

2011

Utah v. Fernando Gonzalez-Camargo : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :

Plaintiff/Appellee :

v. :

FERNANDO GONZALEZ-CAMARGO,:

Case No. 20110027-CA

Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a conviction for possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (2007); and, theft by receiving stolen property, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-408(1), (2008) in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Royal Hansen, presiding.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee :
v. :
FERNANDO GONZALEZ-CAMARGO, : Case No. 20110027-CA
Defendant/Appellant. : Appellant is incarcerated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2) (e) (2008). Appellant Fernando Gonzalez-Camargo was convicted of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (2)(a)(i) (2007), and theft by receiving stolen property, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-408(1) (2008). R. 298-300. A copy of the judgment is in Addendum A.

ISSUES AND STANDARD OF REVIEW

Issue I: Whether the State proved beyond a reasonable doubt that Gonzalez-Camargo constructively possessed methamphetamine located in a metal box in a bedroom that was not solely occupied by Gonzalez-Camargo and there was no additional evidence establishing a sufficient nexus between Appellant and the methamphetamine.

Standard of Review. When the sufficiency of the evidence in a jury trial is challenged, the standard of review requires that the “evidence and the reasonable inferences which may be drawn therefrom must be viewed in the light most favorable to the jury verdict.” *State v. Johnson*, 774 P.2d 1141, 1147 (Utah 1989). A jury verdict can be reversed for insufficient evidence where the evidence “is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” *Id.*; see also *State v. Robbins*, 2009 UT 23, ¶14, 210 P.3d 288. The “trial court’s interpretation of binding case law [presents] a question of law” that is reviewed for correctness. *State v. Stewart*, ---P.3d---, 2011 WL 2276499, ¶6. And, “when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime,” the conviction must be overturned. *State v. Layman*, 1999 UT 79, ¶12, 985 P.2d 911

Preservation: This issue is preserved at R. 346:112-115; 241-50. See Addendum B containing record relevant to the preservation of this issue.

Issue II: Whether admission of a university police officer’s multiple hearsay testimony that he had read a report indicating that a computer had been stolen from a department in the university and other university records violated the rules of evidence and Appellant’s right to confrontation, requiring a new trial.

Standard of Review: The “standard of review on the admissibility of hearsay evidence is complex[.]” *State v. Workman*, 2005 UT 66, ¶10, 122 P.3d 639. This Court reviews “the legal questions to make the determination of admissibility for correctness.”

Id. It reviews any factual findings that may have been made for clear error, and reviews the “district court’s ruling on admissibility for abuse of discretion.” *Id.* Moreover, “[m]atters of constitutional interpretation are questions of law” that are reviewed for correctness,” and “[t]he district court’s decision to admit testimony that may implicate the confrontation clause is also a question of law reviewed for correctness.” *State v. Poole*, 2010 UT 25, ¶8, 232 P.3d 519.

Preservation: The hearsay issue is preserved at R. 346:36-45, contained in Addendum C. The confrontation claim can be reviewed for plain error. *State v. Dunn*, 850 P.2d 1202, 1203 (Utah 1993).

STATUTORY PROVISIONS

The text of the following is in Addendum D:

Utah Code Ann. § 58-37-8 (2)(a)(i) (2007);

Utah Code Ann. §76-6-408 (2007);

Rules 801, 803, Utah Rules of Evidence;

U.S. Const. amend. VI, XIV.

STATEMENT OF THE CASE

The State charged Gonzalez-Camargo with three counts: possession of a controlled substance with intent to distribute, a second degree felony; receiving stolen property with a value exceeding \$5,000, a second degree felony; and possession of a weapon by a restricted person, a third degree felony. Following preliminary hearing, the State moved to consolidate this case with that of Jovalee Lucero who was charged with the same counts. R. 54-61. The trial court denied the motion. R. 66.

A jury trial was held on June 29-30, 2010. R. 182-83, 232-33. The State failed to put on evidence indicating that the controlled substance was possessed with intent to distribute or that the allegedly stolen property had a value exceeding \$300. The trial court therefore granted Appellant's motion for a directed verdict on those elements, and sent the case to the jury on charges of possession of a controlled substance, a third degree felony, receiving stolen property, a class B misdemeanor, and possession of a weapon by a restricted person, a second degree felony. R. 238-39.

The jury acquitted Gonzalez-Camargo of possessing the sawed off shotgun found in the closet of a bedroom that was not solely occupied by Appellant, in a house occupied by numerous people. R. 234. It convicted him of possession of methamphetamine located in a metal box in that bedroom and receiving stolen property based on a computer found in the bedroom. R. 234.

Following trial and before sentencing, Appellant filed a motion to correct the record to reflect the trial court's order granting a directed verdict on the "intent to distribute" element of the possession charge and also on reduction of the theft by receiving charge to a class B misdemeanor. R. 238-39. The trial court granted that motion. R. 259.

Gonzalez-Camargo also filed a motion for judgment notwithstanding the verdict and to arrest judgment, asking that the verdict be set aside because the State failed to prove that Gonzalez-Camargo constructively possessed the methamphetamine. R. 248-50; reply 269-77. The trial judge denied the motion for judgment notwithstanding the verdict. R. 291-94.

On December 6, 2010, the trial court sentenced Appellant to serve 365 days in the Salt Lake County Jail, and then to serve probation of three years. R. 298-300.

Appellant filed a timely notice of appeal and a petition for certificate of probable cause, which the trial judge denied. R. 301, 309-12, 342. Appellant is being held in the Salt Lake County Jail.

STATEMENT OF THE FACTS

Agents from the Attorney General's office conducted surveillance on two apartments in a four-plex at 813 North Riverside Drive on the afternoon of September 29, 2009. The officers observed vehicular and foot traffic and two hand to hand buys involving two different sellers outside the four-plex. R. 345:118, 119, 158, 201. People involved in those hand to hand drug transactions came out of the upstairs apartments but the officers did not know whether they came out of Apartment B or D. R. 345:158. Officers did not detain the people involved in the hand to hand drug transactions and did not know who they were. R. 345:159. Testimony did not indicate that Gonzalez-Camargo was involved in the transactions or even present.

Officers also observed various individuals, some of whom arrived on bikes, enter the four-plex. R. 345:202. These individuals often had backpacks or bags and some would later exit without the backpacks or bags. R. 345:202. People also exited the four-plex and approached vehicles on the curb where they engaged in brief conversations then returned to the apartments. R. 345:202. In addition, officers saw people they characterized as "lookouts" and "at various times an individual would come out and

begin to walk the neighborhood on a cell phone.” R. 245:203. Gonzalez-Camargo was not identified as being involved in any of these incidents.

Late in the evening of September 29, 2009, officers also stopped and searched a vehicle that had left the residence. R. 345:187. They found a number of electronics and construction tools in the car, but let the driver go. R. 345:188. It was unclear from the testimony whether the driver was Angel Ovieda Orio or Alejandro Ramirez. R. 242; 345:187-89.

Agents arrived at the four-plex at about 10:15 p.m. in anticipation of executing a search warrant on Apartments B and D. R. 345:117, 123, 124, 186. Shortly after midnight on September 30, 2009, a large SWAT team began execution of the search warrant; there “was a great number of people there” so rather than execute the search warrant in Apartments B and D “in a normal fashion where they kick in the door and enter,” the SWAT team used a bullhorn to “call[] the residents of the entire apartment building outside.” R. 345:124, 171, 187. Twelve to fourteen people emerged and were placed on the curb. R. 345:121, 232. Several of the individuals on the curb lived in the apartment building. R. 345:171. Officers either arrested the people on the curb or found out where they lived and released them. R. 345:171.

The SWAT team, which included dozens of agents, then entered and spent about an hour securing Apartments B and D. R. 345:121, 159, 160. The SWAT team had at least one canine unit and asked the agents “not to enter until the canine was done.” R. 345:209. While the SWAT team was inside, there was continued foot traffic to apartments in the four-plex. R. 345:160. The agents watched from a distance, then

entered the premises about thirty minutes to an hour after the SWAT team. R. 345:123, 190. Other agents and SWAT team members had entered before Agents Call and Metcalf, and the two agents were unsure who had been inside the apartment before them. R. 345:171, 190. No SWAT team members testified.

Appellant, Fernando Gonzalez-Camargo was one of the people removed from Apartment D of the four-plex. He, along with the others, was seated on the curb outside the four-plex while the agents entered and searched the apartments. R. 345:130, 172. Jovalee Lucero, who was also arrested, was one of the people on the curb. R. 345:135. Agent Call did not see Gonzalez-Camargo in the four-plex before seeing him on the curb. R. 345:161. Another officer testified that he had seen Appellant in the vicinity of the apartments in early August, 2008. R. 346:60-61, 63. Agent Spann talked to Gonzalez-Camargo when he was on the curb and helped move him to a different location. R. 345:228. Gonzalez-Camargo was later questioned inside Apartment D. R. 345:171.

Gonzalez-Camargo, who could speak English unlike many of the occupants, asked the officers questions about what was going on. R. 345:258; 346:80. He asked whether there was a problem or if the officers were looking for someone. R. 346:80. He requested that he be allowed to speak to an officer. R. 345:259. According to Agent Spann, Gonzalez-Camargo identified himself as a resident of Apartment D, and said he lived inside with his girlfriend and was concerned about her well-being. R. 345:228, 229. Appellant testified, however, that he did not tell officers he lived in the apartment. R. 346:94. Gonzalez-Camargo's girlfriend was also arrested. R. 345:260.

When Agent Call entered the northwest bedroom of Apartment D over an hour after the SWAT team, he observed an open black metal box on the bed. R. 345:126. The box contained nine baggies of methamphetamine and a few baggies of marijuana; although boxes containing drugs are often locked, this one was unlocked when Agent Call entered the bedroom. R. 345:126, 162. Plastic baggies, a scale, and a meth pipe were also in the room, but there were no customer lists or receipts. R. 345:127, 128. In addition, a sawed-off shotgun was in the closet, leaning against the wall, and laptops and a couple of car stereos were on the floor. R. 345:127, 128. The clothing was not hanging in front of the shotgun when he entered but could have been moved by other officers. R. 345:162. Because Agent Call entered the bedroom after the SWAT team and others, he did not know whether the items in the bedroom had been moved by other officers. R. 345:161.

When Agent Metcalf entered the bedroom to process evidence, the box with methamphetamine was on the floor next to a mattress. R. 345:174. The closet was “pretty full” and contained several computers stacked next to each other and clothing for adult men and women along with children’s clothing that still had tags. R. 345:174, 175, 178. One of the computers had a Utah State University sticker attached to it. R. 345:179. Agent Metcalf also found cameras, two video recorders, and several cell phones in the northwest bedroom. R. 345:181. One of the cellphones had a picture of Agent Metcalf’s eleven year old neighbor on the screen. R. 345:182. Agent Metcalf testified that he showed the phone to his neighbor and asked whether it was his, but the State presented

no testimony from the neighbor or anyone else regarding the response to this question.

R. 345:183.

The metal box was in a different place, on a chair surrounded by cell phones that were ringing when Agent Lucey entered the room. R. 345:204, 205. The three cellphones were on the bed at some point and later on the chair. R. 345:235. By then, the SWAT team, at least one and possibly two canine units, and other investigators from the Attorney General's office had been in the bedroom. R. 345:204. Agent Lucey was in the apartment for several hours and testified that the cell phones continued to ring steadily during that time. R. 345:205. Neither he nor the other agents gave information as to where the cell phones or metal box had been found. Clothes were still in the room, but many had been moved to the bed. R. 345:205. The agents did not see computer manuals, customer lists, work space, business cards or a license in Gonzalez-Camargo's name, or computer repair tools. R. 345:184, 206, 235.

