2011

State of Utah v. Rolando Cardona-Gueton : Brief of Appellee

Utah Court of Appeals

Case No. 20110146-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/ Appellee,

vs.

ROLANDO CARDONA-GUETON,
Defendant/ Appellant.

Brief of Appellee

Appeal from a conviction for possession of a controlled substance with intent to distribute, a first degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Judith S. Atherton presiding

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Oral Argument Not Requested

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for possession of a controlled substance with intent to distribute, a first degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (West Supp. 2009). This Court has jurisdiction under UTAH CODE ANN. § 78A-4-103(2)(j) (West 2009).

STATEMENT OF THE ISSUES

1. Whether Defendant's drug possession occurred "in a public park," where Salt Lake City defines Pioneer Park to necessarily include its surrounding sidewalks, and the uncontroverted evidence is that Defendant was on the sidewalk?

Standard of Review. The State is unclear whether Defendant's insufficiency of evidence challenge is to the trial court's denial of his motions for a directed

verdict and for judgment notwithstanding the verdict and arrest of judgment ("motion to arrest judgment") or to the jury's verdict.

To the extent that the challenge is to the trial court's pre-verdict legal determination, a "trial court's ruling on a motion for a directed verdict is a question of law, which we review for correctness giving no particular deference to the trial court's legal conclusions." *State v. Hirschi*, 2007 UT App 255, ¶ 15, 167 P.3d 503 (internal quotations and brackets omitted) (citation omitted). To the extent that Defendant seeks "to reverse a jury verdict, we must find that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *State v. Tucker*, 2004 UT App 217, ¶20, 96 P.3d 368 (internal quotations and citation omitted). "Therefore, as long as there is some evidence and reasonable inferences to support the jury's verdict, we will not disturb a jury's findings." *Id.* (internal quotations and citation omitted).

2. Whether evidence that Defendant claimed ownership of the bicycle in which drugs were found was sufficient to prove that Defendant had constructive possession of those drugs?

Standard of Review. The standard of review of sufficiency of evidence from a jury verdict is set out in issue 1.

STATUTES

The following statutes are attached at Addendum A:

UTAH CODE ANN. § 10-8-8, -84 (West Supp. 2011, West 2004);
UTAH CODE ANN. § 58-37-8 (West Supp. 2009);
UTAH CODE ANN. § 76-1-106 (West 2004);
Salt Lake City Code §§ 15.04.010, -150 (2011).

STATEMENT OF THE CASE

Defendant was charged with one count of possession of a controlled substance with intent to distribute in a drug-free zone, a first degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), -(4)(a) (West Supp. 2009). R67-68. Defendant was tried by a jury. R101-02; 175. After the State rested its case, Defendant moved for a directed verdict, which the trial court denied. R175:151-52. The jury found Defendant guilty as charged. R128-29; 175:154-55.

Defendant filed a motion to arrest judgment. R132-40. The trial court denied the motion. R158-59; 176:8. The court sentenced Defendant to a statutory term of five years to life in the Utah State Prison. R161-62. Defendant timely appealed. R163. The Utah Supreme Court transferred the case to this Court. R171.

STATEMENT OF FACTS

State's Case-in-Chief

On October 22, 2009, Salt Lake City Police Officers Ammon Mauga and Kristopher Jeppsen were on bicycle patrol when they saw Defendant near the

300 West and 400 South corner of Pioneer Park in Salt Lake City. R175: 50-51, 78-80. As the officers rode by, they saw Defendant "grab" a bottle off his bicycle, "and start shaking it and drinking it, showing us that it wasn't alcohol." *Id.* at 54, 80, 84.

Later that day, Officers Mauga and Jeppsen, along with Officer Mike Cardwell, again patrolled the area of 300 West and 400 South on bicycle. *Id.* at 50-51, 62, 79-80. Officer Mauga stopped his bicycle when he observed what he suspected might be a drug transaction between Defendant and another male occurring on the corner in Pioneer Park, a location known for drug-dealing. *Id.* at 51-52, 80. Officer Mauga noticed the two "look around before...they approached each other. Then after they met up with each other they once again looked around...and then they went separate ways." Although Officer Mauga did not see a "hand-to-hand transaction" – a car blocked his view – the suspects exhibited a pattern of behavior "common in narcotics deals." *Id.* at 52.

After observing this encounter, the officers approached Defendant, who was smoking while sitting on a bench on the sidewalk abutting the grass." *Id.* at 53, 98; State's Exhibit 1. Because Defendant was smoking "in the park," in violation of a city ordinance, the officers began writing a citation. *Id.* at 53. As they did so, Officers Mauga and Jeppsen noticed Defendant's bicycle "just right next to him leaning against the bench." *Id.* at 53, 55, 99; State's Exhibit 1. The

officers recognized the water bottle on the bicycle as the same one from which Defendant had drunk earlier that day. *Id.* at 83-84; State's Exhibit 2.

Officer Jeppsen noticed that the bicycle was of high quality and expensive and had been spray-painted black. Both officers quickly suspected that the bicycle was stolen because they had received an attempt-to-locate a stolen red bicycle. *Id.* at 53, 81-82. The bicycle's original red paint showed through, and the bicycle appeared to have been "spray painted almost as if purposely to cover up...identifying stickers," which were recognizable beneath the black paint *Id.* at 53, 81, 83.

Acting upon this suspicion, the officers twice asked Defendant if the bicycle was his. *Id.* at 53, 81. Both times Defendant replied, in perfect English, "Yes, it's my bike." *Id.* at 53-54, 81.

