the handcuffs, but the initial viewing and seizure as well. As was stated in State v. Shields, 28 Utah 2d 405, 503 P.2d 848, 849 (1972):

> ". . . The right to search and the validity of the seizure are not dependent on the right to arrest but are dependent on the reasonable cause the seizing officer has for the belief that the contents of the automobile offend against the law. . . ."

Certainly Officer Hayward under the circumstances had justificiation for such a belief. A reasonably alert police officer would believe that he was dealing with more than just a mere traffic violation.

As the United States Supreme Court said in Adams v. Williams,407 U.S. 143, 149 (1972), concerning

probable cause:

> "'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Brinegar v. United States, 338 U.S. 160, 175 (1949).

Respondent submits that based upon the "practical considerations of everyday life," particularly in light of the circumstances which were facing Sgt. Hayward, the actions he took, incorporating the actions taken by Deputies Twitchell and Ondrack, were not unreasonable in terms of the Fourth Amendment, with or without the consent of appellant.

POINT III

THE CROWBAR AND HANDCUFFS WERE PROPERLY RECEIVED INTO EVIDENCE BECAUSE THEIR RELEVANCY TO THE ISSUES IN CONTROVERSY OUTWEIGHED ANY PREJUDICIAL EFFECT.

Appellant has challenged the admissibility of the crowbar and handcuffs taken from his car the night of August 16, 1975, as being "too remote and irrelevant." He further argues that any relevancy is outweighed by the prejudicial effect of the admission of such evidence, as the events of August 16, 1975, in which appellant admitted to other unlawful activity were "opened up" by the admission of the evidence.

Respondent submits that the evidence was relevant to show that facts in controversy did or did not exist depending on the weight which the trier of fact placed upon the evidence itself; that the evidence

was not too remote in time to be irrelevant or prejudicial; and that the evidence, when viewed in relation to the totality of the circumstances involved in the case, was not prejudicial.

The facts presented at trial show that the victim of the crime was handcuffed by her assailant and was assaulted with a crowbar-type instrument (R.395,397-400). The victim described the bar as having four or six sides and about one-half inch thick (R.397-399). She testified that she thought the instrument was a crowbar because her father had a crowbar which she had "felt" before and the bar which she had grabbed, trying to prevent herself from being struck felt very similar to her father's crowbar (R.399).

On August 16, 1975, appellant was stopped for traffic violations, whereupon his car was searched and a crowbar type instrument and a pair of handcuffs were seized. Appellant objected to the admission of the items seized, and the trial court overruled appellant's objection, saying:

> "The exhibits . . . are received only for the purpose of tending to show some connection between the defendant and the event that is in issue, here. The question of weight, of course, is reserved." (R. 1279; T. 182-38).

A trial court is given broad discretion in receiving evidence in a trial, State v. Anderson, 561 P.2d 1061 (Utah 1977); State v. Tuggle, 28 Utah 2d 284, 501 P.2d 636 (1972); and the discretion of the trial court will not be overruled except upon a showing of abuse. State v. Madsen, 28 Utah 2d 108, 498 P.2d 670 (1972).

The question then is whether the trial court abused its discretion in ruling that the evidence was relevant to the

issues in dispute and admissible.

As to what constitutes "relevant" evidence, there is no concrete standard although statutory law and caselaw provides some guidelines. Rule 1(2) of the Utah Rules of Evidence defines "relevant evidence" as ". . . evidence having any tendency in reason to prove or disprove the existence of any material fact." This Court in State v. Neal, 123 Utah 93, 254 P.2d 1053 (1953), rehearing den., 1 Utah 2d 122, 262 P.2d 756, cert. den. 347 U.S. 963, cert. den. Neal v. Graham, 348 U.S. 982, stated:

> ". . . Evidence of any fact which rationally tends to prove any material issue is admissible unless forbidden by some specific rule, and should be received if offered for an admissible purpose although it would be inadmissible if offered for some other purpose." 254 P.2d 1056.

Also, in State v. Olson, 75 Utah 583, 287 Pac. 181 (1930), this Court said:

> "Evidence that reasonably tends to establish the facts sought to be proved is relevant and admissible . . . ." 287 Pac. at 185.

Relevant evidence was further defined in State v. Bullocks, 574 P.2d 243 (Kan.App.1978), and State v. Baker, 549 P.2d 911 (Kan. 1976). In Bullocks, the Kansas Supreme Court said:

> "Evidence is relevant if it renders the desired inference more probable than it would be without the evidence, or if it has any tendency in reason to prove any material fact. . . ." 574 P.2d at 247.

In Baker, the Court said:

> "'[R]elevancy [is] a matter of logic and experience and not of law. . . If an item of evidence tends to prove or disprove a proposition, it is relevant to that proposition. . . .' [Citation omitted.]

> The standard of relevancy is whether the evidence offered renders the desired inference more probable than it would be without the evidence. . . ." 549 P.2d at 916.

Applying the language of the Utah and Kansas Supreme Courts, it is apparent that both items seized in the instant case were relevant. Certain material issues in the case were whether appellant handcuffed Carol DaRonch and then assaulted her with a crowbar, and whether the crowbar found in appellant's car was the one used to assault her. It is uncontested that Carol DaRonch was handcuffed and assaulted with a crowbar-like instrument by a man who fit the description of the appellant and who drove a Volkswagen light in color, with dents in the right side, and a rip in the top of the back seat. Approximately nine months later the appellant was stopped while driving a Volkswagen very similar in appearance (if not in fact the same one) to the one described by Miss DaRonch as the car in which she was abducted. In the car were found a matching crowbar and another set of handcuffs. The question becomes whether the crowbar and handcuffs, as a matter of "logic and experience," have any tendency to prove the material fact in issue, or whether they render a "desired inference more probable than it would be without the evidence." State v. Bullocks, supra. Respondent submits that it does on both counts and thus was relevant.

Experience bears out the fact that only a minority of people carry handcuffs. Most people who do carry handcuffs on their person or in their car do so in connection with their work. Experience also tells us that most people who carry

crowbars in their automobiles do so for the express purpose of changing a tire and thus, generally keep a crowbar with other tire accessories in the trunk rather than on the floorboard of the back seat. Logic tells us that if a man has a crowbar and handcuffs in his car, it is plausible that he also had them in his car at a previous time. It is also reasonable to infer that if a man loses an item, he may desire to replace that item and may in fact actually do so. Thus, both the crowbar and the handcuffs have some tendency to render the material issue more probable than it would be without them. With the introduction into evidence of the items, it becomes more probable, especially when considering the totality of the circumstances, that the appellant was in fact the assailant of Carol DaRonch. Thus, the items were relevant.

The items seized are also relevant because they aid the truth-finding process relative to a material issue, even though the items themselves are only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable. In the present case, the relevancy of the items, when viewed alone, may appear minimal; yet when they are added together with other circumstances, they present a strong inference, at the very least, that the appellant assaulted Carol DaRonch. In Johnson v. State, 562 P.2d 1294 (Wyo. 1977), the court said:

purpose. He pointed it at the struggling girl and told her he would blow her head off if she did not submit to him.

Appellant also had the iron bar. Like the gun, this may have been carried to subdue a victim in the eventuality it was needed, and it was eventually used.

Respondent submits that the evidence sufficiently demonstrates that appellant planned to kidnap a girl and planned to use deadly force upon her if she attempted to escape from him. It is a reasonable presumption that appellant carried the gun and the iron bar for the purpose of preventing the victim's escape by use of a deadly weapon. Appellant failed to rebut the legal presumption that he intended the natural and probable consequences of his actions, so the trial court had ample evidence with which to find the presence of intent to commit aggravated assault.

Second, the facts reveal that at least a simple kidnapping commenced at the Mall. However, during the course of that kidnapping appellant threatened the victim with the gun and tried to hit her with the iron bar. Thus, the crime of simple kidnapping, which was still in progress, was elevated to aggravated kidnapping because of the overt action of appellant showing his specific intent to commit aggravated assault at the later time. It is arguable that under Section 76-5-302 Carol DaRonch was not "restrained against her will" until the handcuffs were placed on her wrists. Trying to escape, she was then threatened with the gun and subsequently assaulted with the iron bar. Thus, even though the simple kidnapping had been committed earlier, aggravated kidnapping occurred when the cuffs were placed on her and she was threatened by the appellant.

Secondly, as to the intent "to inflict bodily injury," respondent submits the same logic applies as heretofore outlined. A few cases have shed some light on the question of intent as it relates to aggravated kidnapping with intent to inflict bodily harm. First, in State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937), this Court held that it was not necessary that bodily harm was actually inflicted to prove a charge of assault with intent to do bodily harm.

In State v. Peterson, supra, this Court again said:

> ". . . it seems almost too obvious for comment that the intent to do bodily harm could reasonably be inferred from the 'slashing' at another person with a hunting knife." 453 P.2d at 697.

Also, in State v. Barry, 216 Kan. 609, 533 P.2d 1308 (1975), the Kansas Supreme Court rejected the very argument which appellant presents to this Court, i.e., that the proper intent at the proper time is missing in this case. In Barry, defendant abducted and raped a 12 year old girl. He argued that the State failed to show that he intended "bodily harm" to his victim at the time he abducted her, as required by Kansas statute.[9] He also claimed that he did not in fact inflict "bodily harm" upon her as required to make the kidnapping aggravated under Kansas law.[10] In rejecting defendant's arguments, the Court said:

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9 Kansas Statute Annotated 21-3420(c) (1974), "Kidnapping. Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person: (2) To inflict bodily injury or to terrorize the victim or another. . . ."

10 Kansas Statutes Annotated 21-3421 (1974). "Aggravated Kidnapping. Aggravated kidnapping is kidnapping, as defined in Section 21-3420, when bodily harm is inflicted upon the person kidnapped. . . ."

> ". . . The argument, although ingenious, is not sound. We have consistently held that rape supplies the element 'bodily harm' required to make a kidnapping first degree under our prior statutes. [Citations omitted.] We think it likewise constitutes 'bodily harm' so as to make a kidnapping 'aggravated' under our present law. And we think the subsequent events provide ample basis for a ready inference that defendant intended the rape of this little girl when he lured her into his car with a promise of a modeling job.
>
> He also complains that the trial court did not make a specific finding as to whether defendant's intent was to inflict bodily injury on Miss K. or mainly to terrorize her. The evidence indicates he actually did both. . . ." 533 P.2d at 1316.(Emphasis added.)

Certainly under the factual situations presented and by using reasonable inferences based upon the facts in the present case, it can be concluded beyond a reasonable doubt the trier of fact could easily have found the requisite intents present based upon the evidence as he saw it. As such, respondent submits that appellant committed aggravated kidnapping, and that the evidence and reasonable inferences therefrom support the verdict.

POINT VI

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS NOT PREJUDICED BY QUESTIONS, COMMENTS AND ARGUMENTS BY THE PROSECUTOR.

Appellant alleges that the State committed error during closing argument and requests reversal on the following grounds: (1) that it was prejudicial for the prosecution to utilize a "statistical probabilities" approach on the issue of identification in his closing argument; (2) that it was prejudicial for the prosecution to personally attest to the

veracity and lack of bias of police officers who were the State's witnesses; (3) that it was prejudicial for the prosecution to comment on the fact that appellant did not go to the police with an explanation after he was charged with a serious crime (R.799, 800). No record was made of final argument; however, at the time of sentencing, the court allowed defense counsel to raise any claimed errors for the record and at that time he made the above claims. The court agreed for the record that the prosecutor had done all of the above.

Referring to the prosecutor's comment that "If I [prosecutor] were charged with such a crime, I would have done anything in my power to go over and convince the police that they had the wrong man," (R.800), the trial judge said:

> "Let me say at this point the Court gave it no credence whatsoever. I do recognize that a defendant has no obligation in a criminal case to say anything or do anything whatsoever, that the entire burden is upon the State of Utah, and I did not give that argument any weight." (R.800) (Emphasis added.)

Regarding the comment concerning the truthfulness of the police officers, the following colloquy occurred:

> "MR. O'CONNELL: Also, in rebuttal, Mr. Yocum stated that he had worked with the law enforcement officers who were involved in the investigation of this case, that he worked with these individuals for years and knew them to be men who worked as hard to exonerate the innocent as to convict the guilty, and that they were honest, sincere law enforcement officers, and he was basing this on his personal knowledge of the individuals involved.
>
> In fact, I took it as somewhat of a campaign speech directed, perhaps, to the law enforcement officers in the room rather than to Your Honor, but I'd also like that in the record.

