

2002

# Utah v. Adrian Whitfield Gordon : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
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 v. :  
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 ADRIAN WHITFIELD GORDON, : Case No. 20020332-SC  
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 Defendant/Appellant. :

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**REPLY BRIEF OF APPELLANT**

Appeal from a judgment of conviction for murder, a first-degree-felony offense under Utah Code Ann. § 76-5-203 (Supp. 2002), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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On appeal, Defendant/Appellant Adrian Gordon is challenging the sufficiency of the evidence presented to the trial court in connection with a charge for murder. (See Brief of Appellant, dated December 13, 2002.) Gordon's case was tried to the bench. This Court has ruled that in reviewing a verdict from the bench, it will consider the trial court's findings of fact supporting the verdict, and it will apply the "clearly erroneous" standard to those findings. State v. Walker, 743 P.2d 191, 192-93 (Utah 1987). This Court has specified that if findings are not supported by the clear weight of the evidence, or if this Court reaches a definite and firm conviction that a mistake has been made, the findings will be set aside. Id. Where findings are insupportable, the conviction must be reversed.

In accordance with Walker, and pursuant to the traditional standards for challenging findings on appeal, Gordon has marshaled the evidence relating to the findings and he has demonstrated that many of the findings made by the trial court are either insupportable or irrelevant. (See Brief of Appellant.) In part, the state does not dispute that findings are erroneous or irrelevant. (See State's Brief of Appellee ("State's Brief") at 16-18.)

Notwithstanding the indefensible findings, the state asserts that the verdict in this case should be affirmed. For the reasons set forth below, and as set forth in the Brief of Appellant, Gordon respectfully urges this Court to reject the state's analysis and to reverse the conviction for murder.

### ARGUMENT

#### WHERE THE CRITICAL FACTUAL ISSUE IN THIS CASE CONCERNS THE IDENTIFICATION OF THE ATTACKER, THE STATE'S OWN EVIDENCE REFUTES THAT BEYOND A REASONABLE DOUBT GORDON COMMITTED THE MURDER.

As set forth in Gordon's opening brief, at the conclusion of a bench trial Gordon was convicted of murder. (Brief of Appellant.) The primary factual issue at trial in the case concerned the identification of the assailant. (See State's Brief at 16.)

In determining that Gordon was the attacker, the trial court specified that none of the "pieces of evidence" alone compelled a conviction against Gordon. (R. 211:537.) Rather, according to the judge, the facts in combination provided a "texture of threads" to form the conclusion and to paint a vivid picture. (R. 211:537.) In connection with rendering its verdict in the case, the trial court articulated more than 30 findings (as identified in the Brief Appellant at 24-28).

Gordon has challenged many of the findings on appeal under the "clearly erroneous" standard. Indeed, he has separated the findings into four categories, where the initial category of findings is uncontested, and the remaining findings are challenged in three respects: the first set of challenged findings consists of the insupportable findings. They must be rejected. (Brief of Appellant at 30-34.) With one exception, the state does not take



issue with Gordon's assessment of the first set of findings. (See State's Brief at 16-17; infra, point B., below.)

The second set of challenged findings consists of irrelevant findings and/or improper inferences. (Brief of Appellant at 34-39.) The state does not dispute Gordon's assessment that those findings are irrelevant. (State Brief at 17-18.)

The third set of challenged findings relates to eyewitness identification testimony. Gordon maintains that the evidence supports that the witness Gustavo Diaz-Hernandez was mistaken in his eyewitness identification testimony. (Brief of Appellant at 39-46.) The state disputes Gordon's analysis and argues that Hernandez's identification testimony was reliable. (See State's Brief at 18-20.) The state disregards the overwhelming, objective facts in conflict with Hernandez's testimony.

Where the state in this case was unable to present a thread of direct evidence tying Gordon to the offense, the evidence was circumstantial. While circumstantial evidence may be sufficient to support a conviction, Gordon maintains that the circumstances of this case support otherwise, as further set forth below.

