1999

State of Utah v. Danny Bryan : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 990903-CA
v.	:	
DANNY BRYAN,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF POSSESSION OF METHAMPHETAMINE WITH INTENT TO DISTRIBUTE IN A DRUG FREE ZONE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(A)(IV) (1998); POSSESSION OF MARIJUANA IN A DRUG FREE ZONE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(A)(I) (1998); POSSESSION OF DRUG PARAPHERNALIA IN A DRUG FREE ZONE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37A-5(A) (1998), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOHN A. ROKICH, PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from convictions for possession of methamphetamine with intent to distribute in a drug free zone, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (1998); possession of marijuana in a drug free zone, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998); and possession of drug paraphernalia in a drug free zone, a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5(a) (1998) (in **Add. A**).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW[1]

1. Did the trial court abuse its discretion in not granting a new trial based on a brief statement linking drugs to defendant's house prior to the instant charges where the trial court sustained defendant's objection at trial and gave the requested curative instruction, and the written jury instructions addressed the point?

"When reviewing a trial court's denial of a motion for a new trial, [this Court] will not reverse 'absent a clear abuse of discretion by the trial court.'" State v. Colwell, 2000 UT 8, ¶ 12, 994 P.2d 177 (quoting State v. Harmon, 956 P.2d 262, 265-66 (Utah 1998)).

2. Did the trial court abuse its discretion when it denied defendant's motion for new trial and motion for mistrial based on alleged prosecutorial misconduct during the prosecutor's rebuttal closing remarks?

To obtain a reversal for prosecutorial misconduct, defendant must show that "'[t]he actions or remarks of [the prosecutor] call to the attention of the jury a matter it would not be justified in considering in determining its verdict,' and 'under the circumstances of the particular case, . . . the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more

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[1]Defendant's third point is a duplication of his first point, with the exception of the final paragraph and his use of the word "appellant" in the heading of the third argument. Br. of Aplt. at 12-18, 20-25. The first three paragraphs of defendant's fourth argument are identical to his entire second argument. Br. of Aplt. at 18-19, 26-27. For the reader's ease, the State has reorganized defendant's major points into three arguments.

favorable result.'" State v. Carlson, 934 P.2d 657, 661 n.5 (Utah App. 1997) (quoting State v. Tenney, 913 P.2d 750, 754-55 (Utah App.) (citations omitted), cert. denied, 923 P.2d 693 (Utah 1996)); see also State v. Basta, 966 P.2d 260, 268 (Utah App. 1998).

When reviewing a trial court's ruling on a claim of prosecutorial misconduct, an appellate court will not overturn the ruling absent an abuse of discretion "because the trial court is in the best position to determine the impact of a statement upon the proceedings[.]" State v. Longshaw, 961 P.2d 925, 927 (Utah App. 1998) (motion for new trial); State v. Cummins, 839 P.2d 848, 852 (Utah App. 1992) (motion for mistrial), cert. denied, 853 P.2d 897 (Utah 1993). "'In other words, unless [the trial court's] determination appears to be so unreasonable that upon review it appears that [the court] was plainly wrong, in that there is a strong likelihood that the plaintiff could not have had a fair trial, we cannot say that [the court's] failure to grant one was an abuse of discretion.'" Arellano v. Western Pac. R.R. Co., 5 Utah 2d 146, 150, 298 P.2d 527, 530 (Utah 1956) (quoting Burton v. Zions Coop. Mercantile Inst., 122 Utah 360, 365, 249 P.2d 514, 517 (Utah 1952)); see also Tenney, 913 P.2d at 754-55.

3. Was the prosecutor's conduct at trial intended to provoke a mistrial so as to obtain a more favorable opportunity to convict, thereby barring retrial on double jeopardy grounds?

This issue involves a constitutional interpretation that presents a question of law. State v. Maguire, 1999 UT App. 45, ¶ 5, 975 P.2d 476. "'We review a trial court's

conclusions of law for correctness, granting no deference to the trial judge's legal determinations.'" Id. (quoting Meadowbrook, LLC v. Flower, 959 P.2d 115, 116 (Utah 1998)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There are no constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal.

STATEMENT OF THE CASE

Defendant and his wife, Debbie, were tried together on charges of possession of methamphetamine with intent to distribute in a drug free zone, a first degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (1998); possession of marijuana in a drug free zone, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998); unlawful possession of drug paraphernalia in a drug free zone, a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5(a) (1998), and unlawful possession of protected wildlife, a class B misdemeanor, in violation of Utah Code Ann. § 23-20-3 (1998) (R. 3-4).

Defendant moved for a mistrial during the testimony of the first trial witness (R. 335:21-24). He moved to dismiss and renewed his mistrial motion at the close of the State's case (R. 335:121-28), and moved for a new trial and a mistrial during jury deliberations (R. 221-22, 226-27, 244-57, 287-91; 335:188-90). All motions were denied (R. 292; 335:24, 127, 129).

