

1999

# West Valley City v. Jasbir Singh Bhatia : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,

Plaintiff/Appellee,

v.

JASBIR SINGH BHATIA,

Defendant/Appellant.

Case No. 990247-CA

Priority No. 2

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BRIEF OF THE APPELLEE

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Appeal from the Third Judicial District Court,  
West Valley Department,  
in and for Salt Lake County, State of Utah;  
the Honorable Ann Boyden

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**FILED**

Utah Court of Appeals

MAY 22 2000

Julia D'Alessandro  
Clerk of the Court

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## STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(e), Utah Code Annotated.

## STATEMENT OF THE ISSUES

### I. DID THE DEFENDANT RECEIVE COMPETENT LEGAL REPRESENTATION AT TRIAL?

Utah has adopted the two prong *Strickland* test for analyzing claims of ineffective assistance of counsel. *State v. Perry*, 899 P.2d 1332 (Utah Ct.App.1995); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under the *Strickland* test, the appellant must first demonstrate that his legal counsel's representation fell below an object standard of reasonableness. The appellant must then show that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. To prevail, the appellant must meet both prongs of the *Strickland* test. *Fernandes v. Cook*, 870 P.2d 870 (Utah 1993).

A claim of ineffective assistance of counsel that is raised for the first time on appeal is a question of law. *State v. Bryant*, 965 P.2d 539 (Utah Ct. App. 1998). Review of the trial counsel's choices regarding trial strategy is highly deferential, even if the choices are incorrect in hindsight. *State v. Tennyson*, 850 P.2d 461 (Utah Ct. App. 1993).

**II. DID THE TRIAL COURT IMPROPERLY ALLOW LAY WITNESSES TO TESTIFY TO LEGAL CONCLUSIONS?**

The appropriate standard of review for this issue is the plain error standard. *State v. Bryant*, 965 P.2d 539 (Utah Ct. App. 1998).

**III. DID CERTAIN REMARKS OF THE PROSECUTOR CONSTITUTE PROSECUTORIAL MISCONDUCT?**

The appropriate standard of review is the plain error standard. *State v. Dunn*, 850 P.2d 1201 (Utah 1993). Whether a prosecutors remarks or actions constitute prosecutorial misconduct is determined by applying the two part test set forth in *State v. Kohl*, 2000 UT 35 ¶22; 392 Utah Adv. Rep. 3 (2000).

**IV. DID THE TRIAL COURT CORRECTLY INTERPRET SECTION 76-10-1204, UTAH CODE ANNOTATED, IN DENYING THE DEFENDANT'S MOTION TO DISMISS ONE COUNT BECAUSE OF THE SINGLE CRIMINAL EPISODE RULE?**

The Court of Appeals should review the trial court's interpretation of the statute for correctness and accord no deference to it's conclusions of law. *State v. Keppler*, 1999 UT App 89, ¶4; 976 P.2d 99.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,  
STATUTES, ORDINANCES, AND RULES**

**76-10-1204 Distributing pornographic material.**

(1) A person is guilty of distributing pornographic material when he knowingly:

(a) sends or brings any pornographic material into the state with intent to distribute or exhibit it to others;

(b) prepares, publishes, prints, or possesses any pornographic material with intent to distribute or exhibit it to others;



(c) distributes or offers to distribute, exhibits or offers to exhibit any pornographic material to others;

(d) writes, creates, or solicits the publication or advertising of pornographic material;

(e) promotes the distribution or exhibition of material he represents to be pornographic; or

(f) presents or directs a pornographic performance in any public place or any place exposed to public view or participates in that portion of the performance which makes it pornographic.

(2) Each distributing of pornographic material as defined in Subsection (1) is a separate offense.

(3) It is a separate offense under this section for:

(a) each day's exhibition of any pornographic motion picture film; and

(b) each day in which any pornographic publication is displayed or exhibited in a public place with intent to distribute or exhibit it to others.

(4) Each separate offense under this section is a class A misdemeanor punishable by:

(a) a minimum mandatory fine of not less than \$100 plus \$10 for each article exhibited up to the maximum allowed by law; and

(b) incarceration, without suspension of sentence in any way, for a term of not less than seven days, notwithstanding any provisions of Section 77-18-1.

(5) If a defendant has already been convicted once under this section, each separate further offense is a third degree felony punishable by a minimum mandatory fine of not less than \$1,000 plus \$10 for each article exhibited up to the maximum allowed by law and by incarceration, without suspension of sentence in any way, for a term of not less than 30 days. This subsection supersedes Section 77-18-1.

#### **76-1-401 "Single criminal episode" defined --Joinder of offenses and defendants.**

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-8a-1 in controlling the joinder of offenses and defendants in criminal proceedings.

#### **76-1-402 Separate offenses arising out of single criminal episode -- Included offenses.**

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be

punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE**

This case involves a prosecution and conviction for three violations of Section 76-10-1204, Utah Code Annotated, Distributing Pornographic Materials.

