AGENDA

STANDING COMMITTEE ON THE
MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84111

Wednesday, November 2, 2016
12:00 p.m. to 1:30 p.m.
Judicial Council Room

12:00	**Welcome and Approval of Minutes** (Tab 1)	Judge James Blanch
12:05	**Drug Offense Instructions** (Tab 2) Utah Code 58-37-8 (Tab 3) Utah Code 58-37-2 (Tab 4) *State v. Lucero* (Tab 5) *State v. Ashcraft* (Tab 6)	Karen Klucznik and Committee
1:20	**Other Business** Possible correction to CR304B - Reckless as to Result (Tab 7)	Sandi Johnson/ Keisa Williams
1:30	**Adjourn**	

Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)

December 7, 2016
January 4, 2017
February 1, 2017
March 1, 2017
April 5, 2017
May 3, 2017
June 7, 2017
September 6, 2017
October 4, 2017
November 1, 2017
December 6, 2017

Tab 1

MINUTES

STANDING COMMITTEE ON
THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, September 7, 2016
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT	**EXCUSED**
Judge James Blanch, Chair	Steve Nelson
Keisa Williams, Staff	Judge Michael Westfall
Jennifer Andrus	Linda Jones
Mark Field	
Sandi Johnson	
Scott Young	
Karen Klucznik	
Judge Brendon McCullagh	
Nathan Phelps	
Jesse Nix	

1. Welcome **Judge Blanch**

Judge Blanch welcomed everyone to the meeting and each member introduced themselves.

Ms. Klucznik moved to approve the minutes from the June 2016 meeting. Judge McCullagh seconded the motion and it passed unanimously.

Judge Blanch asked the committee to discuss priorities for creating jury instructions. He stated that the committee does not have instructions on justification defenses. He stated that he asked Judge Taylor (4th District) to provide those instructions because they often go to trial.

Judge McCullaugh stated that in the past, the committee has not created instructions for capital cases because they are rare. He stated that the committee decided that it would be best for capital attorneys to create those jury instructions themselves.

2. Drug Offense Instructions **Committee**

(a) Constructive Possession

Ms. Johnson stated that "sufficient nexus" and "reasonable inference" should not be used in a jury instruction. Mr. Young stated that those terms are not simple for a jury to understand. Ms. Johnson stated that she is not aware of a jury instruction that contains "reasonable inference" and the phrase decreases the burden of reasonable doubt. She stated that an elements instruction, with intentionally or knowingly, would be better to determine actual possession or constructive possession.

Mr. Field stated that he was concerned with the title of "construction possession" because the phrase could confuse the jury. Professor Andrus suggested two possession instructions: one for actual possession and one for constructive possession. Ms. Kluznik asked if the instructions could mirror the instruction on direct/circumstantial evidence. She stated that actual possession is direct evidence and constructive possession is circumstantial evidence. Ms. Johnson stated that the examples are not parallel.

Ms. Johnson suggested providing a list of factors to determine possession that included "actual possession." Judge Blanch stated that while some cases would require a list of factors, cases with simple facts would not require a list. He stated that simple possession cases that go to trial usually involve constructive possession. Ms. Johnson stated that she was concerned that the language of the definition instruction was becoming similar to the elements instruction.

Ms. Kluzcnik agreed that the constructive possession definition would only be used if constructive possession was applicable and not for all possession cases. Judge Blanch stated that one possession instruction for the jury to consider, that included constructive possession, would be preferable.

Mr. Young asked why reasonable doubt language should be removed. Ms. Johnson answered that this instruction was only definitional. Mr. Young asked if the jury would conclude possession at a different evidentiary standard.

Professor Andrus stated that "dominion" could be removed because it is redundant to control and originates from religious text.

Judge Blanch asked if possession cases would be less likely to be reversed based on jury instructions instead of the sufficiency of the evidence. Ms. Kluzcnik agreed. Judge Blanch stated that deviating from the statutory language would be appropriate because the appellate courts would overturn a jury verdict based on the quantum of evidence rather than jury instructions.

Mr. Field asked the committee to distinguish "special control" from "control." Mr. Phelps stated that roommates could have "special control" over their own room in a house. Mr. Young suggested using "exclusive control," but stated that "special control" may appear in case law. Mr. Phelps quoted *State v. Fox*, 709 P.2d 316 (1985), that used "special control." Professor Andrus stated that "special" is not a meaningful word. Judge Blanch asked if "special" included "exclusive." He stated that he did not believe that a person must be the *only* person to use or access a location for it to be called "special."

Ms. Kluznik stated that the list of factors relevant to determining possession should be prefaced with a "may" instead of "must." She stated that the jury should not view the factors as a checklist. Ms. Johnson suggested including language at the end of the instruction indicating that the jury may choose some or all of the factors. The committee discussed language to inform the jury that the list is not exclusive or exhaustive. Judge Blanch stated that "may include the following" was sufficient for a jury to understand that the factors are not exclusive or exhaustive.

Judge Blanch stated that the instruction should be titled "Definition of Possession" because the instruction now refers to actual and constructive possession. Mr. Young stated that the title should include "constructive possession" because practitioners would search for

"constructive possession." Judge Blanch stated that practitioners would only use this instruction for a case involving "constructive possession" so "Definition of Possession" would be sufficient.

The committee proposed the following language:

CR ___. Definition of Possession.

A person "possesses" [a controlled substance] [drug paraphernalia] when the person has the ability and the intent to exercise control over it. Factors relevant to deciding possession may include the following:

- ownership and/or occupancy of the [residence] [vehicle] [property] [personal effects] where the [controlled substance] [drug paraphernalia] was found;
- whether that ownership or occupancy was exclusive;
- presence of the [controlled substance] [drug paraphernalia] in a location where (DEFENDANT'S NAME) had special control;
- whether other people also had access to the location of the drugs;
- presence of (DEFENDANT'S NAME) at the time the [controlled substance] [drug paraphernalia] was found;
- (DEFENDANT'S NAME) proximity to the [controlled substance] [drug paraphernalia];
- previous drug use;
- incriminating statements or behavior; or
- any other factor related to whether (DEFENDANT'S NAME) had the ability and intent to exercise control over the [controlled substance] [drug paraphernalia].

References
Utah Code § 58-37-2
State v. Lucero, 350 P.3d 237 (2015)

Mr. Young moved to approve the instruction. Professor Andrus seconded the motion and it passed unanimously.

