

2001

Utah v. Sergio Renaga-Gutierrez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

:

Plaintiff/Appellee,

:

v.

:

SERGIO RENAGA-GUTIERREZ,

:

Case No. 20010141-CA

Defendant/Appellant.

:

Priority No. 2

BRIEF OF APPELLEE

*Appeal From a Conviction for Distributing, Agreeing, Consenting, Offering,
or Arranging to Distribute a Controlled Substance, a Second Degree Felony,
in Violation of UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 2001), in the Third
Judicial District Court, Salt Lake County, Utah, the Honorable Judith S.
Atherton, Presiding*

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Utah Court of Appeals
NOV 27 2001
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Clerk of the Court

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
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 v. :
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 SERGIO RENAGA-GUTIERREZ, : Case No. 20010141-CA
 :
 Defendant/Appellant. : Priority No. 2

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Defendant appeals his conviction for distributing, agreeing, consenting, offering or arranging to distribute a controlled substance (cocaine), a second degree felony, in violation of UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 2001), in the Third Judicial District Court. This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (Supp. 2001).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court properly deny defendant's motion for directed verdict where competent evidence supported each element of the charged offense?

A denial of a motion for directed verdict is reversed “only if, viewing the evidence in the light most favorable to the prevailing party, [the appellate court] conclude[s] that the evidence is insufficient to support the verdict.” *Brewer v. Denver & Rio Grande Western Railroad*, 2001 UT 77, ¶ 33, 31 P.3d 557 (citation and quotation marks omitted). Evidence

is insufficient only if, when viewed in the light most favorable to the jury's verdict, it is "wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim." *State v. Clark*, 2001 UT 9, ¶ 12, 20 P.3d 300.

2. Did the trial court properly deny defendant's requested lesser-offense instructions on attempted possession of a controlled substance and criminal solicitation?

A trial court's denial of a requested instruction is a question of law, which is reviewed for correctness. *State v. Kruger*, 2000 UT 60, ¶ 11, 6 P.3d 1116. A defendant is entitled to a lesser-included instruction only if: (1) the requested offense is legally included in the charged offense; and (2) the evidence provides a rational basis for the jury to acquit the defendant of the greater offense and, at the same time, convict him of the lesser. *Id.* at ¶ 12 (citing *State v. Baker*, 671 P.2d 152, 157-59 (Utah 1983)).

3. Did the trial court properly overrule defendant's objections to the prosecutor's closing argument and instruct the jury that comments of counsel are not evidence?

A claim of prosecutorial misconduct is reviewed for an abuse of discretion and will result in reversal only if: (1) the objected-to comment improperly called the jury's attention to a matter it could not properly consider; and (2) the improper remark substantially and prejudicially affected the outcome of the trial. *State v. Kohl*, 2000 UT 35, ¶ 22, 999 P.2d 7.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Copies of the following provisions, and any other provision cited in the body of this brief, are included in *Addendum A*:

UTAH CODE ANN. § 58-37-8 (Supp 2001) - *Prohibited [Drug] Acts - Penalties*,
UTAH CODE ANN § 76-4-101 (1999) - *Attempt – Elements of Offense*,
UTAH CODE ANN § 76-4-203 (1999) - *Criminal Solicitation - Elements*,
SALT LAKE MUNICIPAL ORDINANCE § 11 12 100 - *Solicitation of Person(s) with Intent to Have Another Commit an Offense Specified in Section 58-37-8, Utah Code Annotated*

STATEMENT OF THE CASE

In August 2000, defendant was charged with distribution of cocaine (R 5-6) ¹
Following a jury trial on December 6-7, 2000, defendant was convicted (R 101-03, 128-29)
On January 29, 2001, he was sentenced to the statutory prison term of one-to-fifteen-years
(R 139) Defendant timely appealed (R. 143)

STATEMENT OF FACTS²

Suspected Drug Dealing in the Men's Room

Late at night on August 13, 2000, undercover detective Brian Purvis, with three other Salt Lake City vice officers, entered a bar to investigate reported underage drinking (R 160 23-25, 62) At the door, one of the bar's private security guards told Purvis "he felt like there were drugs being dealt in the men's room" (R 160 26)

Purvis entered the men's room to investigate (R.160. 27) He immediately noticed

¹ The term "distribution" is used in this brief as "shorthand for all the variations of culpable behavior listed in" section 58-37-8(1)(a)(ii) (prohibiting distributing, agreeing, consenting, offering, or arranging to distribute a controlled substance) *See State v. Hester*, 2000 UT App 159, ¶ 1 n 1, 3 P 3d 725. *cert denied*, 9 P 3d 170

² Except as otherwise noted, the facts are recited in the light most favorable to the jury's verdict *See State v. Litherland*, 2000 UT 76, ¶ 2, 12 P 3d 92

defendant, who was dressed differently from the majority of the 200 western-clad bar patrons (R.160: 27-28, 30-31). Defendant and another man were talking “right in the center of the men’s room,” not “at the toilets or the sink or the mirror or anything” (R.160: 27, 29-31). “As soon as [the detective] walked in they stopped and turned around and walked out the door” (*id.*).³

Purvis left the restroom and went to the bar area to watch for underage drinkers (R.160: 32-33, 64). About ten to fifteen minutes later, Purvis saw defendant re-enter the men’s room followed by two men (R.160: 35). Purvis believed that if he followed, defendant would just “leave again like last time” (*id.*). As he tried to think of “some other way to approach it,” another officer told Purvis he was needed in the parking lot (*id.*).

Observed Hand-to-Hand Drug Transaction in Parking Lot

In the bar’s parking lot, Purvis and two undercover officers checked for unauthorized drinking (R.160: 36-38, 79). As Purvis walked down the first row of cars, he saw defendant walk from the bar into the parking lot. Defendant was “leading” a man, subsequently identified as Ignacio Perez-Acevedo, who was walking behind him (R.160: 39-40, 42, 65). Defendant stopped behind a parked windowless delivery truck and turned to face Acevedo (R.160: 41-42). The two were not in the open and apparently did not notice Purvis; but with the help of street lights shining over his back, Purvis could clearly see defendant and

³ Others were using the men’s room, but they had no interaction with defendant and walked out with Purvis after defendant left (R.160: 32-33, 63).

Acevedo (R.160: 42-43).

Defendant and Acevedo placed all four of their hands down low and between them, like a “two-handed handshake” (R.160: 43-44, 67). The two did not look at each other, only down at their hands (R.160: 43). Purvis could see that they held something in their hands, but initially could not tell what it was (R.160: 59, 71-72).

“Defendant pulled his left hand out and [Purvis] could tell at that point [defendant] had cash” in his hand (R.160: 44, 59). Even though Purvis had not seen the money in Acevedo’s hand before seeing it in defendant’s, from their gestures, it “definitely” appeared that Acevedo was “handing money” to defendant (R.160: 70).⁴ At the same time, defendant’s right hand stayed between Acevedo’s two hands (R.160: 44). Purvis had “no doubt” that a “hand-to-hand” drug transaction was occurring and waved to the other detectives (R.160: 44, 47, 59, 67, 75, 80). Defendant and Acevedo looked “straight at” the detective and stepped away from each other (R.160: 45, 68). As their hands separated, Purvis could see a “flash of white” in Acevedo’s right hand (R.160: 45, 59, 73).

Defendant and Acevedo walked in opposite directions (R.160: 48, 68). Purvis confronted Acevedo; the other detectives stopped defendant (R.160: 46).

Purvis told Acevedo to put his hands on the hood of a nearby car (R.160: 46, 49, 69). Acevedo put his left hand on the hood but kept his right hand, which held the white object, in his right pocket (R.160: 46). Purvis told him several times to remove his hand. Finally,

⁴ The detective demonstrated what he saw to the jury (R.160: 44, 60).

Purvis grabbed Acevedo's right hand, placed it on the hood, patted Acevedo's pocket, felt a bump, reached in "just an inch or so," and pulled out a white plastic bag containing a "twist" of cocaine (R.160: 46, 50, 74).⁵ Subsequently, during a more complete jail search, two more "twists" were discovered farther down in the same pocket (R.160: 52-53, 76).⁶

Contemporaneous with Purvis's arrest of Acevedo, Detectives Woodbury and Martin arrested defendant (R.160: 46, 81). The cash Purvis observed was still in defendant's left hand (R.160: 82). Additionally, a thick "wad" of half-folded bills was in defendant's pocket and a "significant" amount of cash was found in his wallet (R.160: 83-84). All total, defendant was carrying \$1426.00 in cash, primarily in tens and twenties (R.160: 83-85).⁷

Based on Purvis's experience, both as an observer and as an undercover participant in other drug transactions, the detective concluded that defendant and Acevedo were involved in

a hand-to-hand transaction. . . It seemed very plain to me that Mr. Gutierrez, the defendant, since he was taking the money away was the seller and that Mr. Acevedo, since he ended up with the drugs, would be the buyer.

(R.160: 47-48).

⁵ A "twist" is normal street packaging for cocaine. It contains about half a gram of cocaine and sells on average for \$20.00 but may run as high as \$40.00. (R.160: 50).

⁶ A total of 1.4 grams of cocaine was found on Acevedo (R.160: 51).

⁷ Due to a computer "glitch," the officers did not record the exact denominations of the money seized from defendant (R.160: 89-90).

Defendant's Claim of Innocence

Defendant never personally explained what he was doing in the parking lot or why he was carrying a multitude of tens and twenties in his hand, pocket, and wallet. Nevertheless, through his mother and Acevedo, defendant claimed he was innocent.

By the time of defendant's trial, Acevedo had pled guilty to "having drugs in my pocket" (R.160: 104).⁸ He was awaiting deportation and admitted that he had "nothing to gain or lose" by what he said at trial (R.160: 111). According to Acevedo, he purchased the drugs found on him from a different person at a different location earlier that evening (R.160: 100). Acevedo testified that no drug sale or attempted drug purchase occurred in the parking lot, no drugs or money were exchanged, and neither Acevedo nor defendant offered to sell drugs to the other (R.160: 101-04). Acevedo claimed that he did not leave the bar with defendant but admitted that he was walking behind defendant in the parking lot and approached him (R.160: 101, 110). Acevedo did not have a car, but defendant "had his car" in the parking lot (R.160: 110). Acevedo claimed they never discussed drugs but only engaged in social conversation (R.160: 110). When defendant turned to say good-bye, the police arrested them because, in Acevedo's words, they looked "suspicious" (R.160: 102, 110).

Defendant's mother claimed that two days before to his arrest, defendant sold a car

⁸ Pursuant to a plea bargain, Acevedo pled guilty to a reduced charge of attempted possession of a controlled substance, was sentenced to six months in jail, and agreed to be deported (R.160: 106, 123).

to his uncle for \$2000.00 (R.160: 114-16).⁹ The sale took place at the mother's home, where defendant lived (R.160: 114-15). The mother did not know what her son had done with the alleged sale proceeds and had no idea what, if any, monies her son carried on him (R.160: 114).

The jury rejected defendant's claim of innocence and convicted him of distribution of a controlled substance (R. 128; R.160: 153).

SUMMARY OF ARGUMENT

Denial of Directed Verdict: The trial court properly denied defendant's motion for directed verdict. The prosecution presented competent evidence to support each element of distribution. While defendant argues that the State's evidence should not be believed and supports other inferences, that is not the test. Instead, a directed verdict is permissible only if, viewing the evidence in the light most favorable to the prosecution, the evidence is wholly lacking and incapable of supporting the prosecution's case.