The State showed a video of an officer walking through the apartment. See State's Exh. 6. It is unclear at what point in the search this video was taken. A portion of the video shows the northwest bedroom. Toward the start of the video, three cellphones are shown on a chair in the room and the metal box is closed and on the bed. By the end, four cellphones are in the chair and the contents of the room had again been disturbed. The video also shows the closed metal box in one place and later moved. R. 345:239; Exh. 6. Agent Spann testified that the box had money, packages of methamphetamine, and packages of marijuana. R. 345:239.

The video also shows a number of women's belongings in the northwest bedroom including purses, clothing, jewelry, perfume, makeup, and a jewelry box. Exh. 6. Identification for the woman sitting on the couch was found in the northwest bedroom, and that woman's purse was also in the bedroom. R. 345:87-88.

The State did not present the testimony of any of the SWAT team members who initially entered the bedroom, nor did it present any testimony from the person who first found the metal box. R. 244. The State therefore did not establish where the metal box was found.

The agents also found items in the southwest bedroom. Those included a drug pipe, baggies, and a fraudulent permanent resident card. R. 345:163; Exh. 6. They found a paystub for Raoul in that bedroom, and various electronics. R. 345:234; Exh. 6. Gonzalez-Camargo testified that Raoul lived in Apartment D. R. 346:97.

Officers found electronics in the hall closet and a social security card in the toilet with the name Marco Antonio Gurrollo. Exh. 6; R. 345:17. Additionally, agents found items, including a firearm, in Apartment B. R. 345:192-93.

After securing the premises and investigating for a while, officers brought fourteen people "back into their apartment, and then the interview process and the identity of folks continued at that time." R. 345:232, 129. Agent Call interviewed Raoul inside the apartment. R. 345:130. Various agents also interviewed Appellant after officers moved him back inside Apartment D. R. 345:130, 232.

When agents carrying computers that came from the northwest bedroom walked by Appellant, Gonzalez-Camargo asked where the officers were going with his

computers. R. 345:101, 207, 232. Gonzalez-Camargo told the officers that he repaired the computers for other people, that he fixed computers for a living, and that the computers were not stolen. R. 345:208, 232; 346:21, 84. Spann testified that Gonzalez – Camargo gestured toward the northwest bedroom and said that the computers were in his bedroom. R. 345:233. But on cross-examination, Spann acknowledged that his report said only that Gonzalez-Camargo motioned his head toward the rear of the residence, and did not include a statement from Appellant that it was his bedroom. R. 345:257. In fact, nowhere in Agent Spann’s report did he say that Gonzalez-Camargo indicated that the northwest room was his bedroom. R. 345:257. And, Agent Spann did not testify at the preliminary hearing that Appellant had said that he lived in the apartment or indicated that the northwest bedroom was his. R. 346:22. Gonzalez-Camargo testified that he did not tell officers that he lived in the apartment and denied living there. R. 346:74.

Agent Call testified that he returned a computer to an individual, but that one of the laptops “belonged to Edward Wright.” R. 345:134. After defense counsel objected, the agent testified that the computer was returned to John Amtoft. R. 345:134. Neither John Amtoft nor Edward Wright testified that the computer was stolen. Instead, a detective with the Utah State University police department testified over defense objection that he was “familiar with a matter involving a stolen laptop – a laptop stolen from a Utah University employee” and that he had verified through university records that the computer was university property, and through police reports that the computer in question was stolen. R. 346:35, 36, 40, 50. The State did not present any testimony from the owner of a computer that the computer was stolen.

The defense presented evidence indicating that Appellant did not live in the apartment. Gonzalez-Camargo testified that he had lived at a West Valley City address with his family since 2008, and was living at that address on September 30, 2009. R. 346:72. He introduced bills with his name and the West Valley City address on them. R. 346:73; Exh. 3, 4. These included a letter from Granite Credit Union and a bill from Select Health. R. 346:74. He testified that he had never lived in the apartment, but knew people who lived there. R. 346:74. He did not receive mail at the Riverside apartment. R. 346:78. He did store a bag of clothes in the apartment because he did not have room in his house. R. 346:77-78. He did not keep other things there. R. 346:78.

Gonzalez-Camargo's sister, Rafaela, also testified that Appellant lived with her in West Valley City. R. 346:71. He had lived at the West Valley City house since sometime in 2008, and had not lived at another location during that time. R. 346:71.

As part of the defense case, Gonzalez-Camargo testified that he had cash on his person that night and was paid in cash when he sold his car. R. 346:81. The State did not present evidence that Gonzalez-Camargo had cash as part of its case. Johnny Hernandez testified that he purchased Appellant's '63 Chevy Impala for \$2500 on September 8, 2009. R. 346:269. He paid cash. R. 346:270.

The man who lived in Apartment B repaired computers and people brought their computers to him. R. 346:77. Sometimes Gonzalez-Camargo helped with the repairs, using the other man's tools, or installed programs. R. 346:77.

Gonzalez-Camargo testified further that he had been visiting the apartments three or four times a week since sometime in 2008. R. 346:75, 98. He stayed there about once a week. R. 346:96. People got together at the apartment to do things like eat meals prepared by one of the occupants who was a good cook, play darts, and watch soccer. R. 346:76. Twelve or more people lived in the apartment, but others visited. R. 346:76. Sixteen or seventeen people were in the apartments on the night of the search, drinking beers and watching a soccer game. R. 346:79. Appellant testified that he had arrived about 2:00 or 3:00 p.m. that afternoon, and had not brought anything with him. R. 346:78-79.

The jury acquitted Gonzalez-Camargo of possessing the gun found in the closet. It convicted him of constructively possessing the methamphetamine found in the metal box and possessing stolen property. R. 234. This appeal follows.

SUMMARY OF THE ARGUMENT

The conviction for possession of a controlled substance should be overturned and an acquittal entered because the State failed to prove beyond a reasonable doubt that a sufficient nexus existed between Gonzalez-Camargo and the methamphetamine found in a metal box in a room that he did not solely occupy. The bedroom where the metal box was located was occupied by a female whose belongings and identification were found in the room. The only belongings even arguably attributable to Appellant were men's clothing and computers found in the closet. Even if this were enough to establish that Gonzalez-Camargo stayed in the room on occasion, the State failed to introduce additional evidence which is necessary to prove the requisite nexus. The State failed to

introduce evidence as to where exactly the metal box was found or whether it was open, closed or locked. Rather than presenting testimony from the officers who found the box, the State used officers who arrived later and saw the metal box in several different locations. Hence, the metal box could have been hidden among the woman's personal belongings, and there is no evidence that it was comingled with male belongings or that Appellant even knew about it.

None of the factors that are usually considered in combination to establish constructive possession existed in this case – Gonzalez-Camargo was not present when the drugs were found, the drugs were not in open view, the State did not establish that he had access to the drugs, he was not in proximity to the drugs, there was no evidence of mutual use and enjoyment of the drugs, and there were no statements or behavior that incriminated Gonzalez-Camargo in regard to the methamphetamine. Under the evidence presented, it is just as likely if not more so, that someone other than Gonzalez-Camargo possessed the methamphetamine found in the metal box, and Appellant knew nothing about it. The evidence is sufficiently inconclusive, requiring that the conviction be reversed.

The conviction for receiving stolen property should also be reversed and the matter remanded for a new trial on this count because the State relied on inadmissible hearsay to establish that the property was stolen. The inadmissible hearsay testimony of a detective that he had reviewed stolen property reports and university records to verify that the computer was stolen did not fit within the business records exception, as the judge incorrectly ruled, since the State did not introduce the records themselves, police

reports are not business records, the State did not lay the foundation for the exception, and the detective was not the custodian of the records or otherwise qualified. In addition to violating the rules of evidence, the hearsay testimony violated Gonzalez-Camargo's right to confrontation. The error was prejudicial because the State did not otherwise establish that the property was stolen.

ARGUMENT

POINT I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT GONZALEZ-CAMARGO CONSTRUCTIVELY POSSESSED METHAMPHETAMINE FOUND IN A METAL BOX IN A BEDROOM THAT APPELLANT DID NOT SOLELY OCCUPY.

While the State need not prove actual possession of a controlled substance in order to convict, the State must nevertheless introduce sufficient evidence to establish a "nexus between the accused and the drug" sufficient enough to allow "an inference that the accused had both the ability and the intent to exercise dominion and control over the drug." *State v. Fox*, 709 P.2d 316, 319 (Utah 1985). The State failed to establish that Gonzalez-Camargo constructively possessed the methamphetamine located in the northwest bedroom of one of the apartments where it failed to link Appellant to the methamphetamine, failed to establish where the methamphetamine was originally found, and otherwise failed to show that Gonzalez-Camargo had the ability and intent to exercise dominion and control over the contraband located in a metal box. In this case where someone other than Gonzalez-Camargo occupied and dominated the northwest bedroom, it is not clear where the drugs were found, the drugs were not visible, Gonzalez-Camargo did not make incriminating statements or engage in incriminating

behavior regarding the methamphetamine or drug use, and nothing linked Appellant to the metal box or the methamphetamine inside the box, the State failed to sustain its burden of proving constructive possession.

Utah Code Ann. § 58-37-8(2)(a)(i) makes it unlawful “for any person knowingly and intentionally to possess or use . . . a controlled substance.” “Actual physical possession is not a required element of the crime of possession of controlled substance.” *State v. Hansen*, 732 P.2d 127, 131 (Utah 1987). Instead, the State can satisfy the possession element of the crime by proving that the defendant had constructive possession of the drugs. *Id.* at 131-32. But to establish constructive possession, the State must prove that the “contraband was found in a place or under circumstances indicating that the accused had the ability and the intent to exercise dominion and control over it.” *Id.* at 132; *see also Spanish Fork City v. Bryan*, 1999 UT App 61, ¶7, 975 P.2d 501 (indicating evidence must establish that defendant “had both the ability and the intent to exercise dominion and control over the drug”) (further citation omitted).

In order to establish constructive possession, the State must do more than establish “mere occupancy of a portion of the premises where the drug is found.” *Hansen*, 732 P.2d at 132. In fact, both the Utah Supreme Court and this Court have made it clear that the evidence must do more than show ownership or mere occupancy and instead must establish a sufficient nexus between the defendant and the contraband to show “that the accused had both the power and the intent to exercise dominion and control over the drug.” *Fox*, 709 P.2d at 319; *see also Hansen*, 732 P.2d at 131-32; *State v. Layman*, 1999 UT 79, 985 P.2d 911; *State v. Salas*, 820 P.2d 1386 (Utah Ct. App. 1991). In other

words, besides mere occupancy, “[t]here must be some additional nexus between the accused and the contraband to show that the accused had the power and intent to exercise dominion and control over it.” *Hansen*, 732 P.2d at 132; *see also Layman*, 1999 UT 79, ¶13. “The sufficiency of the nexus between defendant and the [contraband] depends upon the facts and circumstances of the case,” *Salas*, 820 P.2d at 1388 (citation omitted), and “[t]here must be facts which show that the accused intended to use the drugs or paraphernalia as his own.” *Layman*, 1999 UT 79, ¶13.

Knowledge of the existence of the drugs “and their potential for illegal use” also is not sufficient to establish constructive possession. *Bryan*, 1999 UT App 61, ¶7. “Knowledge and ability to possess do not equal possession where there is no evidence of intent to make use of that knowledge and ability.” *Fox*, 709 P.2d at 319.

The supreme court’s decision in *Fox* illustrates the level of evidence necessary to establish this additional nexus between the defendant and the contraband. In that case, the supreme court held that the State failed to establish that Clive Fox constructively possessed the contraband found in a house he shared with his brother, Gary, while also holding that the evidence was sufficient to establish constructive possession by Gary. In reaching its decision, the Court recognized that some of the factors “which might combine to show a sufficient nexus between the accused and the drug are:” incriminating statements or behavior, “presence of the drugs in a specific area over which the accused had control, such as a closet or drawer containing the accused’s clothing or other personal effects,” or “presence of drug paraphernalia among the accused’s personal effects or in a place over which the accused has special control.” *Fox*, 709 P.2d at 319. The Court

concluded that the evidence established a sufficient nexus between Gary Fox and the marijuana plants where (1) he owned the house, (2) his personal effects were in the same room as contraband and a book on growing marijuana, and (3) greenhouses containing contraband were built onto his house, giving rise to a “reasonable inference that he not only knew of the greenhouses and their contents but also had the power and intent to exercise dominion and control over the marijuana located in them.” *Id.* at 320.