### **DISPOSITION IN TRIAL COURT**

A jury trial was held before the Honorable Judge Ann Boyden on February 17, 1999. The jury found Bhatia guilty of all three counts of Distributing Pornographic Materials. On March 18, 1999, Judge Boyden sentenced Bhatia to 365 days in jail on the count contained in Case No. 981104398. In Case No. 981104396, Judge Boyden sentenced Bhatia to 365 days on each of the two counts. The two sentences on Case No. 981104396 run concurrently to each other, but run consecutively to the sentence imposed in Case No. 981104398. Record 48, P. 40; Record 47, P. 1.<sup>1</sup>

### **COURSE OF PROCEEDINGS**

On or about October 1, 1998, West Valley City filed an information charging Jasbir Bhatia ("Bhatia") with one count of distributing pornographic material, Section 76-10-1204, Utah Code Annotated. This case was filed as number 981104398. Record 48, P.1. On or about October 1, 1998, West Valley City filed an information charging Bhatia with two counts of distributing pornographic material, Section 76-10-1204, Utah Code Annotated. Record 47, P.1. This case was filed as number 981104396. The trial judge denied a defense motion to consolidate these cases with other charges pending against Bhatia, however, these cases were

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<sup>1</sup> Record 48 refers to that record originally filed with the Court of Appeals as Case No. 990248-CA. Record 47 refers to the record originally filed with the Court of Appeals as Case No. 990247-CA.

tried together, before a jury, on February 17, 1999. Record 48, P. 20. Trial Transcript, P. 5.

Prior to trial, the parties entered a stipulation into the record. This stipulation prohibited the parties from using evidence from the other pending cases, the cases that had not been consolidated into this trial. Trial Transcript, PP. 5-9.

Also prior to trial, Bhatia made a motion to dismiss one count from Case No. 981004396. The basis for the motion was the Single Criminal Episode Rule, Sections 76-1-401,402, Utah Code Annotated. Trial Transcript, PP. 9-13. Judge Boyden took this motion under advisement until the close of the City's case in chief, at which time the motion was denied. Trial Transcript, PP. 161-168.

Trial was held on February 17, 1999. The jury returned a verdict of guilty on all three counts and this appeal followed.

#### **STATEMENT OF THE FACTS**

1. Bhatia operates a sales booth at the Redwood Drive-in swap meet in West Valley City. Trial Transcript, pp. 108-109.
2. On April 19, 1998, West Valley City undercover police officers Newbold and Evans observed Bhatia selling what appeared to them to be pornographic videotapes. Trial Transcript, pp. 115,131-132.
3. Officer Evans testified that upon his inquiry, Bhatia told him that the tapes on display were "cable" versions of the

videotapes and those were the only ones that he could sell under Utah law. Trial Transcript, p. 132.

4. Bhatia then volunteered to officer Evans that he could purchase a "triple X" version from a collection that Bhatia kept in the back of his booth. Trial Transcript, p. 132.
5. Officer Evans accompanied Bhatia into an enclosed area in the back of the booth and observed the videos. Officer Evans eventually purchased a video from Bhatia which was entitled "Triple Gang Bang." Trial Transcript, pp. 133-134.
6. As he sold the video to officer Evans, Bhatia gave Officer Evans a telephone number and told him to call if he wished to purchase more videotapes. Trial Transcript, pp. 135-136.
7. On April 24, 1998, Officer Evans made telephone contact with Bhatia and arranged to purchase additional videotapes. Trial Transcript, pp. 120, 138-139. Following the conversation, Officer Evans, accompanied by Officer Newbold, proceeded to Bhatia's residence. Trial Transcript, pp. 121, 140. Officer Newbold stayed in the vehicle while Officer Evans entered the Bhatia house. Trial Transcript, p. 121.
8. On April 24, 1998, Officer Evans purchased three more videotapes from Bhatia. The titles of these tapes were "Cum Pumpers No. 12," "Cum Pumpers Volume 9" and "Mafia Girls." Trial Transcript, p. 141.

9. After viewing the videotapes, Officer Newbold testified that "Triple Gang Bang," "Cum Pumpers No. 9," and "Cum Pumpers Volume 12" contained graphic images of sexual activity, including oral, anal and vaginal penetration and males climaxing. Trial Transcript, p. 125. Officer Newbold testified that the "Mafia Girls" videotape was an edited version that did not show sexual penetration. Trial Transcript, p. 125.
10. Officer Newbold testified that he could find no story line in either "Triple Gang Bang," "Cum Pumpers No. 9," or "Cum Pumpers Volume 12."
11. Portions of the three videotapes were shown to the jury. Trial Transcript, pp. 157-160. It was stipulated by the parties that these portions were representative of the portions of the tape that were not viewed. Trial Transcript, p. 158.
12. Under oath, Bhatia admitted selling the videotapes purchased by Officer Evans at Bhatia's home. Trial Transcript, pp. 177, 179.
13. Under oath, Bhatia admitted that when he sold the videotapes to Officer Evans he told Officer Evans that the videotapes showed penetration. Trial Transcript, p. 180.
14. Under oath, Bhatia admitted that he knew that it was illegal to sell the videotapes. Trial Transcript, p. 181.