**A. THE STATE SEEMS TO DISMISS THE TRIAL COURT'S FINDINGS AS IRRELEVANT "COMMENTS" AND "MUSINGS." SINCE THE STATE CONSIDERS THE FINDINGS TO BE IMMATERIAL HERE, THIS COURT MAY REVIEW THE MATTER WITHOUT DEFERENCE TO THOSE FINDINGS.**

The state seems to claim that a trial court judgment may be sustained if it is supported by the record. (See State's Brief at 8.) The state asserts that review of a sufficiency claim "is review of the evidence to determine whether it supports the conviction, not whether it supports all of the fact-finder's comments, musings, and analysis." (State's Brief at 14.)

The state's assertions may be appropriate in the context of reviewing a sufficiency claim after a jury trial. In that instance, the comments and musings of a multi-member panel are not relevant on appeal. See Walker, 743 P.2d at 192-93. However, this case was not tried to a jury. Thus, the standard of review applicable to a sufficiency claim after a jury trial is not applicable here. Id.

In this case, the finder of fact was a single judge. This Court has ruled that it will apply a different standard of review to a sufficiency claim after a bench trial. See id. For a bench trial, this Court will apply the "clearly erroneous" standard to the trial court's "findings of fact" as set forth in Rule 52(a), Utah Rules of Civil Procedure. Id.

Rule 52(a) provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Utah R. Civ. P. 52(a) (2003). According to the rule, a trial court sitting as fact finder must make specific supportable findings, sufficient to sustain the ultimate determination. Also, the findings must be sufficient for a reviewing court to assess the basis for the ultimate verdict.

Stated another way, "[t]o provide meaningful appellate review, the trial court's findings must be sufficiently detailed and include enough subsidiary facts to clearly show the evidence upon which they are grounded." State in the Interest of S.T., 928 P.2d 393, 398 (Utah Ct. App. 1996) (Wilkins, J.); id. at 399 (recognizing that findings of fact must report the facts found to be true and support the ultimate judgment).

Findings of fact "serve multiple purposes. Appellate review is only one of those

purposes; informing the parties of the reasoning employed by the trial court [in reaching its decision] is another." Id. at 399; also Taylor v. Estate of Taylor, 770 P.2d 163, 168 (Utah Ct. App. 1989) ("Findings of fact serve two important purposes: (1) informing the parties of the trial court's analysis, and (2) providing a basis for review by the appellate court"). "The trial court's findings and conclusions must reveal the court's reasoning clearly enough that an appellate court can apply the appropriate standard of review to each part of the trial court's ruling." Griffith v. Griffith, 1999 UT 78, ¶10, 985 P.2d 255.

Without sufficient findings in a bench trial, the transcript on appeal simply reflects unresolved contested factual issues. Consider the case of Rucker v. Dalton, 598 P.2d 1336 (Utah 1979). There, a homeowner sued a builder for construction deficiencies. Id. at 1337. The homeowner claimed that an agreement between the parties held the builder responsible for the manner in which work was done on several aspects of a construction project. The construction was done in an unworkmanlike manner. The homeowner filed suit and requested damages against the builder in the amount of \$20,000. The builder counterclaimed for \$500, which constituted the balance of the price due under the contract. Id. at 1337-38. The case was tried to the bench. Id.

At the conclusion of trial, the judge entered findings of fact on the matter, and determined that the builder was responsible only for one aspect of the construction project. The trial judge entered judgment in favor of the homeowner in the amount of \$2,000, and the homeowner appealed. Id. at 1337-38. This Court reviewed the matter and found that the trial court's findings were incomplete. Specifically, there was no indication as to why

the trial court found the builder to be responsible only with respect to one aspect of the project when other aspects were listed on the "bid." The findings also were inconsistent on their face. Id. at 1338-39. On that basis, this Court remanded the case for proper findings "in accordance with the evidence." Id.

Rucker supports that in a bench trial, the court must make findings to support the ultimate determination. "The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law." Id. at 1338. The "findings should be sufficiently distinct and certain as not to require an investigation or review to determine what issues are decided." Id. (cite omitted).

