

2009

James Christiansen Crabb v. State of Utah : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

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

Taylor C. Hartley; Attorney for Defendant.

Unknown.

Recommended Citation

Brief of Appellant, *Crabb v. Utah*, No. 20091046 (Utah Court of Appeals, 2009).

https://digitalcommons.law.byu.edu/byu_ca3/2080

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Taylor C. Hartley (11397)
The Advocate Attorney, LLC
10939 N. Alpine Hwy., #505
Highland, UT 84003
Telephone: (801) 404-4987
Facsimile: 1-801-692-9080
Email: *taylorhartley.esq@gmail.com*
Counsel for Defendant

IN THE UTAH COURT OF APPEALS

JAMES CHRISTIANSEN CRABB,

Appellant,

v.

STATE OF UTAH,

Appellee.

APPELLATE BRIEF

Case No.: 20091046

The Defendant, through counsel, hereby, submits this appellate brief. The list of all the parties is the same as the caption; therefore, no list of all the parties is submitted.

FILED
UTAH APPELLATE COURTS
DEC 22 2010

Taylor C. Hartley (11397)
The Advocate Attorney, LLC

10939 N. Alpine Hwy., #505

Highland, UT 84003

Telephone: (801) 404-4987

Facsimile: 1-801-692-9080

Email: *taylorhartley.esq@gmail.com*

Counsel for Defendant

IN THE UTAH COURT OF APPEALS

JAMES CHRISTIANSEN CRABB,

Appellant,

v.

STATE OF UTAH,

Appellee.

APPELLATE BRIEF

Case No.: 20091046

The Defendant, through counsel, hereby, submits this appellate brief. The list of all the parties is the same as the caption; therefore, no list of all the parties is submitted.

Table of Contents

Jurisdictional Statement	5
Statement of Issues	5
Standard of Review	7
Constitutional or Statutory Provisions	7
Statement of Case	8
Statement of Facts	9
Summary of Argument	17
Argument	18
Conclusion	40

Table of Authorities

Cases

<u>Bambrough v. Bethers</u> , 552 P.2d 1286 (Utah 1976).....	41
<u>California v. Trombetta</u> , 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)	24, 37, 38, 39
<u>Davis v. United States</u> , 160 U.S. 469, 488, 16 S.Ct. 353, 40 L.Ed. 499 (1895).....	36
<u>Spanish Fork City v. Bryan</u> , 1999 UT App 61, ¶ 10, 975 P. 2d 501, 504	30
<u>Spanish Fork City v. Bryan</u> , 1999 UT App 61, ¶¶ 2, 10, 975 P.2d 501.....	27
<u>Spanish Fork City v. Bryan</u> , 1999 UT App 61, ¶ 5, 975 P. 2d 501, 502	35
<u>Spanish Fork City v. Bryan</u> , 1999 UT App 61, ¶ 7, 975 P. 2d 501, 503	34
<u>Spanish Fork City v. Bryan</u> , 1999 UT App 61, ¶ 5, 975 P. 2d 501 (Utah App. 1999).....	33
<u>Spanish Fork City v. Bryan</u> , 1999 UT App 61, ¶ 5, 7, 975 P. 2d 501, 504 (Utah App. 1999).....	19
<u>State v. Anderton</u> , 668 P. 2d 1258, 1264 (Utah 1983).....	19
<u>State v. Bingham</u> , 732 P.2d 132, 133 (Utah 1987)	19
<u>State v. Echevarrieta</u> , 621 P.2d 709 (Utah 1980).....	41
<u>State v. Fox</u> , 709 P. 2d 316, 319 (Utah 1985)	26
<u>State v. Fox</u> , 709 P.2d 316, 318-319 (Utah 1985)	19
<u>State v. Fox</u> , 709 P.2d 316, 319 (Utah 1985)	34
<u>State v. Gonzales</u> , 2 P. 3d 954, 957 (Utah App. 2000)	18
<u>State v. Hester</u> , 2000 Utah Ct. App 159, ¶ 16, 3 P.3d 725	34

<u>State v. Hill</u> , 727 P.2d 221, 222 (Utah 1986)	20
<u>State v. Jamison</u> , 767 P.2d 134, 137 (Utah App. 1989).....	40
<u>State v. Johnson</u> , 774 P.2d 1141, 1147 (Utah 1989).....	40
<u>State v. Jonas</u> , 793 P.2d 902, 905 (Utah App. 1990)	40
<u>State v. Larsen</u> , 2000 UT App 106, ¶ 10, 999 P.2d 1252.....	36
<u>State v. Layman</u> , 953 P. 2d 782, (Utah App. 1998).....	19
<u>State v. Layman</u> , 953 P. 2d 782, 787 (Utah App. 1998)	19
<u>State v. Layman</u> , 953 P. 2d 782, 791 (Utah App. 1998).....	36
<u>State v. Layman</u> , 985 P. 2d 911, 913 (Utah 199).....	26
<u>State v. Madsen</u> , 28 Utah 2d 108, 110-111, 498 P.2d 670, 672 (1972).....	20, 22, 37
<u>State v. Madsen</u> , 498 P. 2d 670 (Utah 1972).....	37
<u>State v. Piep</u> , 2004 UT 850, ¶ 11, 84 P.3d 853.....	35
<u>State v. Romero</u> , 554 P.2d 216, 219 (Utah 1976).....	20, 39
<u>State v. Salas</u> , 820 P. 2d 1386, 1387 (Utah App. 1991).....	40
<u>State v. Salas</u> , 820 P. 2d 1386, 1388 (Utah App. 1991).....	31
<u>State v. Salas</u> , 820 P.2d 1386, 1389 (Utah App. 1991).....	27
<u>State v. Watts</u> , 750 P. 2d 1219, 1224 (Utah 1988).....	26
<u>State v. Wynia</u> , 754 P. 2d 667, 671 (Utah App. 1988)	20, 22

Statutes

U.C.A. § 58-37-2(1)(ii)	8, 19
U.C.A. § 58-37-8(2)(A)(I)	7, 9, 18, 26

U.C.A. § 58-37A-5	7,9,10,34,35,36,37
U.C.A. § 76-8-306.....	23
U.C.A. § 76-8-510.5	23

Constitutional Provisions

U.S. Const.amend. XIV, § 1, cl. 2.....	24
Utah Const. Art. I, § 7	24
Utah Constitution, Art. I, § 7	8, 36

Jurisdictional Statement

The Utah Court of Appeals has jurisdiction to hear this case because the alleged crime committed by the Defendant in violation of Utah law purportedly occurred in the Sixth Judicial District, Sevier County, in the State of Utah where he was originally on trial for criminal charges and those proceedings have resulted in a final order for this Court to review.

Statement of Issues

The first main issue is whether the jury made a clearly erroneous finding of guilt based on the lack of sufficient direct and circumstantial evidence proving beyond a reasonable doubt that the Defendant knowingly and intentionally possessed or used a controlled substance.

The second main issue is whether the jury made a clearly erroneous finding of guilt based on the lack of sufficient direct and circumstantial evidence proving beyond a reasonable doubt that the Defendant possessed drug paraphernalia.