## SUMMARY OF THE ARGUMENTS

### I. BHATIA RECEIVED THE BENEFIT OF A COMPETENT DEFENSE WHICH RESULTED IN A JUST AND FAIR TRIAL.

Bhatia's argument of ineffective assistance of counsel must be measured against the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). That test requires that Bhatia demonstrate that his trial counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. *Fernandez v. Cook*, 870 P.2d 870 (Utah 1993). Bhatia cannot satisfy either prong of the *Strickland* test.

First, Bhatia has failed to request a remand to the trial court for an evidentiary hearing pursuant to Rule 23B of the Utah Rules of Appellate Procedure. As a result, all the parties can do is speculate as to trial counsel's strategy and motives. However, all of the actions complained of by Bhatia are either not supported by the record or could be legitimate trial strategy decisions made by his trial counsel. Such decisions by trial counsel are given great deference by appellate courts. *State v. Tennyson*, 850 P.2d 461 (Utah Ct. App. 1993) ("If a rational bases for counsel's performance can be articulated, we will assume counsel acted competently.") Second, Bhatia has not shown that the outcome of the trial would have likely been different had his

trial counsel acted differently. The evidence against Bhatia is overwhelming and any perceived errors by his trial counsel and the conduct of the trial did not affect the core evidence presented by the City.

**II. A PROSECUTION WITNESS DID NOT IMPROPERLY TESTIFY TO LEGAL CONCLUSIONS.**

Bhatia's contention that a prosecution witness was permitted to testify as to legal conclusions is without support in the record. The two statements described by Bhatia were both made by Officer Newbold, a lay witness. In both cases, Officer Newbold used the word pornography in a factual manner and not as a legal conclusion. His opinion that the materials may be "pornographic", was part of his explanation as to why he began an investigation. Statements used in this manner, while using a legal term, did not violate the Utah Rules of Evidence or applicable Utah case law.

**III. THE PROSECUTOR'S CONDUCT DURING THE TRIAL DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.**

Allegations of prosecutorial misconduct are analyzed under a two part test. Bhatia must show that the actions of the prosecutor called to the attention of the jury a matter which it would not be justified in considering, and then he must show that the error by the prosecutor was so substantial that there is a reasonable likelihood that, in its absence that there would have



been a more favorable result. None of the statements complained of by Bhatia meet this standard.

Bhatia argues that there were several improper statements by the prosecutor. The basis for his contention is not supported by the record as is set forth in several other areas of this brief. Bhatia's contention that the prosecutor made inflammatory statements to the jury is also not supported by the record. Bhatia's examples are either taken out of context or so unsubstantial that they would not influence the outcome of the trial. Likewise, the prosecutor's reference to the videos as "pornographic," if improper, was cured by a jury instruction.

Finally, the prosecutor did make an improper statement to the court when he described Bhatia's need for an interpreter as a sham. However, given the overwhelming evidence against Bhatia, he has failed to carry his burden to show that this one statement by the prosecutor effected the outcome of the trial.

**IV. THE COURT INTERPRETED SECTION 76-10-1204, UTAH CODE ANNOTATED, IN DENYING BHATIA'S MOTION TO DISMISS ONE COUNT BECAUSE OF THE SINGLE CRIMINAL EPISODE RULE.**

In this case, Judge Boyden interpreted the plain language of Section 76-10-1204, Distributing Pornographic Material to mean that each tape sold by Bhatia was a separate violation of the statute. Judge Boyden relied upon Subsection (2) of Section 76-10-1204 which states "Each distributing of pornographic material as defined in Subsection (1) is a separate offense."

Judge Boyden correctly determined that this specific provision in the distributing pornographic materials statute made the distribution of each separate video tape a separate violation. Her analysis that the more specific language in this statute took president over the more general language of the single criminal episode statute, Section 76-1-401, is a correct application of the Utah law of statutory construction. *State v. Vigil*, 842 P.2d 843 (Utah 1992).

#### **DETAIL OF THE ARGUMENTS**

##### **I. BHATIA RECEIVED THE BENEFIT OF A COMPETENT DEFENSE WHICH RESULTED IN A JUST AND FAIR TRIAL.**

Bhatia argues that he received ineffective assistance of counsel at trial. This argument is based on the underlying concept that his counsel's performance was so deficient that he was deprived of counsel for his defense as guaranteed by the Sixth Amendment of the United States Constitution. A review of the facts below reveals that this argument is without merit.

Utah has adopted the analytical framework set forth by the United States Supreme Court for deciding ineffective assistance of counsel claims under the Sixth Amendment. *State v. Perry*, 899 P.2d 1232 (Utah Ct. App. 1995). This framework is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). In *Strickland*, the United States Supreme Court set forth a two prong test for analyzing ineffective assistance of counsel claims. To

satisfy the first part of the *Strickland* test, Bhatia must show that his trial counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 668, 688. In order to satisfy the second prong of the test, Bhatia must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. *Strickland*, 466 U.S. 668, 694; *State v. Baker*, 963 P.2d 801 (Utah Ct. App. 1998). If he fails to establish either prong of the *Strickland* test, Bhatia's claim will fail. *Strickland*, 466 U.S. 668, 687; *State v. Tennyson*, 850 P.2d 461 (Utah Ct. App. 1993).

