

2001

# Utah v. Wintron Nunez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. : Case No. 20010019-CA  
WINTRON NUNEZ : Priority No. 2  
Defendant/Appellant. :

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BRIEF OF APPELLEE

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AN APPEAL FROM A CONVICTION FOR ARRANGING TO  
DISTRIBUTE A CONTROLLED SUBSTANCE WITHIN 1,000 FEET  
OF A PUBLIC PARK, A SECOND DEGREE FELONY, IN VIOLATION  
OF UTAH CODE ANN. § 58-37-8 (Supp. 2000), IN THE THIRD  
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE  
HONORABLE ROGER A. LIVINGSTON, PRESIDING

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ORAL ARGUMENT AND PUBLISHED DECISION NOT REQUESTED

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**BRIEF OF APPELLEE**

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**JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS**

Defendant appeals from a conviction for arranging to distribute a controlled substance within a 1,000 feet of a public park, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000) (R.123-124). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

**STATEMENT OF ISSUE  
AND STANDARD OF REVIEW**

**Issue:** Was defendant, charged with arranging to distribute a controlled substance, entitled to a lesser offense instruction of attempted possession of marijuana, where the elements of the two crimes do not overlap and where the evidence did not support both an acquittal on arranging and a conviction for attempted possession?

**Standard of Review:** A trial court's refusal to give a requested jury instruction is reviewed for correctness. *State v. Kruger*, 2000 UT 60, ¶ 11, 6 P.3d 1116; *State v. Widdison*, 2000 UT App 185, ¶ 52, 4 P.3d 100. In reviewing the denial of a defendant's requested lesser

offense instruction, an appellate court views the evidence and reasonable inferences therefrom in the light most favorable to the defense. *State v. Crick*, 675 P.2d 527, 532 (Utah 1983).

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The text of the following relevant statutes are contained in **Addendum A**:

Utah Code Ann. § 58-37-8 (Supp. 2000);  
Utah Code Ann. § 76-1-402 (1999).

## **STATEMENT OF THE CASE**

Defendant, Wintron David Nunez, was charged in an amended information with one count of “unlawful distribution, offering, agreeing, consenting or arranging to distribute a controlled or counterfeit substance,” within 1,000 feet of a public park, a second degree felony (R.4-6); Utah Code Ann. § 58-37-8(1)(a)(ii).<sup>1</sup> At trial, defendant requested a lesser offense instruction for attempted possession of marijuana (R.147:91,160). After hearing all the evidence, the trial court denied defendant’s requested instruction on the ground no rational basis in the evidence supported both an acquittal of arranging and a conviction of attempted possession (R.147:169). The jury convicted defendant as charged (R.147:219).

The trial court sentenced defendant to 0 - 5 years in prison, but suspended the prison term, instead imposing one year in jail and three years probation (R.123-124,148:3). Defendant was given credit for time already served (*id.*). Defendant timely appealed (R.125).

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<sup>1</sup>The State will use the term “arranging” to describe defendant’s conduct in this case because no evidence suggested that he “distributed” or even attempted to distribute any controlled substance or that he ever possessed a controlled substance that he could distribute. Rather, as set out in the Statement of Facts, the uncontroverted evidence at trial was that defendant “arranged” or facilitated the transfer of controlled substances to an undercover officer by a third person. *See e.g., State v. Clark*, 783 P.2d 68, 69 (Utah 1989) (distinguishing between distribution and arranging under this subsection).



## STATEMENT OF FACTS

Over a twenty minute period, defendant thrice tried to arrange a drug buy for an undercover narcotics officer and another person in the vicinity of Pioneer Park. The third attempt was successful. Unless otherwise noted, the following facts were uncontroverted at trial.

***“I don’t have any, but I can . . . find it for you.”***

Although early evening, it was still light outside on June 14, 2000, when the seven-member drug interdiction squad of the Salt Lake Police Department began patrolling the neighborhood between Pioneer Park and the homeless shelter (R.147:94-95,96,103).<sup>2</sup> Officer Tyrone Farillas was the only officer working undercover that day (R. 147:95). Wearing plain clothes and a wire, Farillas walked into the northwest corner of the park, or what the squad called the “number one corner of Pioneer Park”(R. 147:97, 112).

At the same time, Claude Ryans, who had just picked up his paycheck, was walking through Pioneer Park looking for marijuana (R.147:144,145,147). Ryans asked Farillas if he had any “mota,” which is a common street name for marijuana (R.147:97).