3. Adjourn **Committee**

The meeting was adjourned at 1:26 p.m. The next meeting is Wednesday, November 2, 2016.

Tab 2

CR _____. Innocent Possession.

DRAFT

You must decide whether the defense of innocent possession applies in this case. The defendant is not guilty of [OFFENSE] if

(1) the controlled substance [he][she]he possessed was obtained innocently and held with no illicit or illegal purpose, and

(2) [his][her] possession of the controlled substance was transitory; that is, the defendant took adequate measures to rid him or herself of possession of the controlled substance as promptly as reasonably possible.

SVF Marijuana Possession.

DRAFT

(LOCATION) JUDICIAL DISTRICT COURT, [_____DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
	:	**SPECIAL VERDICT**
Plaintiff,	:	
	:	Count (#)
-vs-	:	
(DEFENDANT'S NAME)		
		Case No. (**)
Defendant.		

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Possession of Marijuana. We also (check only the box that applies):

☐ Unanimously find beyond a reasonable doubt Defendant knowingly possessed 100 pounds of marijuana

☐ Do not find beyond a reasonable doubt Defendant knowingly possessed 100 pounds of marijuana.

DATED this _____ day of (MONTH), 20(**).

_____
Foreperson

References
Utah Code § 58-37-8(2)(a)(ii) and (2)(b)(i)

CR ____. Drug-Related Negligent Driving.

DRAFT
(effective October 1, 2015)
(approved by subcommittee)

(DEFENDANT'S NAME) is charged [in Count ___] with committing Drug-Related Negligent Driving [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME)
2. intentionally and knowingly had any measurable amount of a [marijuana] [tetrahydrocannabinols][a Schedule I controlled substance] [a Schedule II] [a Schedule III controlled substance] [a Schedule IV controlled substance] [a Schedule V controlled substance] [a substance listed as a controlled substance in Utah Code Ann. § 58-37-4.2] in [his][her] body; and
3. operated a motor vehicle in a negligent manner; and
4. caused serious bodily injury or the death of another[; and]

[5. the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 58-37-8(2)(g),(h)

Tab 3

West's Utah Code Annotated
Title 58. Occupations and Professions
Chapter 37. Utah Controlled Substances Act (Refs & Annos)

U.C.A. 1953 § 58-37-8
§ 58-37-8. Prohibited acts—Penalties

<Section effective October 1, 2015. See, also, section effective until October 1, 2015.>

(1) Prohibited acts A--Penalties:

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

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

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

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

(iv) engage in a continuing criminal enterprise where:

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

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

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

(i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony, punishable by imprisonment for not more than 15 years, and upon a second or subsequent conviction is guilty of a first

degree felony;

(ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, or a substance listed in Section 58-37-4.2 is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

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

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B--Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony; or

(ii) a substance classified in Schedule I or II, or a controlled substance analog, is guilty of a class A misdemeanor on a first or second conviction, and on a third or subsequent conviction is guilty of a third degree felony.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i) or (ii), including a substance listed in Section 58-37-4.2, or marijuana, is guilty of a class B misdemeanor. Upon a third conviction the person is guilty of a class A misdemeanor, and upon a fourth or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

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

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

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

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

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in the person's body:

(i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;

(ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA), or a substance listed in Section 58-37-4.2 is guilty of a third degree felony; or

(iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation of Subsection 58-37-8(2)(g) whether or not the injuries arise from the same episode of driving.

(3) Prohibited acts C--Penalties:

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

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to

another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

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

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

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

(b)(i) A first or second conviction under Subsection (3)(a)(i), (ii), or (iii) is a class A misdemeanor.

(ii) A third or subsequent conviction under Subsection (3)(a)(i), (ii), or (iii) is a third degree felony.

(c) A violation of Subsection (3)(a)(iv) is a third degree felony.

(4) Prohibited acts D--Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act that is unlawful under Subsection (1)(a), Section 58-37a-5, or Section 58-37b-4 is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools during the hours of 6 a.m. through 10 p.m.;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions during the hours of 6 a.m. through 10 p.m.;

(iii) in or on the grounds of a preschool or child-care facility during the preschool's or facility's hours of operation;

(iv) in a public park, amusement park, arcade, or recreation center when the public or amusement park, arcade, or recreation center is open to the public;

(v) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vi) in or on the grounds of a library when the library is open to the public;

(vii) within any area that is within 100 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iii), (iv), (v), and (vi);

(viii) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(ix) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

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

(ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d)(i) If the violation is of Subsection (4)(a)(ix):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted

for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(ix).

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

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

(6)(a) For purposes of penalty enhancement under Subsections (1) and (2), a plea of guilty or no contest to a violation or attempted violation of this section or a plea which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(b) A prior conviction used for a penalty enhancement under Subsection (2) shall be a conviction that is:

(i) from a separate criminal episode than the current charge; and

(ii) from a conviction that is separate from any other conviction used to enhance the current charge.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

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

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

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

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

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

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

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

(12)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).

(b) In a prosecution alleging violation of this section regarding peyote as defined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c)(i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (12) as soon as practicable, but not later than 10 days prior to trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(13)(a) It is an affirmative defense that the person produced, possessed, or administered a controlled substance listed in Section 58-37-4.2 if the person:

(i) was engaged in medical research; and

(ii) was a holder of a valid license to possess controlled substances under Section 58-37-6.

(b) It is not a defense under Subsection (13)(a) that the person prescribed or dispensed a controlled substance listed in Section 58-37-4.2.

(14) It is an affirmative defense that the person possessed, in the person's body, a controlled substance listed in Section 58-37-4.2 if:

(a) the person was the subject of medical research conducted by a holder of a valid license to possess controlled substances under Section 58-37-6; and

(b) the substance was administered to the person by the medical researcher.

(15) The application of any increase in penalty under this section to a violation of Subsection (2)(a)(i) may not result in any greater penalty than a second degree felony. This Subsection (15) takes precedence over any conflicting provision of this section.