Officer Jeppsen then asked Defendant if he could look at the bicycle, and Defendant answered, "Yes." *Id.* at 81. Officer Jeppsen flipped the bicycle over to check the serial number and noticed "some sort of a cork" protruding from beneath the front fork of the frame. *Id.* at 54, 82-86; State's Exhibits 2-4.[1] As soon as the plug was discovered, Defendant asserted, "[T]hat's not my bike." *Id.* at

[1] The officers "ran" the serial number "and nothing came back." R175:67, 94.

54, 95, 106. However, there was no one else near Defendant or the bicycle. *Id.* at 95.

The officers removed the cork and discovered a Krazy Glue container holding fourteen rocks of crack cocaine hidden in a secret compartment within the front fork. *Id.* at 87-88; State's Exhibit 5. A search of Defendant revealed that he had $166 cash in his wallet. *Id.* at 71, 91; State's Exhibit 7.

The Defense

Defendant testified that he arrived at Pioneer Park by bus. *Id.* at 120. According to Defendant, when he sat down on the bench the bicycle was already there, leaning against a pole. *Id.* at 121. Other people were sitting on the adjacent bench. *Id.* at 121-22.

Defendant claimed that when the police approached and spoke to him, he realized he should not be smoking "in the park." Id. at 122-23. However, he did not understand what they were saying because he does not speak English. *Id.* at 122-23, 126. He did not know who owned the bicycle, he did not wave or drink from a water bottle, he did not own the drugs inside the bicycle, and he did not understand why he was arrested. *Id.* at 123-28. Defendant claimed the $166 came from Social Security Disability. *Id.* at 124.

SUMMARY OF ARGUMENT

I.

Defendant claims that the evidence presented to the jury was insufficient to support a conclusion that the offense was committed "in a public park." On appeal, he appears to argue this claim this claim primarily as an incorrect assessment by the trial court in denying his motion for a directed verdict – that as a matter of law the sidewalk surrounding and abutting the grassy areas of Pioneer Park is not "in a public park" for penalty enhancement purposes. That claim fails on basic principles of statutory construction. Salt Lake City has expressly defined Pioneer Park to include the sidewalk that surrounds it. By giving municipalities the authority to lay out and establish public parks, the Utah legislature, absent any express conflict, implicitly signaled its recognition of Salt Lake City's definition. And given the purpose behind the enhancement – protection of children from drug dealers in places children are likely to congregate – it would be absurd to distinguish the sidewalk from the grassy area for drug enhancement purposes.

Defendant's claim also fails as a challenge to the sufficiency of the jury's factual finding that the underlying offence was committed in a public park. First, because Defendant has failed to adequately marshal all of the facts in support of the jury's finding, the Court need not address this argument. But

even on the merits, the claim fails because all of the witnesses' testimony, including Defendant's, indicated they believed Defendant was in the park at time he was discovered in possession of illegal drugs.

II.

Defendant claims that the evidence was also insufficient to prove that he constructively possessed the drugs concealed in his bicycle. Defendant again fails to adequately marshal the evidence in support of this claim. In any case, the evidence was sufficient to support the jury's verdict. Defendant was seated only six inches from the bicycle when he was approached by the police, who were then investigating him for drug distribution based on his suspicious conduct. No one else was near the bicycle at that time. Defendant twice asserted that the bicycle belonged to him. But when the officers discovered the secret compartment containing the cocaine, Defendant immediately disclaimed ownership of the bicycle. Given the circumstances, this disclaimer was more than ample evidence that Defendant constructively possessed the contraband.

ARGUMENT

I.

AS A MATTER OF LAW AND FACT, THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE OFFENSE WAS COMMITTED "IN A PUBLIC PARK."

Defendant claims that "the State did not present sufficient evidence to prove beyond a reasonable doubt that the offense occurred 'in a public park,'"

which enhanced his drug offense under UTAH CODE ANN. § 58-37-8(4)(a)(v) (West 2009). Aplt. Br. at 7. He particularly argues that the sidewalk surrounding and abutting the grassy area of Pioneer Park is not "in" the public park. Aplt. Br. at 9-13. The claim fails as a matter of law because Salt Lake City has defined Pioneer Park so as to necessarily include the sidewalk surrounding the park and because all the witnesses, including Defendant, recognized that Defendant was in the park at the time of the incident.

A. The proceedings below.

At the close of the State's case-in-chief, Defendant moved for a directed verdict. R175:151-52.[2] He argued that the State had failed to prove beyond a reasonable doubt that he possessed the drugs found in the bicycle, that the drugs were intended for distribution, and that the incident took place in a public park. Id. As to the last argument, Defendant asserted that the officers encountered him sitting on a park bench on the sidewalk at the corner of 300 West and 400 South. *Id.* at 151; State's Exhibit 1. Because he was only "on the sidewalk," Defendant argued, he was "not actually inside the park." *Id.* at 152. Thus, he claimed, the drug-free-zone enhancement did not apply. *Id.*

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[2] Following the trial court's direction, Defendant did not argue his motion until after the parties' closing and rebuttal arguments. R175:119, 151. But see *State v. Smith*, 675 P.2d 521, 524 (Utah 1983) (stating error not to rule on directed verdict motion when raised).

After the trial court denied Defendant's directed verdict motion, Defendant did not seek a jury instruction defining "a public park" to exclude sidewalks that enclose parks. *Id.* at 41-43, 114-16, 152. Nor did he argue that the sidewalk at issue was not part of Pioneer Park. *See id.* at 133-44. By special verdict, the jury found, beyond a reasonable doubt, that Defendant possessed controlled substances with intent to distribute "in a public park." *Id.* at 129; *see* Special Verdict form, R129 (Addendum B).

