

2015

**State of Utah, Plaintiff and Appellee, v. Carl Mack Courtney,
Defendant and Appellant.**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellant, *State of Utah v Carl Mack Courtney*, No. 20141172 (Utah Court of Appeals, 2015).
https://digitalcommons.law.byu.edu/byu_ca3/3701

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE
COURT OF APPEALS OF THE STATE OF UTAH

State of Utah,
Plaintiff and Appellee,

v.

Carl Mack Courtney,
Defendant and Appellant.

BRIEF OF THE APPELLANT

On appeal from the Second Judicial District Court, Weber County,
Honorable Michael DiReda, District Court No. 121901670

Appellant Carl Mack Courtney is currently incarcerated.

Laura B. Dupaix
UTAH ATTORNEY GENERAL
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

*Attorney for Plaintiff/ Appellee
State of Utah*

Emily Adams (14937)
ADAMS LEGAL LLC
1310 Madera Hills Drive
Bountiful, UT 84010
eadams@adamslegalllc.com
(801) 309-9625

*Attorney for Defendant/Appellant
Carl Mack Courtney*

ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

OCT 13 2015

IN THE
COURT OF APPEALS OF THE STATE OF UTAH

State of Utah,
Plaintiff and Appellee,

v.

Carl Mack Courtney,
Defendant and Appellant.

BRIEF OF THE APPELLANT

On appeal from the Second Judicial District Court, Weber County,
Honorable Michael DiReda, District Court No. 121901670

Appellant Carl Mack Courtney is currently incarcerated.

Laura B. Dupaix
UTAH ATTORNEY GENERAL
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

*Attorney for Plaintiff/ Appellee
State of Utah*

Emily Adams (14937)
ADAMS LEGAL LLC
1310 Madera Hills Drive
Bountiful, UT 84010
eadams@adamslegalllc.com
(801) 309-9625

*Attorney for Defendant/Appellant
Carl Mack Courtney*

ORAL ARGUMENT REQUESTED

Table of Contents

Jurisdictional Statement	1
Statement of the Issues	1
Determinative Provisions.....	1
Statement of the Case	2
1. Nature of the Case and Course of Proceedings.....	2
2. Statement of Facts	2
Summary of the Argument.....	7
Argument	7
1. Mr. Courtney's counsel was ineffective for failing to timely move for a mistrial.	7
1.1 Mr. Courtney's counsel performed deficiently.	8
1.2 Mr. Courtney was prejudiced by his counsel's performance.	15
Conclusion.....	19

Addenda

A. District Court Documents

Sentence, Judgment, Commitment dated December 30, 2013 in *State v. Courtney*, District Court Case No. 121901670 (R. 183-84)

B. Determinative Provisions

U.S. Const. amends. VI, XIV

Utah Const. art. I, § 12

C. Voir Dire Transcript Excerpts

Table of Authorities

State Cases

<i>Broberg v. Hess</i> , 782 P.2d 198, 201 (Utah Ct. App. 1989).....	9
<i>Burton v. Zions Co-op. Mercantile Inst.</i> , 249 P.2d 514 (Utah 1952).....	9, 10, 14
<i>Butterfield v. Sevier Valley Hosp.</i> , 2010 UT App 357, 246 P.3d 120.....	10
<i>Dippolito v. State</i> , 143 So.3d 1080 (Fla. Ct. App. 2014)	15, 17
<i>Richardson v. State</i> , 666 So.2d 223 (Fla. Ct. App. 1995)	16, 17
<i>State v. Alvarado</i> , 2014 UT App 87, 325 P.3d 116	17
<i>State v. Crosby</i> , 927 P.2d 638 (Utah 1996).....	14
<i>State v. DeMille</i> , 756 P.2d 81 (Utah 1988).....	9
<i>State v. Ferry</i> , 2007 UT App 128, 163 P.3d 647	14
<i>State v. Gailey</i> , 2015 UT App 249, __ P.3d __.....	1
<i>State v. Hallett</i> , 856 P.2d 1060 (Utah 1993).....	14
<i>State v. Johnson</i> , 2013 UT App 276, 316 P.3d 994	10
<i>State v. King</i> , 2010 UT App 396, 248 P.3d 984	8
<i>State v. Larrabee</i> , 2013 UT 70, 321 P.3d 1136	7-8
<i>State v. Litherland</i> , 2000 UT 76, 12 P.3d 92	9, 12
<i>State v. Lucero</i> , 2014 UT 15, 328 P.3d 841	1
<i>State v. Manatau</i> , 2014 UT 7, 322 P.3d 739	9-10
<i>State v. Miller</i> , 674 P.2d 130 (Utah 1983).....	9
<i>State v. Ott</i> , 2010 UT 1, 247 P.3d 344	8, 15
<i>State v. Snyder</i> , 860 P.2d 351 (Utah Ct. App. 1993)	14
<i>State v. Wach</i> , 2001 UT 35, 24 P.3d 948.....	8, 15
<i>Tabor v. Commonwealth</i> , 948 S.W.2d 569 (Ky. Ct. App. 1997)	15-16, 17
<i>Taylor v. State</i> , 2007 UT 12, 156 P.3d 739	13-14

Federal Cases

<i>Fox v. Ward</i> , 200 F.3d 1286 (10th Cir. 2000)	12
<i>Miller v. Francis</i> , 269 F.3d 609 (6th Cir. 2001)	8-9
<i>Strickland v. Washington</i> , 466 U.S. 668, 687 (1984)	7
<i>United States v. Bell</i> , 516 F.3d 432 (6th Cir. 2008)	18-19
<i>United States v. Street</i> , 614 F.3d 228 (6th Cir. 2010)	9
<i>Vonberg v. Turley</i> , No. 2:09-CV-1027 DB, 2011 WL 573409 (D. Utah Feb. 15, 2011) ..	9

Constitutional Provisions, Statutes, and Rules

U.S. Const. amends. VI, XIV	1, 8
Utah Const. art. I, § 12	1, 8
Utah Code § 78A-4-103	1
Utah R. Crim. P. 18	8, 9

Jurisdictional Statement

This court has jurisdiction over this appeal pursuant to Utah Code § 78A-4-103(2)(e).

The district court issued its Sentence, Judgment, Commitment in *State v. Courtney*, District Court Case No. 121901670, on December 30, 2013 (R. 183-84; attached at Addendum A). On December 1, 2014, the district court reinstated Appellant Carl Courtney's time to file an appeal (R. 259), and Mr. Courtney timely filed a notice of appeal on December 26, 2014 (R. 268).

Statement of the Issues

Issue: Whether counsel was ineffective for failing to timely move for a mistrial.

Standard of Review: "A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law that the court reviews for correctness." *State v. Lucero*, 2014 UT 15, ¶ 11, 328 P.3d 841 (quotation omitted).

Preservation: This issue is not preserved. But "claims of ineffective assistance of counsel, when raised for the first time on appeal, are excepted from the preservation rule." *State v. Gailey*, 2015 UT App 249, ¶ 7, __ P.3d __.

Determinative Provisions

Addendum B sets forth U.S. Const. amends. VI, XIV and Utah Const. art. I, § 12.

Statement of the Case

1. Nature of the Case and Course of Proceedings

The State charged Mr. Courtney with Distribution of or Arranging to Distribute a Controlled Substance, a second-degree felony, in violation of Utah Code § 58-37-8(1)(a)(ii). (R. 6, 302:5.) The case went to a jury trial. During voir dire, a potential juror informed the jury panel that she had “affiliations” with Mr. Courtney “especially during the time that [she] was serving as an agent for the Weber-Morgan Narcotics Strike Force.” (R. 302:23.) The court dismissed the juror, and voir dire and the trial continued. The jury convicted Mr. Courtney, and the district court sentenced him to an indeterminate term of one to fifteen years’ imprisonment. (R. 183.) Mr. Courtney appeals.

2. Statement of Facts

Mr. Courtney’s jury trial in Weber County began with the district court informing the jury panel that Mr. Courtney had been charged with distributing a controlled substance. (R. 302:5.) After a series of preliminary questions, Mr. Courtney’s attorney introduced Mr. Courtney to the jury panel and asked if anyone knew him. (Add. C; R. 302:23.)¹ A potential juror responded: “Due to my

¹ An excerpt of the relevant portions of voir dire is attached as Addendum C. The names of the jurors are included in the transcript, and those names and (and the name of the husband of the juror who made the tainting remark) have been redacted.

years in law enforcement, yes. I have had affiliations with him, especially during the time that I was serving as an agent for the Weber-Morgan Narcotics Strike Force.” (Add. C; R. 302:23.) While the potential juror made her comment, other jurors “piped up” and listened to what she was saying. (Add. C; R. 302:58.) Neither the district court nor the attorneys commented on the potential juror’s statement. (Add. C; R. 302:23–24.)