Here, an experienced undercover officer witnessed what he characterized as a hand-to-hand drug transaction. As defendant, the seller, walked away from the transaction, he was arrested with money in his hand and substantial monies on his person. Walking in the opposite direction, Acevedo, the buyer, had three twists of cocaine in his pocket. This evidence was sufficient to submit the case to a jury.

While Acevedo claimed no drug sale occurred – only a friendly conversation – the

⁹ No verification of the sale was produced.

jury was entitled to disregard that testimony and accept the observations of the police detective, which were fully supported by the physical evidence found on defendant and Acevedo at the time of their arrests.

In sum, defendant's conviction is supported by sufficient, and what the jury determined to be credible, evidence.

Refusal to Give Lesser Offense Instructions: A defendant is entitled to a jury instruction on a lesser offense only if: (1) the requested instruction is legally included in the charged offense; and (2) the evidence provides a rational basis for the jury to acquit the defendant of the greater offense and, at the same time, convict him of the lesser. Here, the trial court correctly concluded that no evidence supported the inference that defendant, rather than Acevedo, was purchasing drugs and, therefore, properly denied defendant's request for lesser instructions. Detective Purvis testified that he observed defendant sell drugs to Acevedo. Acevedo denied buying any drugs from defendant but also testified that defendant never attempted to buy any drugs from him. Thus, acceptance of the State's evidence supported conviction as charged, while acceptance of the defense evidence required acquittal of *any* drug charge.

Alleged Prosecutorial Misconduct: During closing argument, defense counsel objected to three statements by the prosecutor concerning his views of the defense evidence. The trial court properly overruled defendant's objections and reminded the jury of the court's prior instruction that comments of counsel were not evidence. Defendant has failed to

establish that the court abused its discretion in ruling on the objections, or if any alleged error occurred, that the error was prejudicial.

ARGUMENT

POINT I

A DETECTIVE OBSERVED A HAND-TO-HAND DRUG TRANSACTION AFTER WHICH DEFENDANT, THE SELLER, WAS FOUND IN POSSESSION OF MONEY AND THE BUYER WAS FOUND IN POSSESSION OF COCAINE; BECAUSE THE EVIDENCE WAS SUFFICIENT FOR CONVICTION, THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR DIRECTED VERDICT

Defendant claims that the trial court erred in denying his motion for directed verdict because “[n]otwithstanding the fact that [defendant] was seen associating with someone later found to be in possession of three twists of cocaine, there is not a sufficient nexus between [defendant] and the drugs,” and “any connection between [defendant] and the drugs [found on Acevedo] is too speculative and conjectural to legally support the inference of intent [to distribute]. *Brief of Appellant [Br.Aplt.] at 19-20*. Defendant’s argument misconstrues the requisite elements of distribution and is contrary to a fair interpretation of the evidence.

(A) Defendant Has Failed to Properly Marshal the Evidence.

A denial of a motion for directed verdict is reversed “only if, viewing the evidence in the light most favorable to the prevailing party, [the appellate court] conclude[s] that the evidence is insufficient to support the verdict.” *Brewer v. Denver & Rio Grande Western Railroad*, 2001 UT 77, ¶ 33, 31 P.3d 557 (citation and quotation marks omitted). Evidence is insufficient only if, when viewed in the light most favorable to the jury’s verdict, it is

“wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution’s claim.” *State v. Clark*, 2001 UT 9, ¶ 12, 20 P.3d 300.

As a prerequisite to consideration of his evidentiary challenge, defendant must first marshal the evidence in support of the trial court’s ruling and then demonstrate that “all the evidence” in support of the prosecution’s claims would not support conviction. *See Brewer*, 2001 UT 77, ¶ 33 (citations omitted). So long as “some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt,” the trial court’s denial of defendant’s motion for directed verdict must be affirmed. *See Clark*, 2001 UT 9, ¶ 13 (citations and quotation marks omitted).

Here, defendant purports to marshal the evidence, *see Br.Aplt. at 11-13*, but fails to present the evidence in the light most favorable to the prosecution or acknowledge the inferences which may be reasonably drawn from the evidence.

The marshaling process is not unlike becoming the devil’s advocate. Counsel must extricate himself or herself from the client’s shoes and fully assume the adversary’s position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the findings the appellant resists. After construing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the [trial] court’s finding resting upon the evidence is clearly erroneous.

Moon v. Moon, 1999 UT App 12, ¶ 24, 973 P.2d 431, (citation and quotation marks omitted), *cert. denied*, 982 P.2d 89. In essence, defendant’s argument on appeal is no more than his argument below: the detective was “mistaken” in what he saw. *Compare Br.Aplt. at 14-15*,

with R.160: 21 & R.161: 134. But merely rearguing claims rejected by the jury does not satisfy the marshaling requirement or provide a basis to reverse a jury verdict. *See Moon*, 1999 UT App 12, ¶ 24; *see also State v. Boyd*, 2001 UT 30, ¶ 16, 25 P.3d 985 (the “existence of contradictory evidence or of conflicting inferences” does not undermine the validity of a verdict).

Defendant’s failure to properly marshal the evidence permits this Court to summarily reject his argument. Even if the Court considers the substance of defendant’s challenge, his argument is meritless.

(B) Defendant Misconstrues the Elements of Distribution.

In attacking the trial court’s denial of his motion for directed verdict – and, implicitly, the underlying sufficiency of the evidence to support the verdict – defendant misinterprets the elements of distribution of a controlled substance, the crime of which defendant was convicted. UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 2001) states that it is unlawful to knowingly and intentionally “distribute a controlled substance . . . , or to agree, consent, offer, or arrange to distribute a controlled . . . substance.” *See Addendum A for copies of cited statutes*. “Distribute” means “to deliver,” which, in turn, is defined as “the actual, constructive, or attempted transfer of a controlled substance.” UTAH CODE ANN. § 58-37-2(1)(i) & (n) (1998). Distribution does not require proof of possession: it requires proof of a transfer or attempted transfer. *Cf. State v. Hester*, 2000 UT App 159, ¶¶ 9-10, 3 P.3d 725 (discussing elements of arranging, a variation of distribution), *cert. denied*, 9 P.3d 170.

Nevertheless, defendant attempts to add to the statutory definition of distribution an additional element – actual or constructive possession. *See Br.Aplt. at 14 & 19-20*. In doing so, defendant confuses the elements of distribution, defined in subsection 58-37-8(1)(a)(ii), with the separate crime of possession of a controlled substance with intent to distribute, set out in subsection 58-37-8(1)(a)(iii). *See Addendum A*. Unlike distribution, possession with intent to distribute requires proof of actual or constructive possession. *See State v. Layman*, 1999 UT 79, ¶ 13, 985 P.2d 911 (reversing conviction for possession with intent to distribute where the evidence of actual or constructive possession of the controlled substance was insufficient) *See also United States v. Jackson*, 213 F.3d 1269, 1294 (10th Cir.), (contrasting elements of distribution with elements of possession with intent to distribute), *cert. denied*, 531 U.S. 1038 (2000).

Defendant's reliance on *Layman*, 1999 UT 79, is misplaced. Unlike defendant, Layman was convicted of possession with intent to distribute. *Id.* at ¶ 1. Both Utah appellate courts reversed Layman's conviction because the only evidence to support the requisite element of possession was that Layman gestured to his traveling companion, who physically possessed the drugs, not to consent to a search when they were stopped by the police. *Id.* at ¶¶ 3-9 & 16. Because the crime of distribution was not at issue, *Layman*'s holding is neither factually nor legally applicable to this case.

Similarly, *Hester*, 2000 UT App 159, while a distribution case, does not support defendant's argument that evidence of possession is required for conviction. Hester was

charged with arranging to distribute a controlled substance, a variation of distribution contained in the same subsection. *Id.* at ¶ 1 & n.1. Hester agreed to sell cocaine to an undercover officer, took her money, and left. *Id.* at ¶ 2. He was arrested a few blocks away, walking in the opposite direction of the officer without any drugs in his possession. *Id.* at ¶ 3. This Court affirmed the magistrate’s refusal to bindover, concluding that the preliminary hearing evidence did not support an inference that Hester intended to distribute drugs – only that he took money under the pretext of distributing drugs. In analyzing the elements of section 58-37-8(1)(a)(ii), the Court recognized that distribution does not require proof of actual or constructive possession of drugs; it only requires proof that the defendant’s intent was to distribute drugs. *Id.* at ¶ 9. And while that intent might be inferred from actual or constructive possession of drugs, it might also be established through a wide range of other evidence. *Id.* at ¶¶ 9-12. “Even an aborted transaction can serve as the basis for an ‘arranging’ conviction, if the surrounding facts indicated that the defendant had intended to facilitate a completed drug sale.” *Id.* at ¶ 12.

In the present case, the jury accepted the evidence that an actual sale occurred. Thus, under *Hester*, the evidence of a completed transaction was more than sufficient to support a conviction under section 58-37-8(1)(a)(ii).

(C) Competent Evidence Supports Each Element of Distribution

As previously discussed, distribution of a controlled substance requires proof that defendant knowingly and intentionally distributed, that is delivered or attempted to deliver,

a controlled substance. *See discussion, Subsection (B), supra.* When the evidence in this case is properly marshaled, competent evidence supports each element of the crime. The trial court, therefore, properly denied defendant's motion for a directed verdict. *See Brewer*, 2001 UT 77, ¶ 33; *Clark*, 2001 UT 9, ¶ 12.

Detective Purvis, an experienced vice officer, was directed to the men's room by the bar's security guard who suspected that drug sales were occurring there (R.160: 26-27). The bar was crowded with approximately 200 patrons, almost all of whom were dressed in western clothing (R.160: 27-28, 30-31). As Purvis entered the men's room, his focus was drawn to defendant for three reasons: (1) he was not dressed like the rest of the bar patrons, (2) he did not appear to be using the bathroom for normal purposes, but was standing in the middle of the room talking to another man, and (3) he and the other man immediately stopped their conversation and left when Purvis entered (R.160: 29-31). About 10-15 minutes later, defendant re-entered the bathroom followed by two other men (R.160: 35). A few minutes later, defendant left the bar followed by yet another man (R.160: 36-40).

When Detective Purvis observed defendant in the parking lot, it appeared that defendant was "leading" Acevedo away from the bar and to a somewhat secluded area of the parking lot, behind a parked windowless delivery truck (R.160: 40-42). Once they were "not in the open," defendant stopped and turned around to face Acevedo (R.160: 40-43). Without apparent conversation, the men placed their four hands down low and between them (R.160: 43-44, 67). They continued to look down at their grasped hands (R.160: 43). Acevedo

appeared to be handing defendant something (R.160: 44, 59-60, 70-72). When defendant removed his left hand from Acevedo's two hands, defendant had money in it (R.160:44, 59). Keeping the money in his withdrawn hand, defendant continued to hold his right hand between Acevedo's hands (R.160: 44). An object still appeared to be in their joined hands (*id.*). The two men dropped their hands and separated (R.160: 45, 59, 73). As Acevedo walked away, he had a white object hidden in his right hand (*id.*). Defendant walked in the opposite direction with the money still in his left hand (R.160: 48, 68, 82).

Purvis immediately arrested Acevedo, who, despite repeated demands, refused to remove his right hand from his pocket (R.160: 46, 49, 69). Eventually, three twists of cocaine were discovered hidden in the pocket (R.160: 46, 50-53, 74, 76). Defendant was contemporaneously arrested. In addition to the money in his hand, cash was in his pocket and wallet (R.160: 82-84). In total, slightly over \$1400.00, primarily in tens and twenties, was recovered from defendant (R.160: 83-85). A twist of cocaine commonly sells for \$20.00 to \$40.00 on the street (R.160: 50).