(16)(a) It is an affirmative defense to an allegation of the commission of an offense listed in Subsection (16)(b) that the person:

(i) reasonably believes that the person or another person is experiencing an overdose event due to the ingestion, injection, inhalation, or other introduction into the human body of a controlled substance or other substance;

(ii) reports in good faith the overdose event to a medical provider, an emergency medical service provider as defined in Section 26-8a-102, a law enforcement officer, a 911 emergency call system, or an emergency dispatch system, or the person is the subject of a report made under this Subsection (16);

(iii) provides in the report under Subsection (16)(a)(ii) a functional description of the actual location of the overdose event that facilitates responding to the person experiencing the overdose event;

(iv) remains at the location of the person experiencing the overdose event until a responding law enforcement officer or emergency medical service provider arrives, or remains at the medical care facility where the person experiencing an overdose event is located until a responding law enforcement officer arrives;

(v) cooperates with the responding medical provider, emergency medical service provider, and law enforcement officer, including providing information regarding the person experiencing the overdose event and any substances the person may have injected, inhaled, or otherwise introduced into the person's body; and

(vi) is alleged to have committed the offense in the same course of events from which the reported overdose arose.

(b) The offenses referred to in Subsection (16)(a) are:

(i) the possession or use of less than 16 ounces of marijuana;

(ii) the possession or use of a scheduled or listed controlled substance other than marijuana; and

(iii) any violation of Chapter 37a, Utah Drug Paraphernalia Act, or Chapter 37b, Imitation Controlled Substances Act.

(c) As used in this Subsection (16) and in Section 76-3-203.11, "good faith" does not include seeking medical assistance under this section during the course of a law enforcement agency's execution of a search warrant, execution of an arrest warrant, or other lawful search.

(17) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

(18) A legislative body of a political subdivision may not enact an ordinance that is less restrictive than any provision of this chapter.

(19)(a) If a minor who is under 18 years of age is found by a court to have violated this section and the violation is the minor's first violation of this section, the court may:

(i) order the minor to complete a screening as defined in Section 41-6a-501;

(ii) order the minor to complete an assessment as defined in Section 41-6a-501 if the screening indicates an assessment to be appropriate; and

(iii) order the minor to complete an educational series as defined in Section 41-6a-501 or substance abuse treatment as indicated by an assessment.

(b) If a minor who is under 18 years of age is found by a court to have violated this section and the violation is the minor's second or subsequent violation of this section, the court shall:

(i) order the minor to complete a screening as defined in Section 41-6a-501;

(ii) order the minor to complete an assessment as defined in Section 41-6a-501 if the screening indicates an assessment to be appropriate; and

(iii) order the minor to complete an educational series as defined in Section 41-6a-501 or substance abuse treatment as indicated by an assessment.

Tab 4

West's Utah Code Annotated
Title 58. Occupations and Professions
Chapter 37. Utah Controlled Substances Act (Refs & Annos)

U.C.A. 1953 § 58-37-2

§ 58-37-2. Definitions

Currentness

(1) As used in this chapter:

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

(i) a practitioner or, in the practitioner's presence, by the practitioner's authorized agent; or

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

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

(c) "Consumption" means ingesting or having any measurable amount of a controlled substance in a person's body, but this Subsection (1)(c) does not include the metabolite of a controlled substance.

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

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

(f)(i) "Controlled substance" means a drug or substance:

(A) included in Schedules I, II, III, IV, or V of Section 58-37-4;

(B) included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513;[1]

(C) that is a controlled substance analog; or

(D) listed in Section 58-37-4.2.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined in Title 32B, Alcoholic Beverage Control Act;

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

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which:

(I) are not otherwise regulated by law; and

(II) may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(g)(i) "Controlled substance analog" means:

(A) a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;

(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or

(C) A substance which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513.

(ii) "Controlled substance analog" does not include:

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

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

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 355, to the extent the conduct with respect to the substance is permitted by the exemption;

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

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

(F) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(h)(i) "Conviction" means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by:

(A) Chapter 37, Utah Controlled Substances Act;

(B) Chapter 37a, Utah Drug Paraphernalia Act;

(C) Chapter 37b, Imitation Controlled Substances Act;

(D) Chapter 37c, Utah Controlled Substance Precursor Act; or

(E) Chapter 37d, Clandestine Drug Lab Act; or

(ii) for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under:

(A) Chapter 37, Utah Controlled Substances Act;

(B) Chapter 37a, Utah Drug Paraphernalia Act;

(C) Chapter 37b, Imitation Controlled Substances Act;

(D) Chapter 37c, Utah Controlled Substance Precursor Act; or

(E) Chapter 37d, Clandestine Drug Lab Act.

(i) "Counterfeit substance" means:

(i) any controlled substance or container or labeling of any controlled substance that:

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

(B) a reasonable person would believe to be a controlled substance distributed by an authorized manufacturer, distributor, or dispenser based on the

appearance of the substance as described under Subsection (1)(i)(i)(A) or the appearance of the container of that controlled substance; or

(ii) any substance other than under Subsection (1)(i)(i) that:

(A) is falsely represented to be any legally or illegally manufactured controlled substance; and

(B) a reasonable person would believe to be a legal or illegal controlled substance.

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

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

(l) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;

(ii) a drug which contains any quantity of:

(A) amphetamine or any of its optical isomers;

(B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or

(C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system;

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(m) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(n) "Dispenser" means a pharmacist who dispenses a controlled substance.

(o) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(p) "Distributor" means a person who distributes controlled substances.

(q) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(r)(i) "Drug" means:

(A) a substance recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(B) a substance that is required by any applicable federal or state law or rule to be dispensed by prescription only or is restricted to administration by practitioners only;

(C) a substance other than food intended to affect the structure or any function of the body of humans or other animals; and

(D) substances intended for use as a component of any substance specified in Subsections (1)(r)(i)(A), (B), and (C).

(ii) "Drug" does not include dietary supplements.

(s) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to the individual's dependency.

(t) "Food" means:

(i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

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

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

(v) "Indian" means a member of an Indian tribe.

(w) "Indian religion" means any religion:

(i) the origin and interpretation of which is from within a traditional Indian culture or community; and

(ii) which is practiced by Indians.

(x) "Indian tribe" means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village, which is legally recognized as eligible for and is consistent with the special programs, services, and entitlements provided by the United States to Indians because of their status as Indians.

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

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

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

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

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

(i) opium, coca leaves, and opiates;

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

(iii) opium poppy and poppy straw; or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (1)(cc)(i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

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

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

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

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

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

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

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

(kk) "Prescribe" means to issue a prescription:

(i) orally or in writing; or

(ii) by telephone, facsimile transmission, computer, or other electronic means of communication as defined by division rule.

(ll) "Prescription" means an order issued:

(i) by a licensed practitioner, in the course of that practitioner's professional practice or by collaborative pharmacy practice agreement; and

(ii) for a controlled substance or other prescription drug or device for use by a patient or an animal.

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

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

(oo) "State" means the state of Utah.