Voir dire continued until the district court asked whether anyone would have difficulty considering Mr. Courtney innocent until proven guilty or whether anyone would believe that because Mr. Courtney had merely been charged that a basis must exist for his guilt. (Add. C; R. 302:39.) The same potential juror raised her hand. (Add. C; R. 302:39, 60.) She was the “only person that raised her hand to that question” and it “drew attention to her again.” (Add. C; R. 302:60.) Before the potential juror responded orally, the district court asked the attorneys for a sidebar. (Add. C; R. 302:39.)

During the sidebar, the district court expressed that it did not want the juror to “taint[] the pool and if we have an issue now where you already feel that she has done that, then we need to make a record on it because I don’t want to plow through, pick a jury of eight and then have this become an issue.” (Add. C; R. 302:39–40.) The State suggested excusing the juror immediately. (Add. C; R. 302:40.) Mr. Courtney’s counsel stated that he did not know the best way to handle

the situation. (Add. C; R. 302:40–42.) The court asked the attorneys what they wanted it to do and if they felt that the juror had tainted the pool by raising a prior bad acts issue “in a very roundabout way without being specific.” (Add. C; R. 302:42.) The court and the attorneys considered whether the court should ask a curative question, but then they settled on excusing the juror immediately under the pretense that her husband worked as a probation officer in the court. (Add. C; R. 302:43.) The court then asked the juror whether her husband was a probation officer, and after the juror confirmed her husband’s occupation, the court excused her. (Add. C; R. 302:43–44.)

Voir dire continued. Mr. Courtney’s counsel passed the jury for cause. (Add. C; R. 302:49.) Then the attorneys exercised their preemptory strikes and picked the jury, and the jury was sworn. (Add. C; R. 302:55–56.)

After the jury was sworn, the court called for a recess and asked the attorneys if they had anything to discuss. (Add. C; R. 302:57.) Mr. Courtney’s attorney and the court made a record as to what happened with the potential juror. (Add. C; R. 302:58–60.) The court told Mr. Courtney’s attorney that he had never made a formal motion for a mistrial before the jury was sworn, and the court was concerned that since the jury had been sworn that jeopardy attached. (Add. C; R. 302:61–62.) In explaining why he did not move for mistrial, Mr. Courtney’s attorney explained,

I haven't had a chance to talk to my client about his concerns about it either. I mean we just kept rolling so I thought—and I missed the Court swearing the Jury. I was re-organizing and shifting sides and wasn't paying attention when you were swearing the Jury in. So I actually want for the jeopardy to attach, but I wasn't paying attention as I was going on. I was trying to rearrange and my client was asking me a question and so I didn't catch the issue, but I had every intention of bringing it to the record because he leaned over and made some comments to me. I didn't want to draw more attention from the Jury panel as we were selecting them about what was taking place, but he does have a concern about the jury pool being tainted based on [the juror's] comments.

(Add. C; R. 302:62–63.) The court responded:

The minute the response was made we could have excused the panel and you could have made that motion right at that moment or we could have had discussion about ferreting out the poisoning effect, if any, that the rest of the jurors experienced from the response. That was not done and even as late as right before the jury was selected there was no motion made and so I'm just going to find that at this point the motion is untimely.

(Add. C; R. 302:64.) The court expressed its frustration about the situation and its concern that Mr. Courtney's counsel was ineffective for failing to bring the motion for mistrial before the jury was sworn. (Add. C; R. 302:65–67.) After more discussion, the court asked Mr. Courtney's counsel if he wanted to make a formal motion; counsel moved for a mistrial, which the court denied as untimely. (Add. C; R. 302:70–72.)

At trial, the State's main witness was a Weber-Morgan Narcotics Strike Force agent. (R. 302:95.) The agent testified that a confidential informant set up a drug purchase with Darrell Dickerson. (R. 302:103.) The confidential informant called Mr. Dickerson before the purchase to let him know he was coming. (R. 302:107.) The agent—who was undercover—went with the confidential informant to a hotel room registered to Mr. Dickerson. (R. 302:103, 105–107, 128.)

When the agent and the informant entered the hotel room, they observed four people; Mr. Dickerson was laying on a bed, Mr. Courtney was sitting at a table near the bed, and two other people were elsewhere in the room. (R. 302:109–110.) The confidential informant approached the table, and after making some comments, asked, “[I]s that me right there?”—referring to whether a package of drugs was his. (R. 302:121–22.) Mr. Courtney responded, “I don’t know.” (R. 302:138.) Then the agent testified that Mr. Courtney handed a baggie with methamphetamine to the informant, who then handed it to the agent. (R. 302:115.) But on cross-examination the agent admitted that he did not see Mr. Courtney hand the drugs to the informant. (R. 302:139, 170.) The agent also admitted that he never saw the drugs in Mr. Courtney’s possession. (R. 302:133.)

During the jury deliberations, the jury sent a question to the court. (R. 302:216–17.) The jury asked the court to define the instruction setting forth the elements of the distribution crime. (R. 70; 302:216.) Specifically, the jury asked for

further definition of the terms “[a]greed, consented, offered, or arranged to distribute methamphetamine.” (R. 70; 302:216.) The court instructed the jury to use its common sense in defining those terms. (R. 44.) The jury then found Mr. Courtney guilty of distributing or arranging to distribute a controlled substance. (R. 302:220.)

Summary of the Argument

Mr. Courtney’s counsel was ineffective when he failed to timely move for a mistrial based on the potential juror’s tainting remarks. Mr. Courtney was prejudiced by his counsel’s actions; the district court would have granted the motion. Moreover, Mr. Courtney was harmed because the evidence against him was not strong or overwhelming, so a comment by the potential juror that she had interactions with Mr. Courtney in her past drug interdiction work could have pushed the jury towards conviction and ultimately undermines confidence in the jury’s verdict.

Argument

- 1. Mr. Courtney’s counsel was ineffective for failing to timely move for a mistrial.**

For an ineffective assistance of counsel claim, a defendant must satisfy the *Strickland*² standard, which requires a defendant to prove “(1) that counsel’s

² See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Larrabee*, 2013 UT 70, ¶ 18, 321 P.3d 1136 (quotation omitted). "Proving that his counsel's performance fell below an objective standard of reasonableness requires [the defendant] to rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." *State v. Ott*, 2010 UT 1, ¶ 34, 247 P.3d 344 (quotations omitted). Sound trial strategy does not require trial counsel to submit a motion or lodge an objection that would be futile. *State v. King*, 2010 UT App 396, ¶ 33, 248 P.3d 984.

Here, Mr. Courtney's trial counsel was ineffective for failing to timely move for a mistrial based on the potential juror's prejudicial comments that tainted the jury panel during voir dire.

1.1 Mr. Courtney's counsel performed deficiently.

"Both the United States Constitution and the Utah Constitution guarantee an accused the right to a fair and impartial jury." *State v. Wach*, 2001 UT 35, ¶ 36, 24 P.3d 948; *see* U.S. Const. amends. VI, XIV; Utah Const. art. I, § 12. "Among the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using *voir dire* to identify and ferret out jurors who are biased against the defense." *Miller v. Francis*, 269 F.3d 609,

615 (6th Cir. 2001). When an attorney believes a potential juror is unable to be impartial, an attorney may request that the juror be removed from the panel. See Utah R. Crim. P. 18(e)(13)–(14) (rules for challenges for cause); *State v. Litherland*, 2000 UT 76, ¶ 25, 12 P.3d 92 (noting that a potential juror should be removed if juror expressed strong or unequivocal bias).