Assuming, but not conceding, the Court concludes that the Defendant did, in fact, possess drug paraphernalia, the third main issue is whether the jury made a clearly erroneous finding of guilt based on the lack of sufficient direct and circumstantial evidence proving beyond a reasonable doubt that the Defendant possessed drug paraphernalia with intent to use it, and to use it for at least one of these purposes: to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

The fourth main issue is whether the trial court incorrectly interpreted the plain language of the U.C.A. § 58-37A-5 when it allowed the jury's finding to remain as sufficient, which simply found, "with regard to Count 2, guilty, possession of drug paraphernalia, a Class B misdemeanor" (*Transcript*, p. 338), but the jury's finding entirely failed to mention whether the Defendant had any intent to use the particular drug paraphernalia for any of the twenty-two explicit purposes listed under the statute.

The fifth main issue is whether the trial court abused its discretion when it denied Defendant's motion to dismiss the charge of possession based on a broken chain of evidence when the court itself stated that "we may not have exactly a perfect chain of evidence or chain of custody." *Transcript*, p. 241.

The sixth main issue is whether the case should have been dismissed under the doctrine of plain error or abuse of discretion because of the spoliation of evidence when the State failed to bring forth a requested urine sample it initially said was lost, but then represented it was still in existence.

The seventh main issue is whether the case should have been dismissed under the doctrine of plain error because of the State withholding potentially exculpatory evidence in the form of a non-produced urine sample that had been requested twice by motions and which the State continued to assert was not lost at trial.

The eighth main issues is whether the trial court erred in rejecting the Defendant's proposed jury instruction that is consistent with case law regarding the State's need to preclude all reasonable possibilities or alternate hypotheses of innocence in

circumstantial evidence cases in order for a defendant to be found guilty beyond a reasonable doubt.

Standard of Review

The Court will need to apply the following standards:

The material findings are clearly erroneous because all the evidence supporting the findings is legally insufficient to support the findings when viewed in a light most favorable to the trial court's findings in this matter.

Furthermore, the trial court abused its discretion in denying Defendant's motions and/or granting the State's motions.

In addition, the trial court incorrectly interpreted the plain language of the Utah Constitution and Utah statutes.

Lastly, there was also plain error in not dismissing the case because there was (1) error (2) that is plain (3) that affected substantial rights of the Defendant and (4) which error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Constitutional or Statutory Provisions

According to U.C.A. § 58-37-8(2)(A)(I), "It is unlawful for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter."

According to U.C.A. § 58-37A-5, “It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.”

According to U.C.A. § 58-37-2(1)(ii), “‘Possession’ or ‘use’ means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that the person be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under *circumstances* indicating that the person had the ability and the intent to exercise dominion and control over it.” Emphasis added.

Utah Const. Art. I, § 7 says, “No person shall be deprived of life, liberty or property, without due process of law.”

Statement of Case

This case is criminal in nature and on November 2, 2009, a jury found the Defendant guilty of the underlying offenses of possession of a controlled substance in

violation of U.C.A. § 58-37-8(2)(A)(I), a third degree felony, and possession of drug paraphernalia in violation of U.C.A. § 58-37A-5 a class B misdemeanor. Sentence has been imposed. The verdict and orders being final, it is now ready to be heard on the appellate level.

Statement of Facts

1. On October 20, 2005, at 10:30 a.m. six officers of the Central Utah Narcotics Task Force executed a search warrant. *Transcript*, p. 96.
2. The search warrant provided for law enforcement to search for illegal drugs, paraphernalia, packaging material, and scales. *Transcript*, p. 96.
3. The location specified in the warrant was a non-moving trailer and garage-like building, which was on the property of a residence located at 360 South Canal Road in Elsinore, Utah. *Transcript*, pp. 97, 166.
4. The property and residence was that of Morris Crabb, the father of the Defendant. The owner of the trailer in 2005 and 2006 was Trent Jensen. *Transcript*, pp. 96, 188, 247-248, 275, 277-278.
5. After entry into the garage, pulling things back to get in, the officers entered the already open door of the trailer. At that time, one of the officers noticed there was a couch, a so-called “bed” made only of blankets, some closet spaces, and a sink. *Transcript*, pp. 105, 126, 196-198, 212, 262-263.
6. The details about the couch and bed, however, were not in the original police report, but were from an officer’s memory after four years later and after about a thousand cases he had handled. *Transcript*, pp. 130, 134.

7. None of the other five officers prepared reports, only Detective Ekker. *Transcript*, p. 168.
8. Other officers testified that the “bed” may have only been a fold-down or fold-out couch, some item of furniture, or even a table. *Transcript*, pp. 172, 200.
9. Other witnesses testified that there was no bed in the trailer. The Defendant did not use it as a place to stay or sleep. *Transcript*, pp. 260-261, 271, 280-281.
10. An officer described the trailer to be unsuitable for sleeping—“hard to imagine anyone sleeping there.” *Transcript*, p. 205.
11. The sink did not appear to be used and there appeared to be no water hooked up to it. *Transcript*, p. 105.
12. There did not appear to be any way to heat the trailer. *Transcript*, p. 152.
13. There did not appear to be any locks to lock the garage or trailer. One witness, who had been in the trailer “two dozen” times, testified, “There was no lock on any of the doors.” *Transcript*, pp. 184, 263, 271.
14. There did not appear to be multiple changes of clothes in the trailer. *Transcript*, p. 153.
15. The Defendant regularly slept in a separate home from the trailer. *Transcript*, pp. 263, 280, 287.
16. One of the officers allegedly found the Defendant in “bed” inside the trailer, sleeping in sweat pants and a tee shirt. *Transcript*, pp. 106, 132-133, 166-167.
17. Another officer testified the Defendant was in boxers or pajamas and that he was definitely topless. *Transcript*, p. 178.

18. An officer secured the Defendant and took him to the garage, which was a painting area for cars and doing mechanical things. It was built in 2005. *Transcript*, pp. 108, 257, 265, 269, 276.
19. At times, multiple people working with tools were there in the garage and others were there wanting this or that fixed and in the middle of this business, there were multiple times when the Defendant was not there. *Transcript*, pp. 259-260, 270, 276, 284.
20. Some of these people were Dwayne Solomon, Dustin Gledhill, and Dillon Gledhill, all of whom had easy access to the garage and trailer as well as anyone else. *Transcript*, pp. 270-271, 284.
21. The people at the garage and trailer, who were not necessarily even friends, sometimes were doing nothing more than “just hanging out,” or not doing anything recognizable, or “just sitting in their car.” *Transcript*, pp. 260, 266, 270.
22. The area in which the Defendant was found was not a “bedroom,” it was an office, which was a part of his workshop. The office and workshop had been set up for at least six months in 2005. *Transcript*, pp. 149-150, 199, 257, 261, 275, 281, 283.
23. The trailer, though, had been on the property for about ten years. *Transcript*, p. 283.
24. It was very cluttered, dirty, filthy, and messy with a lot of garbage on the floor and “crap everywhere,” which mess had probably resulted from a very long time of accumulation. *Transcript*, pp. 139-140, 166, 205, 211, 271.

25. At the end of the office/trailer were tires, air compressors, paint, and things to work on cars with. *Transcript*, pp. 261-262.
26. Inside the trailer, other officers alerted one another about what they believed to be evidence. *Transcript*, p. 108.
27. The officers took photographs before touching the possible evidence, but the photographs could not be located at the time of trial due to mishandling at the evidence locker and at the police office in keeping the chain of custody. *Transcript*, pp. 150-151.
28. In a back closet, a detective found a broken light bulb that was, by his estimation, perhaps an arm's reach away from the bed. *Transcript*, pp. 109-110.
29. Another officer was not able to recall where the closet was in relation to the bed or to the corners of the trailer and whether the door to the trailer was open or closed. *Transcript*, p. 209.
30. The broken light bulb appeared to have residue in it. *Transcript*, p. 109.
31. Another light bulb, which was not broken, was found at the end of a couch and in a cubby hole or a corner and on the floor of the trailer. *Transcript*, pp. 112, 190, 199.
32. The light bulbs were altered, the center metal piece of the general, surrounding metal piece being bored out. *Transcript*, p. 114.
33. One of the Officers, Detective Ekker, was the case agent, who was responsible for packaging and indentifying the evidence gathered. *Transcript*, pp. 134-135.