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

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

Tab 5

350 P.3d 237
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Armando LUCERO, Defendant and Appellant.

No. 20131000–CA.
|
May 14, 2015.

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake Department, Katie Bernards–Goodman, J., of various drug and weapon offenses arising from discovery of backpack containing contraband in vehicle defendant was driving. Defendant appealed.

[Holding:] The Court of Appeals, Pearce, J., held that evidence was insufficient to establish nexus between defendant and backpack's contents, as required to support convictions which were premised on theory of constructive possession.

Reversed.

West Headnotes (5)

[1] **Controlled Substances**
Constructive possession
Controlled Substances
Presumptions and burden of proof
Weapons
Constructive possession

A defendant constructively possesses contraband when there is a sufficient nexus between the defendant and the contraband to permit an inference that the defendant had both the power and the intent to exercise dominion and control over it; this fact-specific inquiry may consider whether the defendant owned or occupied the location where the contraband was found, whether the defendant had special or exclusive control over that area, any incriminating statements or behavior by the defendant, and previous possession of similar contraband by the defendant.

Cases that cite this headnote

[2] **Controlled Substances**
Presumptions and burden of proof
Weapons
Constructive possession

The final legal test for determining whether a defendant constructively possesses contraband is the most generally-worded one: whether there was a sufficient nexus between the defendant and the contraband to permit a factual inference that the defendant had the power and the intent to exercise control over the contraband.

Cases that cite this headnote

[3] **Controlled Substances**
Constructive possession
Weapons
Constructive possession

A nexus sufficient to establish constructive possession of contraband cannot be established solely by nonexclusive ownership or occupancy of the place where the contraband is found.

Cases that cite this headnote

[4] **Controlled Substances**
Joint or exclusive possession
Weapons
Constructive possession

In proving constructive possession of contraband, a defendant's joint occupancy of the premises where contraband is discovered must be combined with other evidence sufficient to establish the defendant's knowing and intentional control over the contraband.

Cases that cite this headnote

[5] **Controlled Substances**
Possession in general

Weapons

Constructive possession in general

Evidence that defendant was co-occupant of vehicle in which backpack containing contraband was found, that backpack was within defendant's convenient reach, and that defendant denied ownership of backpack was insufficient to establish nexus between defendant and backpack's contents, as required to support various drug and weapon convictions which were premised on theory of constructive possession.

Cases that cite this headnote

Attorneys and Law Firms

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Sean D. Reyes and Marian Decker, Salt Lake City, for Appellee.

Judge JOHN A. PEARCE authored this Opinion, in which Judges JAMES Z. DAVIS and J. FREDERIC VOROS JR. concurred.

Opinion

PEARCE, Judge:

¶ 1 Defendant Armando Lucero appeals from four convictions that flow from the discovery of a sling backpack containing various contraband in a car Lucero was driving. He contends that the State presented insufficient evidence to establish that he constructively possessed the items inside the backpack. We agree and reverse those four convictions.

BACKGROUND

¶ 2 A police officer pulled Lucero over while he was driving with a female passenger. Lucero claimed to have recently bought the car he was driving and produced a vehicle registration. He did not, however, know the registered owner. The officer was unable to contact the registered owner to verify this information, but the car had not been reported stolen. Because Lucero did not have a valid driver's license, the police officer decided to impound the car.

¶ 3 The officer then began an inventory search of the car. The first item he searched was a sling backpack that had been on the floor behind the front passenger seat. When the officer began to go through the backpack, Lucero stated that the backpack was not his.[1] Inside the backpack, the officer found a digital scale disguised as a pack of cigarettes, a false can of peanuts containing a plastic bag filled with drugs, a handgun (later discovered to be stolen) with the serial number filed off, and a package of thank-you notes. The officer also searched the passenger's purse and discovered drugs and drug paraphernalia.[2] A search of the passenger revealed more drugs hidden in her bra.

¶ 4 The car also contained a variety of household goods including a laundry basket filled with folded clothes, a broom, a hair dryer, several other bags of clothing, and a suitcase. Lucero claimed to have been transporting these items for an ex-girlfriend. The ex-girlfriend came to the scene to identify and claim her property; she did not claim the backpack. Officers had previously searched the items she claimed and had found no contraband.

¶ 5 Lucero was charged with and convicted of possession or use of a controlled substance, theft by receiving stolen property, possession of a dangerous weapon by a restricted person, and use or possession of drug paraphernalia. All of these charges were based upon the items found inside the backpack and relied on a theory of constructive possession.

***239** ISSUE AND STANDARD OF REVIEW

¶ 6 On appeal, Lucero contends that the State failed to adduce evidence sufficient for a reasonable jury to find that he constructively possessed the backpack's contents. When considering an insufficiency-of-the-evidence claim, we review the evidence and all reasonable inferences in the light most favorable to the jury's verdict. *State v. Nielsen*, 2014 UT 10, ¶ 46, 326 P.3d 645. We may only reverse a guilty verdict for insufficient evidence when that evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crimes underlying the convictions. *Id.*

ANALYSIS

[1] **[2]** ¶ 7 At trial, the State relied on a constructive-possession theory. A defendant constructively possesses contraband when there is a sufficient nexus between the defendant and the contraband to permit an inference that the defendant had both the power and the intent to exercise dominion and control over it. *See State v. Fox*, 709 P.2d 316, 319 (Utah 1985). This fact-specific inquiry may consider whether the defendant owned or occupied the location where the contraband was found, whether the defendant had special or exclusive control over that area, any incriminating statements or behavior by the defendant, and previous possession of similar contraband by the defendant. *Id.*; *State v. Workman*, 2005 UT 66, ¶ 32, 122 P.3d 639. This list is not exhaustive, nor is each factor always pertinent. *Workman*, 2005 UT 66, ¶ 32, 122 P.3d 639; *see also State v. Layman*, 1999 UT 79, ¶ 15, 985 P.2d 911, 914 ("[T]here is some danger in mechanically relying on a list of factors ... when applying a generally-worded test, such as *Fox* 's statement of what is needed to show constructive possession."). "The final legal test is the most generally-worded one: ... whether there was a sufficient nexus between the defendant and the [contraband] to permit a factual inference that the defendant had the power and the intent to exercise control over the [contraband]." *Layman*, 1999 UT 79, ¶ 15, 985 P.2d 911.

