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20020352

**In the Supreme Court  
State of North Dakota**

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MAY 28 2003

State of North Dakota, )  
)  
)  
Plaintiff/Appellee, )  
)  
-vs- )  
)  
Peter Paul Zephyrin, )  
)  
Defendant/Appellant.)

STATE OF NORTH DAKOTA

Supreme Court No. 20020352

Cass County No. 02-K-01528

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**Brief of Defendant/Appellant**

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Appeal from Criminal Judgment and Commitment  
entered on December 16, 2002  
In District Court, County of Cass, State of North Dakota  
The Honorable John C. Irby

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## Statement of the Case

Peter Paul Zephyrin was charged in a three-count information dated May 10, 2002. (App. 5). Count one charged Robbery in violation of **NDCC Section 12.1-22-01**. Count two charged Felonious Restraint in violation of **NDCC Section 12.1-18-02**. Count three charged an Unauthorized Use of a Vehicle in violation of **NDCC Section 12.1-23-06**. All were related to an incident alleged to have occurred on May 1, 2002. Mr. Zephyrin made his first appearance on May 14, 2002, and counsel was appointed. Bond was set at \$20,000 cash or surety bond. Mr. Zephyrin appeared with counsel on May 23, 2002 for a bail review. Bond was amended to \$10,000 cash or surety bond. Mr. Zephyrin appeared with counsel on June 13, 2002 and waived his right to a preliminary hearing. He entered pleas of not guilty to all three counts, and a further reduction of bail was denied. Mr. Zephyrin appeared on July 29, 2002, with counsel, and indicated he wished to persist in his not guilty pleas, and the matter was placed back on the calendar for a dispositional conference. Mr. Zephyrin appeared with counsel on August 7, 2002, and a jury trial was scheduled for September 24, 2002. Mr. Zephyrin appeared with counsel on September 18, 2002, and a motion was granted to allow the defense to take discovery depositions. A trial date of October 22, 2002 was set.

A jury of thirteen was duly empaneled on October 22, 2002, and the trial proceeded and concluded on October 23, 2002, the jury finding Mr. Zephyrin guilty of all three counts. The court ordered a pre-sentence investigation.

Mr. Zephyrin appeared with counsel on December 16, 2002 for sentencing.

The Court entered judgment on December 16, 2002. Mr. Zephyrin was sentenced to ten years on count one, five years on count two, and one year on count three, all to run concurrent. (App.7). A Notice of Appeal was filed on December 16, 2002. (App. 10).

### **Statement of the Issues**

- 1. Whether the Trial Court erred by not striking the jury panel because it did not contain any minority members.**
- 2. Whether the Trial Court erred by not declaring a mistrial due to mid-trial publicity.**
- 3. Whether the prior identification of Mr. Zephyrin was impermissibly suggestive, and denied him Due Process.**

### **Statement of the facts**

Sandra Klinkhammer is the Manager of the Red-D-Cash store at 3060 South 25<sup>th</sup> Street, Fargo, North Dakota (T159). She handles bookkeeping and provides loans to people. She was working on May 1, 2001 at 10:30 a.m. At 10:30 a customer walked in (T160). He asked about a loan, she gave him an application and he sat down and started to write (T160). She got up from her desk and walked to the back of the room. He kicked in the door (T161). The business consists of a small lobby area and an area behind a counter enclosed by bars (T161). The back office area is separated by a partition. There is also a bathroom in the back area (T161-162). The only access to the back area is through a door which was locked (T162). When the man walked in, she noticed he was wearing jeans, a gray