Defendant assails Detective Purvis's testimony as "inconsistent," *Br.Aplt. at 15*, but the record belies the claim. The detective was questioned concerning any discrepancies between his written report, preliminary hearing testimony, and trial testimony. He explained that he always tried to accurately describe what he saw, but that his report was "very generalized" as compared to his preliminary hearing testimony which was "much more specific," although still limited (R.160: 61, 72-73, 77). Despite some differences in the

report and testimonies, the detective was “positive” that defendant had money in his hand and Acevedo had the “white package” as the two walked away from each other (R 160: 61)

Indeed, he was emphatic:

In my experience¹⁰ I had no doubt that it was a hand-to-hand transaction. It seemed very plain to me that Mr. Gutierrez, the defendant, since he was taking the money away was the seller and that Mr. Acevedo, since he ended up with the drugs, would be the buyer.

(R 160: 48-48) The detective also physically demonstrated what he observed to the jury and testified, “I saw this defendant pull the money from the hands of both defendants in his left hand” (R 160: 59), and on cross-examination, confirmed that he saw Acevedo “definitely handing money” to defendant (R.160: 70).¹¹ The detective further clarified that after defendant’s left hand with the money “came up” and away from Acevedo, defendant’s right hand remained down between Acevedo’s two hands “holding an object between them” (R.160. 59). As the two pulled away from each other, Acevedo closed his hand into a “fist” over the “white object,” which was fully in Acevedo’s hand as he walked away (R.160: 59-60).

Even if some inconsistencies existed between Purvis’s written report and his

¹⁰ The detective explained that he had not only observed other drug transactions but had also directly participated in one as an undercover officer (R.160: 47).

¹¹ On cross-examination, the detective agreed that “I didn’t see who had the money alone when I first walked up. I didn’t see one person take money out of their pocket. It was being held between them as I approached” (R.160: 72). Nevertheless, he explained that defendant’s actions “definitely” made it appear he was withdrawing money from Acevedo’s hands (R.160. 70).

testimonies, inconsistencies do not provide a basis to question the sufficiency of the evidence. *See Boyd*, 2001 UT 30, ¶ 14 (“When reviewing a trial wherein conflicting, competent evidence was presented, [the appellate court] simply assume[s] that the jury believed the evidence supporting the verdict.”) (citation and quotation marks omitted).

Defendant also claims the State’s evidence was insufficient because it was disputed by Acevedo, who testified that no drug sale or discussion occurred, and defendant’s mother, who opined that if defendant had cash, it must be from the sale of his car two days before. *Br.Aplt. at 14-15. See also Statement of Facts, supra.* The jury was entitled to disregard that testimony and accept as credible the detective’s observations, which were supported by the physical evidence. *See State v. Lyman*, 966 P.2d 278, 281-82 (Utah App. 1998) (“the existence of one or more alternate reasonable hypotheses does not necessarily prevent the jury from concluding that defendant is guilty beyond a reasonable doubt”) (citation and quotation marks omitted).

In sum, the evidence was legally sufficient to support the conviction. The trial court, therefore, properly refused to direct the verdict in defendant’s favor.

POINT II

BECAUSE THE EVIDENCE ONLY SUPPORTED CONVICTION OF DISTRIBUTION OR ACQUITTAL OF ANY CHARGE, THE TRIAL COURT CORRECTLY DENIED DEFENDANT’S REQUESTED INSTRUCTIONS ON LESSER OFFENSES

Defendant asserts that the trial court erred in denying his request for lesser included offense instructions on attempted possession of a controlled substance, in violation of UTAH

CODE ANN. § 58-37-8(2)(a)(i) (Supp. 2001), or, alternatively, on “solicitation of a person(s) with intent to have another commit an offense specified in [UTAH CODE ANN. §] 58-37-8,” in violation of SALT LAKE MUNICIPAL ORDINANCE 11.12.100. *Br.Aplt. at 20*. The argument lacks support.

A trial court’s denial of a requested jury instruction is a question of law, which is reviewed for correctness. *State v. Kruger*, 2000 UT 60, ¶ 11, 6 P.3d 1116. “When a lesser included instruction is requested by the defendant, the trial court must apply an ‘evidence-based’ standard to decide whether the instruction is appropriate.” *Id.* at ¶ 12. Under this standard, a defendant is entitled to a lesser-included instruction only if: (1) the requested offense is legally included in the charged offense; and (2) the evidence provides a rational basis for the jury to acquit the defendant of the greater offense and, at the same time, convict him of the lesser. *Id.* (citing *State v. Baker*, 671 P.2d 152, 157-59 (Utah 1983)). In determining if a “rational basis” exists, the trial court must view the evidence in the light most favorable to the defense. *Id.* at ¶ 14.

The evidence-based standard recognizes that a defendant does not have the right to a compromise verdict. *Baker*, 671 P.2d at 157-58. Nor does a jury “have the right to find a fact and then refuse to render the verdict which such a finding necessarily requires.” *State v. Crick*, 675 P.2d 527, 531 (Utah 1983) (citation and quotation marks omitted). The evidence-based standard compels a trial court to “avoid doing anything, such as submitting lower crimes in an inappropriate case, that would constitute an invitation to the jury to

foreswear its duty and return a compromise or otherwise unwarranted verdict.” *Id.* (citation and quotation marks omitted). In sum, where the prosecution’s evidence supports conviction and defendant’s evidence acquittal, no lesser included offense instruction is warranted. *See State v. Shabata*, 678 P.2d 785, 790 (Utah 1984); *Crick*, 675 P.2d at 530-31; *Baker*, 671 P.2d at 160. *Cf. Lyman*, 966 P.2d at 282 n.2 (recognizing that counsel may argue alternative reasonable hypotheses to the jury, but that a trial court is not required to instruct on those alternatives). In this case, the trial court properly applied these principles and refused defendant’s lesser offense instructions.

Defendant’s theory was that he was innocent: the “defense’s theory of the case is that what happened here is that the arresting officer saw something in the parking lot, two young Hispanic men, some sort of a handshake or some sort of hands together, and made an assumption about what he thought might be going on there, a mistaken assumption” (R.160: 21; R.161: 134).¹² What the officer really saw, according to defense counsel, “was two friends, acquaintances, leaving the bar after the bar was closing, dancing was over, going to the parking lot, talking a little bit about the dance, shaking hands and saying good-bye” (R.161: 134).¹³ In support of the defense theory, Acevedo testified and denied any drug

¹² Defense counsel apparently confused the officer’s characterization of the bar as a Hispanic bar, with the officer’s observations of defendant. Detective Purvis noticed defendant because he was dressed differently than the other 200 western-clad bar patrons and had acted suspiciously inside bar (R.160: 29-31, 35-40).

¹³ There is no evidence that the dance was over and the bar emptying when Purvis observed defendant and Acevedo in the parking lot. Purvis testified that the lot was still “pretty full” when he observed the two (R.160: 39). Purvis thought that they did not want

involvement with defendant, as buyer or seller. *See Statement of Facts, supra.* And defendant's mother provided, in counsel's words, an "innocent" explanation for the money found on defendant. *See Statement of Facts, supra,* & R.161: 145. Only as an aside in closing did defense counsel speculate that, assuming a drug transaction occurred, defendant was purchasing from, not selling to, Acevedo (R.161: 140-41).

The trial court initially refused the request for any lesser offense instruction on purely legal grounds.¹⁴ Alternatively, the court addressed the lack of evidentiary support for the

to go into the bathroom and had come to the parking lot for privacy (R.160: 41-42).

¹⁴ Initially, the court erroneously opined that attempted possession was not an independent crime, but a legal fiction (R.161: 123,125). While it is true that distribution includes within its definition attempted distribution, possession does not. **Compare** UTAH CODE ANN. §§ 58-37-2(i) & (n), **with** UTAH CODE ANN. § 58-37-2(dd) (*Addendum A*). Attempted possession of cocaine is a class A misdemeanor. **See** UTAH CODE ANN. §§ 58-37-8(2)(a)(i) & 76-4-102 (1999) (*Addendum A*). The error is inconsequential, however, because the court went on to consider whether the evidence supported a lesser-offense instruction on the theory that defendant was attempting to purchase the drugs found on Acevedo (R.161: 123-24).

Additionally, the court properly rejected on legal grounds, defendant's request for an instruction on the municipal offense of solicitation (R.160: 122-23, 125). As the court recognized, inclusion of a city ordinance as a lesser included offense in a state felony prosecution raises jurisdictional issues (R.160: 122-23). State law permits a city prosecutor to prosecute some misdemeanor state crimes, **State v. Robertson**, 924 P.2d 889, 892-93 (Utah 1996), but a state prosecutor does not have the authority to prosecute violations of city ordinances. **Compare** UTAH CODE ANN. § 17-18-1.7 (2001), **with** UTAH CODE ANN. § 10-3-928 (1999) & SALT LAKE MUNICIPAL ORDINANCE 2.08.040. **See Addendum A for copies of cited provisions.** The legislative power to create ordinances is vested with the municipal governing body. **See** UTAH CODE ANN. § 10-3-701 (1999). Accountability for the enforcement of ordinances runs directly from the city attorney as prosecutor to the municipal governing body. **See** SALT LAKE MUNICIPAL ORDINANCE § 2.08.040(A)(3). Revenues generated from enforcement also flow directly to the city. **See** UTAH CODE ANN. § 10-3-716 (1999). In contrast, the prosecuting party in a felony prosecution is the State of Utah, whose prosecutors have no accountability to the

requested instructions

Analyzing the evidence in the light most favorable to the defense, the trial court found that there was no “nexus” to establish that defendant “possessed” the cocaine found on Acevedo (R.161: 124). Detective Purvis only saw the cocaine after the transaction was completed (R.160: 59-60). By that point, defendant was walking one way with the money, while Acevedo was walking in the opposite direction with the drugs (*id.*) This evidence, while sufficient to support distribution, would not support conviction of possession. Defendant effectively concedes this point. *See Br.Aplt at 14* (arguing that trial court erred in not directing the verdict since State’s evidence did not establish that defendant possessed the drugs) *But see discussion, supra, at 12-14* (distribution does not require proof of possession).

The trial court also found that there was no evidence “suggesting that this defendant intended – attempted to purchase a controlled substance” (R.161: 124). Therefore, there was no basis for instructions on either attempted possession or criminal solicitation.¹⁵ The court’s

municipality. *See* UTAH CODE ANN. §§ 17-18-1.7 & 77-1-5 (1999). Moreover, state statutes pre-empt municipal ordinances. *See* Utah Code Ann. § 10-8-84 (Supp. 2001). Thus, even if *arguendo* there was an evidentiary basis for a solicitation instruction, the instruction would not be pursuant to class B municipal solicitation, but pursuant to third degree felony criminal solicitation of distribution. *See* UTAH CODE ANN. §§ 76-4-203 & -204 (1999), and Utah Code Ann. § 58-37-8(1)(a)(ii) & -(b)(i).