34. The case agent, however, was not the only one involved in the process of packaging and identifying the evidence. *Transcript*, p. 135.
35. The two other officers were Rod Elmer and Dwight Jenkins. *Transcript*, p. 136.
36. The case agent could not recall which pieces of evidence he packaged and identified. He had no notes to help him, either. *Transcript*, pp. 135-136.
37. The items were put in bags and taken to the Sevier County evidence locker that has an evidence custodian administering the locker. *Transcript*, pp. 110, 113, 116.
38. The Defendant was taken to the county jail and he gave a urine sample to law enforcement. *Transcript*, pp. 151, 178.
39. According to the case agent, the urine sample had been “transferred to Fillmore, but it is in the freezer, it is frozen, it is in Fillmore.” *Transcript*, p. 152.
40. The urine sample was either exculpatory evidence that was withheld, inculpatory evidence that was not important enough to be a part of the State’s case, or it was lost through careless safekeeping of the evidence. It was never produced, even after multiple requests by Defendant, over a six month period. Ultimately, the trial court told the jury it was lost and never sent to the crime lab. *Transcript*, pp. 151-152, 164, 241-243, 246-253, 302.
41. The urine sample testing dirty would have been relevant to help show the Defendant’s guilt and it testing clean would have been relevant to help show he was not guilty. *Transcript*, p. 243.
42. On November 23, 2005, more than a month after the initial search, the case agent went to the evidence locker, checked out the broken light bulb from the custodian

- for about five minutes, and he (instead of a forensic scientist) collected residue from it by scraping the glass with a razor. *Transcript*, pp. 116, 118, 140-144, 242.
43. The case agent put the residue in a small, Ziploc baggie and then placed the baggie in a manila envelope. *Transcript*, pp. 118-119.
44. Captain Gary Reed witnessed the scraping and the placing of it in the baggie, but he was not brought to trial for any questioning about what the case agent had done. *Transcript*, pp. 117-119.
45. The case agent personally delivered the envelope to the State Crime Lab in Cedar City. *Transcript*, pp. 116, 119, 122.
46. From the time the case agent collected it to the time he dropped it off to the lab, the case agent was in possession of the scraping. *Transcript*, pp. 122-123.
47. The baggie for the scraping, however, was never returned to the evidence locker and the trial court acknowledged that “we may not have exactly a perfect chain of evidence or chain of custody.” *Transcript*, p. 240-241.
48. Before any expert testimony on the nature of the residue from the broken light bulb, the trial court allowed the residue scrapings in as evidence over the objection of Defendant. *Transcript*, p. 121.
49. Before any expert testimony on the nature of the residue on the intact light bulb, the trial court allowed the intact light bulb in as evidence over the objection of Defendant. *Transcript*, p. 121.

50. A fingerprint expert analyzed the second light bulb gathered at the scene for fingerprints and found some, but they did not match the Defendant's fingerprints. *Transcript*, pp. 147-148.
51. At the lab, the residue evidence was placed on a sheet of paper from the lab's photocopier copy paper and not on any surface that is proven to be sterile. The evidence was then tested. *Transcript*, pp. 229-231.
52. In fact, the forensic scientist admitted that "if there was any contamination, it would have been on the piece of paper where I set the evidence on," which is then thrown away "into a garbage can," preventing any further examination of the paper to determine if it was contaminated. *Transcript*, p. 231.
53. The vials that will hold the to-be-tested substances, however, "come sealed in a sealed thing" and "we do not reuse vials, absolutely not," in order to "make sure there's no contamination." *Transcript*, pp. 230, 232.
54. The lab has certainly "scraped substances off light bulbs." This allows the forensic scientist who analyzes the evidence to be able to "testify that there was no contamination from scraping it off the light bulb." *Transcript*, p. 233.
55. After viewing the broken bulb, the forensic scientist stated that "we receive this type of evidence in the laboratory a lot" and that she could have tested the broken bulb. *Transcript*, pp. 237-238.
56. The forensic scientist herself tests over three hundred methamphetamine samples a year. *Transcript*, p. 219.

57. No admissible testimony was presented on how the broken bulb residue was returned from the lab in Cedar City to the evidence room in Sevier County. *Transcript*, pp. 240-241.
58. At the time when the evidence was gathered and at the time of trial, the color of the residue on the broken bulb was either a burnt black or a white. The officers called it a burnt, black color while the forensic scientist at the lab described it as white. *Transcript*, pp. 109, 113, 115, 144-145 (“black and burnt,” said by the officer who scraped it out of the broken bulb), 193, and 222 (“white residue” of what the scientist received), 223 (“white powder”), 224, 225 (“white substance,” as reiterated by the judge), 228.
59. When the Defendant’s attorney looked at the original light bulb himself and showed it to the forensic scientist, he said to her, “I can see—all I can see is black.” *Transcript*, p. 235.
60. The forensic scientist replied, “Usually burnt residue is more associated with the marijuana pipe than it would be a meth pipe. Usually the residue of a meth pipe is more of a white/brownish.” *Transcript*, p. 235.
61. There is confusion over the evidentiary sample having a black colored residue and yet testing positive for methamphetamine, which is usually white or brownish. *Transcript*, p. 235.
62. The forensic scientist, though, clearly tested a white residue. *Transcript*, p. 235.
63. There is no way to know how old the evidence tested at the lab actually was—it could have been “twenty” years old. *Transcript*, p. 236-237.

64. When shown the broken bulb at trial, the forensic scientist stated that she would classify the residue “as white” or an “off-white color” and as “browns.” *Transcript*, p. 236.
65. The trial court denied Defendant’s proposed jury instruction that would explain that the State has the burden in circumstantial evidence cases to eliminate all reasonable inferences that point to innocence. *Transcript*, p. 303.
66. The proposed jury instruction would have read: “You are not permitted to find the defendant guilty of the charges against him based totally on circumstantial evidence unless the proved circumstances are not only consistent with the theory the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion.” *Transcript*, p. 297.
67. The State read to the jury an instruction, saying, “I want you to focus your attention towards the bottom of that paragraph.” *Transcript*, 317. The State went on to explain that “possession” element is sufficiently met if the controlled substance is found “quote, under *circumstances* indicating that the person had the ability and the intent to exercise dominion and control over it.” *Transcript*, 317.

Summary of Argument

The Defendant should not have been found guilty because a reasonable jury must have entertained reasonable doubt from the State’s lack of ability to preclude the reasonable alternatives and inferences of innocence in their circumstantial evidence case against the Defendant. The trial court should have dismissed the case for an imperfect chain of custody that not all who had handled the evidence were brought to testify at and

should have dismissed it due to the State's withholding of, or loss of, highly relevant and apparently exculpatory evidence. The trial court erred in rejecting the Defendant's jury instruction, causing prejudice against him because a verdict of not guilty would likely have resulted.

Argument

I.