> THE COURT: Yes, the record will reflect that there was some mention made about that in closing argument. But again--
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> MR. O'CONNELL: I realize, I didn't think that it was making too many points with you.
>
> THE COURT: I should note that, of course, both parties are entitled to argue, give argument as to the weight that should be given testimony. And I suppose the matters that are relevant to weight are appropriate. But again, the Court gave that kind of an argument very little weight, if any." (R.800-801). (Emphasis added.)

This Court has set forth the criteria for determining whether comments or arguments by the prosecutor amount to error and whether that error is so prejudicial as to require reveral. In State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973), this Court stated:

> "Counsel for both sides have considerable latitude in their arguments to the jury; they have a right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom. The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks. . . ." 513 P.2d at 426.

This Court also stated that:

> ". . . The determination of whether the improper remarks have influenced a verdict is within the sound discretion of the trial court. . . If there be no abuse of discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment. . . ." Id. (Emphasis added.)

See also State v. Winkle, 535 P.2d 82 (Utah 1975); and State v. Johnson, 25 Utah 2d 160, 478 P.2d 491 (1970).

In reviewing allegations of prosecutorial misconduct, this Court has also said:

> ". . . Error will not be presumed nor can we presume misconduct on the part of counsel. . . ." State v. Cooper, 201 P.2d at 764 at 771 (Utah 1949).

Moreover, this Court has repeatedly stated that great deference will be given to the judgment of the trial court. In State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974), this Court concluded:

> "Due to his advantaged position and consistent with his responsibilities as the authority in charge of the trial, the inquiry is necessarily addressed to the sound discretion of the trial court. . . Inasmuch as this is his primary responsibility, when he has given due consideration and ruled upon the matter, this court on review should not upset his ruling unless it clearly appears that he has abused his discretion." 30 Utah 2d 367, 369-70.

This concept has important ramifications in the present case since there was no jury. The trial court did not have to determine how an improper argument may have affected a jury. He had the much easier and more certain job of merely determining how he was affected. Certainly his declaration that he was unaffected should not be questioned. This Court has in fact noted a presumption, in non-jury cases, that the trial judge disregards any improper material.

> "The court, sitting without a jury is presumed to have disregarded any irrelevant, immaterial or other evidence not pertinent to the issue." State v. Burke, 102 Utah 249, 129 P.2d 560 (1942).

This position has been reaffirmed in several cases: State v. Meacham, 23 Utah 2d 18, 20-21, 456 P.2d 156 (1969); and State v. Park, 17 Utah 2d 90, 404 P.2d 677 (1965). In Parks, this Court said:

> ". . . it can be safely assumed that the trial court will be somewhat more discriminating in appraising both the competency and the effect properly to be given evidence. The rulings on evidence are looked upon with a greater degree of indulgence when the trial is to the court than when it is to the jury." 17 Utah 2d at 94.

It should be noted that in each of the above cases the defendant claimed prejudicial evidence. The present case merely involved closing argument rather than evidence and thus its impact on the judge as trier of fact is further minimized.

In reviewing the statements made by the prosecutor, it is clear from the record that no prejudice resulted to the appellant, particularly when reading not only the remarks of the trial judge, but the remarks of appellant's counsel as well. When referring to the prosecutor's remarks which vouched for the credibility of the police officers, the court stated that he gave that particular argument very little weight, if any. He preceded his remarks by saying that ". . . matters [in closing argument] that are relevant to weight are appropriate. . . ." (R.800-801). Appellant's own counsel even conceded that he did not think that the remarks by the prosecutor regarding the credibility of certain police officers made too many points with the judge and that he [appellant's counsel] took the remarks as somewhat of a campaign speech directed to law enforcement officers in the room rather than directed to the judge.

Regarding the remark by the prosecutor implying that the defendant should have gone to the police to convince them they had the wrong man, the trial judge expressly said that he neither gave that remark any credence whatsoever, nor any weight.

Respondent submits that neither of these remarks by the prosecutor affected the verdict rendered by the trial judge, nor adversely affected appellant's right to a fair trial. Case-law supports this position.

In State v. Boone (Case No. 15275, decided July 11, 1978), this Court held that a remark by the prosecutor emphasizing one of the reasons suggested by defense counsel as to why the defendant did not take the stand was not improper.

In State v. Martinez, 23 Utah 2d 62, 457 P.2d 613 (1969), the defendant testified in his own behalf, claiming the defense of alibi. The prosecution commented that defendant had previously told a different story. This Court held that error not to be prejudicial (the comment was in front of a jury).

In State v. Long, 29 Utah 2d 177, 506 P.2d 1269 (1973), it was held that the principle of law that the prosecutor may not comment on the failure of the accused to testify was inapplicable where the defendant took the witness stand in his own behalf. Though a different constitutional question was involved in Long (privilege against self-incrimination at trial), respondent submits the same principle is applicable in the present case. Here, the prosecutor's remark was directed at appellant's failure to try to convince the police before trial that they had the wrong man (right to remain silent, etc. as per Miranda). The appellant took the stand at trial in his own behalf and admitted that he had lied to police in pre-trial statements (events of night of August 16, 1975). There was also demonstrative evidence that appellant's version of the events relative to the repair work at the gas station on November 8, 1974, was highly questionable at best. Thus, where

appellant had admittedly made false statements to police and his version of other events was highly questionable and highly contradictory, respondent submits that the error of the prosecutor's remark, if error at all, was at most minimal, and certainly not prejudical, especially since the case was tried to the trial judge.

In State v. Moraine, 25 Utah 2d 51, 475 P.2d 831 (1970), the prosecutor made a statement in closing argument that the defendant, after being given the Miranda warnings, made no denial or response. The defendant did not take the witness stand, and claimed that the comment by the prosecutor was a comment on his failure to take the witness stand. In denying the claim, this Court said:

> "The defendant now claims that this was a comment on his failure to testify. We do not regard it as being a comment on his failure to take the witness stand. So far as appears, it was simply a statement of what transpired at the time of arrest.
>
> Such statements might under some circumstances be error, but in this case even if it were error, it is difficult to see how it would be prejudicial to the defendant because the evidence was so clear that a jury could hardly fail to be convinced beyond any preadventure of a doubt that the defendant. . .committed the robbery." 475 P.2d at 833.

The Moraine case appears very similar to the present case but seemingly would present a stronger case for reversal, since the defendant did not take the stand in his own behalf. Nor was there any evidence that the defendant had lied to the police. In the present case, the appellant took the witness stand and as noted before, admitted that he lied to the police.

In State v. Holsinger, 115 Ariz. 89, 563 P.2d 888 (1977), the defendant had been given the Miranda warnings and had lied to the police. The prosecutor brought such information to the attention of the jury and by questioning and argument commented on the fact that the defendant told one story to the police officers and another on the witness stand. The Arizona Supreme Court said:

> ". . . As to the closing argument we have stated:
>
> 'The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks. [Citations omitted.]
>
> The prosecution merely suggested that he could have told the truth rather than lying. [The defendant] having lied, then later admitting he lied, the prosecutor could properly ask why he didn't tell the truth in the first place. We find no error.'" 563 P.2d at 893-894. (Emphasis added.)

Respondent submits that the cases heretofore mentioned present a much stronger basis for a finding of prejudicial error than in the case at bar. When viewing the record, it cannot be said even in uncertain terms based on conjecture that the remarks of the prosecutor on which appellant bases this portion of his appeal can be said to have affected the verdict.

Attention is called to appellant's Reply Brief, p. 16, wherein he says that the prosecutor's personal attesting to the veracity and lack of bias of the police officers was more damaging in front of the judge than a jury because the judge not only worked on a regular basis with the prosecutor but was a

classmate, friend and close political ally of his. Appellant then says, "Appellant was aware of these relationships when he waived the jury and would not expect them to affect the Court's consideration of the evidence." Respondent submits that there is absolutely no evidence in the record of any of these relationships which appellant asserts, nor any evidence that if such relationships did exist, that they affected the verdict in any way. Furthermore, this Court cannot go outside the record in reviewing this appeal, and thus any alleged relationship between the trial judge and prosecutor which are not contained in the record should not be considered by this Court.

Finally, respondent submits that the statistical probability argument utilized by the prosecution is perfectly sound. The closing argument was that there were various characteristics about appellant which were identical to characteristics of the victim's assailant. Each of the characteristics is assigned a probability based on its occurrence in the general population and then the probabilities are multiplied together.

Such an approach is commonly used in fingerprint identification. If two fingerprints are examined and an area of one matches an area of the other, there is a probability that the two are identical. However, if three areas of the first match three areas of the second, the probability they are the same becomes greater. When ten or more areas match, the chance of identity becomes very certain.

This type of testimony or argument is also common

in cases where blood type is being used as circumstantial evidence of identity, or where glass, dirt, fibers, etc. are being matched in the laboratory (e.g., see People v. Jordan, 290 P.2d 484 (Cal. 1955)).

Appellant cites a California Supreme Court case where it was held that a statistical probabilities analysis introduced to the jury as authoritative evidence was prejudicial error warranting a new trial. People v. Collins, 438 P.2d 33 (Cal. 1968). The Collins case is distinguishable in that (1) it was tried before a jury; (2) the prosecutor introduced the statistical analysis as evidence; (3) the prosecution attempted to give the statistical evidence a scientific seal of approval through the testimony of a mathematician.

McCormick on Evidence commented on the Collins case, supra, and stated the following:

> "It is clear that in identification questions, the place of probability theory, or of statistical inference, as the basis of the opinions of experts themselves, or as a course of education for jurors in how to think in the jury room, will not be settled for some time to come." p. 498.
>
> "Nor do the cases mean that. . . counsel may not appeal an argument to the jury's general experience and urge conclusions on them, so long as he does not try to place a scientific seal of approval on results not shown to be scientifically based." p. 499.

In the present case there is absolutely no evidence that the state attempted to try to place such a "scientific seal of approval" on his argument.

Nor did the state introduce the statistical analysis as evidence. The statistical argument was made to a trial

judge, sitting without a jury, in the prosecution's closing argument.

Concluding then, respondent asserts that no error was committed. If the comments of the prosecutor were error, they were minimal and rendered harmless by the trial court's statements regarding the statements. Moreover, when viewing all of the evidence, i.e., the identification, the finding of the crowbar and handcuffs, the bloodstain samples, the strikingly close similarities between appellant's car and the car used in the crime, the lies admitted to by appellant, the inconsistencies of his version of events with evidence produced which was contra, respondent submits that the evidence pointing to the appellant as the assailant of Carol DaRonch becomes overwhelming such as to render any improper comment by the prosecutor non-prejudicial.

POINT VII

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL AND PETITION FOR EXTRAORDINARY RELIEF.

Appellant filed a motion for a new trial or, in the alternative, petition for extraordinary relief with the Third District Court claiming that new evidence had surfaced which he felt was exculpatory, said evidence having allegedly been suppressed by the State prior to and during the trial (R. 974). The underlying facts on this claim are as follows:

On December 19, 1975, appellant filed a pre-trial motion for an order requiring disclosure of evidence which requested inter alia that the court order the Salt Lake County attorney:

> "2. . . . to produce for inspection all written reports in the possession of the State concerning the investigation of this case.
>
> * * *
>
> 4. . . . to disclose to the Defendant any and all evidence which is or may be favorable or exculpatory to the defendant in the defense of the . . . case, including but not limited to, reports concerning the viewing of photographs by Carol DaRonche [sic] and any identification of persons other than the defendant and any occasions Carol DaRonche [sic] was shown photographs of defendant and either made no identification or failed to make a certain identification." (R. 43-44).

At a hearing on the above motion on December 31, 1975, before Judge Peter Leary, the prosecuting attorney responded to the request contained in paragraph 2 of the defense motion as follows:

> "I have already provided to the defendant, and did so prior to preliminary hearing, all written reports in my possession concerning the investigation of this particular case and I believe Mr. O'Connell has already received those items. I have been trying to locate any additional supplemental reports that allegedly existed and if I do discover any further I will provide them to the defense, but at this point I have provided all police reports other than my own work product . . ." (R. 975).

Regarding the request contained in paragraph 4 of the motion, the prosecuting attorney replied:

> "On four, I don't know how to respond to that particular question and request and realizing the status of the law on that, and the requirement of the State to disclose any exculpatory or favorable evidence to the defense, having faced this problem before it's difficult for me, as a prosecutor, to determine what is exculpatory or favorable. I have maintained in this case and still maintain an open file policy with regard to the prosecution, and Mr. O'Connell or Mr. Lubeck [defense counsel] are welcome to go through my file and determine if anything contained therein is exculpatory or favorable. At this point I know of none. If any such evidence does come to light we certainly would disclose it to you.. . ." (R. 976).