A few minutes later, Ryans and Farillas spotted defendant walking towards them along 300 South (R.147:98,113). The two approached defendant, and Ryans asked if defendant had any “mota” (R.147:98,150). Ryans offered, “if you help me find some, I [will] given you a joint - a joint or something” (R.147:146). Defendant told Ryans that he did not

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<sup>2</sup>Pioneer Park sits between 300 and 400 South and 300 and 400 West. The shelter is between 400 West and Rio Grande, which is about 435 West (R. 147:95).

smoke marijuana, to which Ryans replied, “Well, I’ll get you . . . a drink a beer or something” (*Id.*). Defendant responded, “I don’t have any, but I can . . . find it for you” (R.147:99).

***“Follow me”***

Farillas then told defendant that he too was looking for marijuana (R.147:99). Defendant replied, “Follow me” (R. 147:99, 121). With that, the two men followed defendant toward the homeless shelter (R.147:99,121). On the way, defendant asked Farillas and Ryans how much marijuana they each wanted (R.147:99,155). Farillas told defendant he wanted \$20 worth and Ryans stated he wanted “a dime, which is \$10” (R.147:100).

Defendant explained that he had a friend at the shelter named Steve, who likely had marijuana (R.147:100,113,150,155-56). Once the trio reached the shelter, defendant told Farillas and Ryans to wait outside while he tried to find Steve (R.147:101, 114). When defendant returned, he informed them that “his friend Steve had run out of marijuana that morning” (R.147:102,114,157).

***“I know someone else that might have some”***

Undaunted, defendant told Farillas and Ryans that he knew someone else who might have some marijuana to sell (R. 147:102, 114). Defendant again bade the two men to follow him (R. 147:102, 114). Defendant explained that this other “guy he knows usually hangs out at the food line” at the Salvation Army (R. 147:101). By this time, Farillas had been with defendant between ten and fifteen minutes (R.147:103).

Defendant's second attempt at finding marijuana for Farillas and Ryan failed because the person defendant sought was not in the food line as expected (R.147:104). The three returned to "the number one corner" of Pioneer Park (R.147:104,114).

***"Done deal"***

A young woman, later identified as Rebecca Hellman, then approached defendant (R.147:104,105). Ryans and Farillas waited about ten feet away while defendant conversed with the woman (R.147:104, 105,106,115,117). Farillas could not hear what the two said, nor could he discern whether they knew each other (R.147:105,117,124).

Thirty seconds later, defendant again told Ryans and Farillas to "[f]ollow us" (R. 147:104). Defendant and Hellman then led the two back towards the food line (R.147:104,106,116). Hellman sat next to a fenced area by the food line, about 200 to 300 feet from the park, and motioned for both Farillas and Ryans to sit by her (R.147:104,126,152,153).

Although neither Farillas nor Ryans had told Hellman what they were seeking to purchase, she asked them how much marijuana they were looking for (R. 147:104, 110, 152-53). When Farillas replied, "20," Hellman removed two small bags of marijuana from her right sock and handed them to Farillas, who gave her twenty dollars (R.147:104,106, 110, 152-53).

Farillas signaled to his fellow officers that the transaction had occurred by saying over the wire it was a "done deal" (R.147:104-105,119,120). Farillas then noticed Ryans handing

Hellman a ten dollar bill (R.147:106). Defendant, who was standing four feet away from the transaction, told Farillas, “Wait for me. I want to use it with you” (R.147:109).

Defendant never got the chance to share the marijuana, however, because the drug squad arrived and handcuffed everyone, including Farillas (R.147:117).

### ***The Defense***

Defendant called Ryans to testify for him (R. 147:143). Ryans admitted that he went to Pioneer Park looking for marijuana that day and that he asked defendant to help him (R. 147:146). Ryans denied having met defendant before that day (R. 147:146). Ryans testified that when he offered to share any marijuana defendant found for him, defendant replied that he “didn’t smoke” (R. 147:146).

Defendant then testified that he initially said, “I don’t know,” when Ryans first asked if defendant knew where to find some marijuana (R. 147:150). He admitted, however, that “at some point” he “surely did” tell Ryans that he “might know someone who might have marijuana” (R. 147:150). On cross-examination, he conceded that he offered to take Farillas to his friend Steve “who usually had some marijuana to sell” (R. 147:156). He then described how he led Ryans and Farillas on a search for Steve at the shelter (R. 147:150, 156). Defendant stated that he found Steve, but that Steve “told me he had no, no marijuana at all” (R. 147:151). Defendant admitted conveying this information to Farillas (R. 147:157).