Next, pursuant to Utah law, if an appellate court determines that a finding is clearly erroneous / insupportable, it is rejected. Insupportable findings serve to erode the factual basis for the trial court's ultimate determination. See State v. Arroyo, 796 P.2d 684, 687 (Utah 1990) ("A finding not supported by substantial, competent evidence must be rejected"); Walker, 743 P.2d at 193 (recognizing that an appellate court must reject a trial court's findings if the court considers them to be clearly erroneous) (citing Wright & Miller, Federal Practice and Procedure § 2585 (1971)).<sup>1</sup>

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<sup>1</sup>In support of its claim that the trial judge here was required to render only an ultimate verdict, the state has cited to Rule 44 of the juvenile rules. (See State's Brief at 15.) That rule states that in certain instances, "findings of fact shall not be necessary." Utah R. Juv. P. 44(a) (2003). The state does not explain how that rule is relevant here since this case was not presented in juvenile court. In addition, Rule 52(a), which is applicable here, requires that in connection with a bench trial, the court "shall find the facts specially." Utah R. Civ. P. 52(a). If anything, the state's reference to the juvenile rule emphasizes the importance of findings under Rule 52(a). That is, the procedural rules clearly articulate when findings are

Consider the following example. Suppose the trial court here entered a finding that Gordon's white Reebok shoes were used in the homicide at issue. (See R. 209:290-92 (bloody footprints from a Reebok shoe were found at the scene of the crime); 210:500 (officers located white Reebok shoes belonging to Gordon).) That finding would be rejected as insupportable. (R. 210:500 (Gordon's Reebok shoes did not match the prints found at the scene).) If such a finding had been made to support the trial court's determination that Gordon was the assailant, the lack of support for the finding would serve to erode this Court's confidence in the verdict. Indeed, this Court would be left with a definite and firm conviction that a mistake had been committed in the matter. See Walker, 743 P.2d at 192-93.

Here, the trial judge made findings of fact specially and separately from the ultimate determination. See Utah R. Civ. P. 52(a). The judge recognized the importance of the findings in the context of this case in rendering the ultimate verdict. The judge stated the following:

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specifically mandated (Rule 52(a)), and when they are not (Rule 44(a)).

The state also relies on State v. Nagel, 2001 UT App 268, an unpublished decision from the court of appeals. (State's Brief at 16.) In that case, the court of appeals addressed an argument raised by defendant concerning witness credibility. It is unclear from the unpublished decision how the issue was raised. *Assuming arguendo*, the issue was raised in the context of a sufficiency issue after a bench trial, there is no indication that the court of appeals was aware of the standard of review applicable in such cases. Specifically, the court did not identify the "clearly erroneous" standard set forth in Walker, 743 P.2d at 192-93, State v. Featherston, 781 P.2d 424, 432 (Utah 1989) (identifying clearly erroneous standard applicable in a bench trial under Utah R. Civ. P. 52(a)), or Rule 52(a). Thus, the unpublished opinion in Nagel, does not appear to be applicable or helpful to the issue on appeal here. See Horton v. Goldminer's Daughter, 785 P.2d 1087, 1090 (Utah 1989) (where the case law relied upon by a party failed to include analysis, it was not dispositive of the issue); see State v. Ostler, 2001 UT 68, ¶6 n.2, 31 P.3d 528 (state relied on case law that was not dispositive).

[A]s with all cases, criminal and civil but particularly criminal, it's not one thing that makes the difference in a person's determination of guilt or innocence. It's a texture of threads that come together that form a conclusion.

As Mr. Gotay pointed out, being at the 7-Eleven is not a crime. None of the acts or the pieces of evidence if they stood alone would probably be sufficient. It's the totality that, when they come together, paint a vivid picture. And to that end, I would point out that that is where the basis for this conviction lies.

(R. 211:537.) The trial court seemed to recognize that without the "texture of threads," the ultimate verdict could not be sustained.