Defense counsel then sought to have the order regarding general investigative reports extended to law enforcement agencies as well as the prosecuting attorney, expressing concern that the prosecution may not have received all police reports on the case (R. 977-981). However, the prosecutor resisted this request because there were at least four investigations on Mr. Bundy going on in Utah by different police agencies and there would be a problem separating the investigations on other possible offenses from the instant case. Moreover, the investigations had been "intertwined" within agencies, and thus the defense request would open up information on all investigations to the defense under the guise of looking for exculpatory evidence in

the present case. (R. 981). Judge Leary agreed, stating that unless and until the defense made a specific request for certain evidence, the Court was not disposed to require the prosecutor's office to go on a search to acquire such evidence (R. 983). The Court did order the prosecutor to furnish what evidence he had in his possession (R. 985).

On January 15, 1976, a second hearing on the defense motion for disclosure convened before Judge Leary. Again, as to the request contained in paragraph 2 of the defense motion for police investigative reports, the Court was only willing to order that the prosecutor produce any written investigative reports in his possession regarding the instant case, saying:

> "I'm not going to order him [the prosecutor] to obtain the reports from any and all police agencies of the State of Utah." (R. 990).

The prosecutor then added:

> "I have examined the entire records of the Salt Lake Sheriff's Office, if that's Mr. O'Connell's concern. I know what is contained in that record relating to this particular offense, and I can represent to the court that I have everything in that record pertaining to this particular offense . . . I'm not in the dark . . . and I have provided everything available." (R. 991).

The court then stated that "based on the representation of the county attorney's office the order is that he furnish to you all the information that he has available in his file . . ." (R. 991).

Regarding the request contained in paragraph 4 of the defense motion for favorable or exculpatory material including reports concerning photographic identifications by Miss DaRonch, the prosecutor said that the reports would be included, that he had all of those reports with regard to three (police) agencies involved and would make them available for defense counsel. (R. 992). Also, on January 15, 1976, the prosecutor filed a written reply to the defense motion for disclosure stating with respect to the paragraph 4 request that, "The reports concerning the viewing of photographs by Carol DaRonch have been previously submitted to counsel for the defendant." (R. 50).

On February 13, 1976, a third hearing was convened regarding, inter alia, the defense request for disclosure of evidence. This was an off-the-record conference between counsel and Judge Stewart M. Hanson, Jr., however, what transpired at that conference was later made a matter of record during a hearing on February 17, 1976. The defense had requested Judge Hanson to modify Judge Leary's prior order to have it apply to law enforcement agencies as well as the prosecutor's office. (R. 1289). Judge Hanson recalled that during the off-the-record conference he concluded that "anything that relates to Miss DaRonch in any way from any agency should be turned over to Mr. Yocum (the prosecutor) so he can review it to make a determination whether

there are, in fact, any exculpatory materials which he has a duty to give over to the Defense in this matter." (R. 1291). Judge Hanson then issued a written order on February 17, 1976, directed to the Salt Lake County Sheriff, Captain N. D. Hayward, and others directing them to deliver to the prosecuting attorney, "copies of all reports, memoranda, and correspondence pertaining, in any way, to the investigation of the abduction of Carol DaRonch on November 8, 1974, which may be in your possession or in the possession of any person under your control." (R. 82).

In December of 1975, the defense received from the prosecution a copy of an official police report made by Detective Thompson (R. 983). The report was dated September 1, 1975, the same day that Officer Thompson showed Miss DaRonch twenty-seven photographs including one of Mr. Bundy. Officer Thompson testified both at trial and during the hearing on appellant's motion for a new trial, that he, indeed, made the report on September 1, 1975 (R. 503, 1178). He also testified on two different occasions that the report contained his best recollection of what transpired on September 1, 1975 (R. 860-861; motion to suppress hearing) and (R. 1182; motion for new trial hearing). The report was typed on a "Follow-up Report" form and summarized the events of September 1st relative to the showing of photographs to Carol DaRonch as follows:

> "She went through the stack of pictures and pulled Mr. Bundy's picture out, handed me the stack back and stated, 'I don't see anyone in there.' I then asked her what the one was doing in her hand. She stated, 'Oh, I forgot this,' and handed it back to me. She was questioned as to why she pulled it out. She stated, 'I don't know, it looks something like him. I really don't know, I can't be sure, but it does look a lot like him.' She was asked at this time if she would be willing, if we got a lineup set up, to view the individual in person. She stated that she would be more than willing to and that if she saw the individual in person she felt rather confident that she could identify him." (R. 983).

In January, 1977, appellant was extradited to Pitkin County, Colorado, to face a murder charge. In April, 1977, he successfully applied to the Colorado court to permit him to proceed without counsel. In May, 1977, the Colorado court heard discovery motions filed by appellant, and ruled that the district attorney and appellant should have a meeting to exchange the material ordered disclosed (R. 989). A meeting was subsequently held in Glenwood Springs, Colorado, on May 24, 1977, between Milton K. Blakey, a special prosecutor with the Pitkin County District Attorney's Office; Michael Fisher, an investigator for the district attorney's office; and appellant, pro se.

During the course of this discovery session, Michael Fisher gave appellant a nine page report which Fisher said had been sent to him by Detective Jerry Thompson. The report was described in the Report on Discovery Session on May 24, 1977, by Milton Blakey as "Salt Lake County Sheriff's Office report

No. 74-59463 regarding victim Melissa Smith - 4 pages dated September 10, 1975; 5 pages undated, by Det. Thompson." (R. 993).

The last five pages of this nine page document describe Detective Thompson's search of appellant's apartment on August 21, 1975; summarize a conversation between appellant's counsel and Detective Ben Forbes; summarize a contact made by Detective Thompson with Colorado officials regarding appellant's activities in Colorado; and finally describe the showing of photographs to Carol DaRonch (R. 984-988).

The heading at the beginning of the last five pages of the nine page report reads: "Case Number 74-5943" followed by "Criminal Homicide - Melissa Smith" (R. 984). The relevant portion of the report reads:

> "In going through the pictures, she pulled out Mr. Bundy's picture in her hand, gave the pictures back to this officer, stating, 'I don't see anyone in these that resembles him.' She was asked what the one was doing in her hand. She stated, 'Oh, here.' I asked her if that was the guy or why she pulled it out. She stated, 'I don't know, aah, I guess it looks something like him.' She was asked if she was afraid to identify him, and she stated no. She said, 'That looked maybe something like him,' she really just didn't know, she didn't think she could identify him if she saw him again or not. This is a very poor witness in this detective's opinion, and I don't know if she can identify the individual or if she is scared or what the situation is. As of this date, communication is still going on with several other agencies by the detective and Detective Forbes. They are attempting to come up with a line-up on this

> individual through Bountiful and possibly some of the other states' witnesses coming in. It has not been set up as yet." (R. 987).

Appellant, upon the discovery of the above five-page report, filed a motion for a new trial or, in the alternative, petition for extraordinary relief, claiming that the document contained exculpatory material going to the reliability of Carol DaRonch as an eyewitness and further contained statements which contradicted Officer Thompson's September 1st "follow-up" report on the same incident which the defense had received prior to trial.

During the hearing on appellant's motion for a new trial, Officer Thompson testified that the five-page document was one he had typed up from notes he personally kept during the investigation of the Melissa Smith case (R. 1177, 1182). He testified that the document was not a police report, but was part of a "running narrative" in chronological form and part of a large book which contained his personal notes as to what he was doing in all of the cases he was involved in at that time. (R. 1181). He said he had never given a copy of the document to the prosecutor (R. 1178), because it was his personal notes and because the material contained therein was related more to cases other than the DaRonch case (R. 1180). Also, any matters relating to the DaRonch case contained in the document would have already been turned over to Mr. Yocum in other reports dealing directly with

the DaRonch kidnapping (R. 1180). Significantly, Officer Thompson testified that the five-page document was prepared after September 3, 1975, whereas the follow-up report which was released to the defense was dated September 1, 1975, the same day that the photographic display with Carol DaRonch occurred (R. 1177). Thus, he said the released report was his best recollection of what took place on September 1st (R. 1182). He also said that he never included his personal views about the quality of a witness in an official police report. (R. 1182).

After the above hearing, Judge Jay E. Banks denied appellant's motion for a new trial and petition for extraordinary relief. Judge Bank's entire findings and conclusions are set forth at (R. 1235-1238). In denying the motion, Judge Banks first stated that he had not only considered all of the briefs filed and evidence taken with respect to the motion, but more significantly, had also read the transcripts of all of the hearings of the case to fully acquaint himself with the issues. Secondly, he found that there was not a willful withholding of evidence by either Officer Thompson or by the prosecuting attorney's office. Third, he found that the unofficial report was really part of a lengthy report involving other individuals (i.e. other than the DaRonch case). Fourth, the detective's statement that in his opinion the girl was a very poor witness was immaterial and could not have been admitted into evidence. Fifth,

any inconsistencies between the reports were basically a matter of semantics because at that time, Miss DaRonch admitted she really did not know if appellant was her assailant. In other words, indecision was expressed in both reports. The judge finally noted that he took into account the excellent job of cross-examination conducted by defense counsel in bringing forth all inconsistencies in the victim's photographic identification and that those inconsistencies were thoroughly probed by the defense at trial and thus the newly discovered report would not have made a difference in the outcome of the trial.

Respondent submits that Judge Bank's ruling was proper and was consistent with rulings of the United States Supreme Court and the Utah Supreme Court with respect to the issue of whether to grant a new trial based on newly discovered evidence allegedly suppressed by the prosecution.

In the leading United States Supreme Court case of Brady v. Maryland, 373 U.S. 83 (1963), the defendant prior to trial, had requested the prosecution to allow him to examine a co-defendant's extrajudicial statements. Several statements were shown to him, but one, in which the co-defendant admitted the actual killing, was withheld by the prosecution and did not come to the attention of the defense until after trial and after appeal. This was a death penalty case and the Court held that:

> " . . . the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. (Emphasis added)

The difficulty with the broad holding in the Brady case is that it did not specify how general or specific the defense request had to be, nor did it specify what constitutes "suppression of evidence," what is considered "favorable" evidence, and what type of material evidence goes to the "guilt or punishment" of an accused (i.e. does it also include impeachment evidence, character evidence, etc.?). Thus, the courts have had a difficult time applying Brady to the various situations where favorable evidence might not be turned over to an accused. However, it may at least be said that the main requirement of Brady is that the claimed suppressed evidence must be shown to be material to the guilt or punishment of the accused before a new trial will be granted.

Judge Banks in the instant case considered the allegedly suppressed evidence in the context of the total record and recognized that the evidence was more in the nature of collateral impeachment evidence going only to the credibility of the identification testimony of Carol DaRonch on September 1, 1975. He then noted that the witness, in both the released report and the suppressed report was characterized as uncertain in her identification and in the final analysis she really did not know if the individual in the photograph was, in fact, her assailant and she so testified at trial as did Officer Thompson. Thus, the suppressed evidence was of minimal value even as impeachment evidence and was so collateral that it could hardly be characterized as material to appellant's guilt.[11]

In Moore v. Illinois, 408 U.S. 786 (1972), the United States Supreme Court attempted to clarify its position in Brady.

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11 The Eighth Circuit Court of Appeals construed the Brady case in a case very similar to the instant situation. In Evans v. Janing, 489 F.2d 470 (8th Cir. 1973), a police sergeant's report on a robbery indicated that one eyewitness was unable to identify the defendant from certain color photographs shown to the witness seven days after the robbery. The defendant claimed that the failure to produce the police report deprived him of due process of law. In rejecting appellant's claim the court said that the sole purpose of the police report would have been to impeach the testimony of the key witness. The court further said that suppressed impeachment evidence requires a higher standard of materiality than would be imposed for evidence directly related to guilt. The court concluded its opinion by declaring: ". . . setting aside a conviction is only called for when there is 'a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'" 489 F.2d at 477.

