

2011

Utah v. Fernando Gonzalez-Camargo : Brief of Appellee

Utah Court of Appeals

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Case No. 20110027-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

FERNANDO GONZALEZ CAMARGO,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for possession of methamphetamine, a third degree felony, and receiving stolen property, a class B misdemeanor, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Royal I. Hansen presiding

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APPELLATE COURTS
POSTMARKED

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Case No. 20110027-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/ Appellee,

vs.

FERNANDO GONZALEZ CAMARGO,
Defendant/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for possession of methamphetamine, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2009), and receiving stolen property, a class B misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUES

1. Was the evidence sufficient to support Defendant's conviction for possession of methamphetamine?

Standard of Review. "The standard of review for a sufficiency claim is highly deferential to the jury verdict." *State v. Workman*, 2005 UT 66, ¶ 29, 122 P.3d 639. The appellate court "begin[s] by reviewing 'the evidence and all inferences which may be reasonably drawn from it in the light most favorable to

the verdict.” *Id.* (citation omitted). The Court “will reverse a jury verdict only if [it] determine[s] that ‘reasonable minds could not have reached the verdict.’” *Id.* (citation omitted).

2. Was testimony about a Utah State University incident report that a laptop computer was stolen inadmissible hearsay?

Standard of Review. “In reviewing the admissibility of hearsay, legal questions are reviewed for correctness while the ultimate ruling on admissibility is reviewed for an abuse of discretion.” *State v. Burke*, 2011 UT App 168, ¶16, 256 P.3d 1102, *cert. denied*, 263 P.3d 390 (Utah 2011); *accord State v. Workman*, 2005 UT 66, ¶ 10, 122 P.3d 639.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutory provisions and rule are reproduced in Addendum A: Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2009); Utah R. Evid. 801; Utah R. Evid. 803.

STATEMENT OF THE CASE

A. Summary of proceedings.

After a warrant-based search of his apartment, Defendant was charged with possession of methamphetamine with intent to distribute, a second degree felony; receiving stolen property having a value of \$5,000 or more, a second degree felony; and possession of a weapon by a restricted person, a third degree felony. R1-3,92-94. However, at the close of the State's case at trial, the district court found no evidence of an intent to distribute or of the value of the stolen property. R346:125-26. Accordingly, it submitted the case to the jury on the charges of (1) possession of methamphetamine, a third degree felony; (2) receiving stolen property, a class B misdemeanor; and (3) possession of a weapon by a restricted person, a second degree felony. *See* R226-28; R346:126. The jury found Defendant guilty of counts I and II, but not guilty of count III. R182-83,232-35,259.

Following his verdict, Defendant filed a motion to arrest judgment on count I, possession of methamphetamine. R241-50. After hearing argument, the district court denied the motion in a signed Minute Entry and Order. R291-94 (Addendum B). After receiving an amended presentence investigation report, the court sentenced Defendant to a suspended prison term of zero-to-five years on count I, possession of methamphetamine, and to a suspended jail term of 180

days on count II, receiving stolen property. R298. The court placed Defendant on supervised probation for 36 months and ordered that he serve 365 days in jail with the possibility of early release upon Defendant's completion of the "CATS" program. R298-300. Defendant timely appealed. R301-02.

On December 14, 2010, Defendant was released from jail and transferred to the custody of the U.S. Marshall pending deportation to Guatemala for being in the United States illegally. R307-08. The district court thereafter terminated Defendant's probation and issued a \$50,000 cash-only bench warrant for his arrest should he return to the United States illegally. R308.

B. Summary of Facts.

On September 29, 2009, Utah Attorney General (UAG) agents from the special investigations and strike force units conducted surveillance of an apartment fourplex in Salt Lake City. R345:115-17,200-03,202,208. During their surveillance, agents observed "[h]eavy traffic patterns to and from" the two upstairs apartments. R345:118,120-21,124,201. They saw numerous people make short-term visits, arriving by foot, bike, and car. *See* R345:201-02. Some, carrying backpacks, entered the residence and left shortly after without the backpacks. R345:202. Others drove up to the curb and were met by someone from one of the upstairs apartments. R345:202. Agent Brendan Call "saw what appeared . . . to be two hand-to-hand drug transactions." R345:118,158. And, at

various times, someone emerged from the apartment as an apparent lookout, walking the neighborhood with a cell phone in hand. R345:118-19,202-03.