By contrast, the evidence did not establish constructive possession by Clive Fox. While the Court concluded that Clive knew marijuana was being grown in the house, more than mere knowledge was required to prove that he intended to exercise dominion and control over the contraband. *Id.* In fact, “evidence supporting the theory of ‘constructive possession’ must raise a reasonable inference that the defendant was engaged in a criminal enterprise and was not simply a bystander.” *Id.* Although the evidence showed that Clive lived in the house where marijuana was being grown, the room that was apparently his sleeping quarters had no marijuana or paraphernalia. Because there was no evidence other than a showing that Clive was involved in growing the plants, the Court concluded that the evidence was insufficient to establish that Clive constructively possessed the marijuana being grown in the house where he lived. *Id.*

The supreme court likewise concluded that the evidence was insufficient to establish constructive possession in *Layman*. In that case, the contraband was found in a waistband pouch of a woman who was in the car defendant was driving. Although Layman knew the drugs were in the pouch and “shook his head in a negative fashion” after the woman looked at him when the officer asked to search the pouch, the evidence

failed to establish that he “had such control over [the woman’s] person that one could reasonably infer beyond a reasonable doubt that he knowingly and intentionally possessed the drugs and paraphernalia in her pouch.” *Id.* at ¶16. In fact, the Court clarified that “[n]either her presence in his vehicle, his erratic behavior after the traffic stop, nor his use of drugs at some earlier time” were sufficient to establish the required nexus. *Id.* And, although not one fact is determinative, the *Layman* court “reiterated several factors to consider when determining whether constructive possession of a controlled substance exists” *Bryan*, 1999 UT App 61, ¶8, citing *Layman*, 953 P.2d at 788. Those factors include:

“(1) defendant’s presence at the time the drugs were found, with emphasis on the fact that the drugs were in plain or open view; (2) the defendant’s access to the drugs; (3) the proximity of the defendant to the drugs; (4) evidence indicating that the ‘defendant was participating with others in the mutual use and enjoyment of the contraband; and (5) incriminating statements.”

Bryan, 1999 UT App 61, ¶8 (further citations omitted).

This Court reached a similar conclusion that the evidence was insufficient to establish constructive possession in *State v. Salas*, 820 P.2d 1386 (Utah Ct. App. 1991). In that case, officers had received a tip that Salas would be driving a certain vehicle and was in possession of cocaine. *Id.* at 1387. They stopped the vehicle, which was being driven by Salas and was occupied by a “passenger in the front seat and one in the backseat.” *Id.* Officers searched the car, which was co-owned by Salas and his wife, and found cocaine “in the crack of the backseat on the driver’s side, where the bottom of the cushion fits the back.” *Id.* The passenger in the backseat was seated behind the front seat

passenger, but had been seated behind the driver and moved when the car was stopped.

Id. This Court concluded that the facts failed to prove that Salas constructively possessed the cocaine, stating “[t]his furtive movement, coupled with the fact that the cocaine was found under the backseat where the passenger had been sitting, renders the remaining evidence sufficiently inconclusive as to whether the defendant knew of the presence of the cocaine or had intent to exercise dominion and control over the cocaine.” *Id.*

In reaching the decision in *Salas*, this Court reiterated that mere presence in the premises or vehicle where contraband is located is not enough to establish constructive possession where occupancy is not exclusive. *Id.* Where a defendant is not the sole occupant and does not have sole access to contraband, additional evidence is required in order to establish constructive possession. *Id.* Such additional evidence did not exist under the circumstances in *Salas*.

The factual evidence in this case, however, is inconclusive as to whether defendant knew of or possessed cocaine. Although defendant owned and occupied the vehicle, the ownership and occupancy were not exclusive. Defendant’s wife was a co-owner of the vehicle and there were two passengers in the vehicle at the time of the arrest. One passenger had better access to the spot where the cocaine was found than did defendant. Further, defendant denied the presence of cocaine before the search, did not try to escape the scene during the search, denied putting the cocaine in the vehicle after it was discovered, and did not have drugs or drug paraphernalia on his person at the time of the arrest. The drug itself was found in an area that was not easily accessible to the defendant. There had been a backseat passenger close to where the drug was found, and this passenger was seen moving around in a furtive manner just before the traffic stop. In addition, the statement spontaneously uttered by defendant that “they put it there” lends further support to the assertion that defendant did not exercise control over the cocaine. Neither [officer] testified that defendant carried a package to his vehicle, talked suspiciously with other passengers, was in the back seat or reached to the back seat, or that defendant’s behavior was suspicious in anyway.

Id. at 1389. Because the evidence failed to establish a connection between Salas and the cocaine that proved he had knowledge of the cocaine and the intent and ability to exercise dominion and control over it, this Court reversed the conviction. *Id.* at 1340.

This Court's decision in *Bryan* likewise held that the State failed to establish constructive possession of items seized in defendant's home. In reaching that decision, this Court considered a number of factors including:

First, defendant was not present at the time the items were found. Second, although defendant may have had access to the items found in her home, there is no evidence that she used or intended to use the items for illegal purposes. Third, there was no evidence that defendant participated in the mutual use of the items seized. Lastly, defendant made no statements, incriminating or otherwise.

Bryan, 1999 UT App 61, ¶9. This Court "agree[d] with defendant's argument that the fact that she lived in a house with her husband where the items were found "is as fully explained by her attachment to her husband as it might be by a control over the [items seized.]"" *Id.* (further citations omitted). And, this Court emphasized that "neither possibilities nor probabilities can substitute for certainty beyond a reasonable doubt" and also that "[i]n cases relying on constructive possession, [the State's] burden requires a presentation of extensive and detailed facts." *Id.* at ¶10.

By contrast, the State established sufficient evidence of constructive possession in circumstances where the contraband is directly linked to the defendant. *See, e.g., Hansen*, 732 P.2d at 131-32; *Workman*, 2005 UT 66, ¶¶29-35. For example, in *Hansen*, the evidence was sufficient where the contraband was found in a metal box "stashed" under the defendant's clothing, the metal box was locked with defendant's lock, the

defendant lied and denied that he had the key even though it was in his pants pocket, and drug scales were on defendant's bookshelf. *Hansen*, 732 P.2d at 132. In that case, defendant clearly occupied the room since officers entered when he was still sleeping in his bed. *Id.* at 127. The evidence in addition to occupancy directly linked him to the contraband since it was in his bedroom, found under a pile of his dirty laundry, and he had a key to the box containing the contraband. *Id.* at 132.

And in *Workman*, the totality of the circumstances also established a sufficient nexus between defendant and the clandestine lab found in the bedroom she occupied with another. *Workman*, 2005 UT 66, ¶35. Workman's personal items, including day planner, driver's license, and identification were intermingled on a shelf with "a Tupperware-type container holding pills and a plastic container holding a meth pipe and glass loading rod;" her fingerprint was on the Tupperware container. *Id.* at ¶¶3, 34. She made statements "that could imply that she had a guilty conscience," and "admitted to buying some of the containers and glassware that were being used in the lab." *Id.* at ¶34. And, "she admitted to previous drug use, including meth use." *Id.* Although the Court recognized that "[t]aken alone, it is not likely that any one, or even a small group, of these factors would be enough to establish a sufficient nexus between Workman and the clandestine lab," "the cumulative effect of these factors" created the sufficient nexus. *Id.* at ¶35; *see also State v. Martin*, 2011 UT App 112, 251 P.3d 860 (holding evidence established a sufficient nexus to prove constructive possession beyond a reasonable doubt where contraband was found in the backseat of police car where defendant had been the sole

occupant, the drugs were found where defendant had been seated, and defendant had moved around in the backseat).

The evidence in this case failed to establish constructive possession since it failed to prove beyond a reasonable doubt a nexus between the methamphetamine in the metal box and Gonzalez-Camargo “sufficient enough to allow an inference that Gonzalez-Camargo had both the ability and the intent to exercise dominion and control over the drug.” The marshaled evidence is as follows:

1. Gonzalez-Camargo was present in the apartments, along with at least a dozen other people, shortly after midnight when officers executed the search warrant. R. 345:123, 160, 227.
2. Appellant talked with officers while being detained outside. He asked whether there was a problem or if the officers were looking for someone. R. 345:121, 161, 228, 258.
3. Agent Spann testified that Gonzalez-Camargo asked about the welfare of his girlfriend and told him that he lived with his girlfriend in Apartment D. R. 345:228-29. He also testified that after he was inside, Gonzalez-Camargo gestured toward the northwest bedroom, indicating it was his. R. 345:233-34.
4. When Agent Call entered the premises, the metal box containing contraband was on the bed in the northwest bedroom. R. 345:126. He thought there was also a meth pipe. R. 345:126. But he and the other agents with the Attorney General’s office entered the bedroom over an hour after the SWAT team members and at least one canine unit had gone through the apartment, and did

not know whether the items had been moved, where they had been originally located, or whether the metal box was locked. R. 345:161, 248. There was no testimony from the person who first located the metal box or meth pipe indicating this information.

5. Agent Call testified that plastic baggies, a scale, and a meth pipe were also found. R. 345:127, 128.
6. Men's clothing was found in the northwest bedroom. R. 345:174, 175, 178. The officers also found computers in that bedroom. R. 345: 174, 175, 178. Cellphones were also ultimately located in the bedroom but it is unclear precisely where they were found. R.345:181.
7. Agents testified that when they walked past Gonzalez-Camargo carrying computers, Appellant asked where they were going with his computers and gestured toward the northwest bedroom, saying the computers were his. R. 345:207, 232, 233. They said Appellant told them that he repaired computers for a living and the computers were not stolen. R. 345:208, 232; 346:21, 84.
8. Gonzalez-Camargo's girlfriend was also arrested. An officer testified that he thought only one woman was arrested. R. 346:88. A woman who was being detained asked for a specific item out of her purse; that purse was in the northwest bedroom. R. 346:88. The room contained purses, a jewelry box, and women's clothing. Exh. 6

This marshaled evidence is even less compelling than the evidence linking defendants to the contraband in *Salas*, *Clive Fox*, *Bryan*, and *Layman*, where Utah

appellate courts have held that the State's evidence failed to prove a sufficient nexus between the defendant and the contraband. The evidence therefore failed to establish beyond a reasonable doubt that Gonzalez-Camargo constructively possessed the contraband found in the metal box.

None of the factors relied on in establishing constructive possession are present in this case. In fact, regardless of whether the evidence established that Gonzalez-Camargo occupied the bedroom with his girlfriend, there is no additional evidence linking him to the methamphetamine found in the metal box. It is just as possible, if not more so, under the evidence presented in this case that the girlfriend or someone else possessed the methamphetamine. Under these circumstances, the State failed to prove that Gonzalez-Camargo had the ability and intent to exercise dominion and control over the drugs.

The only evidence linking Appellant to the northwest bedroom was the officers' testimony that he said he shared that room with his girlfriend and claimed that the computers found in that room were his, and men's clothing found in that room. R. 345:233-34, 228-29, 207. But even if the evidence was sufficient to establish that Gonzalez-Camargo occupied the bedroom on occasion, that evidence did not link Gonzalez-Camargo to the methamphetamine in the metal box. Additional evidence was needed to establish the requisite nexus between Gonzalez-Camargo and the contraband; such additional evidence was not introduced. Because the State did not present additional evidence establishing a sufficient nexus, the conviction for possession of a controlled substance must be overturned. *See Fox*, 709 P.2d at 320.

