

1999

## West Valley v. Jasbir Singh Bhatia : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,

Plaintiff/Appellee

vs.

JASBIR SINGH BHATIA,

Defendant/Appellant

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Appellate No. 990247-CA

Priority No. 2

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AN APPEAL FROM A CRIMINAL CONVICTION OF THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
WEST VALLEY DEPARTMENT DATED FEBRUARY 17, 1999  
THE HONORABLE JUDGE ANN BOYDEN

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REPLY BRIEF OF APPELLANT

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Utah Court of Appeals  
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Clerk of the Court

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WEST VALLEY CITY,

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## **ARGUMENT**

### **I. BHATIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO OBJECT DURING THE TRIAL.**

Bhatia received ineffective assistance of counsel based on counsel's failure to object during the trial. The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996). A claim of ineffective assistance of counsel may not be brought to the attention of the Court of Appeals on a direct appeal, usual "unusual . . . narrow circumstances exist." State v. Vessey, 967 P.2d 960, 964 (Utah App. 1998)[citations omitted]. Such unusual circumstances exist when "there is new counsel on appeal and there is an adequate trial record" for the Court of Appeals to review the allegations. Id. The present case fits the unusual narrow circumstances exception which should permit this Court to review the ineffective assistance of counsel issues on direct appeal.

To prevail on a claim of ineffective assistance of counsel, the defendant "must first show that his trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness." State v. Finlayson, 956 P.2d 283 (Utah App. 1998) citing to State v. Winward, 941 P.2d 627, 635 (Utah App. 1997)(quoting Strickland v. Washington, 466 U.S. 668, 687-688, 693, 104 S. Ct. 2052, 2052, 2064, 2067, 80 L.Ed. 2d 674 (1984)). "Once that is established, defendant must show that "there is a reasonable probability that the result would have been different absent the deficient performance." Id. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Bhatia believes that he received ineffective assistance of counsel based on counsel's failure to object throughout the proceedings. First, Bhatia believes that counsel's performance fell below an objective standard of reasonableness with respect to objecting to

inadmissible matters throughout the course of the trial. But for perhaps two or three objections, no other objections were lodged during the trial. Counsel permitted testimony regarding events which were outside the scope of the stipulation concerning admissible evidence. TT, P. 93, L 4-5. The agreement as placed on the record was not limited solely to other pending cases but expressly stated that no evidence would come in concerning any day other than the day of the events upon which Bhatia was charged. Id. Counsel permitted the prosecutor to make inflammatory comments in opening argument, during the trial and in closing argument calculated to influence the juries mind concerning the nature of the evidence which they would be presented. TT. P.91 L. 16-17; P. 97 L. 22 to P. 98 L. 1; TT. P. 102, L. 15-17; TT. P. 151 L. 12-15, 17-20. Counsel permitted the prosecutor to continually characterize and refer to the videos as "pornography." TT. P. 97 L. 3; P. 97 L. 22 to P. 98 L. 1; P. 173 L. 20-22. Counsel permitted witnesses to testify to matters which were beyond the stipulated admissibility dates. TT. P. 110 L. 8 through P. 114 L. 4. Counsel permitted the prosecutor to elicit legal conclusions from prosecution witnesses. TT. P. 119 L. 23-25; P. 121 L. 5 to P. 122 L. 3. Counsel permitted the prosecutor to lead witnesses on direct examination resulting in direct identification of Bhatia. TT. P. 109 L. 20-22 and P. 138 L. 23 to P. 139 L. 2. Finally, Bhatia's counsel permitted the prosecutor to be argumentative concerning the right of Bhatia to an interpreter merely because the prosecutor was frustrated with the pace of the questioning. TT. P. 174 L. 11-22. Based on the foregoing, Bhatia clearly believes that trial counsel's conduct fell well below an objective standard of reasonableness. Bhatia

does not believe there was any reasonable trial strategy behind these gross errors of counsel.<sup>1</sup> Rather, they were simply conduct which fell below the reasonably objective standard.