THE JURY MADE A CLEARLY ERRONEOUS FINDING OF GUILT BASED ON THE LACK OF SUFFICIENT DIRECT AND CIRCUMSTANTIAL EVIDENCE PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KNOWINGLY AND INTENTIONALLY POSSESSED OR USED A CONTROLLED SUBSTANCE

A. The Defendant did not commit the *actus reus* of possessing a controlled substance.

In order to be guilty of a violating of U.C.A. § 58-37-8(2)(A)(I), a defendant must have satisfied the element to “possess or use a controlled substance analog or a controlled substance.” This is the *actus reus* element of the crime that must be met. According to State v. Gonzales, 2 P. 3d 954, 957 (Utah App. 2000), “We will not make speculative leaps across gaps in the evidence. Every element of the crime charged must be proven beyond a reasonable doubt. To affirm the jury's verdict, we must be sure the State has introduced evidence sufficient to support all elements of the charged crime.” Internal quotations and alterations omitted. In the current case, all the elements were not so established.

At trial, the evidence established that the Defendant never personally had physical possession of the evidence. He, therefore, could only have had constructive possession. “Possession of a controlled substance sufficient to sustain a conviction need not be actual

but may be constructive.” State v. Fox, 709 P.2d 316, 318-319 (Utah 1985); State v. Bingham, 732 P.2d 132, 133 (Utah 1987); State v. Layman, 953 P. 2d 782, 787 (Utah App. 1998). However, “In cases relying on constructive possession, that burden requires a presentation of *extensive and detailed facts*.” Spanish Fork City v. Bryan, 975 P. 2d 501, 504 (Utah App. 1999) (emphasis added); *see also* State v. Layman, 953 P. 2d 782, (Utah App. 1998).

According to State v. Anderton, 668 P. 2d 1258, 1264 (Utah 1983), “[I]n finding constructive possession of controlled substances in nonexclusive occupancy settings, courts have relied on *extensive and detailed factual evidence*.” Emphasis added. The evidence at trial fell short of being extensive and detailed to establish proof beyond a reasonable doubt of the Defendant’s guilt. The evidence established that the Defendant was found during the day in an area that multiple people also occupied during that same time where contraband was allegedly found, but the evidence failed to exclude other reasonable sources for the alleged drugs and paraphernalia.

The evidence linking the Defendant to the alleged methamphetamine and paraphernalia is purely circumstantial because no one actually saw him physically possessing them. In this case, the State relied on the circumstantial definition of possession found in U.C.A. § 58-37-2(1)(ii) in his closing arguments to the jury. Reading them a specific portion of a jury instruction, he said, “I want you to focus your attention towards the bottom of that paragraph.” *Transcript*, 317. He went on to explain that “possession” is sufficiently met if the controlled substance is found “quote, under *circumstances* indicating that the person had the ability and the intent to exercise

dominion and control over it.” *Transcript*, 317. Emphasis added. The State emphasized and made it abundantly clear that the evidence connecting the Defendant to the crime was purely circumstantial.

The Utah Supreme Court has stated that “[w]here the only evidence presented against the defendant is circumstantial, the evidence supporting a conviction must preclude every reasonable hypothesis of innocence. This is because the existence of a reasonable hypothesis of innocence necessarily raises a reasonable doubt as to the defendant’s guilt.” State v. Hill, 727 P.2d 221, 222 (Utah 1986) (plurality opinion) (citing State v. Romero, 554 P.2d 216, 219 (Utah 1976). In this case, therefore, the State had the burden to exclude all reasonable hypotheses of the Defendant’s innocence. As demonstrated below, the State clearly failed to do so.

The residue sample may have been contaminated: “Before a substance connected with the commission of a crime is admissible as evidence, there must be a showing that the proposed exhibit is what it purports to be and is in substantially the same condition as it was at the time of the crime.” State v. Wynia, 754 P. 2d 667, 671 (Utah App. 1988) citing State v. Madsen, 28 Utah 2d 108, 110-111, 498 P.2d 670, 672 (1972). The evidence at trial established that there was a broken bulb inside of an office closet, which bulb may have had methamphetamine residue on it. The illegal drug may not have been on the bulb due to potential contamination from non-sterile paper used by the crime laboratory before testing the scrapings from the broken bulb, making it not in “substantially the same condition” as at the crime scene. State v. Madsen, 28 Utah 2d 108, 110-111, 498 P.2d 670, 672 (1972).

Except for the non-sterile paper, the forensic scientist at the laboratory took meticulous precautions to prevent contamination. These precautions included using vials before the actual analysis that are pre-sealed in order to prevent any contamination. The forensic scientist did not make such an effort for the printer paper she used to dump the to-be-tested residue on.

Instead, the forensic scientist used paper that was out in the open and vulnerable to foreign contaminants. This is especially concerning because the forensic scientist herself receives and tests over three hundred foreign *methamphetamine* samples a year. *Transcript*, p. 219. The scientist admitted that the contamination would have come from the paper she used. *Transcript*, p. 231.

Instead of being able to examine the paper for contaminants, such analysis was prevented because the paper had been thrown away. The State failed to submit evidence that would contradict the genuine possibility that the particular piece of photocopier paper used in this case had not already been contaminated.

The State was unable to exclude the real possibility that was established by the forensic scientist to rationally doubt the validity of the test, which showed positive for methamphetamine, and, therefore, doubt whether the Defendant committed the *actus reus* of possessing a controlled substance. There is a real chance that he was innocent. Under these circumstances, the State failed to produce “evidence supporting a conviction” that would “preclude every reasonable hypothesis of innocence.” State v. Hill, 727 P.2d 221, 222 (Utah 1986).

The substance on the bulb and the substance tested were two different substances.

As previously noted, “Before a substance connected with the commission of a crime is admissible as evidence, there must be a showing that the proposed exhibit is what it purports to be and is in substantially the same condition as it was at the time of the crime.” State v. Wynia, 754 P. 2d 667, 671 (Utah App. 1988) citing State v. Madsen, 28 Utah 2d 108, 110-111, 498 P.2d 670, 672 (1972). Another reason to doubt the sample is that the original residue was a burnt “black” color, as testified to by the case agent who scraped it from the broken bulb. *Transcript*, pp. 144-145. The sample the forensic scientist received was clearly not black. It was the exact opposite: a “white powder.” *Transcript*, p. 223.

The sample the scientist received was never even described as brown or off-white. It was nothing close to black. The evidence shows the sample was not substantially the same and it suggests an affirmative show of tampering. See State v. Wynia, 754 P. 2d 667, 671 (Utah App. 1988) (“it is generally presumed that the exhibits were handled with regularity, *absent an affirmative showing of bad faith or actual tampering.*” Emphasis added.). The State failed to offer any evidence rebutting this show of tampering and it failed to prove that the sample was in the same condition as it had been when it was collected. It was, therefore, an abuse of discretion on the trial court’s part to admit the sample as evidence.

The case agent was unqualified to scrape the residue and he was not supposed to scrape it: Nowhere in the evidence at trial was there any assurance that the case agent, who scraped the residue off the bulb, was qualified to do so or allowed to do so. Without

such an assurance, the case agent tampered with or altered the evidence. See generally U.C.A. § 76-8-510.5 or U.C.A. § 76-8-306. Not only may he have been unqualified, but there was also no need for him to do so and he was not instructed to do so, either. Testimony established that the laboratory handles broken bulbs frequently and that this particular broken bulb could have been analyzed by the forensic scientist herself. She could then have been able to testify, as a less prejudiced witness, that there was no contamination in the scraping of the residue off the broken bulb.