¶ 8 We, as well as the Utah Supreme Court, have had a number of opportunities to consider whether a particular evidentiary nexus was sufficient to establish constructive possession. For example, in *State v. Fox*, the defendant (Fox) shared a house with his brother. The police discovered marijuana plants growing in greenhouses attached to the house. 709 P.2d at 319. The Utah Supreme Court concluded that the nexus between the plants and Fox's brother was sufficient to establish the brother's constructive possession because he owned the house, his personal effects were found in the same room as the plants, and there was evidence that he intended to distribute marijuana. *Id.* at 320. In contrast, the supreme court held that the nexus between the plants and Fox himself was insufficient to support Fox's constructive-possession conviction. *Id.* Specifically, the supreme court concluded that while the evidence supported an inference that Fox knew of the grow operation, there was no evidence that he had any intent to possess the marijuana or had any intent to exercise dominion and control over it. *Id.* Accordingly, the evidence was insufficient to support Fox's constructive-possession conviction, and that conviction was reversed. *Id.*

¶ 9 In *State v. Layman*, a police officer pulled over a car at about three in the morning. 1999 UT 79, ¶ 6, 985 P.2d 911. Layman was at the wheel and accompanied by a passenger. *Id.* Layman's bloodshot eyes, fidgety demeanor, and erratic driving led the officer to suspect that Layman might be under the influence of a controlled substance. *Id.* ¶¶ 6–7. When the officer asked to search a pouch tucked into the passenger's waistband, the passenger looked to Layman who shook his head in the negative. *Id.* ¶ 8. The officer nonetheless searched the pouch and found drugs and drug paraphernalia. *Id.* Layman was convicted of two drug-related charges under a constructive-possession theory. *Id.* ¶ 11. The Utah Supreme Court explained that there was little evidence to suggest that Layman had the type of control over the passenger's person necessary to infer beyond a reasonable doubt that Layman knowingly and intentionally possessed the contraband in the pouch. *Id.* ¶ 16. According to the supreme court, the questioning ***240** look simply was not enough to demonstrate the power and intent to exercise control. *Id.* ("The only fact tending to prove [Layman's] control over [the passenger] is that she looked at him when the deputy requested to see the pouch and [Layman] shook his head in negative fashion.... Neither her presence in his vehicle, his erratic behavior after the traffic stop, nor his use of drugs at some earlier time make up for this critical lack of evidence."). As a result, Layman's convictions based on constructive possession were reversed. *Id.* ¶ 17.

¶ 10 In *State v. Gonzalez–Camargo*, police officers executed a search warrant on two apartments. 2012 UT App 366, ¶ 3, 293 P.3d 1121. At the time of the search, twelve to fourteen people were inside the four-unit building. *Id.* The defendant (Gonzalez–Camargo) and his girlfriend shared a bedroom in one of the searched apartments. *Id.* ¶¶ 6, 19. The search of the bedroom turned up a lockbox containing drugs. *Id.* ¶ 5. However, at trial, the officers could not agree on where in the bedroom the lockbox was first located. *Id.* ¶ 20. Gonzalez–Camargo was eventually convicted of possessing the drugs based on a constructive-possession theory. *Id.* ¶ 12. On appeal, we explained that to establish constructive possession, "the defendant's joint occupancy of the premises where the controlled substance is discovered must be combined with other evidence sufficient to establish the defendant's knowing and intentional control over it." *Id.* ¶ 17. We noted that Gonzalez–Camargo was a co-occupant of the bedroom where the lockbox was found and that the State had not produced evidence establishing that the lockbox had been found commingled with his possessions. *Id.* ¶¶ 19–20.

Thus, the only evidence suggesting that the lockbox belonged to Gonzalez–Camargo was (1) that he was present, along with twelve to fourteen other people, when it was found and (2) that he and his girlfriend shared the room where it was found. *See id.* ¶ 26. As a result, a jury could only speculate as to whether the lockbox belonged to Gonzalez–Camargo, his girlfriend, both of them, or neither. *See id.* We therefore vacated Gonzalez–Camargo's drug-possession conviction. *Id.*

¶ 11 In *State v. Salas*, police officers received an anonymous tip that Salas would be driving a certain vehicle and was in possession of cocaine. 820 P.2d 1386, 1387 (Utah Ct.App.1991). Officers stopped the vehicle, which Salas and his wife co-owned. *Id.* As the car was pulling over, the passenger in the rear seat moved from the left side to the right side of the car. *Id.* The officers searched the seat the passenger vacated and discovered cocaine wedged between the bench and back cushion. *Id.* We concluded that the passenger's movement rendered the remaining evidence sufficiently inconclusive on the issue of whether Salas had the intent to exercise dominion and control over the cocaine. *Id.* at 1388. We noted that before the officers found the cocaine, Salas stated there was no cocaine in the vehicle, did not have any drugs or paraphernalia on his person, and did not try to escape. *Id.* at 1389. Thus, the only evidence linking Salas with the cocaine was his part-ownership of the vehicle, his presence in the vehicle, and the anonymous tip (which was admitted into evidence only to explain why the officers had pulled Salas's vehicle over). *Id.* We explained that to establish a defendant's constructive possession of contraband found in a vehicle of which the defendant was not the sole occupant, there must be evidence beyond the presence of the contraband and the defendant in the same vehicle to buttress the inference. *Id.* at 1388. Because the evidence was insufficient to establish constructive possession, we reversed Salas's conviction. *Id.*

[3] **[4]** ¶ 12 These cases provide that a nexus sufficient to establish constructive possession cannot be established solely by nonexclusive ownership or occupancy of the place where the contraband is found. *See id.; see also Spanish Fork City v. Bryan*, 1999 UT App 61, ¶ 9, 975 P.2d 501. In short, "[a] defendant's joint occupancy of the premises where the [contraband] is discovered must be combined *with other evidence* sufficient to establish the defendant's knowing and intentional control over [the contraband]." *Gonzalez–Camargo*, 2012 UT App 366, ¶ 17, 293 P.3d 1121 (emphasis added); *see also State v. Ashcraft*, 2015 UT 5, ¶ 20 n. 3, 349 P.3d 664 ("[I]f the only connection ***241** between a defendant and the contraband is bare title or mere occupancy of the area in which it is found, there may be substantial room for reasonable doubt as to whether the contraband belongs to the defendant. Such doubt may be especially substantial where other people with access to the area could have placed the contraband in the home or vehicle without the owner's knowledge, and thus the owner would have no power and intent to exercise dominion and control over it." (emphasis, citation, and internal quotation marks omitted)).