Bhatia believes that the cumulative errors as set forth above impacted the outcome of the trial. Bhatia admits that there was evidence in the record which supports the conclusion reached by the jury. However, the strength of that evidence would have been substantially less had he not received ineffective assistance of counsel. Because of the gross ineffective assistance of counsel, it is nearly impossible to set forth how strong the evidence may have been but for the failure of the assistance of counsel. In short, Bhatia believes the outcome of the trial was grossly different as a result of the failure of counsel to render effective assistance.

## **II. BHATIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON CUMULATIVE ERROR.**

Bhatia received ineffective assistance of counsel based on cumulative error. The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996). Because most of the allegations as set forth herein were not objected to at trial, a plain error standard applies. Plain error has three elements which are (1) error; (2) obviousness; and (3) prejudice. State v. Tenney, 913 P.2d 750 (Utah App. 1996).

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<sup>1</sup>Counsel argues that the determination of whether such conduct falls below the standard is hampered by the failure to request an evidentiary hearing pursuant to Rule 23(b) of the Utah Rules of Appellate Procedure. Bhatia believes that such a hearing is not mandated by the Rules and that the conduct complained of falls so far below the reasonable standard that such a hearing is unnecessary.



Assuming arguendo, that while it is possible that any one single error as set forth herein and throughout this brief by itself may not rise to the level error, Bhatia believes that the cumulative effect of all of the errors is sufficient that together they must undermine this Court's confidence in the verdict. See State v. Palmer, 860 P.2d 339 (Utah App. 1993) and State v. Alonzo-Nolasco, 932 P.2d 606 (Utah App. 1997).

### **III. BHATIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR BASED ON THE FAILURE OF COUNSEL TO REQUEST A PSYCHIATRIC EVALUATION.**

Bhatia received ineffective assistance of counsel for the failure of counsel to request a psychiatric evaluation of Bhatia. The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996). The evidence before this Court was the Bhatia clearly did not understand the gravity of the proceeding against him. First, in a pretrial hearing, Bhatia objected to a hearing being set on Thursday based on his religious beliefs. TT. P. 231, L. 12-23. On direct examination, Bhatia asked what the difference was between the United States Constitution and the Constitution of the State of Utah in response to a question concerning whether he understood something concerning what is required under those documents. TT. P. 170 L. 13-21. Based on nothing more than Bhatia's failure to fully and completely understand the existence of separate Constitutions for the State of Utah and the United States it is clear that he could not possibly understand the implications of his rights and responsibilities thereunder. It is equally clear that his counsel knew or should have known that Bhatia was not in his right mind and sought a psychiatric evaluation of Bhatia. The purpose behind a psychiatric evaluation is to insure

that the Defendant had the request mental capacity to understand that his conduct was in violation of the law and to insure that he had the requisite mental capacity to understand the nature of the proceedings filed against him. If he did not have that capacity, it was plain error for his counsel to not request an evaluation be performed.

**IV. BHATIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY ENTERED INTO STIPULATIONS WITHOUT HIS CONSENT WHICH WENT SPECIFICALLY TO THE ELEMENTS OF THE CRIMES THE STATE HAD TO PROVE.**

Bhatia received ineffective assistance of counsel when counsel entered into stipulations without his client's consent which stipulations went specifically to the elements the State had to prove for conviction. The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996).

Counsel entered into or made three separate stipulations which constitute ineffective assistance of counsel because they fell below an objective standard of reasonableness. First, counsel entered into said stipulations without consulting with his client. An attorney has no right to enter into a stipulation which impacts the substantive rights of their client without the client's prior consent. Rackham v. Rackham, 230 P.2d 566 (Utah 1951). In each case, the stipulations of counsel impacted the substantive rights of Bhatia without there being any evidence that Bhatia consented to such stipulations.