Defendant reasserted his challenge to the enhancement in a motion to arrest judgment. R133-42 at 139-41; 176:2, 5, 7. Again, the trial court rejected it. R158-59; 176:8.

B. The evidence was sufficient to prove that the offense occurred within a public park.

1. The legal definition of Pioneer Park necessarily includes the sidewalk that surrounds and abuts its grassy areas.

As he did below, Defendant argues that "the evidence is legally" insufficient "to prove beyond a reasonable doubt that the offense was committed in a public park" because the sidewalk abutting the grassy area of a public park is not "in a public park" for purposes of Utah's enhancement statute. Aplt. Br. at 7-8. Defendant's argument fails as a matter of law under the rules of statutory construction.

Pursuant to "general principles of statutory interpretation, [the appellate court] ... look[s] first to the ... plain language, recognizing that [its] primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve." *State v. Reinhart*, 2011 UT 77, ¶ 10 --- P.3d --- (citations and internal quotation marks omitted) (brackets added). Additionally, the reviewing court reads statute "to harmonize it with related statutes." *In re A.B.*, 936 P.2d 1091, 1097 (Utah App. 1997). *See also State v. Bishop*, 753 P.2d 439, 468 (Utah 1988) (stating "statutes must be interpreted harmoniously with other statutes relevant to the subject matter").

To enhance Defendant's controlled substances conviction under section 58-37-8 in the circumstances of this case, the jury had to find "the act [was] committed ... in a public park." UTAH CODE ANN. § 58-37-8(4)(a)(v) (West 2009).[3] Section 58-37-8 does not define the phrase, "in a public park." Thus,

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[3] In 1991 the legislature amended section 58-37-8 by adding to existing locations an enhancement if a violation of section 58-37-8 occurred within 1000 feet of a public park. *See* UTAH CODE ANN. § 58-37-8 (5)(a) (Michie Supp. 1991). In H.B. 231, enacted in 2007 the legislature altered this provision to exclude subsection (iii) ("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") and subsection (v) ("in a public park, amusement park, arcade, or recreation center"). *See* 2007 Utah Laws 2315 (encoding amendments at UTAH CODE ANN. § 58-37-8 (4)(a) (West Supp. 2007)). H.B. 231 expressly provided for the alteration in section 58-37-8, but the legislative history offers no discussion for excluding the locations from the 1000-foot provision. *See* H.B. 231 Controlled Substances Penalty Amendments (2007), http//le.utah.gov/~2007/ htmdoc/hbillhtm/HB0231.htm.

Defendant relies on dictionary definitions and statutes, including the Salt Lake City Code, to distinguish the sidewalk surrounding and abutting Pioneer Park from the "public park" itself. Aplt. Br. at 9-13. This Court should reject Defendant's attempt for two reasons.

First, regardless of any generic dictionary definition of "park," The Utah legislature has expressly enabled local governments to "lay out, establish, ... streets, alleys, avenues, boulevards, sidewalks, parks, ... public grounds, ..., as provided in this title." Utah Code Ann. § 10-8-8 (West Supp. 2011). Thus, by statute, Salt Lake City has the authority to define the boundaries of its public parks, including Pioneer Park. And, under that authority, Salt Lake City has provided that "Pioneer Park is described as ... [a]ll of Block 48, Plat 'A,' Salt Lake City Survey, *being the area between Third and Fourth South Streets and Third and Fourth West Streets.*" Salt Lake City Code § 15.04.150 (emphasis added). *See also* Salt Lake City Code, § 15.04.010 ("The provisions of this chapter shall apply to the *public parks* and playgrounds as named and described in the succeeding sections of this chapter." (emphasis added)In this case, the undisputed evidence is that the bench Defendant was sitting on fell within the area between 300 and 400 South Streets and 300 and 400 West Streets. Salt Lake City Code § 15.04.150. *See also* R175:53, 98, 121; State's Exhibit 1; Aplt. Br. at 12. Thus, as a matter of law, that bench was "in" Pioneer Park, and therefore "in a public park," for

purposes of Utah's drug enhancement statute. On this basis alone, Defendant's legal claim fails.

But Defendant's claim also fails under a plain meaning of a "public park" if interpreted consistent with the legislative intent behind Utah's enhancement provisions. As this Court recognized in *State v. Powasnik*, the "legislature enacted the penalty enhancement statute in 1986 to protect the public health, safety, and welfare of children of Utah from the presumed extreme potential danger created when drug transactions occur on or near a school ground [or other public places frequented by children]." 918 P.2d 146, 149 (Utah App. 1996) (internal quotation marks and citation omitted) (brackets in original). "Thus, the law's overarching purpose is to create drug-free zones around schools and other specified places to protect children from the influence of drug-related activity." *Id.* (internal quotation marks and citation omitted).

To exclude sidewalks from the definition of "public park" in the enhancement statute because they are found on the outer perimeter of the park would be contrary to the legislature's intent in enacting the enhancement statute. *See Powasnik*, 918 P.2d at 149. *See* Utah Code Ann. § 76-1-106 (West 2004) ("[O]ffenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law ...."). *Cf. State v. Miller*, 2010 UT App 25, ¶ 12 , 226 P.3d 743 ("[W]here a

literal reading of the plain language at issue 'creates an absurd, unreasonable, or inoperable result, we assume the legislature did not intend that result ... [and] endeavor to discover the underlying legislative intent and interpret the statute accordingly.'") (quoting *State v. Jeffries*, 2009 UT 57, ¶ 8, 217 P.3d 265). Nor do Defendant's dictionary definitions require such a result. None of those definitions necessarily exclude from their definitions of parks the sidewalks which mark their boundaries. Simply stated, municipal authority to "lay out [and] establish" numerous public places, including "sidewalks, parks ...," merely recognizes that sidewalks and parks will be established in places completely unrelated to one another. *See* UTAH CODE ANN. 10-8-8 (West Supp. 2011).

