

2006

State of Utah v. Richard Galbreath : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

RICHARD GALBREATH

Defendant/Appellant.

BRIEF OF APPELLANT

APPELLANT NOT IN CUSTODY

Case # 20060090-CA

20060900

BRIEF OF APPELLANT

AN APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
CONVICTING DEFENDANT OF TWO COUNTS OF ARRANGING TO
DISTRIBUTE OR DISTRIBUTION OF A CONTROLLED SUBSTANCE, A
VIOLATION OF § 58-37-8(1)(a)(ii)-2-102, A SECOND & A THIRD
DEGREE FELONY, IN AND R DUCHESNE COUNTY, STATE OF UTAH,
THE HONORABLE JOHN R. ANDERSON PRESIDING.

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED FILED
UTAH APPELLATE COURTS
APR 23 2007

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

RICHARD GALBREATH,
Defendant/Appellant.

BRIEF OF APPELLANT
APPELLANT
NOT IN CUSTODY

Case # 20060992-CA

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a Final Judgement and Commitment in the Eighth District Court, Duchesne County, for convictions of a Second and a Third Degree Felony violation of Utah Code Ann. §58-37-8(1)(a)(ii), Arranging to Distribute or Distribution of Methamphetamine and Marijuana.

This Court has jurisdiction over this matter pursuant to Rule 26 of the Utah Rules of Criminal Procedure, Rule 3(a) of the Utah Rules of Appellate Procedure, and Utah Code 78-2a-3(2).

STATEMENT OF ISSUE PRESENTED ON APPEAL
AND STANDARD OF APPELLATE REVIEW

Mr. Galbreath asserts that the Trial Court committed reversible error when it allowed into evidence testimony about prior drug dealing and prohibited his rebuttal witness testimony. Such improper and prejudicial information made it impossible for the jury to deliberate his guilt or innocence based solely on the issue of the sale to the confidential informant on the day in question.

Admissibility of evidence is a question of law; therefore the Court generally grants no deference to the trial court's decision on that issue, but does review the ruling for correctness. It should be reviewed under an abuse of discretion standard. State v. Levine, 101 P.3d 846 (Utah Ct. App. 2004), State v. Mickelson, 848 P.2d 677 (Utah App. 1992).

"On appeal from a jury verdict, we view the evidence and all reasonable inferences in a light most favorable to that verdict and recite the facts accordingly." State v. Gordon, 913 P.2d 350, 351 (Utah 1996).

Second, Mr. Galbreath asserts that absent the admission of the prejudicial information that the jury would not have had sufficient evidence to convict him. He asserts that the police did not possess tapes, eye witness evidence or other proof of a drug transaction—only the word of a biased person trying to work off his own felony drug charges by setting up someone else.

"[I]n considering an insufficiency-of-evidence claim, we review the evidence and all inferences drawn therefrom in a light most favorable to the verdict." State v. Honie, 57 P.3d 977 (Utah 2002). "We reverse a jury verdict only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime r which he or she was convicted." State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993). Upon review, "we determine only whether sufficient competent evidence was admitted to satisfy each element of the charge[and] whether sufficient evidence was before the jury to enable it to find, beyond a reasonable doubt, that the defendant committed the crime." Honie.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutions, statutory provisions, or rules referenced in this brief and pertinent to the issues now before the court on appeal are contained herein or attached to this brief.

STATEMENT OF THE CASE

Mr. Richard Galbreath was charged by information on November 7, 2005 with two counts of Distribution or Arranging to Distribute a Controlled Substance in violation of Utah Code Annotated §58-37-8 (1)(a)(ii). The charging document alleged that Mr. Galbreath had distributed Methamphetamine and Marijuana. (Docket Entry #1).

Officer Brandon Adams filed an Affidavit of Probable Cause (D. #3) that alleged the facts of the investigation. On January 5, 2006 Mr. Galbreath was booked into jail (D.#9) and arraigned on the charges (D.#10). A preliminary hearing was held on February 13, 2006 in which Mr. Galbreath's case in this matter District Court Case # 05180180 and in a similarly charged case District Court Case # 051800181 were both bound over and set for jury trials.

The trial in this case was held on June 27, 2006 and Mr. Galbreath was found guilty of Distribution of Methamphetamine a Second Degree Felony (D.# 60) and Distribution of Marijuana a Third Degree Felony (D.#59). Counsel filed a Motion for Judgement Notwithstanding the Verdict and a Motion for a New Trial (D. #65) which were denied.