Search of Defendant's Apartment

Sometime after 10:00 that same evening, UAG agents met with members of the Salt Lake City SWAT team at a nearby staging area to coordinate the execution of a search warrant for the south (B) and north (D) upstairs apartments. See R345:121-24,208-09,226. Close to midnight, the SWAT team entered the apartments on the no-knock warrant to secure the premises. R345:121-23,159,209,248-49. UAG agents monitored their entry from positions outside of the residence, and Agent Call listened to their activities by radio. R345:123-24,209. In all, the SWAT team removed fourteen people from the apartments, including Defendant and his girlfriend. See R345:130,135,159-60,171-72,226-27,249,253.

After the SWAT team escorted the occupants outside, UAG Agent Ed Spann directed many of them to sit down on the street curb. R345:226-29,250-51,260. During this time, Defendant told Agent Spann that he lived in the upstairs north apartment and asked that someone explain to him what was going on. R345:228-29,258-59; R346:24. He said that he lived there with his girlfriend and was concerned about her well-being. R345:229-30. Once the apartment was cleared, the SWAT team brought in a drug-detection dog to

sweep the apartment for the presence of narcotics. R345:165-67. When the SWAT team was finished at approximately 1:00 a.m., Agents Spann and Stephen Metcalf led the UAG search team into the two apartments to conduct the search for evidence. *See* R345:123,129,159-60,171,190,205,209.

Apartment D was comprised of a living room, a kitchen and dining area, a hallway and bathroom, and two bedrooms. R345:124-25,170,203-04. The northwest bedroom included a sofa chair, a small dresser, a computer desk, and a single bed. *See* R345:125,174,239; DVD3:03-5:05 (SE4). Agents found both men's and women's clothing in the bedroom, as well as some children's clothing with the store tags still attached. R345:125-26,174-75,205; DVD3:48-56. In a lock box on the floor next to the bed, agents found nine baggies of methamphetamine, a meth pipe, and some money. R345:125-27,154,161-62,174-75,191,204-05,239; DVD4:26-31; R346:31,53-54. The agents also found a variety of electronics strewn throughout the room, including numerous laptop computers — some in bags, car stereo components, several cameras, two video recorders, and four cell phones. R345:128,174,177-78,181,205-06; DVD3:03-5:05,9:22-29.¹ The cell phones rang repeatedly throughout the search.

¹ Agents also found computers in the living room, a social security card in the toilet, and a torn up social security card in the bathtub. R346:17.

R345:205,235. Finally, agents found a loaded, sawed-off shotgun in the closet.
R345:127-28,153,155,162,205,238.

During the course of the search for evidence, agents brought Defendant and his girlfriend back inside Apartment D and seated them on the living room couch. R345:130. As Agents Spann and Leo Lucy were carrying laptop computers out of the northwest bedroom to the kitchen for processing, Defendant asked what they were doing with his computers. R345:207,232,245, 260. Absent any inquiry from the agents, Defendant asserted that "they weren't stolen" and claimed that he repaired them for people. R345:207-08,232,253-54,257,260-61; R346:21,100-01. However, the agents did not find customer lists or receipts, computer manuals, computer repair tools, or any business cards with Defendant's name in the apartment. R345:128-29,184,206-07,235. Defendant's girlfriend also asked that agents retrieve something from her purse in the northwest bedroom. R346:87-88,92.

Seized Property Determined to be Stolen

One of the laptops seized from the northwest bedroom was affixed with a Utah State University sticker. R345:178-79; R346:46-47; SE4. A UAG agent later contacted Detective Kim Ellis of the University police department and provided him with the make, model, and serial number of the computer. R346:36-37,40,47-48. Detective Ellis reviewed University records showing that the laptop

was reported missing in August 2009. *See* R346:37,40-41,44-45,50. Detective Ellis also called the University's equipment manager, Deb McGill, and provided her with the information on the laptop computer. R346:46-48. Detective Ellis then notified the UAG agent that the laptop was University property. R346:48.

