

2001

Utah v. Sergio Renaga-Gutierrez : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Utah v. Gutierrez*, No. 20010141 (Utah Court of Appeals, 2001).
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IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Distributing or 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. 2000), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, Judge, presiding.

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FILED
Utah Court of Appeals

JAN 26 2002

Paulette Stagg
Clerk of the Court

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ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED RENAGA-GUTIERREZ'S MOTION FOR A DIRECTED VERDICT.

A. Renaga-Gutierrez Has Met the Marshaling Requirement on Appeal.

Contrary to the State's assertion on appeal, Appellant Sergio Renaga-Gutierrez ("Renaga-Gutierrez") met his marshaling requirement on appeal. See State's Brief ("SB") at Point I.A. The marshaling rule requires that appellants "marshal the evidence in support of the verdict." State v. Rudolph, 2000 UT App 155, ¶18, 3 P.3d 192 (citations omitted). Renaga-Gutierrez did just this in his opening brief, marshaling all the facts, spanning two pages, which supported the prosecution. See Appellant's Brief ("AB") at 11-13. Notably, Renaga-Gutierrez did not mention the evidence which most strongly supported his innocence, such as Ignacio Acevedo's ("Acevedo") testimony that Renaga-Gutierrez did not sell him drugs or his mother's testimony that the money found on his person was the proceeds from an earlier car sale rather than drug dealing. Id.; cf. Dejavue, Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶13, 993 P.2d 222 (Appellant's

claim of insufficient evidence to support punitive damage award would not be considered on appeal because of its failure to Marshall all evidence supporting award; . . . appellant instead stated only those facts most favorable to its position). Accordingly, Renaga-Gutierrez fulfilled his marshaling duty on appeal. See Moon v. Moon, 1999 UT App 12, ¶24, 973 P.2d 431.

B. The Fully Marshalled Evidence Does Not Establish the Elements of Distribution.

The State contends that Renaga-Gutierrez erroneously attempts to make actual or constructive possession an element of distribution, see Utah Code Ann. § 58-37-8(1)(a)(ii), since he made an argument under that legal theory in his opening brief. See SB Point I.B.. The State misreads Renaga-Gutierrez's analysis on appeal.

As the State asserts, actual or constructive possession is not an element of the crime of distribution with which he was charged. The elements of that offense, quoted in Renaga-Gutierrez's opening brief, see AB 11, are the knowing and intentional distribution of a controlled or counterfeit substance, or the agreement, consent, offer, or arranging thereof. See § 58-37-8(1)(a)(ii).

Nonetheless, under the circumstances of this case, the absence of any evidence of Renaga-Gutierrez's actual or constructive possession of drugs is relevant. See, e.g., State v. Hester, 2000 UT App 159, ¶3, 3 P.3d 725 (considering fact that defendant did not have drugs on him at time of arrest in holding that the evidence was insufficient to support a bindover on the charge of arranging to distribute a controlled substance).

Indeed, even the trial court understood its relevance to the extent that it instructed the jury on actual and constructive possession. R.117 (Instruction 13). If he did not have any drugs on him, then the inference that he sold the drugs to Acevedo is significantly weakened and makes the link between Renaga-Gutierrez's observed behavior and the assumption that he sold drugs too speculative and slight to support the State's case. *Id.* at ¶¶14-20. This is especially true where the other evidence points to his innocence. For instance, Renaga-Gutierrez was not found with a large stash of drugs on him as would be expected of a person selling drugs. Acevedo testified that Renaga-Gutierrez did not sell drugs to him, and that he bought the drugs found on his own person earlier that day from someone else. Renaga-Gutierrez's mother testified that he had a large sum of cash on him because he sold his car a few days earlier for \$2000.

The absence of evidence establishing actual or constructive possession is particularly telling given that the only testimony against Renaga-Gutierrez was too speculative, inconsistent, and slight to support the distribution charge. Detective Purvis could only say that the interaction he saw transpire between Renaga-Gutierrez and Acevedo *resembled* a hand-to-hand drug transaction based on his experience as an undercover vice officer. R.160[47]. He did not actually see any drugs in Renaga-Gutierrez's hands and never noticed any white substance until after Acevedo walked away. R.160[73].