With the fact that the evidence at trial established two different substances involved, the State failed to contradict the reasonable inference that the case agent could have been the one who unintentionally, or even intentionally, contaminated the evidence. This is especially so considering that the scrapings happened in close proximity to the evidence locker where illegal drug evidence is brought in and regularly kept.

The State failed to bring in Captain Reed's testimony to exclude the doubt that the case agent did not intentionally scrape a different substance into the evidence baggie when Captain Reed was watching. Again, the State failed to produce "evidence supporting a conviction" that would "preclude every reasonable hypothesis of innocence," (State v. Hill, 727 P.2d 221, 222 (Utah 1986)), which was required after the evidence demonstrated that the sample scraped and the sample delivered to the scientist were not the same.

The investigation and safekeeping of evidence was careless and raises legitimate doubt as to the believability of it. Finally, the investigation by the officers is fraught with reasons to doubt its validity. The Due Process Clause provides two forms of protection to

a criminal defendant. The Federal Due Process Clause, made applicable to the States through the Fourteenth Amendment, states: “No State shall...deprive any person of life, liberty, or property, without due process of law.” U.S. Const.amend. XIV, § 1, cl. 2; Utah Const. Art. I, § 7. Due Process guarantees a defendant access to evidence “that is either material to the guilt of the defendant or relevant to the punishment to be imposed” so as to ensure that “defendants [are] afforded a meaningful opportunity to present a complete defense.” California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). This guarantee provides the defendant access to all evidence that “might be expected to play a significant role in the suspect’s defense.” Id. at 488, 104 S.Ct. at 2534. To meet this standard, “evidence must both possess an [apparent] exculpatory value...and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Id. at 489, 104 S.Ct. at 2534 (emphasis added) (citation omitted).

In this case, the Defendant was deprived of Due Process rights by a number of deprivations of significantly exculpatory pieces of evidence. First, only one of the six officers made a report about the arrest, depriving the Defendant of exculpatory evidence that could have attacked the credibility and accuracy of the original report.

Second, the officers could not recall the details accurately and they contradicted each other, depriving the Defendant of a reliable investigation into the facts of the case.

Third, and most importantly, they lost the Defendant’s urine sample and crime scene photographs, all of which were *essential* to a proper investigation and which would have played a significant role in the Defendant’s defense. The pictures and urine sample

had apparent exculpatory value in showing the Defendant was not guilty of either using or possessing the drugs and paraphernalia. They were of such a nature that the Defendant could not obtain comparable evidence by any other available means—a subsequent urine test would not have had any value in showing the lack of methamphetamine in his system if it were taken once the need for it became known, which was years after the original sample was taken; no pictures could have been produced later to show the exact placement of the supposedly incriminating evidence away from the Defendant because they had been put into evidence bags and taken away. The loss of all of these pieces of evidence was a clear violation of his Due Process rights and should have been sufficient to have the trial dismissed.

In addition, as previously discussed, the case agent scraped evidence out of a bulb that was fully within the capability and qualifications of the laboratory's forensic scientist to do; the only need for him to do it would have been to plant false evidence.

In the end, the officers were sloppy and untrustworthy, and they violated his Due Process rights in preventing him from putting on a complete defense with apparently exculpatory evidence that was either withheld or lost.

Thus, based on the multiple reasons to doubt the validity of the test sample and to doubt the reliability of the investigation, the State failed to demonstrate beyond a reasonable doubt that the residue was methamphetamine and that the Defendant possessed any controlled substance at the time of his arrest. The State failed to “preclude every reasonable hypothesis of innocence” (State v. Hill, 727 P.2d 221, 222 (Utah 1986))

at trial in this case, a case of circumstantial evidence tying the Defendant to the purported drugs and paraphernalia.

B. The Defendant did not *knowingly or intentionally* possess a controlled substance.

In order to be guilty of a violation of U.C.A. § 58-37-8(2)(A)(I), a defendant must “knowingly and intentionally” possess or use a controlled substance. This is the *mens rea* element of the crime. For the following reasons, the State failed to prove beyond a reasonable doubt that both (1) the Defendant knew of the existence of the potentially incriminating evidence and (2) that he had any intent to possess the evidence for any purpose. The factual circumstances of the case must permit the inference that the Defendant intended to use the drugs as his own.

In the face of a challenge to the sufficiency of the evidence, “whether a sufficient nexus between the accused and the contraband exists depends upon the facts and circumstances of each case.” State v. Fox, 709 P. 2d 316, 319 (Utah 1985); State v. Watts, 750 P. 2d 1219, 1224 (Utah 1988). The existence of a sufficient nexus to prove constructive possession is a “highly fact-sensitive determination.” State v. Layman, 985 P. 2d 911, 913 (Utah 1999).

The Utah courts have previously held that many of the factors indicating possession, by themselves, are insufficient to establish the requisite nexus. Persons who “*might* know of the whereabouts of illicit drugs and who *might* even have access to them, but who have no intent to obtain and use the drugs can not [sic] be convicted of possession of a controlled substance.” State v. Fox, 709 P. 2d 316, 319 (Utah 1985).

Emphasis added. See Fox, 709 P 2d at 320 (holding that co-occupancy of a house where marijuana was being grown, absent other evidence, was insufficient to establish a nexus), Anderton, 668 P 2d at 1264 (holding that co-ownership and co-occupancy of a home were insufficient to establish a nexus), Spanish Fork City v Bryan, 1999 UT App 61, ¶¶ 2, 10, 975 P 2d 501 (holding that co-occupancy of bedroom where drug paraphernalia was found was insufficient to establish a nexus), State v Salas, 820 P 2d 1386, 1389 (Utah App 1991) (holding that ownership and co-occupancy of a vehicle, along with an anonymous informant's tip, was insufficient to establish a nexus). One factor present in this case was multiple occupancies of the workshop. The Defendant's proximity to the contraband is disputable because he was asleep when awakened by the officers and the evidence established that the paraphernalia may not have even been in plain view since one was in a closet and the other was in a cubby hole on the ground.

The State failed to establish a sufficient nexus and demonstrate beyond a reasonable doubt that the residue did not come from a different source than the Defendant. The factual evidence at trial did not establish the age of the residue, but expert testimony established that it could have been on the bulb for as many as "twenty" years prior to the date the Defendant was arrested. *Transcript*, p. 236-237. The State failed to bring any facts or evidence to contradict the likelihood that the residue was of an older origin. It, therefore, failed to "preclude" (State v Hill, 727 P 2d 221, 222 (Utah 1986)) the residue as coming from a source besides the Defendant, such as the original owner of the trailer, by any facts or evidence to the contrary.

The evidence established that the broken bulb was not the Defendant's. The facts and evidence at trial established that a light bulb belonged to another person. A fingerprint expert examined the bulb, “found some fingerprints” (*Transcript*, pp. 147-148) on it, but they did not belong to the Defendant. No other facts or evidence contradicting the ownership of this bulb as being the person who touched it was brought to trial and certainly no facts or evidence were brought to establish the Defendant as the one who touched or owned the light bulbs. No facts or evidence established the Defendant had used any tools to alter the bulbs.

The only fact the State successfully established by witness testimony was that someone else had used the bulb in which to burn a residue. By this evidence of ownership or use by another, the State contradicted its own allegation that the Defendant intended to possess or use the possibly incriminating bulbs.