Defendant testified that he saw Hellman after they returned to the park, but denied that he ever spoke to her (R. 147:150-51). According to defendant, Hellman asked the three men from across the street, “What . . . you guys looking for?” (R. 147:152). Defendant claimed

that Farillas, not he, answered, “I’m looking for \$20 of weed” (R. 147:152). Defendant said that Hellmen then joined them and led them to a little alley near the Salvation Army (R. 147:152). Defendant disclaimed any interest in the resulting transaction, asserting instead that he had his back to them and saw nothing (R. 147:156). Defendant said nothing about asking Farillas to share his marijuana (R. 147:154).

### **SUMMARY OF THE ARGUMENT**

Defendant challenges the trial court’s denial of his requested lesser offense instruction for attempted possession of marijuana. To be entitled to a lesser offense instruction, a defendant must show that (1) the elements of the two offenses overlap, and (2) the evidence, viewed in the light most favorable to the defense, provides a rational basis for both acquitting on the greater offense and convicting on the lesser offense.

Defendant was not entitled to the lesser offense instruction because the elements of arranging to distribute a controlled substance do not include possession. Therefore, the elements of arranging and attempted possession do not overlap.

Defendant was also not entitled to the lesser offense instruction because even accepting defendant’s version of events, the evidence did not support both an acquittal of the greater and a conviction of the lesser. Under controlling case law, defendant’s testimony conclusively established all the elements of arranging before he ever sought to possess any marijuana. Other uncontroverted facts conclusively established that defendant also committed a second act of arranging before he sought to possess any marijuana. Moreover, even assuming defendant attempted to possess marijuana when he asked the officer to share

it with him, that fact does not negate the evidence conclusively proving that defendant was also guilty of arranging. Consequently, no rational basis in the evidence permitted the jury to both acquit defendant of arranging and convict him of attempted possession.

## **ARGUMENT**

### **POINT I**

**DEFENDANT WAS NOT ENTITLED TO A LESSER OFFENSE INSTRUCTION FOR ATTEMPTED POSSESSION OF MARIJUANA BECAUSE THE ELEMENTS OF ATTEMPTED POSSESSION AND ARRANGING DO NOT OVERLAP AND BECAUSE THE EVIDENCE DID NOT SUPPORT BOTH AN ACQUITTAL FOR ARRANGING AND A CONVICTION FOR ATTEMPTED POSSESSION.**

Defendant's sole claim on appeal is that the trial court erred in not giving his requested lesser offense instruction for attempted possession of marijuana. He argues he was entitled to this instruction because (1) the elements of arranging and attempted possession overlap, and (2) the evidence presented would have allowed the jury to acquit him of arranging and to convict him of attempted possession. Br. Aplt. 9-12.

Contrary to defendant's claim, the elements of arranging and attempted possession do not overlap. In addition, even accepting defendant's version of events, the evidence did not support both an acquittal on the charged offense and a conviction on the lesser. Consequently, the trial court properly denied the requested instruction.

**A. A defendant is entitled to a lesser offense instruction only when the statutory elements overlap and a rational basis exists in the evidence to both acquit on the greater offense and convict on the lesser offense.**

As defendant acknowledges, he is entitled to a requested lesser offense instruction only if (1) the statutory elements of the greater and lesser crimes overlap and the evidence of the greater offense includes proof of some or all of the overlapping elements, *and* (2) the evidence at trial provides a “rational basis for a verdict acquitting the defendant of the offense charged *and* convicting him of the included offense.” *State v. Baker*, 671 P.2d 152, 158-59 (Utah 1983); *accord State v. Kruger*, 2000 UT 60, ¶ 13, 6 P.3d 1116. *See also* Utah Code Ann. § 76-1-402(3)(a) and (4); *State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997); *State v. Standiford*, 769 P.2d 254, 266-67 (Utah 1988); *State v. Shabata*, 678 P.2d 785, 790 (Utah 1984); *State v. Payne*, 964 P.2d 327, 332 (Utah Ct. App. 1998).

Defendant must show both requirements to receive the instruction. *Baker*, 671 P.2d at 158-59. As explained below, defendant has not met either requirement.