Mr. Galbreath was sentenced on September 11, 2006, with the formal Judgement and Commitment Filed on September 29, 2006(D.#97) to prison for one to fifteen years on the Second and zero to five years Third Degree Felony Convictions in case # 151800180 and the same prison terms on the Second and Third Degree Felony Convictions in case #151800181. Mr. Galbreath's prison terms were not specified to run consecutive or concurrent. However, all the prison terms were stayed (D.# 99) and Mr. Galbreath was placed on three years supervision through Adult probation and Parole on the following conditions:

1) He serve 180 days in the Duchesne County jail will no credit for time served. He was to report

on September 16, 2006.

- 2) He was to pay a fine of \$1,500 on the terms set by Adult Probation and Parole.
- 3) He was to complete a substance abuse evaluation and successfully complete any treatment recommended by Adult Probation and Parole or the evaluation.
- 4) He was to comply with the other standard Adult Probation and Parole Conditions set forth in his sentence (D.# 99 & 100).

Mr. Galbreath filed a timely Notice of Appeal on September 18, 2006 (D.# 89 a). After the Notice of Appeal was filed he filed a Motion to Stay the Imposition of Sentence on Appeal on September 18, 2006 (D.# 90). The Stay was granted on December 18, 2006 (D.# 118) and Mr. Galbreath was released from jail pending the outcome of his appeal.

The Brief scheduling was set with an initial due date of March 19, 2007 and appellate counsel Julie George who was assigned by the Trial Court on (D.#104) filed a Motion to Extend the Due Date with an additional five day extension and the appeal is now due on April 23, 2007.

STATEMENT OF THE FACTS

The first to testify at this trial against Mr. Galbreath was Officer Rick Coil who testified that he was employed by the Duchesne County Sheriff's Department and on July 15, 2005, was in charge of the canine unit of the Uintah Basin Narcotics Strike force as the evidence custodian (Transcript of Trial on June 27, 2006, page 16-hereafter referred to as Tr. 16). On November 10th, 2005 Mr. Coil tested a substance identified as item No. 2 which was found to contain 4.8 grams of crushed marijuana (D. 18).

Kevin Smith, the Utah State crime laboratory criminalist testified about his qualifications and that on November 10, 2005, he received a sample for testing that was marked as exhibit 2 in

this case (Tr. 29-30). After testing, Mr. Smith concluded that the sample contained 910 milligrams or just under one gram of methamphetamine (Tr. 31).

Next to testify was Brandon Adams a deputy with the Uintah Basin Narcotics Strike Force. He has been an officer with the task force for two years and testified that on the 15th of July 2005 he was involved in an undercover drug buy as his duty in the Uintah Basin Narcotic Strike Force (Tr. 37-38).

Adams testified that he received a call that a confidential informant drug buy was going to occur in Roosevelt so Adams met up with Sgt. Ammon Manning and Derek Nelson (Tr. 40). Adams did not remember if the confidential informant Affleck called him or if it was another officer to tell him that a drug buy had already been set up for the at night (Tr. 61). They met up with their confidential informant, Chad Affleck, where Adams searched Aleck. Affleck was wearing a long sleeve shirt with a pocket, shorts and sandals. Affleck had a wallet (Tr. 43) and he uses an oxygen tank that was also searched (Tr. 44). They put a recording device on the oxygen tank to record the transaction (Tr. 45).

Officer Derek Nelson searched the vehicle that Chad Affleck was driving for money or drugs (Tr. 46). The police officers gave Affleck \$120.00 in "buy" money that was to be used to buy the drugs (Tr. 48). Affleck called Richard Galbreath to set up the buy and officer Adams wrote the number down (Tr. 49). Adams thinks he may have called to see if the number was Galbreaths but was not sure (Tr. 49). There was no testimony as to what number he called or how he knew it was Galbreath's telephone number or how he could identify Mr. Galbreath (Tr. 49).

The three officers, Adams, Manning and Nelson followed the C.I. Affleck in an unmarked car to Myton to the Ute Petroleaum location. On the way the officers could not get any sound on

the body wire and so they called Affleck on his cell phone, told him to pull over and officer Nelson got into the vehicle to fix the recording equipment (Tr 50-51, 68-69).

The deal that Affleck set up prior to calling the police in to the buy was to purchase \$120.00 of drugs, specifically a gram of methamphetamine and eighth ounce of marijuana (Tr. 52). According to Adams a gram of methamphetamine sells for a hundred to a hundred twenty dollars and an eighth of marijuana sells for twenty dollars (Tr. 52).

Affleck parked in front of the double doors of the petroleum office and the officers were parked on a road that gave them a clear visual of the meeting of Affleck (Tr. 54).

Affleck told the officers that Mr. Galbreath would be arriving in either a silver Ford Taurus or a Dodge Durango (Tr.55) and then a silver ford Taurus drove up (Tr. 56). Adams did not see the exchange of drugs for money but heard conversation for five to six minutes (Tr. 56), however none of the conversation heard by the officers mentioned drugs, money exchange, the sound of baggies being exchanged (Tr. 76-77, 106)

No finger prints were taken of the three baggies that Affleck turned over to the police (Tr. 79) and no money was recovered that had the recorded serial numbers of the bills (Tr. 79).