The State clearly failed to “preclude every reasonable hypothesis of innocence” (*State v. Hill*, 727 P.2d 221, 222 (Utah 1986) (Utah 1986)) because the person whose fingerprints on the paraphernalia is more likely the criminal than the Defendant since the Defendant was never seen touching it, possessing drugs on his person, having them in his system, or doing any other kind of incriminating behavior.

The Defendant's potentially inculpatory or exculpatory urine sample was lost. The State could have helped demonstrate intent to use a controlled substance if it showed (1) that the alleged methamphetamine on the purported light bulb paraphernalia was of recent origin or proximity in time to the Defendant, (2) that the residue was more likely methamphetamine through non-contaminating procedures, and (3) that the Defendant

intended to use the paraphernalia for the purpose of inhaling methamphetamine if the lost or withheld urine sample the Defendant had given tested positive for methamphetamine. Because the State failed to adequately show any of these, it also failed to establish any intent on Defendant's part to intentionally possess a controlled substance.

The State failed to exclude the other possible sources for the bulbs and methamphetamine, including the first owner of the trailer. The State failed in its burden to show the residue had been burned in recent origin or that it had any proximity in time to the Defendant other than the residue on the bulbs being present in the same office that he was in. In fact, testimony established that the trailer in which the bulbs with residue were found had been on the property for ten years and had a mess in it that had accumulated over a long period of time. The original owner of the trailer could have left the purported methamphetamine residue there from ten years in the past. The State brought no evidence to suggest the trailer had been cleaned out and put into pristine condition when Mr. Crabb, Sr. allowed the trailer to be placed on his property. They gave no evidence that the prior owner did not have a criminal history for methamphetamine. No evidence was presented to suggest the light bulbs themselves were of recent making. And, again, no evidence that the forensic scientist was aware of could establish that the methamphetamine was not ten years old or older. The State clearly failed to preclude reasonable alternatives for the source of the residue and bulbs. State v. Hill, 727 P.2d 221, 222 (Utah 1986) (Utah 1986).

Placement of the bulbs in the mess demonstrates that they could have been around since the first owner. The bulbs were found among the mess in places within the trailer.

that demonstrate they may not have been placed there recently and that they may not have been in plain view. One may have found its way into a cubby hole at the end of a couch on a floor and the other stationed away inside of a closet. Their placement indicates they were not necessarily of recent origin and were pushed to the sides as the messes accumulated, not being as visible as something new in the middle of the room. This gives reason to doubt that the Defendant possessed them. One of the bulbs was even broken, suggesting that over time it could have been smashed by the clutter that was accumulating and ignored because it was not clearly visible. Most people pick up and throw away dangerous items such as broken glass *if they see it*. This leads to the inevitable conclusion that the State failed to preclude reasonable inferences that he was not the owner or possessor of the alleged contraband, which the State would have to have done in this circumstantial case. State v. Hill, 727 P.2d 221, 222 (Utah 1986) (Utah 1986).

The State failed to exclude the other possible sources for the bulbs and methamphetamine, including the other people who came to the trailer. “We note that neither possibilities nor probabilities can substitute for certainty beyond a reasonable doubt.” Spanish Fork City v. Bryan, 1999 UT App 61, ¶ 10, 975 P. 2d 501, 504. The State failed to establish beyond a reasonable doubt that the Defendant was the only one who could have possessed the contraband—he is a mere probability. Multiple people were going in and out of the trailer and garage area, both of which were easily accessible and not locked. The people frequenting the area could very well have been the possessors of the drug and paraphernalia. Oftentimes, they were doing nothing. When

people have nothing to do, they frequently resort to drugs and alcohol to make the time go by faster. The State did nothing to bring in evidence that the others frequenting the workshop were *not* methamphetamine users. Excluding them as the possible sources for the methamphetamine would have been very simple and brief using histories. The State was required to do so under State v. Hill, 727 P.2d 221, 222 (Utah 1986) (Utah 1986).

In State v. Salas, 820 P. 2d 1386, 1388 (Utah App. 1991), the court listed multiple factors that the State should have proved after evidence of multiple occupants to the buildings came in: “In order to find that the accused was in possession of drugs found in an automobile he was not the sole occupant of, and did not have sole access to, there must be other evidence to buttress such an inference. The law has recognized several particular evidentiary factors as linking or tending to link an accused with drugs. These include incriminating statements, suspicious or incriminating behavior, sale of drugs, use of drugs, proximity of defendant to location of drugs, drugs in plain view, and drugs on defendant's person.” The State failed to bring in any evidence of incriminating statements or behavior, any sale or purchase of drugs, any use of drugs by the Defendant, or that the drugs were on the Defendant’s person. It also did not clearly establish that the drugs were in plain view. Under these circumstances, the Defendant’s innocence was a very real likelihood.

Importantly, the State also did not bring in any criminal histories of the named people, who were common visitors and who was the owner of the trailer at the time: Dwayne Solomon, Dustin Gledhill, Dillon Gledhill, or Trent Jensen. Each of these individuals could have been methamphetamine users who were responsible for the tossed

away paraphernalia. Others who had just been hanging out could have been the users, too. The evidence, therefore, failed to exclude the reasonable doubt that the drugs and paraphernalia were someone else's and the evidence of fingerprints showed clearly that they were, in fact, someone else's. There are at least four reasonable hypotheses: Dwayne did it, Dustin owned them, Dillon smoked it, and Trent left them. This set of facts and reasonable possibilities clearly fail to "preclude every reasonable hypothesis of innocence." State v. Hill, 727 P.2d 221, 222 (Utah 1986).

II.

THE JURY MADE A CLEARLY ERRONEOUS FINDING OF GUILT BASED ON THE LACK OF SUFFICIENT DIRECT AND CIRCUMSTANTIAL EVIDENCE PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT POSSESSED DRUG PARAPHERNALIA.

A. The Defendant did not possess drug paraphernalia.

As previously noted in Argument I, A, there was not sufficient direct or circumstantial evidence to prove that the Defendant "possessed" drug paraphernalia. In fact, the evidence shows it was possessed by someone else. The fingerprints show it and the lack of the Defendant's fingerprints on the evidence demonstrates it was not his. The location of the evidence also demonstrates it was discarded and perhaps even hidden among the mess. The Defendant never stated the evidence was his and he has no criminal history of using methamphetamine. There were multiple other potential sources for the evidence besides the Defendant. They could have included any number of the people who came to the garage and had free access to the office room to discard their used drugs. The State failed to exclude all of the named individuals as sources for the evidence by showing any lack of criminal history for methamphetamine. The State was

obligated in this case of proving guilt by circumstantial evidence to “preclude” (State v. Hill, 727 P.2d 221, 222 (Utah 1986)) the reasonable inferences that the other sources could very well have been guilty, and not the Defendant. There was plenty of reasonable doubt that any reasonable jury would have had to entertain and wrongfully disregard in order to find the Defendant guilty. Under these circumstances, the jury made a clearly erroneous finding of guilt and their verdict should be overturned.

III.

THE JURY MADE A CLEARLY ERRONEOUS FINDING OF GUILT BASED ON THE LACK OF SUFFICIENT DIRECT AND CIRCUMSTANTIAL EVIDENCE PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT POSSESSED DRUG PARAPHERNALIA WITH INTENT TO USE IT, AND TO USE IT FOR AT LEAST ONE OF TWENTY-TWO PURPOSES.