“Ordinarily, if a party knows or believes that a juror or jury is disqualified because of bias or prejudice, the challenge must be asserted before the jury is sworn; otherwise it is waived.” *Burton v. Zions Co-op. Mercantile Inst.*, 249 P.2d 514, 516 (Utah 1952).³ The timing of the objection is especially important in criminal proceedings, where jeopardy attaches once the jury is sworn and empaneled. *State*

³ The necessity of objecting to a juror before the jury is sworn is firmly established in case law. See Utah R. Crim. P. 18(c)(2) (“A challenge to an individual juror may be made only before the jury is sworn [but a court may permit a challenge after the jury is sworn upon a showing of good cause.]”); *State v. DeMille*, 756 P.2d 81, 83 (Utah 1988) (holding that a defendant's failure to ask jurors during voir dire about a foreseeable issue of bias or object to the court's failure to do so constituted a waiver of the bias question); *State v. Miller*, 674 P.2d 130, 131 (Utah 1983) (per curiam) (holding that a defendant who neither objected to allegedly improper voir dire nor sought permission to inquire further into prospective jurors' biases waived his claim of juror bias); *Broberg v. Hess*, 782 P.2d 198, 201 (Utah Ct. App. 1989), overruled on other grounds by *State v. Mead*, 2001 UT 58, 27 P.3d 1115 (“A specific objection to the failure to make a requested voir dire inquiry is required so that the trial court may correct its error before the jury is selected and empaneled.”); see also *United States v. Street*, 614 F.3d 228, 234–35 (6th Cir. 2010); *Vonberg v. Turley*, No. 2:09-CV-1027 DB, 2011 WL 573409, at *2 (D. Utah Feb. 15, 2011) (“[U]nder the doctrine of ‘invited error,’ Utah appellate courts will not address the merits of challenges to jury taint when those challenges were not made during voir dire.”).

v. Manatau, 2014 UT 7, ¶ 9, 322 P.3d 739. Requiring a timely objection “prevents defendants from sandbagging the prosecution by waiting until the only available remedy for the alleged error is outright dismissal or a new trial.” *State v. Johnson*, 2013 UT App 276, ¶ 8, 316 P.3d 994 (quotations omitted). Furthermore, “[p]assing the jury for cause . . . obviate[s] the possibility of the trial judge questioning the jury more carefully as to [the] matter [at issue] and permit[s] [the court] to excuse the rest of the jury panel so that the trial [can] not . . . continue[.]” *Burton*, 249 P.2d at 516; see *Butterfield v. Sevier Valley Hosp.*, 2010 UT App 357, ¶ 28, 246 P.3d 120 (holding that because plaintiffs passed on the jury for cause, plaintiffs invited the court’s error).

Here, Mr. Courtney’s trial counsel had multiple opportunities to move for a mistrial before the jury was sworn but failed to do so. He could have moved for a mistrial right after the potential juror made her initial comment that she knew Mr. Courtney from her time on the narcotics strike force. (Add. C; R. 302:23.)

He could have moved for a mistrial during the lengthy sidebar with the trial court after the potential juror indicated she could not afford Mr. Courtney his presumption of innocence. (Add. C; R. 302:39–43.) At the beginning of that sidebar, the district court stated that it did not want the potential juror “tainting the pool” and invited the attorneys to act if they believed that potential juror had already tainted the panel. (Add. C; R. 302:39–40.) In fact, the district court asked Mr.

Courtney's counsel what to do, and trial counsel said, "I don't know how the handle this. I don't know how to handle this." (Add. C; R. 302:40.) After the district court suggested that it dismiss the potential juror because of her husband's connection to the court, trial counsel said, "I don't know that that's the best way to handle it." (Add. C; R. 302:41-42.) The district court asked trial counsel for suggestions, and trial counsel said, "That's the best approach as possible at this point, what you're suggesting." (Add. C; R. 302:42.) Trial counsel then suggested that the jury was tainted, and the district court stated that it did not "profess to have all the answers." (Add. C; R. 302:43.) Trial counsel responded, "I have less answers than you." (R. 302:43.) Throughout the sidebar, the district court solicited trial counsel's advice on how to move forward, and trial counsel failed to bring a motion for mistrial.

Trial counsel again could have asked for a mistrial during the sidebar where the attorneys struck jurors for cause. (R. 302:46-48.) Instead, trial counsel passed on the jury for cause. (Add. C; R. 302:49.)

Finally, trial counsel could have moved for a mistrial during or after he exercised his preemptory strikes. (Add. C; R. 302:54-55.) Instead, trial counsel exercised his strikes and expressly consented to the selection of the jury. (Add. C; R. 302:55.) And after the district court thanked those who were not selected for the

jury and had the jury seated, the court had the jury sworn—without any motion for a mistrial from trial counsel. (Add. C; R. 302:55–56.)

After the jury was sworn, trial counsel asked the district court to make a record on the jury tainting issue, and trial counsel admitted that he never moved for a mistrial. (Add. C; R. 302:62.) He stated that he “missed the Court swearing the Jury” because he was “re-organizing and shifting sides and wasn’t paying attention.” (Add. C; R. 302:63.) He also stated that he “didn’t want to draw more attention from the Jury panel as we were selecting them about what was taking place.” (*Id.*) He later told the trial court that he “didn’t know where [he] was supposed to make the timely—[he] thought it was after the jury was picked.” (Add. C; R. 302:66.)

When trial counsel finally brought the motion for mistrial, the district court found that “numerous opportunities . . . existed to bring this motion previously,” so it deemed the motion untimely and denied it. (Add. C; R. 302:72.)

It is true that “counsel’s actions during voir dire are presumed to be matters of trial strategy.” *Fox v. Ward*, 200 F.3d 1286, 1295 (10th Cir. 2000); see *Litherland*, 2000 UT 76, ¶ 20 (noting presumptions offered to trial counsel during voir dire because of the *Strickland* standard). But trial counsel’s stated reasons on the record for not timely moving for a mistrial do not indicate a reasonable trial strategy.

First, trial counsel stated that he did not move for a mistrial prior to the jury being sworn because he did not want to draw the jury's attention to the tainting remarks of the potential juror. (Add. C; R. 302:63.) But trial counsel had several opportunities to move for a mistrial without giving undue attention to the potential juror's comments. For example, trial counsel could have moved for a mistrial during the sidebar where the attorneys struck jurors for cause. (Add. C; R. 302:46–48.) Trial counsel could have also moved for a mistrial while the attorneys exercised their preemptory strikes. (Add. C; R. 302:54–55.) In both instances, the potential juror had been dismissed from the panel for some time. Because trial counsel had several opportunities to move for a mistrial without drawing attention to the tainting comment, his failure to do so is not reasonable trial strategy.

Second, trial counsel indicated that he did not know he was supposed to make the motion for a mistrial before the jury was "picked." (Add. C; R. 302:66.) But this reason is contradicted by his other comment that he missed the district court swearing the jury because he was not paying attention—he implies that he knew that he was supposed to make a motion before the jury was sworn but missed the swearing in because he was distracted. (Add. C; R. 302:63.) At the very least, trial counsel was not paying attention, and failure to pay attention is not reasonable trial strategy. *See Taylor v. State*, 2007 UT 12, ¶ 75, 156 P.3d 739 (noting

that a defendant can rebut the presumption of reasonable trial strategy by showing that trial counsel was inattentive or indifferent). But even more worrisome, trial counsel misunderstood well-established law, which requires that objections to a juror be lodged before the jury is sworn. *See, e.g., Burton*, 249 P.2d at 516. Counsel's misunderstanding of the law is not a reasonable trial strategy. *See State v. Hallett*, 856 P.2d 1060, 1063 (Utah 1993) (noting that trial counsel was ineffective for failing to object to erroneous construction of statute).

Furthermore, courts have consistently held that an attorney's failure to act in a timely manner renders the attorney's performance deficient. *See State v. Crosby*, 927 P.2d 638, 645–46 (Utah 1996) (holding that counsel was ineffective for not timely objecting to the information); *State v. Ferry*, 2007 UT App 128, ¶ 16, 163 P.3d 647 ("Defendant's trial counsel therefore rendered ineffective assistance by failing to timely file Defendant's motion to suppress evidence."); *State v. Snyder*, 860 P.2d 351, 359 (Utah Ct. App. 1993) ("[W]e fail to see how trial counsel's failure to meet a crucial filing deadline can be explained as a sound trial tactic or strategy.")

Similarly, no reasonable trial strategy explains trial counsel's failure to timely move for a mistrial. Consequently, Mr. Courtney's counsel performed deficiently.

1.2 Mr. Courtney was prejudiced by his counsel's performance.

Trial counsel's failure to timely move for a mistrial prejudiced Mr. Courtney. "To show prejudice in the ineffective assistance of counsel context, the defendant bears the burden of proving that counsel's errors actually had an adverse effect on the defense and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Ott*, 2010 UT 1, ¶ 40, 247 P.3d 344 (quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotations omitted).

Here, Mr. Courtney was prejudiced because, if trial counsel had timely moved for a mistrial, the district court would have likely granted it. A district court may grant a mistrial when "circumstances are such as to reasonably indicate that a fair trial cannot be had and that a mistrial is necessary in order to avoid injustice." *State v. Wach*, 2001 UT 35, ¶ 45, 24 P.3d 948 (quotation omitted). In instances where a potential juror insinuates to the jury panel during voir dire that the defendant committed a similar crime in the past, a defendant is prejudiced. *See Dippolito v. State*, 143 So.3d 1080, 1085–86 (Fla. Ct. App. 2014) (holding that a comment by a potential juror was not harmless because of the possibility that jurors were prejudiced by the allegation that was close to the charged crime); *Tabor v. Commonwealth*, 948 S.W.2d 569, 572–73 (Ky. Ct. App. 1997) (reasoning that a

potential juror's comment that she might have met the defendant at a correctional institution was prejudicial because the panel learned about the defendant's inadmissible conviction through voir dire); *Richardson v. State*, 666 So.2d 223, 224 (Fla. Ct. App. 1995) (holding that defendant was deprived his right to an impartial jury when a potential juror, who informed the panel that she was employed by a correctional institution, suggested that she knew the defendant through her employment, implying that he was a convicted felon).