Indeed, the witnesses, defense counsel, and Defendant himself identified the sidewalk with the park in the natural course of their testimony: (1) Officers Mauga and Jeppsen, approached Defendant, who was sitting on a bench at the corner of 400 South and 300 East, to enforce were enforcing a smoking infraction "in the park" (*Id.* at 62, 64, 69, 98); (2) defense counsel, in attempting to sever a connection between Defendant and the bicycle during closing argument, noted that it was "leaning against the park - - the bench" (*Id.* at 98); and (3) Defendant himself stated that he sat down on a corner bench "[w]hen he got to the park" (*Id.* at 121), that he threw away his cigarette when he saw the police because he

knew "that you're not supposed to smoke in the park" (*Id.* at 122), and that he sat on a "park bench" I*d.* at 125. Based on this common understanding, defense counsel did not even argue in closing that the bench was not in the park, possibly thinking that Defendant would lose credibility in the eyes of the jury.

In sum, the trial court correctly denied Defendant's motions for a directed verdict and for arrest of judgment because a public park, for purposes of the drug-free-zone enhancement, includes the sidewalk surrounding and abutting the grassy areas of Pioneer Park.

2. The evidence sufficed to prove the offense occurred in Pioneer Park.

Given that the sidewalk at issue here fell within Pioneer Park, the evidence was sufficient to prove beyond a reasonable doubt that the offense occurred "in a public park," as required under Utah's drug enhancement statute. Thus Defendant's challenge to the sufficiency of the evidence as a factual matter also fails. Aplt. Br. at 7-8, 14.

a. Defendant has failed to adequately marshal the evidence regarding the jury's express finding that the offense was committed "in a public park."

This Court should decline to reach Defendant's claim because he has not properly marshalled the evidence. A defendant who claims the evidence is insufficient to support the jury's verdict has the burden to "'first marshal all record evidence that supports the challenged finding.'" *State v. Prichett*, 2003 UT

24, ¶ 25, 69 P.3d 1284 (quoting Utah R. App. P. 24(a)(9)). He must "then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.'" *State v. Larsen*, 2000 UT App 106, ¶ 11, 999 P.2d 1252 (citation omitted). The marshaled evidence must be "viewed in the light most favorable to the verdict." *Prichett*, 2003 UT 24, ¶ 25. After gathering "this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence." *West Valley City v. Majestic Investment Co.*, 818 P.2d 1311, 1315 (Utah App.1991). *Id.* "Where a party fails to meet the marshaling requirement, [the appellate court] generally will assume that the evidence on record adequately supports the trial court's findings." *State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 20, 186 P.3d 1023. *See e.g., State v. Shepherd*, 1999 UT App 305, ¶ 25, 989 P.2d 503 (rejecting insufficiency claim where the defendant notably failed to marshal the evidence in support of the jury's verdict). Defendant has failed to marshal the evidence in support of the jury's finding that the offense occurred within a public park.

Defendant contravenes the marshaling requirement by listing at least two pieces of evidence that tend *not* to support the jury's finding that he was in the public park. Thus, he writes that the bench on which he sat "was facing away from Pioneer Park" and that he "was never officially cited for smoking in a public park." Aplt. Br. at 14-15. More importantly, Defendant has not

marshaled all of the evidence that placed him in Pioneer Park. He has not marshaled that Officer Mauga, as well as Officer Jeppsen, considered the bench where Defendant sat smoking to be "in the park." R175:69. Nor has he marshaled his repeated statements that he considered himself to be in the park. *Id.* at 121, 122, 125. As a result of Defendant's failure to marshal the most critical evidence in support of his being in Pioneer Park, the Court should decline to consider the merits of Defendant's claim. *Shepherd*, 1999 UT App 305, ¶ 25. In any case, Defendant's claim fails on the merits.

b. Ample evidence supported the jury's finding that the sidewalk, where Defendant sat on a bench and on which the bicycle stood, was in a public park.

The jury found Defendant guilty of possession with intent to distribute a controlled substance. R128. Having made this determination, the jury then found by special verdict that, "from all the evidence and beyond a reasonable doubt" Defendant "committed the offense in a public park." R129 (Addendum B). The evidence amply supports the jury's finding on this point.

It is undisputed that when police approached Defendant, suspecting he had been involved in a drug transaction, he was then sitting on a park bench on the sidewalk at the corner of Pioneer Park where 300 West and 400 South intersect. R175:51-53, 62, 80; 176:5; State's Exhibits 1 and 2. By definition, that park bench was located in Pioneer Park. *See* Salt Lake City Code § 15.04.150.

Moreover, as discussed, *see* Aple. Br. at I.B.1., *supra*, all of the witnesses, including Defendant, referred to this location as being "in the park." R175: 62, 64, 69, 98, 121, 122, 125. Indeed, Defendant never argued to the jury that he was not in the park. *Id.* at 133-44.