Although Purvis testified that he saw Renaga-Gutierrez holding money, his

testimony as to if and how it changed hands is inconsistent. He testified that he saw them make a two-handed hand shake and that he saw the money change hands. R.160[44,72]. He also said that he did not see who originally held the money. Id. However, Purvis wrote in his incident report that Renaga-Gutierrez pulled the money from Acevedo's hand. R.160[59]. He testified at the preliminary hearing that he never saw Acevedo with the money in hand. R.160[72-73].

In short, the lack of evidence showing Renaga-Gutierrez's actual or constructive possession of the drugs that he allegedly distributed is but one of many pertinent factors in this case that render the State's evidence insufficient to support the conviction. See, e.g., Hester, 2000 UT App 159 at ¶3; see AB Point I (fully discussing insufficiency of evidence). This fact is especially compelling considering that the evidence against him is purely circumstantial and based solely on Detective Purvis' unparticularized hunch and inconsistent testimony that a hand-to-hand drug deal occurred. As so aptly stated in Hester, “[w]hen the correlation between the predicate facts and the conclusion is slight, then the inference is less reasonable, and 'at some point, the link between the facts and the conclusion becomes so tenuous that we call it 'speculation'” and the evidence becomes insufficient to support the distribution charge. 2000 UTApp 159 at ¶17 (quotations omitted).

In light of the foregoing, and the arguments set forth in Renaga-Gutierrez's opening brief, Point I, the trial court erred in denying his motion for a directed verdict

where there was insufficient competent evidence to support the distribution charge. See Utah Code Ann. § 58-37-8(1)(a)(ii).

II. THE TRIAL COURT ERRED IN FAILING TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION ON ATTEMPTED POSSESSION.

A. An Innocence Defense Does Not Preclude the Trial Court from Submitting a Lesser Included Offense Instruction That Is Appropriately Based in the Evidence.

The State asserts that the trial court properly denied a lesser included offense instructions on attempted possession of a controlled substance, Utah Code Ann. §§ 58-37-8(2)(a)(i) (Supp. 2000) & 76-4-101 (1999), and solicitation, Salt Lake City Ord. 11.12.100 (1996), because Renaga-Gutierrez maintained his innocence as to the distribution charge. SB Point II. The State cites State v. Baker, 671 P.2d 152 (Utah 1983), State v. Crick, 675 P.2d 527 (Utah 1983), State v. Shabata, 678 P.2d 785 (Utah 1984), and State v. Lyman, 966 P.2d 278 (Utah App. 1998), in support of the proposition that “where the prosecution's evidence supports conviction and defendant's evidence acquittal, no lesser included offense instruction is warranted.” SB 20.

The State's argument has already been rejected by the Utah Supreme Court in State v. Dyer, 671 P.2d 142 (Utah 1983), which upheld the right of the trial court to submit a lesser included offense instruction even where the defense theory is that of total innocence. Id. at 145. The defendant in that case was originally charged with

manslaughter. Id. at 144. The court determined that the evidence was insufficient to support the manslaughter charge, but instructed counsel to prepare arguments on the lesser included offense of negligent homicide. Id. After hearing those arguments, the “judge entered a verdict of guilty of negligent homicide.” Id.

The defendant contested the submission of the lesser included offense. Id. at 145. He argued that he sought acquittal on the original manslaughter charge on an “all or nothing’ defense theory, i.e., that [he was] totally innocent” and that the “trial court [could not] consider a lesser included offense absent a specific request by the defendant.” Id.

In rejecting the defendant's argument, the Supreme Court stated, “[t]his Court has recognized on numerous occasions the prerogative of the trial court to submit or consider lesser included offenses whenever the interest of justice so requires.” Id. at 145 (citing State v. Mora, 558 P.2d 1335, 13377 (Utah 1977); State v. Howell, 649 P.2d 91 (Utah 1982); State v. Close, 499 P.2d 287 (Utah 1972)). The Court noted that defendant cited authority which merely held that a trial court is not obligated to instruct the jury on a lesser included offense “where the defendant fails to request [it] or provide any evidentiary basis therefor; it did not, however, argue [] that the trial court is precluded from instructing the jury on a lesser included offense where the defendant employs an ‘all or nothing’ defense theory.” Id.