sweatshirt, and what she thought was a baseball cap. He had gloves on, and she thought he was carrying a cane, which turned out to be a golf club (T163). The sweatshirt's hood was up. The hat was blue with "zero two" or "02" on the front (T164). The man was an African American. He was wearing gardening gloves (T164). The man was making her nervous (T166). She got her silent alarm device out of her purse and put it on, around her neck. With it she can signal a security company (T167). She went behind the partition to file something, heard a loud bang, turned, and the man was standing about 10 feet away holding the golf club (T168). He was holding the golf club as if he was going to swing it at her (T169). She was afraid, put her hands up, and stepped back (T170). She said "don't hit me," he said "I won't, get into the bathroom." She said "please don't hit me." She went into the bathroom and he began tying her hands (T171). He had her get down on her knees and tied her hands with a rope (T171). There was no rope in the office, so he must have brought it with him (T172). She was tied to the handicapped bar in the bathroom. He had her lie down on the floor. He asked her if she had a vehicle. She said yes. He asked her where the keys were, and she indicated that they were either in her pants pocket or in her coat pocket which was hanging on a chair (T172). He left the room and did not shut the door all the way (T172). She heard him rummaging around and she could see him walking around through a gap between the door and the floor (T172). He came back and asked if there was an alarm on the safe or the cash drawer (T173). She said, "No, you just push the button and it opens" (T173). She noticed his shoes were either black or dark blue,

had a white stripe on the bottom, and were slip-on, with no laces (T173). When he asked her about car keys, he took his glove off and reached into her pocket, but the keys were not there (T173). She heard the bell on the cash drawer. She then heard the bell on the exit door (T175). She was able to free herself, and then she called 911. Her wrists were injured by the rope (T175). Money was missing from the cash box and the safe, \$2,931.00 total (T177). The police came and she began answering questions. She described her vehicle as a green Ford F150 (T177) .

On May 8, 2002, the Fargo Police came and showed her a six-person photo line-up of African American men (T178). She picked the Defendant out after looking over the photos carefully (T179). She was asked for a "percentage" of how sure she was, and she stated eighty-five percent (T180). She identified Mr. Zephyrin in the courtroom as the person who robbed and tied her up (T180). Exhibits 1 and 2 are pictures of the lobby area (T181). Exhibit 3 is a picture of the door (T182). Exhibit 4 shows damage to the door (T182). Exhibits 5 and 6 show the bathroom with the rope tied to the handi-rail. (T183). Exhibit 7 shows the safe and cash drawer (T183-184). Exhibit 8 is a picture of her pickup (T184). Exhibit 9 is a golf club (T185). She stated it looks like the golf club that was used in the robbery. Exhibit 10 is a gray hooded sweatshirt, which "looks like the one that he had on" (T186). Exhibit 11 is a blue visor with "02" on it. She "thought it was a baseball cap, but I guess it was a visor" (T187). She could not see the top because "he" never took the sweatshirt hood off (T187). Exhibit 12 was "a pair of shoes, looks very similar to what I saw." She could only see part of the shoes because she was down on the

floor (T198). She believes those were the shoes worn by the robber (T189). She did not report to law enforcement that the sweatshirt had a "USA" insignia stitched on it, or that it was stained (T193). She could not be certain the golf club in Exhibit 9 was positively the golf club used in the robbery (T194). She never noticed a blue portion on the head of the golf club (T195). She also could only say the shoes were similar to those worn by the robber (T196). She described the individual as being six feet tall (T197). She is now 100% certain that Mr. Zephyrin was the robber, having seen him in person, despite being only eighty-five percent certain when viewing the photo line-up (T198-201). She denied that she was identifying Mr. Zephyrin based on the photo (T201). She could not remember any distinctive markings on the gloves, just that they were off-white and garden-type gloves (T201-203). The individual did not have any distinguishing characteristics or facial hair (T205). In her deposition she could not positively identify the individual (T206).

Rochelle King lives and works in Fargo and knows Peter Zephyrin (T209). They had a relationship and a child together, a girl who was four at the time of the trial (T210). Detectives came to her apartment to question her about Peter Zephyrin (T212). She invited them in. They asked if she knew why they were there and she said she did not (T213). They told her they believed Peter had been involved in a crime and wanted to know if she knew anything or if they could find anything. She allowed them to look around her apartment. They found a sweatshirt, a golf club, a pair of garden gloves, and her visor (T213). The golf club was found in her closet behind her Christmas tree box. She was surprised they found a golf club, because



she did not have golf clubs and had never seen it before (T214). She knew Peter Zephyrin was at her apartment on May 1, 2002, the day of the robbery (T215). He was there in the morning when she left for work (T215). He was sleeping on her couch when she left for work (T216). She returned home about 5:30 or 5:45. Peter Zephyrin had access to her apartment that day. No one else had access to her apartment that day (T217). He had no money and was in the process of finding a job (T218). She and Peter Zephyrin went out that same evening. He had a \$20 bill (T218).

