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State of Utah v. Kidus Yohannes : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee vs. KIDUS YOHANNES, Defendant / Appellant	:	Case No. 20080377-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH,
FROM A CONVICTION OF UNLAWFUL ACQUISITION, POSSESSION OR TRANSFER
OF A FINANCIAL TRANSACTION CARD, A THIRD DEGREE FELONY
BEFORE THE HONORABLE GARY D. STOTT

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Plaintiff / Appellee	:	
vs.	:	Case No. 20080377-CA
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ARGUMENT

I. The State Failed to Prove a Sufficient Nexus Between Yohannes and the Financial Card to Show Control and Intent Under Utah Code Annotated § 76-6-506.3 (2003)

"To find that a defendant had constructive possession of ... contraband, it is necessary to prove that there was a sufficient nexus between the accused and the [contraband] to permit an inference that the accused had both the power and the intent to exercise dominion and control over the [contraband]." *State v. Fox*, 709 P.2d 316, 319 (Utah 1985). In *State v. Workman*, 2005 UT 66, ¶ 32, 122 P.3d 639, the Utah Supreme Court listed several factors that "may be important in determining whether the nexus in a particular case is sufficient, including ownership and/or occupancy of the residence or vehicle where the [contraband was] found, defendant's proximity to the [contraband]...

incriminating statements or behavior, presence of [contraband] in a specific area where the defendant had control, etc."

However, the Utah Supreme Court has also issued a caveat about "mechanically relying on a list of factors … ." *State v. Layman*, 1999 UT 79, ¶ 15, 985 P.2d 911. Moreover, these factors are "not 'universally pertinent,' and … 'no such list is exhaustive, and that listed factors are only considerations.'" *Workman*, 2005 UT at ¶ 32 (quoting *Layman*, 1999 UT at ¶ 14-15). Whether there is a sufficient nexus "depends on the facts and circumstances of each case." *Fox*, 709 P.2d at 319. Yohannes asserts that in this case this Court should consider the evidence "within the totality of the circumstances presented[,]" *State v. Layman*, 953 P.2d 782, 789 (Utah App. 1998), and "whether there was a sufficient nexus between the defendant and the [financial card] to permit a factual inference that the defendant had the *power* and the *intent* to exercise control over the [financial card]." *Layman*, 1999 UT at ¶ 15 (emphasis added). In addition, "although circumstantial evidence may be enough to prove constructive possession, the State has the burden of establishing beyond a reasonable doubt that [Yohannes] committed each element of the crime charged." *Spanish Fork v. Bryan*, 1999 UT App 61, ¶ 10, 975 P.2d 501 (citing *State v. Workman*, 852 P.2d 981, 985 (Utah 1993)).

A. Insufficient evidence existed at trial to prove Yohannes had dominion and control over the financial card

The State relies on some of the factors used in *State v. Workman*, 2005 UT 66, ¶

32, 122 P.3d 639, to determine whether a sufficient nexus existed between Yohannes and the financial card (Appellee Br. at 8-9). The State claims that the debit card's presence in Yohannes's locked vehicle is significant (Appellee Br. at 9). When isolated, the fact that the debit card was found in Yohannes's locked vehicle is suggestive, but alone is insufficient. *See State v. Fox*, 709 P.2d 316, 319 (Utah 1985) (holding that "[o]wnership and/or occupancy of the premises upon which the drugs are found, although important factors, are not alone sufficient to establish constructive possession, especially when occupancy is not exclusive."). Here, any number of persons had access to Yohannes's vehicle, especially because his keys were missing (R. 149: 121) and the vehicle was not secured and was accessible through the sunroof (R. 149: 99-100).

Furthermore, the State erroneously claims that "[n]othing in the record suggests that any person other than the defendant has access to and control over the car ..." (Appellee Br. at 9). It is undisputed in the record that Yohannes's keys were missing (R. 149: 121) and mysteriously reappeared only after Westfahl discovered them in one of Yohannes's bags (R. 149: 122). Furthermore, the investigating officer testified that because the sunroof was not fully secured a person could get into the vehicle without keys (R. 149: 99-100). Clearly, during this time any number of people could have had access to Yohannes' car.

Also, the State claims that because Yohannes may have suspected Westfahl of vandalizing his computer and taking his car keys, an inference of constructive possession

exists. The State's analysis is misplaced. Even if Yohannes was "enraged" about the situation, this behavior is not incriminating to the point that one could reasonably infer that Yohannes had control over the card. *See*, *State v. Fox*, 709 P.2d 316, 319 (Utah 1985) (citing *United States v. Garcia*, 655 F.2d 59 (5th Cir. 1981) (defendant nodded affirmatively when introduced as owner of cocaine)). In fact, there was no evidence introduced at trial that Yohannes had made any incriminating statements about the debit card. *See Bryan*, 99 UT App 61 at ¶ 9 (A factor weighing against conviction in a constructive possession case based on circumstantial evidence was that "defendant made no statements, incriminating or otherwise").

Finally, and most importantly, the State presented no evidence that Yohannes either possessed or attempted to use the financial card. At trial, the State stipulated to the fact that fingerprints were indeed found on the financial card, but they did not belong to Yohannes (Stipulated Exhibit #3). Furthermore, no evidence was presented that Yohannes either used or attempted to use the financial card.

Under *Layman*, this Court should consider all the evidence "within the totality of the circumstances presented." *Layman*, 953 P.2d at 789. In light of the facts as presented above, there is an "[in]sufficient nexus between the accused and the [financial card] to permit an inference" that Yohannes had the *power* to exercise control over it. *State v. Fox*, 709 P.2d 316, 319 (Utah 1985).