In sum, the evidence was sufficient to prove the enhancement. *See State v. Davis*, 2007 UT App 13, ¶ 10, 155 P.3d 909 (jury capable of determining what constitutes a "public park").[4]

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[4] Defendant also argues that the elements instruction and the special verdict form inadequately instructed the jury on its duty to find beyond a reasonable doubt that he committed the offense "in a public park." (R115, 128-29, attached at Addendum B). Aplt. Br. at 15-17 n.6. Defendant, however, did not object to the the elements instruction or special verdict form, and therefore did not preserve his claims for appeal. *See State v. Stevenson*, 884 P.2d 1287, 1290 (Utah App. 1994) ("[J]ury instructions to which a party failed to object will not be reviewed absent manifest injustice [, i.e., plain error].") "[E]xceptions to the preservation rule ... include plain error, exceptional circumstances, [and] ineffective assistance of counsel." *State v. Cram*, 2002 UT 37, ¶ 4, 46 P.3d 230 (brackets added and citations omitted). Because Defendant has not argued any exception to the preservation rule on appeal, the Court need not consider these claims. *See State v. Jackson*, 2011 UT App 318, 263 P.3d 540 (declining to consider statute of limitations defense raised for first time on appeal where defendant had "not asserted plain error, exceptional circumstances, or ineffective assistance of counsel"). Indeed, because Defendant affirmatively agreed to the elements instruction, *see* R175:42-43, his challenge to the instruction is precluded under the invited error doctrine. *See State v. Pinder*, 2005 UT 15, ¶ 62, 114 P.3d 551 ("A jury instruction may not be assigned as error, even if such instruction would otherwise constitute manifest injustice, 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'") (quoting *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111). In short, the Court should decline to consider Defendant's challenges to the elements instruction and the special verdict form.

II.

EVIDENCE WAS SUFFICIENT TO SHOW THAT DEFENDANT HAD CONSTRUCTIVE POSSESSION OF THE DRUGS FOUND HIDDEN IN THE BICYCLE

Defendant challenges the sufficiency of the evidence supporting his drug conviction, asserting that the State "failed to establish a sufficient nexus between [Defendant] and the drugs to establish constructive possession." Aplt. Br. at 18. Specifically, Defendant contends that the State "offered no direct evidence that [he] had knowledge of the drugs beyond what was inferred by his contradictory claims as to the ownership of the bicycle." Aplt. Br. at 18.

Here, to convict, the State was required to show that Defendant knowingly and intentionally possessed controlled substances with intent to distribute them. UTAH CODE ANN. § 58-37-8(1)(a)(iii) (West Supp. 2009).[5] However "[a]ctual physical possession is not necessary to convict a defendant of possession of a controlled substance. A conviction may also be based on constructive possession." *State v. Martin*, 2011 UT App 112, ¶ 2, 251 P.3d 860 (alterations and citation omitted). "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

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[5] Defendant does not argue that the amount of crack cocaine found hidden in the bicycle was insufficient to establish an intent to distribute. Aplt. Br. at 17-26.

the accused had both the power and the intent to exercise dominion and control over the drug." *Id.* at ¶ 12 (citation omitted). A non-exclusive list of evidentiary factors "tending to link an accused with drugs" include "incriminating statements, suspicious or incriminating behavior, sale of drugs, ... [and] proximity of defendant to location of drugs." *State v. Salas*, 820 P.2d 1386, 1388 (Utah App. 1991).

However, "[t]he existence of such a nexus depends on the particular circumstances of the individual case." *Id.* Because constructive possession cases are so factually-dependent, there is no set list of factors to determine constructive possession. Thus, "both trial and appellate courts need to be mindful that no such list is exhaustive, and that listed factors are only considerations." *State v. Layman*, 1999 UT 79, ¶ 15, 985 P.2d 911.

Defendant, again, has not adequately marshaled the evidence supporting the jury's finding that he possessed the drugs found here. Therefore the Court should not reach the merits of his sufficiency claim. In any case, ample evidence shows that Defendant had constructive possession of the drugs found hidden in the bicycle.

A. Defendant has failed to adequately marshal the evidence showing he constructively possessed a controlled substance.

As stated, to challenge a jury's verdict, a defendant must show that the "evidence to support the verdict was completely lacking or was so slight and

unconvincing as to make the verdict plainly unreasonable and unjust." *Tucker*, 2004 UT App 217, ¶20. In this case, Defendant purports to marshal the evidence by listing fourteen sets of facts, at least nine of which tend *not* to support the jury's finding that he constructively possessed the controlled substances hidden in the bicycle. Aplt Br. at 22-23. For example, Defendant states that, "Officer Mauga had seen [Defendant] on prior occasions, but never with a bicycle"; Defendant "made no incriminating statements relating to the drugs"; and "[o]fficers never saw Cardona-Gueton touch the bike, nor were prints taken from the bike Aplt. Br. at 22, par. 3, 10, and 14. These and other recitations are contrary to the letter and spirit of the marshaling requirement. *Majestic Investment Co.*, 818 P.2d at 1315.

More importantly, Defendant has not marshaled two pieces evidence supporting a reasonable inference that he constructively possessed the bicycle and the drugs it concealed. First, Officer Mauga initially approached Defendant because he observed what he "thought was possibly a drug transaction going on the No. 4 corner of Pioneer Park." R175:51. Officer Mauga watched Defendant and another male look around before approaching each other. *See* R175:52. After briefly meeting up, "they once again looked around again, and then they went separate ways." R175:52. Officer Mauga was specifically assigned at that

time to investigate narcotics transactions, and he testified that the behavior he observed was common in narcotics deals. R175:50-51, 52.