A jury convicted both defendant and his wife of the first four counts, as charged, and acquitted them of the last count (R. 198-99; 335:190-91).[2] The trial court granted defendant's post-trial motion to reduce the first degree felony to a second degree felony and sentenced him to serve one-to-fifteen years in prison for the felony, and one year each for the two misdemeanor convictions (R. 328-29, 332). The court then suspended the incarceration time and placed defendant on 90 days home confinement (R. 332). Defendant timely appealed the trial court's sentencing order (R. 307).

STATEMENT OF FACTS

The Bedroom Search:

At 5:25 a.m. on May 12, 1997, Officer Steve Adams and five other officers executed a search warrant on defendant's home at 88 North 700 East in Spanish Fork, Utah (R. 335:20, 26-28). The home is directly across the street from an elementary school (R. 335:58-59). The officers had to knock down both the locked front door and defendant's bolted bedroom door (R. 335:27, 104-05). Acting on information they had received about drug activity at the house, the officers secured the six people they found inside and began their search for drug-related evidence (R. 335:20, 27-28).

A search of defendants' bedroom revealed a hole that had been knocked into the plaster and lathe ceiling (R. 335:35). The bedroom had high ceilings, and two of the

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[2]Citation herein to the transcript will be to the volume number stamped on the cover of the transcript volume, followed by a colon and the internal page number, i.e., R. 335: 7.

walls in the room contained floor-to-ceiling built-in units with cabinets at the top and several drawers near the floor (R. 335:31-32). By opening one of the cabinet doors and standing on the drawers beneath the cabinet, an officer was able to reach into the hole and retrieve several items within arm's length of the opening (R. 335:34-35).

Inside the hole they found a soft pouch containing a coin purse which itself contained four "little pouches" of methamphetamine totaling 15.8 grams–more than fifteen times the amount normally possessed for individual use (R. 335:36, 57, 90, 103). Also in the pouch were six syringes (R. 335:41, 51). A second pouch retrieved from inside the hole contained a white substance suspected of being a cutting agent used to dilute the strength of the methamphetamine to increase the amount available for sale and, hence, the profit obtained (R. 335:42-44, 86-87).

The State's Evidence:

The State put on evidence of the items seized from the hole in the ceiling of defendant's bedroom. An officer noted that the amount of methamphetamine for personal use would weigh anywhere from one quarter to one gram and that one gram would cost approximately $100 (R. 335:57, 100). He also testified that in his experience, when officers locate methamphetamine intended for distribution, it is generally packaged in amounts from one to four grams and there is usually evidence that it has been or will be cut, i.e., diluted to increase profits (R. 335:57).

The State also offered a box containing crushed marijuana leaves which was found on top of a microwave oven in the kitchen (R. 335:61-64).

The Defendant's Evidence:

Defendants' joint theory was that the methamphetamine and paraphernalia found in his bedroom ceiling belonged to one of the other four people found in the house. To support this theory, defendant adduced evidence that others lived in the house and that other drug-related items were found in other areas of the house and on the persons of the other men, including: two syringes found in the back pocket of one of the other men (R. 335:69), one syringe found on another individual (R. 335:84-85), and paraphernalia and methamphetamine found in their sixteen-year-old son's bedroom (R. 335:73-80, 96).

In support of the claim that someone else was keeping the drugs in the attic, defendant's wife took the stand and suggested that there was access to the attic area from an opening located near the roof outside the house and a "door" in the ceiling in the washroom (R. 335:140, 148). She also testified that, while there was a hole in the bedroom ceiling with insulation sticking out of it, there was no real access to the attic from the bedroom until the officers enlarged the hole in the ceiling with a golf club–a claim the police denied (R. 335:79-80, 136-37, 149).

After deliberating two hours, the jury rejected the defense and convicted both defendants of the drug-related offenses as charged (R. 199; 335:190-91).

SUMMARY OF THE ARGUMENTS

Point I: The trial court properly denied defendant's motion for mistrial made immediately after the State's first witness made a brief, isolated reference to a previous drug sale at defendant's home. The reference had little, if any, impact on the jury when the jury had already been told, without objection, that there had been previous drug activity at the house, the remark was brief and isolated, the objection was immediate and sustained, a curative instruction was given at defendant's request, and the jury was advised by the written instructions to not speculate as to why the court did not allow certain evidence. Defendant does not establish any intentional wrongdoing by the prosecutor, and the evidence against defendants on the methamphetamine possession charge was compelling.

Point II: The prosecutor's reference in closing to defendants' home as a "drug house" and to defendants as drug dealers does not constitute prosecutorial misconduct. Both sides are given considerable latitude in closing argument and both counsel may discuss the evidence from their point of view, including reasonable deductions and inferences arising therefrom. As the prosecutor's challenged remarks find support in the evidence adduced at trial, there was no misconduct warranting reversal.