¶ 13 In cases involving co-ownership or co-occupancy, the quantum of "other evidence" needed to support an inference of power and intent to exercise dominion and control equals the quantum of evidence sufficient to eliminate reasonable doubt. In *State v. Workman*, police officers executing a federal fugitive warrant discovered chemicals, equipment, and wall stains consistent with the production of methamphetamines in a bedroom. 2005 UT 66, ¶ 2, 122 P.3d 639. In the same bedroom, the officers found several items belonging to Workman (including her day planner and driver's license) on a bookshelf that also housed a plastic container holding drug paraphernalia. *Id.* ¶ 3. Workman initially admitted to sharing the bedroom with her boyfriend but later claimed she had moved out three weeks before the search. *Id.* ¶ 4. Workman was eventually convicted of possessing laboratory equipment or supplies with the intent to engage in a clandestine laboratory operation under a constructive-possession theory. *Id.* ¶¶ 30–31. The Utah Supreme Court noted that shared occupancy of the house was insufficient by itself to establish the requisite nexus for constructive possession. *Id.* ¶ 33. However, the supreme court determined that "other evidence" existed that was sufficient for that purpose: Workman's personal items were intermingled with methamphetamine-production equipment in the bedroom, Workman admitted buying (for household purposes) some of the containers and glassware eventually used in the operation, and Workman admitted to previous use of methamphetamines. *Id.* ¶ 34. The supreme court concluded that the constructive-possession theory was sufficiently supported by the "other evidence" that went beyond mere co-occupancy, and therefore affirmed Workman's conviction. *Id.* ¶¶ 35–36.

¶ 14 In *State v. Ashcraft*, a majority of the Utah Supreme Court determined that the "other evidence" the State presented was sufficient to support a constructive-possession conviction. 2015 UT 5, ¶ 22, 349 P.3d 664. There, a police officer observed a pickup truck being driven twice through a motel parking lot known for frequent drug activity. *Id.* ¶¶ 2–3. The following night, the officer again observed the truck in the same motel parking lot. *Id.* ¶ 4. He began following the truck,

without turning on his police lights, until it stopped. *Id.* The officer approached the truck and asked the driver, Ashcraft, whether he was the truck's registered owner. *Id.* Ashcraft admitted that he was not and that he had borrowed it from the owner. *Id.* After Ashcraft and his passenger admitted that they lacked driver's licenses, the officer impounded the truck. *Id.* ¶ 5. As part of the impoundment process, the officer conducted an inventory search of the truck. *Id.* ¶ 7. In the bed of the truck, within reach of the cab's rear window, he found a green bag. *Id.* Without opening it, the officer asked Ashcraft who owned the green bag. *Id.* Ashcraft replied that he did not know who it belonged to and accused the officer of planting it in the truck bed. *Id.* His suspicions aroused, the officer searched the green bag and discovered several bottles of pills, over thirty plastic bags containing unknown substances, three glass pipes, two digital scales, and miscellaneous other drug paraphernalia. *Id.* A search of Ashcraft's person revealed $793 in cash and a knife with a tar-like substance on the blade similar to that found in the plastic bags. *Id.* ¶ 6. Ashcraft was convicted of, inter alia, possession of a controlled substance with intent to distribute and possession of drug paraphernalia. *Id.* ¶ 10. These convictions relied on theories of constructive possession. *Id.*

¶ 15 On appeal, Ashcraft contended that the evidence was not sufficient to support a jury finding that he constructively possessed the contents of the green bag, because the sole connection between the green bag and himself was his occupancy of the truck. *Id.* ¶ 21. A divided Utah Supreme Court disagreed, ***242** noting that Ashcraft had repeatedly driven around an area known for drug activity, had done so late at night and early in the morning, and had carried a large amount of cash. *Id.* The majority opinion further noted that the bag was within Ashcraft's reach and that Ashcraft had not only denied owning it but had also accused the officer of planting it before the officer even opened it. *Id.* Finally, the majority observed that the tar-like substances found on Ashcraft's knife and in the plastic bags were identified, at least by the arresting officer, as heroin.[3] *Id.* ¶¶ 8–9, 21, 26. The majority concluded that the cumulative effect of these pieces of evidence was sufficient "other evidence," beyond Ashcraft's presence in the truck, to support the constructive-possession theory underlying the jury's ultimate verdict. *Id.* ¶ 22. Accordingly, the supreme court affirmed Ashcraft's convictions. *Id.* ¶¶ 30, 40.

¶ 16 Justice Parrish, joined by Justice Nehring, dissented. *Id.* ¶ 41 (Parrish, J., dissenting). The dissent first noted that the passenger and the truck's owner also had access to the green bag and that the bag's position rendered it more easily accessed by the passenger than by Ashcraft. *Id.* ¶¶ 45–46. The dissent then challenged three inferences relied upon by the majority's conclusion that an evidentiary nexus connected Ashcraft to the green bag. *Id.* ¶¶ 43, 47. First, the dissent did not agree that Ashcraft's late-night presence in an area known for drug activity with a large amount of cash created any nexus between him and the green bag.[4] *Id.* ¶ 48. Second, the dissent did not view Ashcraft's immediate accusation that the officer planted the bag as suggesting knowledge of its contents. *Id.* ¶ 49. Rather, the dissent suggested that Ashcraft's statement was "equally consistent with the possibility that the bag in fact belonged to [one of the passengers] and that Mr. Ashcraft intended to distance himself from it because he suspected its contents." *Id.* Third, the dissent dismissed as speculative any connection between the substance found packaged in the bag and the substance found on Ashcraft's knife.[5] *Id.* ¶ 50. The dissent viewed the inferences relied upon by the majority as "insufficient to establish beyond a reasonable doubt that Mr. Ashcraft exercised dominion and control over the green bag." *Id.* ¶ 52. Accordingly, the dissent would have reversed his convictions. *Id.* ¶¶ 53–54.

[5] ¶ 17 Here, Lucero was charged with and convicted of four crimes relating to the items found inside the sling backpack. The State's case against Lucero relied on theories of constructive possession. The State therefore had to put forward sufficient evidence to establish a nexus between Lucero and the backpack's contents. As noted above, *supra* ¶ 12, mere co-occupancy does not satisfy that burden and must be combined with other evidence before it can reasonably establish the requisite nexus. *See State v. Gonzalez–Camargo,* 2012 UT App 366, ¶ 17, 293 P.3d 1121.