As is set forth below, Bhatia has failed both prongs of the *Strickland* test.

**A. THE ACTIONS OF BHATIA'S TRIAL COUNSEL WERE OBJECTIVELY REASONABLE TRIAL STRATEGY DECISIONS.**

Utah law creates a strong presumption of competence by defense counsel. In reviewing defense counsel's actions, the court does not need to come to a conclusion that counsel had a specific strategy in mind, it simply needs to be able to articulate a plausible strategic explanation for defense counsel's actions. *Tennyson*, at page 468.

The presumption of competence is so strong that the Utah Court of Appeals has stated: "If a rational basis for counsel's performance can be articulated, we will assume counsel acted

competently. Indeed, authority from this court supports the notion that in ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." *Tennyson*, at page 468. It is also clear from the case law that "although defense counsel must vigorously represent his or her client, 'counsel [is] not required to develop every conceivable defense that [is] available.'" *State v. Baker*, 963 P.2d 801 (Utah Ct. App. 1998) (citation omitted).

The analysis of the trial strategy decisions made by Bhatia's trial counsel is hampered by Bhatia's failure to move for a remand to the trial court for an entry of findings of fact regarding trial counsel's conduct. Rule 23B, Utah Rules of Appellate Procedure Because no evidentiary hearing was held by the trial court, any discussion of trial counsel's strategy will be performed in a factual vacuum, without the benefit of any knowledge of trial counsel's actual motives or strategies.

Bhatia's first contention is that his trial counsel failed to object at certain points in the trial. However, several of Bhatia's examples of his trial counsel's failure to object are obviously ill founded.

For example, Bhatia complains that his trial counsel failed to object to certain evidence which went beyond a stipulation entered into prior to trial. Appellants Brief, p.4, p.13, p.16. This characterization of the stipulation is simply incorrect. The

stipulation which was placed on the record was an agreement that information from other pending cases against Mr. Bhatia would not come in during this trial. (Trial Transcript PP. 5-9).

The evidence which is referred to by Bhatia as violating the stipulation did not relate to any other pending case. It consisted of testimony by Officer Newbold that approximately four months prior to the incidents which gave rise to this case, Officer Newbold had seized similar video tapes from Bhatia. As Officer Newbold testified, no charges were filed based upon the earlier incident in which the tapes were seized. (Trial Transcript, P. 114). Therefore, the testimony of Officer Newbold did not violate the terms of the stipulation which simply prohibited evidence related to other pending charges. Obviously understanding the nature of the stipulation, Bhatia's trial counsel did not object to this testimony.

Another example of the shallowness of Bhatia's arguments, is his contention that defense counsel failed to object when the prosecutor improperly led witnesses on direct examination. This argument is so inconsequential that it is almost absurd. In each instance referred to by Bhatia, the prosecutor simply asked the witness if he recognized the "gentleman over here with the green sweater on" as Mr. Bhatia. Trial transcript, PP. 109,138-139. Bhatia's identity was never in doubt or at issue during the trial

and an objection to such a question by the prosecutor would not have furthered Mr. Bhatia's case.

Also, based upon reading Bhatia's argument, one could almost come to the conclusion that his trial counsel never objected during the course of the trial. That is not the case. Bhatia's trial counsel made numerous objections throughout the course of the trial as he vigorously defended his client. Bhatia's attempt to use hindsight to second guess his trial counsel's strategy and objectives without any evidentiary process to determine what that strategy may be, is not persuasive. Without any further evidence, we should defer to Bhatia's trial counsel and presume that he had a competent trial strategy in mind and his decisions on when or when not to object were in keeping with that strategy.

Bhatia's other arguments regarding ineffective assistance of counsel are also without merit. He argues that it was ineffective assistance for trial counsel to fail to request psychiatric evaluation of Bhatia. This contention is based on virtually no evidence in the record. First, Bhatia points to a post trial statement by Bhatia's counsel reminding the judge that Bhatia preferred hearings not be set on Thursday for religious and cultural reasons. (Trial Transcript, P.231). Bhatia offers no explanation as to why, although that belief may be outside of the norm for American culture, it is an indication of mental illness. Second, Bhatia points to his lack of knowledge regarding the United

States Constitution and the Constitution of the State of Utah. (Trial Transcript, P. 170). This lack of understanding should certainly not be surprising from someone who appears to have been raised in another country/or culture. Neither of these instances, either by themselves or together, provide an indication that Bhatia has a mental problem.

Finally, Bhatia argues that his trial counsel entered into certain stipulations without his consent, that his trial counsel did not prepare properly for trial, and that his trial counsel failed to make an opening statement. However, he has failed to support these contentions.