Point III: Defendant is not entitled to double jeopardy protection for two reasons. First, he has not established any error in the proceedings below which would trigger double jeopardy considerations. Second, although he argues that the State was

responsible for the evidentiary error of which he complains, he does not establish that the prosecutor engaged in bad faith conduct with the intent to provoke a mistrial to obtain a more favorable opportunity to convict. Accordingly, his argument is without merit.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL WHEN IT SUSTAINED DEFENDANT'S OBJECTION TO A WITNESS' BRIEF STATEMENT AND ISSUED AN IMMEDIATE CURATIVE INSTRUCTION AND A SUBSEQUENT APPLICABLE WRITTEN INSTRUCTION

Defendant takes exception to the trial court's denial of his motion for a mistrial made shortly after the first witness began testifying. Br. of Aplt. at 12-18, 20-25. That witness, Officer Steve Adams, obtained and helped execute the search warrant on defendant's home (R. 335:20-21, 26). After the prosecutor elicited testimony about the officer's training on writing search warrants, the following exchange occurred:

> [THE PROSECUTOR] Could you indicate to the jury the residence for which that search warrant was sought?
>
> A. We received probable cause that there was drug activity going on in a home in Spanish Fork being at 88 North 700 East, that being Debbie and Danny Bryan's home.
>
> Q. How did you know that was the Bryans' home?
>
> A. From past law enforcement experience, past involvements with the Bryans.
>
> Q. This information[,] it provided, you indicated, probable cause. Could you explain what that is just briefly?

MR. GAITHER: I'll object to the relevancy of that in these proceedings, your Honor.

THE COURT: I'll sustain the objection. I don't think it's relevant.

[THE PROSECUTOR] The information you received was regarding what?

A. Drug activity in the home, a previous sale.

MR. GAITHER: Objection, your Honor. Move to strike. And I have a motion I think we should hear right now.

THE COURT: All right. Let's excuse the jury for a few minutes and hear the motion. . . .

(R. 335:20-21) (emphasis added) (in **Add. B**).

Outside the jury's presence, the parties presented their arguments regarding defendant's motion for mistrial, after which the trial court ruled:

Well, the answer to the question does go into the subject matter to which the Court had sustained the previous objection. However, I think it was an inadvertent response, and I'm going to deny your motion, Mr. Gaither, at this time.

However, Mr. Larson, I'd caution you to not inquire into the subject matter of the warrant that was issued. The fact that it was issued is a legal matter anyway and what the cause for it would be. You're going to have to rely on direct evidence regarding the proof of your elements of distribution.

(R. 335:24-25) (in **Add. B**). Defendant then sought a curative instruction from the court, which resulted in the following statement to the jury:

THE COURT: Be seated, please. Okay. Before beginning, I want to instruct the jury to disregard any previous statements made and if you've made notes of them, to strike them and forget them. And the Court has determined that the issue of the search warrant is a legal matter, and the basis for the warrant has to do with elements of what we call probable cause. And that's a legal determination and one that I don't think you need to be concerned with, nor do I think it's relevant to the

case. And that's why I have ordered any comments regarding it to be stricken. So you may proceed.

(R. 335:25-26) (in **Add. B**).

Defendant argues that testimony concerning "[d]rug activity in the home, a previous sale" was irrelevant, violated rule 404(b), Utah Rules of Evidence, and constituted inadmissible hearsay evidence. Br. of Aplt. at 13-15, 20-23. He then argues that the testimony was prejudicial because without it, the evidence was insufficient to establish either a nexus between defendant and the methamphetamine or the fact of possession with intent to distribute. Id. at 16-17, 24-25. Assuming, arguendo, that the testimony was inadmissible, defendant's claim fails as he has not established that the testimony was anything more than harmless.

Utah courts have consistently held that a defendant is not prejudiced by the improper disclosure of evidence where (1) the evidence is immediately stricken upon objection; (2) a curative instruction is immediately given; (3) no further reference is made to that evidence; (4) an additional instruction on the issue is included in the final written instructions given to the jury; and (5) the evidence against defendant is sufficiently strong. See State v. Colwell, 2000 UT 8, ¶¶ 37-38, 994 P.2d 177 (holding that, although it was "error for the prosecutor to inquire into the details of the defendant's prior conviction," the error "was harmless because the questioning was suspended before the defendant could provide details to prejudice the jury and the jury was given adequate instruction on two separate occasions to disregard the evidence"); State v. Peters, 796

P.2d 708, 712 (Utah App. 1990) (holding that although the jury "was in a position to speculate about whether [defendant] had . . . committed [another] crime, the court's limiting instruction minimized the danger of such speculation to the point of being harmless"); see also State v. Kohl, 2000 UT 35, ¶ 24, 999 P.2d 7; State v. Harmon, 956 P.2d 262, 274-75 (Utah 1998); State v. Longshaw, 961 P.2d 925, 931 (Utah App. 1998); State v. Stephens, 946 P.2d 734, 737-38 (Utah App. 1997); State v. Boyatt, 854 P.2d 550, 554-55 (Utah App.), cert. denied, 862 P.2d 1356 (Utah 1993). Cf. State v. Saunders, 1999 UT 59, ¶ 29, 992 P.2d 951 (finding prejudice where trial court erroneously admitted evidence of defendant's alleged prior criminal conduct and prosecutor's closing argument was "replete with direct references to defendant's alleged [prior] conduct") (emphasis added); State v. Troy, 688 P.2d 483, 487 (Utah 1984) (holding that repeated improper questions and argument by prosecutor were prejudicial where evidence was not compelling) (emphasis added).