As was the case in *Salas*, *Layman*, and *Clive Fox*, the evidence did not establish that Appellant was engaged in a criminal enterprise rather than a bystander. *See Fox*, 709 P.2d at 320. The contraband was located in a metal box in a room dominated by female possessions and containing the identification of a female who was also arrested; very few male effects other than men's clothing were in the room, and it was not clear from the evidence whether the clothing was hanging in a closet or stored in a bag. Purses, perfume, makeup, and women's clothes were found throughout the room. Exh. 6. Because the State did not present evidence as to where exactly the metal box was found, the contraband could have been found wrapped in female clothing or a drawer with female possessions which would demonstrate that it belonged to someone other than Gonzalez-Camargo. In any event, there was no evidence that the contraband was found among male possessions or otherwise linked to Gonzalez-Camargo. Appellant did not have contraband or paraphernalia on him, and nothing else linked him to the metal box containing contraband. In all, the State failed to introduce evidence establishing that Gonzalez-Camargo intended to exercise dominion and control over the contraband; any other of the dozen or more people, including the female in whose room the contraband was located, could have been in possession.

The factors often considered in determining whether a defendant constructively possessed contraband work against the State in this case. *See, e.g., Bryan*, 1999 UT App 61, ¶8; *Layman*, 953 P.2d at 788. In fact, none of those factors demonstrate that Gonzalez-Camargo constructively possessed the contraband. Considered together, the factors show that the State's evidence was so inconclusive that it failed to prove beyond a

reasonable doubt that Gonzalez-Camargo constructively possessed the methamphetamine.

First, Gonzalez-Camargo was not present when officers found the methamphetamine. Like the other twelve or more people who had been inside the apartments when the SWAT team arrived, Gonzalez-Camargo was taken outside before officers entered the premises and began conducting the search. R. 345:121, 258, 232. There is no evidence that the drugs were in plain view when the search began or that Gonzalez-Camargo had seen the drugs. They were in a metal box that was closed when at least some of the officers saw it; it is not clear whether it was also locked. Since there is no evidence as to where the box was found or whether it was open, closed or locked, and Gonzalez-Camargo was outside when the metal box was located, the first factor weighs against a finding of constructive possession. In fact, it is as likely that the methamphetamine was locked up and hidden among female possessions or deposited in the bedroom by one of the many people exiting the apartments as it was that Gonzalez-Camargo was aware of the existence of the meth and had the ability and intent to exercise dominion and control over it.

The second factor also weighs against a finding of constructive possession since there is no evidence that Gonzalez-Camargo had access to the methamphetamine. By failing to introduce evidence as to where the metal box was found or evidence as to whether it was locked, the State failed to establish that Gonzalez-Camargo had access or that he used or intended to use the methamphetamine. *See Bryan*, 1999 UT App 61, ¶9.

The State likewise failed to prove that Gonzalez-Camargo was in close proximity to the methamphetamine for the same reasons. Even if it were reasonable to infer that Gonzalez-Camargo stayed over in the northwest bedroom, the State's evidence failed to prove that he had the ability to exercise dominion and control over the methamphetamine located in the metal box. The State needed to establish, among other things, where the drugs were found, whether the metal box was locked or open, and other evidence linking Gonzalez-Camargo to the methamphetamine in order to establish that Appellant constructively possessed the drugs.

The evidence also failed to establish that Gonzalez-Camargo participated in the mutual use or enjoyment of the methamphetamine. Unlike *Workman*, there is no evidence the drugs were comingled with Appellant's belongings. See *Workman*, 2005 UT 66, ¶32. The bedroom contained predominantly female belongings and there is no evidence the metal box was found among the men's clothing or computers that were being stored in the bedroom. Although officers testified that plastic baggies, a scale, and a pipe were also found, their testimony was unclear as to where those items were initially located. R. 345:127, 128. As was the case with the metal box containing methamphetamine, the officer who found these items did not testify and the State's failure to establish where these items were found precludes the State from linking them to Appellant since the pipe, baggies and scale could have been found among female possessions or inside the metal box.

Finally, Gonzalez-Camargo did not make incriminating statements about the methamphetamine. Although the evidence shows he acknowledged that the computers

were his, he said nothing that showed he was aware of the drugs, let alone that would suggest that he intended to exercise dominion and control over them. In fact, his acknowledgment that he shared the northwest bedroom would suggest the opposite – that he was unaware that there were drugs in that room.

As was the case in *Bryan*, “the factual evidence in this case is inconclusive as to whether [Gonzalez-Camargo] possessed the [methamphetamine].” *Bryan*, 1999 UT App 61, ¶11. Even if the evidence showed that Gonzalez-Camargo occupied the northwest bedroom, that evidence “is as fully explained by [his] attachment to [his girlfriend] as it might be by a control over [the methamphetamine].” *Id.* at ¶9 (further citations omitted). And, evidence in addition to occupancy is required to establish constructive possession. *Hansen*, 732 P.2d at 131-32; *Layman*, 1999 UT 79, ¶13.

Like *Salas*, the evidence was “sufficiently inconclusive as to whether [Gonzalez-Camargo] knew of the presence of the [meth] or had the intent to exercise dominion and control over [it]” because the room appeared to belong to a female, Gonzalez-Camargo’s girlfriend was also charged, and there was a reasonable possibility under this evidence that someone other than Appellant possessed the meth. *See Salas*, 820 P.2d at 1388. And, like *Layman*, “there was little evidence to prove that [Gonzalez-Camargo] had such control over [the methamphetamine] that one could reasonably infer beyond a reasonable doubt that he knowingly and intentionally possessed the drugs.” *Layman*, 1999 UT 79, ¶16. This case was even weaker than *Layman* since there were no looks exchanged between Gonzalez-Camargo and his girlfriend and nothing indicating Appellant knew the metal box existed or that metal box had methamphetamine in it.

The drugs were not found among Gonzalez-Camargo's "personal effects or in a place over which [Gonzalez-Camargo] ha[d] special control." *Fox*, 709 P.2d at 319. He made no statements that suggested drug involvement on his part and did not engage in behavior that suggested drug involvement. Gonzalez-Camargo's questions to officers were just as likely to have been caused by the fact that he spoke English or was concerned about his girlfriend, as they were by any concern about the apartments' contents. And, his willingness to talk with officers and say he shared the northwest bedroom with his girlfriend would suggest that he was unaware that drugs were in that room since it was evident that the large SWAT team and numerous officers were looking for contraband. Nor was paraphernalia or evidence of drug use or involvement found among Appellant's personal effects. Hence, the factors considered in *Fox* did not combine in this case to establish constructive possession.

Because the State did not produce evidence establishing that Gonzalez-Camargo knew about the methamphetamine and had the ability and intent to exercise dominion and control over it, the State failed to establish constructive possession. In this case where it is just as likely that Gonzalez-Camargo did not know about the metal box or its contents or did not have the ability and intent to exercise dominion and control over the contraband, the State's evidence fails and the conviction for possession should be overturned.

POINT II. EVIDENCE OF POLICE REPORTS THAT THE COMPUTER HAD BEEN STOLEN WAS IMPROPERLY ADMITTED.

Rather than calling the owner of the computer to testify that it had been stolen, the State relied solely on the hearsay testimony of a university police officer who testified that the computer had been reported stolen. This testimony was inadmissible hearsay. Because the State did not present any other evidence proving that this or any other item was stolen, the conviction for misdemeanor theft by receiving stolen property should be overturned.¹

A detective from the Utah State (USU) police department testified that he spoke with agents at the Attorney General's office who gave him the make, model, and serial number of a specific computer, then "verified that a computer was owned by the university." R. 346:37, 40, 48. The detective spoke with USU's equipment manager and "verified the information." R. 346:40-4. And he accessed USU records, including stolen property reports, and testified that the computer was reported stolen in those reports. R. 346:44-45. Although defense counsel repeatedly objected to the hearsay testimony (R. 346:36, 37, 38-40, 41, 43, 42, 44, 45), the trial court nevertheless admitted it, indicating that the stolen property reports were business records and the officer could testify

¹ Agent Call's testimony that one of the laptops belonged to someone else and had been reported stolen (R. 345:134) was also inadmissible hearsay. Defense counsel objected and read in context, it appears that the objection was sustained. R. 345:134. But if it was not, it should have been since the statement was hearsay under Rule 802 and did not fit within the business records or any other exception. The inadmissibility of this hearsay was obvious, and although the testimony was not enough to prove beyond a reasonable doubt that the computer was stolen, to the extent it contributed, it was prejudicial. Hence, even if counsel had not objected, the trial court would have plainly erred in admitting the testimony. *See State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993) (outlining test for plain error; *see also infra* at 34, 38, 43).

regarding those reports “if he’s entitled to review those and utilize those in the ordinary course of business . . .,” and overruled counsel’s objections that hearsay police reports are not admissible. R. 346:43. This ruling was contrary to the Rules of Evidence, case law, and Appellant’s right to confrontation, and the erroneous admission of the evidence prejudiced Gonzalez-Camargo.

A. The admission of hearsay testimony that the computer had been stolen violated the rules of evidence and requires that the conviction for receiving stolen property be overturned.

Under the rules of evidence, “[h]earsay is not admissible except as provided by law or by [the rules of evidence].” Utah R. Evid. 801. Hearsay is defined under the rules as “an oral or written assertion,” or conduct if intended as an assertion, “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. 801. Although the rules of evidence do allow the admission of hearsay under certain limited exceptions, “[h]earsay statements have been generally discredited because they . . . lack trustworthiness” and also because “the person purporting to know the facts is not stating them under oath.” *State in the Interest of K.D.S.*, 578 P.2d 9, 12 (Utah 1978). Moreover, even if evidence would otherwise be admissible under the rules of evidence, its admission is erroneous if it violates the defendant’s right to confrontation. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004).

While hearsay is generally inadmissible, the rules of evidence allow its admission under certain limited circumstances. *See* Utah R. Evid. 803, 804, 807. Contrary to the trial court’s ruling, however, this evidence did not fit within the business records

exception to the hearsay rule found in Utah R. Evid. 803(6). The improper admission of the hearsay evidence, which the State relied on to prove that property seized in the apartment had been stolen, affected the outcome of the receiving stolen property count, requiring reversal of that conviction.

In this case, the prosecutor and trial court looked to the business record exception outlined in Rule 803(6). R. 346:38-39, 43. Rule 803 outlines the exceptions to the hearsay rule which apply regardless of whether the declarant is available, provides in part that records “kept in the course of a regularly conducted business” are admissible if the custodian of the records or other qualified witness establishes that it was “the regular practice of that business” to keep the record, and the record was “kept in the course of regularly conducted business.” Utah R. Evid. 803(6). Hearsay evidence that fits within the following is not excluded, “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), Rules 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.

Utah R. Evid. 803(6). This exception was inapplicable not only because neither the records at issue nor the police officer qualified under the rule, but also because the

records themselves were not introduced and instead the officer testified regarding his memory of those records.

As a starting place, the police officer's testimony regarding what the records said was not admissible under this rule since the rule provides only for the admission of the *records* themselves. Utah R. Evid. 803(6). The officer's testimony about what he had read multiplied the hearsay, making it untrustworthy and unreliable. The trial court therefore erred in allowing the officer to testify as to what he read based on this rule.²

Additionally, the business records exception does not apply in this context even if the records themselves had been offered because police reports offered by the State in support of its prosecution are too unreliable to qualify under the rule. *See Layton City v. Peronek*, 803 P.2d 1294, 1297-98 (Utah Ct. App. 1990); *State v. Bertul*, 664 P.2d 118, 1185-86 (Utah 1983). As this Court recognized in *Peronek*, the supreme court held in *Bertul* "that police reports made for the purpose of prosecuting an offense and offered by the prosecution lack sufficient reliability so as to be admissible under the business records exception." *Peronek*, 803 P.2d at 1297 (citing *Bertul*, 664 P.2d at 1184). This is because such reports are not made as part of regularly conducted business and are made with an eye toward prosecution, thereby undermining their reliability. *See also*

² Admission of the detective's testimony regarding the contents of the records also violated the "best evidence rule" found in Rule 1002, Utah Rules of Evidence. *See* Rules 1001-06, Utah Rules of Evidence; *see also State v. Ross*, 573 P.2d 1288 (Utah 1978) (reversing conviction under best evidence rule found in former Rule 70, Utah Rules of Evidence, where officer testified regarding contents of phone record). Although defense counsel did not object on these grounds, the error was obvious under Rule 1002 and case law, and it prejudiced Gonzalez-Camargo because no other evidence established that property was stolen. *See State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993) (outlining test for plain error); discussion *supra* at 31; *infra* at 38.