On appeal, the state disregards the important role served by specific and separate findings of fact in a bench trial. Even where Utah case law has emphasized the importance of such findings, and even where the trial court emphasized the importance of such findings in this case, the state seems to argue that findings in general are irrelevant to the issue here. (See State's Brief at 16, 17.) In that regard, the state does not dispute that certain findings entered by the court in this matter are insupportable, unreasonable, immaterial and irrelevant. (See State's Brief at 16-21.) Where findings are insupportable, the ultimate verdict is in doubt.

Inadequate findings make application of the proper rule of law "difficult, if not impossible." Rucker, 598 P.2d at 1339. Without proper findings, the fabric of evidence against Gordon fails to cover the gap between the presumption of innocence and the proof of guilt.

Under the law, and in compliance with the "clearly erroneous" standard identified in Walker, Gordon has demonstrated that many of the threads purportedly supporting the conviction do not tie Gordon to the crime. (See Brief of Appellant at 30-46.) Without

supportable findings, the foundation for the ultimate verdict is eroded to the point that it must be rejected. On that basis, Gordon respectfully requests that this Court reverse the conviction in this matter.

**B. THE TRIAL COURT AND THE STATE HAVE IDENTIFIED THE LINCHPIN OF THE CASE AS HERNANDEZ'S EYEWITNESS IDENTIFICATION TESTIMONY. OVERWHELMING, OBJECTIVE EVIDENCE UNDERMINES THAT TESTIMONY.**

The state asserts in its brief that the trial court's finding relating to the lighting on the morning of the homicide is relevant to Hernandez's testimony that he observed the assailant commit the murder. (State's Brief at 16.) In addition, the state asserts without discussion or analysis that the evidence here supports the finding "that the lighting, while imperfect, was sufficient to allow Diaz-Hernandez to identify defendant." (State's Brief at 16.) The state then provides a string of record citations. (Id. at 17.) The state does not discuss in its brief how those citations to the record support the trial court's finding that the lighting was sufficient. (Id. at 17.)

The state's bare citations are inadequate. The appellate rules require more than a bald citation to the record or to authority; the rules require reasoned analysis and a discussion of the facts in the case. See State v. Thomas, 961 P.2d 299, 304-05 (Utah 1998); Utah R. App. P. 24(a)(9) and (b) (2003) (identifying standard for adequate briefing); State v. Montoya, 937 P.2d 145, 150 (Utah Ct. App. 1997) (declining to address the state's arguments where the state failed to meet the briefing requirements set forth in Rule 24(a)(9)). Where the state's brief contains only citations to the record in support of its argument that the trial court's finding is sustainable, this Court should reject the state's argument.

In addition, those portions of the record cited in the state's brief do not support that the lighting was adequate to allow Hernandez to identify the assailant. Specifically, the state cites to volume 208 of the record, pages 42-43, 101, 114, 117, and 119-120. (State's Brief, 17.) Also, the state cites to volume 211, which does not contain evidence. (Id.; see R. 211.)

The record citations identified by the state reflect the following: The state's witness Cathy Burget testified that the area in front of the 7-Eleven store was pretty well lit (R. 208:42-43). She also testified that the dumpster area where the attack occurred was "not light"; it was "pretty good" if "you're closer" to the dumpster, 3 or 4 feet away. (R. 208:42-44; see also 209:303, 374; 210:396-97 (Hernandez was 75, 142 and 282 feet away when he made observations).) The state's citation to the record does not support the trial court's finding that the lighting was sufficient to allow Hernandez to identify the assailant.

The state's next record citation supports that Hernandez was "estimating that he could see" the dumpster area early that morning, and he referred to a dark photo of the store. (R. 208:114 (identifying State's Exhibit 26).) To be clear, Hernandez testified that the area north of the store near the dumpster was "[n]ot very well lighted." (R. 208:61-62.) He testified that the store "now" has lights on the north side of the building, "[b]ut I don't think it had any on" September 29, 2001. (R. 208:62.)