In this case, the testimony had little, if any, effect on the jury. First, it was largely cumulative. The jury had already been informed, without objection, that the search warrant was based on prior drug activity at defendant's house (R. 335:20). That activity was not tied to a particular person or to a particular time. The sole piece of new information provided in the challenged statement is the phrase, "a previous sale" (R. 335:21). Again, the phrase is not tied to a particular person or time nor does it indicate whether the person(s) at defendant's home purchased or sold. Further, nothing suggests

this additional information was intentionally elicited. Given the previous testimony that there was drug activity in the home and the defense that others in the home used and possessed drugs, this phrase adds very little to the case.

Second, it was a brief, isolated statement. The objection was immediate, the motion for a mistrial was presented and argued, and the curative instruction was given without unnecessary delay or embellishment. Following the curative instruction, the prosecutor pursued unrelated questions, and the issue was not revisited.[3]

Third, the court admonished the jury not to consider the testimony and to cross it off any notes the jurors might have taken (R. 335:25-26). Such an admonition is generally deemed to be curative. Peters, 796 P.2d at 712.

Fourth, nothing supports defendant's claim that the prosecutor intentionally elicited the challenged testimony for improper purposes. Br. of Aplt. at 18-19, 26-27. See Point III, infra. The prosecutor expressly stated that he was intending to establish a basis for the search warrant and the officers' conduct, and his avoidance of the subject throughout the remainder of the trial weighs against defendant's claim of bad faith conduct.

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[3]Defendant argues that the prosecutor's comments in closing argument concerning this being a drug house and defendants being drug dealers color the challenged exchange. Br. of Aplt. at 16, 23-24. However, those comments are properly based on defendant's own evidence relating to drugs found throughout the house and the presence of others in the house at the time and on his theory that others in the home possessed and possibly dealt drugs. See Point II, infra.

Fifth, the statement was followed by defendant's immediate objection, which the trial court sustained. Thereafter, at defendant's request, the court gave a strong curative instruction, after which no further reference was made to the matter. Additionally, written jury instruction 36 provides:

> . . .
>
> At times I have ruled upon objections to the admission of certain things into evidence. Questions relating to admissibility of evidence are solely questions of law and you must not concern yourself with my reasons for ruling as I have, or draw any inferences therefrom in favor of or against either party. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.
> . . .

(R. 161) (in **Add. B**).

Finally, the evidence against defendants on the methamphetamine possession charge at issue was compelling. The drugs and paraphernalia were located in defendant's home, behind his locked bedroom door, within arm's reach of an opening knocked in the ceiling of defendant's bedroom (R. 335:27, 34-36, 41-44, 104-05, 150-51). The only other access to the drugs was from the ceiling of the washroom in another part of the house or an opening located near the roof on the outside of the house, both of which were separated from the drugs by large quantities of insulation that defendant had put inside the attic (R. 335:140, 148-49). Nothing suggests that drugs or paraphernalia were found in these other areas of the attic.

The hole in the bedroom ceiling was concealed by the doors of one of defendant's closets and was readily accessed by standing on built-in drawers underneath the closet (R. 335:31-35). Defendant exercised control over the room and its contents, locking the door with a deadbolt to keep others out (R. 335:27, 104-05, 150-51). No evidence was offered that anything in defendants' bedroom belonged to someone else or that anyone else exercised any dominion or control over the room or its contents. Nor was there any explanation why anyone other than defendants would keep that quantity of drugs in a location to which they would not have 24-hour access. There were numerous other places in the house where someone else could have put drugs so that they would have more ready access to them. In fact, the police found drugs in other areas of the home (R. 335:67-71, 73-80, 84-85, 96).

The requisite intent was readily established by the quantity and packaging of the drugs and the presence of the cutting agent. The State's evidence established that the amount of methamphetamine for personal use generally ranges from one quarter to one gram, and that one gram costs approximately $100 (R. 335:57, 100). Defendants possessed four "little pouches" of methamphetamine totaling 15.8 grams–more than fifteen times the amount normally possessed for individual use (R. 335:36, 57, 90, 103). This stash was worth more than $1500.00 and was found next to a cutting agent used to increase the amount of methamphetamine available for sale and, hence, profit (R. 335:42-44, 86-87).

All this evidence strongly suggests an exclusivity of dominion and an intent to control on defendants' part, thereby establishing either actual or constructive possession.[4] See State v. Fox, 709 P.2d 316, 319 (Utah 1985) (constructive possession requires proof that "there [is] a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug.")

In sum, the trial court quickly minimized any potential harm caused by the brief, isolated statement about a previous sale. That quick action was followed by a final written instruction on the point. The error was not intentional, and no further reference was made to the statement. Finally, the evidence concerning defendants' possession of the methamphetamine was overwhelming under the circumstances. Thus, regardless of whether error occurred in the uttering of the challenged statement, there is no reasonable likelihood that, in its absence, there would have been a more favorable result for defendant. Kohl, at ¶ 24; Colwell, at ¶¶ 37-38; Harmon, 956 P.2d at 274-75; Longshaw,

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[4]If this Court looks to constructive possession in determining the sufficiency of the evidence, it should disregard defendant's reference to State v. Layman, 953 P.2d 782 (Utah App. 1998), and the reasonable alternative hypothesis language in that case. Br. of Aplt. at 17-18, 24-25. The Utah Supreme Court granted certiorari review in Layman and, while affirming the outcome, determined that the reasonable alternative hypothesis discussion had no place in deciding the case. Instead, the Court held that the constructive possession issues "should have been decided by applying an ordinary sufficiency of the evidence test." State v. Layman, 1999 UT 79, ¶ 10, 985 P.2d 911.