B. There was insufficient evidence to prove that Yohannes intended to use the debit card in violation of Utah Code § 76-6-503.2 (2007)

"Knowledge and ability to possess do not equal possession where there is no evidence of intent to make use of that knowledge and ability." *State v. Fox*, 709 P.2d 316, 319 (Utah 1985). *Accord State v. Layman*, 953 P.2d 782, 787 (Utah App. 1986). Here, the State argues that because Yohannes may have been upset with Westfahl because he suspected him of causing $100 damage to his computer, there is a reasonable inference that Yohannes took the card without permission in order to use it to repair the damage (Appellee Br. at 10-12). While that is a possible inference, it is insufficient to establish intent.

Other facts overcome the speculation that Yohannes possessed the card with intent to use it. First, evidence showed that Yohannes probably did not possess the card. When the card was retrieved by police a fingerprint was found on it, but not Yohannes' (Stipulated Exhibit #3). This indicates that if he never "possessed" it, he could not have intended to use it. Second, evidence showed that the debit card was never used (R. 149: 136). From the time Westfahl discovered his card missing, June 4th or 5th to the time officers seized the card on June 8th there was sufficient time for Yohannes to have allegedly used the card (R. 149: 115-16; 128; 149: 91-92). Together, these facts overcome any perceived possibility or conjecture that Yohannes intended to use the card. *See Layman*, 953 P.2d at 792. The State presented no evidence to show that the card was

used or that there was even an attempt to use it.

By this logic, even absurd factual situations could result in a conviction of Utah Code § 76-6-506.3 (2003). For example, imagine a man has just taken a woman out for dinner and a movie. At the conclusion of the date, when he is dropping his date off at home, her credit card accidentally falls from her purse onto the floor of his car. Disillusioned by the date, the man returns to his apartment and shares his regret with his roommates, calling the date a waste of time and stating that he would like his money back. The next day, on his way to work, this man finds the woman's credit card and places it in his glove compartment for safe keeping until he can return it. The woman, panicked about her missing card, suspects that maybe the man from her date took it. If police found the card in the man's possession and were privy of his statements about him wanting his money back, under the State's logic, this would be sufficient to convict him of unlawful possession of a financial card. This would be a considerable stretch to conclude that the man had control *and* intended to use the card. Here too it would be unreasonable to find that, under the totality of the circumstances, a person could find a sufficient nexus between Yohannes and the financial card to show that he had control and intended to use the card. *See* Utah Code § 76-6-506.3 (2003).

Furthermore, even if the evidence presented at trial was sufficient, it was only sufficient to prove motive to obtain the card, not intent to use the card. "Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a

required mental state such as intent or malice." *People v. Hillhouse*, 27 Cal.4th 469, 504, 40 P.3d 754 (Cal. 2002). *See also State v. Rosales*, 136 N.M. 25, 30, 94 P.3d 768 (N.M. 2004) ("Motive ... is the inducement which impels or leads the mind to indulge in a criminal act."); *State v. Yarbrough*, 210 P.3d 1029, 1038 (Wash Ct. App. 2009) ("[M]otive is not synonymous with intent. Intent is the mental state with which the criminal act is committed. Motive is an inducement which tempts a mind to commit a crime.") (internal citations omitted).

Here, the facts set forth by the State were merely proof of motive, not intent, and therefore are insufficient to prove intent to use a financial card. The State claims that Yohannes suspected his roommate to have (1) sabotaged his computer; and (2) taken his car keys, which cost Yohannes money to repair and replace (Appellee Br. at 10-12). Even if the State's hypothesis were true and Yohannes did believe that his roommate had damaged his computer and taken his keys, Yohannes' frustration demonstrates only motive to use the financial card, not intent as required under Utah Code § 76-6-503.3 (2003). This evidence merely describes why Yohannes would want to take the financial card; intent, however, requires something different. Evidence at trial never demonstrated an intent to use the financial card. In fact, the evidence points to the opposite conclusion: Yohannes' fingerprints were never found on the card and there was no evidence presented that the card was ever used. Because the trial evidence was proof of motive and not intent, the second prong of the analysis necessarily fails, thus creating a

significant deficiency in evidence and a reasonable doubt as to Yohannes' guilt.

As this Court concluded in *Layman*, "any significant deficiency in evidence establishing the nexus almost always leaves room for those 'reasonable hypothes[es] of innocence' which 'necessarily raise[ ] a reasonable doubt as to the defendant's guilt.'" *Layman*, 953 P.2d 782, 792 (quoting *State v. Hill*, 727 P.2d 221, 222 (Utah 1986)). Here, the evidence was insufficient to support a conclusion that Yohannes (1) possessed the debit card; and (2) intended to use it. Accordingly, "the necessary nexus between [him] and the [transaction card] does not exist... [and] neither possibilities nor probabilities can substitute for certainty beyond a reasonable doubt." *Bryan*, 1999 UT App 61 at ¶ 10. As such, this Court should reverse Yohannes' conviction on the ground of insufficient evidence.

CONCLUSION AND PRECISE RELIEF SOUGHT

Yohannes asks that this Court reverse his conviction because the evidence was insufficient to establish that he committed the crime of unlawful acquisition, possession or transfer of a financial transaction card.

DATED this 1st day of September, 2009.

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CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 1st day of September, 2009.