Here, the district court realized that the potential juror informed the jury of Mr. Courtney's prior bad acts "in a very roundabout way without being specific." (Add. C; R. 302:42.) The district court seemed to acknowledge that the potential juror's comment created a situation where Mr. Courtney was unable to have a fair trial when the court expressed its frustration multiple times over the improper comment. In one instance, the court stated that the problem "was created by a juror who quite honestly, in my opinion, ought to be bitch-slapped because . . . I mean for her not to understand the tainting that she was creating when she said that, it's hard for me to . . . I'm just so frustrated. . . ." (Add. C; R. 302:67-68.) The court also said, "That juror should be slapped for — I mean that's an extreme statement, but it just reflects the frustration of the Court that she would go beyond the simple question of do you know and offer what she offered. It's so frustrating to me." (Add. C; R. 302:69.)

In making these comments, the district court realized that in a case where a defendant was charged with drug distribution from his interactions with the Weber-Morgan Narcotics Task Force, and a potential juror informed the panel that she knew of Mr. Courtney from her employment with the Weber-Morgan Narcotics Task Force, the jury panel was given information about Mr. Courtney's past bad acts that improperly colored their view of the case. *See Dippolito*, 143 So.3d at 1085–86; *Tabor*, 948 S.W.2d at 572–73; *Richardson*, 666 So.2d at 224. In attempting to remedy the situation, the district court elicited suggestions from trial counsel, but trial counsel gave no substantive answers. (Add. C; R. 302:41–42.) Given the district court's recognition that the potential juror's comment was improper and the court's attempt to solve the problems caused by the comment, the district court likely would have granted a timely motion for mistrial.

Moreover, the trial would have turned out differently had the jury panel not been exposed to the tainting remark. Strong evidence of Mr. Courtney's guilt did not exist. *See State v. Alvarado*, 2014 UT App 87, ¶28, 325 P.3d 116. In fact, the undercover operation was focused on Mr. Dickerson; the confidential informant called Mr. Dickerson right before the drug interaction occurred, and the confidential informant purchased the drugs in a hotel room registered to Mr. Dickerson. (R. 302:95, 103, 105–107, 128.) When the confidential informant approached the table where Mr. Courtney was sitting and asked if the drugs were

his, Mr. Courtney responded, "I don't know." (R. 302:121-22; 138.) And the State's main witness admitted that he did not see Mr. Courtney hand the drugs to the informant and he never saw the drugs in Mr. Courtney's possession. (R. 302:133, 139, 170.)

Furthermore, the jury's question during deliberations illustrates the closeness of the case. The jury asked the district court to further define the elements of the crime, especially the element that the defendant "[a]greed, consented, offered, or arranged to distribute methamphetamine." (R. 70; 302:216.) The evidence against Mr. Courtney simply was not conclusive: he was not the target of the undercover drug investigation; he was not the one who the informant called minutes before the drug purchase; he did not know if the drugs on the table were the informant's; and he did not, according to the State's main witness, have the drugs in his possession.

The potential juror's tainting comment that she had interacted with Mr. Courtney through her work on the Weber-Morgan Narcotics Strike Force improperly tipped the scale in favor of conviction—the comment informed the jury of past bad acts involving drugs and allowed the jury to reason that if Mr. Courtney had been involved with drugs once, he was probably involved in this instance, also. *See, generally, United States v. Bell*, 516 F.3d 432, 444 (6th Cir. 2008) ("The only way to reach the conclusion that the person currently has the intent to

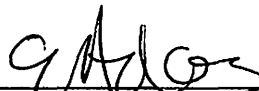
possess and distribute based solely on evidence of *unrelated* prior convictions for drug distribution is by employing the very kind of reasoning—*i.e.*, once a drug dealer, always a drug dealer—which 404(b) excludes.”). Because of the shortage of strong evidence and the nature of the potential juror’s tainting comment, this court should lack confidence in this jury’s verdict.

Mr. Courtney was prejudiced by his counsel’s failures. Because his counsel was deficient and Mr. Courtney was prejudiced thereby, his counsel was constitutionally ineffective.

Conclusion

Mr. Courtney’s counsel was ineffective. His counsel performed deficiently when he failed to timely move for a mistrial, and Mr. Courtney was prejudiced by his counsel’s failure. Consequently, this Court should vacate the jury’s verdict and remand Mr. Courtney’s case for a new trial.

DATED this 9th day of October, 2015.



Emily Adams (T4937)
ADAMS LEGAL LLC
1310 Madera Hills Drive
Bountiful, UT 84010
eadams@adamslegalllc.com
(801) 309-9625

*Attorney for Defendant/Appellant
Carl Courtney*

Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 4,757 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 9th day of October, 2015.



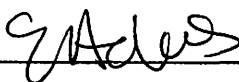
Certificate of Service

This is to certify that on October 13, 2015, I caused two true and correct copies of the Brief of Appellant to be served on the following via first class mail, postage prepaid:

Laura Dupaix
Utah State Attorney General's Office
Appeals Division
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

The appropriate number of copies of the brief were hand-delivered to the Utah Court of Appeals.

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format was also filed with the Court and served on Appellee.



ADDENDUM A
District Court Rulings

SECOND DISTRICT COURT - OGDEN
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCING 4TH APP
 : SENTENCE, JUDGMENT, COMMITMENT
 :
vs. : Case No: 121901670 FS
CARL MACK JR COURTNEY, : Judge: MICHAEL DIREDA
Defendant. : Date: December 30, 2013

PRESENT

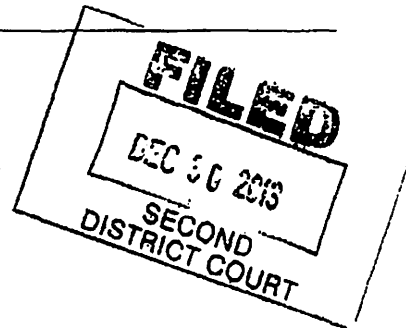
Clerk: zoilab
Prosecutor: HEWARD, GARY R
Defendant
Defendant's Attorney(s): STATE PUBLIC DEFENDER
SEAN YOUNG
Agency: Adult Probation & Parole

DEFENDANT INFORMATION

Date of birth: August 12, 1968

Audio

Tape Number: 2D123013 Tape Count: 10:49-11:02



DEC 30 2013

CHARGES

1. DISTRIBUTE/OFFER/ARRANGE DISTRIBUTION OF CONTROLLED SUBSTANC -
2nd Degree Felony

Plea: Not Guilty - Disposition: 07/15/2013 Guilty

HEARING

Defendant present in the custody of Weber County Jail.
Defense counsel requests a deviation from the prison
recommendation.

Defendant addresses the Court.

Court makes prefacing comments.

State addresses the prison recommendation and the defendant's
criminal history.

The Court makes a record regarding the sentence in this case
running consecutively as opposed to concurrently with the
defendant's other sentences.

SENTENCE PRISON

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE
DISTRIBUTION OF CONTROLLED SUBSTANC a 2nd Degree Felony, the
defendant is sentenced to an indeterminate term of not less than
one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the WEBER County Sheriff: The defendant is remanded to your
custody for transportation to the Utah State Prison where the
defendant will be confined.

Printed: 12/30/13 13:20:24

Page 1

000183

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE


This sentence to run consecutively to the sentences imposed in case no. 131900508, 121900920 and 121901671.

SENTENCE RECOMMENDATION NOTE

The Court recommends the defendant be considered for a substance abuse treatment such as Con-Quest, Drug Board or some other program.

Credit is granted for time served.

Date: 12/30/13



MICHAEL DIREDA
District Court Judge

ADDENDUM B
Determinative Provisions

U.S. Const. amend. VI

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

U.S. Const. amend. XIV

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

Utah Const. art. I, § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by

statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

ADDENDUM C
Voir Dire Transcript Excerpts

1 familiar with you. I met you. Courtney, I haven't seen him
2 since high school really. So, yeah. Nothing.