961 P.2d at 931; Stephens, 946 P.2d at 737-38; Boyatt, 854 P.2d at 554-55; Peters, 796 P.2d at 712.

POINT II

THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT BECAUSE HIS REBUTTAL CLOSING REMARKS WERE A REASONABLE INTERPRETATION OF THE EVIDENCE ADDUCED AT TRIAL

In closing argument, the State pointed to the evidence which it contended established the requisite elements of the charged crimes (R. 335:160-68). Defense counsel then identified in closing argument the evidence relating to other drugs, paraphernalia, and people present in the house at the time the search warrant was executed, arguing that the presence of other people who had both proximity and access to other drugs supported the defense that the drugs stashed in defendants' bedroom ceiling may well have belonged to someone else (R. 335:172-81). The prosecutor stated in rebuttal:

> . . .
>
> [Jury instruction n]o. 20, defense counsel spent a lot of time on the nexus between the defendant and the drugs. All I can say is from what you have heard is the defendants carried on a drug house. If you look at the evidence that was brought in – and if you want to know the reason the State didn't bring in this particular canister or this or that is because they were found in different rooms. This was found in the defendants' child's room. And this, of course, was located next to that. Does that bring or cast a disparaging point at the State because we didn't use evidence that tends to incriminate somebody else? No, it doesn't. All this does is serve to show that the defendants were in a drug house, and that was brought in by the defense in that regard.
>
> . . .

> Now, once again, I would request that you go into your deliberations, you use the faculties that you've been given, you apply the facts as they've been presented, and you apply the law that has been presented, and you find the defendants guilty of all the counts charged, especially the possession of a drug with intent to distribute because they are drug dealers, and this case will prove it. Thank you.

(R. 335:184-86) (emphasis added) (in **Add. C**).

Defendant argues that the references to a drug house and to drug dealers constitutes prosecutorial misconduct because they called to the jury's attention a matter not proper for its consideration and they significantly influenced the verdict. Br. of Aplt. at 16, 23-24.

To obtain a reversal for prosecutorial misconduct, defendant must show that "'[t]he actions or remarks of [the prosecutor] call to the attention of the jury a matter it would not be justified in considering in determining its verdict,' and 'under the circumstances of the particular case, . . . the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result.'" State v. Carlson, 934 P.2d 657, 661 n.5 (Utah App. 1997) (quoting State v. Tenney, 913 P.2d 750, 754-55 (Utah App.) (citations omitted), cert. denied, 923 P.2d 693 (Utah 1996)); see also State v. Basta, 966 P.2d 260, 268 (Utah App. 1998). "In assessing whether there was prejudicial error in the prosecutor's comments, we will consider the comments both in context of the arguments advanced by both sides as well as in context of all the evidence." State v. Bakalov, 1999 UT 45, ¶ 56, 979 P.2d 799. "[C]ounsel for each side has considerable latitude [in closing arguments] and may discuss

fully his or her viewpoint of the evidence and the deductions arising therefrom." State v. Dunn, 850 P.2d 1201, 1223 (Utah 1993); Bakalov, at ¶¶ 56, 59.

Defendant's argument fails because the prosecutor did not bring to the jury's attention a matter it would not be justified in considering in determining its verdict. Instead, the prosecutor tied his remarks directly to facts in evidence and provided a reasonable and permissible interpretation of that evidence from the State's point of view. The jury was free to infer the same from the evidence. See Bakalov, at ¶¶ 57, 59. That defendants could be viewed as living in a drug house was a reasonable interpretation not only of the State's evidence of the large amount of drugs and paraphernalia in defendants' bedroom ceiling, but also of defendant's own evidence of the other significant amounts of drugs and paraphernalia found in defendants' son's bedroom and on a man defendant admits was living there at the time (R. 335:69, 73-75, 96, 132). Some of the paraphernalia showed signs of use, and there was significantly more methamphetamine in the house than would be expected for the personal use of the occupants (R. 335:57, 72-75, 88-89, 90, 103).

The significant amount of methamphetamine found in defendants' bedroom ceiling further supports the prosecutor's statement that defendants were drug dealers. The amount of methamphetamine, the location, the presence of the cutting agent and paraphernalia, and the lack of any other reasonable explanation for the drugs suggests that the defendants intended to sell the drugs. From the State's point of view, this evidence

reasonably supports a determination that defendants are drug dealers, a determination that the jury could also reasonably make.

The same evidence supports the determination that there is no reasonable likelihood of a more favorable result for defendant absent the remarks. As stated, the jury had before it evidence of drugs, paraphernalia and drug use throughout the house. The amount of drugs exceeded fifteen times the normal amount for personal use. That fact taken with the large amount of cutting agent and numerous syringes, located in a spot and under conditions suggesting dominion and control by defendants with an intent to sell, provided compelling evidence that the defendants were guilty as charged. See Point I, supra. Even if the prosecutor had not said the words "drug dealers" or "drug house," the jury is reasonably likely to have rejected defendants' claim that someone else, having full access to the rest of the house, concealed the drugs in the ceiling of defendants' locked bedroom.