The argument that his trial counsel entered into stipulations without his consent has no basis in the record. There is no indication from the record that Bhatia objected to these stipulations. His contention that these stipulations were without his consent constitutes new evidence being interjected into the appellate process. Such evidence is outside the record and should not be considered by this court. *State v. Bredehoft*, 966 P.2d 285 (Utah Ct. App. 1998).

Also, the stipulations had strategic benefit to Bhatia. One stipulation kept out evidence of other charges that were pending against him. The other stipulation conceded that the videotapes just showed sexual activity and had no plot; that they possessed no artistic, literary or scientific value. This point was testified

to by the witnesses and was apparent from the videos themselves. His closing argument reveals that defense counsels basic strategy to argue that the community standards of Salt Lake County accepted this type of material. To belabor this obviously losing point regarding the nature of the material in front of the jury probably would not have advanced Bhatia's case, nor would it have made the jury more sympathetic to his cause.

Likewise there is no evidence to support the contention that Bhatia's trial counsel was unprepared for trial. Bhatia simply points to an occasion during trial when a potential witness entered the courtroom. Bhatia's counsel then asked for a short continuance during which he could question the potential witness. (Trial Transcript, PP 127-128).

Bhatia has presented nothing more than this. There is no evidence concerning his trial counsel's other preparations for trial, nor is there any evidence regarding this particular witness. It is unknown whether or not Bhatia's trial counsel had previously spoken with this witness, or what efforts he may have made to attempt to contact and ascertain the testimony of this witness prior to trial. Once again Bhatia is asking this court to operate in a factual vacuum and second guess his trial counsel's actions based upon few, if any, facts.

His last contention is his trial counsel's decision to forego an opening statement. There could be several reasons why this



decision was made. For example, it may have been based upon trial counsel's reading of the attitude and demeanor of the jury at that point in the trial.' However, we can only speculate, since Bhatia failed to request a Rule 23B hearing.

Based on the forgoing, it is apparent from the record that Bhatia's trial counsel met an objective standard of reasonableness. It is also apparent that Bhatia has failed to provide this court with sufficient factual basis for determining that the actions of his trial counsel were ineffective or in violation of his Sixth Amendment rights.

**B. THE JURY'S VERDICT IS STRONGLY SUPPORTED BY THE EVIDENCE AND ANY ALLEGED ERRORS BY BHATIA'S TRIAL COUNSEL DID NOT EFFECT THE OUTCOME OF THE TRIAL.**

If, for the sake of argument, the actions of Bhatia's trial counsel are considered to have fallen below a reasonable level of competence, Bhatia can still not satisfy the second prong of the *Strickland* test. In order to meet the requirements of the second prong of the *Strickland* test, Bhatia must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 694. In determining whether or not this standard has been met, the Utah Court of Appeals has stated:

"In deciding whether a case should be remanded for re-trial on the bases of ineffective assistance of counsel, 'an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors effected the entire evidentiary picture or have an

isolated effect and how strongly the evidence is supported by the record.'"

*State v. Strain*, 885 P.2d 810 (Utah Ct. App. 1994) [quoting *State v. Templin*, 805 P.2d 182 (Utah 1990.)]

In this case, the verdict of the jury is strongly supported by the evidence presented at trial. Even if the actions of Bhatia's trial counsel are considered errors, rather than strategic decisions, the perceived errors do not begin to affect or overcome the overwhelming evidence against Bhatia. First, there can be no doubt that Bhatia sold the videotapes in question. Both Officer Evans and Officer Newbold conclusively testified regarding the events that surrounded their purchase of the videotapes from Bhatia. Also, Bhatia himself testified that he sold at least two of these particular videotapes to Officer Evans. Trial Transcript, p. 177. That he sold many such videos to many people. Trial Transcript, p. 178. And, that he told the officer that the video tapes contained images of sexual penetration. Trial Transcript, p. 180.

Based upon the evidence presented at trial, the only reasonable conclusion is that the tapes presented at trial had been sold by Mr. Bhatia. Furthermore, by his own testimony, Bhatia admitted that he knew that the videotapes contained images similar to those depicted on their covers (Trial Transcript, pp. 180,181); and, that they contained images of sexual penetration. Trial Transcript, p. 180. Finally, Bhatia also testified that he

understood that the selling of such material was illegal. Trial Transcript, p. 181.

Based on the foregoing, it is undisputed that Bhatia sold the videotapes at issue and that he sold them with knowledge of their contents and an understanding that to sell such videotapes was in violation of the law.

The issue of whether or not the videos themselves meet the definition of pornographic materials set forth in Section 76-10-1203, Utah Code Annotated, was determined by the jury after viewing a representative sample of the content of the videos. Since the parties had stipulated that the videos did not have serious literary, artistic, political, or scientific value, the only issue for the jury was whether or not an average person, applying contemporary community standards, would find that the videos appeal to prurient interest in sex and are patently offensive in their descriptions or depictions of nudity and sexual conduct.