First, counsel stipulated to the relevant period of admissibility. After having done so, he failed to require the prosecutor to stand by his stipulation and limit the evidence as stipulated. By failing to enforce the stipulation, the prosecutor used inadmissible evidence

to prove elements of the crime. Second, counsel stipulated to editing the tapes such that they would not have to be shown in their entirety. However, the absence of any artistic, literary, political or scientific value is specifically one of the elements of the crimes Bhatia was charged with which the prosecution had the burden of proving. By stipulating to editing the tapes, he precluded the jury from making the determination on that element. Finally, in closing argument, Counsel specifically stipulated that the videos lacked any artistic, literary, political or scientific value thereby completing eliminating the requirement that the State prove that element of the charged offenses. Bhatia believes that entering such stipulations clearly fell below an objective standard of reasonableness.

Bhatia further believes that he was prejudiced by such stipulations. Initially, stipulating to limiting the evidence to only evidence concerning the dates of the charged events may have been sound trial strategy which would not be ineffective assistance of counsel. However, there is no evidence that Bhatia consented to such a stipulation. Weset Valley argues that said stipulations were made in open court without objection from Bhatia. However, there is similarly no indication in the record that counsel consulted with Bhatia or that he understood that said stipulations were being made. More importantly, once the stipulation was made, the failure to enforce the stipulation resulted in prejudice to Bhatia insofar as the State used actions outside the relevant time frame to prove the intent element of the crimes charged. This clearly was prejudicial. The other stipulations were also prejudicial insofar as they eliminated the requirement that the state prove all of the elements of its case beyond a reasonable doubt. There was no reasonable strategic basis for Bhatia's

counsel entering into stipulations which included eliminateing the prosecutions need to prove all of the elements of the action. Bhatia's counsel's stipulations were without consent, impacting his substantive rights, well below an objective reasonable standard and prejudicial.

**V. BHATIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE MANNER WHICH COUNSEL PREPARED FOR TRIAL.**

Counsel has an obligation to reasonably prepare for a client's case, regardless of the number of other cases he may have. In Strickland v. Washington, 466 U.S. 668 (1984), the Court stated when discussing an attorney's duty to investigate potential defenses based both on law and fact, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations."

In the present case, Bhatia believes he received ineffective assistance of counsel in the manner in which his attorney prepared for this litigation. Specifically, counsel admitted in the middle of the trial that a defense witness had entered the court room and that he had no idea what the witness would say. TT. P. 127 L. 23 to P. 128 L. 5. Clearly, counsel's own admission during trial indicates a failure to adequately prepare for this proceeding. Bhatia believes this falls below an objective standard of reasonableness. Presumably, if counsel did not know what a witness would testify to, he conceivably did not know what any other witness was going to testify concerning. Bhatia believes that counsel's failure to adequately prepare for trial prejudiced him. Counsel did not interview all of the potential witnesses. He admitted as much. Based thereon, Bhatia believes that counsel's lack of preparation

contributed to the overall plethora of mistakes which give rise to his ineffective assistance of counsel claims.

**VI. BHATIA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO MAKE AN OPENING ARGUMENT.**

Bhatia received ineffective assistance of counsel for counsel to fail to make an opening argument prior to the commencement of Bhatia's case. The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996).

Bhatia's counsel's conduct fell below an objective standard of reasonableness. First, he reserved the right to present his opening argument at the conclusion of the State resting its case. TT, P. 106 L. 21 to P. 107 L. 11. Then, at the commencement of Bhatia's case, he failed to give his opening argument. TT. P. 169. Bhatia does not believe this was sound trial strategy. A similar event occurred in State v. Harry, 873 P.2d 1149 (Utah App. 1994). In that case, counsel claimed that it was an intentional subconscious decision made for strategy purposes. Here, there is no such evidence. Rather, the evidence is that counsel's conduct simply fell below an objective reasonable standard resulting in his forgetting to give his opening argument.

**VII. IT WAS PLAIN ERROR TO PERMIT PROSECUTION WITNESSES TO TESTIFY TO LEGAL CONCLUSIONS.**

It was plain error to permit prosecution witnesses to testify as to legal conclusions. The standard of review is whether the trial court committed plain error. State v. Irwin, 924 P.2d 5 (Utah App. 1996).