The Moore case, like the present case, involved evidence, allegedly suppressed, which went to the credibility of an identification witness. Prior to trial, the defense moved for disclosure of all written statements taken by the police from any witness. The state agreed to furnish existing statements of prosecution witnesses. On post-conviction relief, the defendant cited six examples of evidence not disclosed by the prosecution, one of which was a photographic identification where one of the witnesses to the crime did not recognize the defendant's picture at the photographic identification and, in fact, identified a different person. The defendant argued that the state failed to produce a pretrial statement which contradicted one of the witness' identifications and alleged that the evidence not produced was "material" and would have been helpful in his defense.

The Court stated that:

> "The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured." Id. at 794-795.

The Court then noted that the prosecution at trial submitted his entire file to the defense. The prosecutor had no recollection that the alleged suppressed statement was in his file. The statement was therefore either in the file and not noted by the defense or it was not in the possession of the prosecution at the trial. The Court then stated:

> "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Id. at 795.

The Court noted that this was merely a situation of mistaken identity and the added evidence would not have significantly impeached the witness' testimony if at all. Id. at 796. The Court then held that in the light of all the evidence, the suppressed misidentification evidence was not material to the issue of guilt. Id. at 797.

The numerous similarities of the Moore case with the instant case are readily apparent. Moore's request for "written statements taken by the police from any witness" is comparable to Mr. Bundy's request for any written reports concerning the investigation of the case and any favorable or exculpatory evidence including reports concerning photographic displays to the victim. The prosecutor had agreed to furnish the evidence in both cases and in fact submitted his entire file to the defense. In each case a police report which the prosecutor was unaware of later surfaced. (Although, in the instant case, it is not entirely clear whether the suppressed document could even be considered an official police report in the traditional sense of the word.) The suppressed evidence in each case involved photographic identifications where the witness did not make a positive identification. In fact, in Moore, the suppressed report revealed much more impeachable evidence that the witness not only did not recognize the defendant, but even selected another individual as the assailant. In the instant case, both of the reports and the victim's and Officer Thompson's testimony throughout the

proceedings were consistent in showing that no positive identification was made by Carol DaRonch on September 1, 1975. In both cases the added evidence "would not have significantly impeached the witness' testimony if at all."

Respondent submits that under the facts of the instant case, like in Moore, there should be "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work," especially given the fact that Mr. Bundy was the subject of so many different police investigations where police files of different law enforcement agencies became "intertwined" and the officers' "personal" reports were so voluminous that personal chronological "books" had to be kept by individual officers such as Detective Thompson. Moreover, since the "suppressed evidence" was only minimal impeachment evidence, respondent submits the conclusion reached in Moore should apply. Namely, that in view of all the evidence, the suppressed identification evidence "was not material to the issue of guilt" and thus, Judge Bank's denial of a new trial was proper.

In 1976, the United States Supreme Court again attempted to explain its decision in Brady. In United States v. Agurs, 427 U.S. 97 (1976), the defendant had claimed self-defense. After trial, she learned that the victim had a prior criminal record of assault and carrying a deadly weapon and this record would have supported the defense claim that she had acted in self-defense. There had been no specific request for the information by the defense and the prosecution did not voluntarily

disclose the information. The lower court denied the motion for a new trial stating that the victim's criminal record was not material to the defendant's guilt because it shed no new light on the victim's character that was not already apparent from the evidence revealed at trial. The Court of Appeals reversed, holding the evidence to be material and ordered a new trial because the jury "might have returned a different verdict had the evidence been received." The United States Supreme Court reversed holding that where the criminal record was not requested by the defense, and the report gave no rise to an inference of perjury, and the trial judge was convinced of the defendant's guilt beyond a reasonable doubt after considering the new evidence in the context of the entire record, the trial court's ruling was reasonable and the prosecutor's failure to tender the criminal record did not deprive the defendant of a fair trial. The court noted that its decision rested on (1) a review of the facts, (2) the significance of the failure of defense counsel to request the material, and (3) the standard by which the prosecution's failure to volunteer exculpatory material should be judged. Id. at 99.

The Agurs Court said that the rule of Brady arguably applies in three quite different situations. First, is where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and the prosecution knew or should have known of the perjury. The Court concluded that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is "any

reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. at 103. Thus, a strict standard of materiality applies. (Citing Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Alcorta v. Texas, 355 U.S. 28; Napue v. Illinois, 360 U.S. 264; Miller v. Pate, 386 U.S. 1; Giglio v. United States, 405 U.S. 150; and Donelly v. DeChristoforo, 416 U.S. 637, as example cases.)

Appellant, in Point IV of his supplemental brief, attempts to show that this was the situation in the instant case alleging Officer Thompson perjured himself when he testified at trial that Carol DaRonch, during the September 1, 1975, photographic identification, said that Mr. Bundy's photograph looked "a lot" like her assailant whereas the "suppressed" report stated that Miss DaRonch said the photo looked "something" like the assailant. Respondent submits that when Officer Thompson's testimony at the motion to suppress hearing and at trial is read in its entirety, it clearly shows that he testified that he was uncertain what Miss DaRonch said regarding the photograph, and that clearly no perjury occurred.

At the motion to suppress hearing, Officer Thompson testified: "She says, 'This looks an awful lot like the individual. I'm not sure, but this could be the individual.' Or similar to that. I don't recall the exact wording, but it was similar to that." (R.869-870).

At trial, he testified: "She states, 'Yes, I believe that looks a lot like the individual, but I'm not sure.'" (R.497).

> "Even though none of the circumstances standing alone might be sufficient to support a conviction, it has been said:
>
> '. . . The nature of circumstantial evidence implies the weaving of a fabric of known facts, which may be inconsequential alone, but become important when they are tied to other facts which lead to inevitable conclusions as to facts in issue. . .' Mathis v. People, 167 Colo. 504, 448 P.2d 633, 637." 562 P.2d at 1297.

Thus, in the present case, the fact that appellant had a crowbar and handcuffs may, standing alone, only be slightly probative in proving his culpability. Perhaps the fact that he drives a Volkswagen which "very strikingly" resembled the one in which Carol DaRonch was abducted is only slightly probative. Even the fact that the items seized were recovered from a Volkswagen owned by appellant (and driven by him) which very strikingly resembled the one in which she was abducted may be only slightly probative. Furthermore, the fact that the appellant fits the description of the assailant and was identified by the victim tentatively by photograph and positively at a lineup, plus the fact that he wears patent leather shoes, as the assailant did, may in and of themselves be only slightly probative. However, when added together and viewed as a whole, the inference becomes very strong that appellant assaulted Carol DaRonch.

It can thus be said that the items seized from appellant's car, at the very least, had probative value, and as such, were relevant and were properly received in evidence. State v. Scott, 111 Utah 9, 175 P.2d 1016, 1021 (1947).

Appellant further challenges the admissibility of the crowbar on the grounds that there was no positive identification

that the crowbar admitted into evidence and taken from appellant's car was in fact the one used in the commission of the crime. Appellant then misconstrues two cases[6] to formulate a rule of law that when the state relies on a specific kind of weapon or items used in a crime, it is error to admit weapons or items of a similar type. Case law in Utah and other jurisdictions has repeatedly rejected this position.

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6 State v. Anselmo, 46 Utah 137 (1915), contrary to appellant's assertions, does not stand for the proposition that when a specific weapon is used in a crime, it is error to admit a weapon of similar type or one which may in fact have been the weapon. In Anselmo, a defendant was running from a police officer when he turned and shot the officer, killing him. Later that same day he was arrested with the same revolver in his possession. Sometime later, a search of a room where the defendant was staying revealed another revolver, a black jack, two masks, and a pair of shoes called sneakers. The defendant explained his possession of the items. The state introduced the articles into evidence, contending that the items themselves were material and competent evidence which would shed light on the question of motive and rebut appellant's evidence of his good character. The court rejected the introduction of the articles into evidence (appellate court) for the purpose which the prosecution sought to have them introduced, i.e., "bad character," motive, etc. It is obvious that Anselmo is highly distinguishable from the present case. Appellant also cites People v. Riser, 305 P.2d 1 (Cal. 1956). In Riser, it was well established through investigation that a .38 Smith and Wesson special revolver was used in a murder. Later a Colt .38 revolver was introduced into evidence. The California Appellate Court held this to be error, though not prejudicial error. The facts in the present case differ widely. Here, a crowbar-like instrument was used--no specific type was identified. The victim could only describe how it felt and that it looked similar to the one with which the appellant sought to assault her. Also, crowbars do not generally possess the identifying characteristic that revolvers do. As for the handcuffs, even though a different pair than those used on the victim was found in appellant's car, they were not introduced to show that appellant was a "bad man," but to show in relation to all the circumstances, the modus operandi of the crime which appellant was charged with. See State v. Montayne, infra; State v. Huffman, infra; People v. Latem, infra.

In Banning v. United States, 130 F.2d 330, 335 (6th Cir. 1942), it was held that evidence of the defendant's possession of weapons or instruments similar to those employed in the commission of a crime charged are admissible and relevant for three purposes: (1) to connect the defendant with the commission of the crime; (2) to corroborate the victim's testimony that weapons were used in the commission of the crime; (3) to show a design or plan, the carrying out of which required their use. The relevancy of the crowbar and handcuffs clearly would fit into any of the categories mentioned, especially the first two.

In further responding to appellant's claim that the crowbar is inadmissible because it cannot be positively identified, cases holding contrary to such a claim fall into two categories: (1) where the weapon or instrument found in the suspect's possession might be the actual weapon employed in the crime; (2) where the item found is not the actual item used in the crime but is similar to it.

Referring to the former category, it has been held that positive testimony that the item offered as evidence is the actual weapon or instrument in the crime is not required. United States v. Cunningham, 423 F.2d 1269, 1276 (4th Cir. 1970); State v. Hatton, 95 Idaho 856, 522 P.2d 64, 69 (1974); Commonwealth v. Ford, 301 A.2d 856, 857 (Pa. 1973). In State Hatton, supra at 522 P.2d 69, the Court said:

> "'There is no requirement that weapons . . . offered in evidence be positively identified as those used in the perpetration of a crime. The admission of such evidence is within the sound discretion of the trial court and any

> objection to the lack of positive identification goes to the weight of the evidence rather than the admissibility. . . ."

In Cummingham, supra, the Court said:

> ". . . The lack of positive testimony to identify the gun as the gun used in the robbery does not preclude its admissibility. There was ample testimony of the fact that a weapon was used in the commission of the crime and there was ample evidence of the similarity between the gun admitted and the gun which was used. The testimony as to similarity warranted admission . . . ." 423 F.2d at 1276. (Emphasis added.)

In Banning, supra, the Court said that the weapons, though not positively identified as those used in the crime, could be admitted to ". . . justify an inference of the likelihood of their having been used. . . ."

As to the degree of certainty required in offering an item for admission into evidence when it is uncertain that the instrument or weapon is or is not the actual weapon used in the crime, it has been held that only a prima facie showing of identity is required:

> "'To warrant the admission in evidence of the instrument or weapon as the one with which a crime was committed, a prima facie showing of identity and connection with the crime is necessary and sufficient; clear, certain, and positive proof, or positive identification, is generally not required . . . .'" DeLuna v. State, 501 P.2d 1021, 1025 (Wyo. 1972).

It is noteworthy that this case refutes appellant's contention that a crowbar is not to be placed in the same category as a "weapon" such as a gun. However, as was held in Banning v. United States, supra; and DeLuna v. State, supra, the rule of law stating that positive identification that the item

offered was the item used in the crime is not required is not limited to cases wherein guns were used. The law applies to "any instrumentality" used in the crime.

The law in Utah is in line with that in other jurisdictions. In State v. Sheen, 27 Utah 2d 9, 492 P.2d 648 (1972), this Court held:

> ". . . While it was not shown that that particular weapon was used, there was evidence that the gun used in the robbery was of a similar type." 492 P.2d at 649. (Emphasis added.)

There, the gun later found was admitted into evidence, though no positive identification was produced.

Turning now to the situation where an item is found which is not the actual item used in the crime but is similar to it, case law refutes appellant's contentions. In State v. Banks, 541 P.2d 808 (Utah 1975), the defendant was convicted of aggravated assault. He fired shots at a victim, and later a gun was found in the vicinity of the defendant. At trial, the victim examined the gun, saying it was similar to the one used by the defendant. In admitting the gun into evidence, the Court said:

> "Even if the pistol in question were not the exact one used in the crime. . . it was sufficiently similar to serve for illustrative purposes." 541 P.2d at 809.

In State v. St. Clair, 5 Utah 2d 342, 301 P.2d 752 (1956), a defendant was arrested for shooting persons in a home which was broken into through a back door, by cutting out parts of the screen door. A pocket knife found on defendant when he was

arrested was held to be properly admitted into evidence, even though FBI reports indicated that the knife was not the one used to cut out and remove portions of the screen door.