¹⁵ Attempted possession requires a substantial step towards acquiring possession of cocaine. *See* Utah Code Ann. § 76-4-101(1999). Criminal solicitation requires a request to have another commit any felony, in this case, distribution. *See* UTAH CODE ANN. § 76-4-203. Municipal solicitation is limited to requests to have another commit a drug offense. *See* SALT LAKE ORDINANCE 11.12.100. *But see note 14, supra* (defendant

finding is fully supported by the record. *See Point I, supra*. The evidence supported no middle ground. Either defendant sold the drugs Acevedo possessed, as testified to by the detective, or defendant was not guilty of any crime, as claimed by Acevedo. Defendant was not, therefore, entitled to instructions on any lesser drug offense. *See Shabata*, 678 P.2d at 790; *Crick*, 675 P.2d at 530-31; *Baker*, 671 P.2d at 160.

POINT III

THE PROSECUTOR DID NOT COMMIT INTENTIONAL MISCONDUCT IN STATING HIS VIEWS OF THE EVIDENCE DURING CLOSING ARGUMENT; THE TRIAL COURT, THEREFORE, PROPERLY OVERRULED DEFENDANT'S OBJECTIONS AND CAUTIONED THE JURY THAT COMMENTS OF COUNSEL WERE NOT EVIDENCE

Defendant alleges that the prosecutor committed misconduct by making “prejudicial and inappropriate remarks” during closing argument. *Br.Aplt. at 34*. Again, defendant’s argument is meritless.

Prosecutorial misconduct claims are reviewed for abuse of discretion and will be reversed only if the defendant establishes that

(1) the actions or remarks of counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, (2) under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result.

State v. Kohl, 2000 UT 35, ¶ 22, 999 P.2d 7 (citation and quotation marks omitted). In making this assessment, the reviewing court must consider the objected-to comments in the

not legally entitled to instruction on municipal ordinance in state felony prosecution).

context of the “arguments advanced by both sides as well as in [the] context of all the evidence,” keeping in mind that “counsel for each side has considerable latitude in closing arguments and may discuss fully his or her viewpoint of the evidence and the deductions arising therefrom.” *State v. Bakalov*, 1999 UT 45, ¶ 56, 979 P.2d 799. While a prosecutor should not express his personal opinion or personal knowledge of the facts, “a prosecutor may draw permissible deductions from the evidence and make assertions about what the jury may reasonably conclude from those deductions.” *Id.* at ¶ 57. He may also “fully discuss” these inferences and deductions with the jury. *Id.* at ¶ 59.

Prosecutorial misconduct is not established solely because a prosecutor makes an improper comment. In addition to establishing that an improper statement was made, a defendant must also show that the improper comment was “substantial” in that, absent the comment, the outcome of the trial would have been more favorable for defendant. *See Kohl*, 2000 UT 35, ¶ 24. Three factors are considered: “the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the improper statements.” *United States v. Modica*, 663 F.2d 1173, 1181 (2nd Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). *Cf. Bakalov*, 1999 UT 45, ¶¶ 56-60.

In determining the severity of the misconduct, “[t]he first question is whether the improper comments were minor aberrations in a prolonged trial or cumulative evidence of a proceeding dominated by passion and prejudice.” *Modica*, 663 F.2d at 1181 (citation and quotation marks omitted). Elements to be weighed are the “extent to which the misconduct

was intentional and the extent to which the statements were made in response to defense contentions.” *Id. Accord State v. Span*, 819 P.2d 329, 333-36 (Utah 1991) (recognizing necessity of a strong deterrent to “flagrant” or intentional misconduct, but ultimately finding the prosecutor’s intentional misconduct harmless). Additionally, the reviewing court will consider any instructions given by the trial court. *Modica*, 663 F.2d at 1181. *Accord Kohl*, 2000 UT 35, ¶¶ 6 & 24 (concluding that improper remark was harmless where jury was formally instructed that comments of counsel were not evidence and the trial court immediately told the jury to “remember my admonition[, s]tatements of the lawyers are not evidence in this case”).

Here, no objections were made during the prosecutor’s initial closing argument (R.161: 126-34). *See Addendum B for Closing Arguments*. When defense counsel gave his closing argument, he attacked Detective Purvis’s testimony (R.161: 134-37, 140-43), and then argued that Acevedo and defendant’s mother provided “evidence that proves [defendant] is innocent of this charge” (R.161: 139, 145).

In rebuttal, the prosecutor challenged defense counsel’s portrayal of the quality of the defense evidence. The prosecutor’s initial statements were objected to, one after the other:

- (1) “And what was the [sic] Ignacio’s explanation? They were going to his car. The car they brought his mother in to tell you he had sold” (R.161: 147);
- (2) “Don’t believe for [a] second that evidence of innocence. If they really wanted you to believe that he had sold the car and he had that money from the sale of the car, don’t you think they would have brought in the bill of sale? Don’t you think they’d have brought in a transfer of title?” (R.161: 148), and

(3) “Next, the testimony of Ignacio. He’s admitted to you that he’s a drug user for two years. He had used that night. And he was looking for more. He sat there and told you in no uncertain terms that there’s really nothing we could do once he was deported and that, yes, he would lie for his friends” (*id.*).

Each time, the court overruled the objection and reminded the jury of the court’s prior formal instruction that arguments of counsel were not to be considered as evidence (R.161: 148-49).¹⁶ The prosecutor continued his rebuttal argument and received one more objection, the propriety of which is not raised on appeal (R.161: 149-51).

The prosecutor’s first statement – in essence, that Acevedo and defendant’s mother made conflicting statements about the same car – was a logical evidentiary deduction. *See*

¹⁶ The court formally instructed the jury:

The lawyers, like you and myself, are officers of this court. It is the duty of each of them to present the evidence on behalf of their client and to make such objections as they deem proper and to fully argue the client’s cause. You should, however, bear in mind that each of the lawyers is here in a partisan capacity, and it is both the duty and responsibility of each to be an advocate. If during the trial or in closing arguments the lawyers make statements concerning the evidence which do not conform with your recollection, you should disregard the statement and rely solely on your own recollection of the evidence. If either attorney’s argument includes statements of the law which differ from the law I am now explaining, you should disregard such statements and rely entirely upon these instructions as given to you.

(R. 123). The jurors were also instructed that they were the sole judges of the credibility and weight to be accorded any evidence (R. 121-23). In overruling defendant’s objections, the court reminded the jury that “arguments of counsel are not to be considered” and that “arguments of counsel are not facts” (R. 161: 148-49). The court further reminded the jury that they had “listened to all the evidence and can weigh the evidence and if it’s inconsistent with what argument of counsel is they are aware that they are the fact finders in this case” (R.161: 149). *See Addendum B*. Despite defendant’s claim that the court’s admonitions were inadequate, very similar instructions were deemed sufficient in *Kohl*, 2000 UT 35, ¶¶ 6 & 24.

17-18-1.7. Powers — Duties of district attorney — Prohibitions.

- (1) The district attorney is a public prosecutor and shall
 - (a) prosecute in the name of the state all violations of criminal statutes of the state,
 - (b) be a full-time county officer,
 - (c) conduct on behalf of the state all prosecutions for public offenses committed within the county, except for prosecutions undertaken by the city attorney under Section 10-3-928 and appeals from them and
 - (d) institute proceedings before the proper magistrate for the arrest of persons charged with or reasonably suspected of any violation of state law when in possession of information that the offense has been committed and for that purpose shall attend court in person or by deputy in cases of arrests when required
- (2) The district attorney shall
 - (a) appear and prosecute for the state in the district court all criminal actions for violation of state law,
 - (b) render assistance as required by the attorney general in all criminal matters or matters enumerated in Subsections (5) and (8) that may be appealed to the Court of Appeals or the Supreme Court and shall prosecute the appeal from any crime charged by the district attorney as a misdemeanor in the district court.
- (3) The district attorney shall
 - (a) attend the deliberations of the grand jury,
 - (b) draw all indictments and informations for offenses against the laws of this state within the county,
 - (c) cause all persons indicted or informed against to be speedily arraigned,
 - (d) cause all witnesses for the state to be subpoenaed to appear before the court or grand jury,
 - (e) examine carefully into the sufficiency of all appearance bonds that may be tendered to the district court of the county, and
 - (f) perform other duties as required by law
- (4) The district attorney shall
 - (a) each year on the first business day of August file a report with the attorney general covering the preceding fiscal year stating the number of criminal prosecutions in his office, the character of the offenses charged, the number of convictions, the amount of fines and penalties imposed and the amount collected, and
 - (b) call attention to any defect in the operation of the laws and suggest amendments to correct the defect
- (5) The district attorney shall
 - (a) appear and prosecute for the state in the juvenile court of the prosecution district in any proceeding involving delinquency,
 - (b) represent the state in any proceeding pending before the juvenile court if any rights to the custody of any juvenile are asserted by any third person, and
 - (c) prosecute before the court any person charged with abuse, neglect or contributing to the delinquency or dependency of a juvenile

- (6) A district attorney may not
 - (a) engage in private practice of law
 - (b) engage in any occupation that may conflict with his duties as a district attorney.
 - (c) in any manner consult, advise counsel, or defend within this state any person charged with any crime, misdemeanor, or breach of any penal statute or ordinance.
 - (d) be qualified to prosecute or dismiss in the name of the state any case in which the district attorney has previously acted as counsel for the accused on the pending charge, or
 - (e) in any case compromise any cause or enter a nolle prosequi after the filing of an indictment or information without the consent of the court
- (7) If at any time after investigation by the district judge involved, the judge finds and recommends that the district attorney in any prosecution district is unable to satisfactorily and adequately perform the duties in prosecuting a criminal case without additional legal assistance, the attorney general shall provide the additional assistance
- (8) The district attorney may act as counsel to any state or local government agency or entity regarding only the following matters of civil law
 - (a) bail bond forfeiture actions;
 - (b) actions for the forfeiture of property or contraband because of misuse of the property or possession of the contraband in violation of criminal statutes of the state.
 - (c) civil actions incidental to or appropriate to supplement the district attorney's duties as state prosecuting attorney including injunction, habeas corpus, declaratory actions, and extraordinary writ actions in which the interests of the state in any criminal prosecution or investigation may be affected, and
 - (d) any civil duties otherwise provided by statute
- (9) The district attorney or his deputy may be sworn as a deputy county attorney for the purpose of public convenience for a period of time and subject to limitations specified by the county attorney

58-37-2. Definitions.

1) As used in this chapter

a) "Administer" means the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by

(i) a practitioner or, in his presence, by his authorized agent or

(ii) the patient or research subject at the direction and in the presence of the practitioner

b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a motor carrier, public warehouseman, or employee of any of them

(c) "Continuing criminal enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or groups of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities created or maintained for the purpose of engaging in conduct which constitutes the commission of episodes of activity made unlawful by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, which episodes are not isolated but have the same or similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise

(d) "Control" means to add, remove, or change the placement of a drug substance, or immediate precursor under Section 58-37-3

(e) (i) "Controlled substance" means a drug or substance included in Schedules I, II, III, IV, or V of Section 58-37-4, and also includes a drug or substance included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513, or any controlled substance analog.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32A, regarding tobacco or food.

(B) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription, or

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(f) (i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4 or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this subsection; or

(B) which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic

genic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this subsection.

(ii) Controlled substance analog does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 366, to the extent the conduct with respect to the substance is permitted by the exemption; or

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(E) Any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription.

(F) Dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(g) "Conviction" means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, or for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under Title 58, Chapters 37, 37a, 37b, 37c, or 37d.

(h) "Counterfeit substance" means:

(i) any substance or container or labeling of any substance that without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by, any other manufacturer, distributor, or dispenser; or

(ii) any substance that is represented to be a controlled substance

(i) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(j) "Department" means the Department of Commerce.