POINT III

DEFENDANT IS NOT ENTITLED TO DOUBLE JEOPARDY PROTECTION BECAUSE HE HAS NOT ESTABLISHED THAT THE PROSECUTOR ENGAGED IN BAD FAITH CONDUCT WITH THE INTENT TO PROVOKE A MISTRIAL IN ORDER TO OBTAIN A MORE FAVORABLE OPPORTUNITY TO CONVICT

In his second and fourth points, defendant claims that double jeopardy should bar any retrial in the event his appeal is successful. Br. of Aplt. at 18-19, 26-27.

"Generally, if a defendant seeks a mistrial, he waives any defense he might otherwise assert based upon double jeopardy, even though the prosecution or the court provoked the error. However, double jeopardy bars retrial where bad faith conduct by a judge or prosecutor is intended to provoke a mistrial so as to afford the prosecution a more favorable opportunity to convict." State v. Trafny, 799 P.2d 704, 709 (Utah 1990) (citations omitted).

Defendant's claim of double jeopardy protection fails because he has not established that his case falls within the exception to the general rule that a defendant may be retried after a mistrial. First, defendant is not entitled to declaration of a mistrial because any error in questioning Officer Adams was harmless.[5] See Point I, supra.

Second, defendant must establish not only that the prosecutor provoked the error, but that he did it in bad faith in order to obtain a more favorable opportunity to convict. Defendant has not shown this. Defendant claims that "the State was responsible for the error," so reversal with prejudice is warranted. Br. of Aplt. at 19, 27. However, responsibility is not the test. On this record, there is no indication that the prosecutor in bad faith embarked on the challenged questioning of Officer Adams and provoked the mention of the prior drug sale or that the prosecutor's conduct improved the chances of

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[5]Although defendant includes this argument twice in his brief, the substance of each argument relates solely to the questioning of Officer Adams, not to the prosecutor's closing remarks. Br. of Aplt. at 18-19, 26-27.

conviction in a new trial. Indeed, the trial court, from its advantaged position observed that it believed the elicited comment was inadvertent (R. 335:24) (Add. B).

Defendant claims that the prosecutor should have known where the questioning was going, that the response would be prejudicial to defendant, and that some preliminary preparation of the witness or discussion with the court was necessary. Br. of Aplt. at 19, 27. However, the brief, isolated response was in fact not prejudicial, and the mere fact of the questioning does not establish intentional bad faith. See Point I, supra. The prosecutor explained that his questioning was intended to establish the basic reason the officer obtained and executed a search warrant for defendants' home (R. 335:22-23). When the court informed the prosecutor that he should avoid the subject, the prosecutor scrupulously did so and did not mention it again. More important, defendant does not explain what benefit the prosecutor would gain in a retrial or why a retrial would provide a more favorable opportunity for conviction.

The prosecutor's conduct does not suggest that he intentionally sought to provoke a mistrial in order to pursue a new trial against defendant. As the record does not reflect any bad faith by the prosecutor in exploring the basis of the search warrant, and defendant has not shown that the questioning was aimed at securing a second trial, defendant's appellate claim must fail. See Trafny, 799 P.2d at 710.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentences.

RESPECTFULLY SUBMITTED this 29th day of June , 2000.

JAN GRAHAM
Attorney General

KRIS C. LEONARD
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed by first class mail, postage prepaid, to Randall Gaither, attorney for defendant/appellant, 321 South 600 East, Salt Lake City, Utah 84102, this 29th day of June, 2000.

ADDENDA

ADDENDUM A

UTAH CODE
ANNOTATED

1953

VOLUME 6A

1998 REPLACEMENT

Titles 58 and 58A

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II or a controlled substance analog is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (4)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(7) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(8) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(9) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(10) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(11) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

History: L. 1971, ch. 145, § 8; 1972, ch. 22, § 1; 1977, ch. 29, § 6; 1979, ch. 12, § 5; 1985, ch. 146, § 1; 1986, ch. 196, § 1; 1987, ch. 92, § 100; 1987, ch. 190, § 3; 1988, ch. 95, § 1; 1989, ch. 50, § 2; 1989, ch. 56, § 1; 1989, ch. 178, § 1; 1989, ch. 187, § 2; 1989, ch. 201, § 1; 1990, ch. 161, § 1; 1990, ch. 163, § 2; 1990, ch. 163, § 3; 1991, ch. 80, § 1; 1991, ch. 198, § 4; 1991, ch. 268, § 7; 1995, ch. 284, § 1; 1996, ch. 1, § 8; 1997, ch. 64, § 6.

58-37a-5. Unlawful acts.

(1) 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.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used 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 act. Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

History: L. 1981, ch. 76, § 5.