The United States Supreme Court has also held that evidence of a weapon or instrument similar to the one actually used is admissible. In Moore v. Illinois, 408 U.S. 786 (1972), the Court reviewed the admissibility of a 16 gauge shotgun when a 12 gauge had actually been used in the commission of the crime. The Court held that the admitted evidence was not irrelevant or inflammatory where the details of the shooting and of the death wound established that a shotgun was used.

Respondent thus submits that the admissibility of the crowbar was extremely relevant to the question of guilt or innocence, and was thus properly admitted.

Respondent also allges that the handcuffs were properly admitted and relevant to the issues in question, particularly regarding the "modus operandi" of appellant. Several cases touch directly on the issue. In State v. Montayne, 18 Utah 2d 38, 414 P.2d 958 (1966), cert. den. 385 U.S. 939, the defendant was found guilty of robbery and grand larceny. He had gained entrance to a pharmacy by prying a hole in the roof. He was later arrested because the car he rented and was driving at the time was "overdue" at the rental agency. A search of the car at the time of arrest revealed a crowbar, sledge hammer, a bag similar to the one taken during the robbery, and some pistol shells. In upholding the admission of the articles seized from the car into evidence, this Court stated:

> "The appellant's final assault on the trial court's judgment is based on a contention that the trial court erred in admitting into evidence the articles found in the car appellant was driving. They were properly admitted because they tended to show a pattern of the crime committed and connect the appellant to the robbery on the basis of similar modus operandi and intent." 414 P.2d at 960.

In People v.LaTeur, 39 Mich.App. 700, 198 N.W.2d 727 (1972), the sole eyewitness to a robbery was handcuffed to a laundry tub in the basement of a house. Another set of handcuffs, an attache case containing the handcuffs, and a revolver not identified as being involved in the crime were admitted into evidence as being seized from the defendants at the time of their arrest. The appellate court sustained the admission upon the principle that "the possession of articles necessary to commit the crime has probative value and the articles are admissible when sufficiently connected with the accused." 198 N.W.2d at 729. (Emphasis added.)

In State v. Huffman, 209 N.C. 10, 182 S.E. 705 (1935), fuses, caps, and nitroglycerine found at the defendant's residence some ten months after the burglary were properly admitted into evidence where the burglary of the safe had been accomplished by the use of an explosive.

Thus, in Montayne, LaTeur and Huffman, the articles similar to the ones used in the commission of the crimes were admitted even though it could not be established that they were in fact the articles used in the commission of the crime. Such reasoning applies in the instant case since the handcuffs found in appellant's car certainly could connect him with the crime, particularly relative to the modus operandi.

Appellant finally claims that the prejudicial nature of the items seized outweighed their relevancy and should not have been admitted into evidence.

First, respondent submits that there is nothing inherently prejudicial in the items seized when they are used in the proper context for which they were made. Thus, any prejudicial effect they may have had in the instant case was created by the appellant in his use of the items for criminal activity. When the crowbar and handcuffs are found in the possession of a man who fits the description of a kidnapper who used a specific combination of such items to further his criminal activity; when the items and the person fitting the description are found in a vehicle (owned and driven by the person fitting the description) which fits the description of the car in which the victim was abducted; and when finally, the items are seized in the early morning hours after chasing down the appellant who tried to outrun the police without his headlights on, in a residential area, they become extremely relevant to the material issue of whether appellant and these items are connected with the kidnapping.

The courts have held where evidence is relevant, it will not be rendered inadmissible merely because it may be gruesome, State v. Jackson, 22 Utah 2d 408, 454 P.2d 290 (1969), offensive, shocking, repulsive, or even prejudicial to some extent, People v. Galloway, 192 N.E.2d 370, 28 Ill.2d 355 (1963), cert. den. 376 U.S. 910. The resolution of the question whether the probative value of evidence outweighs a possible prejudicial effect is within the sound discretion of the trial court. People v. Ford, 345 P.2d 573 (Cal. App. 1959):

Regarding the question of remoteness, this is an issue by which there are no rigid rules. In determining whether evidence, though relevant, is too remote in time to have sufficient reliable probative value, it is necessary to view all the circumstances, the nature of the evidence, and the nature of the crime. For this reason, the question is, again, left to the discretion of the trial judge and his decision should not be disturbed unless clear abuse is shown. Kempton v. State, 488 P.2d 311, 314 (Wyo. 1971); State v. Schuman, 100 P.2d 706 (Kan. 1940). If the evidence is relevant, as it is in the present case, the interval of time is only one factor for the trier of fact to consider in evaluating the weight of the evidence. State v. Stevenson, 169 Wash. 10, 13 P.2d 47 (1932); Kempton v. State, supra at 488 P.2d 314. In this case, the trier of facts was an experienced jurist, who should be presumed to have given sufficient consideration to matters of weight and probative value. As this Court noted in State v. Park, 17 Utah 2d 90, 94, 404 P.2d 677, 679 (1965):

> ". . . because it can be safely assumed that the trial court can be somewhat more discriminating in appraising both the competency and the effect properly to be given evidence, the rulings on evidence are looked upon with a greater degree of indulgence when the trial is to the court than when it is to the jury."

The time factor was approximately nine months in the present case. In determining that weapons were similar enough to allow their admission, courts have upheld time spans of ten months, State v. Huffman, supra; nine months, Banning v. United States, supra; and seven months, United States v. Ramey,

414 F.2d 792 (5th Cir. 1969).

In summary, the reception into evidence by the trial court, sitting without a jury, of the crowbar and handcuffs was not error. Rule 45 of the Utah Rules of Evidence and Utah Code Ann. § 78-21-3 (1953), as amended, give the trial judge the discretion to determine what evidence is admissible. There is no basis for a finding of abuse of discretion. The items had substantial probative value, which was neither overcome by prejudicial qualities nor rendered irrelevant by the passage of time; and as such, the ruling of admissibility should be sustained.

POINT IV

WHERE THE INFORMATION CHARGED AN ELEMENT OF THE OFFENSE IN THE DISJUNCTIVE, THE GENERAL VERDICT OF GUILTY AS CHARGED IN THE INFORMATION WAS VALID.

Appellant was charged by information with the crime of aggravated kidnapping pursuant to Utah Code Ann. § 76-5-302 (1953), as amended. The information reads as follows:

> "[Appellant] did intentionally or knowingly, by force, threat or deceit, detain or restrain Carol DaRonch against her will with the intent to:
> (A) Facilitate the commission of or attempted commission of a felony, to wit: criminal homicide or aggravated assault; or
> (B) Inflict bodily injury on or to terrorize Carol DaRonch." (R.41).

Appellant alleges the information is improper for including an element of the offense in the disjunctive. He further claims the State should have been required, at trial, to elect which alternative intent it would prove. Finally, appellant claims prejudice on two grounds. First, he claims prejudice because the trial court did not require an election. Second, he alleges he was

prejudiced by a general verdict which did not specify which intent the trier of fact ultimately found to have existed.

Respondent submits that it is entirely proper to plead an element of an offense in the disjunctive. It is also proper and within the discretion of the trial court not to require the prosecution to make an election as to which of the intents he intends to prove. Moreover, when one alternate intent is proved, the question of whether other intents are likewise supported becomes academic and moot. Appellant was therefore neither prejudiced by the decision denying election nor by the general verdict of guilty rendered against him.

The statute under which appellant was convicted lists several intents with which the crime of aggravated kidnapping may be committed. The State charged, disjunctively, four such intents. Multiple pleading is most certainly permissible in Utah and in most jurisdictions. Utah Code Ann. § 77-21-33 (1953), as amended, provides:

> "No information or indictment for an offense which may be committed . . . with one or more of several intents . . . shall be invalid or insufficient for the reason that two or more of such . . . intents . . . are charged in the disjunctive or alternative."

Note also Utah Code Ann. § 77-21-8(1) (1953), which provides the requirements for sufficiency of an information as follows:

> "The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:
>
> (a) by using the name given to the offense by the common law or by a statute.
>
> (b) by stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged."

This Court has said that if a statute lists different means by which a crime can be committed, then, ". . . the means may be alleged in the alternative in the same court." Batley v. Ritchie, 73 Utah 320, 273 Pac. 969, 972 (1928). See also State v. Taylor, 570 P.2d 697 (Utah 1977), and State v. Nicholson, Utah Supreme Court (Case No. 15359, September 21, 1978).

Other jurisdictions which permit disjunctive pleading by statute include Iowa (Iowa Code, sec. 773.24 (1959)), New Mexico (New Mexico Statutes Ann., sec. 41-23-7), and Massachusetts (Massachusetts General Laws Ann. 277 sec. 31). Several jurisdictions have allowed disjunctive pleading by practice if not by statute.

In the case of State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (1977), appellant was charged in the disjunctive. Appellant's motion to dismiss the indictment was predicated on three grounds: (1) failure to inform defendant of the nature and cause of the accusation; (2) lack of specificity so as to enable defendant to plead the judgment as a bar to a subsequent prosecution; (3) lack of facts for the trial court to decide whether the facts would be sufficient to support a conviction. In a second motion to dismiss he alleged (1) the indictment did not sufficiently apprise defendant of the nature and cause of the accusation against him; (2) being tried on the indictment would deprive defendant of a fair trial. This motion was also denied. The Court rejected these allegations, saying:

> "Defendant's argument is that '[i]n obtaining an indictment on these three charges, then in proceeding to trial on all three, the prosecutor is in effect saying, "I think there is evidence to support all three charges, but rather than risk an election and go on the one I believe least supported by the evidence, we will let the jury pick". . . .'" 563 P.2d at 115.

". . . We see nothing unfair in the charging of the defendant in the alternative. When alternative charging is to the effect of a crime being committed in various ways and the various ways are pursuant to a statute the charge is not legally deficient. State v. Gurule, 90 N.M. 87, 559 P.2d 1214 (Ct. App.) decided January 18, 1977; State v. Ochoa, 41 N.M. 589, 72 P.2d 609 (1937). We fail to see how the alternative charging in the instant case would be any different than the alternative charge situation which occurred in State v. Gurule, supra, particularly since the charges arose out of the same events and carried the same penalties. [Citation omitted.] Here defendant was furnished with a most detailed statement of fact which . . . included the complete district attorney's file and police reports. . . ." 563 P.2d at 116. (Emphasis added.)

Similarly, the Oregon Court in State v. Dickenson, 497 P.2d 374 (Or.App. 1972), where defendant was convicted of the offense of larceny by bailee and asserted the trial court erred in refusing to require the state to elect by which of several ways specified in the larceny by bailee statute it intended to prove the offense, held:

"Where an offense may be committed by several means, the indictment may allege in a single count the means in the alternative, unless the allegations are repugnant to each other. In the present case the means were not repugnant and there was evidence in support of each of the alternatives alleged. There is no merit in this assignment."

Applying the rationale of Ortiz and Dickenson to the instant case, it is clear that four different intents were charged, but any of the intents which may have been proved all arose out of the same series of events. Also, regardless of which intent may have been proved, the penalty would

have been the same. As it eventually turned out, the trial judge sentenced appellant to a lesser sentence than required for conviction of aggravated kidnapping, pursuant to Utah Code Ann. § 76-3-402 (Supp. 1975).

In State v. Curtis, 87 N.M. 128, 529 P.2d 1249 (1974), the defendant's conviction was reversed on other grounds, but the court held there that an indictment is not jurisdictionally void for disjunctive allegations of intent.

In State ex rel. McKenzie v. District Court of Ninth Judicial District, 525 P.2d 1211 (Montana 1974), where a challenge to amending an information in a criminal case was made, that Court held:

> "The purpose of an information is to inform the defendant of what he is charged, nothing more nothing less . . . no bill of particulars is called for, nor is a statement of all possible legal theories the prosecutor intends to pursue. It is not the function of an information to anticipate or suggest instructions to the jury, to argue the case, or to influence either public opinion or the jury. It is a notice device, not a discovery device." (Emphasis added.)

Similarly, the Idaho Supreme Court in State v. McKeehan, 430 P.2d 886 (Idaho 1967), held:

> "That the appellant was properly informed of the exact nature of the charge against him within the general criteria governing the sufficiency of an information and was afforded thereby the means by which to prepare a proper defense . . . it is neither necessary or proper to allege evidence or disclose in the information the proof which the prosecution relied upon to establish the charge." (Emphasis added.)