Second, Defendant also fails to marshal evidence that the amount of cocaine discovered in the bicycle showed that it was intended for distribution. Officer Jeppsen discovered fourteen rocks of cocaine, amounting to "just over half of an eight ball."[6] R175:89-90. The officer testified that he had "never seen that much cocaine on just a user" and that it was "very apparent and obvious...that it's of somebody distributing drugs." R175:94. The jury was also shown a photo of the confiscated cocaine rocks.[7] *See* R100; 175:88-89. From these facts, strongly suggesting that Defendant had been dealing drugs only moments before he was found in immediate proximity to the bicycle, the jury could reasonably infer that Defendant had drugs readily available for sale within easy reach.

Last, Defendant's recitation that first he affirmed and then denied that the bicycle was his (*see* Aplt. Br. at 22, par. 5) hardly captures the flavor and meaning of that moment. In fact, Defendant twice responded to the officers that the bicycle was his: "Yes, it's my bike." R175: 53-54, 81. After receiving

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[6] "Eight ball" is a term commonly used to reference a substantial quantity of drugs weighing 1/8 ounce, approximately 3.5 grams. *See* R175:134.

[7] The photo of the cocaine is listed as exhibit #6. The exhibit list indicates that exhibit #6 was returned to the Salt Lake City Narcotics Task Force.

Defendant's consent to examine the bicycle, Officer Jeppsen flipped the bicycle over to check the serial number and noticed "some sort of a cork" protruding from beneath the front fork of the frame. *Id.* at 54, 81-86; State's Exhibits 2-4. As soon as the plug was discovered, Defendant asserted, "[T]hat's not my bike." *Id.* at 54, 95, 106. In short, Defendant immediately denied being connected to the bicycle at the instant that discovery of the drugs was imminent. No citation to authority is necessary to show how incriminating this sequence of events was.

These unmarshaled facts were important to the State's constructive possession argument. *See* R175:129-33. Because Defendant did not marshal the evidence, the Court should decline to address the merits of his claim. *See Shepherd*, 1999 UT App 305, ¶ 25. In any case, the evidence was sufficient to support the jury's finding that Defendant constructively possessed the cocaine hidden in the bicycle.

B. Even if the court disregards Defendant's inadequate marshaling, the evidence presented to the jury was sufficient to support its finding that Defendant constructively possessed the cocaine.

Notwithstanding the above, Defendant claims that the State "failed to establish a sufficient nexus between [Defendant] and the drugs to establish constructive possession." Aplt. Br. at 18. More specifically, Defendant contends that "the evidence is sufficiently inconclusive such that reasonable minds must have entertained a reasonable doubt that Cardona-Gueton had the knowledge,

ability, and intent to exercise dominion and control over the crack cocaine." Aplt. Br. at 18.

Here, the evidence shows that Defendant had dominion and control over the bicycle concealing the contraband: (1) Defendant had been seen drinking water the bicycle's water bottle (R175: 54, 65, 83-84; State's Exhibit 2); (2) immediately before they approached Defendant, Officers Mauga and Jeppsen saw Defendant in what appeared to be a drug transaction (R175:51-52); (3) Defendant then retreated to the bench (R175: 53, 98); (4) when the officers approached Defendant, the bicycle was only six inches away from him and there was no other person in the vicinity of the bicycle (R175:53, 71, 95, 101); (5) both officers testified that Defendant was twice asked if the bicycle was his, and in both instances he claimed ownership (R175:53-54, 81); (6) Defendant did not deny ownership until the police turned the bicycle over, exposing the hidden compartment (R175:54, 95, 106); (7) the amount of drugs found there was consistent with the officer's observation of what he believed was Defendant's engaging in a drug transaction (R175:51-52); (8) Defendant had $166 on him (R175:71, 91); and (9) Defendant testified in this case and could judge his credibility. R175:121-28.

This evidence was sufficient to support Defendant constructive possession conviction. Defendant's initial assertions that the bicycle belonged to him, along

with the officers' seeing Defendant with the bicycle at two different times and the fact that there were no other people around are sufficient to show that Defendant had exclusive dominion and control of the bicycle at time he was investigated. This conclusion is bolstered by the officers' observation of Defendant having drunk from the bottle, a highly unlikely choice if Defendant did not believe the bicycle belonged to him.

The evidence also suffices to establish that Defendant had the knowledge and intent to exercise dominion and control over the drugs. Officer Mauga testified that he had seen Defendant engaging in conspicuous behavior consistent with drug dealing only moments before the cocaine was discovered in the bicycle. *See* R175:51-52. Defendant also had a large amount of cash—$166—which the jury could reasonably have inferred stemmed from drug dealing. *Id.* at 71, 91; State's Exhibit 7. And perhaps most significantly, Defendant disclaimed ownership of the bicycle only at the moment the officers turned the bicycle over and noticed the plug covering the hidden compartment containing the cocaine. R175:54, 82-86; State's Exhibits 2-4. Yet, there was no one else near Defendant or the bicycle at the moment of his disclaimer. *Id.* at 95. In these circumstances, the jury could have reasonably interpreted—and apparently did interpret—that Defendant's immediate, unsolicited attempt to

disassociate himself from the discovery of incriminating evidence as tantamount to a confession that the bicycle and the drugs belonged to him alone.

In sum, the evidence was sufficient to show that Defendant had the power and intent to exercise dominion and control over the cocaine. *See Martin*, 2011 UT App 112, ¶¶ 2-7 (holding discovery of illegal drugs in a space otherwise accessible to others was plausibly explained only by the suspect's exclusive dominion and control of that space at the time contraband was discovered).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted this 19th day of January, 2012.