The State's position is without merit for the same reasons that defeated the

defendant's position in Dyer. The State does not cite any authority precluding instructions on lesser included offenses simply because a defendant maintains his innocence at trial. Instead, the State cites State v. Shabata, 678 P.2d 785 (Utah 1984) (Stewart, J., concurring in the result), a case where the Utah Supreme Court upheld a trial court's refusal to submit a jury instruction on manslaughter for a defendant who was charged with second degree murder. Id. at 790. The defendant in that case maintained that he was not the victim's killer. Id. In dicta, the Court stated, “[d]efendant's own theory of the defense precluded the requested instruction on manslaughter. The evidence offered the jury only the choice between finding defendant innocent or guilty of the crime charged. . . . Defendant claimed that he did not commit the act, not that the killing was anything less than intentional.” Id. (citing State v. Baker, 671 P.2d 152, 159-60 (Utah 1983)).

Nonetheless, the Shabata Court did not base its holding upon any general prohibition against lesser-included offenses where the defendant asserts innocence. Id. Specifically relying on the evidence-based standard and looking to the record, the Court noted the evidence that overwhelmingly suggested murder. Id. at 790. “Here the believable evidence showed that defendant purchased a gun and was concerned about whether it was powerful enough to kill a person. The victim's multiple gunshot wounds

are evidence of his assailant's intent to kill.” Id.¹ Accordingly, the evidence did not support an instruction on manslaughter, which presumed a “less than intentional” act. Id.

The State also misrelies on State v. Baker, 671 P.2d 152 (Utah 1983), for the erroneous proposition that an innocence defense necessarily precludes a lesser included offense instruction. See SB 19. Baker established the elements/evidence-based standard for lesser included instructions, but in no way holds that they are precluded by an innocence defense. Id. at 159. In fact, the Court in Baker incorporated the evidence-based standard into the analysis in order to protect against the risk of a verdict based only on a jury's compassion or leniency, recognizing that a defendant's right to a lesser included instruction is not “absolute or unlimited.” Id. at 157. As noted in Baker, “[t]he

¹ Additional evidence not cited by the Shabata Court in its opinion but presented at trial also overwhelmingly suggested defendant's guilt for the murder charge. For example, the defendant, a Libyan national, was apprehended at Chicago's airport boarding a flight to Libya on the same day that the victim's body was found. Id. at 786. Defendant asked several friends to purchase a gun for him. Id. A witness testified that he bought the a .22 caliber gun and shells, and delivered it to defendant. Id. Two witnesses testified that they dropped the victim off at defendant's apartment. Id. at 787. Nonetheless, when asked about the victim's whereabouts, defendant claimed that he did not see the victim there, or that he must have been taking a shower even though defendant's apartment only has a bath. Id. The victim's body was found in the trunk of his car. Id. A set of the victim's car keys were found in defendant's knapsack when he was arrested. Id. A blood stain was found on the carpet padding in defendant's apartment, as well as a .22 caliber bullet fragment that pierced and fell behind a kitchen drawer. Id. In light of this evidence, there was no rational basis for acquitting defendant of the murder charge and convicting him of manslaughter, i.e., that he killed the victim in the heat of passion. See State v. Crick, 675 P.2d 527, 532 (Utah 1983) (standard of review for granting or denying lesser included offense instructions).

Shabata factually distinguishable from the present case.

defendant's right to a lesser included offense instruction is limited by the evidence presented at trial. This limitation *requires* the application of the evidence-based standard.” Id. (emphasis added). Hence, the evidence-based standard provides a built-in protection against the State's so-called “compromise verdict[s],” SB 19; this analysis will ferret out meritless lesser included offense instructions regardless of the defense theory.

The State's argument is not only unsupported in case law, but goes against sound policy as well. Defendants have a constitutional right to present their defenses so long as they are grounded in the evidence, even if they are seemingly inconsistent. See U.S. Const. amend. V & XIV (Due Process); Utah Constitution art. I, § 7 (same). It is not outside the bounds of zealous advocacy to argue that the defendant is not guilty of any offense, but even if he was he was only guilty of the lesser. Moreover, It is not for the court or the State on appeal to second guess defense theory when a defendant requests a lesser included instruction. See, e.g. State v. Pascual 804 P.2d 553, *556 -557 (holding that counsel did not render ineffective assistance when he switched defense theories; “[t]he change in defense appears to be nothing more than a change in strategy. We ‘will not second-guess a trial attorney's legitimate use of judgment as to trial tactics or strategy.’ We believe any election between inconsistent defenses was a legitimate exercise of trial strategy rather than ineffective assistance of counsel”) (quoting State v. Wight, 765 P.2d 12 at 15 (Utah App.1988); citing State v. Morehouse, 748 P.2d 217, 219 (Utah App.1988)).