She asked him about financial support, and he told her to look in a piggy bank. She did, and found a \$100 bill. She called the detective about it (T219). She gave the bill to the police, because she felt it was not hers to keep (T220). She was shown photos of the robbery and she felt she recognized items of clothing, the sweatshirt, visor, and gloves (T221). She also thought the pants and shoes looked like those belonging to Peter Zephyrin (T222). She could not identify Peter Zephyrin from the photos on the security tape (T223). She had no idea when or how the golf club came to be at her residence (T224). She had no idea where the money came from (T225). She can not be positive the clothing worn by the robber was the clothing found in her apartment. Peter never told her he had committed a robbery (T226).

Charles Sullivan is a Fargo Police Officer (T229). He was the first officer at the scene on May 1, 2002 (T231). He talked to Ms. Klinkhammer and got a description of the robber and broadcast it (T232). A crime scene investigation was

conducted. He noticed marks on her wrists consistent with somebody being tied up (T234). He visited with Rochelle King on May 8, 2002. Ms. Klinkhammer's pickup was located in the vicinity of Ms. King's apartment (T235). Police had received a tip that led them to Ms. King. Ms. King gave the officers consent to search her apartment (T237). They found the items received into evidence, the sweatshirt, golf club, visor and gloves. Exhibits 9, 10, 11, and 13 (T240). Exhibits 14 through 17 are pictures of the items as they were found in Ms. King's apartment (T243). The officers went to Valley City, obtained a search warrant, and went to an apartment to locate Mr. Zephyrin (T245). They located Mr. Zephyrin and identified him (T246). They executed the search warrant and located some slip-on tennis shoes with a white stripe on the soles (T246). The shoes were marked as Exhibit 12 (T248). They arrested Zephyrin and transported him back to Fargo in an unmarked police car. The car did not have a partition (T249). Detective Lies and Mr. Zephyrin had a conversation on the way back to Fargo. Mr. Zephyrin had been given his Miranda warnings. Detective Sullivan did not participate in the conversation, he simply listened (T250).

Ms. Klinkhammer had estimated the robber's height as being between 5'7" to 6'1" (T289). The gloves were found in a box in a closet. There is a picture of a flower on the gloves, if the gloves were worn properly (T291).

Detective Paul Lies participated in the investigation of the robbery (T296). He took photographs of the crime scene. He recognized the rope, Exhibit 18, as the rope from the crime scene (T298). He found a partial shoe print on the door that had

been kicked in. He used lighting and finger print powder to enhance and "lift" the print (T300). Exhibit 19 is a photo of the shoe print (T303). Detective Lies described what the video from the security camera showed (T305-306). The tape is generally poor quality, but some items can be seen. One can see what the robber was wearing, the golf club, and the bottom of his shoes. Everything is in black and white (T308). Exhibits 20 through 24 were still prints taken from the video (T311). Exhibit 25 is an enlarged photo from the video (T314). This photo shows a male individual with a hat on, with some kind of emblem on the hat (T314). The photo does not clearly define details. Detective Lies participated in the search of Ms. King's apartment and the arrest of Peter Zephyrin (T326). Exhibit 12 is the pair of shoes seized from Mr. Zephyrin. The shoes are consistent with those worn by the robber as shown on the video (T327). The heel portion of the shoes have a pattern (T327). The pattern on the bottom of the shoes was compared to the picture of the shoe pattern that was taken from the door at the robbery scene, as shown in Exhibits 12 and 19 (T328-329). Exhibit 26 is a picture of the shoes as they were found in the apartment in Valley City when Peter Zephyrin was arrested (T330).