**B. The statutory elements of attempted possession of a controlled substance do not overlap with the statutory elements of arranging.**

Defendant contends that the first *Baker* requirement is met because the statutory elements of distribution and arranging the sale of marijuana under section 58-37-8(1)(a)(ii) and attempted possession of marijuana under section 58-37-8(2)(a)(i) overlap. Br. Aplt. 9. Defendant argues that “[s]ince distribution requires possession of the controlled substance, the elements for a charge of distribution of marijuana pursuant to section 58-37-8(1)(a)(ii) and possession of marijuana pursuant to section 58-37-8(2)[(a)(i)] overlap.” Br. Aplt. 9. He

then asserts that “since arranging involves anticipation of possession, as does an attempt to possess, the two statutes overlap.” Br. Aplt. 9.

Defendant’s claim rests on two incorrect assumptions: (1) that defendant “distributed” marijuana, and (2) that arranging necessarily involves possession of the controlled substance. Br. Aplt. 9.

**1. Defendant did not “distribute” marijuana; he “arranged” for its sale.**

As stated, under the first *Baker* requirement, an offense is included for purposes of deciding whether to grant a defendant’s requested jury instruction, “where [the] two offenses are related because some of their statutory elements overlap, *and* where the evidence at the trial of the greater offense includes proof of some or all of those overlapping elements.” *Baker*, 671 P.2d at 158-59 (emphasis added). Thus, the analysis of whether an offense is included “begin[s] with the proof of facts at trial.” *Id.* at 158. “If the same facts tend to prove elements of more than one statutory offense, then the offenses are related . . . .” *Id.* “[R]eference to the statutory elements of the offenses involved [is necessary] in order to determine whether given facts are ‘required to establish the commission of the offense charged.’” *Id.* at 158-59 (emphasis in original).

Here, defendant was charged under Utah Code Ann. § 58-37-8(1)(a)(ii), which makes it unlawful for any person to knowingly and intentionally “distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance.” Therefore, a defendant may be convicted under this section if he distributes, agrees, consents, or offers to distribute, or if he arranges to distribute a controlled



substance. The elements instruction to the jury repeated this statutory language (R. 94). Another instruction defined “distribute” as “to deliver other than by administering or dispensing a controlled substance” (R. 95). “Deliver” was defined as “the actual, constructive, or attempted transfer of a controlled substance, whether or not an agency relationship exists” (R. 95).

Beginning, as *Baker* requires, “with the proof of facts at trial,” it is clear that defendant was not convicted of “distributing” a controlled substance. According to the testimony of Farillas and Ryans, as well as defendant’s own testimony, defendant had no marijuana to distribute or deliver (R. 157:99, 101-102, 114, 150-51, 157). Defendant also never offered to “distribute” or “deliver” marijuana himself. Rather, the uncontroverted testimony was that defendant offered to introduce Farillas and Ryans to someone who could sell them marijuana (R. 147:99, 101-02, 114, 150-51, 156-57). He then led them to two different places, the shelter and the food line, in an attempt to find someone who could sell the two men marijuana (R. 147:100-02, 113-14, 150-155-56). Ultimately, he hooked Farillas and Ryans up with Hellman, who distributed marijuana to them (R. 147:104-05, 115-17, 126). At no time did defendant represent that he personally would provide marijuana to Farillas and Ryans. Thus, under the uncontroverted facts proved at trial, defendant was not convicted of distributing, but of arranging the sale of marijuana. *See State v. Clark*, 783 P.2d 68, 69 (Utah App. 1989) (rejecting claim that defendant could not be convicted under section 58-37-8(1)(a)(ii) where he had not “distributed” any controlled substance because evidence showed that defendant had “arranged” to distribute a controlled substance).

As a result, this defendant may not rely on “distribution” as a basis for arguing that “possession” was a necessary prerequisite to his crime and that the elements of attempted possession therefore overlapped with the charged crime. Rather, defendant can meet the first *Baker* requirement only if the elements of attempted possession overlap with the elements of “arranging” the sale of marijuana.

**2. Arranging does not anticipate or otherwise involve possession.**

Contrary to defendant’s argument, the elements of arranging the distribution or sale of a controlled substance neither require nor even contemplate actual possession of the contraband. Arranging is “any witting or intentional lending of aid in the distribution of drugs, in whatever form the aid takes . . . .” *State v. Gray*, 717 P.2d 1313, 1320-21 (Utah 1986) (quoting *State v. Harrison*, 601 P.2d 922, 923 (Utah 1979)); accord *State v. Gallegos*, 851 P.2d 1185, 1190 (Utah App. 1993); *State v. Peterson*, 841 P.2d 21, 25 n.2 (Utah App. 1992); *State v. Pelton*, 801 P.2d 184, 185 (Utah App. 1990).