(k) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of:

(A) barbituric acid or any of the salts of barbituric acid; or

- (B) any derivative of barbituric acid which has been designated by the Secretary of Agriculture as habit-forming under Section 502 (d) of the federal Food, Drug, and Cosmetic Act, 21 U S C 352 (d);
- (ii) a drug which contains any quantity of:
 - (A) amphetamine or any of its optical isomers;
 - (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or
 - (C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system; or
- (iii) lysergic acid diethylamide; or
- (iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.
- (l) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.
- (m) "Dispenser" means a pharmacist who dispenses a controlled substance.
- (n) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.
- (o) "Distributor" means a person who distributes controlled substances
- (p) "Drug" means:
 - (i) articles recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them;
 - (ii) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;
 - (iii) articles, other than food, intended to affect the structure or function of man or other animals; and
 - (iv) articles intended for use as a component of any articles specified in Subsection (i), (ii), or (iii); but does not include devices or their components, parts, or accessories.
- (q) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to his dependency.
- (r) "Food" means:
 - (i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and
 - (ii) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to

ited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food, underweight, and overweight, uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes

(s) "Immediate precursor" means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance

(t) "Manufacture" means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis

(u) "Manufacturer" includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who dispense or compound prescription orders for delivery to the ultimate consumer.

(v) "Marijuana" means all species of the genus *cannabis* and all parts of the genus, whether growing or not, the seeds of it, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant *cannabis sativa* or any other species of the genus *cannabis* which are chemically indistinguishable and pharmacologically active are also included

(w) "Money" means officially issued coin and currency of the United States or any foreign country

(x) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis

(i) opium, coca leaves, and opiates,

(ii) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates,

(iii) opium poppy and poppy straw, or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine

(y) "Negotiable instrument" means documents containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery

(z) "Opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability

(aa) "Opium poppy" means the plant of the species *papaver somniferum* L., except the seeds of the plant

(bb) "Person" means any corporation, association, partnership, trust, other institution or entity or one or more individuals

(cc) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing

(dd) "Possession" or "use" means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

(ee) "Practitioner" means a physician, dentist, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state

(ff) "Prescribe" means to issue a prescription orally or in writing

(gg) "Prescription" means an order issued by a licensed practitioner in the course of that practitioner's professional practice, for a controlled substance, other drug, or device which it dispenses or administers for use by a patient or an animal. The order may be issued by word of mouth, written document, telephone, facsimile transmission, computer, or other electronic means of communication as defined by rule

(hh) "Production" means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance

(ii) "Securities" means any stocks, bonds, notes, or other evidences of debt or of property

(jj) "State" means the state of Utah

(kk) "Ultimate user" means any person who lawfully possesses a controlled substance for his own use, for the use of a member of his household, or for administration to an animal owned by him or a member of his household

(2) If a term used in this chapter is not defined, the definition and terms of Title 76, Utah Criminal Code, shall apply

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)(i) 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

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.

(3) Prohibited acts C — Penalties:

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

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

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

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

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

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

(4) Prohibited acts D — Penalties:

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

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

(ii) in a public or private vocational school or 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 a church or synagogue,
- vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto
- (viii) in a public parking lot or structure,
- (ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii), or
- (x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. 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.

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

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

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

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

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

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

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

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

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

(10) 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.

State v. Day, 815 P.2d 1345, 1350 (Utah App. 1991) (when evidence is not “clear or conclusive,” the court “must allow for the prosecution’s reasonable inferences and deductions”). Acevedo, as a defense witness, testified that defendant “had his car” in the bar’s parking lot (R.161: 110). When asked the type of car defendant had, Acevedo said he could not remember (*id.*). In contrast, defendant’s mother testified that two days prior to defendant’s arrest, he sold “a car” to his uncle (R.161: 114). Presumptively, the car was defendant’s since, according to the mother, he kept the money (R.161: 113-14). The mother initially claimed it was a 1989 vehicle but corrected herself and said she had “forgotten” the year (R.161: 114). When asked the brand, she said she did not know the brands of cars but then volunteered that it was a “Honda” (*id.*). Assuming Acevedo was telling the truth and defendant had his car at the bar on August 13th, then either defendant owned two cars (something no witness claimed) or his mother was lying or mistaken about the date of the car’s sale (assuming *arguendo* there was a sale). While the evidence did not conclusively establish that Acevedo and defendant’s mother were referring to the same car, the prosecutor permissibly argued that they were. The court, therefore, properly overruled defendant’s objection to the prosecutor’s evidentiary deduction.

The prosecutor’s second statement – that if a sale had really occurred, the defense would have produced documentation – is also fair comment on the evidence. Defense counsel had just argued that the mother was credible and her testimony “evidence” of defendant’s innocence (R.161: 145). The prosecutor was entitled to attack that credibility,

especially in light of the mother's natural bias for her son, by stating the obvious: if defendant really sold his car, why not produce neutral documentary evidence to corroborate the mother's testimony? (R.161: 148). *See Bakalov*, 1999 UT 45, ¶ 57 (permissible for prosecutor to attack or support credibility of a witness by suggesting reasonable inferences to jury). *See also United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000) ("A prosecutor may express doubt about the veracity of a witness's testimony."). Furthermore, commenting on defendant's failure to provide documentation did not impermissibly shift the burden of proof as claimed by defendant, *Br.Aplt. at 39-42*. *See Cabrera*, 201 F.3d at 1250 ("A prosecutor's comment on a defendant's failure to call a witness does not shift the burden of proof, and is therefore permissible, so long as the prosecutor does not violate the defendant's Fifth Amendment rights by commenting on the defendant's failure to testify."). The jury had already been fully informed of the State's burden to prove the elements of the crime beyond a reasonable doubt (R. 108-10). At the same time, they were instructed that, as the fact-finder, they must weigh and determine the credibility of witnesses (R. 121-22). Taken in context, the jury would not have understood the prosecutor's comment to mean defendant had a burden of proof, but that the prosecutor disputed the legitimacy of the defense. *See Bakalov*, 1999 UT 45, ¶ 60; *Cabrera*, 201 F.3d at 1250.

The prosecutor's final objected-to statement – that Acevedo admitted he would "lie for his friends"(R.161: 148) – is not supported by the evidence. In cross-examining Acevedo, the prosecutor asked a series of questions about truth and lies, after which Acevedo

admitted that because he was already convicted and facing deportation, he had nothing to lose by what he said at defendant's trial (R.160: 111). A fair inference from this admission is that Acevedo *might* lie for defendant. Acevedo was not asked, however, and did not actually say that he "would lie for his friends," as stated by the prosecutor in argument (R.161: 148). The remark is, therefore, an inaccurate representation of the evidence.

Nevertheless, an unintentional misstatement does not alone establish prosecutorial misconduct. *See Kohl*, 2000 UT 35, ¶ 22; *Modica*, 663 F.2d at 1181. The prosecutor's misstatement does not appear to be a deliberate misrepresentation, but simply inaccurate recall. *See Span*, 819 P.2d at 330 (characterizing misconduct as intentional where prosecutor "deliberately" introduced evidence previously excluded by court); *State v. Troy*, 688 P.2d 483, 485 (Utah 1984) (characterizing misconduct as intentional where prosecutor made statements which he knew were not true).

In any case, the misstatement is not "substantial," but a "minor aberration" in a trial that was otherwise void of "passion and prejudice." *See Modica*, 663 F.2d at 1181. Absent the misstatement, the jury had ample reasons to question Acevedo's veracity: he was an admitted drug-user found in illegal possession of drugs while illegally in this country. *See State v. Cummins*, 839 P.2d 848, 853-854 (Utah App. 1992) (finding no error where "prosecution's reference to defendant as a liar, while intemperate, only disclosed what the jury could have reasonably inferred from the evidence"), *cert. denied*, 853 P.2d 897 (Utah 1993). In light of the trial court's formal instruction and oral admonitions that the comments


of counsel were not evidence, *see note 16, supra*, there is no reasonable likelihood that the prosecutor's misstatement prejudicially affected the outcome of the trial. *See Kohl*, 2000 UT 35, ¶¶ 22 & 24.

CONCLUSION

This Court should affirm defendant's conviction for distribution of a cocaine.

RESPECTFULLY SUBMITTED this 27th day of November, 2001.

MARK L. SHURTLEFF
Attorney General


CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Plaintiff/Appellee were mailed, postage prepaid, to CATHERINE E. LILLY & RALPH W. DELLAPIANA, SALT LAKE LEGAL DEFENDER ASSOCIATION, attorneys for Defendant/Appellant, 424 East 500 South, Suite 300, Salt Lake City, UT 84111, this 27th day of November, 2001.



ADDENDA

Addendum A

10-3-701. Legislative power exercised by ordinance.

Except as otherwise specifically provided, the governing body of each municipality shall exercise its legislative powers through ordinances

10-3-716. Fines and forfeitures — Disposition.

All fines, penalties, and forfeitures for the violation of any ordinance, when collected, shall be paid into the municipal treasury within seven days after the collection date. A violation of this section constitutes a class C misdemeanor. The retention or use of any fine, penalty or forfeiture by any person for personal use or benefit constitutes a class B misdemeanor, except that if the amount or amounts exceed \$1,000 the offense is a class A misdemeanor as defined in the Utah Criminal Code.

10-3-928. Attorney duties — Deputy public prosecutor.

In cities with a city attorney, the city attorney may prosecute violations of city ordinances, and under state law, infractions and misdemeanors occurring within the boundaries of the municipality and has the same powers in respect to violations as are exercised by a county attorney or district attorney, except that a city attorney's authority to grant immunity shall be limited to granting transactional immunity for violations of city ordinances, and under state law infractions, and misdemeanors occurring within the boundaries of the municipality. The city attorney shall represent the interests of the state or the municipality in the appeal of any matter prosecuted in any trial court by the city attorney.

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

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense

(3) No defense to the offense of attempt shall arise

(a) because the offense attempted was actually committed, or

(b) due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be

76-4-203. Criminal solicitation — Elements.

(1) An actor commits criminal solicitation if with intent that a felony be committed, he solicits, requests, commands, offers to hire, or importunes another person to engage in specific conduct that under the circumstances as the actor believes them to be would be a felony or would cause the other person to be a party to the commission of a felony

(2) An actor may be convicted under this section only if the solicitation is made under circumstances strongly corroborative of the actor's intent that the offense be committed

(3) It is not a defense under this section that the person solicited by the actor

(a) does not agree to act upon the solicitation,

(b) does not commit an overt act.

(c) does not engage in conduct constituting a substantial step toward the commission of any offense,

(d) is not criminally responsible for the felony solicited.

(e) was acquitted, was not prosecuted or convicted or was convicted of a different offense or of a different type or degree of offense, or

(f) is immune from prosecution

(4) It is not a defense under this section that the actor

(a) belongs to a class of persons that by definition is legally incapable of committing the offense in an individual capacity, or

(b) fails to communicate with the person he solicits to commit an offense, if the intent of the actor's conduct was to effect the communication

(5) Nothing in this section prevents an actor who otherwise solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense from being prosecuted and convicted as a party to the offense under Section 76-2-202 if the person solicited actually commits the offense

76-4-204. Criminal solicitation — Penalties.

Criminal solicitation to commit

(1) a capital felony is a first degree felony,

(2) a first degree felony is a second degree felony,

(3) a second degree felony is a third degree felony, and

(4) a third degree felony is a class A misdemeanor

77-1-5. Prosecuting party.