A. The evidence did not prove the Defendant possessed drug paraphernalia to use it.

“A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.” Spanish Fork City v. Bryan, 975 P. 2d 501 (Utah App. 1999). Assuming the residue on the light bulbs was methamphetamine that had been smoked, assuming that the test of the residue was not contaminated, assuming that the residue and bulbs were of a recent nature, and assuming that the Defendant actually knew about their existence, the Defendant can only have been guilty of violating U.C.A. § 58-37A-5 *if* the State brought in enough evidence to eliminate all reasonable doubt as to whether the Defendant *intended* on using the drug paraphernalia. Remote or speculative possibilities are insufficient. Even assuming, but not conceding, the Defendant most certainly knew of the existence of the items and their potential for illegal use, “Knowledge and ability to possess do not equal possession where

there is no evidence of intent to make use of that knowledge and ability.” Spanish Fork City v. Bryan, 1999 UT App 61, ¶ 7, 975 P. 2d 501, 503; State v. Fox, 709 P.2d 316, 319 (Utah 1985).

The statute states, “It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.” U.C.A. § 58-37A-5.

The State submitted no evidence that the light bulbs were the Defendant’s that he used to inhale methamphetamine other than some proximity to them at the time the police entered the trailer. The fingerprints proved the bulbs were not his. The State failed to prove that he actually owned anything within the trailer portion where the bulbs were found. At most, the evidence showed that the workshop and office were areas where the Defendant usually worked, along with other people. The State never submitted any confession showing ownership or use of the bulbs, it never established that others did not own the bulbs, and there is room to doubt that the State even established by the evidence that the bulbs were in fact paraphernalia since the residue tested might have been contaminated by the paper used at the laboratory. What we are left with is the speculative possibility that someone—the Defendant—at the workshop may have been guilty. But “there is a difference between a reasonable inference and merely speculating about the possibilities.” State v. Hester, 2000 Utah Ct. App 159, ¶ 16, 3 P.3d 725.

Because the State failed to show the Defendant had even touched the bulbs, it also failed to show that the Defendant intended to use the bulbs for any purpose. Because the State failed to show that the Defendant had ever even touched methamphetamine, it also failed to show that the Defendant intended to use the bulbs for any purpose, including the inhalation of methamphetamine. His intent in this regard is mere speculation.

In addition, the law requires the State to have shown that the Defendant had an intent to exercise dominion or control over the paraphernalia, however, if it was paraphernalia, then it appeared to be *discarded* by where it was located and by the burnt residue on it. Discarding the contraband shows no intent to exercise any control or dominion over the items discarded, rejected, or abandoned. Thus, the State clearly failed to meet its burden that the Defendant had any intent to do anything with the bulbs, and, therefore failed to meet an element of U.C.A. § 58-37A-5 for which he was wrongfully convicted. At most, there are inferences giving rise to speculations of guilt based on the inadequate circumstantial evidence and the sloppy investigation in this case.

IV.

THE TRIAL COURT INCORRECTLY INTERPRETED THE PLAIN LANGUAGE OF THE UTAH STATUTE § 58-37A-5 WHEN IT ALLOWED THE JURY'S FINDING TO REMAIN AS SUFFICIENT WHEN THE JURY'S FINDING ENTIRELY FAILED TO MENTION WHETHER THE DEFENDANT HAD ANY INTENT TO USE THE PARTICULAR DRUG PARAPHERNALIA.

A. The Defendant is not guilty because the jury did not find an element of the crime.

A defendant must be found guilty beyond a reasonable doubt on all the elements of a crime. Spanish Fork City v. Bryan, 1999 UT App 61, ¶ 5, 975 P. 2d 501, 502; State v. Piep, 2004 UT 850, ¶ 11, 84 P.3d 853; State v. Larsen, 2000 UT App 106, ¶ 10, 999

P.2d 1252. This is “to ensure that our review of the evidence does not encourage the indulging of inference upon inference, or, worse, the indulging of inference upon assumption.” State v. Layman, 953 P. 2d 782, 791 (Utah App. 1998).

It is even a state constitutional requirement implicit in “constitutions...[which] recognize the fundamental principles that are deemed essential for the protection of life and liberty.” Davis v. United States, 160 U.S. 469, 488, 16 S.Ct. 353, 40 L.Ed. 499 (1895). (1895). The Utah Constitution requires such. Utah Const., Art. I, § 7 (“No person shall be deprived of *life, liberty* or property, without due process of law.”). Emphasis added.

In the current matter, on count two, possession of paraphernalia, the jury only found the Defendant guilty of “possession of drug paraphernalia, a Class B misdemeanor,” (*Transcript*, p.338) not possession “with intent to use[] drug paraphernalia” for any of the twenty-two specified “purpose[s].” U.C.A. § 58-37A-5. The jury failed to find the Defendant guilty of one of the elements of the crime. The trial court even approved of the legally deficient finding when it said, “It appears to the Court that the verdict is appropriate.” *Transcript*, p. 340. Because an essential element had not been found, the Defendant is not guilty of possession of drug paraphernalia with the intent to use it. Accordingly, the judgment should be reversed.

V.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT’S MOTION TO DISMISS THE CHARGE OF POSSESSION BASED ON A BROKEN CHAIN OF EVIDENCE WHEN THE COURT ITSELF STATED THAT “WE MAY NOT HAVE EXACTLY A PERFECT CHAIN OF EVIDENCE OR CHAIN OF CUSTODY.”

A. The broken chain of custody led to the wrongful admission of evidence.

According to the Utah Supreme Court, there is “no error where chain of custody was established by having all persons who handled evidence testify.” State v. Madsen, 498 P. 2d 670 (Utah 1972).

Here, there was a broken chain of evidence because no one testified about how the baggie with the residue came from the laboratory to the evidence locker and how the evidence came from the evidence locker to the trial court. The trial court itself stated that “we may not have exactly a perfect chain of evidence or chain of custody.” *Transcript*, p. 241. The Defendant motioned to dismiss the trial based on the error of the broken chain of custody. The trial court denied it, but under State v. Madsen there was error and the Defendant’s verdict should be reversed on these grounds.

VI.

THE CASE SHOULD HAVE BEEN DISMISSED UNDER THE DOCTRINE OF PLAIN ERROR OR ABUSE OF DISCRETION BECAUSE OF THE SPOILIATION OF EVIDENCE WHEN THE STATE FAILED TO BRING FORTH A URINE SAMPLE IT INITIALLY SAID WAS LOST, BUT THEN REPRESENTED IT WAS STILL IN EXISTENCE.

A. The trial court erred in not dismissing the case due to the State destroying potentially exculpatory evidence.

Plain error occurs when a trial court does not dismiss a case because there was (1) error (2) that is plain (3) that affected substantial rights of the Defendant and (4) which error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

As previously discussed in Argument I, A with the law cited (including California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984), the Defendant was taken to the county jail and he gave a urine sample to law enforcement.

Transcript, pp. 151, 178. According to the case agent, the urine sample had been “transferred to Fillmore, but it is in the freezer, it is frozen, it is in Fillmore.” *Transcript*, p. 152.

The urine sample was either exculpatory evidence that was withheld, inculpatory evidence that was not important enough to be a part of the State’s case, or it was lost through careless safekeeping of the evidence. It was never produced, even after multiple requests by Defendant, over a six month period. Ultimately, the trial court told the jury it was lost and never sent to the crime lab. *Transcript*, pp. 151-152, 164, 241-243, 246-253, 302. This was plain error or an abuse of discretion after the testimony that the urine sample had been sent to Fillmore.