MARK L. SHURTLEFF
Utah Attorney General

KENNETH A. BRONSTON
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on this 19th day of January, 2012, two copies of the foregoing brief were ☐ mailed ☒ hand-delivered to:

Brittany D. Enniss
Kerri Priano
Salt Lake Legal Defender Assoc.
424 East 500 south, Suite 300
Salt Lake City, UT 84111

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

Melissa Fryer

Addenda

Addendum A

Utah Code Ann. 1953 § 10-8-8

West's Utah Code Annotated Currentness

Title 10. Utah Municipal Code
Chapter 8. Powers and Duties of Municipalities
Article 1. General Powers
§ 10-8-8. Streets, parks, airports, parking facilities, public grounds, and pedestrian malls

A municipal legislative body may lay out, establish, open, alter, widen, narrow, extend, grade, pave, or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports, parking lots, or other facilities for the parking of vehicles off streets, public grounds, and pedestrian malls and may vacate the same or parts thereof, as provided in this title.

Laws 1911, c. 120, § 1; Laws 1915, c. 100, § 1; Laws 1919, c. 11, § 1; Laws 1965, c. 18, § [1]; Laws 1966, 2nd Sp.Sess., c. 1, § 1; Laws 2005, c. 254, § 3, eff. May 2, 2005.

Utah Code Annotated 1953 § 10-8-84

West's Utah Code Annotated Currentness

Title 10. Utah Municipal Code
Chapter 8. Powers and Duties of Municipalities
Article 1. General Powers
§ 10-8-84. Ordinances, rules, and regulations--Passage--Penalties

(1) The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city.

(2) The municipal legislative body may enforce obedience to the ordinances with fines or penalties in accordance with Section 10-3-703.

Laws 1911, c. 120, § 1; Laws 1915, c. 100, § 1; Laws 1981, c. 56, § 2; Laws 1986, c. 178, § 6; Laws 2000, c. 323, § 4, eff. March 16, 2000.

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

West's Utah Code Annotated Currentness
Title 58. Occupations and Professions

Chapter 37. Utah Controlled Substances Act (Refs & Annos)

§ 58-37-8. Prohibited acts—Penalties

(1) Prohibited acts A—Penalties:

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

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

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

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

(iv) engage in a continuing criminal enterprise where:

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

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

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

(i) a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric 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.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation of Subsection 58-37-8(2)(g) whether or not the injuries arise from the same episode of driving.

(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 (4) 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) For purposes of penalty enhancement under Subsections (1)(b) and (2)(c), a plea of guilty or no contest to a violation of this section which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

(8)(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.

(9) 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.

(10) 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.

(11) 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.

(12)(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 (12) 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 (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(13) 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.

Laws 1971, c. 145, § 8; Laws 1972, c. 22, § 1; Laws 1977, c. 29, § 6; Laws 1979, c. 12, § 5; Laws 1985, c. 146, § 1; Laws 1986, c. 196, § 1; Laws 1987, c. 92, § 100; Laws 1987, c. 190, § 3; Laws 1988, c. 95, § 1; Laws 1989, c. 50, § 2; Laws 1989, c. 56, § 1; Laws 1989, c. 178, § 1; Laws 1989, c. 187, § 2; Laws 1989, c. 201, § 1; Laws 1990, c. 161, § 1; Laws 1990, c. 163, §§ 2, 3; Laws 1991, c. 80, § 1; Laws 1991, c. 198, § 4; Laws 1991, c. 268, § 7; Laws 1995, c. 284, § 1, eff. May 1, 1995; Laws 1996, c. 1, § 8, eff. Jan. 31, 1996; Laws 1997, c. 64, § 6, eff. May 5, 1997; Laws 1998, c. 139, § 1, eff. May 4, 1998; Laws 1999, c. 12, § 1, eff. May 3, 1999; Laws 1999, c. 303, § 1, eff. May 3, 1999; Laws 2003, c. 10, § 1, eff. May 5, 2003; Laws 2003, c. 33, § 6, eff. May 5, 2003; Laws 2004, c. 36, § 1, eff. March 15, 2004; Laws 2005, c. 30, § 1, eff. May 2, 2005; Laws 2006, c. 8, § 4, eff. May 1, 2006; Laws 2006, c. 30, § 1, eff. May 1, 2006; Laws 2007, c. 374, § 1, eff. April 30, 2007; Laws 2008, c. 295, § 1, eff. May 5, 2008; Laws 2009, c. 214, § 3, eff. May 12, 2009.

Utah Code Ann. § 76-1-106 (West 2004)

West's Utah Code Annotated Currentness
Title 76. Utah Criminal Code
Chapter 1. General Provisions (Refs & Annos)
Part 1. Introductory Provisions
§ 76-1-106. Strict construction rule not applicable

The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of Section 76-1-104.

Laws 1973, c. 196, § 76-1-106.

Salt Lake City, Utah
City Code

Title 1
GENERAL PROVISIONS

Chapter 1.04
GENERAL PROVISIONS

1.04.010: DEFINITIONS AND INTERPRETATION OF LANGUAGE:

A. Rules Of Construction: In the construction of this code and all ordinances amendatory thereof, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislative body or repugnant to the context of the ordinance.

B. Interpretation Of Language:

1. The singular number includes the plural.

2. Words used in the present tense include the future.

3. Words used in the masculine gender comprehend, as well, the feminine and neuter.

C. Definitions:

BRIBE: Means and signifies any money, goods, rights in action, property, thing of value, or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote, or opinion in any public or official capacity.