After the meeting Affleck met the officers at the location they had met him and searched him to begin with (Tr. 57) where he handed Adams a bag of what was later determined to be marijuana and methamphetamine (Tr. 57).

Derek Nelson testified that he was made aware from Officer Manning that a drug deal was going to happen that night and the officers net up and obtained their equipment and met Chad Affleck outside of Roosevelt (Tr. 91). Officer Nelson searched the vehicle looking under floor mats, visors, seats glove box, ashtrays etc for drugs or other contraband or money (Tr. 92). Affleck was given the buy money and the recording device and then the officers noticed that they

could not hear on the recording equipment (Tr. 93). The officers stopped Affleck and put Nelson in the car with him to watch him while Manning and Adams went back to the police station to obtain new police equipment for recording (Tr. 94). The officers then affixed the new recording device and then Affleck left alone the with the officers following him to the buy location in Myton (Tr. 95). It was dark when they got to Myton and then a silver car pulled up to Affleck and then one person got out and went up to the car with Affleck and had a short conversation with him and then left the scene (Tr. 97). The officers did not follow the silver car, did not take down the license plate number of photograph the person in the silver car. The officers followed Affleck from the scene and then re-searched his car when he gave them the drugs (Tr. 96-98).

Chad Affleck testified was willing to work as a CI because he was wanted himself on drug charges and the task force had agreed to reduce his charges if he did some “stings” for them. The task force dismissed two of his four charges for the drug buys (Tr. 111).

Affleck testified that he had been arrested thirty days prior and kept his cell phone with the numbers of his drug connections so he called them to set up the buy. Affleck testified that he called Richard Galbreath from his house to set the buy (Tr. 112) and then called Brandon Adams that he had the connection (Tr. 113). Officer Adams does not remember who called him about the drug buy (Tr. 61). Affleck testified that then he met the officers in Roosevelt and they gave him a recording device to record the telephone call to Galbreath to set up the buy –it was not recorded and Affleck stated, “I don’t know what happened to it.” (Tr. 113). Affleck testified that with the three officers there that he called Galbreath and told him exactly what drugs he needed and set up a place and time to meet him (Tr. 115). Affleck testified that the recording device did not work and they went to fix that and he drove around with Nelson in the car (115-116). Affleck put the \$120 in his shirt pocket (Tr. 117). Affleck testified he met with Galbreath at Ute Petroleum where

Affleck parked and he then testified that Galbreath parked two cars to the left of him (Tr. 118). He testified that Galbreath walked over to the driver's side window and Affleck handed him the money and Galbreath handed him the drugs (Tr. 119).

Chad Affleck testified that when he got caught he wanted to work off two of his charges and he decided to go after Mr. Galbreath because Mr. Galbreath was not addicted to nor did he use Methamphetamine and Affleck wanted to bring him down because he was allegedly making money off of selling the drug (Tr. 124). Based on setting up Mr. Galbreath Affleck was able to get two first degree felony drug charges dismissed and pled to one second and one third degree felony distribution charges for which he received a sentence of 30 days and 60 days house arrest for his convictions (Tr. 125-127).

Affleck testified that he saw Mr. Galbreath smoke marijuana and that he had purchased methamphetamine from him several times in the past (Tr. 124). No objection to this testimony was made nor was a curative instruction requested at this time (Tr. 124).

Ammon Manning testified that he is a deputy with the Uintah Basis Narcotics Task Force and that he has been an officer with the task force for seven years or so and that on the night of July 15, 2005 Manning received a call from Officer Adams as Adams was the manager of the informant Chad Affleck (Tr. 133-134).

Officer Manning did not hear the telephone call from Affleck to Galbreath (Tr. 135). Manning testified that he personally knows Galbreath from "prior dealings with Mr. Galbreath. He had a marriage that had gone bad and lived in Roosevelt." (Tr. 136). Manning testified like the others that the recording equipment did not work and they had to stop to get new equipment and Nelson stayed in the car with Affleck (Tr. 137). Manning testified that the call made by Affleck to the dealer was on a cell phone and that He (Manning) heard the person on the other end

of the line and it sounded like Galbreath (Tr. 139).

Manning testified that he had previously run the license plate on the silver Taurus and knew it was Galbreath that drove up in the car (Tr. 141) as the Taurus was registered to Erica Allman and Richard Galbreath (Tr. 142). Additionally he recognized him and that he had shorter hair (Tr. 141). The meeting at Ute Petroleum was at 10:00 at night (Tr. 139) and the officers were parked three hundred (300) yards away from Affleck's car (Tr. 147).