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2538 (2009) (indicating that documents do not qualify for federal business records exception where “the regularly conducted business activity is the production of evidence for use at trial.”)

Moreover, the business records exception does not apply here because the State did not meet the requirements for laying a foundation that would establish the reliability of those records. *See Bertul*, 664 P.2d at 1184. The supreme court outlined four factors that should generally be met in order to allow admission under the business records exception:

(1) The record must be made in the regular course of the business or entity which keeps the records; (2) the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition or event recorded; (3) the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity; and (4) the sources of the information from which the entry was made and circumstances of the preparation of the document were such as to indicate its trustworthiness.

Id. The detective did not address any of these factors. In fact, the evidence gives no information as to how the records the detective reviewed were prepared or when they were made in proximity to the event. His testimony also did not support a determination that the integrity of the documents was preserved after recordation or that “the sources of the information from which the entry was made and the circumstances of the preparation of the document were such as to indicate its trustworthiness.” *See id.* The detective’s testimony regarding the university records he had reviewed was inadmissible not only because the records themselves were not being offered but also because the foundational

requirements under the business records exception were not met. *See Peronek*, 803 P.2d at 1297.

And, the testimony regarding university records the detective reviewed was not admissible under the business records exception because the detective was not the custodian of the records or an otherwise qualified witness. As was the case in *Peronek*, the detective's testimony demonstrated that he was not the custodian of the records. *See id.* at 1298 (indicating police officer was not custodian of records of incidents reports or other qualified witness under business records exception where he "had no knowledge of the circumstances of the report's creation, and had no custodial responsibility for the report). The detective's testimony did not establish that he had knowledge of how the reports were prepared or custodial responsibility for them. The detective worked for the Utah State University Police Department. R. 346:35. In that capacity, he had *access* to records compiled by the university. R. 346:35-37. Based on that *access* and the ability "to review those and utilize those in the ordinary course of business," the trial court allowed the detective to testify regarding what he had read in stolen property reports. R. 346:43, 44. But that is not what the rule requires. *See* Utah R. Evid. 803(6). Instead, it requires that a person with personal knowledge testify regarding whether the record was made in the course of regularly conducted business, the proximity to the event with which the record was made, details regarding the keeping of the record to ensure its integrity, and information regarding the sources of the information and the manner in which it was made, as outlined in *Bertul*.

In fact, the court recognized in *Bertul* that “[g]enerally, the requisite foundation can be made by the custodian of the records.” *Bertul*, 664 P.2d at 1184. The fact that the detective did not testify as to any of the *Bertul* factors further demonstrates that he was not the custodian or otherwise qualified to testify as to how the records were made or kept.

In all, the detective’s testimony regarding records he had reviewed was inadmissible hearsay. It did not qualify under the business records exception since the records themselves were not admitted, he was not the custodian, the testimony did not establish the requisites for qualifying under the business records exception, and the records were police reports. The trial court therefore erred in admitting the records under the business records exception.³

The error in admitting the hearsay testimony requires that the conviction for receiving stolen property be overturned. Courts will overturn a conviction based on the erroneous admission of evidence where “there is a “reasonable likelihood that the error affected the outcome of the proceedings.”” *Workman*, 2005 UT 66, ¶23 (further citations omitted). In this case, the detective’s hearsay testimony was necessary to the State’s case since it did not otherwise establish that the property was stolen. The State did not present

³ Nor does the testimony qualify under Rule 803(8)(B), Utah Rules of Evidence. First, the records themselves were not admitted so the exception found in Rule 803(8)(B) does not apply and, as outlined in footnote 1, the officer’s testimony regarding the contents of the records also violated the best evidence rule. Second, the State failed to establish that the records were public records under the rule. Third, the exception excludes in criminal cases “matters observed by police officers and other law enforcement personnel,” making the public records exception inapplicable. Hence the public records exception found in Rule 803(8)(B) does not provide an alternative grounds for affirmance in this case.

any witnesses who purported to own the computers found in the northwest bedroom. Instead, the State relied solely on this hearsay testimony regarding one of the computers to establish its charge that Gonzalez-Camargo committed theft by receiving stolen property. Without the testimony, the State failed to prove beyond a reasonable doubt that the computers were stolen.

The only other evidence presented by the State that even touched on whether an item was stolen was itself objectionable and also was so weak that it could not sustain that element alone or withstand the fact that the error in allowing the detective to testify to the contents of reports requires reversal. Agent Call testified that “one of the laptops we recovered was reported stolen” and also that he had returned one of the laptops. R. 345:133-34. Defense counsel objected on hearsay grounds and read in context, it appears the trial court sustained that objection. R. 345:134. But even if the court did not sustain that objection it was error to allow that testimony for the same reasons it was error and also plain error to allow Detective Ellis’s testimony. *See plain error discussion supra* at 34, *infra* at 43. Agent Call’s testimony indicating that the computer was reported stolen and returned was obviously hearsay that did not fit within an exceptions; it was prejudicial since the State did not present testimony from any of the owners that items found in the bedroom were stolen. *See Dunn*, 850 P.2d at 1203. Moreover, these statements were general and vague, and failed to tie the computer to one taken from the northwest bedroom or to Appellant. Even if Agent Call’s testimony was admissible and considered, the error in admitting the detective’s testimony affected the outcome and requires reversal because the State did not otherwise prove that a computer was stolen.

The Utah State sticker on the computer also did little to demonstrate that it was stolen. The computer could have been sold, on loan, or under repair.

Nor did the State otherwise establish that Gonzalez-Camargo received stolen property based on other items found in the apartments. It failed to link the cellphones to Appellant and also failed to establish they were stolen. Although an officer testified that one of the cellphones had the picture of his neighbor's daughter, the State failed to present testimony from the owner of the cellphone establishing that it had been stolen rather than given away or sold. And, the State failed to establish in any way that Appellant actually or constructively possessed the phones. Hence the existence of a number of cellphones in the apartment did not prove the State's stolen property case against Gonzalez-Camargo.

Under these circumstances where the hearsay testimony was the only evidence arguably demonstrating that property possessed by Appellant was stolen, the erroneous admission of the hearsay affected the outcome. A new trial on the stolen property count is required.

B. Appellant's right to confrontation was also violated by the erroneous admission of the hearsay evidence.

Allowing the detective to testify regarding police reports he had read also violated Gonzalez-Camargo's Sixth Amendment right to confrontation. *See Crawford v. Washington*, 541 U.S. 36 (2004). The right to confrontation is a "bedrock procedural guarantee [that] applies to both federal and state prosecutions." *Id.* at 42. Regardless of

whether evidence is admissible under the rules of evidence, it can nevertheless violate a defendant's right to confront the witnesses against him. *Id.* at 50-51.

"Statements taken by police officers in the course of" investigation are testimonial in nature. *Crawford*, 541 U.S. at 52; *see also Salt Lake City v. Williams*, 2005 UT App 493, ¶17, 128 P.3d 47 (citing cases "attempt[ing] to define 'testimonial'"). Their admission is barred by the Confrontation Clause unless the witness is unavailable, and the defendant "had a prior opportunity for cross-examination," regardless of whether the hearsay is otherwise reliable. *Crawford*, 541 U.S. at 53-54; *see also Melendez-Diaz*, 129 S. Ct. at 2531 (holding that forensic and laboratory certificates were testimonial in nature and subject to Sixth Amendment confrontation protection where they were prepared "under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial."). The Supreme Court has therefore made clear that "[a] witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had the prior opportunity for cross-examination." *Melendez-Diaz*, 129 S. Ct. at 2531 (citing *Crawford*, 541 U.S. at 51-52).

Testimonial statements subject to the Confrontation Clause protection apply to statements made to police to establish events relevant to a criminal prosecution. *See Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also Williams*, 2005 UT App 493, ¶17 (recognizing that "testimonial" has been defined to include statements where "a reasonable person . . . would objectively foresee that his statement might be used in the investigation or prosecution of a crime") (further citation omitted). Although *Crawford*

did not outline a precise “definition of ‘testimonial,’” it made clear that “testimonial” “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 U.S. at 66. And *Davis* further clarified that police reports made with an eye toward prosecution are testimonial in nature. *Davis*, 547 U.S. at 822. While the Supreme Court did not “produce an exhaustive classification of all conceivable statements” it did recognize that

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal investigation.”

Id. The Court further clarified that “statements made in the absence of any interrogation” can also be testimonial in nature. *Id.* n.1. Moreover, certificates from lab analysts “showing the results of forensic analyses” are testimonial in nature and protected by the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2527.

Like the certificates in *Melendez-Diaz*, “[t]here is little doubt” that the police reports indicating that the computer was stolen “fall within ‘the core class of testimonial statements’” outlined in *Crawford*. See *Melendez-Diaz*, 129 S. Ct. at 2532 (citing *Crawford*, 541 U.S. at 51-52). Because “‘a reasonable person . . . would objectively foresee’” that such stolen property reports would be used as part of a criminal investigation, the stolen property reports were testimonial in nature, implicating the Confrontation Clause. *Williams*, 2005 UT App 493, ¶17 (further citations omitted).

Also like *Melendez-Diaz*, “[t]his case involves little more than the application of [the] holding in *Crawford*.” *Melendez-Diaz*, 129 S. Ct. at 2542. “[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses” *Id.* at 2540. In this case, the State failed to present a witness with personal knowledge as to whether the computer was stolen when it failed to call the person who had reported it stolen. Introducing the police reports of stolen property would have violated Gonzalez-Camargo’s right to confrontation; the State compounded that error by presenting the detective’s testimony regarding what the reports said, thereby multiplying the hearsay and precluding Gonzalez-Camargo any opportunity for cross-examination on the issue of whether the computer was in fact stolen.

When the admission of evidence violates a defendant’s right to confrontation, the State must establish that the evidence was harmless beyond a reasonable doubt. *State v. Calliham*, 2002 UT 86, ¶46, 55 P.3d 573. In this case, the State cannot establish that the error in relying on reports of stolen property to establish that the computer was stolen was harmless beyond a reasonable doubt. The State did not present other evidence establishing that Appellant received any items that had been stolen. In fact, the only evidence aimed at establishing that property had been stolen was the detective’s hearsay testimony and apparently a Utah State sticker on one computer. But the sticker itself would not establish that the computer had been stolen; the computer could have been sold or on loan or out for repairs. The State needed the owner or custodian of the computer to testify that it had been stolen. Nor did the State establish its case through the cellphones. While one cellphone had the picture of a girl who was the daughter of an officer’s

neighbor, the State did not put on evidence that the phone was stolen. And, even if it had, the State did not tie Appellant to the cellphones. Instead, the State rested its stolen property case on the computers but failed to present evidence demonstrating they were stolen.

Under these circumstances, the violation of Appellant's right to confrontation was not harmless beyond a reasonable doubt. Although defense counsel repeatedly objected to the hearsay testimony, she did not explicitly address the confrontation violation. Nevertheless, this error can be remedied under a plain error review. *See Dunn*, 850 P.2d at 1208.