Mr. Zephyrin was advised of his Miranda rights on May 8, 2002, at the time he was arrested in Valley City (T331). Detective Lies sat next to Mr. Zephyrin in the back seat of the unmarked police car, and they conversed the entire drive back to Fargo from Valley City (T333). As they passed the Tower City Truck Stop, Mr. Zephyrin said "I should have jacked that place instead of Red-D-Cash" (T335). The Detective stated that "jacked" refers to a hold up (T335). He later asked Mr.

Zephyrin, "why does an intelligent person like you do something like this?" He replied "That'll be the question I'll be asking myself for years." (T335).

The pickup itself contained nothing tying Mr. Zephyrin to the robbery (T339). Detective Lies prepared the photo line up (T341). Ms. Klinkhammer provided a percentage of how sure she was of her identification after being asked to by Detective Lies (T342). She said "85 percent sure. The eyes and the nose are the same but the skin isn't quite right" (T342). The gloves which were found in Ms. King's apartment had a picture on them (T344). That picture would be visible on the back of the hand if a person was wearing them (T344). There was no DNA analysis done, and there was no physical evidence tying Mr. Zephyrin to the gloves. There was also no DNA evidence tying Mr. Zephyrin to the rope or the golf club (T345). There was no DNA or other evidence tying Mr. Zephyrin to the sweatshirt or the hat (T346). The shoes were found in a different apartment than the one Mr. Zephyrin had come out of (T347). None of the money taken during the robbery could be tied to Mr. Zephyrin (T350). When Mr. Zephyrin was given his Miranda warnings, Detective Lies intended to ask him about the robbery. He did not answer any questions in regard to the robbery (T352). Mr. Zephyrin was told what evidence they had against him and he stated, "If you have all this evidence, why do you need to talk to me?" (T352). When Mr. Zephyrin said "That'll be a question you ask yourself for years," he meant it was a question Detective Lies would be asking himself, not Mr. Zephyrin (T355).

Exhibit 27 was the photo line-up used in this case (T360). The photo of Mr.

Zephyrin was located in the bottom center of the line-up (T362). The photo was an old driver's license photo (T362). Detective Lies did not dust anything for fingerprints because the suspect was wearing gloves (T365). DNA analysis was not done on items found in the apartment because it was clear Mr. Zephyrin had access to the items (T367).

Peter Zephyrin testified in his defense (T375). He stated he did not rob the Red-D-Cash Store. He was at Rochelle's apartment (T377). He got up at 11 or 12 o'clock and left the apartment about 2:00 p.m (T378). Mr. Zephyrin stated he had never seen Ms. Klinkhammer before she testified (T379). He stated he was not the person depicted in Exhibit 25 (T379). Mr. Zephyrin stated that he is 6'4" tall and weighs about 205 pounds (T380). Mr. Zephyrin denied ever seeing the gloves or the rope before. He stated the golf club was his, from his set of golf clubs. However, he said his clubs were never at Rochelle's place for any reason (T381). He has no idea how the club got into her closet (T381). He stated that he had worn the hat that was now in evidence many times before (T382). Mr. Zephyrin recognized the sweatshirt and said it belonged to Rochelle's dad. It has an easily seen logo "USA" on it (T382). Mr. Zephyrin related that he and Detective Lies talked about many things on the drive back to Fargo (T385). Mr. Zephyrin said when he made the comment about the Tower City Truck Stop he was just "being a smart ass" (T385-386). He stated that when he said to Detective Lies, "That's a question you'll be asking yourself for years," he meant he had nothing to say about the robbery (T386). Mr. Zephyrin made specific denials about all details at the robbery (T387-388).