Trial counsel Cindy Barton-Coombs made a motion for a directed verdict based on the arguments that the only evidence the officers had were calls that they did not overhear, an alleged exchange that they did not directly see and the informant's statements that he received the drugs from Galbreath and gave Galbreath the money. The argument was that Affleck had a motive to set up Mr. Galbreath and no one but Affleck heard the conversation or saw any alleged exchange (Tr. 150-153). The Court denied the motion (Tr. 153). Trial counsel then asked to bring in a rebuttal witness to Officer Manning's testimony and notified the Court and the prosecution that she wanted to call Angelina Medina the owner of the silver Taurus to testify about the registration (Tr. 154). The court denied the request based on the fact that the defense did not given the prosecution advance notice of their rebuttal witness. Furthermore the Court stated that the witness had sat through the trial as she was the girlfriend of the accused and therefore the Court denied the request (Tr. 155). Both sides rested and the jury deliberated convicting Mr. Galbreath of one count of Distribution of Methamphetamine and one count of Distribution of Marijuana (Tr. 172-173).

SUMMARY OF THE ARGUMENT

Mr. Galbreath asserts that it was plain error to allow in testimony that he had sold drugs to Chad Affleck on prior occasions. Such prejudicial and non-probative information is exactly the

kind of material that should not be admitted pursuant Rule 404(b) of the Utah Rules of Evidence. Mr. Galbreath's attorney should have objected to the admission of the material, asked for a curative instruction and the Court itself should have protected the issue as a matter of plain error. Mr. Galbreath asserts that it was also plain error for the Trial Court to deny his request for the rebuttal witness to testify about the ownership of the vehicle. He asserts that only when officer Manning stated that he ran the plates and verified the car belonged to Galbreath that the defense had the information that the vehicle registration would be an issue. There was no time to put the state on notice of the rebuttal witness and therefore there should have been no notice requirement. Furthermore the witness was only going to testify about the registration of her car and her presence in the trial would not have tainted her testimony.

Mr. Galbreath also asserts that there was insufficient evidence to convict him of Arranging to Distribute a Controlled Substance of selling Marijuana and Methamphetamine to the police confidential informant Chad Affleck on July 15th 2006. Mr. Galbreath asserts that there was no body wire transitions, recordings, reliable eye witness verification or any cooperative evidence about Chad Affleck's statements about the drug buy. Chad Affleck had reason to misstate the facts according to Mr. Galbreath as Chad Affleck wanted to work off charges.

ARGUMENT

- I. THE TRIAL COURT ERRED IN : 1) NOT ALLOWING THE TESTIMONY OF THE REBUTALL WITNESS ABOUT THE VEHICLE REGISTRATION IN ORDER TO CHALLENGE THE VERACITY OF THE STATE'S WITNESS IDENTIFICATION, AND 2) ALLOWING IN INFORMATION ABOUT PRIOR DRUG DEALING BETWEEN THE INFORMANT AND MR. GALBREATH IN VIOLATION OF RULE 404(B) OF THE UTAH RULES OF EVIDENCE AND FAILING TO GIVE A CURATIVE INSTRUCTION TO REMEDY THE ERROR

The Trial Court erred in not allowing in the rebuttal witness, Angelina Medina the owner of the silver Taurus that Mr. Galbreath was alleged to have driven to the drug buy, to testify about

the registration. Mr. Galbreath asserts that there was no credible, reliable evidence that he was the person who drove to Ute Petroleum to meet Chad Affleck on the night of July 15, 2005. Mr. Galbreath asserts that the officers testified it was 10:00 at night and dark, the officers were 300 yards away from the vehicles and that no one could get a good view of the person who walked up to the vehicle to talk to Affleck. Furthermore, not one officer heard the two people talk about drugs or see drugs or money exchanged. Only Manning testified that he knew it must be Mr. Galbreath meeting Affleck because he ran the plate on the car earlier and the car was registered to Mr. Galbreath. However, Angelina Medina who is Mr. Galbreath's girlfriend and owns the silver Taurus Mr. Galbreath may have been in, was sitting in the trial. Only when it became evident that Manning was trying to solidify the state's case with an identification of the car to Mr. Galbreath was defense counsel Ms. Barton-Coombs put on notice that she needed Ms. Medina as a rebuttal witness.

This issue was preserved by trial counsel (Tr. 155) and was timely raised in the case. The Trial Court refused to allow Ms. Medina to testify on the basis that the prosecutor had not been on earlier notice of the witness and that Ms. Medina had been in the courtroom during trial (Tr. 155).