Bhatia's counsel permitted the prosecutor to elicit legal conclusions from prosecution

witnesses. TT. P. 119 L. 23-25; P. 121 L. 5 to P. 122 L. 3. Specifically, both Newbold and Evans testified that the videos were pornographic. TT. P. 119 L. 23-25; P. 121 L. 5 to P. 122 L. 3. While eliciting testimony concerning the ultimate issue is permissible under Rule 704 of the Utah Rules of Evidence, "questions which would merely allow a witness to tell the jury what result to reach are not permitted." State v. Tenney, 913 P.2d 750 (Utah App. 1996)(stating that permitting such questions is "plain error" even if no objection is lodged).

Bhatia does not believe that the testimony of Newbold and Evans was anything other than concerning legal conclusions. Bhatia does not believe that these sophisticated officers who regularly testify in criminal proceedings were merely testifying concerning facts and the inferences therefrom. As such, testimony concerning whether the videos viewed were pornographic was clearly designed to lead the jury to the same legal conclusion.

In the present case, no objections were lodged. Nonetheless, it was plain error to permit the prosecutor to illicit legal conclusions from the prosecution witnesses. Bhatia was prejudiced as a result of these errors. Specifically, these witnesses, police officers, told the jury what they should conclude were the nature of the videos in question. Such testimony is highly prejudicial and should not be elicited by the prosecutor. Bhatia believes that such testimony regarding legal conclusions is sufficient to undermine the confidence in the verdict rendered.

#### **VIII. THE PROSECUTOR ENGAGED IN PROSECUTORIAL MISCONDUCT.**

The prosecutor engaged in prosecutorial misconduct during the trial. Bhatia believes that the prosecutor engaged in prosecutorial misconduct sufficient to warrant to an

undermining of this Court's confidence in the verdict. Specifically, the prosecutor engaged in the following conduct:

A. **Testimony beyond Stipulation Dates.** The prosecutor elicited testimony regarding events which were outside the scope of the stipulation concerning admissible evidence. TT, P. 93, L 4-5; TT. P. 110 L. 8 through P. 114 L. 4. In State v. Emmett, 839 P.2d 781 (Utah 1992), the Court defined the unique role of a prosecuting attorney as adversarial but with a compelling obligation to the sovereignty with an obligation not necessarily to win cases, but rather to insure that justice shall be done." To that end, when a prosecutor enters into a stipulation limiting the admissibility of evidence to the dates of the particular crimes charged, he does not have the unbridled right to then elicit testimony beyond that stipulation date. Moreover, in the present case, the prosecutor violated Rule 404(b) of the Utah Rules of Evidence by admitting evidence of allegedly prior bad acts to prove the character of Bhatia in order to show that he acted in conformity therewith." *Id.* Specifically, in closing argument, the prosecutor argued that the fact that tapes had been confiscated from Bhatia prior to the dates of the incidents charged proved his intent. Not only was this evidence not admissible under Rule 404(b), but it was not evidence which should have been before the Court at all based on the stipulation entered into by the prosecutor. Such conduct was plain error.

B. **Inflammatory Comments.** The prosecutor continually made inflammatory comments in opening argument, during the trial and in closing argument calculated to influence the jury's mind concerning the nature of the evidence which they would be presented. TT. P.91 L. 16-17; P. 97 L. 22 to P. 98 L. 1; TT. P. 102, L. 15-17; TT. P. 151 L. 12-15, 17-20. The prosecutor told the jury that the evidence would make them sick. He told them they had the unfortunate duty of viewing the videos. In opening arguments, the

prosecutor has the right to tell the jury what he expects the evidence will be, but not to be argumentative in so doing. The continual making of inflammatory statements was prejudicial and misconduct.