In State v. Parmenter, 444 P.2d 680 (Wash. 1968), the Washington Court also held that an information charging a single crime of manslaughter committed in two ways, which were not

repugnant to each other, was proper. In reaching this conclusion, the court said:

> "Since many crimes are committable in more than one way, the information may properly charge several acts which constitute a single crime. That is, if the statute sets forth several ways of committing a single crime, the information may specify several ways in which the crime is charged to have been committed."

See also State v. Metcalf, 540 P.2d 459,14 Wash.App. 232 (1975).

In two Colorado cases, Cortez v. People, 394 P.2d 346 (Colo. 1964), and Hernandez v. People, 396 P.2d 952 (Colo. 1964), that Court held that it was proper in one count of an information to charge all the ways in which a crime may be committed by the use of the word "and" even where the statute uses "or".

In State v. Pierce, 469 P.2d 308 (Kan. 1970), Kansas adopted the same policy:

> "An accusatory pleading in a criminal case may, in order to meet the exigency of proof, charge the commission of the same offense in different ways or by different means to the extent necessary to provide for every possible contingency in the evidence."

See also State v. Woods, 222 Kan. 179, 563 P.2d 1061 (1977).

Most pertinent is the decision in the Oregon Appellate Court in Oregon v. Draves, 524 P.2d 1225(Or.App. 1974):

> "Regardless of whether the indictment charged intentional murder or reckless murder defendant would have known that the evidence about the action element--causing another's death--would have been exactly the same. The accompanying mental state is inferred from this evidence, not something capable of direct proof except in the rarest of cases. Other than in arguments to the jury about what inferences to draw from the evidence, we fail

> to see how a murder defense would ever be conducted differently depending upon whether the indictment read intentional murder or reckless murder. This is a single offense that can be committed in alternative ways. Any murder indictment with a correct understanding of the murder statute puts the defendant on sufficient notice of what he must defend against."

Thus, it is well supported that the purpose of an information is to serve as a notice device to defendant to inform him of a specific charge against him and allow him to begin preparation for defense against that charge, ensuring that he is not taken by surprise by evidence offered at the time of trial. Here appellant knew he was charged with the crime of aggravated kidnapping and the details upon which it was premised. There was not such a variance between the information and the proof offered at trial that appellant can claim he was prejudiced or prevented from having a fair trial because he was not fairly or reasonably informed of the nature and cause of accusations against him.

Therefore, pursuant to Utah Code Ann. §§ 77-21-8(1) and 33, supra, Batley v. Ritchie, supra, and other cases cited, respondent submits that the disjunctive pleading of intents in the information was valid.

Regarding the question of election of alternatively charged intents, it is well settled that election is a matter of discretion resting entirely with the trial court and that

his decision will not be disturbed save for abuse.[7] The leading United States Supreme Court case on this issue is Pointer v. United States, 151 U.S. 396 (1894), where the Court stated:

> ". . . the Court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarrassed in his defense, if that course is not pursued." 151 U.S. at 403. (Emphasis added.)

The Court then said that a decision of a trial court not requiring election would not be disturbed except for abuse. Id. at 403-404.

The Utah Supreme Court most recently addressed the subject of election in State v. Butler, 560 P.2d 1136 (Utah 1977). The defendant was charged and convicted for the offense of manslaughter pursuant to Utah Code Ann. § 76-5-205(1)(Supp. 1975). The information filed alleged all three subsections of the manslaughter statute. Defendant filed a motion to require the state to elect under which subsection of the statute it would proceed. The motion was denied by the trial court. On appeal, this Court affirmed the ruling:

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7 Sanders v. People, 109 Colo. 243, 125 P.2d 154 (1942); Foyil v. State, 85 Okl. Cr. 200, 187 P.2d 254 (1947); State v. Williams, 34 Wash.2d 367, 209 P.2d 331 (1949). See also United States v. Cusumano, 429 F.2d 378 (2d Cir. 1970); United States v. Hernandez, 444 F.2d 157 (5th Cir. 1971); Carroll v. United States, 174 F.2d 412 (6th Cir. 1949); Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967); D'Argento v. United States, 353 F.2d 327 (9th Cir. 1965), cert. den. 384 U.S. 963; and United States v. Day, 533 F.2d 524 (10th Cir. 1976).

> "It is clear that an accused must know the charge against him in order to prepare an adequate defense. The very purpose of an information is to give notice of the charge, but it is not intended to be a discovery device. Defendant knew he was charged with manslaughter, was furnished with bills of particulars, and had full access to the evidence the State intended to rely on.
>
> By statute, the information itself may be in the disjunctive. And the state need not make an election upon which theory it will proceed if the theories specified in the information are not repugnant to each other. . . ." 565 P.2d at 1138. (Emphasis added.)

It is clear in the instant case that subsections (b) and (c) under Utah Code Ann. § 76-5-302 (1953), are not repugnant to each other. These were the subsections under which the State intended to prove the intent necessary to prove aggravated kidnapping. The information was verbatim with the statute. The State also provided appellant with a bill of particulars and opened up its files to appellant as to any evidence which would be relied on in the prosecution.

To further show that the discretion of the trial court was not abused in refusing to compel election, it may be helpful to examine those circumstances where election is proper. First, in Pointer v. United States, supra, it was held that when an indictment charges two separate offenses, the State may be required to elect the offense upon which it will rely. As is stated in the Federal Rules of Criminal Procedure, Rule 14:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses . . . the court may order an election or separate trials . . . or provide whatever relief justice requires." (Emphasis added.)

Appellant, however, was not charged with two separate crimes. He was charged only with aggravated kidnapping. Only one

element of that crime was charged disjunctively.

Another instance where election may be proper is when facts alleged in several counts constitute different grades of offenses of the same general class. Again, most courts hold that under these circumstances the trial court may, in its discretion, compel an election. Woodford v. United States, 77 F.2d 861 (8th Cir. 1935). Again, in the case at bar, only one crime was charged. There were not multiple grades or degrees of offenses.

If the offenses charged are of the same character, and are included in good faith for the purpose of meeting the various aspects in which the evidence may present itself upon the trial, the state will not be required to elect the offense upon which it will proceed. State v. Golladay, 470 P.2d 191 (Wash.1970). Also, if various crimes charged all come from a single transaction there is no need to compel election. State v. Keith, 537 P.2d 1333, 24 Ariz.App.275 (1975). This rule is applicable to the present case. Appellant was charged with one crime which may be committed with various intents. The State charged alternate intents, in good faith, for the purpose of meeting the various aspects in which the evidence might present itself at trial. There was therefore no abuse of discretion by the trial court in refusing to compel an election at trial.

Finally, respondent submits that the denial of an election in this case was in the best interest of justice. This Court noted in State v. Peterson, 22 Utah 2d 377, 453 P.2d 696 (1969), that often the State is unable to prove directly what is in a defendant's mind relative to doing harm to a victim. For

that reason such a burden is not placed on the state. If it were: ". . . it would lie within the power of a defendant to defeat practically any conviction which depended upon his state of mind." 22 Utah 2d at 378. As noted in State v. Ortiz, supra: ". . . An essential element of each count is intent. Intent is seldom provable by direct testimony. . . ." 563 P.2d at 116. Instead, the intent of the perpetrator of a crime may be proved by what was said and done and by reasonable inferences drawn from the conduct displayed. As this Court noted:

> "This is in accord with the elementary rule that a person is presumed to intend the natural and probable consequences of his act." State v. Peterson, supra at 453 P.2d at 697.

Often, as in this case, the actions of the criminal could justify a finding of a number of similar intents. Therefore, the State is allowed to proceed at trial upon alternately charged intents. It is for the finder of fact to decide what actually happened and which, of alternate intents, is most reasonably inferred from the conduct of the perpetrator. Were it otherwise, the result would be both an onerous and an unintended burden on the State and would create the possibility of multiple trials for a defendant. Thus, there was no abuse of discretion in refusing to compel the State to elect which of the four intents charged in the information it would proceed on.

Focusing now on whether a general verdict can be returned based upon an information which contains an alternately pled element of the crime, respondent submits that it can.

As will be discussed in Point V, infra, under the "Sufficiency of Evidence" argument, at least two of the alternatives are clearly supported by the evidence. A general verdict was rendered without specifying which of the alternative intents was found to have existed. However, a trial judge is presumed to know and follow the law; therefore, it must be presumed that he found at least one of the four intents to have existed beyond a reasonable doubt.

This Court addressed the subject of general verdicts supported by alternative intents in Batley v. Ritchey, supra, at 273 Pac. 972:

> "There is no uncertainty whatever in the present case of the intention of the jury to convict the accused. . . and of what consequence is it that a doubt might exist as to the particular manner in which it was violated? The punishment is the same, whether the offense was committed by either or both ways or means. And the accused is protected by the judgment from being prosecuted again for the same offense committed by either of the means alleged in the complaint." (Emphasis added.)

In State v. Anderson, 27 Utah 2d 226, 495 P.2d 804 (1972), the appellant raised the issue of a general verdict based upon an alternatively pled information. Appellant had been charged with first degree murder on two theories, "felony murder" and murder with malice, deliberation and premeditation. The jury was also instructed on both theories of the murder. In rejecting appellant's claim, this Court said:

> ". . . we think the evidence was such as to justify a guilty verdict under either theory; and since the defendant made no request for an instruction which could enable him to know which theory the jury adopted,

> he now is in no position to complain about the verdict if it could be properly based upon either theory of guilt." 495 P.2d at 805. (Emphasis added.)

In State v. Norman, 580 P.2d 237 (Utah 1978), this Court impliedly supported the appropriateness of such general verdicts by stating:

> "It is not known upon which provision of the manslaughter statute the judge based his judgment. We presume that he based it upon the statutes which would justify his ruling absent an affirmative showing to the contrary." Id. at 240.

Likewise, in State v. Nicholson, Utah Supreme Court (Case No. 15359, September 21, 1978), this Court noted that Utah's second degree murder statute had several subsections enumerating different elements of intent. The Court again impliedly approved general verdicts in such situations, saying with respect to the different intent subsections:

> "We think the record reflects a fact situation proper for determination by a jury, and the trial court here, acting as such arbiter of the facts, was justified in finding guilt, particularly under subsection "c" [of the second degree murder statute]."

In State v. Butler, supra, this Court held that since the statute allowed disjunctive pleading in the information, the State should not be required to make an election as to which theory charged in the information it would proceed on, as long as the theories were not repugnant to each other.

The logical extension of this rationale is that the trial court, likewise, would not be required in a general verdict to specify which theory it found to have been supported by the evidence as long as the evidence was sufficient to sustain one of the theories. The same logic would apply when multiple intents are charged in the information.

Similarly, in State v. Ortiz, supra, defendant was charged in the alternative with fraud or embezzlement. Both charges arose out of the same events and carried the same penalties. In presenting an argument that he was at an unfair disadvantage because he did not know which charge to prepare for (very similar to the argument presented by the appellant in the present case), appellant alleged that the alternative counts should not have been presented to the jury. In rejecting appellant's claim, the New Mexico Supreme Court said:

> "Here there was sufficient evidence, reasonable inferences and surrounding circumstances for the alternative counts to be presented to the jury to decide whether the crime was fraud or embezzlement. Specifically, it was for the jury to decide . . . ." 563 P.2d at 116.

The same logic should be applied in the present case. Since the trial judge was the trier of fact, he should be able to decide which of the intents charged are supported by the evidence and make a finding thereon, not having to specify which intent was proved as long as there was sufficient evidence to

support any of the intents. This would particularly hold true in the present case since all or any of the intents would arise out of one set of facts or one single series of events.

One further case worthy of mention is State v. Metcalf, 540 P.2d 459 (Wash. 1975), wherein the Court held that although several means of committing a crime were alleged, and although there was no jury instruction requiring unanimity, a general verdict would still be upheld if sufficient evidence exists to support either alternative.

Respondent submits that in the instant case there was no jury, and therefore, no instructions. A trial judge is presumed to know the law and to apply it properly. State v. Criscola, 21 Utah 2d 272, 444 P.2d 517 (1968). Therefore, the trial court in the present case must be presumed to have found that at least one intent was supported by the evidence beyond a reasonable doubt. At this point, whether more than one intent was found beyond a reasonable doubt is merely academic.

Appellant was not prejudiced as a result of the general verdict or the alternately pled intents. One crime was specified in the information. The punishment for conviction of aggravated kidnapping was the same regardless of which intent was found. Appellant was also furnished the state's files before trial, so appellant was not "taken by surprise." He knew what the state intended to prove. Also, res judicata protects the accused from being prosecuted again under any of the charged intents.