As for the state's remaining record citations, they do not relate to lighting. (See R. 208:101 (Hernandez testified he was 100% sure that Gordon was the assailant); 208:117-18 (Hernandez testified that he saw the assailant's face in the dark for 3-4 seconds); 208:119-120 (as Hernandez was walking in the area he realized a crime was being committed).) Indeed



the overwhelming evidence from the state's witnesses support the determination that it was very dark that morning. (See R. 209:283-84, and State's Exhibit 23 (Steve Butcher testified that the distance from the sidewalk to the corner of the store was such that a person could not see behind the dumpster even "if it was daylight"; and he testified that even up close, it was so dark that morning, he could not see Lundskog's face); R. 209:369-72 (Officer Judd took photographs for the state in November at night); 210:398 (Judd had no information regarding the lighting at the store on September 29).)

As set forth in the Brief of Appellant, the trial court's finding that the lighting was sufficient to allow Hernandez to identify the assailant cannot be sustained. (See Brief of Appellant at 31-32.) The overwhelming evidence supports insufficient lighting to make an accurate identification. The weakness in that finding compromises the texture of threads sustaining the verdict against Gordon. The objective, overwhelming evidence should raise doubt about the validity of the verdict here.

Next, the state admits that many of the findings made in connection with the trial court's ruling were irrelevant or insubstantial. (See State's Brief at 16-17 (stating that the only relevant finding in defendant's "first set" of challenged findings related to "lighting"; "[o]ther challenged 'findings' were not relevant").) The state does not dispute that the trial court's following findings were in error:

The trial court found that robbery was the motive for the homicide (see Brief of Appellant at 30-31).

The trial court found that there were no cars at the 7-Eleven at 5:30 (see id. at 32-33).<sup>2</sup>

And the court found that Gordon and Lundskog interacted, they left together and after they left, no one saw the victim alive again (id. at 33-34).

Those findings are improper. (Brief of Appellant at 30-34.)

The state does not dispute that additional findings are irrelevant (see State's Brief at 17-18). The additional, irrelevant findings include the following:

Clothing that Gordon wore on the morning in question was distinctly and conspicuously clean (Brief of Appellant at 34-35).

Gordon was mistaken in that he went in and out of the 7-Eleven three times rather than one (id. at 35).

White tennis shoes were not found in a home where Gordon had been staying, and

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<sup>2</sup> The state claims that the trial court simply failed to note that "Augustin Castaneda, another witness, pulled into the 7-Eleven at 5:30." (State's Brief at 17.) The state considers that failure to be "inconsequential." (Id.) Yet, the trial court made its finding based on Hernandez's testimony. Specifically, Hernandez testified at trial that he observed the attack. He described events in detail, including the fact that after the attacker stomped on Lundskog, he then entered the store and came out again with large bags in each hand. The attacker then placed the bags in the back seat of a Nissan/Chevrolet that pulled into the store parking lot. The attacker walked over to Lundskog and kicked him again before he left the store property. Hernandez specifically observed only the attacker and the Nissan/Chevrolet at the store. He did not observe any other activity at the store that morning. (R. 208:78-85.)

Based on Hernandez's testimony, and the videotape of Gordon's activities inside the store, the state argued that Gordon committed the homicide between 5:27 and 5:31 that morning. (See R. 210:508.) Thus, in an effort to give Hernandez's testimony and the state's theory credibility, the trial court found that there were no cars at the store at 5:30. (R. 211:544.) The overwhelming and objective evidence supports the determination that a mistake was committed with respect to that finding. Between 5:27 and 5:31, when Gordon supposedly was committing a homicide just outside the 7-Eleven store, three cars pulled into the parking lot, and four people entered the store. (R. 209:228-31; 210:437-38; 210:469-70; 210:482-84.) There is no indication that any of those individuals saw or heard anything unusual at the store. Yet, if Gordon was the attacker as claimed by the state, those four individuals would have been closer to the incident than Hernandez. The trial court's finding that there were no cars at the store was meant to bolster credibility. It was erroneous.

white tennis shoes would have shown signs of the homicide (id. at 35-36).

The court considered it to be a distinctive fact that Gordon did not keep a pair of white tennis shoes at the home where he had been staying prior to and on September 29, 2001 (id. at 37).