It must be noted in this case, however, that claiming innocence as to distribution is consistent with a lesser included offense on attempted possession or solicitation.

Especially in cases based on circumstantial evidence like the present, a drug sale may easily be confused with a drug buy. The transactions are often conducted so covertly that it is difficult to distinguish the sellers from the buyers unless an observing officer is directly involved as an undercover agent or is closer to the action than the officers in this case.

In fact, Detective Purvis' testimony in this regard is so uncertain that it is quite conceivable that he mistook Renaga-Gutierrez as the seller. Purvis was in a semi-lit parking lot at night when he observed from a distance the two men together and a handshake between them. R.160[39,44]. He could not say with specificity who passed money to who, and he did not see any items resembling drugs until Acevedo walked away. R.160[73]. He did not see the drugs pass from Renaga-Gutierrez to Acevedo, or hear any incriminating conversation, in order to conclusively state that Renaga-Gutierrez had in sold the drugs. R.160[44-45,73-74]. To the extent that the jury believed that Renaga-Gutierrez was involved in a drug transaction, it is reasonably conceivable that he was the attempting to possess or solicit rather than distributing drugs. Accordingly, his claim of innocence as to the distribution is compatible with his request for a lesser included offense instruction on attempted possession or solicitation. See, e.g., People v. Sedeno, 518 P.2d 913 (Calif. 1974) (noting that when there is evidence at trial that the

defendant is guilty not of the crime charged, but of a lesser included offense, the court must instruct on the lesser offense even when the defendant claims to be innocent of both the greater and the lesser).

It is under just such ambiguous evidence that lesser included instructions are effective tools in the truth-finding process:

"[C]ourts are not gambling halls but forums for the discovery of truth." Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the crime charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth ascertainment function . . . [and] would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

People v. Barton, 47 Cal. Rptr. 2d 569, 574 (Calif. 1995) (quotation omitted); see also Baker, 671 P.2d at 156-57 (noting that juries tend to resolve doubt as to guilt in favor of conviction despite their theoretical duty to not convict unless there is proof beyond reasonable doubt; lesser included offense instructions shield defendant's against this risk by giving juries another conviction option) (citing Keeble v. United States, 412 U.S. 205, 212-13 (1973)) (full quote cited in Renaga-Gutierrez's opening brief at p.30).

B. The Trial Court Had Jurisdiction to Grant a Lesser Included Offense Instruction on the Municipal Offense of Solicitation.

In footnote 14 to its brief, the State erroneously asserts that the trial court did not

have jurisdiction to submit a lesser included offense instruction on the municipal offense of solicitation. It cites a string of city and state ordinances comparing the legislative authorities at municipal and state levels, and the accountability and revenue flow from city and state attorneys to their respective governing entities. See SB n.14.

Nothing in the statutes cited by the State prohibits a district attorney from prosecuting the municipal crime of solicitation. See Utah Code Ann. § 10-3-701 (providing that municipalities shall exercise legislative powers through ordinances); Salt Lake City Ord. § 2.08.040 (outlining functions of city attorney but never expressly or impliedly prohibiting a district attorney from prosecuting a city offense); Utah Code Ann. § 10-3-716 (providing that fines and forfeitures be paid into municipal treasury; no prohibition on district attorney prosecuting crimes that generate such funds); Utah Code Ann. § 17-18-1.7 (granting district attorney prosecuting authority for public offenses except where already undertaken by the city; does not prohibit him or her from prosecuting public offenses, such as the current solicitation offense, that are not taken up by the city); Utah Code Ann. § 77-1-5 (does not prohibit district attorney from prosecuting city ordinance, only provides that state ordinance will be prosecuted in the name of the state of Utah and municipal ordinances will be prosecuted in the name of the government involved); Utah Code Ann. § 10-8-84 (Supp. 2001) (providing municipalities authority to pass ordinances and rules necessary for the administration of the city; does not discuss limits on prosecuting authority of city or state prosecutors).