Here, the urine sample testing dirty would have been highly relevant to help show the Defendant’s guilt and it testing clean would have been highly relevant to help show he was not guilty. *Transcript*, p. 243. The State’s failure to produce it at trial was a spoliation of evidence. In essence, the State’s actions toward it were tantamount to the destruction of evidence in violation of the Defendant’s Due Process rights. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). The case must be overturned and the jury verdict reversed because this was clearly error, it was plain, it affected the Defendant’s substantial rights, and seriously affected the fairness of the proceedings against the Defendant.

VII.

THE CASE SHOULD HAVE BEEN DISMISSED UNDER THE DOCTRINE OF PLAIN ERROR BECAUSE OF THE STATE WITHHOLDING POTENTIALLY EXCULPATORY EVIDENCE IN THE FORM OF A NON-PRODUCED URINE SAMPLE THAT HAD BEEN REQUESTED TWICE BY MOTIONS AND WHICH THE STATE CONTINUED TO ASSERT WAS NOT LOST AT TRIAL.

Based on the law stated above (including, but not limited to California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984) and the reasons stated in Argument I, A and VI, the State’s withholding of evidence violated the Defendant’s rights and under the doctrine of plain error—the trial court clearly erred in not dismissing the case after the evidence showed that the State in fact had the highly relevant and potentially exculpatory evidence, but were simply refusing to produce it.

VIII.

THE TRIAL COURT ERRED IN REJECTING THE DEFENDANT’S PROPOSED JURY INSTRUCTION THAT IS CONSISTENT WITH CASE LAW REGARDING THE STATE’S NEED TO PRECLUDE ALL REASONABLE POSSIBILITIES OR ALTERNATE HYPOTHESES OF INNOCENCE IN CIRCUMSTANTIAL EVIDENCE CASES IN ORDER FOR A DEFENDANT TO BE FOUND GUILTY BEYOND A REASONABLE DOUBT.

A. The Defendant’s jury instruction should have been used.

The Utah Supreme Court has stated that “[w]here the only evidence presented against the defendant is circumstantial, the evidence supporting a conviction must preclude every reasonable hypothesis of innocence. This is because the existence of a reasonable hypothesis of innocence necessarily raises a reasonable doubt as to the defendant’s guilt.” State v. Hill, 727 P.2d 221, 222 (Utah 1986) (plurality opinion) (citing State v. Romero, 554 P.2d 216, 219 (Utah 1976).

The State read to the jury an instruction, saying, “I want you to focus your attention towards the bottom of that paragraph.” *Transcript*, 317. The State went on to explain that “possession” element is sufficiently met if the controlled substance is found “quote, under *circumstances* indicating that the person had the ability and the intent to exercise dominion and control over it.” *Transcript*, 317. This focus is clearly

circumstantial. By admonishing the jury to “focus” on the language of the instruction referring to “circumstances,” the State made it abundantly clear that it was relying on circumstantial evidence to connect the Defendant to the charged crimes.

In response, the Defendant offered a jury instruction. It read: “You are not permitted to find the defendant guilty of the charges against him based totally on circumstantial evidence unless the proved circumstances are not only consistent with the theory the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion.” *Transcript*, p. 297. As is evident from the language here, it is consistent with State v. Hill. The trial court, however, rejected the Defendant’s proposed jury instruction that would explain that the State has the burden in circumstantial evidence cases to eliminate all reasonable inferences that point to innocence. This was error and not including it was prejudicial to the Defendant because, lacking it, the jury found him guilty even though there were clearly alternate, and reasonable inferences of innocence. In other words, the jury would likely have found him not guilty with the instruction.

Conclusion

Reversal is appropriate “only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” State v. Salas, 820 P. 2d 1386, 1387 (Utah App. 1991); State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989); accord State v. Jonas, 793 P.2d 902, 905 (Utah App. 1990); State v. Jamison, 767 P.2d 134, 137 (Utah App. 1989).

In this case at trial, because of the following reasons, reversal is appropriate. The jury must have entertained reasonable doubt as to the Defendant's guilt—(1) the Defendant was never seen touching the evidence, having the evidence on his person, or doing any other kind of incriminating behavior, (2) he never tested positive for methamphetamine—ever, (3) he never had any criminal history of using methamphetamine, (4) he never confessed to even knowing of the light bulbs in all of the mess of the office, which bulbs were not necessarily even in plain view, (5) someone else's fingerprints were on the tested light bulb, (6) the Defendant was not the sole occupant of the workshop that many others worked in, hung out in, and did nothing in, (7) the State failed to show the other occupants, who had free access to the constantly open office, were not users of methamphetamine that had used the light bulbs by at least producing their criminal histories, (8) the age of the methamphetamine was never established and could have been as old as twenty years and coming from the original owner of the trailer and not the Defendant, (9) and the very existence of the methamphetamine was in reasonable doubt due to an admittedly real contamination potential at the laboratory.

Based on the numerous examples of reasonable doubt, no reasonable jury could have found the Defendant guilty of the crimes for which he was convicted. As such, this Court should reverse the verdict and acquit the Defendant.

Further, “the erroneous admission of evidence, standing alone, is insufficient to set aside a verdict unless it had a substantial influence in bringing about the verdict.”

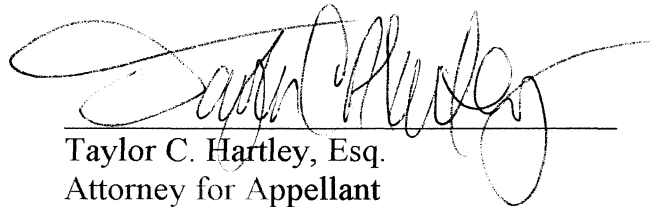
Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976); State v. Echevarrieta, 621 P.2d 709

(Utah 1980). The admission of evidence in this case was erroneous, due to the real contamination problems and broken chain of evidence. Without the erroneously admitted evidence, the case against the Defendant would have to have been dismissed, which would clearly have resulted in a different verdict (or outcome).

The rejection of the Defendant's jury instruction caused the same prejudice and a guilty verdict. The plain error in not dismissing the case for spoliation of evidence or for the withholding of exculpatory evidence in the urine sample after the case agent testified where it actually was error and caused a guilty verdict. The jury failed to find an essential element of possession; therefore, the possession charge(s) should have been dismissed.

For all these reasons, the verdict must be reversed and the Defendant treated as innocent.

DATED the 13th day of December 2010.



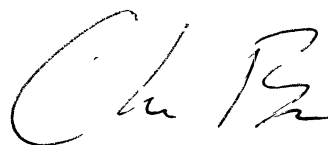
Taylor C. Hartley, Esq.
Attorney for Appellant

PROOF OF SERVICE

I certify that a true and correct copy of the foregoing Docketing Statement was mailed by first class mail or otherwise delivered this 16th day of December 2010 to the following:

Criminal Appeals Division
P.O. Box 140854
Salt Lake City, UT 84114-0854

Dated this ²⁰16th day of December 2010.



Taylor C. Hartley, Esq.



10939 N. Alpine Hwy., #505
Highland, UT 84003

Tel: 801-404-4987
Fax: 801-692-9080
ProtectYourLiberty@gmail.com

December 22, 2010

FILED
UTAH APPELLATE COURTS

DEC 22 2010

Re: James Crabb, Case #20091046

To Whom It May Concern,

The addendum to Mr. Crabb's appellate brief is not necessary.

Sincerely,

A handwritten signature in black ink, appearing to read 'Taylor C. Hartley', is written over a horizontal line.

Taylor C. Hartley, Esq.
Attorney at Law