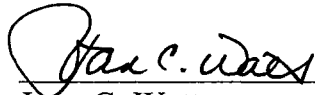
Plain error requires reversal where "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome" *Id.* Because this error "involves little more than the application of [the] holding in *Crawford* (*Melendez-Diaz*, 129 S. Ct. at 2532), it should have been obvious to the trial court. *Melendez-Diaz*, *Davis*, and *Crawford* make it clear that a defendant has the right to confront a person making a testimonial police report to police officers. The error was therefore obvious under Supreme Court case law.

The error was also harmful as outlined above. Without the testimony, the State had no evidence demonstrating that Appellant possessed stolen property. The improper admission of this testimony therefore requires a new trial because without the hearsay, there was a reasonable likelihood of a more favorable outcome.

CONCLUSION

Appellant/Defendant Fernando Gonzalez-Camargo respectfully requests that his conviction for possession be overturned and an acquittal be entered based on the insufficient evidence of constructive possession presented at trial. Appellant further requests that the conviction for receiving stolen property be reversed based on the improper admission of hearsay testimony that a computer was stolen, in violation of the rules of evidence and Appellant's right to confrontation.

SUBMITTED this 4 day of August, 2011.



Joan C. Watt
Andrea Garland
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Joan C. Watt, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 4 day of August, 2011.



JOAN C. WATT

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this ___ day of _____, 2011.

Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH ATTORNEY GENERAL, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
:
vs. : Case No: 091907747 FS
FERNANDO GONZALEZ-CAMARGO, : Judge: ROYAL I HANSEN
Defendant. : Date: December 6, 2010

PRESENT

Clerk: lynettm
Prosecutor: TAYLOR, JACOB S
Defendant
Defendant's Attorney(s): GARLAND, ANDREA J

DEFENDANT INFORMATION

Date of birth: November 18, 1980
Audio
Tape Number: S41 Tape Count: 1100-1124

CHARGES

1. POSS W/ INTENT TO DIST C/SUBSTANCE (amended) - 3rd Degree Felony
Plea: Guilty - Disposition: 06/30/2010 Guilty
2. THEFT BY RECEIVING STOLEN PROPERTY (amended) - Class B
Misdemeanor
Plea: Guilty - Disposition: 06/30/2010 Guilty

SENTENCE PRISON

Based on the defendant's conviction of POSS W/ INTENT TO DIST
C/SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an
indeterminate term of not to exceed five years in the Utah State
Prison.
The prison term is suspended.

ALSO KNOWN AS (AKA) NOTE

JOSE PENA

SENTENCE JAIL

Based on the defendant's conviction of POSS W/ INTENT TO DIST
C/SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to a
term of 365 day(s)
Based on the defendant's conviction of THEFT BY RECEIVING STOLEN
PROPERTY a Class B Misdemeanor, the defendant is sentenced to a
term of 180 day(s) The total time suspended for this charge is 180
day(s).
Credit is granted for time served.
Credit is granted for 11 day(s) previously served.

SENTENCE JAIL SERVICE NOTE

Deft to complete CATS and the court will consider early release upon completion

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

charges run consecutive

Charge # 1

Charge # 2 Fine: \$1180.00
 Suspended: \$0.00
 Surcharge: \$560.00
 Due: \$1180.00

 Total Fine: \$1180.00
 Total Suspended: \$0
 Total Surcharge: \$560.00
Total Principal Due: \$1180.00
 Plus Interest

SENTENCE TRUST

The defendant is to pay the following:

Attorney Fees: Amount: \$400.00 Plus Interest

Pay in behalf of: SLCO TREASURER

The amount of Attorney Fees is to be determined by Adult Probation & Parole.

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 365 day(s) jail.

Defendant is to pay a fine of 1180.00 which includes the surcharge.
Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation & Parole.
Violate no laws.

No contact with victim(s).

Enter, participate in, and complete any program, counseling or treatment as directed by probation agency.

Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.

Do not frequent any place where drugs are used, sold or otherwise distributed illegally.

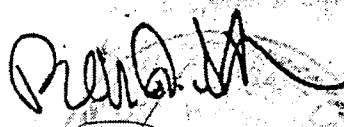
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.

Refrain from the use of alcoholic beverages.

Case No: 091907747 Date: Dec 06, 2010

Not to possess alcohol nor frequent places where alcohol is the chief item of sale.
Obtain a substance abuse evaluation and successfully complete any recommended treatment.
Obtain and maintain full-time verifiable employment and/or schooling.
Participate in and complete any educational and/or vocational training as directed by probation agency.
Submit to curfew, random UA's and ankle monitor if deemed necessary by Adult Probation and Parole.
CATS aftercare
GED with in 12 months
No contact with co-defendants. AP&P to look into contact w/child and/or third party
Current child support

Date: 12/6/10



ROYAL I HANSEN
District Court Judge
By _____
STAMP USED AT DIRECTION OF JUDGE

STATE OF UTAH) ss. _____
County of Salt Lake)
I, the undersigned, Clerk of the District Court, State of Utah, Salt Lake County, Salt Lake Department do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.
Witness my hand and seal of said Court This 9 day of 11 20 11

CLERK OF COURT
By _____ Deputy

ADDENDUM B

ADDENDUM B

Tab B

THIRD JUDICIAL DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 091907747FS
	:	
Plaintiff,	:	Appellate Court Case No. 20110027
	:	
v	:	Volume II of II
	:	
FERNANDO GONZALEZ CAMARGO,:	:	
	:	
Defendant.	:	With Keyword Index

JURY TRIAL JUNE 29 & 30, 2010

BEFORE

THE HONORABLE ROYAL I. HANSEN

FILED DISTRICT COURT
Third Judicial District

MAR 21 2011

SALT LAKE COUNTY

By _____ Deputy Clerk **MD**

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

FILED
UTAH APPELLATE COURTS

APR -7 2011

20110027-CA

ORIGINAL

1 THE COURT: You may.

2 MS. GARLAND: I've brought you some copies of the
3 Fox, and Layman, and Spanish Fork v. Brian cases, and I've
4 highlighted the relevant language in all of them. I think if
5 you go through - here's Fox, and then here's Layman, and
6 here's Brian. There you go.

7 THE COURT: All right, thanks.

8 MS. GARLAND: Those set forth the law regarding
9 constructive possession. And in State v. Fox, on 319 it
10 says, "That constructive possession exists where the
11 contraband is subject to defendant's dominion and control."
12 However, it goes onto say. "Persons who might know of the
13 whereabouts of illicit drugs and who might even have access
14 to them, but have no intent to obtain and use the drugs
15 cannot be convicted of possession of a controlled substance.
16 Knowledge and ability to possess do not equal possession
17 where there's no evidence of intent to make use of that
18 knowledge and ability."

19 And then going onto State v. Layman, that's on page
20 913. I believe it's paragraph 13 with the little paragraph
21 sign. Interpreting Fox, they say there must be facts which
22 show that the accused intended to use the drugs or
23 paraphernalia as his own. And later on in Spanish Fork v.
24 Brian where they're interpreting both State v. Fox and State
25 v. Layman, they're talking about a case where the Spanish

1 Fork police got a complaint that narcotics were being used a
2 residence. They got a search warrant. They found contraband
3 under the mattress that the defendant shared with her
4 husband, and they found other items in the residence in plain
5 view, including a roach clip, zig-zag papers, other
6 paraphernalia. And Spanish - in Spanish Fork v. Brian, the
7 court said - interpreting these prior cases with those facts.
8 "Although the defendant most certainly knew of the existence
9 of the items and their potential for illegal use, evidence
10 must raise a reasonable inference that defendant was engaged
11 in a criminal enterprise and not simply a bystander." And I
12 think that those cases set forth what is required to
13 establish a prima facie case of constructive possession, and
14 I think - although they're talking about narcotics, the
15 reasoning certainly applies to both guns and stolen property.
16 Here, they're saying that Mr. Gonzalez-Camargo was brought
17 into an apartment where they're saying that he said he lived,
18 and they're saying that he said that he owned some laptops,
19 and that's what their testimony is. The testimony from Ed
20 Spann was kind of confusing. He said that - I think he said
21 that Mr. Gonzalez-Camargo made some kind of a head motion
22 that he interpreted as meaning the northwest bedroom. But
23 even there, Your Honor, taking all that as absolutely true,
24 that doesn't meet these standards that's been - that have
25 been set out in - by prior courts on constructive possession.

1 There's no evidence that - there's - we've heard no evidence
2 of any connection that Mr. Gonzalez-Camargo would have had to
3 the drugs or the guns or the stolen property with the
4 exception perhaps of some laptops. We don't know what the
5 value of those laptops were. It's - you know, there's been
6 no evidence as to the value of those laptops, Your Honor.

7 Taking all the evidence in favor of the State as we
8 must at this point, they still haven't established a prima
9 facie case either of constructive possession or that the
10 value of the laptops reaches \$5,000. And for that reason, I
11 would ask for directed verdicts.

12 THE COURT: Thank you.

13 MS. GARLAND: Thank you.

14 THE COURT: And, Mr. Taylor, anything further from
15 the State as well on those issues?

16 MR. TAYLOR: Your Honor, regarding constructive
17 possession, the facts that support constructive possession
18 are as follows. The defendant acknowledge - himself
19 acknowledge that the laptops were ones that he was repairing.
20 Those were laptops that agents testified came from the
21 northwest bedroom.

22 On top of that, there's evidence that - he stated
23 that he lived in the apartment with his girlfriend. He
24 testified that his girlfriend is Jobilee Lucero. There's
25 evidence or there's testimony that it was her ID card that

1 was found in that northwest corner bedroom. If they're boy -
2 if they're girlfriend and boyfriend, it's reasonable to
3 conclude that he's staying in that bedroom. Also the
4 testimony that - or the evidence that he would stay there,
5 that he took clothes there. The way that I heard it. I
6 think all -

7 MS. GARLAND: Well, -

8 MR. TAYLOR: Hold on.

9 THE COURT: I'm going to give you a chance to
10 respond too.

11 MS. GARLAND: I know it's just that the motion for
12 directed verdict goes to the State's evidence.

13 MR. TAYLOR: Then I'll try to limit it.

14 THE COURT: Yeah. That's - I think that's fair.
15 Go ahead.

16 MR. TAYLOR: The evidence that - he told Ed - Agent
17 Spann while he was outside that he lived in the apartment
18 with his girlfriend. He gestured towards apartment D. When
19 he was inside the apartment, he asked - he said - according
20 to Agent Spann, he said, those are my laptops. I'm just
21 repairing those. And he said that as they were bringing them
22 out of the northwest corner bedroom.

23 I would add to that - what I just said, which is
24 that his girlfriend is - the woman who was arrested, Jobilee
25 Lucer - the woman who was arrested, the woman who was wearing

ANDREA J. GARLAND (7205)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

FILED
THIRD DISTRICT COURT
10 AUG 26 PM 2:40
SALT LAKE DEPARTMENT
BY CLM
DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION FOR JUDGEMENT
	:	NOTWITHSTANDING VERDICT
Plaintiff,	:	AND TO ARREST JUDGEMENT
	:	Case No. 091907747
vs.	:	JUDGE HANSEN
	:	
FERNANDO GONZALEZ CAMARGO,	:	
	:	
Defendant.	:	

Defendant, by and through counsel, and pursuant to Utah Rule of Civil Procedure 50(b) for a judgment notwithstanding the jury's verdict in this matter. Mr. Gonzalez Camargo moves this Court to set aside the jury's verdict in the interests of justice and grant Mr. Gonzalez Camargo a directed verdict. Mr. Gonzalez Camargo moves also pursuant to Rule 23 of the Utah Rules of Criminal Procedure for this Court to arrest judgement against him.

FACTS

1. The State charged Mr. Gonzalez Camargo with Possession of Controlled

Substance with Intent to Distribute, a second degree felony, Receiving Stolen Property with a Value of or Exceeding \$5,000.00, a second degree felony, and Possession of a Weapon By Restricted Person, a third degree felony.