Although the jury made their finding based upon actually viewing portions of the video tapes, there are certain portions of the testimony which also support their findings. For example, Officer Newbold testified that he personally viewed all four videotapes that the Police Department purchased from Bhatia. He testified that in the three videotapes which resulted in the filing of these charges, he was able to find no discernable story line and

that all three videotapes showed vaginal, anal, and oral sexual penetration, and showed males climaxing.

Based upon the content of the videotapes themselves, which were placed into evidence as prosecution Exhibits 1, 3, and 4, and upon the testimony of Officer Newbold, the jury found the videotapes content to meet the definition of "pornographic material." Other than his trial counsel's argument regarding the contemporary community standards, Bhatia essentially had no defense to the factual evidence contained in the videotapes themselves.

The evidence upon which the jury found Bhatia guilty of distributing pornographic material was overwhelming. Any perceived errors by his trial counsel in the conduct of the trial did not affect the core evidence presented by the City. The jury determined that the videotapes met the legal definition for pornographic material and it was undisputed that Bhatia intentionally sold the videotapes with full knowledge of their content. Bhatia has failed to meet the second prong of the *Strickland* test by showing that the alleged errors of his trial counsel would have affected the outcome of the trial.

## **II. A PROSECUTION WITNESS DID NOT IMPROPERLY TESTIFY TO LEGAL CONCLUSIONS.**

Bhatia's contention that a prosecution witness was permitted to testify as to legal conclusions is without support in the

record. Statements of the type that occurred in this case do not violate the evidentiary rules, nor did they prejudice the jury.

There are two statements in the transcript which are referred to by Bhatia as impermissible legal conclusions. In the first of these statements Officer Newbold was asked what he decided to do after viewing the first videotape that had been purchased. Officer Newbold's response was "Once I viewed the tape and felt that the contents was of a pornographic or harmful material, I began a--an investigation into the distribution of pornography from Jasbir Bhatia." Trial Transcript, PP. 119, 120. In the second statement Officer Newbold was asked what he viewed in the sack of items that Officer Evans had purchased at Bhatia's house. Officer Newbold replied "He had three video cassettes, two of them appeared to be pornographic material and then the third one just from viewing it, didn't appear to be pornographic." These statements by Officer Newbold were not made in violation of the rules.

The Utah Rules of Evidence provide that the testimony of a lay witness is limited to opinions and inferences which are rationally based on the witnesses perception and helpful to the fact finder to clearly understand the witnesses testimony or determine a fact in issue. Rule 701, Utah Rules of Evidence; *State v. Bryant*, 965 P.2d 539, 547. Rule 704, Utah Rules of Evidence specifically states that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate

issue to be decided by the trier of fact." In *Bryant*, the court quotes *State v. Larsen*, 828 P.2d 487 (Utah Ct. App. 1992) which stated that "... the determination of whether [a witnesses] opinion embraces an ultimate factual issue or constitutes a legal conclusion is a difficult call...." However, the court determined that a witness may use a legal term when the testimony is factual and not a legal conclusion. *Bryant*, P.548.

In this case, Officer Newbold, a lay witness and not an expert, was not instructing the jury in the ultimate legal conclusion to be considered. Rather, Officer Newbold's statement was a factual statement which was based upon his perception and was necessary to clearly understand his testimony. In the first instance, his perception that the videotape was pornographic was part of his explanation as to why he began a criminal investigation. The second statement was made for a similar purpose. It merely conveyed to the jury his perception that the second and third videotapes were of a similar type to the first videotape that had initiated the investigation. As was described in both the *Bryant* and *Larsen* cases cited above, these types of statements are not prohibited by the Utah Rules of Evidence.

Finally, any possible prejudicial effect of these statements was cured by the jury instructions. Instruction No. 6 specifically stated that only the jury, applying the tests given by the court, can find the videotapes to be obscene or pornographic. Trial

Transcript P. 200. Instruction No. 7 describes the various common meanings and usages of terms used throughout the trial, such as "obscene", "obscenity", "pornography", or "pornographic". That instruction further instructs the jury to only use the definition provided them by the court and disregard the terms when used at other times or in other contexts. Trial Transcript, P. 200. Instruction No. 8 provides the jury with the legal definition of pornographic material found in Section 76-10-203, Utah Code Annotated.

Based on the forgoing, it is clear that Officer Newbold's use of the word pornographic was not in violation of the Utah Rules of Evidence, nor was the outcome of the trial affected in any manner.

**III. THE PROSECUTOR'S CONDUCT DURING THE TRIAL DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.**

Allegations of prosecutorial misconduct are analyzed under a two part test. First, Bhatia must show that the actions or remarks of the prosecutor called to the attention of the jury a matter which it would not be justified in considering and determining its verdict. Assuming the first prong of the test has been met, Bhatia then has the burden to show that the error by the prosecutor was so substantial and prejudicial that there is a reasonable likelihood that, in its absence, there would have been a more favorable result. *State v. Kohl*, 2000 UT 35 ¶22; 392 Utah Adv. Rep. 3 (2000).