Mr. Galbreath asserts that the issue was preserved on the record (Tr. 155). If the State attempts to assert that the record was not clear enough to establish that it was preserved on the record then Mr. Galbreath submits that the error was so obvious, and prejudicial that the Trial Court itself should have known that to prohibit the rebuttal witness was plain error.

Additionally, the Trial Court erred in allowing in prejudicial information about Mr. Galbreath having previously dealt drugs to Affleck (Tr. 123-124). However, as the issue of a 404(b) violation was not preserved by trial counsel, Mr. Galbreath asserts that the error was so obvious and prejudicial that the Trial Court itself should have stepped in and prevented the

introduction of the prejudicial and improper evidence. Failure to do so, and failure to give a curative jury instruction about the prejudicial testimony, was plain error.

By failing to prevent the testimony from being introduced the following prejudicial elements tainted the trial:

Affleck testified that he picked Mr. Galbreath because Mr. Galbreath was a drug dealer profiting off of the misery of addicts (Tr. 124). Affleck testified that he saw Mr. Galbreath smoke marijuana (Tr. 124). Affleck testified that he bought Methamphetamine several times from Mr. Galbreath (Tr. 124).

Affleck could have testified that he called Galbreath that day to see if he could buy drugs and that he did do so. There was no need to put on prejudicial and irreparably damaging testimony that Galbreath had previously sold drugs to Affleck several times before, had smoked marijuana before, and was profiting off of miserable drug addicts.

The testimony that Galbreath was his dealer and that he chose to set him up for that reason was clearly more prejudicial than probative and should not have been allowed. It should have been prevented by the Court even though it was not objected to by defense counsel.

Rule 404(b) of the Utah Rules of Evidence states that evidence of other crimes as well as other “wrongs or acts,” is not “admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403, meaning that after scrupulously examining the evidence outside the presence of the jury, before it is admitted into trial, it is more probative than

prejudicial to the defendant. See State v. Widdison, 28 P.3d 1278 (Utah 2001).

“ Accordingly, when deeming evidence of prior bad acts admissible, the trial court must first determine that the evidence is being offered for a proper, noncharacter purpose under one of rule 404(b)'s listed exceptions; that it "tends to prove some fact that is material to the crime charged . . . other than the defendant's propensity to commit crime"; and that the evidence's probativeness in this regard is not substantially outweighed by its prejudicial impact. State v. Nelson-Waggoner, 6 P.3d 1120 (Utah 2000), see also State v. Mead, 27 P.3d 1115 (Utah 2001).

There was no need to have Affleck testify that he had bought drugs from Mr. Galbreath on several prior occasions (Tr. 124). Affleck essentially identified Mr. Galbreath as his drug dealer. The prosecution could have had him identify the person he met on the date in question from whom he bought drugs that day. The narration allowed by Affleck (Tr. 124) was to show Mr. Galbreath's propensity to commit this crime. It was not necessary to prove some fact necessary for the jury to convict of the drug sale on July 15, 2005. The testimony about prior deals were brought in to show that Mr. Galbreath was a bad guy who “was thriving off the misery of [drug] addicts” (Tr. 124) and he should be taken off the streets. Mr. Galbreath asserts that the testimony set forth above was introduced in violation of 404(b) and it should never have been admitted.

Here, the testimony was so prejudicial—the very thing Rule 404(b) was designed to prevent—that no jury could disregard the information and judge Mr. Galbreath only on the proper evidence. Without a curative instruction the jury did not know that they could not use the testimony of Affleck that Mr. Galbreath was a drug dealer, that he had made a lot of money off the suffering of drug addicts, that he had sold to Affleck on many prior occasions etc. It would be very difficult if not impossible for a jury to base its deliberations on the proper evidence before it

regarding the drug transaction alleged that day in July rather than on the prejudicial information that if Mr. Galbreath had done it before he was guilty of doing it now.

Mr. Galbreath asserts that the jury convicted him based on inappropriate evidence—they assumed because Affleck testified that he had previously bought drugs on several occasions from Galbreath that he had done so on that day.

Mr. Galbreath asserts that when the inappropriate testimony started to come in that defense counsel should have objected. When the objection was not made that the Court should have prevented its admission or to cure the prejudice the Court should have instantly given a curative admonition to the jury and then made sure that a curative jury instruction was sent with the jury for deliberation.

Mr. Galbreath asserts that here, failure to give the curative instruction was manifest injustice because without the instruction the jury used inappropriate, improper and prejudicial evidence to convict him. There was no independent evidence that he dealt drugs to Affleck other than Affleck's testimony. The police did not see or hear the exchange of drugs. Moreover Affleck had a motive to set Galbreath up. Mr. Galbreath asserts that without the testimony that he used to sell drugs to Affleck, that he made a profit off of selling to addicts, and the erroneous refusal to allow his rebuttal witness to testify that the jury would not have convicted him.