3 MR. ARNOLD: Thank you. I believe [inaudible]

4 WOMAN: I know Jason through mutual friends and Courtney
5 Ryan is the step-father to my nieces and nephews.

6 MR. ARNOLD: Is there anything about that relationship
7 that would cause you to favor one side or the other?

8 WOMAN: No.

9 MR. ARNOLD: Thank you.

10 THE COURT: Mr. Young would you like to conduct any
11 follow-up on either of these three witnesses at this time?

12 MR. YOUNG: No, Your Honor.

13 THE COURT: Okay, thank you. All right. Mr. Young let me
14 allow you to introduce yourself and any witnesses you intend to
15 call.

16 MR. YOUNG: My name is Sean Young. I'm a criminal defense
17 attorney here in Ogden. This is Carl Courtney. He's the
18 defendant in this case and we intend to possibly call Mr.
19 Courtney as our only witness in this case. Does anybody know
20 myself or Mr. Courtney?

21 [REDACTED]: Due to my years in law enforcement, yes. I
22 have had affiliations with him, especially during the time that
23 I was serving as an agent for the Weber-Morgan Narcotics Strike
24 Force.

25 WOMAN: Mr. Young represented my husband in a case.

1 MR. YOUNG: Thank you.

2 THE COURT: All right ladies and gentlemen, as I indicated
3 to you at the outset this is a criminal trial in which the
4 defendant Carl Mack Courtney, Jr. has been charged by
5 information which has been duly filed with the commission of
6 distribution of or arranging to distribute a controlled
7 substance. To the best of your knowledge and memory has any one
8 of you heard or read anything about this case? If so would you
9 please raise your hand? All right, I don't see any hands
10 raised.

11 GENTLEMAN: Sorry.

12 THE COURT: Oh, I'm sorry.

13 GENTLEMAN: Previously to today?

14 THE COURT: Yes, previous to today.

15 GENTLEMAN: Okay.

16 THE COURT: All right, the next questions go to your prior
17 jury service. If any of you have had the opportunity to serve
18 on a jury previously, please raise your hand. All right. What
19 I'd like to know, starting with you [REDACTED], is when your
20 jury service was, what kind of case it was if you remember and
21 what the result of that case was, what the outcome was.

22 [REDACTED]: I believe it was 1982. It was Judge
23 Wahlquist's Court. I had one other previous jury duty, but it
24 was in Mississippi a couple years prior to that before my moving
25 out here. The case here was a civil case. Well, I guess you

1 teenager. So--

2 THE COURT: Okay. Okay, the next question. Would any of
3 you have difficulty in affording the defendant his guarantee of
4 being considered innocent until proven guilty beyond a
5 reasonable doubt or stated differently would any of you believe
6 that because the defendant has been charged in this case by the
7 State that there must be some basis for his guilt?

8 [REDACTED] before you respond, perhaps what we ought to
9 do--may I see counsel at the bench for just a moment please?
10 Will you hold off on your response? Thank you.

11 [Discussion at bench.]

12 THE COURT: We dodged a bullet the first time.

13 MR. YOUNG: No, we didn't. We--

14 THE COURT: Well I mean I guess what I'm saying is we
15 didn't dwell on it. We didn't linger on it. I recognize what
16 you're saying, but the problem is there's no way to anticipate
17 that she would say what she said. I mean--

18 MR. ARNOLD: But the question was do you know Carl. I
19 knew that she would strike.

20 MR. YOUNG: There's no previous strike orders.

21 MR. ARNOLD: Well, we don't, but you know she's been at
22 Riverdale P.D. for a long time.

23 THE COURT: Well I don't think there's any question that
24 she is gone. I guess the bigger issue though is I don't want
25 her tainting the pool and if we have an issue now where you

1 already feel that she has done that, then we need to make a
2 record on it because I don't want to plow through, pick a jury
3 of eight and then have this become an issue. I mean I guess I
4 don't know how we're going to determine whether she has tainted
5 the pool or not.

6 MR. ARNOLD: I mean what if we stipulate that she be
7 excused?

8 THE COURT: Now?

9 MR. ARNOLD: Now.

10 MR. YOUNG: But that's kind of [inaudible]

11 THE COURT: Well you tell me what you--

12 MR. YOUNG: I don't know how to handle this. I don't know
13 how to handle this. We can take her back in chambers. We can
14 always take her back in chambers or everyone is going to know
15 what's going on.

16 THE COURT: Well, okay. Then if I don't take her back in
17 chambers, then I just allow her response in open Court. What do
18 I do? She stood up now. I've got to do something.

19 MR. ARNOLD: I would say that we--I mean given her prior
20 you know, I mean relationship with the facts, I mean the Strike
21 Force and everything, I think we need to just cut her right here
22 and just say thank you.

23 MR. YOUNG: [inaudible]

24 THE COURT: Well let me try to handle it in a different
25 way. I think what I'm going to do is I'm going to ask her if

1 her husband is [REDACTED]. I know he is. He's a probation
2 guy from Alliance--or, no, Utah Alternative and I'm just going
3 to indicate this from the fact that her husband works in my
4 Court that maybe it would be appropriate to let her go and I
5 won't even draw attention to the law enforcement, Weber-Morgan
6 Narcotics Strike Force [inaudible] I'll just connect it to the
7 probation issue. Kick her loose for that reason and just leave
8 it alone.

9 MR. YOUNG: You can just tell them that [inaudible]
10 because her husband is working for--

11 THE COURT: No. I think I'm just going to let her go
12 because the real--

13 MR. YOUNG: Have her walk out right now?

14 THE COURT: Well if I base it on the probation connection,
15 I don't think I create a problem. The problem that I have is if
16 I leave her here, what are we going to do every time there's a
17 question? She's going to stand up and I'm going to shut her
18 down and it just draws more attention to her.

19 MR. YOUNG: If she walks out right now.

20 THE COURT: Well all it does is draw attention to the fact
21 that her husband is a probation officer in my Court and for that
22 reason I'm going to just act like--

23 MR. YOUNG: [inaudible]

24 THE COURT: Well, okay, but then what do you--

25 MR. YOUNG: I don't know that that's the best way to

1 handle it.

2 THE COURT: Well, but you've got to do more than tell me
3 that you don't like my approach. You've got to offer a
4 suggestion.

5 MR. YOUNG: That's the best approach as possible at this
6 point, what you're suggesting.

7 THE COURT: I think I say well you're likely to be
8 excused. If I leave her there then every question I ask has the
9 potential for her--

10 MR. ARNOLD: What about some follow-up? Excuse her and
11 then follow-up with the jurors based on--

12 THE COURT: Well, I had no idea she was going to say she
13 knew Mr. Courtney.

14 MR. ARNOLD: I had no idea. I had no idea.

15 THE COURT: I mean I thought she would say she knew you.
16 I didn't know she would say she knew [inaudible]

17 MR. ARNOLD: That's [inaudible] I agree. That's what I
18 would--

19 THE COURT: And once it was out there was nothing I could
20 do. I couldn't unring the bell. Well, you tell me what you
21 want to do. If you feel that because of that the jury has been
22 tainted, because I mean that sort of goes to the whole 404
23 issue. You weren't going to get into 404 unless they opened the
24 door. Well she kind of did that in a very roundabout way
25 without being specific.

1 MR. ARNOLD: I agree.

2 THE COURT: But I mean I'll--

3 MR. ARNOLD: What if we did this? She's excused based on
4 the probation [inaudible] and then some colloquy, some
5 questions. You heard this witness or this potential juror talk
6 about her relationship with Mr. Courtney. Do any of you
7 jurors--has that affected--are you able to maintain--

8 THE COURT: What do you think about trying to ferret out
9 the reason [inaudible] The problem is it's a loaded question.
10 If they're smart, they say yes and they know they're gone.
11 That's the problem.

12 MR. ARNOLD: That's true. [inaudible]

13 MR. YOUNG: Well, if they want to be on the jury, they'll
14 say no. They're tainted.

15 THE COURT: And they say no. I understand. Well I don't
16 profess to have all the answers.

17 MR. YOUNG: I have less answers than you.

18 THE COURT: Well I'm not sure that you do.

19 MR. YOUNG: Let's get her out on the probation itself.

20 THE COURT: Okay. All right.

21 [REDACTED], before you answer, I was discussing with Mr.
22 Young and Mr. Arnold, both attorneys who are assigned to my
23 Court on Thursdays, if [REDACTED], who is also assigned
24 to my Court is your husband.

25 [REDACTED]: Yes, Sir.

1 THE COURT: Okay. I wasn't sure when you said that and I
2 was trying to make the connection and then it occurred to me
3 he's relatively new in his position with the probation company
4 that he works for. Is that right?

5 [REDACTED]: Right.