The State also introduced evidence that Officer Robert Gwynn of the North Salt Lake City Police Department took a stolen property report of a laptop on September 13, 2009. R346: 65. The complainant subsequently notified Officer Gwynn that he had been contacted by an officer from the Utah Attorney General's Office. R346:65. Two and a half months after the search, one of the computers seized from the apartment was returned to John Amtoft. R345:134.

When Agent Stephen Metcalf, who processed the evidence at the scene, inventoried one of the cell phones, he noticed that it had a photograph of his neighbor's daughter on it. R345:182-83.

SUMMARY OF ARGUMENT

I. Sufficiency of the evidence. Because Defendant was not in actual possession of the methamphetamine, the State was required to demonstrate constructive possession, i.e., he had both the power and intent to exercise dominion and control over the drug. The evidence at trial were sufficient to establish the necessary nexus between Defendant and the drugs. Defendant admitted that he lived in the apartment and that his bedroom was the one where

the drugs were found. Defendant was present in the apartment when officers executed the search warrant. Although he apparently shared the room with his girlfriend, the bedroom was dominated by items to which he claimed a right to (computers) or which were male-related. And finally, the lock box containing the methamphetamine was found on the floor next to the bed, along with two computers. This evidence established the necessary nexus to show constructive possession. This Court should thus affirm Defendant's conviction for possession of methamphetamine.

II. Hearsay. The State concedes that admission of Detective Ellis' testimony that a seized computer was stolen, which was based on a police incident report, was prejudicial error. Accordingly, the State agrees that the case should be remanded for a new trial on the charge of receiving stolen property.

ARGUMENT

I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT THAT DEFENDANT UNLAWFULLY POSSESSED METHAMPHETAMINE

At the close of the State's case, Defendant moved for a directed verdict on the ground that the evidence was insufficient to support a conviction for possession of methamphetamine. R346:111-12,123. The trial court denied the motion and the jury thereafter found Defendant guilty. R346:125-26. Thereafter, Defendant again argued that the evidence was insufficient in a motion to arrest the judgment. See R241-50,269-77. The court also denied that motion. See R291-93 (Addendum B). Defendant challenges this ruling on appeal. See Aplt. Brf. at 15-30. Contrary to Defendant's claim, the evidence was sufficient to support the jury's verdict and this Court should thus affirm.

* * *

When reviewing the sufficiency of the evidence from a jury verdict, this Court "accord[s] high deference to the fact-finder at trial." *State v. Hamilton*, 2003 UT 22, ¶ 38, 70 P.3d 111. The Court thus "review[s] the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the verdict." *State v. Dunn*, 850 P.2d 1201, 1212 (Utah 1993). It "'do[es] not weigh conflicting evidence,' nor [does it] 'substitute [its] judgment for that of the fact-finder.'" *Id.* at ¶ 38 (citations omitted). If there is conflicting evidence, the Court

"must 'accept that version of events'" which supports the verdict. *See People v. Maury*, 68 P.3d 1, 30 (Cal. 2003) (citation omitted). This Court "will reverse a criminal conviction for insufficient evidence only when the evidence is so inconclusive or so inherently improbable that 'reasonable minds must have entertained a reasonable doubt' that the defendant committed the crime." *State v. Goddard*, 871 P.2d 540, 543 (Utah 1994) (citation omitted).

In this case, Defendant was tried for "knowingly and intentionally ... possess[ing] ... a controlled substance," in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2009). The State was thus required to establish that Defendant was either in "actual physical possession" or in "constructive possession" of the baggies of methamphetamine found in the lock box in the bedroom he shared with his girlfriend. *See State v. Fox*, 709 P.2d 316, 318-19 (Utah 1985).