ADDENDUM B

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. DANNY D. BRYAN AND DEBBIE PETERSEN BRYAN, Defendants.	CASE NO. 971400732

BEFORE THE HONORABLE RAY M. HARDING

125 NORTH 100 WEST

PROVO, UTAH 84601

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TRIAL TRANSCRIPT
(Excluding jury selection)

OCTOBER 19, 1998

REPORTED BY: Vonda Bassett, RPR, CSR

Utah Drug Academy, through the Drug Enforcement Administration, and that was in Colorado. And basic training from just in-service training throughout the years. I'd say over 200 hours worth of training in this area.

Q. Were you employed with the police department on May 11th of 1997?

A. Yes.

Q. On that day did you receive information that led you to draft a search warrant?

A. Yes, I did.

Q. Could you indicate to the jury the residence for which that search warrant was sought?

A. We received probable cause that there was drug activity going on in a home in Spanish Fork being at 88 North 700 East, that being Debbie and Danny Bryan's home.

Q. How did you know that was the Bryans' home?

A. From past law enforcement experience, past involvements with the Bryans.

Q. This information it provided, you indicated, probable cause. Could you explain what that is just briefly?

MR. GAITHER: I'll object to the relevancy of that in these proceedings, your Honor.

THE COURT: I'll sustain the objection. I don't think it's relevant.

MR. LARSON: Thank you, your Honor.

Q. (BY MR. LARSON) The information you received was regarding what?

A. Drug activity in the home, a previous sale.

MR. GAITHER: Objection, your Honor. Move to strike. And I have a motion I think we should hear right now.

THE COURT: All right. Let's excuse the jury for a few minutes and hear the motion.

If you'll go with the bailiff, please.

(The following proceedings were held in open court after the jury left the courtroom:)

MR. GAITHER: At this time, your Honor --

THE COURT: Be seated, please.

MR. GAITHER: -- I would move the Court for a mistrial. An objection was made about probable cause, and it was sustained. And this is exactly the reason that I didn't want to get into the -- Count No. I about distribution has been dismissed. And the prior drug sale situation here is not relevant. They don't have -- that evidence was based upon hearsay of a person who is not present. That's why they dismissed it.

So now we have this jury who has heard information about a prior drug sale and drug activity in the home. This is not -- there's no relevance for it. It was in an area that should not have been delved into, and I would submit there's no way this could be cured. It's extraordinarily prejudicial. This case may come down to whether my clients were found guilty because the possession with intent. And the jurors now have in their mind that there was a prior drug sale at the residence. And I don't believe the State has any evidence of that other than the hearsay of a person who is not present.

THE COURT: Mr. Larson.

MR. LARSON: Your Honor, if I remember the question, I never asked if there was any type of drug activity in the home prior to. I asked the officer if he knew the Bryans, and he indicated at that time that he knew the Bryans or how he knew it was the Bryans' residence. He simply indicated he knew the Bryans' residence because of prior law enforcement contact. He did not indicate that there was ever any sale or drugs as Mr. Gaither is referring to. We haven't even approached any information regarding the charge that ha been dismissed.

I think the jury has a legitimate interest in

understanding the basis for the search warrant, so they can understand why a search warrant was drafted. We haven't heard any hearsay whatsoever in this particular case. The officer has related information. It's not been attributed to anybody in any way, shape, or form. We're just looking at the basis of the search warrant and the actions of the officer.

Clearly, if it's not being offered for the matter of the truth asserted, the officer can indicate why he went and got a search warrant based on that. I don't think the jury has anything before it that would call for a mistrial in this particular case.

And in addition to that, if we looked at Rule 404(b), the officer can testify to prior circumstances for identification purposes. I think it fits squarely within the rules of evidence, especially Rule 404(b). We'd stand on that.

MR. GAITHER: Well, we can have the court reporter read back what he indicated, but he did indicate there had been a prior drug sale.

As far as using prior drug arrests for identification purposes, I know the Court would not allow that. That would result in a mistrial.

And these types of cases, they go over there and they enter under the authority of a search warrant.

You don't have to tell the jury about all of the hearsay that was contained in the search warrant. And that's exactly what we were into, and that's what I tried to stop with the objection that was sustained.

The prosecution has gone ahead, and now we've had before the jury very inflammatory, unnecessary, prejudicial information. And if this trial commences and keeps going, it's never going to be eradicated from their minds. They've now got information because the police went over there because of a drug sale when there's not going to be any such evidence introduced at trial. This was evidence which was in the prosecutors' ability to control, and they didn't control it. And now we've had the information that should result and I would request that the Court declare a mistrial and reschedule this for another day.

THE COURT: All right. Let's go off the record and have the reporter check the question and the answer that was given.

(Record read.)

THE COURT: Well, the answer to the question does go into the subject matter to which the Court had sustained the previous objection. However, I think it was an inadvertent response, and I'm going to deny your motion, Mr. Gaither, at this time.

However, Mr. Larson, I'd caution you to not inquire into the subject matter of the warrant that was issued. The fact that it was issued is a legal matter anyway and what the cause for it would be. You're going to have to rely on direct evidence regarding the proof of your elements of distribution.

MR. LARSON: That's fine, your Honor. Thank you.

THE COURT: All right. Let's bring them back in.

MR. GAITHER: Excuse me, your Honor. Before the jury comes back, I would then move the Court to admonish the jury to disregard any of that.