POINT V

THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR AGGRAVATED KIDNAPPING.

Appellant was charged with aggravated kidnapping in violation of Utah Code Ann. § 76-5-302 (1953), as amended. To convict under that section the State had to prove that appellant (1) intentionally or knowingly, (2) by force, threat, or deceit, (3) detained or restrained Carol DaRonch, (4) against her will with (5) the specific intent to do one of several things listed in the statute. Four such intents were charged in the information: i.e., that appellant committed the kidnapping with the intent to (1) facilitate the commission or attempted commission of criminal homicide, (2) facilitate the commission or attempted commission of aggravated assault; (3) inflict bodily injury on Carol DaRonch; or (4) terrorize Carol DaRonch (R.41).

Appellant alleges insufficient evidence as to any of the specific intents and that the state proved no more than simple kidnapping. Respondent submits that the evidence amply supports aggravated kidnapping and that the trial judge, based upon the evidence presented, could have found appellant guilty of aggravated kidnapping on at least two theories. Appellant only challenges the sufficiency of the evidence regarding the element of intent; thus, respondent will focus only upon that issue.

In reviewing the theories of intent necessary for aggravated assault and bodily harm as they relate to aggravated kidnapping and the evidence which supports them, this Court must survey the entire record in the light favorable to the judgment and assume that the trial judge believed the evidence which

supports it. State v. Mecham, 23 Utah 2d 18, 456 P.2d 156 (1969); State v. King, 564 P.2d 767 (Utah 1977). The question whether appellant had the requisite specific intent necessary for conviction was a matter to be decided by the trier of fact, in this case, the court. State v. Brooks, 222 Kan. 432, 565 P.2d 241 (1977).

Before establishing at what point in time the necessary specific intent for aggravated kidnapping can be established a few words defining "intent" and how the courts ascertain the presence of "intent" is imperative.

Utah Code Ann. § 76-2-103 (Supp. 1975), says:

> "A person engages in conduct: (1) Intentionally, or with intent or willfully with respect to the nature of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result."

In determining whether the intent required is present in a given case, the courts have noted the problem of "going inside a person's mind" to ascertain what, in fact, he was thinking of at the time of the commission of a crime where a specific intent is an element to be proved. In State v. Peterson, 22 Utah 2d 377, 453 P.2d 697 (1969), this Court said:

> "With respect to the intent: It is true that the State was unable to prove directly what was in the defendant's mind relative to doing harm to the victim; and that he in fact denied having any such intent. However, his version does not establish the fact, nor does it even necessarily raise sufficient doubt to vitiate the conviction. If it were so, it would be within the power of a defendant to defeat practically any conviction which depended upon his state of mind. As against what he says, it is

> the jury's privilege to weigh and consider all of the other facts and circumstances shown in evidence in determining what they will believe. This includes not only what was said and what was done, but also the drawing of reasonable inferences from the conduct shown . . . This is in accord with the elementary rule that a person is presumed to intend the natural and probable consequences of his act. . . ." 453 P.2d at 697. (Emphasis added.)

Similarly, in State v. Ortiz, supra, the New Mexico Supreme Court noted:

> ". . . Intent is seldom provable by client testimony. [Citation omitted.] It must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. If there are reasonable inferences and sufficient circumstances then the issue of intent becomes a question of fact for the jury. . . ." 563 P.2d at 16. (Emphasis added.)

Thus, the intent of a perpetrator of a crime may be proved by what was said and done and by reasonable inferences from the conduct shown. When a person acts voluntarily, he is presumed to intend necessary or natural and probable consequences of those acts. This rule applies not only to the finding of general criminal intent, but specific intent as well. State v. Luoma, 544 P.2d 770, 776 (Wash. App. 1976). The rule has been specifically applied to the ascertainment of specific intent necessary in kidnapping cases. In Jensen v. Sheriff, White Pine County, 89 Nev. 123, 508 P.2d 4 (1973), the court said:

> "The dominating element of the crime of kidnapping is the intent with which the acts enumerated in the statute was done, but the essential criminal intent is deemed included in the doing of the prohibited act. [Citation omitted.] The necessary intent may be inferred from the acts of the accused. [Citation omitted.] 'Intention is manifested by the circumstances connected with the perpetration of the offense . . .' [Citation omitted.] We fully recognize

> the rule that intent, as an element of crime, is seldom susceptible of proof by direct evidence, and that it may be inferred from a series of acts and circumstances. . . ." 508 P.2d at 56.

Thus, specific intent may be based upon inferences arising from the natural and probable consequences of an act.

The evidence in the instant case supports a finding of specific intent that the kidnapping was conducted to facilitate the commission or attempted commission of aggravated assault, and further supports the intent necessary to sustain aggravated kidnapping with the intent to inflict bodily injury.

The facts clearly establish that an aggravated assault was committed by appellant upon Miss DaRonch. Aggravated assault is defined in Utah Code Ann. § 76-5-103 (1953), as amended, as follows:

> "(1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:
> (a) He intentionally causes serious bodily injury to another; or
> (b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury."

Utah Code Ann. § 76-5-102 (1953), as amended, defines assault as:

> ". . . (a) An attempt, with unlawful force or violence, to do bodily injury to another; or
> (b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another."

Respondent submits that appellant committed an aggravated assault on the victim in two distinct ways. First, he aimed a gun at her and threatened her life. In other words, he made a threat to do bodily injury (blow her head off), which was accompanied by a show of

immediate force or violence by use of a deadly weapon.[8]

Second, an aggravated assault was commited at the time appellant attempted to strike Miss DaRonch with the iron bar. Using the language of the statute, appellant attempted, with unlawful force or violence, to do bodily injury to Carol DaRonch by use of a deadly weapon, to wit: a crowbar or facsimile (Utah Code Ann. §§ 76-5-102(a), and 76-5-103(b) (1953), as amended). A crowbar or iron bar is certainly a deadly weapon as contemplated in the statute, the general rule being that a thing or object, though not a "deadly weapon" per se, can become such depending on the nature of the instrument and the manner in which it is used to accompalish the assault. (Grass v. People, 471 P.2d 602 (Colo. 1970).) Certainly the evidence is sufficient to support a finding that an iron bar used as a club on a girl's head in the manner in which it was done in this case is a deadly weapon.

Turning now to the issue as to what point in time did appellant have the specific intent to commit an aggravated assault or attempted bodily injury, respondent submits there are two theories on which the intent necessary can be supported. First, the facts show that at the time of the kidnapping at the Mall and even prior thereto, when appellant lured the victim by deceit into his car, he had specific

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8 Note the recent decision in State v. Jones, 554 P.2d 1321 Utah 1976), wherein the defendant was convicted of aggravated assault after he pointed a gun at a process server. There is no mention in that decision as to whether the action was accompanied by a verbal threat as in the instant case. The conviction was nevertheless affirmed.

intent to commit aggravated assault or to inflict bodily injury on Carol DaRonch. The appellant carefully structured a fictitious story to deceive a girl into trusting him. His story was calculated to draw the girl away from the crowd. The evidence demonstrates that these first two steps were carried out. The question now becomes, what are the "natural and probable consequences" of such actions. It is entirely natural and highly probable that a girl, upon discovering that she had been deceived by a total stranger into accompanying him alone in his car, would try to resist her captor and escape from him, particularly when he "slaps" a pair of handcuffs on her. Since her resistance and attempted escape are "natural and probable consequences," then under the law, it is reasonable to infer that appellant intended his assaultive actions.

Moreover, appellant brought a pair of handcuffs in his pocket and actually used them on his victim. It can be inferred that appellant would not have carried handcuffs on his person, not being a police officer, unless he intended to restrain someone. Furthermore, he certainly would not have placed them on the girl unless he intended to keep her from escaping. It can be inferred from the evidence that appellant planned for the eventuality of a possible escape attempt and also, that he planned to subdue his victim by force.

Appellant also carried a gun. A reasonable inference is that he intended to use it to threaten or subdue his victim and force compliance with his will. In other words, he planned to commit an aggravated assault if necessary. This inference is borne out by the fact that appellant actually did use the gun for such a

But later, on cross-examination, he testified as follows:

> "Q. And she said, 'I don't know,' right?
> A. Similar to that. 'I don't know, it resembles the individual,'. . .
> Q. You just testified that she said, 'I don't know,' and then you asked her again, and at that point she said it looks like him?
> A. Yes.
> Q. Is that the way it happened?
> A. That's possible. I don't recall the exact wording with her at that time." (R.502-503).

Later on cross-examination, Officer Thompson testified as follows:

> "Q. . . . didn't she really say, 'It looks something like him?'
> A. Similar conversation. I don't recall her exact words.
> Q. Then she said, after she said it looks something like him, she says, 'I really don't know,' again; right?
> A. Something like that.
> Q. Well, you don't--don't you think there's a difference between a witness saying that looks something like him, and that looks a lot like him?
> A. Yes, I think there's a difference.
> Q. All right. Well, what you said you said in your report is, she said, 'It looks something like him.' You really don't know?
> A. Yes, sir." (R.503).

Thus, the officer repeatedly testified that he was uncertain what words Carol DaRonch used during the photographic identification. He testified that she could have said that the photo looked "an awful lot like the individual;" "this could be the individual;" "it looks a lot like the individual;" "it looks like him;" or "it looks something like him." The officer used all of these terms, but each time he carefully added that he really was not certain what words were used, and made clear that she really did not know if the photo was of her

assailant. Such testimony could hardly be characterized as perjurious, and therefore the strict standard of materiality expressed in the first situation of Agurs is certainly inapplicable.

The second situation of non-disclosure described by the United States Supreme Court in Agurs, supra, is where there is a pretrial defense request for specific evidence and the prosecutor, nevertheless, suppresses the information. In this situation, the Court stated that "if the evidence is material to guilt or punishment," irrespective of the good or bad faith of the prosecution, it is a violation of the process, if the suppressed evidence might have affected the outcome of the trial." Id. at 104. (Citing Brady v. Maryland, supra, as an example case.)

Appellant argues that this second situation applies to the instant case because a request had been made by appellant for specific photographic identification evidence which was not disclosed, and thus his burden of proof on the issue of materiality should be the lower standard of showing that the suppressed evidence "might have affected the outcome of the trial."

Assuming that appellant is correct, it must be remembered that the Agurs court cites Brady v. Maryland as its example of the second situation, and respondent has already shown that under Brady, the defendant must still show that the suppressed evidence was material to the guilt of the accused. Moreover, respondent has also shown that Judge Banks properly determined after reviewing the entire record of the case, that the "suppressed" evidence was not material to the issue of guilt, but rather

was only minimal and collateral impeachment evidence. He concluded that since Miss DaRonch testified that she really did not know if the photograph was of her assailant, and since both reports reflected her indecision, the new evidence "would not have made a difference in the outcome of the trial." (R. 1238). Thus, Judge Banks applied the precise standard set forth by the Supreme Court as applicable to the second situation in Agurs, supra, to wit: whether the evidence "might have affected the outcome of trial." Thus, Judge Banks can hardly be accused of applying the wrong standard of review as asserted by appellant in Point III of his supplemental brief.

Several federal circuit courts since Agurs was decided have recognized, as did Judge Banks, that collateral impeachment evidence is seldom sufficient enough to be considered material to the issue of guilt of an accused, and some courts have held that impeachment evidence going to a witness' credibility is not even exculpatory evidence and thus there is absolutely no duty to disclose such evidence. In Garrison v. Maggio, 540 F. 2d 1271 (5th Cir. 1976), the undisclosed evidence was a supplementary police report summarizing an interview between the officer and the victim. The victim made a positive identification at trial and the victim's description of the defendant's clothing and role in the robbery corresponded to that information in the suppressed police report, but the description at trial of his physical appearance was completely inconsistent with what was in

the police report. The court found that where the undisclosed evidence is useful only for impeachment purposes (as opposed to the situation in Agurs where the undisclosed evidence was pertinent to the merits of a self-defense claim), a higher showing of materiality should apply, namely one requiring the defendant to demonstrate the new evidence "probably would have resulted in an acquittal." Id. at 1274. The court then concluded that the suppressed report was not even exculpatory, but rather merely indicated that the victim may have previously offered a somewhat different version of the crime. The court finally stated that:

> "The ultimate issue is whether the prosecutor's omission is of sufficient significance to result in a denial of defendant's right to a fair trial. [cite omitted]. The inevitable uncertainty about the impact of impeachment matter means that such evidence can very rarely clear the bar, and consequently a prosecutor is seldom required to volunteer it to the defense." Id. at 1274.