CITY: The city of Salt Lake City, Utah.

CORRUPTLY: Means and imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

HIGHWAY AND ROAD: Means and includes public bridges, and may be held equivalent to the words "county way", "county road", "common road" and "state road".

KNOWINGLY: Imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

LAND, REAL ESTATE AND REAL PROPERTY: Means and includes land, tenements, hereditaments, water rights, possessory rights and claims.

MALICE AND MALICIOUSLY: Means and imports a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or by presumption of law.

MAYOR: The duly elected or appointed mayor of Salt Lake City, Utah, and shall include any person or persons designated by the mayor to act in his/her stead, unless the context clearly indicates that the mayor, as an individual person, is intended.

MONTH: A calendar month unless otherwise expressed, and the word "year" or the abbreviation "A.D." is equivalent to the expression "year of our Lord".

NEGLECT, NEGLIGENCE, NEGLIGENT AND NEGLIGENTLY: Means and imports a want of such attention to the nature or probable consequences of the act of omission as a prudent man ordinarily bestows in acting in his own concern.

OATH: Means and includes "affirmation", and the word "swear" includes the word "affirm". Every mode of oral statement under oath or affirmation is embraced in the term "testify" and every written one in the term "dispose".

OFFICER: Means and includes officers and boards in charge of departments and the members of such boards.

OWNER: Applied to a building or land means and includes any part owner, joint owner, tenant in common, joint tenant or lessee of the whole or of a part of such building or land.

PERSON: Means and includes bodies politic and corporate, partnerships, associations and companies.

PERSONAL PROPERTY: Means and includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, rights or title to property is created, acknowledged, transferred, increased, defeated, discharged or diminished, and every right or interest therein.

PROPERTY: Means and includes both real and personal property.

SIGNATURE: Means and includes any name, mark or sign written with the intent to authenticate any instrument or writing.

STATE: The state of Utah.

STREET: Means and includes alleys, lanes, courts, boulevards, public ways, public squares, public places and sidewalks.

TENANT OR OCCUPANT: Applied to a building or land, means and includes any person who occupies the whole or any part of such building or land either alone or with others.

WILFULLY: When applied to the intent with which an act is done or omitted, means and implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to require any advantage.

WRITING: Means and includes printing, writing and typewriting. (Amended during 1/88 supplement; prior code § 26-1-3)

Title 15
PARKS AND RECREATION

15.04.010: APPLICABILITY OF PROVISIONS:

The provisions of this chapter shall apply to the public parks and playgrounds as named and described in the succeeding sections of this chapter. (Prior code § 27-8-1)

15.04.150: DESCRIPTION OF PIONEER PARK:

Pioneer Park is described as follows:

All of Block 48, Plat "A," Salt Lake City Survey, being the area between Third and Fourth South Streets and Third and Fourth West Streets.
(Amended during 1/88 supplement: prior code § 27-8-12)

Addendum B

In The Third Judicial District Court Of Salt Lake County
State of Utah

State of Utah, Plaintiff, vs. ROLANDO CARDONA-GUETON, Defendant,	**JURY INSTRUCTIONS** Case No. 091908492

THE JURY IS HEREBY CHARGED WITH THE LAW THAT APPLIES TO THIS CASE IN THE FOLLOWING INSTRUCTIONS, NUMBERED (1) THROUGH ( ), INCLUSIVE.

DATED THIS 7 DAY OF Sept., 2010.

Judith S. Atherton
HONORABLE JUDITH S ATHERTON
JUDGE, THIRD DISTRICT COURT

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

INSTRUCTION NO. 12

Before you can convict the defendant, ROLANDO CARDONA-GUETON of the offense of Possession of a Controlled Substance with Intent to Distribute, a First Degree Felony, you must find from the evidence and beyond a reasonable doubt, each and every one of the following elements:

1. That on or about October 22, 2009, in Salt Lake County, State of Utah, the defendant, ROLANDO CARDONA-GUETON;
2. Did knowingly and intentionally possess Cocaine;
3. That Cocaine was then and there a controlled substance; and
4. That at the time of said possession, the defendant intended to distribute the substance.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Possession of a Controlled Substance with Intent to Distribute as charged in the Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty.

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

State of Utah,)

Plaintiff,)

vs.)

Rolando Cardona-Gueton,)

Defendant.)

VERDICT

Case No. 091908492

We, the jurors impaneled in the above case, find the defendant, Rolando Cardona-Gueton, Guilty of Possession with Intent to Distribute a Controlled Substance, as charged in Count 1 of the Information.

DATED this 7 day of September, 2010.

Foreperson

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- ROLANDO CARDONA-GUETON, Defendant.	)	**SPECIAL VERDICT** Case No. 091908492 Hon. JUDITH S. ATHERTON

If you find the defendant, Rolando Cardona-Gueton, guilty beyond a reasonable doubt of Possession of a Controlled Substance with Intent to Distribute as charged in Count I of the information, please answer the following question:

We, the jury, having found the defendant, Rolando Cardona-Gueton, guilty of Possession of a Controlled Substance with Intent to Distribute as charged in Count I of the Information,

X do

_____ do not

find from all the evidence and beyond a reasonable doubt that in committing the offense of Possession of a Controlled Substance with Intent to Distribute, the defendant, Rolando Cardona-Gueton, committed the offense in a public park, amusement park, arcade, or recreation center.

DATED this 7th day of September, 2010.

Foreperson