6 THE COURT: I mean not brand new, but new enough that I'm
7 just not used to having him all the time. The discussion that
8 we had at the bench was based on the fact that your husband
9 comes to my Court every Thursday as a probation officer for that
10 private probation company, I think it would be better to just
11 excuse you at this time. I think that just the fact that I have
12 that, that he's working in my Court with other probation
13 entities, I think creates enough of an issue that beyond your
14 own experiences and things, I think that's probably enough.

15 So rather than have you stay here only to excuse you at
16 the end, I think what we'll do is just let you get on your way
17 now if that's okay with you.

18 [REDACTED]: That's fine with me Your Honor.

19 THE COURT: Okay, thank you.

20 [REDACTED]: Thanks.

21 THE COURT: Appreciate your time. All right. So let me
22 repeat the question and I apologize for the interruption. Would
23 any of you have difficulty in affording the defendant his
24 guarantee of being considered innocent until proven guilty
25 beyond a reasonable doubt or stated another way would any of you

1 BAILIFF: No. That's the only one that's clean. Every
2 other one I saw had something up here, defense, bailiff, in
3 Court clerk.

4 THE COURT: Okay. All right. Then I'll hand that to you.

5 BAILIFF: Okay.

6 THE COURT: Mr. Arnold do you pass the jury for cause?

7 MR. ARNOLD: I do.

8 THE COURT: Mr. Young do you pass the jury for cause?

9 MR. YOUNG: Yes.

10 THE COURT: Thank you. Now ladies and gentlemen each of
11 the parties has a chance to disqualify four of you from serving
12 on the jury for a total of eight. They can do that for any
13 reason and you shouldn't take it personally. I wouldn't imagine
14 that you would. You'd probably celebrate actually, but some
15 people, believe it or not, get offended. I mean they walk out
16 thinking why in the world didn't they select me? I'm the
17 perfect juror. If they were to have, you know, in the
18 dictionary juror, my picture should be there because I'm the
19 person that should be on this jury and all I can tell you is
20 that when I was an attorney, before I became a judge, I had my
21 own theories of the kinds of people that I wanted on my jury and
22 when I won, my theories were validated and when I lost, I went
23 back to the drawing board and reconsidered my theories.

24 They can excuse you for any reason. They can look at the
25 clothing you're wearing, the way you comb your hair, what you do

1 soda doesn't expire, let me just tell you that it does. I went
2 back not too long ago and checked the refrigerator and noticed
3 that these soda cans have expiration dates on them and I was in
4 a meeting back in my jury room and I said I don't think soda
5 expires and so it was one of those sort of dare things. They
6 said well judge why don't you try it and let us know and so I'll
7 just be the one to tell you that soda does in fact expire and so
8 after having that terrible experience, we went ahead and pulled
9 out all of the soda that had expired and put in fresh soda. So
10 I wouldn't expect you to have a bad experience, but if for some
11 reason we missed something, let us know again.

12 During the course of the trial it is important that you be
13 able to hear everything that is said and be able to see
14 everything that is shown. If you have difficulty hearing or
15 seeing, please let us know. Don't wait until the end of the
16 trial and when you're leaving say oh by the way it would have
17 been nice. I couldn't really hear very much. Just raise your
18 hand and get our attention and we'll make the adjustments that
19 need to be made for your benefit.

20 Thank you. All right Mr. Young, Mr. Arnold, one last time
21 at the bench to confirm this list please.

22 [Discussion at bench.]

23 THE COURT: Just double-check my marks to make sure. So
24 I've got Juror 1, 4, 8, 9, 14, 16, 17 and 21. Does that look
25 right? Okay. All right, thank you.

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

1 All right ladies and gentlemen, I'm now going to read the
2 names of those of you who have been selected to serve as the
3 Jury in this case. [REDACTED]

4 [REDACTED]
5 [REDACTED]. Mr. Arnold is this the jury
6 selected?

7 MR. ARNOLD: It is Your Honor.

8 THE COURT: Mr. Young is the jury selected?

9 MR. YOUNG: Yes, Your Honor.

10 THE COURT: All right, thank you. Ladies and gentlemen if
11 you were not selected, you are now free to leave. You're
12 excused with the thanks of the Court. I truly appreciate your
13 patience this morning. I wish you well. You will receive a
14 check in the mail for your time. You're not going to get rich.
15 I'll just tell you that now. It might be enough just to cover a
16 couple of ice creams, but it's the State's way of thanking you
17 for your time and as I think Ms. Rogers told you before I
18 started the process, by coming today, by being selected to come
19 you're off the hook for two years which is probably the best
20 news that I could give you today.

21 So thank you. Have a wonderful day and a wonderful 24th
22 holiday coming up and appreciate your time.

23 BAILIFF: All jurors that were selected if you'll just
24 come with me.

25 [The Bailiff seats the Jury.]

1 BAILIFF: So we have [REDACTED]
2 [REDACTED] and [REDACTED].

3 THE COURT: All right ladies and gentlemen, now that
4 you're comfortable in your seats, I'm going to ask you to stand,
5 raise your right hand and my Clerk is going to swear you in as
6 the Jury that's been selected in this case.

7 THE JURY PANEL IS SWORN.

8 THE COURT: All right, thank you. You may be seated. Now
9 as I indicated to you, I'm going to let you take a short break
10 to use the restroom, make phone calls, get a drink, whatever you
11 need to do and then when you come back in I will read you the
12 initial set of jury instructions, invite the attorneys to make
13 their opening statements and begin presenting evidence and then
14 we'll just kind of see where we are time wise.

15 Now that I've got you there, do you have any thoughts
16 about how you would like me to handle the lunch, whether you
17 would like a shorter lunch or a longer lunch? Nobody has a
18 preference? Counsel, back at 1:30 or 1:00? What would you
19 prefer?

20 MR. ARNOLD: Could we see how far we get?

21 THE COURT: Okay.

22 MR. ARNOLD: Is that okay?

23 THE COURT: That's fine. You bet.

24 MR. ARNOLD: Just during the break we've got a few things
25 to set up.

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

1 THE COURT: Okay. All right, then we'll be in recess for
2 let's say--what do you think? Ten minutes is adequate?

3 MR. ARNOLD: At least ten.

4 MR. YOUNG: Go 15 just to be safe.

5 MR. ARNOLD: Let's go 15.

6 THE COURT: All right. We'll be in recess for 15 minutes.
7 That should be plenty of time for you to get oriented in the
8 back and then we'll reconvene and proceed as I've outlined. Any
9 questions that you have of a general nature? Okay, thank you.

10 BAILIFF: Okay, just a reminder. On that back row, watch
11 that step. We did have one juror take a tumble off of there.

12 [Jurors leave the Courtroom.]

13 THE COURT: All right. The record will reflect we're
14 outside of the presence of the jury. Anything that we need to
15 discuss at this time?

16 MR. YOUNG: Possibly. I'd like to make a record at least
17 of what took place with Juror Number 5.

18 THE COURT: All right, you go ahead.

19 MR. YOUNG: Just to the possible jury tainting issue with
20 what happened with Number 5. Officer [REDACTED] was actually
21 involved in controlled buys with my client before. He testified
22 at a grand jury on issues where she set up controlled buys when
23 she was a Weber-Morgan Strike Force Agent. She made comments to
24 that end here today that she knew my client due to her
25 involvement with the Weber-Morgan Strike Force department, when

1 she was working with them. She made reference knowing my client
2 in that capacity in front of all the jurors.

3 So I mean there's a possible issue. You know, I was
4 looking not at her, but other jurors' faces as she was making
5 the comments and there were a couple of jurors that kind of you
6 know piped up when they were listening to what she was saying
7 and so you know there might be some issues with 404(b) evidence
8 where my client doesn't testify about prior bad acts coming in
9 and she's now told them about her prior involvement. She didn't
10 go into detail like I am now, but she made reference to the fact
11 that she knew my client due to her involvement in the Strike
12 Force work in the past.

13 THE COURT: Mr. Arnold?

14 MR. ARNOLD: Your Honor, I mean we knew that Ms. [REDACTED]
15 was a law enforcement officer and what was absolutely surprising
16 was the fact that she knew and responded to the question of
17 knowing Mr. Courtney. I think that what the Court has done by
18 excusing her based on another reason, I think that we're safe to
19 proceed at this point.