Bhatia argues that several statements made by the prosecutor were improper. This brief has already addressed three of the areas in which he makes' this claim. First, is the claim that the prosecutor elicited testimony in violation of the pre-trial stipulation. As was set forth above, this argument is based upon Bhatia's mischaracterization of that stipulation. A close reading of the stipulation reveals that testimony regarding videotapes which were confiscated from Bhatia on a previous date was not prohibited by the stipulation. The stipulation only prohibited evidence of other pending charges. There were no pending charges from the videotape confiscation incident.

Bhatia also argues that this evidence was inadmissible character evidence under Rule 404(b), Utah Rules of Evidence. This argument is also without merit. As Bhatia admits in his brief, "Specifically, in closing argument, the prosecutor argued that the facts the tapes had been confiscated from Bhatia prior to the dates of the incidents charged proved his intent." Appellant Brief, P.21. Demonstrating proof of intent was also the explanation given by the prosecutor in response to an objection to this line of questioning during trial. Trial Transcript, P.112. Rule 404(b) specifically states that evidence of other acts "...may, however, be admissible for other purposes, such as proof of ... intent...." Rule 404(b), Utah Rules of Evidence. The evidence elicited by the



prosecutor clearly falls within the "intent" exception to Rule 404(b) and was not improper.

The other two arguments that have been previously discussed regard legal conclusions elicited from prosecution witnesses and leading witnesses under direct examination. As was set forth above, these two arguments are not well founded. Officer Newbold's testimony did not contain legal conclusions but rather factual conclusions that clarified his testimony. The complaints regarding leading witnesses on direct examination were limited solely to identification of Bhatia by the police officers, something that was not at issue at trial.

Bhatia's next contention regarding prosecutorial misconduct is his allegation of inflammatory comments made by the prosecutor. He cites four comments in the record that he believes to be improper. In the first instance, the prosecutor states "This isn't going to be a case where you just decide the evidence from the witnesses on the stand; unfortunately, you have to or get to (inaudible) view three videos and I'll describe those to you in a minute and their contents is going to be questionable and that's going to be the decision that you are going to have to make, is, is that pornographic by the standards of our community." Bhatia's objection to this statement seems to be the prosecutors use of the word "unfortunately". However Bhatia fails to explain how the use of

this word in this instance can or will influence the outcome of the trial.

The second allegedly inflammatory comment that Bhatia takes issue with is the prosecutor's statement that after watching the entire ten hours of videos "We're not sure you can drive home after something like that." Again Bhatia fails to explain or show how this comment has affected the outcome of the trial.

The third allegedly inflammatory comment that Bhatia points to has been taken out of context. In his brief, Bhatia states "The prosecutor told the jury that the evidence would make them sick." Appellants Brief, P.21. This is a complete mis-characterization of the statement made by the prosecutor. The prosecutor's statement in it's entirety is as follows: "Now, I would love to tell you that it's just as simple as the City proving that this stuff makes you sick to your stomach, but it's not. The law requires specific things and the burden is upon the citizens of West Valley to prove that to you, that burden is to prove a three- prong test." The prosecutor then goes on to explain the three prongs of the "pornographic material" test. Trial Transcript, pp. 102-103. As a reading of the complete quote shows, the prosecutor did not tell them that the evidence would make them sick, to the contrary, he was telling them that even if the evidence made them sick, that is not enough. The statement was made in the context of explaining the three prongs that must be met in order for the City to carry

it's burden of proof in the case. This statement is not prosecutorial misconduct.

The final statement Bhatia believes to be inflammatory occurred immediately prior to the showing of the videos to the jury. At that time, the prosecutor informed the court that several people, including the interpreter, would prefer not to see the videos and would like to exit the courtroom. A discussion of the subject between the court and both counsel followed. Trial Transcript, pp. 151-153. Bhatia completely fails to explain why this statement constitutes prosecutorial misconduct or how this statement impacted the jury or affected the outcome of the trial.

The allegedly inflammatory statements about which Bhatia now complains are either mis-characterizations of the actual statements or do not meet the test set forth in the *Kohl* case. Allowing these statements was not plain error nor was it prosecutorial misconduct.

Bhatia also complains about the prosecutor's references to the videos as "pornography." However, these statements, if improper, were cured by the court's instruction. Instruction No. 7 specifically instructed the jury that the term "pornography" has various common meanings and usages and anticipates that the terms will be used during the trial. The instruction begins by stating: "Throughout this trial and during instruction and argument, the terms "obscene" or "obscenity" and "pornography" or "pornographic" have been used." Trial transcript, p. 200. The instruction told the

jury to only consider pornography to mean that which was defined by the court and to disregard the term at other times and in other contexts. Trial Transcript, P.200. The court then gave instruction No. 8 which was a detailed definition of a pornography. Trial Transcript, PP. 200-201. Even if the prosecutor's use of the word pornography is considered improper, Bhatia has not carried his burden of showing that the comments were so prejudicial as to defeat the mitigating effect of the courts instruction. *Kohl*, P.6, ¶24.