Mr. Galbreath asserts that where defense counsel did not object to the testimony, then the defense would not have known to raise the issue of admonishing the jury or giving a curative instruction. Therefore counsel would not have known to place on the record an objection to the failure to place the curative instruction before the jury. The failure to make the initial objection to the testimony and failure to ask for the curative instruction go hand in hand.

Therefore, both the admission of the improper testimony and the failure to give a curative

instruction were not preserved on the record and are raised here as plain error as no objection was made by trial counsel. The Trial Court should have excluded the testimony and at the least should have issued an immediate curative admonition to the jury and then made sure a jury instruction regarding the proper use of the information was given for deliberations. Failure to do so was plain error.

“To establish plain error and to obtain appellate relief from an alleged error that was not properly objected to, Defendant must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [Defendant]." State v. Cruz, 122 P.3d 543 (Utah 2005) (quotations and citation omitted); see also State v. Powell, 872 P.2d 1027, 1031 (Utah 1994).

This Court may address an issue if it was not raised below by counsel under the Plain Error Standard. When a claim such as this is not preserved at the Trial Court level this Court can only review the matter if mistake is one of plain error—meaning it is so obvious that the Court should have discovered the problem and moved to address the issue sua sponte. "To succeed on a claim of plain error, a defendant has the burden of showing "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.'" State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993), See also State v. Helmick, 9 P.3d 164 (Utah 2000).

In summary, Mr. Galbreath asserts that under the plain error doctrine the testimony that Mr. Galbreath was Affleck's prior drug dealer was both prejudicial and improper to place before the jury. Furthermore, the testimony of Affleck that Galbreath was his prior drug dealer was so much more prejudicial than probative that it should not have been allowed at all. However, once

it came in and no mistrial was asked for, the Court should have placed a curative admonition right then in front of the jury and a curative instruction before the jury in deliberations to tell them the proper weight and use of the testimony if any. Failure to do so was plain error and warrants a reversal of Mr. Galbreath's conviction. Additionally, the failure to allow in the rebuttal witness is also in error and limited the favorable evidence that Mr. Galbreath had to put on in his favor, specifically that Officer Manning could not actually identify him as the person who met Affleck that night as the Taurus was not actually registered to him.

II. THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A GUILTY VERDICT IN THIS CASE ESPECIALLY HAD THE REBUTTAL WITNESS BEEN ALLOWED TO TESTIFY THAT THE VEHICLE WAS NOT REGISTERED TO MR. GALBREATH AS ASSERTED BY OFFICER MANNING FOR IDENTIFICATION PURPOSES AND IF THE PREJUDICIAL TESTIMONY ABOUT PRIOR DRUG DEALING HAD BEEN EXCLUDED FROM TRIAL.

Mr. Galbreath asserts that there was insufficient evidence to justify a jury verdict of guilty in this case. The police did not see what telephone number Affleck called to set up the buy, Affleck admitted he wanted only to set up Mr. Galbreath and no one else, Affleck had felony charges dismissed for setting up Mr. Galbreath, the police did not see nor did they hear the alleged exchange of drugs, the only evidence that Affleck obtained drugs from Mr. Galbreath is Affleck's self-serving testimony that he got them from Mr. Galbreath.

"[I]n considering an insufficiency-of-evidence claim, we review the evidence and all inferences drawn therefrom in a light most favorable to the verdict." State v. Honie, 57 P.3d 977 (Utah 2002). "We reverse a jury verdict only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993). Upon review, "we determine only whether

sufficient competent evidence was admitted to satisfy each element of the charge[and] whether sufficient evidence was before the jury to enable it to find, beyond a reasonable doubt, that the defendant committed the crime." Honie.

Although in keeping with the requirement to marshal all of the evidence in light of the jury's verdict—Mr. Galbreath must admit that Affleck was searched by law enforcement prior to the buy for drugs or money and was sent to meet Mr. Galbreath with nothing but the marked “buy money” on him. Additionally, the police were following them in their car and they testified—all three of them—that Affleck's car was not out of sight and they did not see anyone else approach the car, or get into it other than Affleck and the person getting out of the silver Taurus. Furthermore, none of the “buy money” was located on Affleck when he returned and Methamphetamine and Marijuana were located on Affleck when he was searched after the encounter.

Mr. Affleck testified that Mr. Galbreath is the person that he called to buy the drugs. It was Mr. Galbreath that he called back to set the time and place, that it was Galbreath who parked two cars down from him at the Ute Petroleum station and that it was Mr. Galbreath who handed him the drugs in exchange for the \$120.