**C. Characterization of the Videos.** The prosecutor continually characterized and referred to the videos as "pornography." TT. P. 97 L. 3; P. 97 L. 22 to P. 98 L. 1; P. 173 L. 20-22. By so doing, he implied to the jury the ultimate conclusion he wanted them to reach. Finally, counsel for Bhatia objected and the objection was sustained. However, at that point the trial was nearly concluded and the prosecutor has been implying to the jury all day long that the videos were pornography which was for them to decide. Such improper statements are prosecutorial misconduct.

**D. Legal Conclusions.** The prosecutor elicited legal conclusions from prosecution witnesses. TT. P. 119 L. 23-25; P. 121 L. 5 to P. 122 L. 3. Specifically, the prosecutor had both police officers testify as to their legal conclusion that the videos were pornographic. As noted above, it is impermissible to elicit such legal conclusions and is contrary to the duty of a prosecutor to insure that the administration of justice is done. This is but one more cumulative showing of prejudice which should undermine this Court's confidence in the verdict.

**E. Leading Witnesses on Direct.** The prosecutor lead witnesses on direct examination resulting in direct identification of Bhatia. TT. P. 109 L. 20-22 and P. 138 L. 23 to P. 139 L. 2. Admittedly the trial court has wide discretion to permit leading questions and the administration of the case. However, "it is essential that judges exercise tight control



over the use of leading questions . . . to assure that they are used only after more open ended questions have failed to produce responses."

F. was argumentative with Bhatia concerning the right of Bhatia to an interpreter merely because the prosecutor was frustrated with the pace of the questioning. TT. P. 174 L. 11-22.

The prosecutor engaged in misconduct. This misconduct was prejudicial to Bhatia. The prosecutor brought up matters which was outside the scope of the jury's purview thereby tainting the proceedings.

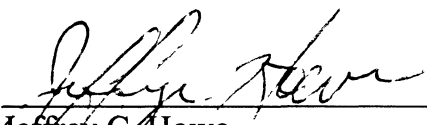
### CONCLUSION

Bhatia received ineffective assistance of counsel based on counsel's failure to object during the trial. There was no legitimate trial strategy which supported this failure to object. Bhatia received ineffective assistance of counsel based on cumulative error. Bhatia believes that he was prejudiced in each instance by ineffective counsel but even if he was not prejudiced by each individual incident of ineffective assistance of counsel the cumulative effect of such conduct deprived him of a fair trial. Bhatia received ineffective assistance of counsel for the failure of counsel to request a psychiatric evaluation of Bhatia. The evidence was clear that Bhatia was irrational to the point of requesting the Court not set hearings on Thursdays for allegedly religious reasons. Bhatia received ineffective assistance of counsel when counsel entered into stipulations without his client's consent which stipulations went specifically to the elements the State had to prove for conviction. Bhatia was clearly prejudiced by such a stipulation entered into without his consent. Bhatia received ineffective

assistance of counsel in the manner in which counsel prepared for trial. Counsel even went so far as to acknowledge to the Court that a witness came into the Court room the subject of his testimony was unknown to counsel. Bhatia received ineffective assistance of counsel for counsel to fail to make an opening argument prior to the commencement of Bhatia's case. Counsel's failure prejudiced Bhatia by not alerting the jury to his defense prior to its presentation.

Bhatia believes that plain error was committed when the Court permitted witnesses to testify of legal conclusions which were the ultimate issue to be determined by the trier of fact. Bhatia believes the prosecutor continually made improper prejudicial comments throughout the trial. Bhatia believes that it was error to permit the prosecutor to lead witnesses thereby suggesting the answer to identifications of Bhatia. Bhatia believes the Court err as a matter of law by denying the motion filed by Bhatia based on a single criminal episode.

Dated and Signed this 22<sup>nd</sup> day of June, 2000.

  
\_\_\_\_\_  
Jeffrey C. Howe  
FAMILY LAW PRACTICE  
Attorney for Appellant

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing **Reply Brief** was **MAILED**, postage prepaid, on this 23 day of June, 2000 to:

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