Although Robert Mellen did not observe criminal activity that morning, he was uneasy and nervous. He was suspicious of Gordon and testified that Gordon looked at him pretty hard (id. at 36-37).

While the trial court stated it would not take into account the fact that Gordon did not testify in this case, the court observed that Gordon's demeanor at trial lacked emotion, thereby contributing to the verdict (id. at 37-38).

Here, the state does not dispute that many of the findings made by the trial court were improper. (See State's Brief at 16-18.) Those findings must be set aside. Where many of the trial court's findings are irrelevant and not sustainable, this Court should be "left with the definite and firm conviction that a mistake has been committed." Walker, 743 P.2d at 192-93 (citing Wright & Miller, Federal Practice and Procedure § 2585 (1971)). Stated another way, since the trial court here made numerous improper findings, that is a basis for reversing the conviction in this case. Indeed, many of the threads purportedly holding the fabric of evidence together are erroneous.

Without the erroneous findings set forth above, the evidence reflected the following: It was dark on the morning of the homicide (R. 208:127 (Hernandez testified it was too dark, "nothing could be seen"); 209:268 (Steven Butcher testified that it was dark at 5:45).) Gordon was at the 7-Eleven store between 5:20 and 5:32. (R. 210:426-28, 439-41.) Gordon entered the store three times. He was mistaken when he reported that he believed he entered the 7-Eleven store just once. (R. 210:452; State's Exhibit 57 at 22.) Gordon was not in

view of the 7-Eleven video camera between 5:27 and 5:31. Mellen did not see Gordon and Lundskog interact that morning. (R. 209:258.)

Gordon had no reason to attack Lundskog. A state expert did not detect blood on Gordon's clothes (R. 209:354-55, 358). Gordon kept a pair of white Reebok shoes at a friend's house. Gordon's shoes did not match the bloody prints at the store. (R. 210:500.)

During the time that Gordon allegedly was involved in an attack, three cars pulled into the 7-Eleven parking lot and four people walked into the store. (R. 210:437-38, 482-83.) Those individuals did not report anything unusual that morning at the 7-Eleven. (See R. 210:482-83; 209:233-34.)

In the end, as set forth in the opening Brief, the state's entire case hinged on the eyewitness identification testimony of a single witness: Hernandez. Hernandez testified that he heard and saw the attack in the dark. He made his alleged observations from 75, 142, and 282 feet away. (R. 208:64-67, 73-74, 77-78; 210:396-97; 209:303, 374.) He testified that he observed only the attacker and the Nissan/Chevrolet car at the 7-Eleven that morning. (R. 208:78, 80-85.) He did not indicate any other activity at the 7-Eleven.

The state argues that Hernandez's testimony implicating Gordon in the crime was reliable and sufficient to support a guilty verdict. (See State's Brief, 20.) The state relies on Hernandez's "very good eyesight," his report of the attack to his coworker (R. 209:204 (Hernandez reported to a coworker that he witnessed an attack behind the dumpster)), and Hernandez's objectivity in the matter, where Hernandez did not make his observations while being attacked or threatened. (Id.) The state's argument places undue confidence in the

observations of one person. As set forth in the opening brief, many discrepancies in the evidence place Hernandez's eyewitness identification in doubt. (Brief of Appellant, 39-46.)

Specifically, Hernandez testified that he heard/observed the events over a period of 9 to 10 minutes, while Gordon was out of view of the camera for under four minutes. (R. 208:76-77; 210:436, 439.) Also, Hernandez was the only person to observe the assailant; no other person was in the area during the matter. Yet, according to the videotape, while Gordon was out of camera view, several patrons were in and out of the store. (R. 209:229-31; 210:437-38, 469, 482-84.) That evidence supports Gordon was not the attacker.

While some of Hernandez's testimony was similar to events reflected in the videotape, that does not support that Gordon committed the homicide beyond a reasonable doubt. Specifically, Hernandez told a friend, Jose Lopez, about the incident. (R. 208:136.) Lopez reported the crime to police as though he had witnessed it, even though he had not. (R. 208:93-97; 208:138.) In connection with reporting the crime, Lopez viewed the videotape at the police station, and he identified Gordon as the assailant. (R. 208:168, 179.) Lopez then went home and described Gordon and the videotaped events to Hernandez. (R. 208:138.)