A person is said to be in "constructive possession" of an object when he or she does not have actual physical possession of the item, but nevertheless has "both the power and the intent to exercise dominion and control over [it]." *Fox*, 709 P.2d at 319. Typically, the doctrine of constructive possession is used to establish possession of drugs found in a location occupied by multiple people. *See, e.g. State v. Workman*, 2005 UT 66, 122 P.3d 639 (finding live-in girl friend to be in constructive possession of meth lab in apartment where she and her

boyfriend lived). The doctrine is also used in cases where the defendant is absent or separated from the place where the drugs are found. *See, e.g. Fox*, 709 P.2d 316 (finding owner/occupant to be in constructive possession of marijuana growing at home even though he was no longer there).

When drugs are found on a defendant's person, the fact of physical possession is direct evidence of the defendant's "power and intent to exercise dominion and control over the drug." *Fox*, 709 P.2d at 319. But when the defendant does not have actual physical possession, the State must demonstrate that "the drugs were subject to the defendant's dominion and control and the defendant had the intent to exercise that control." *State v. Layman*, 1999 UT 79, ¶ 16, 985 P.2d 911. To do so, the State must rely on other facts to establish "the necessary nexus" between the defendant and the contraband. *Spanish Fork City v. Bryan*, 1999 UT App 61, ¶ 10, 975 P.2d 501.

"Whether a sufficient nexus between the accused and the drug exists depends upon the facts and circumstances of each case." *Fox*, 709 P.2d at 319. Factors that may be relevant in determining possession "include[e] ownership and/or occupancy of the residence or vehicle where the drugs were found, presence of defendant at the time [the] drugs were found, defendant's proximity to the drugs, previous drug use, incriminating statements or behavior, [and] presence of drugs in a specific area where the defendant had control." *Workman*,

2005 UT 66, ¶ 32. These considerations, however, “are not ‘universally pertinent,’” and the list is not exhaustive. *Id.* (quoting *Layman*, 1999 UT 79, ¶¶ 14-15). A review of the record in this case reveals that the evidence was sufficient to support the jury’s finding of possession.

First, the methamphetamine was found in the northwest bedroom of Apartment D. R345:125-27,154,161-62,174-75,191,204-05,239; DVD4:26-31; R346:31,53-54. At the scene, Defendant admitted to UAG agents that he lived in the apartment with his girlfriend, R345:228-29, and specifically indicated to the agents when he was inside that the northwest bedroom was his, R345:233-34. Second, Defendant was in the apartment when officers entered to conduct the search. *See* R345:130,172,227-28,248-49. Third, and contrary to Defendant’s claim on appeal, *see* Aplt. Brf. 26,29, the northwest bedroom was dominated by his possessions and effects, not his girlfriend’s. It is true that some items belonging to a woman were in the bedroom—a purse next to the door, *see* DVD3:34-38; some women’s clothing in the closet, *see* DVD3:47-4:18; and two jewelry boxes on the bed—though it is not clear whether they contained men’s or women’s jewelry, *see* DVD4:32-40. Otherwise, however, the room was cluttered with computers—which Defendant admitted were his—electronic parts, tools, and other items typically associated with men. *See* DVD3:03-5:05.

Moreover, Agent Metcalf, who with Agent Spann, was the first to enter the apartment after it was cleared, testified that the lock box containing the methamphetamine was found on the floor next to the mattress. *See* R345:171,191. And a review of the video shows that two of the laptop computers were also on the floor next to the bed — one at the side of the bed and the other at the foot of the bed. *See* DVD4:44-54. This fact further supports the inference that the lock box, and the items therein, were Defendant's. *See Workman*, 2005 UT 66, ¶34 (recognizing that the intermingling of personal items with contraband is a factor supporting a finding of constructive possession).

Defendant argues that the location of the lock box cannot be certain, because the SWAT team, none of whom testified, entered the room first to clear the area and to conduct a drug sniff by the canine unit. *See* Aplt. Brf. at 15. However, Agent Call testified that the SWAT team "do[es]n't search [for items] at all," but act to secure the residence for safety reasons. R345:122. Although the team conducted a drug sniff, nothing in the record suggests that they moved any items.

In sum, the evidence at trial provided "a sufficient nexus between [Defendant] and the drug to permit an inference that [he] had both the power and the intent to exercise dominion and control over the drug." *Fox*, 709 P.2d at

319. Accordingly, this Court should affirm Defendant's conviction for possession of methamphetamine.

II.

THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY TESTIMONY THAT THE LAPTOP COMPUTER WAS STOLEN AND DEFENDANT IS THUS ENTITLED TO A NEW TRIAL FOR RECEIVING STOLEN PROPERTY

In establishing that the seized laptop computer with a Utah State University sticker on it was stolen, the State relied on the testimony of Officer Kim Ellis of the Utah State University Police Department. *See* R346:34-51. Over the objections of defense counsel, Officer Ellis testified that an incident report showed that the subject laptop computer was reported stolen in August 2009. *See* R346:44-45,50. On appeal, Defendant argues that this testimony was inadmissible hearsay, meriting a new trial on the charge of receiving stolen property. *See* Aplt. Brf. at 31-39. The State agrees.

Detective Ellis explained that when a computer is reported stolen from the University, his office makes a report of it. *See* R346:44-45. He testified that according to his report, the subject laptop was taken in August of 2009. R346:50-51. This Court has held that as a general rule, "[p]olice reports are not eligible for admission under either [the business records or public records exceptions] of Rule 803." *State v. Morrell*, 803 P.2d 292, 298 (Utah App. 1990). Police records of "routine matters," such as the date a crime was reported, are an exception to the

rule. *State v. Bertul*, 664 P.2d 1181, 1184 (Utah 1983). But police reports of the factual events and details of a criminal case "should ordinarily be excluded." *Id.* at 1184-85. The incident report upon which Detective Ellis relied appears to fall within this category. Accordingly, the State concedes that it was error to admit this evidence.

To merit reversal, Defendant must also show that the error was prejudicial, i.e., "that there is 'a reasonable likelihood that the error affected the outcome of the proceedings.'" *State v. Workman*, 2005 UT 66, ¶ 23, 122 P.3d 639 (citation omitted). The State concedes that based on the trial record, such a likelihood exists and that a new trial is thus warranted on the charge of receiving stolen property.

Because the State concedes that admission of Detective Ellis' hearsay testimony constituted prejudicial error, this Court need not, and should not, address Defendant's constitutional claim that admission of the testimony violated his right to confrontation. *See State v. Nelson*, 2007 UT App 34, ¶15, 157

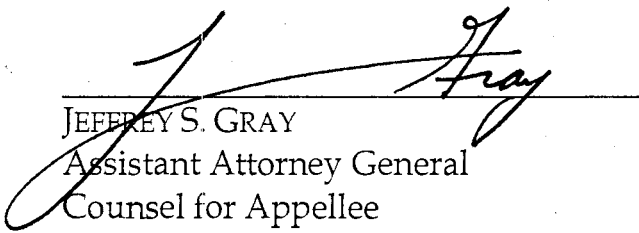
P.3d 329 (“It is a fundamental rule that this court should avoid addressing constitutional issues unless required to do so.”) (citation omitted).²

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant’s conviction for possession of methamphetamine, but reverse his conviction for receiving stolen property and remand the case for a new trial on that charge.

Respectfully submitted this January 6, 2012.

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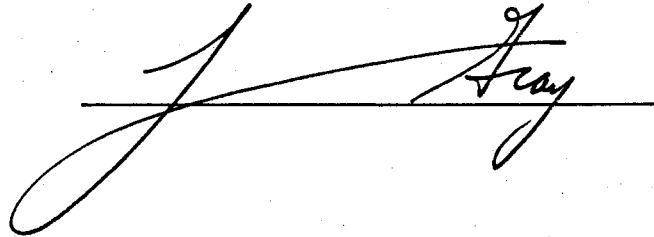
² Nor should the Court address Defendant’s claim that Detective Ellis’ testimony summarizing the report does not qualify under the hearsay exceptions, because testimony is not a record. *See* Aplt. Brf. at 37 n.3. The claim was not preserved below, nor is it necessary to resolution of the case. *See Gallivan v. Walker*, 2002 UT 89, ¶97, 54 P.3d 1069 (Durham, J., concurring) (observing that “courts should generally resolve cases on the narrowest applicable grounds unless specific reasons exist for offering broader guidance”).