20 THE COURT: Let me make a record. Counsel approached. We
21 discussed prior to Ms. [REDACTED] answering the question that
22 pertained to whether or not she could afford the defendant his
23 presumption of innocence or whether she would assume that simply
24 because he had been charged that he was guilty of the offense
25 and she raised her hand. Before allowing her to respond the

1 Court invited counsel to the bench. We discussed the
2 difficulties that were created by [REDACTED]'s unanticipated
3 answer to the question that we always ask; which is do any of
4 you jurors know either of the attorneys or any of the witnesses
5 and we always include of course the defendant, not anticipating
6 [REDACTED] would go into detail about how she knew Mr.
7 Courtney, but rather just that she did. I think again to make
8 the record clear, she indicated that she knew Mr. Courtney and
9 was familiar with him from other cases and then I think as you
10 correctly noted Mr. Young, I think she did specify from her work
11 with--I don't know the words she used exactly, but her
12 association for sure with the Weber-Morgan Narcotic Strike
13 Force.

14 There was no follow-up done. The Court did not inquire
15 into any of the specifics. Allowed the questioning to proceed
16 with the other jurors. No follow-up was conducted from counsel
17 at that time or any other time with [REDACTED] and in an
18 effort to try to avoid drawing additional attention to her
19 earlier response, when the Court perceived that further
20 responses by her could certainly have the potential of tainting
21 the Jury, the Court made the determination to excuse her because
22 her husband who is a private probation officer working for Utah
23 Alternative Programs and is assigned to my Court essentially has
24 contact with the Court on a weekly basis and for that reason
25 excused [REDACTED] not drawing any additional attention to her

1 association with the Strike Force or any connection to Mr.
2 Courtney.

3 I think there was discussion about questioning the
4 remaining members of the Jury to determine to what extent, if
5 any, that jury panel was influenced by her responses and I
6 think, and if I'm wrong about this you correct me, but I think
7 the decision was rather than draw more attention to that, we
8 would allow the dust to settle and simply move on and excuse her
9 and so that was a decision made by counsel and of course with
10 the Court's approval as well.

11 Anything that you want to clarify about what I've said?

12 MR. YOUNG: The only issue is also that that's when it
13 kind of came to the forefront was when the Court asked can
14 anybody here not afford him the right of innocence until proven
15 guilty. That's when she popped back up and we kind of quashed.
16 So I mean she's the only person that raised her hand to that
17 question. It kind of drew attention to her again and the Court
18 did the best the Court could to quash the issue when it arose,
19 but I mean up to that point there's possible bias already and
20 maybe tainting of the jury pool at that time.

21 THE COURT: Well maybe I just need to ask Mr. Young and
22 maybe we need to recess and give you some time to think about
23 it, but I sort of broached the subject with counsel at the
24 bench. Are you asking the Court to--well, we have a couple of
25 problems.

1 MR. ARNOLD: The Jury has been sworn.

2 THE COURT: They have, but I think--and you correct me if
3 I'm wrong because I've not had this issue. In a jury trial is
4 it when the jury is sworn or is it when the first witness takes
5 the stand?

6 MR. YOUNG: When the jury is sworn.

7 MR. ARNOLD: When the jury is sworn.

8 THE COURT: Okay. Well, so the problem that I have is I
9 invited a challenge to going forward. I said are you making the
10 claim that the jury has been tainted and we should not have a
11 trial and that motion was never brought or even alluded to at
12 the bench.

13 MR. YOUNG: Well I said I needed to make--I thought I said
14 up there pretty clearly that I need to make a record of this at
15 some point, but there was never a break again between the Jury
16 being selected. I didn't know at what point to make that. The
17 Jury was in the room the whole time, but I did allude to the
18 fact up there I needed to make a record of this, make a--at
19 least put on the record my objection to it. I thought I made
20 that pretty clear up at the bench.

21 MR. ARNOLD: The issue--I have to go back and read my
22 Fifth Amendment stuff, but I think that once the Jury is sworn,
23 I mean all bets are off for the State.

24 THE COURT: Jeopardy attaches.

25 MR. YOUNG: Yes.

1 MR. ARNOLD: Jeopardy attaches. All bets are off for the
2 State. We've got to move forward with where we're going and
3 however the case may be or may result, but I mean there was
4 some--I thought that from the conversation that we had that the
5 dust had settled as the Court had indicated and so I don't think
6 that the objection at this point is timely, if it is an
7 objection.

8 THE COURT: And I think that's my concern is that I don't
9 feel like there was ever a formal--I mean there was reference
10 made to making a record, but never a formal indication that a
11 motion to declare a mistrial and re-set the trial was ever made.
12 I mean I think Mr. Young expressed concerns as did the Court,
13 but I don't think the Court was advised that there was going to
14 be a motion for mistrial.

15 MR. YOUNG: That's correct. I didn't make that motion.

16 THE COURT: And I want to make that clear because I think
17 it does affect the procedure and the way I handled it because
18 had I anticipated that, I would have entertained that motion
19 prior to swearing the Jury in of course to avoid the jeopardy
20 issues and because I didn't perceive that that motion was going
21 to be brought, I went ahead and swore the Jury in and then
22 allowed us to just make this record for the sake of making a
23 record.

24 MR. YOUNG: But see? I haven't had a chance to talk to my
25 client about his concerns about it either. I mean we just kept

1 rolling so I thought--and I missed the Court swearing the Jury.
2 I was re-organizing and shifting sides and wasn't paying
3 attention when you were swearing the Jury in. So I actually
4 want for the jeopardy to attach, but I wasn't paying attention
5 as I was going on. I was trying to re-arrange and my client was
6 asking me a question and so I didn't catch the issue, but I had
7 every intention of bringing it to the record because he leaned
8 over and made some comments to me. I didn't want to draw more
9 attention from the Jury panel as we were selecting them about
10 what was taking place, but he does have a concern about the jury
11 pool being tainted based on Juror Number 5's comments.

12 THE COURT: Well I don't quibble with Mr. Courtney's
13 concerns. I think the issue is that it was discussed at the
14 bench Mr. Courtney. I asked the attorneys if they wanted to
15 conduct follow-up to ferret out whether or not there was that
16 taint and the response that I received is no. We don't want to
17 further the problem. We don't want to make it worse than
18 perhaps it already is.

19 So we're just going to leave it alone because she made one
20 comment and it was quite some time ago, kind of early on in the
21 voir dire. I mean at the very beginning of the voir dire when
22 the jury was asked do you know Mr. Young or Mr. Courtney and I'm
23 just going to find at this point in time that there has not a
24 motion been made. There wasn't one made at the time she made
25 the response. There could have been one made at that juncture.

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

1 The minute the response was made we could have excused the
2 panel and you could have made that motion right at that moment
3 or we could have had discussion about ferreting out the
4 poisoning effect, if any, that the rest of the jurors
5 experienced from her response. That was not done and even as
6 late as right before the jury was selected there was no motion
7 made and so I'm just going to find that at this point the motion
8 is untimely.

9 I think the concerns have been expressed and placed on the
10 record. I respect them. [REDACTED] made one comment and was
11 not allowed to answer the second question when she stood up. I
12 stopped her from responding and then that was when we excused
13 her. So we have the one response on the record. I think you've
14 indicated what that was and so we're going to move forward.

15 I mean to the extent that you are making a motion for
16 mistrial, and I don't know that you are, because you haven't,
17 but I mean are you making that motion?

18 MR. YOUNG: Well I haven't had a chance to discuss that
19 with my client. I'd like to--I mean I guess during this recess
20 I can discuss that with my client. I haven't had a chance to
21 discuss it.

22 THE COURT: Okay. You talk to your client about it and
23 let me know. Anything else?

24 MR. ARNOLD: I don't have anything currently. I think Mr.
25 Young, nothing that we can't handle, but we may just need a few

1 extra minutes.

2 THE COURT: Okay. Understood. Thank you.

3 [RECESS.]

4 [Discussion at the bench.]

5 THE COURT: I'm not trying to make more of this than needs
6 to be made, but I have a couple of concerns that I'd like to
7 just kind of flush-out and express the first of which is this.
8 I think, and I understand how we get on a roll and we things
9 just keep going and going and going and it's difficult to kind
10 of call a time out and say I need to go talk to my client. I
11 mean I understand logistically how that can be awkward.

12 The flip side is as I'm looking back over this selection
13 process I'm thinking there were plenty of chances we had to try
14 to cure it or fix it before we swore the Jury in. I mean and as
15 I reflect on some of the things we could have done, well one of
16 them would have been right at that moment to either make the
17 motion or approach and make the motion or start calling the
18 jurors back individually so as to not have them answering in
19 front of everybody and asking them you know is there anything
20 about what [REDACTED] said that you feel is going to influence
21 you? We didn't do that, okay? It is what it is. I'm not being
22 critical. I'm just saying we were all trying to figure out how
23 to solve it and we were struggling.