A criminal action for any violation of a state statute shall be prosecuted in the name of the state of Utah. A criminal action for violation of any county or municipal ordinance shall be prosecuted in the name of the governmental entity involved.

2 08 040 Office Of City Attorney:

A Functions:

- 1 The city attorney shall be the chief legal officer of the city and shall be responsible to the mayor and city council for the proper administration of the legal affairs of the executive and legislative branches of city government
- 2 The executive and legislative branches of government shall enjoy equal and independent access to the services of the office of the city attorney with reference to their respective functions and duties. It shall be the responsibility of the city attorney to administer the office of the city attorney in a manner which will enable the mayor and city council to fulfill their respective duties in a timely fashion
- 3 The foregoing notwithstanding, the city attorney shall not in any instance, either personally or by his or her deputies, act as both prosecutor and advocate before (and at the same time advisor to) any board, commission, agency, officer, official or body of the city. In cases where such a conflict shall arise, special counsel may be employed who shall not be subject to the control or direction of the city attorney in such matter, and who shall provide the legal service to or before such board, commission, agency, officer, official or body

B Separate Executive Or Legislative Counsel: Nothing in this chapter shall be construed to prohibit either the city council or mayor from retaining separate counsel from appropriated funds as either may from time to time deem appropriate (Ord 8-86 § 1, 1986 prior code § 24-3-4)

11.12.100 Solicitation of person(s) with intent to have another commit an offense specified in Section 58-37-8, Utah Code Annotated.

A 1 It is unlawful for any person to request, or solicit a controlled substance, or controlled substance precursor from another person, except as permitted by the Utah Controlled Substances Act Section 63-37-1 et seq., Utah Code Annotated, or its successor

2 Definitions

- a "Controlled substance" means a drug, substance, or immediate precursor as defined by Section 58-37-2(4), Utah Code Annotated, or its successor
- b "Controlled substance precursor" means any material defined as a controlled substance precursor by Section 58-37c-3(2), Utah Code Annotated, or its successor

B Violation of this section is a Class B misdemeanor (Ord 57-95 § 1, 1995)

Addendum B

1 MR. SHEFFIELD: Does this double as an easel?

2 THE COURT: Theoretically that part is, yes.

3 Okay. I think I'm ready. Let's get the jury.

4 (Whereupon, the jury returned to the courtroom at
5 9:55 a.m.)

6 THE COURT: Good morning and welcome back. What
7 I'm having Aaron do now is pass out copies of the jury
8 instructions which I'll read to you. You're free to follow
9 along with them. They tend to be a little bit lengthy. You'll
10 also be sent the originals with you into the jury room at the
11 time of your deliberations.

12 (Whereupon, the court so instructed the jury.)

13 THE COURT: That is the extent of the
14 instructions that you will consider at the time of your
15 deliberations. Closing, Mr. Sheffield?

16 MR. SHEFFIELD: Well, we're here. Thank you.
17 I've been watching and I know, I had my officer watching
18 yesterday, you're all very attentive and listening to the
19 testimony. Sometimes it's a little more difficult when the
20 only evidence or most of the evidence is just coming from the
21 witness stand. There's no other hard pieces of evidence. The
22 only one that we have is that officer report and that will go
23 back with you to the jury room.

24 I'd like to just quickly review the way the state
25 sees this case and I'm sure you haven't forgotten much

1 overnight. But lest we forget the purpose of Detective Purvis
2 being at that bar was not for drug interdiction. The purpose
3 was for under age drinking. And as he entered the bar you'll
4 remember a security guard came and said he suspected
5 something was going on in the bathroom, and that's not
6 uncommon where that kind of activity takes place because it's
7 a little more private than out on the dance floor or in the
8 bar.

9 So Detective Purvis went to the bathroom and the
10 first thing he saw when he opened the door and went in was
11 that defendant standing there. And you'll remember the
12 description of the clothes he was wearing that were unique to
13 him. Most everybody else in the bar the testimony -- his
14 testimony reflected were dressed cowboy boots, jeans perhaps,
15 cowboy hats. It was a Mexican bar with salsa music going. And
16 he did not look like the rest of the ones in there. The rest
17 of the patrons that were there.

18 And so his attention was drawn to him. And what
19 happened when he went in? They scattered, they all left
20 including the defendant. Purvis then left himself and walked
21 across the edges of the dance floor to the bar area to resume
22 why he was there, looking for under age drinking.

23 And his testimony was about 10 minutes he was
24 doing that, then he noticed again the defendant walked back
25 into the bathroom with some others. And he told you he had a

1 gut feeling what was going on in there. There was illegal
2 activity, likely drugs, but he elected not to go back in that
3 second time because the same thing probably would have
4 happened.

5 And about that point in time his sergeant said
6 let's go to another bar, but on the way out they saw a couple
7 under age drinkers. They left the bar with those under age
8 drinkers. Went to the car. You'll remember the diagram.
9 (Inaudible) the officers entered the parking lot where there
10 cars were. And the sergeant said well why don't you just go
11 look through the parking lot. And why did he do that? Again
12 for the same purpose that they were there, either looking for
13 under age drinkers or people that would come out and take a
14 drink of their own liquor because they didn't want to pay the
15 bar.

16 So that's what they were doing. That's what Purvis
17 was doing. That's what Woodbury was doing. That's what Martin
18 was doing.

19 And so the third time he sees this defendant who
20 is uniquely dressed, he is now leaving, and I think that's
21 important. They're not side by side just walking casually
22 out. He's leading him, this other person who you heard
23 testify, Ignacio, and where do they go? He's deciding where
24 they go.

25 They walk and Purvis is walking almost parallel,

1 two car widths apart. Then they cut in between two cars and
2 they go hide behind a panel delivery type van where no
3 windows are. Where there's a little bit of secrecy and
4 privacy.

5 There's a reason for that. They hadn't seen
6 anybody. I'm sure they were looking in the parking lot just
7 like Detectives were looking in the parking lot. Didn't see
8 anybody. He's the one who decided where they went to stand to
9 do their little deal. Their transfer. Their exchange.
10 Whatever you want to call it. Their hand-to-hand exchange.

11 So that's the third time that Detective Purvis had
12 seen this individual. And you'll remember he was circling
13 back and was going to follow them but they stopped. He
14 stopped. And he turned around and faced Ignacio. And he
15 determined where and when to do the deal. Purvis standing
16 just the other side of the car from where they had stopped.

17 And, again, he thought he'd walked out and
18 (inaudible) it all apart. But he froze. He just stood there.
19 Eight to 10 feet, testified there was light coming from
20 behind him, going that direction over his shoulders into the
21 two that were there.

22 And what did he see? He sees this defendant and
23 Ignacio kind of hunkered over a little bit with all four
24 hands right out there. They're not looking around. They're
25 looking at their hands. And why are they looking at their

1 hands? Because they're going to do something.

2 It's also his testimony, his training and
3 experience, that people that get into that kind of position
4 each have a reason for being there. And by now you know one
5 was there to sell. The other was there to buy. And when you
6 get into that kind of a situation not only is it quick
7 because you don't want to be belaboring the issue, but it's
8 fluid. They've done it before. They know how to do it. And if
9 you aren't watching you won't see it.

10 And that's when he saw the money come out from the
11 left hand, his left hand with his right hand still down
12 there. Then he's made. They both see him because he does one
13 of these to his other officers.

14 And they both turn and as this defendant pulls his
15 right hand away that's when he sees the white package of the
16 drug. And as he pulls away the other one, Ignacio, closes his
17 right hand and goes right to his pocket with it.

18 A lot can be made of what Purvis did at that
19 point. He told you that his focus was right on Ignacio
20 because it's not unusual for somebody who has just purchased
21 drugs to ditch them one way or the other. So he needed to
22 watch Ignacio. That's why he had motioned his other officers
23 to take care of this defendant.

24 The search took place of the defendant. There was
25 \$1,426. Much has been made of the fact that we don't know the

1 denominations of what was in the hands, of what was in the
2 pocket, of what was in the wallet. You've heard a defense
3 spin on why he had that money.

4 Ladies and gentlemen, one of the jury instructions
5 that you have talks about using your common sense. We're not
6 to check our common sense at the door. We have life's
7 experiences. We can draw reasonable conclusions.

8 Now, his mother came in and testified, and I think
9 it was an uncle, somebody bought a car, his car, and gave him
10 \$2,000 for his car.

11 Maybe. Maybe not. I would wonder why somebody
12 would have brought all that money with him to a bar where
13 he's going to be ostensibly drinking, dancing. Again it's
14 just a common sense thing that we can draw our own
15 conclusions about whether that actually happened. Personally,
16 I don't believe it. But you're the ones that have to make
17 that determination whether that's plausible enough for you.

18 We do know he had a substantial wad of money
19 folded in half in his right front pants pocket, and we do
20 know that there was a substantial amount in his wallet, and
21 we do know that there was some in his hand at the time of his
22 arrest consistent with the hand-to-hand drug buy and
23 distribution.

24 I'd like to put up for your review, this is the
25 evidence instruction and it says before you convict the

1 defendant, Sergio Renaga Gutierrez, of the offense of
2 unlawful distribution (Inaudible), substance as charged in
3 the information, you must find from all the evidence and
4 beyond a reasonable doubt each and every one of the following
5 elements of that offense.

6 Number one. That on or about the 13th day of
7 August, 2000, absolutely no doubt about number one.

8 Number two. In Salt Lake County, State of Utah.
9 There's no doubt about that.

10 The defendant, Sergio Renaga-Gutierrez. There's no
11 doubt that he is the one.

12 Number four. Distributed (inaudible) agreed,
13 consented or arranged to distribute. No doubt in my mind, and
14 we'll talk about that.

15 Number five. Cocaine. Absolutely no doubt. The tox
16 report tells you that. That cocaine was then and there a
17 controlled substance. No doubt. You have a jury instruction
18 to that fact.

19 And number seven. The defendant did so
20 intentionally and knowingly. There's no doubt about that. But
21 we'll talk about that.

22 Let's look at these definitions. Arranging
23 (inaudible) or intentional (inaudible) in any form or any act
24 in furtherance of (A) for distribution of a controlled
25 substance.

1 You can reasonably make the argument that he was
2 leading him out to the parking lot. He was the one that was
3 in the lead, directing where they go. Where to stop. When
4 they make the deal.

5 Distributing is deliver (inaudible) by
6 administering or dispensing a controlled substance. Deliver,
7 the actual constructive or attempted transfer of a controlled
8 substance whether or not (inaudible). Exactly what occurred.
9 (Inaudible). There's no doubt he arranged. There's no doubt
10 he delivered.

11 And you are instructed that a person engages in
12 conduct (inaudible) or with intent or willfully with respect
13 to the nature of his conduct or as a result of his conduct
14 when it is his conscious objective or desire to engage in the
15 conduct or cause the result. Is there really any doubt in
16 your mind?

17 Common sense. If are buying a controlled substance
18 you want to minimize your exposure. You wouldn't want to be
19 going and buying and buying and buying. You'd go and buy what
20 you're going to need and leave.

21 Look at his suspicious activity. How many times
22 did he go in the restroom that we know of? And then he leaves
23 the restrooms and he thinks the cops are probably still in
24 there and he goes out into the parking lot to continue his
25 activity.

1 Knowingly or with knowledge with respect to his
2 conduct or the circumstances surrounding his conduct when
3 he's aware of the nature of his conduct or the existing
4 circumstance. A person has knowingly (inaudible) knowledge
5 with respect to the result of his conduct when he is aware
6 that his conduct is reasonably certain to cause this result.