2. A jury trial was held before this Court on June 29, 2010 and June 30, 2010.
3. During the jury trial, the State put on a number of witnesses.
4. Brandon Call, an investigator for the Attorney General's office testified that he performed surveillance on the apartment earlier that day. He testified that he witnessed several hand-to-hand transactions that appeared to involve persons coming out of 813 North Riverside Drive, Apartment D, in Salt Lake City, Utah. The transactions did not appear to involve Mr. Gonzalez Camargo and he was not present when they took place.
5. The agents obtained a search warrant to enter both apartment D and apartment B, also on that same floor.
6. Steven Metcalf, an investigator for the Attorney General's office, testified that on the date of this arrest, he performed surveillance. He and Agent Carolina Herrin stopped a 2002 maroon Nissan Altima driven by either Angel Ovaedo Araya or Leandro Ramirez, that they found a number of items in the car and let the individual go.

7. The Attorney General's office agents waited to enter the apartment because the Salt Lake Police Department SWAT team first secured and entered the apartment. SWAT performed a "surround and call-out" maneuver in which they brought people out of the apartment before entering. There were numerous people brought out of the apartment, more than a dozen. Attorney General's office agents attempted to find out everyone's identity and try to find out who lived at the apartment. At some point, Mr. Gonzalez Camargo was brought out of the apartment and sat on the sidewalk with other persons, many of which were allowed to leave. It took about two hours for officers to process the individuals brought out to the sidewalk.
8. The agents testified that they took photographs of the persons on the sidewalk but the photos did not turn out because they did not use a flash.
9. During this two hours, the State's witnesses testified that they found a juvenile male in Apartment B and brought him out with the others. They also found a gun in Apartment B.
10. Ed Spann testified that Mr. Gonzalez Camargo said he lived in the apartment, so they brought him back into the apartment.
11. In the apartment, in the bathroom they found torn up social security cards. Mr. Gonzalez Camargo's was not among them.

12. In the northwest bedroom they found methamphetamine in a box that Brandon Call thought was on a mattress. Agent Ed Spann thought the drugs were on the floor. The agents for the Attorney General's office were not present when the SWAT officers initially entered the room and located the drugs. No SWAT officers testified. It is therefore not known where in the room the SWAT officers found the drugs.
13. Mr. Gonzalez Camargo's counsel cannot recall but believes that agents Spann and/or Call testified that a scale and perhaps packaging materials were also found in the northwest bedroom.
14. The State presented testimony from a technician at the Utah State Crime Laboratory that the substance found was methamphetamine.
15. When Ed Spann and Brandon Call entered the northwest bedroom they located a gun in the closet behind men's and women's clothing. Also in the closet were stacked laptops and a number of other items, some believed to be stolen.
16. The State's witnesses testified that one of the laptops had been reported stolen from Utah State University. They testified that one was reported stolen by John Amtoft.
17. In the other bedroom, the southwest bedroom, the State's witnesses testified

they found paraphernalia and a fraudulent identity card.

18. The agents put Mr. Gonzalez Camargo in the living room while they removed items from the bedroom. Agent Spann testified (as may one or two other of the State's witnesses) that Mr. Gonzalez Camargo, upon seeing the computers removed from the room said words to the effect that the computers were his, that his job was to repair computers.
19. The State also introduced evidence that the identification of Jovalee Lucero was found in the bedroom and that Ms Lucero appeared to be Mr. Gonzalez Camargo's girlfriend.
20. Mr. Gonzalez Camargo testified that he did not live at the Riverside apartments, that he lived elsewhere, with his family.
21. Mr. Johnny Hernandez also testified that he met with Mr. Gonzalez Camargo earlier that week at a different location, that he believed was Mr. Gonzalez Camargo's residence, and bought a car from Mr. Gonzalez Camargo.
22. Mr. Gonzalez Camargo testified that he had been frequenting the Riverside address for about a year, that he was friends with the people there, that at one point, months before events giving rise to the instant case, he had even been arrested at that address. He testified that he and the other people who

lived at or frequented the apartment liked to get together to cook meals, watch soccer, and socialize.

23. At the close of the State's evidence, prior to Mr. Gonzalez Camargo's testimony, Mr. Gonzalez Camargo moved for a directed verdict. This Court returned a directed verdict on Count's I and II. This Court found no evidence of "intent to distribute," and therefore sent Count I to the jury as Possession of a Controlled Substance, a third degree felony. The Court found no competent evidence of the value of the stolen items and therefore sent Count II to the jury as a class B misdemeanor.
24. The jury returned a verdict of Guilty on Count I, Possession of Controlled Substance, a third degree felony and Guilty of Count II, possession of stolen items, a class B misdemeanor. The jury found Mr. Gonzalez Camargo not guilty of possession of the firearm.
25. Mr. Gonzalez Camargo is legally here in the United States of America and supports children born in the United States.

ARGUMENT

1. This Court Should Set Aside the Jury's Verdict on Count I.

Even examining the evidence in the light most favorable to the jury's verdict

(Management Comm. of Graystone Pine Homeowners Ass'n ex rel. Owners of

Condominiums v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982)), the State presented insufficient evidence to support a conviction for Possession of Controlled Substance.

The Utah Supreme Court set forth what evidence the State must present at trial in State v. Fox, 709 P.2d 316, 319 (Utah 1985).

Actual physical possession presupposes knowing and intentional possession. However, actual physical possession is not necessary to convict a defendant of possession of a controlled substance. State v. Carlson, Utah, 635 P.2d 72, 74 (1981). A conviction may also be based on constructive possession. *Id.* In Carlson, we held that constructive possession exists “where the contraband is subject to [defendant’s] dominion and control.” However, persons who might know of the whereabouts of illicit drugs and who might even have access to them, but have no intent to obtain and use the drugs can not be convicted of possession of a controlled substance. Knowledge and ability to possess do not equal possession where there is no evidence of intent to make use of that knowledge and ability.

To find that a defendant had constructive possession of a drug or other contraband, 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.

Even in situations where the State can show that a defendant knew of the existence of contraband and its potential for illegal use, that does not equal possession, unless the State can also establish the defendant’s personal intent to make use of that knowledge. Spanish Fork City v. Bryan, 975 P.2d 501, 503 (Utah App. 1999).

Also, even where, as in Bryan, a defendant’s spouse is involved in drugs, the evidence “must raise a reasonable inference that defendant was engaged in a criminal enterprise and not simply a bystander.” *Id.*, quoting Fox, 709 P.2d at 319-20. In State v.

Layman, 985 P.2d 911, 913, 1999 UT 79, ¶ 13 (Utah 1999), the Utah Supreme Court further clarified that the evidence must show that the defendant not only knew about the contraband but intended to use the contraband as his own. It is not enough to say that the presence of paraphernalia indicates that someone intended to use the drugs; this intent must be specific to the defendant. Id. Even where, as in Bryan, a defendant's spouse is known to be involved in drugs, that spouse's involvement may not be then attributed to the defendant. See generally, Bryan.

Here, drawing inferences in the light most favorable to the State's verdict, it is a close question as to whether Mr. Gonzalez Camargo may have known that persons residing or visiting at the apartment may have been involved in sales or use of controlled substance. Given that the drugs were found in a room also containing computers that Mr. Gonzalez Camargo apparently claimed as his own, it may be fair to infer that Mr. Gonzalez Camargo knew the drugs were there, even though the State presented no evidence of where the SWAT team initially found the drugs and even though many unknown persons were in the apartment, engaged in destroying or hiding evidence (as with the torn identity cards).

Even so, assuming Mr. Gonzalez Camargo knew drugs were present, the State presented no evidence tending to show that Mr. Gonzalez Camargo had any intent to use them as his own. No fingerprints were present. No witnesses saw Mr. Gonzalez Camargo

personally involved in the use or physical possession of drugs. No items with Mr. Gonzalez Camargo's name on them were found in the immediate vicinity of the contraband. Mr. Gonzalez Camargo was not drug-tested. Mr. Gonzalez Camargo, though searched pursuant to arrest, did not have on his person any pipes, baggies, scales, or other contraband tending to show Mr. Gonzalez Camargo's personal involvement with drugs. The State presented no evidence tending to show Mr. Gonzalez Camargo was on or about the date of the arrest involved in the possession of illegal controlled substance.

As such, the State did not present evidence sufficient to show that Mr. Gonzalez Camargo knowingly and intentionally exercised dominion and control over controlled substance.

2. This Court Should Arrest Judgment Against Mr. Gonzalez Camargo.

Rule 23 of the Utah Rules of Criminal Procedure authorizes this Court to arrest judgment against Mr. Gonzalez Camargo on grounds that the facts presented in the trial do not constitute a public offense. This Court may arrest judgment based on insufficiency of the evidence. State v. Workman, 806 P.2d 1198 (Utah App. 1991), aff'd, 852 P.2d 981 (Utah 1993). This Court may even arrest a jury verdict when the evidence viewed in the light most favorable to the verdict is so inconclusive as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element. Id.

In the instant case, the State simply failed to present evidence of Mr. Gonzalez Camargo's intent to exercise dominion and control over the controlled substance. There was no evidence presented upon which reasonable minds could conclude that Mr. Gonzalez Camargo not only knew the drugs were present but intended to use them as his own. The evidence on that point was entirely lacking.

CONCLUSION

Mr. Gonzalez Camargo respectfully requests that this Court set aside the jury's verdict on the issue of whether he possessed controlled substance. Alternatively, Mr. Gonzalez Camargo respectfully requests that this Court arrest the judgment against him. Although the jury found him guilty, it is hard to say why they did so, when the evidence was simply not present.

DATED this 26 day of AUGUST, 2010.


ANDREA J. GARLAND
Attorney for Defendant

CERTIFICATE OF SERVICE

MAILED/DELIVERED a copy of the foregoing to the Utah Attorney General
5272 South College Drive, Suite 200, Murray, Utah 84123 this 26th day of AUGUST,
2010.



Tab C

THIRD JUDICIAL DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 091907747FS
	:	
Plaintiff,	:	Appellate Court Case No. 20110027
	:	
v	:	Volume II of II
	:	
FERNANDO GONZALEZ CAMARGO,	:	
	:	
Defendant.	:	With Keyword Index

JURY TRIAL JUNE 29 & 30, 2010

BEFORE

THE HONORABLE ROYAL I. HANSEN

FILED DISTRICT COURT
Third Judicial District

MAR 21 2011

SALT LAKE COUNTY

By _____ Deputy Clerk **MD**

CAROLYN ERICKSON, CSR, **FILED**
CERTIFIED COURT TRANSCRIBER **UTAH APPELLATE COURTS**

1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

APR -7 2011

20110027-CA

ORIGINAL

1 Q (BY MR. TAYLOR) Detective Willis, are you familiar
2 with the matter involving a stolen laptop - a laptop stolen
3 from a Utah University employee?

4 MS. GARLAND: Objection, hearsay.

5 THE COURT: Okay.

6 MR. TAYLOR: Yes or no question, Your Honor.

7 THE COURT: And I'm going to allow you to respond
8 to that, Detective Ellis, go ahead.

9 THE WITNESS: Yes.

10 Q (BY MR. TAYLOR) To your knowledge, was that a
11 laptop with a Utah State University number 100898?

12 MS. GARLAND: Objection.

13 THE COURT: And the basis is?

14 MS. GARLAND: Hearsay.

15 THE COURT: Hearsay? I'm going to have to have him
16 tell us how he's aware of that. So you're going to have to
17 lay some foundation with regard to that.

18 Q (BY MR. TAYLOR) Detective Ellis, if you could just
19 tell us how you're aware of this matter?

20 A I received a call from -

21 MS. GARLAND: Objection.

22 THE COURT: Okay. He can tell us he received a
23 call. I don't want him to tell us what was the content of
24 that call, but go ahead.