CERTIFICATE OF SERVICE

I certify that on January 6, 2012, two copies of the foregoing brief were ☒ mailed ☐ hand-delivered to:

Joan C. Watt
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424 East 500 South, Ste. 300
Salt Lake City, UT 84111

A digital copy of the brief was also included: ☒ Yes ☐ No

A handwritten signature in dark ink, appearing to be "J. Reuben Clark", is written over a horizontal line.

ADDENDUM A

Relevant Statutory Provisions and Rules

Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2009)

It is unlawful:

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

....

Utah R. Evid. 801

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

* * *

Utah R. Evid. 803

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business,

institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * *

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

* * *

ADDENDUM B
Minute Entry and Order
(filed Nov 18 2010)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

NOV 18 2010

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY

By

Deputy Clerk

STATE OF UTAH,	:	MINUTE ENTRY AND ORDER
Plaintiff,	:	CASE NO. 091907747
vs.	:	
FERNANDO GANZALEZ-CAMARGO,	:	
Defendant.	:	

Pending before the court is the defendant Fernando Ganzalez-Camargo's motion for Judgement Notwithstanding the Verdict and to Arrest Judgement. The defendant argues that, viewing the evidence in the light most favorable to the jury verdict, the prosecution failed to present sufficient evidence to support a conviction for Possession of Controlled Substance.

A. Standards for the Court

Utah R. Civ. P. 50(b) states, "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict" The grounds for a directed verdict and for a judgment notwithstanding the verdict are identical and thus a "trial court can enter the judgment notwithstanding the verdict only for one reason — the absence of any substantial evidence to support the verdict." Koer v. Mayfair Markets, 19 Utah 2d 339, 342 (Utah 1967). A party moving for a judgment notwithstanding the verdict "has the very difficult burden of showing no evidence exists that raises a question of material fact." Alta Health Strategies, Inc. v. CCI

Mechanical Serv., 930 P.2d 280, 284 (Utah Ct. App. 1996).

The determination of constructive possession of drugs turns on the particular circumstances of the case and facts which permit the inference that the accused intended to use the drugs as his own. Fox, 709 P.2d 316, 319 (Utah 1985). To find constructive possession, "it is necessary to prove that there was 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." Workman, 2005 UT 66, ¶11, 122 P.3d 639 (Utah 2005) (quoting Fox, 709 P.2d at 319). The Utah Supreme Court has listed several factors that may be important in determining a sufficient nexus. Factors include "ownership and/or occupancy of the residence . . . , presence of defendant at the time drugs were found, defendant's proximity to the drugs, previous drug use, incriminating statements or behavior, presence of drugs in a particular area where the defendant had control," presence of drug paraphernalia among accused's personal effects, or in a place where accused has special control. Workman, 2005 UT 66, ¶12; Fox, 709 P.2d at 319. When taken alone or in a small group these factor may not support a nexus, but the if the cumulative effect of the factors is such that a reasonable jury could have concluded that there was a sufficient nexus between the drugs and the defendant this court will deny the motion for judgment notwithstanding the verdict of the jury.

B. Analysis

Applying these standards to the case at hand, there is not an absence of evidence that could lead a reasonable jury to find constructive possession. The prosecution presented evidence of a nexus between the methamphetamine and the defendant to permit a reasonable jury to infer that the defendant had the power and the intent to exercise dominion and control over the drugs. The prosecution presented evidence with respect to the defendant's occupancy of the bedroom

where the drugs were found, the defendant's presence outside the residence when the raid occurred, the proximity of the drugs to defendant's possessions, the defendant's statements, and the defendant's behavior. The jury was presented with this evidence and from this the jury found a nexus to support an inference of possession. There was not an absence of any substantial evidence in this case to set aside the jury's verdict.

C. Conclusion

Based on the evidence presented at trial, it was certainly reasonable to infer that defendant knew of the drugs and had the power and intent to exercise dominion and control over the methamphetamine in the northwest bedroom. Defendant's motion for Judgment Notwithstanding the Verdict and to Arrest Judgment is denied.

Date this 18 day of November, 2010.