7 Now as you look at those elements there's no doubt
8 on any of them. And I would ask you to convict this defendant
9 as charged.

10 Because it is my burden I will have one more
11 opportunity to talk with you and I will take advantage of
12 that.

13 Thank you.

14 THE COURT: Thank you, Mr. Sheffield. Mr.
15 Dellapiana.

16 MR. DELLAPIANA: Thank you, Your Honor. Ladies
17 and gentlemen, the State's entire case is based on mistaken
18 assumptions. What the officer saw was two friends,
19 acquaintances, leaving the bar after the bar was closing,
20 dancing was over, going to the parking lot, talking a little
21 bit about the dance, shaking hands and saying good-bye.

22 Let's look at what the officer assumed he had
23 seen. (Inaudible) from when he first saw these two
24 individuals, Sergio and the other fellow. Remember he said he
25 saw them come out of the side door. That was his estimate. On

1 cross examination I said, well, wait a minute. Where did you
2 first see them? Oh, right here. Which by the way, certainly
3 he sees them walk maybe one car length. I'm not sure how you
4 could -- how you should interpret this idea they were going
5 off on some (inaudible).

6 But anyway he admitted, oh, yes, I guess they
7 could have come out the front door. I just assumed they came
8 out the side door because that's where I saw them.

9 What he saw he described, he himself described as
10 a handshake. And immediately he leapt to the conclusion, oh,
11 I'm suspicious that that's a drug deal. So, the drug deal
12 (inaudible) before he actually sees anything.

13 And as you'll recall on cross examination even he
14 had to admit that up to that time he had not seen anything
15 illegal. He gave that to me. (Inaudible) The prosecutors.
16 Even as they were outside he said as you saw them outside
17 (inaudible). He said no.

18 He's quickly jumping to some conclusion. He goes
19 up. He stops them. Pats down Ignacio, finds a twist of
20 cocaine on him. Assumes without knowing that he got it from
21 Sergio.

22 But why do I say he assumes without knowing? Even
23 by his own testimony, the officer's own testimony, he sees
24 Sergio with money and Ignacio with some sort of white
25 substance. He never saw a transfer between the two of them.

1 Never saw Sergio give money to Ignacio or vice versa. He's
2 assuming that that's what happened.

3 And there's some other troubling things, very
4 troubling things about the officers testimony in that regard
5 about what he saw particularly after he heard my opening
6 statement where I said he wasn't (inaudible). He saw Ignacio
7 give the money to Sergio. Saw Sergio with money. And I said,
8 no, he won't be able to say that. But he did, didn't he? You
9 can go by your own recollection, but he tried very hard to
10 say well, actually I did see that money in Ignacio's hand.

11 And I had to-- and I challenged him on that, had
12 to cross examine him (inaudible). You previously testified
13 under oath to the contrary at the preliminary hearing.

14 We read into the record his responses from the
15 preliminary hearing where he testified under oath.
16 (Inaudible) say, you didn't see Mr. Acevedo, Ignacio, with
17 the money? His answer? " That's correct."

18 And just to confirm I asked him again see if you
19 can answer the question." You didn't see Mr. Acevedo with the
20 money in his hands?" Answer " no".

21 But now he wants so badly to try to make this case
22 stick the way he originally assumed that it happened that
23 he's willing to change his testimony.

24 Another troubling thing shows how much the state
25 and/or the officers want to make this case stick. You're

1 going to get an exhibit, the toxicology report. The
2 toxicology report shows that there's really a bindle of
3 cocaine. There isn't any dispute that one of these bindles of
4 cocaine were found on the person of Ignacio Perex Acevedo.
5 One by the officer in the parking lot and two during a more
6 thorough search at the jail later.

7 (Inaudible) Ignacio Perex Acevedo or Sergio
8 Renaga-Gutierrez. You're going to see that (inaudible) but
9 please realize that that (inaudible) that this officer's own
10 testimony was such that he indicated those were all found on
11 Ignacio.

12 The other officer's testimony was also kind of
13 bothersome. You know, I was trying to make an issue of the
14 denominations. If you're investigating an alleged
15 transaction aren't you supposed to take note of who has what
16 money and where? The thing that bothers me most about it is
17 not that (inaudible) number (inaudible) specifically denied
18 that he had a duty that was -- in the sense that he reported
19 in the Salt Lake City Police reporting process, or part of
20 their general form, the police form to fill in the
21 denominations.

22 I asked him about it. I warned him that I already
23 have the police documents. After he agreed that, yeah, I
24 didn't write one so I went ahead and read the other officer's
25 report.

1 And after he said it was his -- his responsibility
2 to fill that in, then denied there was a form. I showed it
3 to him. (Inaudible) this is evidence but you'll recall after
4 I showed it to him saying -- I said, well, where is it that
5 you see this? Oh, well, it's the part where you enter the
6 denominations. What are the denominations? Oh hundreds,
7 fifties, twenties, tens, et cetera.

8 It was -- it was because he was so misleading that
9 I -- that I have serious questions about the frankness and
10 credibility of any of his testimony and so should you.

11 All of these things raise significant doubts about
12 the state's case, reasonable doubts.

13 One other thing about the state's case and I
14 wasn't going to talk about this because I thought it was so
15 -- so minor but how weak is the state's case if they have to
16 try to persuade you that the fact that one person is wearing
17 clothing different than another person has some sort of
18 importance in the case. Officer's testimony, yeah, he was
19 wearing a shirt, Panama hat. Most of the other guys were
20 wearing button down shirts with cowboy hats. Not every single
21 person differently, of course. I mean, I hesitate to even
22 talk about this it's so minor but that's the sort of thing
23 the state is trying to get you to rely on.

24 How about the issue about the bathroom. I wasn't
25 going to talk about this either but the officer walks into

1 the bathroom. Wasn't going to use the bathroom. I guess
2 he's standing there looking at these guys, you know. I mean,
3 it's not surprising that anybody in there would say, hum,
4 let's get out of here. And then the officer said he didn't
5 see anything unusual or didn't see anything illegal.

6 Let me talk a little bit about the defenses case.
7 We presented evidence that proves that Sergio Gutierrez is
8 innocent of this charge. We don't have to present evidence.
9 We don't have the burden to prove anything to you. The state
10 has the entire burden to what? To present its evidence from
11 people who know, not assuming, people who know what happened.

12 Ignacio Acevedo frankly admitted that he was
13 carrying the cocaine. Pled guilty to having the cocaine, not
14 just the one in his pocket but the other two they found
15 later. He's in jail for it now, has nothing to gain at this
16 time. He's doing some time. He's going to be deported. He has
17 no interest in the outcome of this case. Knew the definition
18 of perjury. Testified according to his knowledge. Told you
19 where he got the drugs from. Specifically not from Sergio
20 Gutierrez. Confirmed there was no distribution or offering or
21 agreeing or consenting or arranging between them.

22 We have the testimony of Maria Renaga about the
23 source of the money in case the money was significant to you.

24 More importantly than the state's or at least as
25 important as the defendant's own witnesses is I think the

1 physical evidence corroborates the defense's explanation of
2 the events more than it does the state's. Where are the
3 drugs? Officer sees the drugs in Ignacio's hands, Ignacio
4 Acevedo's hands, not Sergio.

5 And the number of packages also is a clue. The
6 officer -- this is, I think, critical. The officer sees two
7 people. And they're making an issue, number one, maybe this
8 was a drug transaction. I mean there's suspicious
9 circumstances about that. But if there was who was the
10 seller? Person without the drugs or person with the drugs
11 not. Not only did Ignacio Acevedo have the money the officer
12 found in his pocket, this is an officer who's trained to
13 conduct searches. He testifies he sees one twist, pats him
14 down, feels one twist. Puts his hands in his pocket, pulls it
15 out, finds one twist. Two were found at the jail but of
16 course you have to (inaudible.) Twists of cocaine.

17 If there is a buying and selling going on it ought
18 to raise serious concern for you about who was doing it.
19 Certainly it supports that it wasn't Sergio Gutierrez that
20 was selling drugs, if anyone.

21 The elements of the case. The date is not in
22 question. Salt Lake County (inaudible.) What's in question is
23 who was it that was doing the selling. Was it nobody? Was it
24 Ignacio Acevedo?

25 There's two things I want to say about this. One

1 is that the officer did not see the transfer. He tried to say
2 that he did but on cross-examination he had to admit the
3 first time he approaches these guys they're shaking hands.
4 He's waving. They look at him. They're separating.

5 The first time he sees any white substance in the
6 hands of Ignacio Acevedo and when he tried to say that he got
7 it from Sergio he had to admit, well, it was -- he was
8 blocked (Inaudible). Eventually I got him to admit maybe, no,
9 he didn't see a transfer of an illegal substance. He didn't
10 see a distribution. I mean, that's -- that's not proof.
11 That's -- that maybe he's got some suspicions. Maybe he can
12 make some assumptions but that's not proof of a distribution
13 when he himself says he didn't see one.

14 Same with the money. He tried to say, oh, yeah, I
15 saw the money in Ignacio's hands first but he's testified
16 under oath (Inaudible). Because he didn't see a distribution
17 and didn't hear anything about offering or arranging the
18 state has no proof of the distribution charge -- element.
19 Even by their own -- never mind these defense witnesses. The
20 state's own witnesses have not shown there was a
21 distribution.

22 Okay. Now here's the other thing I want to say
23 about that. As the judge indicated to you I'm -- as is the
24 prosecutor, I'm an advocate. I'm a partisan. I'm arguing
25 one side of the case which is what I'm supposed to do anyway.

1 But I'm going to try to put this evidence the state has
2 presented in a light most favorable to their case and for the
3 purpose of this little bit of argument I want you to
4 disregard the sworn testimony of the defenses own witnesses
5 who knew where the money came from, who knew where the drugs
6 came from. Testified clearly in support of finding Sergio
7 Gutierrez not guilty. We'll just forget about them for a
8 minute. Just look at the state's evidence.

9 As the prosecutor argued, okay, two people are
10 there. They both have a reason for being there, one to buy,
11 one to sell. And this goes back to what I started to say
12 before about, well, who's buying, who's selling? Would it be
13 the person with the drugs who's doing the selling? Person
14 with the money who's doing the buying? That's a reasonable
15 assumption. Particularly when you consider -- and this kind
16 of goes back to the bathroom thing.

17 Why did he go to the bathroom a couple of times or
18 why did he, you know, go out in the parking lot assuming for
19 the moment that Sergio Gutierrez was the one doing the
20 buying. Well, obviously the first -- if we're going on this
21 line of argument obviously the first time he went to the
22 bathroom he was interrupted when he was trying to buy drugs.

23 The officer came in, everybody left. He didn't
24 have any drugs on him. It's not like he went and bought some,
25 went and bought some, went and bought some as the state is

1 trying to argue. He didn't have any. And then he was
2 interrupted by Officer Purvis again. Still didn't get any.

3 If it was within my power to do so I would present
4 you with the alternative of finding Sergio Gutierrez guilty
5 of soliciting to buy drugs. Have to acknowledge I'm trying to
6 be fair, that there's at least an inference that can be made
7 from the state's witness -- own witnesses that that's what
8 was going on.