¶ 18 On appeal, Lucero contends that the State failed to meet this burden. Specifically, he argues that, aside from his co-occupancy of the car in which the backpack was found, there was no evidence linking him to the backpack. The State responds that other evidence did exist: the backpack was within Lucero's convenient reach and Lucero denied ownership of the backpack.

***243** ¶ 19 These two facts track similar circumstances in *State v. Ashcraft;* namely, that the contraband containers in both cases were within reach of the defendants and both defendants denied ownership of the respective containers. *See* 2015 UT 5, 349 P.3d 664. But in *Ashcraft,* the majority expressly rejected the idea that "anyone who has the misfortune of occupying a vehicle in which illegal drugs are

found is subject to conviction." *Id.* ¶ 21 n. 5. Instead, the supreme court detailed additional facts that suggested a nexus between Ashcraft and the bag before concluding that all of the evidence combined was sufficient for a jury to find beyond a reasonable doubt that Ashcraft constructively possessed the bag. *Id.* ¶¶ 22, 27 (explaining that the pieces of evidence were "suspect" and "a slim basis" for conviction individually but that, considered cumulatively, they were sufficient to sustain a jury verdict based on constructive possession).

¶ 20 It is true that both Ashcraft and Lucero could reach the contraband containers in the vehicles they were driving. But in *Ashcraft*, the jury also heard evidence to the effect that a knife carried by Ashcraft was caked in a tar-like substance that matched the substance found inside the bag. *Id.* ¶¶ 21, 26. And it is true that both Ashcraft and Lucero denied owning the containers. But unlike Lucero, Ashcraft did not merely deny ownership; rather, before the contents of the bag were even revealed, Ashcraft brashly accused the searching officer of planting the bag in his truck. *Id.* ¶ 25 (noting that Ashcraft's accusations suggested that he knew contraband would be found inside the bag). Moreover, Ashcraft was carrying an unusually large amount of cash, *id.* ¶ 21, and the police officer may have seen Ashcraft driving the truck through a drug-ridden area multiple times on two successive nights, *id.* ¶ 21. *But see supra* ¶ 16 n. 4.

¶ 21 *Ashcraft* instructs that the ability to reach a contraband container and the simple denial of ownership of that container are, in the absence of other corroborative evidence, insufficient to establish constructive possession beyond a reasonable doubt. This comports with the principle that constructive possession cannot be inferred from mere co-occupancy of the area where contraband is found. *See, e.g.*, *Ashcraft*, 2015 UT 5, ¶ 20 & n. 3, 349 P.3d 664; *State v. Workman*, 2005 UT 66, ¶¶ 33–35, 122 P.3d 639; *State v. Fox*, 709 P.2d 316, 320 (Utah 1985); *Gonzalez–Camargo*, 2012 UT App 366, ¶ 17, 293 P.3d 1121; *State v. Salas*, 820 P.2d 1386, 1388 (Utah Ct.App.1991).

¶ 22 Considered alone, Lucero's co-occupancy of the car was an insufficient basis to attribute constructive possession of the sling backpack and its contents to him. *See Workman*, 2005 UT 66, ¶ 33, 122 P.3d 639 (explaining that shared occupancy of a bedroom was insufficient to establish constructive possession). We conclude that the other two pieces of evidence presented by the State to buttress the constructive-possession theory—that the backpack was within Lucero's reach and that Lucero denied owning it—do not "constitute other evidence sufficient to establish the defendant's knowing and intentional control over [the contraband]" beyond a reasonable doubt. *See Gonzalez–Camargo*, 2012 UT App 366, ¶ 17, 293 P.3d 1121. [6]

CONCLUSION

¶ 23 We conclude that the State did not present evidence sufficient to demonstrate beyond a reasonable doubt that Lucero constructively possessed the backpack or its contents. We therefore reverse Lucero's convictions stemming from his purported constructive possession of the contents of the backpack: possession or use of a controlled substance, theft by receiving stolen property, possession of a dangerous weapon by a restricted person, and use or possession of drug paraphernalia.

All Citations

350 P.3d 237, 786 Utah Adv. Rep. 14, 2015 UT App 120

Footnotes

1 There is some dispute as to the number and timing of Lucero's denials. Our analysis proceeds in line with the State's position that Lucero first denied owning the backpack "as soon as" the officer began "dealing with" it and before any contraband was found.

2 A bandana initially found by the officer in the passenger's purse was mistakenly returned to the sling backpack.

3 While a field testing kit used by the officer indicated that the tar-like substance was an opiate and that a crystalline white substance in some of the plastic baggies was methamphetamine, none of the substances in the plastic bags or on Ashcraft's knife were conclusively identified through laboratory testing. *State v. Ashcraft*, 2015 UT 5, ¶ 8, 349 P.3d 664.

4 The majority opinion explained that "Ashcraft repeatedly drove through an area known for drug activity during late night and early morning hours." *Id.* ¶ 21. In apparent contrast, the dissenting opinion notes that the passenger was "seen in the truck both nights, while Mr. Ashcraft may have been driving the truck on only the second night." *Id.* ¶ 48 (Parrish, J., dissenting).

5 The majority noted that the arresting officer "testified, based on his experience and results of field tests, that the 'brown caked tar [-]like powdery substance' on the blade of knife and in some of the baggies in the green bag was consistent with heroin." *Id.* ¶ 26 (alteration in original). However, according to the dissent, "the State presented no ... evidence" to the effect that "the substance on the knife was the same as the illicit substance in the green bag." *Id.* ¶ 50. (Parrish, J., dissenting).

6 At oral argument, the State noted that, after the contraband in the backpack had been discovered and Lucero had been arrested, Lucero's passenger claimed ownership of a purse containing drugs. The State suggests that it is unlikely that the passenger would carry both a purse and a bag. Even if we were to agree with the State, it would not change the result we reach.

Tab 6

349 P.3d 664
Supreme Court of Utah.

STATE of Utah, Appellee,
v.
Shannon Jess ASHCRAFT, Appellant.

No. 20120306.
|
Jan. 23, 2015.
|
Rehearing Denied May 13, 2015.

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake, Denise P. Lindberg, J., of possession of a controlled substance with intent to distribute. He appealed.

Holdings: The Supreme Court, Lee, J., held that:

[1] evidence was sufficient to support finding of constructive possession;

[2] prosecutor did not improperly vouch for witness by stating that arresting officer had "nothing to gain by bringing in preconceived notions"; and

[3] even if prosecutor's closing argument comment about his own practices for carrying cash was improper, it did not warrant reversal.