However, not one of the three officers made the telephone call directly but took Affleck's word that he called Galbreath. Not one officer recorded the conversation or verified the telephone number to belong to Mr. Galbreath. The transaction was not recorded but all three officers were listening in to the conversation. Not once during the few minutes of conversation did the drugs or money or identifying information linking Mr. Galbreath to the transaction occur.

Without the prejudicial testimony that Mr. Galbreath had dealt drugs to Affleck in the past,

there would have been little or no evidence linking Mr. Galbreath to the crime other than Affleck's self serving statements.

"[I]n considering an insufficiency-of-evidence claim, we review the evidence and all inferences drawn therefrom in a light most favorable to the verdict." State v. Honie, 57 P.3d 977 (Utah 2002). "We reverse a jury verdict only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993). Upon review, "we determine only whether sufficient competent evidence was admitted to satisfy each element of the charge[and] whether sufficient evidence was before the jury to enable it to find, beyond a reasonable doubt, that the defendant committed the crime." Honie.

Although in keeping with the requirement to marshal all of the evidence in light of the jury's verdict—Mr. Galbreath must admit that Affleck was searched by law enforcement prior to the buy for drugs or money and was sent to meet Mr. Galbreath with nothing but the marked "buy money" on him. Additionally, the police were following them in their car and they testified—all three of them—that Affleck's car was not out of sight and they did not see anyone else approach the car, get in or come near it other than a person whom Manning testified was Mr. Galbreath. This identification was in the dark, 300 yards away and based on a license plate for the Taurus that was not testified to in the record and for which the rebuttal witness was not allowed to correct. Furthermore, and Methamphetamine and Marijuana were located on Affleck when he was searched after the encounter with Mr. Galbreath.

No one saw an exchange and no one heard an exchange despite the body wire, the tape

recordings and the police tailing them. The only person who could testify that drugs and money were exchanged with Mr. Galbreath was Affleck himself.

Mr. Galbreath asserts that the evidence was insufficient to warrant a conviction based on the informant's testimony alone. Affleck had felony charges he wanted to work off. To do so he had to set someone else up. He testified himself that the person he wanted to set up—the only person he wanted to set up—was Mr. Galbreath. Mr. Galbreath asserts that Affleck had a reason and motive to set up someone else.

Had it not been for the jury hearing about Mr. Galbreath dealing drugs to Affleck on prior times—especially that Mr. Galbreath did not use Methamphetamine but sold it only to make money off of addicts—the jury would not have had any predisposition to find Mr. Galbreath guilty as a drug dealer.

Incorporating the first argument of error—Mr. Galbreath asserts that had the Trial Court not let in the damaging, prejudicial information the jury never would have had sufficient evidence to convict him of drug distribution based on the evidence that was properly presented to the jury.

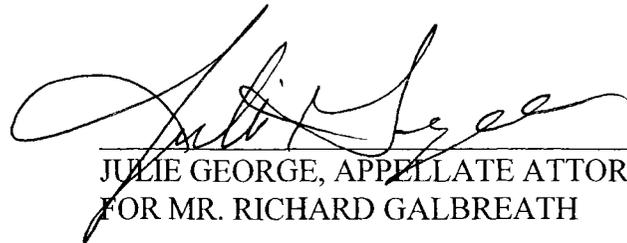
CONCLUSION

Mr. Galbreath respectfully requests that this Court rule that the Trial Court committed plain error when it allowed into evidence the prejudicial testimony. Further, the Court's refusal to allow his rebuttal witness to testify eliminated his ability to discredit officer Manning's alleged identification of Mr. Galbreath as the dealer that night. Such prejudice caused reversible error either on its own merit or on the basis that without it there was insufficient evidence to convict him. He seeks to have this Court vacate his conviction and remand the case for a new trial.

Had it not been for the jury hearing about Mr. Galbreath dealing drugs to Affleck on prior

times—especially that Mr. Galbreath did not use Methamphetamine but sold it only to make money off of addicts—the jury would not have had any predisposition to find Mr. Galbreath guilty as a drug dealer. Incorporating the first two arguments of error—Mr. Galbreath asserts that had the Trial Court not let in the damaging, prejudicial information—or if the Court had let his rebuttal witness testify-- the jury never would have had sufficient evidence to convict him of drug distribution based on the evidence that was properly presented to the jury. He seeks to have this Court vacate his conviction and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 23 day of April, 2007.



JULIE GEORGE, APPELLATE ATTORNEY
FOR MR. RICHARD GALBREATH

MAILING CERTIFICATE

I hereby certify that I hand-delivered or mailed, first class postage prepaid, a true and correct copy of the foregoing Appellant's Brief to:

LAURA DUPAIX, SECTION CHIEF
UTAH ATTORNEY GENERAL'S OFFICE
PO BOX 140854
SALT LAKE CITY, UTAH 84114-0854

DATED THIS 23 DAY OF April 2007.