## Argument

### **1. The Trial Court erred by not striking the jury panel because it did not contain any minority members.**

Mr. Zephyrin's trial attorney made an objection to the jury panel because it did not contain any minority members (T 11). He specifically stated that the panel was objected to because it was not "representative of the diversities in this case, backgrounds of the population of Cass County. And based on the fact that the jury is entirely white, there are no minority members on the jury, we do not believe that panel is in a position to give Mr. Zephyrin a fair trial" (T 11). The State resisted the motion, and the Court denied the motion, noting that defense counsel would be given ample opportunity to delve into the issue and make appropriate challenges for cause (T 11). The defense motion was not filed pre-trial, and it was not supported by a brief, affidavits, witnesses, or any evidence of any kind, other than the conceded fact that there were no African Americans on the jury panel.

This Court has addressed this issue directly. **See *State v. Robles*, 535 N.W.2d 729 (N.D. 1995); *State v. Marshall*, 531 N.W.2d 284 (N.D. 1995); *State v. Fredericks*, 507 N.W.2d 61 (N.D. 1993).** In *Fredericks*, this Court discussed a challenge very similar to the one made here. ***Id.* NDCC Chapter 27-09.1** is the Uniform Jury Selection and Service Act as enacted in North Dakota. **NDCC Section 27-09.1-12** contains the procedure for challenging the selection procedures. It appears that this Court will determine that Mr. Zephyrin can not argue that the Act was not complied with in selecting his jury panel, because he did

not follow the statutory procedure to attack the selection of the panel. **Fredericks, 507 N.W.2d at 64.** However, Mr. Zephyrin would nonetheless argue that his rights to a fair trial under the State and Federal Constitution were violated because there were no African Americans on his jury panel. **Fredericks** recognized a separate constitutional analysis, and applied a test found in **Duren v. Missouri, 439 U.S. 357 (1979).** **Fredericks, 507 N.W.2d at 64.** The Court quoted **Duren** as follows:

Although the North Dakota Constitution's guarantee of the right to a jury trial does not explicitly require an impartial jury, **see N.D. Const. art. I, 13,** we would read the Sixth Amendment's impartiality and fair-cross-section requirements into our state constitution. In **Duren v. Missouri, 439 U.S. 357 (1979),** the Supreme Court set out the elements of a prima facie violation of the Sixth Amendment's fair-cross-section requirement: "[T]he defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." **Id. at 364.** Once the defendant has made a prima facie showing, the burden shifts to the state to show a significant interest manifestly and primarily advanced by the aspects of the jury selection process that result in the disproportionate exclusion of a distinct group. **Id. at 367-68.**

**Fredericks, 507 N.W.2d at 65.** Certainly the first prong of the test is met, that African Americans, absent from the jury panel, are a distinctive group. Mr. Zephyrin did not present any actual evidence on the second or third prong. Clearly, however, there were no African Americans on the jury panel, and the State presented no evidence to show that any attempt was made to have African Americans on the jury panel, and no explanation of whether or not the selection process would result in a fair representation of African Americans on the jury panel. It is Mr. Zephyrin's position that his conviction should be reversed because there were no African

Americans on his jury panel. Notwithstanding the holding in *Fredericks*, this Court should consider requiring the State to produce evidence that African Americans have a representative chance of being on jury panels in Cass County. The Judgment should be reversed and the case remanded for that purpose.

**2. The Trial Court erred by not declaring a mistrial due to mid-trial publicity.**

On the second morning of the two-day trial, the Trial Court conducted an inquiry about news reports about Mr. Zephyrin (T 264-287). There were radio, television, and newspaper reports the evening of the first day of trial and the morning of the second day of the trial that Mr. Zephyrin was going to be charged with causing \$30,000 in damage to the new Cass County jail. There were also some basic reports of the progress of the trial. The Court allowed the attorneys to conduct individual voir dire of the jurors who admitted to being exposed to news reports (See T 265-T286). The first three jurors were questioned and passed for cause by defense counsel. The fourth juror questioned admitted to reading an entire *Forum* article about the damage to the jail (T 272-275). The juror stated that she would not be able to put what she read out of her mind, and that she would not be able to be fair and impartial. The Assistant State's Attorney attempted to rehabilitate her. The Court granted defense counsel's challenge for cause (T 275). The jury empaneled consisted of thirteen, twelve and one alternate. With that challenge, there were only twelve jurors left.