25 Q (BY MR. TAYLOR) Now, you were saying that you

1 received a call from whom?

2 A From the Attorney General's Office.

3 Q Okay. And as a result of that call, what, if
4 anything, did you do?

5 A As a result of that call, I was given the model,
6 make, and serial number.

7 MS. GARLAND: Objection.

8 THE COURT: He can tell us what he did, and that's
9 what I'm asking him to do with regard to that. So let's
10 confine it to that.

11 Q (BY MR. TAYLOR) Just tell us what you did after
12 you got that call.

13 A I verified that a computer was owned by the
14 university.

15 MS. GARLAND: I'm going to object, Judge. This is
16 hearsay.

17 MR. TAYLOR: Your Honor?

18 THE COURT: He can tell us how he knows that, and
19 I'm going to allow him to proceed and to do it, and so just
20 we're all aware of how we're proceeding. He's entitled to
21 tell us what he did, not the conversations that you had with
22 others and the process. And assuming there's a sufficient
23 foundation - and I'll note that objection with regard to that
24 on an ongoing basis.

25 MS. GARLAND: May we approach?

1 THE COURT: You may. Go ahead.

2 MR. TAYLOR: Actually, I think the next two
3 questions might clarify this. If we could just hold off.

4 THE COURT: Good, and that - you can ask them. And
5 if you need to approach, I'm glad to see you both at anytime.
6 Go ahead.

7 Q (BY MR. TAYLOR) Detective, do you have - in your
8 capacity as a detective for Utah State University, do you
9 have access to Utah State University records?

10 MS. GARLAND: May we approach, Your Honor?

11 THE COURT: You may. The same instructions, ladies
12 and gentlemen of the jury. Stand up and stretch if you'd
13 like to do so.

14 (Whereupon a sidebar was held as follows:

15 MS. GARLAND: That would be hearsay records, Your Honor.

16 THE COURT: Uh-huh (affirmative).

17 MS. GARLAND: Records of stolen property. That's
18 hearsay.

19 MR. TAYLOR: Your Honor, he's employed by Utah
20 State University. He has access to the records. There's a
21 specific exclusion to this in the hearsay rule.

22 THE COURT: Uh-huh (affirmative).

23 MR. TAYLOR: It's a government record. He works
24 for the same institution. It's something that he's able to
25 testify about.

1 THE COURT: And tell me what -

2 MS. GARLAND: Judge, these are out of court
3 statements made for the proof of - offered for the proof of
4 the matter asserted.

5 THE COURT: Exactly, but there's an exception.

6 THE COURT: But there's a business record exception
7 with regard to that. It doesn't have to be applicable -

8 MS. GARLAND: If he -

9 THE COURT: [inaudible]. They're the same thing.

10 MS. GARLAND: Well, if he was looking at just
11 general records, that might be okay. I mean if he's the -

12 THE COURT: I don't think -

13 MS. GARLAND: - custodian of those records. But if
14 he's looking at lists of things that have been reported
15 missing, that would be more along the lines of police
16 reports.

17 THE COURT: Okay. Well, if he has even established
18 that he has access to those in the ordinary course of
19 business -

20 MS. GARLAND: He's not the -

21 THE COURT: - he does have -

22 MS. GARLAND: He's not the custodian of those
23 records, though.

24 THE COURT: And, you know, if he can show us that
25 he has those - that access that he's entitled to them, I'm

1 going to allow him to testify regarding that. And I note the
2 objection.

3 MS. GARLAND: Okay.

4 (End of sidebar)

5 THE COURT: Okay, Mr. Taylor, you can proceed.

6 Q (BY MR. TAYLOR) Detective Ellis, in your capacity
7 as a detective for Utah State University, do you have access
8 to records regarding property that belongs to Utah State
9 University?

10 A Yes.

11 Q And does that include stolen property?

12 A Yes, it does.

13 Q Okay. You testified that you received a call from
14 the Attorney General's Office. Do you know if that was from
15 Brendan Call - Agent Brendan Call?

16 A No. That was from somebody else?

17 Q Was it Carolina Erin?

18 A It was Carolina.

19 Q Okay. And after receiving that call, did you check
20 any kind of records?

21 A I verified the information that was given to me
22 with the equipment manager.

23 Q Okay.

24 A That that computer was -

25 MS. GARLAND: Objection.

1 THE COURT: Okay. And I'm going to have him
2 testify with regard to his review as opposed to what he
3 learned from other people, and let's lay that foundation, Mr.
4 Taylor, on that.

5 Q (BY MR. TAYLOR) Detective, did you -
6 If I could have one moment, Your Honor?

7 THE COURT: You may.

8 Q (BY MR. TAYLOR) Detective Ellis, did you - after
9 receiving the call and after taking any other action, did you
10 write any kind of a report - or excuse me. Did you verify
11 that any property was stolen?

12 A I did.

13 Q And what was that property?

14 A A Dell laptop computer.

15 MS. GARLAND: I'm going to object.

16 THE COURT: Well, tell me the basis of what you're-

17 MS. GARLAND: May we approach?

18 THE COURT: You may.

19 (Whereupon a sidebar was held as follows:

20 MS. GARLAND: Using the word verify is just another
21 way to get into hearsay, Your Honor.

22 THE COURT: You know, what I want you to do is if
23 you want it in, you've got to have him say what he did and
24 the foundation that he - and lay the - and -

25 MR. TAYLOR: Well, -

1 THE COURT: - that he was [inaudible] in.

2 MR. TAYLOR: I think it was getting into that, but
3 Ms. Garland objected. He spoke to somebody who also works
4 with the university.

5 MS. GARLAND: Hearsay.

6 THE COURT: And hearsay, we're going to keep out,
7 right?

8 MR. TAYLOR: Right.

9 THE COURT: Okay.

10 MR. TAYLOR: But what I'm trying to get in is that
11 he - as an employee of Utah State University, especially in
12 his capacity as a detective, that he has access to property -
13 to records regarding stolen property.

14 THE COURT: Ask him - lay the foundation, and then
15 he can't testify as to what others told him, but what he did
16 and -

17 MR. TAYLOR: Right. Well, I think he already said.
18 I think I asked him, and I think he said - correct me if I'm
19 wrong - but I think he has testified that he did do - that he
20 - subsequent from receiving a call, that he verified it
21 through his records that he has access to that this laptop
22 was stolen. And if I haven't - I thought I asked that. But
23 if I didn't, I'll ask it.

24 THE COURT: Okay. And I think it's worth laying
25 the foundation, and I think your objections based on what -

1 Ms. Garland, with regard to -
2 MS. GARLAND: Hearsay.
3 THE COURT: Okay.
4 MS. GARLAND: Your Honor, it's - these are out of
5 court -
6 THE COURT: I understand, and -
7 MS. GARLAND: - recordations.
8 THE COURT: - and I've already gone through -
9 MS. GARLAND: - information.
10 THE COURT: - that issue with regard to -
11 MS. GARLAND: That's -
12 THE COURT: - the business records. If he's
13 entitled to review those and utilize those in the ordinary
14 course of business -
15 MS. GARLAND: Right, but -
16 THE COURT: - then he's entitled to -
17 MS. GARLAND: - if he's just saying I verified -
18 THE COURT: - testify. Yeah.
19 MS. GARLAND: - that's hearsay.
20 THE COURT: Well, he can tell us what he did, okay?
21 MS. GARLAND: Right.
22 THE COURT: So I'm going to allow to proceed on
23 that basis as soon as there's an adequate foundation.
24 MR. TAYLOR: I'll do my best, Your Honor.
25 (End of sidebar)

1 THE COURT: Great. Okay. Mr. Taylor, you can
2 proceed, please.

3 MR. TAYLOR: Yes, Your Honor.

4 Q (BY MR. TAYLOR) Detective Ellis, we've been asking
5 you some questions about what you - your role -

6 If I could just have a moment, Your Honor?

7 We've been asking some questions about your access
8 to records. Do you have access to various types of records
9 in your capacity as a detective for Utah State University?

10 A We do.

11 Q Do those records include stolen record - or stolen
12 - records pertaining to stolen items? Well, I'll ask it this
13 way.

14 MS. GARLAND: Judge, I'm going to object.

15 MR. TAYLOR: I'll rephrase it, Your Honor.

16 THE COURT: Go ahead.

17 Q (BY MR. TAYLOR) If an item is stolen - just
18 hypothetically. If an item is stolen and it belongs to Utah
19 State University, is there any kind of a report that's made?

20 A If it occurs in our jurisdiction, we make a report
21 of it.

22 Q Okay. If an item belonging to Utah State
23 University is stolen outside of the jurisdiction, would there
24 still be some kind of a - if not a report, at least something
25 - would you be notified?

1 A Sometimes we are if the person comes back and is
2 told to notify us.

3 Q Okay. And if that person notifies you, do you or
4 does anyone else make a note of it somehow or a record of it?

5 A If they talk to us, we make a report of it in our
6 office.

7 MS. GARLAND: And I'm going to object, Your Honor.

8 THE COURT: And what's the basis?

9 MS. GARLAND: Your Honor, he's referring to police
10 reports.

11 THE COURT: Okay. And I'm going to overrule the
12 objection with regard to that. Go ahead.

13 Q (BY MR. TAYLOR) If someone does make a report like
14 that, do you have access to such a report?

15 A I do.

16 Q Okay. And is that in the normal course of your
17 duties?

18 A Yes, it is.

19 Q Okay. And as a part of your duties, can you verify
20 if property is belonging to Utah State University?

21 A Yes, we can.

22 Q Okay. So if - hypothetically if someone reports
23 property belonging to Utah State University is stolen,
24 there's a way for you to check to see if that property
25 actually belongs to Utah State University?

Tab D

UTAH CODE ANN. § 58-37-8 (2007)

(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, a controlled substance analog, or gamma-hydroxybutyric acid as listed in Schedule III 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 who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) 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 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;
- (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; or
- (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) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) 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.

(e) 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), and if the conviction is with respect to controlled substances as listed in:

- (i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and
(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and
(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(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.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

- (i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and
- (ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in his body:

- (i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;
- (ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA) is guilty of a third degree felony; or
- (iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(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 this Subsection (4) if the trier of fact finds 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 postsecondary 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 or on the grounds of a house of worship as defined in Section 76-10-501;

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

(viii) in or on the grounds of a library;

(ix) within any area that is within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iv), (vi), and (vii);

(x) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b)(i) A person convicted under this Subsection (4) 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. (ii)

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 (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d)(i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) 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)(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.

(7) 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.

(8) 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.

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

- (a) any person registered under this chapter 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.

(10)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).

(b) In a prosecution alleging violation of this section regarding peyote as defined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c)(i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (10) as soon as practicable, but not later than ten days prior to trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (10) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(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.

UTAH CODE ANN. § 76-6-408 (2007)

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:

- (a) is found in possession or control of other property stolen on a separate occasion;
- (b) has received other stolen property within the year preceding the receiving offense charged; or
- (c) is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:
 - (i) certify, in writing, that he has the legal rights to sell the property;
 - (ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and
 - (iii) provide at least one positive form of identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(c) is presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(c), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

- (a) "Dealer" means a person in the business of buying or selling goods.
- (b) "Pawnbroker" means a person who:
 - (i) loans money on deposit of personal property, or deals in the purchase, exchange, or possession of personal property on condition of selling the same property back again to the pledge or depositor;
 - (ii) loans or advances money on personal property by taking chattel mortgage security on the property and takes or receives the personal property into his possession and who sells the unredeemed pledges; or
 - (iii) receives personal property in exchange for money or in trade for other personal property.
- (c) "Receives" means acquiring possession, control, or title or lending on the security of the property.

UTAH R. EVID. 801

(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.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

UTAH R. EVID. 803

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

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(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.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(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.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organization. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the

original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons

other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

U.S. CONST. AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.