9 In fact the evidence is stronger based on the
10 state's case that that's what was going on than the officer
11 because as we indicated before it's undisputed that Ignacio
12 Acevedo was the one who had the drugs. And not only did he
13 have drugs that he was apparently trying to sell at that
14 particular moment, he had some others hidden for later
15 selling. If he had just got them from -- these other two
16 twists from Sergio Gutierrez this highly trained officer
17 would have found them hidden for later's sake.

18 That's the state's best case. Course we have
19 additional evidence that disputes even that -- that even that
20 happened.

21 The last thing I want to talk to you about is the
22 burden of proof and the standard of proof. The judge has made
23 it clear the defense doesn't have any burden, that it's all
24 on the state, and she's talking about the standard of proof,
25 proof beyond a reasonable doubt. I want to put that in

1 perspective.

2 Everybody will agree that beyond a reasonable
3 doubt standard is the highest, most difficult standard.
4 There's also a preponderance of the evidence standard that's
5 applied to civil cases. Clear and convincing that's applied
6 in some other cases. And a couple of you were involved in
7 civil cases. I think one as a witness, one as a juror, and
8 of course our military juror has a lot of judicial
9 experience.

10 In regards to the preponderance, those civil cases
11 that's a case where somebody is suing a corporation for toxic
12 tort. Polluting the water. In such a case the person, the
13 plaintiff, bringing that case has to prove beyond a
14 preponderance. It's not about trying to decide who has the
15 most. Fifty percent, you have to have more than fifty percent
16 to prove a preponderance. Otherwise (inaudible) evidence,
17 forty-five percent of the evidence the defendant wins.
18 (Inaudible) of proof is on the plaintiff. (Inaudible) Based
19 on contracts, the question of implied contract you have
20 preponderance of the evidence to decide whether implied
21 contract is in force.

22 (Inaudible) You think that that would be a high
23 standard because of the importance of family. It is pretty
24 high. (Inaudible) beyond a reasonable doubt.

25 The same is true by a preponderance of the

1 evidence (inaudible.) The highest standard, beyond a
2 reasonable doubt standard required in criminal cases to be
3 sure (inaudible) humanly possible that we don't convict an
4 innocent person. That's describing things somewhere up around
5 ninety-nine percent. No specific percentage.

6 Down here on the other end of this scale and up
7 here, of course, is where the -- we find somebody guilty. The
8 rest of it (inaudible) you have to find a person not guilty.
9 (Inaudible) down here (inaudible) of innocence (inaudible).
10 Somewhere along here is lack of evidence of guilt.

11 There is something down here called reasonable
12 suspicion. (Inaudible) A person may have a suspicion and even
13 if it's reasonable that they would have a -- be suspicious
14 under those circumstances that's (Inaudible) you can't find
15 somebody guilty when he's under suspicion. (Inaudible) You
16 see something suspicious you jump to a conclusion.
17 (Inaudible) That's not-- that's not proof.

18 In this case we have -- can reasonably imply the
19 sorts of things we have in this case, we have evidence of
20 innocence. Ignacio Acevedo, Maria Renaga who know what was
21 going on, know what was happening, testified clearly as to
22 Sergio Gutierrez' innocence.

23 We have a lack of evidence of guilt. This is the
24 officer didn't see the transaction. There was suspicious
25 circumstances. He didn't see any transaction. He can't say

1 it was a distribution. Came up, interrupted them. Oh, okay,
2 that's way down there on the not guilty side of your chart.

3 Course I've already talked about his suspicions
4 and his assumptions. And then -- and then if there's an
5 inference it can go one of two ways.

6 A couple more things about preponderance. If you
7 really can't find beyond a reasonable doubt, I mean you
8 really can't determine the facts beyond a reasonable doubt,
9 evidence goes both ways, somewhere around the preponderance
10 standard, then it's safe to determine the state hasn't met
11 its burden, you should find the defendant not guilty.

12 Or if there's an alternative reasonable
13 explanation for the facts as the evidence is presented,
14 that's going to put you above the preponderance. In that
15 regard I'm talking about what it looks like was actually
16 going on, you know, giving the state all the reasonable
17 doubt, disregarding the defense witnesses. I hope you don't,
18 but if you did it looks like the evidence at least supports
19 as we can make an inference, the evidence supports Sergio
20 Gutierrez was going around with his money trying to find
21 somebody to sell the drugs.

22 So they say to buy drugs. In fact that's even more
23 likely what happened than the state's explanation. More
24 likely it could have gone this way on the chart.

25 So, I certainly hope just to tie up, I certainly

1 hope that each of you believes the defense, Mr. Gutierrez, is
2 innocent of this charge. But that's not the question you're
3 being asked to decide. You're only being asked to decide
4 whether the state has proven beyond a reasonable doubt -- any
5 -- any reasonable doubt that he's guilty. So the verdict of
6 not guilty -- it's not saying -- it's not giving Sergio a
7 certificate of innocence. It's simply saying that on these
8 facts you cannot find beyond a reasonable doubt the state's
9 met its burden.

10 I believe on the facts that you've been presented
11 not only that you ought to acquit him, find him not guilty,
12 but that it's your duty, your sworn duty based on your oath
13 that you find him not guilty. I ask you to do so.

14 THE COURT: Thank you, Mr. Dellapiana. Rebuttal?

15 MR. SHEFFIELD: I feel like I have a (inaudible)
16 for putting the case in a light most favorable to the state
17 but I think I'll pass on that.

18 He said it was closing time and everybody was
19 leaving. No. That's not what I heard. What I heard is that
20 they were seeing the two of them, not a crowd of people
21 leaving, the two of them were leaving and going.

22 And what was the Ignacio's explanation? They were
23 going to his car. The car they brought his mother in to tell
24 you he had sold. Now he sold that --

25 MR. DELLAPIANA: Judge, I'm going to object to

1 the statement that his mother said that he sold that car.

2 THE COURT: The jury's been instructed that
3 arguments of counsel are not to be considered. They've
4 listened to that. I'm not going to address that. They've been
5 properly instructed as to their job.

6 MR. DELLAPIANA: Very well. Thank you.

7 MR. SHEFFIELD: You're right and he is right.
8 Evidence of innocence. Don't believe for second that
9 evidence of innocence. If they really wanted you to believe
10 that he had sold the car and he had that money from the sale
11 of the car, don't you think they would have brought in the
12 bill of sale? Don't you think they'd have brought in a
13 transfer of title? Don't you think --

14 MR. DELLAPIANA: Judge, I'm going to object.
15 He's trying to switch the burden to the defense. I don't
16 have the burden of proof in this case.

17 THE COURT: Jury's been instructed as to the
18 duty and to the arguments of counsel. Go forward.

19 MR. DELLAPIANA: Thank you.

20 MR. SHEFFIELD: Next, the testimony of Ignacio.
21 He's admitted to you that he's a drug user for two years. He
22 had used that night. And he was looking for more. He sat
23 there and told you in no uncertain terms that there's really
24 nothing that we could do once he was deported and that, yes,
25 he would lie for his friends.

1 MR. DELLAPIANA: Well, objection, Your Honor.
2 There's no evidence to support that assertion.

3 THE COURT: Mr. Dellapiana, I'm not going to
4 repeat it. Arguments of counsel are not facts. The jury has
5 listened to all the evidence and they can weigh the evidence
6 and if it's inconsistent with what argument of counsel is
7 they are aware that they are the fact finders in this case.

8 MR. SHEFFIELD: As for reasonable doubt, you
9 have the instruction. You can read it and determine for
10 yourself. It's not any doubt. It's reasonable doubt. When you
11 look at this defendant's activities that night, in the hall,
12 you are entitled to draw your conclusions. What was he
13 doing?

14 Now where were the drugs? He said that's vitally
15 important. The defense wants you to think that that's vitally
16 important, in fact an indicator that may be determinative of
17 how you should rule. Well, the reason they are in his
18 friend's hand is because he has been buying and he admitted
19 to buying. That's why they were there. And he was trying to
20 buy some more. And that's what he told you.

21 Now a lot has been said that Officer Purvis
22 couldn't see. Let me ask the court to take judicial notice of
23 the fact that this is one gram. The substance in this
24 envelope. It says right there on the --.

25 THE COURT: I can't read it but the

1 applicability of this case is a mystery to me. I will take
2 notice of the fact that that's a sweetener, and that's about
3 all I'm going to do.

4 MR. SHEFFIELD: Right here it says one gram, the
5 amount that's in there.

6 THE COURT: Okay.

7 MR. DELLAPIANA: Judge, absent some foundation
8 as to how this is specifically applicable or comparable to
9 the evidence --

10 THE COURT: Will the attorneys approach?

11 (Whereupon, a side bar conference was held at the
12 bench.)

13 MR. SHEFFIELD: A twist of cocaine is not very
14 big. Can it be covered by a hand as he places it in?
15 Absolutely. Is that what happened? As plausible as anything
16 else. This is not a transaction at a 7-11 store where you put
17 your product down and then you offer your money. They open
18 the cash register, put it in to make change, then put it back
19 for you. It's a fluid activity I think is what Detective
20 Purvis said. It happens that quickly. And when the
21 participants are there they're going to get what they want as
22 quickly as they possibly can. And that's exactly what
23 happened, and I'm asking you to convict, find guilty, this
24 defendant.

25 I'm hesitant to not talk about hiding things or

1 trying to gloss over things but much has been made of the
2 money. If I was concerned for a minute about the money being
3 an issue in this case I wouldn't have put the officer on the
4 stand, knowing full well he hadn't written a report, knowing
5 full well he hadn't itemized the denominations.

6 That's -- he was up there. He told you he made a
7 mistake, did not fill out the form as he possibly could have
8 and should have, but he also told you that the computer was
9 not working. They had received a flyer instruction that he
10 couldn't have done it had he wanted to. But he could have
11 gone a step further and written them down by himself. He
12 didn't do it. But his testimony is still clear there was a
13 small amount in his hand when he asked him to put them up
14 over his head where he handcuffed him.

15 It's clear and he remembers a lot of money being
16 folded in his right front pocket. And then there was money
17 also in his wallet.

18 We're not afraid of the evidence ladies and
19 gentlemen. It's there. The pieces go together. We don't have
20 to put the whole puzzle together. Each of you have a puzzle
21 if you want to draw that analogy. We don't have to put every
22 piece there. That's not what we're required to do. Because
23 you have life experiences, you have common sense, and you can
24 draw conclusions from all the evidence. And that is what
25 we're asking you to do. The pieces go together and you can

1 convict.

2 Thank you.

3 THE COURT: Thank you, Mr. Sheffield. Aaron.
4 Want to come and be sworn.

5 (Whereupon, the bailiff was sworn in.)

6 THE COURT: All right. Members of the jury, I'm
7 about to release you to go into your deliberations. I will
8 ask you to leave your copies of the jury instructions in here
9 for a moment. I'll send them out with the originals as well
10 as the one exhibit we've received as well the verdict forms.

11 The admonition that I've been telling you for the
12 last day and a half no longer exists. In fact it is your duty
13 now to go and deliberate, to speak among yourselves, to weigh
14 the evidence in this case and to reach a verdict. I cannot
15 answer any -- or the bailiff cannot answer any questions.
16 All the evidence that you need to make a decision in this
17 case you have already. If there are some questions you may
18 have for me please put them in writing, give them to Aaron,
19 and I will review them with the attorneys.

20 With that I'll release you for your deliberations.

21 (Whereupon, the jury retired to deliberate at
22 11:12 a.m.)

23 THE COURT: All right. I'm going to ask that
24 you make yourselves available. Tell us where you'll be on
25 your cell phone, keep it on, stay nearby so we can contact