The supreme court compared the crime of arranging to “the theory of conspiracy which requires an *attempt* to commit a criminal act, coupled with any overt act in furtherance of that intent.” *Harrison*, 601 P.2d at 924 (emphasis added). The court explained that in a conspiracy case, “[t]he intent coupled with any action in furtherance thereof, completes the offense, and no confusion exists as to whether any given course of conduct is criminal or not.” *Id.* “Likewise,” the court concluded, “. . . if [the defendant] intends the distribution for sale of a controlled substance, *any* act in furtherance of an arrangement therefor constitutes the criminal offense described by the [arranging] statute.” *Id.* (emphasis added).

*Accord Gray*, 717 P.2d at 1320; *Gallegos*, 851 P.2d at 1190; *Pelton*, 801 P.2d at 185. In other words, an intentional *attempt* to arrange a drug deal, without more, is arranging under the statute. *Harrison*, 601 P.2d at 924; *Gallegos*, 851 P.2d at 1190; *Pelton*, 801 P.2d at 185.

A defendant need not possess the contraband to be guilty of arranging. In *Pelton*, this Court affirmed a defendant's conviction for arranging, even though defendant "never possessed the cocaine, never directed [the narcotics agent] to the house where the cocaine was purchased, was not present when the transaction occurred, and never discussed the prices or handled any money." *Pelton*, 801 P.2d at 185. Indeed, most of the arranging convictions addressed on appeal in this state involve defendants who never possessed or anticipated possessing the contraband they arranged to be distributed. *See, e.g., Harrison*, 601 P.2d at 923-24 (affirming arranging conviction of defendant who set up drug transaction, but never actually possessed any drugs until after transaction completed and buyer rewarded defendant with small quantity of drugs); *Gallegos*, 851 P.2d at 1190 (defendant who offered in several telephone conversations to "check around" for drugs and to provide drugs was guilty of arranging even absent evidence that he actually distributed drugs or that any drug transaction took place); *Peterson*, 841 P.2d at 23-24, 25-26 (affirming arranging conviction of defendant who promised to ask her live-in boyfriend if he could provide caller with cocaine, even though no evidence that defendant ever possessed or anticipated possessing the drug or that any transaction in fact occurred); *Clark*, 783 P.2d at 69-70 (defendant's conviction for arranging affirmed even without evidence that defendant ever possessed drugs or that a sale

was ever consummated). *But see Gray*, 717 P.2d at 1320 (defendant convicted of arranging had divided the drugs, and therefore possessed them before giving them to buyer).

That possession is not a necessary element of arranging is further supported by the unanimous decisions by this and the Utah Supreme Court stating that arranging the distribution of a controlled substance does not require an actual distribution or transaction. *See, e.g., Harrison*, 601 P.2d at 924 n. 5 (offense of arranging does not require actual distribution); *State v. Hester*, 2000 UT App 159, ¶ 11, 3 P.3d 725 (proof of actual sale is not element of crime of arranging, although such evidence may be helpful in proving knowledge or intent); *Peterson*, 841 P.2d at 25 n.2 (State had no obligation in prosecution for arranging to present evidence of actual distribution or transfer); *Clark*, 783 P.2d at 69 (defendant guilty of arranging even though “sale was never actually consummated”).

In short, possession of a controlled substance is not an element of arranging. Indeed, proof that a defendant charged with arranging actually possessed the drugs at some point is superfluous, because that fact neither proves nor disproves the elements of arranging.

Because a defendant may be guilty of arranging regardless of whether he ever possesses the contraband, the elements of arranging and attempted possession do not overlap. Consequently, the evidence of the greater offense, in this case arranging, does not include proof of any element the lesser offense, attempted possession. *See Baker*, 671 P.2d 158-59.

Defendant has failed to show that the elements of the two statutes overlap and that he was therefore entitled to his requested lesser offense instruction.

**C. The evidence at trial did not provide a rational basis for both acquitting defendant of arranging and convicting him of attempted possession.**

Even if the elements of the two statutes did overlap, defendant was not entitled to his requested instruction under the second *Baker* requirement because the evidence at trial did not provide a rational basis for acquitting him of arranging and convicting him of attempted possession.