Thus, the Garrison court suggests that where the undisclosed evidence merely goes to the credibility of a witness and could be used only for impeachment purposes, there is a serious question whether the evidence should even be deemed exculpatory so as to require disclosure. If deemed exculpatory, the showing of materiality by the defense should be much higher than that suggested in Agurs.

In United States v. Figurski, 545 F. 2d 389 (4th Cir. 1976), a request had been made by the defense for a specific item of evidence they intended to use to impeach the testimony of a state's witness. The request was denied by the trial court. The Fourth Circuit Court, on review noted the distinction between exculpatory material and impeachment evidence, stating that:

> "If the report contains exculpatory material, that part of the report must be disclosed. If the report contains only material impeaching the witness, disclosure is required only where there is a reasonable likelihood of affecting the trier of fact. Whether there is such a likelihood depends upon a number of factors such as the importance of the witness to the government's case, the extent to which the witness has already been impeached, and the significance of the new impeaching material on the witness' credibility." Id. at 391-392. (Emphasis added.)

Thus, the Court in Figurski concluded that where the suppressed evidence which has been specifically requested by the defense is merely impeachment evidence, the standard for showing materiality should be higher than that expressed in the second situation in Agurs. The defendant should be required to show a "reasonable likelihood" that the trier of fact would have been affected by the new evidence. Under this standard and the three factors expressed in Figurski, Judge Banks properly found, that despite Carol DaRonch's importance to the State's case, the new evidence would not have significantly impeached her or Officer Thompson's testimony regarding the September 1st photographic identification. He noted the excellent job of cross-examination

conducted by defense counsel in bringing out any inconsistencies in the victim's photographic identification, and therefore, the extent to which she had already been impeached was carefully considered. Thus, under the standard of Figurski, there clearly was no "reasonable likelihood" that the trier of fact, in the instant case, Judge Stewart Hanson, Jr., would have been affected by the new evidence.

In United States v. Smith, 538 F. 2d 1332 (8th Cir. 1976), another circuit court of appeals refused to consider impeachment evidence as material enough to the issue of the guilt of the accused. Likewise, in United States v. Mackey, 571 F. 2d 376 (7th Cir. 1978), impeachment evidence had been withheld from the defense. The lower court held that the impeachment evidence would only have been of a collateral nature and at the very most, might have been used to impeach the witness. However, such evidence would only have been cumulative. The Seventh Circuit Court agreed saying:

> "Given that the omitted evidence was merely additional material for impeaching an already thoroughly impeached witness, we conclude that the district court's assessment was reasonable." Id. at 389.

This rationale applies equally in the present case given the fact that Carol DaRonch repeatedly testified that during the September 1, 1975,photographic identification session, she was unable to make a positive identification of her assailant and could not remember much of what happened at the session.

(R. 409, 435, 436, 818, 823, 824, 826). It is difficult to see how the newly discovered evidence could have been used to more thoroughly impeach her testimony.

In summary, assuming the second situation addressed in Agurs applies to the instant case, respondent has already shown that Judge Banks utilized the precise standard of materiality suggested in Agurs and properly concluded that the new evidence would not have "affected the outcome of the trial." Moreover, recent decisions of at least four federal circuit courts suggest that this standard of materiality suggested in Agurs should not even apply where the suppressed evidence could only have been used to impeach the credibility of a witness because such evidence is not necessarily exculpatory, is usually cumulative, and collateral, and is seldom material to an accused's guilt.[12]

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12 Even though the "suppressed" report in the instant case was merely impeachment evidence going solely to the credibility of a witness' first photographic identification, rather than appellant's guilt, appellant attempts to magnify its importance by arguing that eyewitness identification cases are particularly affected by suppression of evidence because effective cross-examination may be thwarted which could reveal misidentification. He relies heavily on Norris v. Slayton, 450 F. 2d 1241 (4th Cir. 1976) for his position; however, that case is readily distinguishable. In Norris, the 81 year old victim was raped and an hour after the incident, the defendant was taken to the victim's home where she made an identification (showup). At preliminary hearing, she at first was unable to identify the defendant, but subsequently identified him. At trial, she identified the defendant as her assailant. A police officer had made a contemporaneous report about the first showup identification and he reported that the first thing the victim said was "that is the man." But when she was asked if she was sure, she hesitated and said, "I know that is the man, but cannot swear to it." The prosecutor knew of the report but did not furnish it to the defense. The court concluded that the primary issue before the jury was the identification of the defendant, and the expression of doubt in the suppressed report conflicted with the victim's testimony at trial that (continued on page 145)

They suggest that the defendant should be required to show that the impeachment evidence "probably would have resulted in acquittal" (Garrison, supra), or that there was a "reasonable likelihood" that the new evidence "would have affected the trier of fact." (Figurski, supra). Since appellant has been unable to meet his burden of proof under the standard suggested in Agurs, a fortiori he does not meet the higher standard proposed by the above circuit courts when only impeachment evidence is involved. Judge Banks' decision was therefore clearly not an abuse of discretion and should be affirmed.

The third situation of non-disclosure mentioned in Agurs deserves brief mention. The Court said that where the defense either makes no request or merely a general request for exculpatory

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(Continued from page 144)

12 when she first confronted the defendant she was certain he was her assailant. The Court thus held that since the evidence was of crucial value to the defense in cross-examination on the victim's identification, especially in view of her equivocation at preliminary hearing, there was a substantial likelihood it would have affected the result if known at trial. The key distinction is that in the instant case, Carol DaRonch's testimony at trial did not differ with the information in the suppressed report. She said all along that she did not positively identify Mr. Bundy when shown the photographs on September 1, 1975, and that she could not remember what happened at that identification. Thus, the evidence was of limited impeachment value. Moreover, unlike the victim in Norris, once Miss DaRonch later made a positive identification of appellant's driver's license photograph and identified him at the lineup, she never equivocated in her identification. Thus, the information in the suppressed report was not of such crucial value to the defense as it was in Norris and, in fact, the cross-examination by the defense was found by Judge Banks to be effective in bringing out any inconsistencies in her photographic identification testimony which the suppressed report may have revealed.

material, and certain favorable material is not voluntarily supplied by the prosecutor, there is no constitutional duty of disclosure unless the omission is of "sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. at 108. The appropriate standard to be applied is:

> "If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 427 U.S. at 112-113.

Respondent recognizes that in the instant case a specific request was made by the defense for favorable or exculpatory evidence concerning the viewing of photographs by Carol DaRonch, and thus the third situation discussed in Agurs appears inapplicable. Nevertheless, respondent again submits that Judge Banks properly applied the standard of materiality suggested in the second situation in Agurs and reasonably concluded that the newly discovered impeachment evidence in the context of the entire record was not sufficiently material to the issue of appellant's guilt to warrant a new trial and the evidence would not have affected the outcome of the trial. Moreover, any significance the suppressed evidence may have had at one time was certainly minimized once Carol DaRonch made her later positive photographic

identification and subsequent lineup identification of appellant.

Finally, under Utah law, respondent again submits that Judge Bank's ruling was proper. In State v. Stewart, 544 P. 2d 477 (Utah 1975), this Court held that:

> " Suppression or destruction of evidence by those charged with prosecution, including police officers, constitutes a denial of due process if the evidence is material to guilt or innocence of the defendant in a criminal case." Id. at 478.

Thus, this Court has merely reaffirmed the requirement in Brady v. Maryland, that the suppressed evidence must be shown to be material to the guilt of the accused. Respondent has already shown that the suppressed evidence in the instant case was not material to appellant's guilt but was merely collateral and cumulative impeachment evidence.

An important comparison can also be made between the Stewart case and the present matter. In Stewart the evidence at issue was a tape recorded conversation between a defendant drug seller and a police undercover agent. Before trial, the police erased the recording so the tape could be used in other police investigations. The tape recording was collateral evidence which only aided the prosecution in bringing criminal charges and was not used at trial. Thus, the defendant's claim that the state had deliberately destroyed the evidence in violation of defendant's right to due process of law was rejected by the court.

In the present matter, appellant's claim that Officer Thompson's notes were suppressed to appellant's disadvantage should likewise be rejected for the doctrine above quoted that the evidence was not "material to guilt or innocence of the defendant." Respondent therefore urges the Court to again so rule.

In another Utah case, this Court dealt with a situation very analagous to the present matter. The case of State v. Montoya, 22 Utah 2d 237, 451 P. 2d 586 (1969), involved a robbery wherein the victim was unable to positively identify the defendant on the night of the crime and at the preliminary hearing, but identified him from pictures immediately after the robbery and picked defendant out of a line-up. The defendant argued that "the prosecution failed to disclose that the robbery victim was unable to identify the defendant" at various times during the course of the police investigation. Id., at 587. The court summarily rejected this assignment of error and refused to set aside defendant's conviction on such a basis. Thus, it can be concluded that withheld evidence of a victim's indecision with regard to identification of a defendant is not a sufficient enough basis of error to merit reversal.

The case of Villiard v. Turner, 523 P. 2d 863 (Utah, 1974) also illustrates this view. There the defendant convicted of rape asserted error in the prosecution's failure to turn over to him an FBI report of the case which indicated that tests of the victim in connection with the investigation "were inconclusive and showed neither guilt nor innocence." Id. at 864. In rejecting defendant's claimed error, this Court noted that since the accused had not asked for any information regarding the physical examination and since the prosecutor "did not consider the FBI report of any importance and did not wish to take the time of the court and jury by offering it in evidence, that "there was no withholding of evidence favorable to the defense." Id., at 864.

While in the present case appellant did make a specific request for all exculpatory evidence with regard to Miss DaRonch's photographic identifications, the Villiard case is important in its holding that suppressed evidence can only be the basis of reversable error if the evidence is "favorable to the defense." In Villiard, the FBI report was neutral and did not exculpate or incriminate defendant. In the present case, Officer Thompson's notes were merely synonomous restatements of the official police report. Thus, in a similar comparison to Villiard, the personal notes did not contribute "favorab[ly] to the defense."

Utah Code Annotated 77-38-3(7) (1953, as amended), states that new trials are to be allowed only "when new evidence has been discovered, material to the defendant and which he could not with reasonable diligence have discovered and produced at trial." (Emphasis added)

Utah case law interpreting this section has concluded that:

> "It is a matter solely within the discretion of the trial court as to whether it should grant a new trial on the ground of newly discovered evidence. This court cannot substitute its discretion for that of the trial court, whose ruling will be sustained, unless it is clearly indicated that it abused or failed to exercise its discretion." State v. Harris, 30 Utah 2d 77, 513 P. 2d 438, 440 (1973).

Thus, inasmuch as Judge Jay E. Banks refused such grounds as a basis for a new trial (R. 1235-1238), this Court can "substitute its discretion for that of the trial court" and grant a new trial only if there is a clear showing of abuse of discretion by Judge Banks. Respondent submits none can be shown and urges the Court to reject appellant's claim of suppression of evidence as a basis for reversal.

CONCLUSION

Respondent submits that the evidence contained in the record was sufficient for the trial court to find that the appellant was properly identified by Carol DaRonch as her assailant, and that this identification comported with due process requirements of the Utah and United States Constitutions. The seizure of the crowbar and handcuffs from appellant's car

was properly determined by the lower court to have comported with the due process requirements of the Fourth and Fourteenth Amendments. Furthermore, their probative value was neither overcome by prejudicial qualities nor rendered irrelevant by the passage of time.

The disjunctive information upon which appellant was tried was proper under Utah law as was the general verdict rendered by the trial court. No prejudice resulted to appellant through the use of the disjunctive pleading or general verdict based thereon, since there was sufficient evidence presented to the trier of fact for him to find beyond a reasonable doubt that appellant had committed an aggravated kidnapping in at least two of the disjunctively charged ways.

The closing argument by the prosecutor to the trial judge was not prejudicial to the appellant. Any error that may have been committed was clearly purged by the remarks of the judge that he was not influenced by such.

The issue presented as to whether appellant's motion for a new trial or petition for extraordinary relief should have been granted was properly determined by Judge Banks in accordance with standards enunciated by the Utah Supreme Court, United States Supreme Court, and federal circuit courts.

In conclusion, respondent asserts that appellant was tried on the merits, given his due process of law, received a fair trial and no errors amounting to prejudice were committed.

Respectfully submitted,

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