Hernandez likely learned from Lopez's description of videotaped events that Gordon entered the 7-Eleven more than once. Thereafter, Hernandez testified that the attacker entered the 7-Eleven after he kicked Lundskog. (R. 208:78-80.)

In this case, other objective facts fail to support that the attacker entered the store at all. That is, according to investigating officers, the attacker left bloody foot prints at the scene. There is no indication that the bloody prints went into or toward the 7-Eleven store.

(See R. 209:290, 336, 351, 363-64.) In addition, employees for the 7-Eleven did not observe or clean bloody prints from the floor. (R. 208:51; see also R. 209:331.) Thus, in the end, Hernandez's testimony implicating Gordon appeared to be based on information Lopez observed from the videotape. (See Brief of Appellant at 45.)

Also, Hernandez likely learned from Lopez's description of videotaped events that Gordon carried something out of the store. (See R. 210:430-31.) Thereafter, Hernandez testified that *after the attack*, the assailant went into the store and he came out carrying bags that were 2½ feet tall and 1½ feet wide. (R. 208:83-84.) On this specific point, Hernandez's testimony implicating Gordon is discredited by events captured on video. According to the video, Gordon carried items out of the store before Lundskog was attacked. (See R. 210:430-31, 466.) Thus, Hernandez's testimony is in error.

In sum, Hernandez's observations were made in the dark from 75, 142, and 282 feet away (R. 210:396-97; 209:303, 374). According to state witnesses, lighting in the area was inadequate, particularly at those distances (Brief of Appellant at 31-32, 41); the timing of Hernandez's observations did not coincide with the time that Gordon was at the 7-Eleven store; and Hernandez's testimony implicating Gordon was in conflict with information captured on videotape, and information learned from the bloody footprints. (See Brief of Appellant at 39-46.)

This Court has recognized that eyewitness identification testimony is fallible. An eyewitness is not not like a camera. State v. Long, 721 P.2d 483, 488 (Utah 1986). Here, Hernandez claimed to observe a violent beating in the dark from several feet away. It


frightened him. When the attacker turned only once (R. 208:117), Hernandez saw his face for 3 or 4 seconds (R. 208:118); he then avoided the attacker by looking away (R. 208:74-75). Initially Hernandez could not say whether the suspect had facial hair or jewelry, and initially he did not identify Gordon as the attacker. (R. 208:127; 208:107-09.) He testified it was so dark, "nothing could be seen" (R. 208:127), he was "traumatized" (R. 208:129), and "[w]hen it comes to sad cases," he did not like to "remember them that well." (R. 208:146.) While Hernandez was sincere in his identification testimony, he was fallible.

When this Court examines all the evidence in this case, it should be left with reasonable doubt in the verdict. Many trial court findings are irrelevant and insupportable, and Hernandez's fallible, but sincere, eyewitness testimony is in conflict with objective facts. The findings supporting the guilty verdict in this case should be set aside.

### CONCLUSION

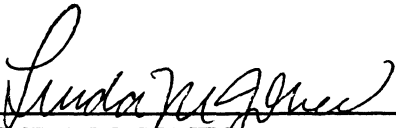
For the reasons set forth herein, and as set forth in the Brief of Appellant, Gordon respectfully requests that this Court reverse the judgment and vacate the guilty verdict on the basis that the evidence is insufficient to support the determination that Gordon committed the homicide in this case.

SUBMITTED this 2<sup>nd</sup> day of June, 2003.

  
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Attorneys for Defendant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered 10 copies of the foregoing to the Utah Supreme Court, 450 South State Street, Fifth Floor, Salt Lake City, Utah 84111, and 4 copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 2<sup>nd</sup> day of June, 2003.

  
\_\_\_\_\_  
LINDA M. JONES

DELIVERED to the Supreme Court and the Attorney General's office as set forth above, this \_\_\_ day of \_\_\_\_\_, 2003.

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