ADDENDA

ADDENDUM A

The Law Office of
CINDY BARTON-COOMBS, P.C.
193 North State Street (73-13)
Roosevelt, Utah 84066
Cindy Barton-Coombs - 5842
Telephone No: (435) 722-0200
Fax: (435) 722-0218
Client: 005-605

IN THE EIGHTH DISTRICT COURT, STATE OF UTAH
DUCHESNE DEPARTMENT
COUNTY OF DUCHESNE

STATE OF UTAH,)	
Plaintiff,)	NOTICE OF APPEAL
)	
vs.)	Case No.: 051800180 FS
)	051800181 FS
RICHARD GALBREATH,)	
Defendant.)	Judge: JOHN R. ANDERSON

COMES NOW the Defendant, Richard Galbreath , by and through her attorney of record, Cindy Barton-Coombs, and files this Notice of Appeal pursuant to Rule 4 of the Utah Rules of Appellant Procedure. Appeal is taken from the Jury Trial heard before the Court on the 13th day of June , 2006 and again on the 27th of June, 2006 wherein Defendant was found guilty of (2 Counts) Distribution of a Controlled Substance, Meth. (Second Degree Felony) and (2 Counts) Distribution of Controlled Substance, Marijuana (Third Degree Felony).

DATED this 15 day of September, 2006.


Cindy Barton-Coombs
Attorney for Defendant

ADDENDUM B

SEP 29 2006

JOANNE MCKEE, CLERK
BY mp DEPUTY

KAREN ALLEN #7454
DUCHEsNE COUNTY ATTORNEY
STEPHEN D. FOOTE #8945
DEPUTY DUCHEsNE COUNTY ATTORNEY
Attorney for Plaintiff
P.O. Box 206
Duchesne, Utah 84021
(435) 738-0184
(435) 738-0186 (fax)

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
DUCHEsNE COUNTY, DUCHEsNE DEPARTMENT**

—0000000—

STATE OF UTAH,	:	JUDGMENT AND
	:	ORDER
Plaintiff,	:	
vs.	:	Criminal No. 051800180
	:	Criminal No. 051800181
RICHARD GALBREATH,	:	
	:	Judge John R. Anderson
Defendant.	:	

—0000000—

Criminal No. 051800180

**DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED
SUBSTANCE (MARIJUANA) - A THIRD DEGREE FELONY**

**DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED
SUBSTANCE (METHAMPHETAMINE) - A SECOND DEGREE FELONY**

Criminal No. 051800181

**DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED
SUBSTANCE (MARIJUANA) - A THIRD DEGREE FELONY**

**DISTRIBUTION OF OR ARRANGING TO DISTRIBUTE A CONTROLLED
SUBSTANCE (METHAMPHETAMINE) - A SECOND DEGREE FELONY**

The above-entitled case came before the Court for Sentencing on Monday, September 11, 2006, the Honorable Judge John R. Anderson presiding. The defendant was present and was represented by his attorney, Cindy Barton-Coombs. The State of Utah was represented by Karen

the defendant is sentenced to serve an indeterminate term of not less than one (1) year nor more than fifteen (15) years in the Utah State Prison.

Criminal No. 051800181: That for the offense of **Distribution of or Arranging to Distribute a Controlled Substance (Marijuana), a Third Degree Felony**, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison. That for the offense of **Distribution of or Arranging to Distribute a Controlled Substance (Methamphetamine), a Second Degree Felony**, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not less than one (1) year nor more than fifteen (15) years in the Utah State Prison.

The foregoing prison and jail sentences are suspended and the defendant is placed on three (3) years supervision through Adult Probation and Parole on the following conditions:

1. The defendant shall serve 180 days in the Duchesne County Jail, with no credit for time served. The defendant shall report no later than Saturday, September 16, 2006, at noon.
2. The defendant shall report to Adult Probation and Parole within 48 hours of his release from custody.
3. The defendant shall pay a fine in the sum of \$1,500 on terms set forth by Adult Probation and Parole.
4. The defendant shall obtain a substance abuse evaluation and successfully complete any treatment recommended by Adult Probation and Parole or the evaluation.
5. The defendant shall carry with him at all times the offender identification card provided to him by Adult Probation and Parole and present the identification card to any law enforcement officer who requests identification or a driver's license.

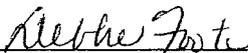
State of Utah vs **Richard Galbreath**
Case No. 051800180 and 051800181

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of September, 2006, I mailed a true and correct copy of the foregoing proposed Judgment and Order to the attorney for the defendant, at:

Cindy Barton-Coombs
Attorney at Law
193 North State St. (73-13)
Roosevelt, UT 84066

by depositing the same in the U.S. Mail, Duchesne, Utah.



Legal Assistant