Finally, Bhatia raises the issue regarding prosecutor's statement that Bhatia's need for an interpreter was a "sham." Trial Transcript, P.174. The City concedes that this statement by the prosecutor was improper and calls into question Bhatia's credibility. However, he has not carried his burden to show that this statement affected the outcome of the trial.

Bhatia's credibility was not an issue. Bhatia admitted that he sold the videos to the police officers. Bhatia also admitted that he knew the content of the videotapes. If his testimony had been in conflict with the officers, for example if he had denied selling the videotapes, then his credibility would be at issue. However, given the circumstances, this error by the prosecutor is harmless.

Also, the second step of the prosecutorial misconduct test requires consideration of the circumstances of the case as a whole.

If proof of the defendant's guilt is strong, the challenged conduct by the prosecutor will not be presumed to be prejudicial. *State v. Longshaw*, 961 P.2d 925, 931. In this case, the evidence against Bhatia was overwhelming. Viewed in that light, this error by the prosecutor is not substantial and did not effect the outcome of the trial.

**IV. THE COURT CORRECTLY INTERPRETED SECTION 76-1-1204, UTAH CODE ANNOTATED, IN DENYING BHATIA'S MOTION TO DISMISS ONE COUNT BECAUSE OF THE SINGLE CRIMINAL EPISODE RULE.**

Prior to trial, Bhatia moved the court for dismissal of one of the two counts of distributing pornography that arose from Officer Evans purchase of videotapes at Bhatia's house. Bhatia argued that the April 24<sup>th</sup> purchase by Evans constituted a single criminal episode and that he should not be charged with one count for each videotape purchased. The court took argument on this issue both prior to trial and following the City's case in chief. Trial Transcript PP. 9-13; PP. 161-168. Following argument, the trial court interpreted the language of Section 76-10-1204, Distributing Pornographic Material, to mean that each separate item distributed could constitute one count and, therefore, denied Bhatia's motion.

Utah courts have set forth certain standards when faced with an issue of statutory construction. First, the plain language of the statute should be examined. *State v. Fisher*, 972 P.2d 90, 97 (Utah Ct. App. 1998). Also, the statute should be interpreted in

order to give effect of the legislature's intent in light of the purposes the statute was meant to achieve. *State v. Perez*, 2000 UT App 65, ¶6.

In this case, Judge Boyden interpreted the plain language of Section 76-10-1204 to mean that each tape sold by Bhatia was a separate violation of the statute. Bhatia was charged under Subsection (1) of Section 76-10-1204. Among other things, Subsection (1) states that a person is guilty of distributing pornographic material when he knowingly "distributes or offers to distribute, exhibits or offers to exhibit any pornographic material to others." Subsection (2) of Section 76-10-1204 states "each distributing of pornographic material as defined in Subsection (1) is a separate offense.

Judge Boyden correctly determined that this specific provision in the statute made the distribution of each separate videotape a separate violation. Her analysis that the more specific language found in the Distributing Pornographic Material statute took precedent over the more general language of the Single Criminal Episode statutes, Section 76-1-401, 402, is a correct application of the Utah law of statutory construction. *State v. Vigil*, 842 P.2d 843, 845.

The plain language of the statute should prevail and Judge Boyden's decision to deny Bhatia's motion should be upheld.

### CONCLUSION

Bhatia's arguments on appeal are without merit. He argues ineffective assistance of counsel, yet failed to request a Rule 23B evidentiary hearing and has failed to provide this court with an evidentiary basis to support his claim. Bhatia's trial counsel asserted a vigorous defense on his behalf and his trial strategy decisions should be accorded great deference.

Bhatia's arguments that a lay witness testified to legal conclusions and that the prosecutor committed prosecutorial misconduct are also not well founded. The statements referred to by Bhatia are either taken out of context or constitute harmless error given the overwhelming evidence presented to the jury.

Finally, the trial judge's decision to deny Bhatia's motion to dismiss one count from Case No. 981104396 was correct. Judge Boyden's ruling that the specific provision in the Distributing Pornographic Materials statute takes precedence over the generic terms of the Single Criminal Episode Rule is based upon solid Utah law regarding statutory construction.

Bhatia received a fair and just trial. The evidence of his guilt was overwhelming and the jury's verdicts should be affirmed by this court.

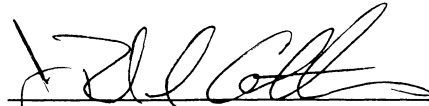
DATED this 22<sup>ND</sup> day of May, 2000.

  
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J. Richard Catten, Senior Attorney  
Attorney for Plaintiff/Appellee

**CERTIFICATE OF SERVICE**

I, J. Richard Catten, certify that on the 22<sup>nd</sup> day of May, 2000, I served upon Jeffrey C. Howe, Attorney for Defendant/Appellant, two (2) copies each of the Brief of the Appellee, by causing said Briefs to be mailed to them, by first class mail, with sufficient postage prepaid, to the following addresses:

Jeffrey C. Howe  
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243 East 400 South, #301  
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J. Richard Catten, Senior Attorney  
Attorney for Plaintiff/Appellee