Defendant claims that the evidence supported an acquittal for arranging because he “merely hung out with the officer and Ryans while the three wandered around and vaguely tried to locate some marijuana.” Br. Aplt. 11. Defendant further points to his denial that he ever talked to Hellman and his asking Farillas to share the marijuana with him as proof that “the jury could reasonably have found [defendant] did not arrange a deal, but instead was hanging out with Farillas and Ryans in the hope that he could get some marijuana.” Br. Aplt. 12. Defendant claims that taken together, this view of the evidence provided a rational basis for acquitting him of arranging and convicting him of attempted possession.

Defendant’s argument fails for three reasons. First, defendant’s own trial testimony conclusively established that he was not just “hanging out with Farillas and Ryans in the hope that he would get some marijuana,” but that he intentionally committed an “act in furtherance of arranging to distribute a controlled substance.” *Gray*, 717 P.2d at 1321 (brackets and ellipses omitted). Second, the requested lesser offense instruction was inconsistent with defendant’s own testimony, and that of his witness Ryans, that defendant did not smoke marijuana. Third, even if defendant’s asking Farillas to share the marijuana

with him provided a rational basis for convicting him of attempted possession, it did not provide a basis for acquitting him of arranging.

**1. Defendant admitted to committing all the elements of arranging.**

Defendant correctly states that in assessing whether any evidence supports a defendant's requested lesser offense instruction, the evidence and reasonable inferences therefrom must be viewed in the light most favorable to the defense. *Crick*, 675 P.2d at 532; *State v. Jaimez*, 817 P.2d 822, 827 (Utah Ct. App. 1991). Applying that standard, there was no rational basis in the evidence on which the jury could have acquitted defendant of arranging, because his own testimony admitted to all the elements of that offense.

Defendant testified that when approached by Ryans and Farillas, he "surely did" offer to take the two men to his friend Steve "who usually had some marijuana to sell" (R. 147:156). Defendant then admitted on the stand that he led Ryans and Farillas to the shelter where he asked his friend Steve if he had any marijuana to sell (R. 147:151). Although Steve had no marijuana to sell and no transaction resulted at this time, under the controlling precedent detailed above, which makes the *attempt* to arrange a drug deal an offense under the statute, defendant's admitted conduct to this point amounted to arranging. *See, e.g., Gallegos*, 851 P.2d at 1190-91 (defendant guilty of arranging where he told potential buyer that he knew where to get cocaine, but later told buyer that he would not be able to get the drugs after all); *Peterson*, 841 P.2d at 25-26 (defendant guilty of arranging where she merely told potential buyer over telephone that she would ask her live-in boyfriend if he could get her some cocaine, even though no evidence presented of an actual transfer); *see also Clark*,

783 P.2d at 69 (affirming defendant's arranging conviction for a sale he arranged that never transpired, although later cocaine negotiations took place between the parties he introduced). Thus, regardless of whether defendant later conversed with Hellman, the jury would not have had a rational basis on which to acquit him of arranging.<sup>3</sup>

Defendant committed a second "act in furtherance of arranging to distribute a controlled substance" when he told Officer Farillas that he knew another potential seller who "usually hangs out at the food line" at the Salvation Army and then led Farillas and Ryans to look for this person (R. 147:102, 104, 114). Although defendant did not testify regarding this second act, he did not deny it and no testimony contradicted that of Farillas on this point (R. 147:102-04, 144-47, 149-57). *See Kruger*, 2000 UT 60, ¶¶ 17-19 (defendant not entitled to requested lesser included offense instruction where he did not adduce sufficient quantum of evidence to create a jury question).

Again, although defendant was ultimately unsuccessful in finding this second buyer, his conduct amounted to arranging under the statute. *See Gallegos*, 851 P.2d at 1190-91 (defendant guilty of arranging where he told potential buyer that he knew where to get cocaine, but was later unsuccessful in attempt to obtain the drug). Also, there was evidence that the food line was within 1,000 feet of a public park (R. 147:126). Thus, the

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<sup>3</sup>Officer Farillas testified without contradiction that the shelter was located within 1,000 feet of a public park (R. 147:101). Moreover, defendant admitted that he "was standing on the south . . . side of the park on the walkway" when he made his initial offer to find a buyer for Farillas and Ryans (R. 147:149-50). In addition, defense witness Ryans testified that defendant's initial offer came inside the park (R. 147:145-46). Thus, the uncontroverted evidence is that this first act of arranging occurred within 1,000 feet of a public park.

uncontroverted evidence was that defendant committed a second act of arranging before Hellman ever appeared on the scene.