Consequently, the State's argument does not undermine the constitutional and statutory framework that allows district attorneys, and by extension the trial court below, to enforce a city ordinance through the submission of a lesser included offense on the municipal crime of solicitation. See AB 29-33 (discussing constitutional provisions and statutes providing for the district attorney's authority to seek conviction on the municipal crime of solicitation).²

C. Failure to Give the Lesser Included Offense Instructions Constitutes Reversible Prejudicial Error.

The trial court's failure to grant the requested lesser included instructions on attempted possession and solicitation amount to reversible prejudicial error. See State v. Piansiakson, 954 P.2d 861, 871-72 (Utah 1998) (concluding that any error in refusing lesser included offense instruction was harmless). "For an error to require reversal, 'the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.'" State v. Jacques, 924 P.2d 898, 902 (Utah App. 1996) (quotation omitted).

First, the error was prejudicial because the evidence, as discussed *infra* and at length in the opening brief, AB Points I & II, the evidence in support of distribution was weak, and the jury would have likely convicted on one of the lesser offenses had it had

² The State concedes that the trial court erroneously denied the lesser included offense instruction on attempted possession on the basis that it is only a legal fiction. See SB n.14; see also R.161[123]. Attempted possession, as noted by the State and in Renaga-Gutierrez's opening brief is an actual crime under Utah Code Ann. §§ 58-37-8(2)(a)(i) (possession) & 76-4-101 (attempt). See AB 22-23; SB n.14.

the opportunity to do so. See, e.g. State v. Iorg, 801 P.2d 938, 941-42 (Utah App. 1990) (reversing for prejudicial error where state's evidence was uncorroborated and inconsistent). The case against Renaga-Gutierrez was circumstantial and Detective Purvis' testimony was weak and inconsistent. He was observed in a restroom in a bar talking to a man, R.160[29-31], and then in a semi-lit parking lot with Acevedo as they made a double-handed hand shake and talked for a bit. R.160[43-44]. Detective Purvis could not testify with certainty that he saw Renaga-Gutierrez accept money from Acevedo. R.160[72]. He never saw Renaga-Gutierrez pass drugs to Acevedo. R.160[73]. In fact, he did not notice any drugs until after Acevedo walked away. Id. When Renaga-Gutierrez was arrested, he was found with money, but not a stash of drugs on him as would be expected of a drug dealer. R.160[85]. He did not attempt to flee when the arresting officers told him to stop. R.160[81-85]. In addition, Acevedo testified that Renaga-Gutierrez did not sell or buy any drugs. R.160[102]. Moreover, Renaga-Gutierrez's mother testified that he had a large sum of cash on him not because of drug sales, but because he had just sold his car a few days earlier. R.160[114].

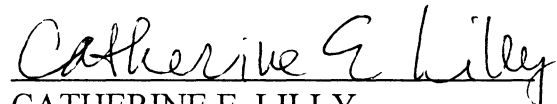
The harmful effect in this case is amplified given that the jury only had the option of convicting on the charged offense of distribution or absolute acquittal. See R.110-27 (Jury Instructions); cf. State v. Daniels, 2002 UT 2, ¶29 (failure to give lesser included instruction on manslaughter was harmless where jury was given instruction on lesser included offense of murder yet convicted defendant of the charged offense of aggravated

murder). As noted in Baker, despite their theoretical duty to acquit if the State has not met its burden of proof, juries nonetheless tend to resolve doubts in favor of conviction when it appears that defendant is guilty of something if not the charged offense. See 671 P.2d at 156-57 (citation omitted). Absent the option to convict on the lesser offenses of attempted possession or solicitation, the jury in this case likely resolved its doubts as to Renaga-Gutierrez's claims of absolute innocence in favor of conviction, even if it did not necessarily believe that he was guilty of distribution. Accordingly, the trial court's error in failing to give the requested lesser included instructions is reversible prejudicial error. See Piansiaksone, 954 P.2d at 871-72.

CONCLUSION

In light of the foregoing, and for the reasons set forth in his opening brief, Renaga-Gutierrez respectfully requests this Court to reverse his conviction and remand this case to the trial court.

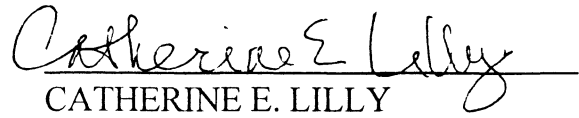
RESPECTFULLY submitted this 28th day of January, 2002.


CATHERINE E. LILLY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt

Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office,
Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake
City, Utah 84114-0854, this 28th day of January, 2002.


CATHERINE E. LILLY

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's
Office as indicated above this ____ day of January, 2002.