The fifth juror admitted that she heard a television report that Mr. Zephyrin



had been charged with causing damage to the jail (T 276). She said it “might make a difference” when asked if what she heard would interfere with her ability to be a fair and impartial juror. She then said she could set aside what she heard (T 277). She was challenged for cause (T 278). The Court summarily denied the challenge for cause.

The sixth juror questioned admitted that she had heard on the radio that Mr. Zephyrin was being charged with damaging the jail (T 279). She said she had “three reactions” when she heard it (T 280). She explained that she knew that the jury would be asked about it, and that, if it is not brought up in the trial, they can not consider it (T 280). Defense counsel also challenged her for cause, and the Court denied the challenge (T 281). Two more jurors were questioned, and passed for cause (281-286). Defense counsel made a motion for a mistrial based upon the fact that eight of the thirteen jurors had heard news reports (T 287). The Trial Court denied the motion.

The Trial Court did not give any special cautionary instructions to the jury as a whole about the mid-trial publicity, and their duty to decide the case only on the evidence presented, beyond the standard instructions (Pages 1-4 of instructions read, T 158; final instructions read T 391; T 424).

This Court has addressed mid-trial publicity. ***State v. Osier*, 1999 ND 28, 590 N.W.2d 205; *State v. Voeller*, 356 N.W.2d 115 (N.D. 1984).** In *Voeller*, the trial court did not conduct individual voir dire as in this case, but the court went to great lengths to give special cautionary instructions, specifically directed to the mid-

trial news reports. *Id.* at 121. In *Osier*, the trial court handled the situation in much the same way, with repeated cautionary instructions specifically about the mid-trial publicity. *Osier* at ¶28. Evidently the standard of review is whether the trial court abused its discretion in denying the motion for a mistrial. *Osier* at ¶31.

Some language of the *Voeller* court summarizes the applicable analysis:

In the absence of contrary evidence, a presumption exists that a jury performed its duties in accordance with the law and were not influenced by outside events or evidence. *State v. Hepper*, 316 N.W.2d 338, 340 (N.D. 1982) *Olson, supra*. There was no reason for the trial court to assume that any of the jurors had disregarded the admonishments or instructions given by the court. The jurors assured the trial court that they would "put out of their minds" anything they had read or heard about Voeller out of court and would base their verdict only on evidence presented in court. We said in *Olson, supra*, that in determining whether a defendant was deprived of a fair and impartial jury, the court will not readily discount the assurances of a juror as to his impartiality:

"Courts look at the totality of circumstances to determine whether the trial was fair.... After trial and conviction, where the reasonable likelihood of prejudice has been refuted by voir dire examination, we give deference to the trial judge who has heard the responses made by the jurors." 274 N.W.2d at 198.

Voeller's conviction was not obtained in a trial atmosphere "utterly corrupted by press coverage" [*Murphy v. Florida, supra*, 421 U.S. at 798, 95 S.Ct. at 2035], from which we could presume unfairness of a constitutional magnitude. *State v. McLain*, 301 N.W.2d 616, 623 (N.D. 1981).

*Voeller*, 356 N.W.2d at 121. However, in this case, unlike the cited cases, the information acquired by the jurors was highly prejudicial to Mr. Zephyrin. The trial judge granted the challenge for cause of one juror, and denied two more. Had the judge granted even one more challenge, there presumably would have been a mistrial because the number of jurors would have dropped to less than twelve. The information obtained by the jurors was inadmissible as highly prejudicial "other

crimes wrongs or acts.” **N.D.R.Ev. Rule 404b**. Such information would have been inadmissible under any theory.

The trial judge abused his discretion by not granting a mistrial, in light of his failure to give specific cautionary instructions to the entire panel. There is entirely too much of a likelihood, considering the totality of the circumstances, that Mr. Zephyrin was denied a fair trial because of the prejudicial information acquired by the jurors in mid-trial. This Court should reverse the judgment and grant Mr. Zephyrin a new trial.