Thus, even if the jury rejected Farillas' testimony and accepted defendant's story that he never conversed with Hellman, no rational basis existed to acquit defendant of arranging, because by his own admission and the uncontroverted evidence he had already committed two other acts of arranging before Hellman consummated the drug deal.

**2. A lesser offense instruction on attempted possession was inconsistent with defendant's defense.**

Giving an instruction that defendant could be found guilty of attempted possession was inconsistent both with defendant's testimony and that of his witness Ryans. Although defendant admitted to trying to help Farillas and Ryans find a seller, he scrupulously avoided testifying that he never attempted to obtain any marijuana for himself (R. 147:149-57). After emphatically denying that he said so much as two words to Hellman, defendant claimed that he had not knowledge of the subsequent transaction "because my butt was to the street. I was -- I mean wasn't facing their transaction. I -- I care less about their transaction" (R. 147:153-54). Although defendant said nothing about asking to share marijuana with Farillas, the clear import of his testimony was that he was neither involved nor interested in the transaction with Hellman and therefore would not have asked Farillas to share his marijuana.

Significantly, defense witness Ryans testified that when he offered to give defendant "a joint" for helping him find some marijuana, defendant replied that "he didn't smoke" (R. 147:146). Thus, if the jury accepted the defense version of events, it would have had no



basis for convicting defendant of attempting to possess marijuana. Consequently, giving a lesser offense instruction to that effect would have been inconsistent with defendant's own evidence.

**3. Asking Farillas to share his marijuana did not provide a basis for acquitting defendant of arranging.**

The only possible evidence that supports defendant's claim that he attempted to possess marijuana was Officer Farillas' testimony that after the drug deal was complete, defendant asked Farillas to wait so that defendant could smoke the marijuana with him (R. 147:109). That defendant sought to possess marijuana at that juncture, however, did not provide the jury with a rational basis for *both* acquitting defendant of arranging *and* convicting him of attempted possession, as *Baker* requires. As the trial court correctly recognized below, the fact that defendant may have been motivated by a desire to obtain drugs himself did not negate the evidence that defendant had committed all the elements of arranging (R. 147:162-65). To the contrary, that evidence showed that defendant expected to share in the proceeds, thereby *supporting* the State's case that defendant not only intended, but also arranged the drug sale between the officer and Hellman. Defendant would have had no expectation that these two strangers would simply share marijuana with him if, as he now claims, he was "just hanging out with them." Br. Aplt. 10-11.

Moreover, as the trial court rightly pointed out, the State might well have charged defendant with attempted possession, not as an alternative lesser offense, but as an additional offense to arranging (R. 147:163). Thus, even assuming that defendant's statement provided

a basis for convicting him of attempted possession, that evidence did not provide a rational basis for acquitting him on the greater offense of arranging.

Because defendant has also failed to meet the second *Baker* requirement he was not entitled to his requested lesser offense instruction.

### CONCLUSION

Based on the foregoing, the State respectfully requests the Court to affirm defendant's conviction for arranging to distribute a controlled substance.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2001.

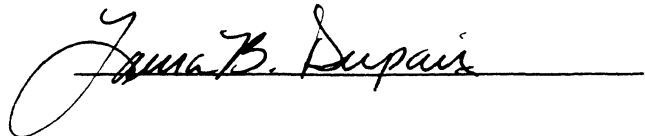
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MAILING CERTIFICATE

I hereby certify that on this 18<sup>th</sup> day of July, 2001, I caused to be mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

Joan C. Watt  
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A handwritten signature in cursive script, reading "James B. Dupuis", is written over a horizontal line.

## **ADDENDUM A**

### **Statutes**

## **58-37-8. Prohibited acts — Penalties.**

### **(1) Prohibited acts A — Penalties:**

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

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

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

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

(iv) engage in a continuing criminal enterprise where:

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

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

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

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

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

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

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

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

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

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

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

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

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

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

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

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

- (a) The offenses are within the jurisdiction of a single court; and
- (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

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

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
- (c) It is specifically designated by a statute as a lesser included offense.

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

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