24 So now we're in a posture where you haven't made a motion.
25 You may make the motion. I don't know if you will or won't,

1 but the likelihood that I'm going to grant it is very slim
2 mostly because of untimeliness. So great for you, right? I
3 mean in the sense that you don't have to worry about jeopardy
4 attaching and him walking, but the bigger problem that I have is
5 we always have looming out there ineffective assistance of
6 counsel, always, and despite attorneys' best efforts, their
7 performance is called into question.

8 Here we have what I perceive as a pretty significant
9 situation. Maybe you disagree. I don't know what appellate
10 counsel would say about Mr. Young's performance with respect to
11 this issue and whether he should have done something and didn't.

12 MR. ARNOLD: We spoke about that and I think we talked
13 that this is probably, at this point, it's untimely. So
14 ineffective assistance would be the claim that would be made up
15 on appeal. I think that Mr. Young had a reasonable trial
16 strategy for not, you know, I guess at the time raising more of
17 a raucous. So--

18 MR. YOUNG: I didn't know where I was supposed to make the
19 timely--I thought it was after the jury was picked I was
20 supposed to make my [inaudible] Ineffective obviously. I mean
21 I brought it to the Court's attention I thought up here where I
22 thought I made it pretty clear that I needed to make that a
23 record. I thought we were making a record up here.

24 THE COURT: Well my issue is I just don't want to try this
25 again in a year or two years because they send it back on an

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

1 ineffective assistance.

2 MR. ARNOLD: Well that's probable now.

3 THE COURT: I mean that's my concern. I'm just being as
4 frank as I can be. I just don't want it coming back.

5 MR. ARNOLD: I agree. No, I think that there's--

6 THE COURT: And I don't know how to cure it at this point
7 and maybe we can't and I don't know whether or not there was any
8 wiggle room in negotiating. That's still the potential to be
9 explored. I mean the problem was created through no fault of
10 ours. I mean it was created by a juror who quite honestly, in
11 my opinion, ought to be bitch-slapped because--

12 MR. YOUNG: She knew better.

13 MR. ARNOLD: Yeah.

14 THE COURT: --I mean for her not to understand the
15 tainting that she was creating when she said that, it's hard for
16 me to--

17 MR. YOUNG: If I had known she was Strike Force I would
18 have said something earlier. You knew she was Strike--

19 MR. ARNOLD: I had heard. I haven't dealt with that.

20 THE COURT: But the problem is you still didn't know
21 whether she knew him or not. I mean none of us knew that--

22 MR. ARNOLD: No. I had no idea.

23 THE COURT: --and the question was a yes or no question.

24 MR. YOUNG: No one anticipated it.

25 THE COURT: It was not--

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

1 MR. ARNOLD: Does anybody know--

2 THE COURT: --how do you know. It was just do you know.
3 So are we on or off? Okay. I just wanted to make sure. Yeah,
4 that's fine.

5 COURT CLERK: [inaudible]

6 MR. ARNOLD: Yeah. So, I mean as far as the [inaudible]
7 I'm not coming off of seconds. He wants thirds. He has earned
8 seconds and so I gave him an offer in which we would dismiss
9 certain cases of his. The offer is still--I mean I'll leave
10 that open currently. If he wants to take the offer, then that's
11 fine.

12 THE COURT: I'm just so frustrated with--

13 MR. YOUNG: [inaudible]

14 MR. ARNOLD: [inaudible]

15 MR. YOUNG: Well the thing is he thought there was a
16 video. We told [inaudible] that we were looking for a video on
17 it. We found there's no video. Audio is pretty--I mean you
18 can't tell whether he was in the room or not which can be
19 Vanderwarf's testimony. Vanderwarf got killed in the papers in
20 the Stewart trial and no one reads the paper. [inaudible]

21 MR. ARNOLD: [inaudible]

22 MR. YOUNG: It doesn't matter. It's public opinion.

23 MR. ARNOLD: Well I mean here's the--you want to listen to
24 the tape, listen to the tape.

25 MR. YOUNG: I've heard the tape. I've heard the tape.

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

1 THE COURT: Okay. Well it is what it is. I was just
2 trying to avoid appeal issues down the road.

3 MR. YOUNG: I'm sure there's going to be an appeal.

4 THE COURT: It's like I said. That juror should be
5 slapped for--I mean that's an extreme statement, but it just
6 reflects the frustration of the Court that she would go beyond
7 the simple question of do you know and offer what she offered.
8 It's so frustrating to me.

9 MR. ARNOLD: Then the other option that we have I think is
10 for him to waive--I don't know. This is just thinking outside
11 the box--for him to waive any double jeopardy concerns that
12 could come back on another day.

13 MR. YOUNG: I don't think we can waive double jeopardy.
14 Can we do it?

15 THE COURT: I don't know.

16 MR. ARNOLD: I can call over to the office and see what
17 the chiefs think.

18 THE COURT: Well it's your guys' case to try. So you do
19 what you want to do as far as how we go forward. If you want to
20 just call the Jury back in and get going, that's what we'll do.
21 I mean I've got the instructions. I'm ready to go. I just
22 wasn't sure if you had thought through the appellate issues that
23 are created by it.

24 MR. ARNOLD: [inaudible] Talk to him about that or just
25 go forward?

1 THE COURT: I mean does he want to come back and re-try
2 this in a year? I can't imagine he wants to do that any more
3 than the rest of us.

4 MR. YOUNG: He thinks he's going to win.

5 THE COURT: But let's assume he doesn't.

6 MR. YOUNG: I've had this conversation with him.

7 THE COURT: Oh, okay.

8 MR. YOUNG: He can appeal.

9 THE COURT: Okay, but my point is let's assume he wins his
10 appeal. He's back here re-trying this case in a year. Does he
11 want to do that? I mean do you have--okay. Okay. I'm not
12 trying to elicit--

13 MR. YOUNG: He's got six felony cases pending.

14 THE COURT: Yeah. I understand.

15 MR. YOUNG: He's going to be in prison that whole time,
16 five six times [inaudible]

17 MR. ARNOLD: [inaudible]

18 THE COURT: Okay. Well I guess he'll have to appeal then.
19 Do you want to make the motion then before?

20 MR. YOUNG: Yeah.

21 THE COURT: Okay. All right.

22 Okay, before we bring the Jury in, Mr. Young let me turn
23 the record over to you. Do you have any motions you wish to
24 make?

25 MR. YOUNG: Yes. I'd like to make a motion for a mistrial

1 due to the tainting of the jury due to Juror Number 5's comments
2 [inaudible]

3 THE COURT: Mr. Arnold a response?

4 MR. ARNOLD: I believe that the objection is untimely now
5 that the Jury has been sworn.

6 THE COURT: I think the Court is going to find in this
7 particular case that this disclosure that we're talking about
8 occurred early on in the jury selection process. Specifically,
9 it was shortly after each juror indicated their name, residence,
10 married or single, children, education, occupation, I
11 introduced--the attorneys introduced themselves and their
12 witnesses and it was in response to the question do you know Mr.
13 Young or Mr. Courtney, his client, that Juror Number 5 responded
14 that she did through her experience with law enforcement,
15 specifically with the Narcotics Strike Force because of other
16 case involving Mr. Courtney.

17 Now she did not specify Mr. Courtney's role in those other
18 cases. Did not indicate whether or not he was a victim in other
19 cases, whether he was an informant in other cases. She never
20 specified exactly how Mr. Courtney was involved in those other
21 cases and so to that extent I think the statement was generic,
22 innocuous, non-specific. She wasn't allowed to elaborate beyond
23 that. There was no motion made at that time, no motion made
24 during any of the rest of jury selection and when Juror Number 5
25 prepared to answer the question of whether or not she would be

1 able to afford the defendant his presumption of innocence until
2 the State proved beyond a reasonable doubt its case, she raised
3 her hand and was going to respond to that question. Was not
4 allowed to and was then excused because her husband is a private
5 probation officer who is assigned to this Court and that was the
6 reason she was excused in an effort to not draw any further
7 attention to her earlier response.

8 There was discussion at the bench again about how to fix
9 the problem. There was no request to individually question each
10 of the remaining jurors to determine whether there was taint.
11 The decision that was made was to not draw any further attention
12 to Juror Number 5's earlier response and to proceed with the
13 selection process.

14 After the attorneys were asked if the jury selected was in
15 fact the jury that they had intended to select and each
16 responded in the affirmative, and even during the moment in time
17 when the remaining members of the jury panel were excused and we
18 were seating the eight that were selected, no motions were made.
19 Attorneys did not ask to approach the bench to discuss the need
20 to make a motion and so the jury was subsequently placed under
21 oath to serve in this case.

22 Based on the numerous opportunities that existed to bring
23 this motion previously, I'm going to find that the motion is
24 untimely and I'm going to deny the motion for mistrial in this
25 case.