THE COURT: I'll do so. And I had not previously because I wanted to hear your objection before I did so.

MR. GAITHER: And for the record it is still our position that the answer requires a mistrial, but we would, nonetheless, request a cautionary instruction.

(The following proceedings were held in open court in the presence of the jury:)

THE COURT: Be seated, please. Okay. Before beginning, I want to instruct the jury to disregard any previous statements made and if you've made notes of

them, to strike them and forget them. And the Court has determined that the issue of the search warrant is a legal matter, and the basis for the warrant has to do with elements of what we call probable cause. And that's a legal determination and one that I don't think you need to be concerned with, nor do I think it's relevant to the case. And that's why I have ordered any comments regarding it to be stricken. So you may proceed.

MR. LARSON: Thank you, your Honor.

Q. (BY MR. LARSON) Officer, you obtained a search warrant; is that right?

A. Yes, I did.

Q. And where was that search warrant directing yo to search?

A. The home of Danny and Debbie Bryan in Spanish Fork.

Q. What was that address, once again?

A. 88 North 700 East.

Q. Did you execute that search warrant?

A. Yes, I did.

Q. Could you tell the jury when that took place?

A. It took place at approximately 8:00 in the morning -- correction -- at 5:25 in the morning.

Q. On what day?

INSTRUCTION NO. 36

Insofar as you are concerned, you may consider as evidence whatever is admitted in the trial as part of the record, whether it be the testimony of witnesses or an article or document marked as an exhibit, or other matter admitted, such as an admission, agreement, or stipulation.

At times I have ruled upon objections to the admission of certain things into evidence. Questions relating to admissibility of evidence are solely questions of law and you must not concern yourself with my reasons for ruling as I have, or draw any inferences therefrom in favor of or against either party. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. You should disregard any such utterance that has no basis in the evidence, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

If the Court has said or done anything which has suggested to you that it is inclined to favor the claims or positions or either party, you will not permit yourself to be influenced by any such suggestion. Neither in these instructions nor in any ruling action, or remark that I have made during the course of this trial have I intended to interpose any opinion or suggestion as to how I would resolve any of the factual issues of this case.

ADDENDUM C

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. DANNY D. BRYAN AND DEBBIE PETERSEN BRYAN, Defendants.	CASE NO. 971400732

BEFORE THE HONORABLE RAY M. HARDING

125 NORTH 100 WEST

PROVO, UTAH 84601

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TRIAL TRANSCRIPT
(Excluding jury selection)

OCTOBER 19, 1998

REPORTED BY: Vonda Bassett, RPR, CSR

ORIGINAL

No. 20, defense counsel spent a lot of time on the nexus between the defendant and the drugs. All I can say is from what you have heard is the defendants carried on a drug house. If you look at the evidence that was brought in -- and if you want to know the reason the State didn't bring in this particular canister or this or that is because they were found in different rooms. This was found in the defendants' child's room. And this, of course, was located next to that. Does that bring or cast a disparaging point at the State because we didn't use evidence that tends to incriminate somebody else? No, it doesn't. All this does is serve to show that the defendants were in a drug house, and that was brought in by the defense in that regard.

Now, as for the syringes, the State will take for granted -- we'll tell you right straight out there are probably syringes in here that are not attributable to the defendant. In fact, there are 3, as the officer testified. There are 14 in this package securely fastened for safety purposes. And there's a standard procedure for officers to do that. And in here are 11 syringes that were found in the attic which were found next to this particular package and the other package that has the cutting material in it.

This is the focus of the case, ladies and gentlemen. It is not the fact that there are 3 syringes in this package that might belong to somebody else. There are 11 in here that are belong and are attributable directly to the defendants because they were found in a place where the defendants had special control. That's what Instruction No. 20 says.

It says such as a closet, drawer containing the accused's clothing, personal effects, presence of paraphernalia among the accused's effects, or in a place under which the accused has special control. This is a place of special control. This was in their room. It was in the ceiling in their room. They locked the door. They have a bolt lock on it.

You can take and you can infer that they had all the intent necessary, that they had all the requirements for possession necessary to distribute these drugs, possess and distribute these drugs.

Now, once again, I would request that you go into your deliberations, you use the faculties that you've been given, you apply the facts as they've been presented, and you apply the law that has been presented, and you find the defendants guilty of all the counts charged, especially the possession of a drug with intent to distribute because they are drug dealers, and

this case will prove it. Thank you.

THE COURT: I'll now ask the clerk to swear the bailiff to take the jury in charge.

THE CLERK: You do solemnly swear that you will keep this jury together in some convenient place until they agree upon a verdict or have been discharged by the Court; that you will not suffer any communication to be made to them or make any yourself, except to ask them if they have agreed upon a verdict; that you will not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon; and that you will return them into court when they have agreed or when so ordered by the Court, so help you God.

THE BAILIFF: Yes.

THE COURT: All right. If you'll now go with the bailiff to the jury room to commence deliberations. The instructions and verdict forms will be provided to you and all of the exhibits which were received in evidence.

(At 5:53 the jury left the courtroom to deliberate, and the following proceedings were held in open court:)

THE COURT: Okay. Counsel, are there any other matters at this time?