**3. The prior identification of Mr. Zephyrin was impermissibly suggestive, and denied him Due Process.**

Defense counsel did everything he could to challenge the victim’s identification of Mr. Zephyrin as the man who robbed her. She could not identify him from the security camera stills. She described the individual as being six feet tall (T197). She is now 100% certain that Mr. Zephyrin was the robber, having seen him in person, despite only being eighty-five percent certain when viewing the photo line-up (T198-201). She denied that she was identifying Mr. Zephyrin based on the photo (T201). Ms. Klinkhammer provided a percentage of how sure she was of her identification after being asked to by Detective Lies (T342). She said “85 percent” sure. She said the “the eyes and the nose are the same but the skin isn’t quite right” (T342). Exhibit 27 was the photo line-up used in this case (T360). The photo of Mr. Zephyrin was located in the bottom center of the line-up (T362). The photo was an old driver’s license photo (T362). It is Mr. Zephyrin’s position that the

identification process was unreliable because it was tainted by the suggestive photo line up.

This Court has addressed the issue of an impermissibly suggestive identification process in ***State v. Norrid*, 2000 ND 112, 611 N.W.2d 866**. In part the Court described the analysis as follows:

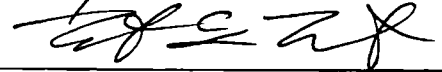
[¶8] In ***Stovall v. Denno*, 388 U.S. 293, 302 (1967)**, a companion case to ***Wade*** and ***Gilbert***, the Court held identification testimony must be suppressed if, under the totality of the circumstances, the procedure for identification “was so unnecessarily suggestive and conducive to irreparable mistaken identification” to constitute a denial of due process.

***Citations and footnote omitted***. Here, the defense did not make any pre-trial motion to suppress the identification of Mr. Zephyrin. However, for the first time, during the trial, the victim was “100%” certain of her identification. The suggestive nature of the photo lineup, and the inability of anyone to identify the robber as Mr. Zephyrin from the security camera pictures, combined with the other circumstances of the case, call her identification into serious question. Mr. Zephyrin’s former girlfriend, Ms. King, could not identify Mr. Zephyrin from the security camera pictures (T223). It is Mr. Zephyrin’s position that the in-court identification of him by the victim, in light of the totality of the circumstances, violated his right to due process. In a way, this is an argument that, without the identification, the evidence of record would be insufficient to sustain the conviction. ***See State v. Yineman*, 2002 ND 145, 651 N.W.2d 648; *State v. Himmerick*, 499 N.W.2d 145 (N.D. 1993)**. This, in combination with the other arguments set forth above, entitles Mr. Zephyrin to a reversal of his conviction, and a new trial.

### Conclusion

The undersigned respectfully submits that the judgment should be reversed,  
and the case should be remanded for a new trial.

Respectfully submitted this 28<sup>th</sup> day of May, 2003.



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20020352

RE: State of North Dakota, Plaintiff and Appellee v. Peter Paul  
Zephyrin, Defendant and Appellant

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

Supreme Court No. 20020352  
Cass County No. 09-02-K-01528

MAY 28 2003

**CERTIFICATE OF SERVICE BY MAIL** STATE OF NORTH DAKOTA

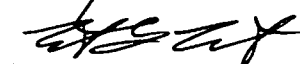
I, Monty G. Mertz, do hereby certify that, on the 28th day of May, 2003, I served the Brief of Defendant/Appellant upon the following, by placing true and correct copies in envelopes addressed as follows:

Ms. Penny Miller  
Clerk of the Supreme Court  
Judicial Wing, 1st Floor  
600 East Boulevard Avenue  
Bismarck, ND 58505

Birch P. Burdick (Bar ID #05026)  
States Attorney  
Cass County Courthouse  
P.O. Box 2806  
Fargo, ND 58108-2806  
Attorney for Plaintiff/Appellee

and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 28<sup>th</sup> day of May, 2003.



Monty G. Mertz  
Attorney for Defendant/Appellant  
Peter Paul Zephyrin