Affirmed.

Parrish, J., filed dissenting opinion in which Nehring, Associate C.J., joined.

West Headnotes (16)

[1] Criminal Law
Construction of Evidence
Criminal Law
Inferences or deductions from evidence

When reviewing a sufficiency of the evidence claim, the Supreme Court must take the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury.

1 Cases that cite this headnote

[2] Criminal Law
Inferences from evidence

Inferences may reasonably be drawn from circumstantial evidence, and a jury's inference is reasonable unless it falls to a level of inconsistency or incredibility that no reasonable jury could accept.

1 Cases that cite this headnote

[3] Controlled Substances
Presumptions and burden of proof
Controlled Substances
Possessory offenses

For drug possession charges, the circumstantial evidence necessary to convict is evidence showing a sufficient nexus between the accused and the contraband to permit an inference that the accused had both the power and the intent to exercise dominion and control over the contraband; the analysis of the evidence under this standard depends upon the facts and circumstances of each case.

1 Cases that cite this headnote

[4] Controlled Substances
Constructive possession

Factors that a jury may consider in determining whether there is sufficient circumstantial evidence to convict a defendant on a drug possession charge, under theory of constructive possession, include ownership and/or occupancy of the residence or vehicle, presence of the defendant when the contraband is discovered, the defendant's proximity to the contraband, previous drug use by the defendant if the contraband is drug-related, incriminating statements or behavior, and presence of

contraband in a specific area where the defendant had control.

2 Cases that cite this headnote

[5] Controlled Substances

Constructive possession

Ownership or occupancy of the premises where contraband is discovered may not be enough to show constructive possession by itself which would support drug possession conviction.

3 Cases that cite this headnote

[6] Controlled Substances

Presumptions and burden of proof

Controlled Substances

Possessory offenses

In drug possession cases where there is additional evidence, including circumstantial evidence, that strengthens the nexus between ownership or occupancy and the contraband, the jury may consider those circumstances in drawing an inference of constructive possession.

1 Cases that cite this headnote

[7] Controlled Substances

Possession for sale or distribution

Evidence was sufficient to support finding of defendant's constructive possession of bag containing drugs, located in bed of truck which defendant was driving, as required for conviction of possession of a controlled substance with intent to distribute; defendant, while carrying large amount of cash, repeatedly drove through area known for drug activity during late night and early morning hours, bag in question was in close enough proximity that defendant could have reached through open window and touched it from driver's seat, a substance, identified as heroin by arresting officer, was found on blade of pocketknife defendant was carrying, and upon being asked about bag, even before it was opened, defendant immediately accused arresting officer of planting bag.

1 Cases that cite this headnote

[8] Criminal Law

Matters Not Sustained by Evidence

Matters not in evidence cannot be properly considered by the jury, and it is misconduct for the prosecutor to refer to such matters.

Cases that cite this headnote

[9] Criminal Law

Statements as to Facts, Comments, and Arguments

To sustain a reversal on an assertion of prosecutorial misconduct, a defendant must establish both that the prosecutor's conduct called to the attention of the jurors matters they would not be justified in considering in determining their verdict and, under the circumstances of the particular case, the error is substantial and prejudicial.

Cases that cite this headnote

[10] Criminal Law

Particular statements, arguments, and comments

Defendant's claims of allegedly inappropriate vouching by prosecutor would be reviewed by Supreme Court under futility exception to requirement that such claims be preserved by specific objection at trial where, after defense counsel asserted initial general objection to prosecutor's statements, trial court interrupted and directed prosecution to "go ahead," admonishing defense counsel with assertion that "this is argument and you were given the benefit of silence."

1 Cases that cite this headnote

[11] Criminal Law

Credibility of other witnesses

It is improper for a prosecutor to bolster a witness by vouching for his credibility; such vouching is improper because it invites the jury to rely on matters outside the record.

Cases that cite this headnote

[12] Criminal Law
Credibility of other witnesses

Prosecutor's inviting the jury to credit the testimony of the state's witness is not, without more, improper vouching.

Cases that cite this headnote

[13] Criminal Law
Credibility and Character of Witnesses; Bolstering

Impermissible witness vouching occurs when the prosecution places the prestige of the government behind the witness by making explicit personal assurances of the witness' credibility, or implicitly indicating that information not presented to the jury supports the testimony.

Cases that cite this headnote

[14] Criminal Law
Credibility of other witnesses

Prosecutor did not improperly vouch for witness by making statement during closing argument that arresting officer had "nothing to gain by bringing in preconceived notions" with respect to his approach of drug possession defendant, whom officer believed at the time to be an individual with several outstanding warrants and a suspect in a previous drug investigation; prosecutor made no explicit statement that he personally knew officer to be truthful and did not ask jury to take his word for it that officer was a credible witness, and instead urged jury to view with skepticism defense counsel's argument that officer's perception of events was undermined by preconceived notions.

Cases that cite this headnote

[15] Criminal Law
Particular statements, comments, and arguments

Even if prosecutor's comment, made during closing argument when discussing potential conclusions to be drawn from fact that drug possession defendant had over $800 in cash in his wallet at time of arrest, about prosecutor's own practices for carrying cash, was improper, comment did not warrant reversal where prosecutor immediately instructed jury to rely on its own experience and not his own.

Cases that cite this headnote

[16] Criminal Law
Statement of evidence

There was no misconduct in prosecutor's summary of evidence and ultimate insistence that state had proven drug possession defendant's guilt beyond a reasonable doubt; prosecutor did not ask jurors to defer to state's judgment over its own, and simply summarized his position and evidence supporting it.

Cases that cite this headnote

Attorneys and Law Firms

***665** Sean D. Reyes, Att'y Gen., Brian L. Tarbet, Jeffrey S. Gray, Michelle M. Young, Asst. Att'ys Gen., Salt Lake City, for appellee.

Joanna E. Landau, Kerri S. Priano, Salt Lake City, for appellant.

Justice LEE authored the opinion of the Court, in which Chief Justice DURRANT and Justice DURHAM joined.

Opinion

Justice PARRISH authored a dissent, in which Associate Chief Justice NEHRING joined.

***666** Justice LEE, opinion of the Court:

¶ 1 Shannon Ashcraft appeals his convictions of possession of a controlled substance with intent to distribute, unlawful possession of a dangerous weapon, and possession of drug paraphernalia. Ashcraft asserts that there was insufficient evidence to establish his possession of the contraband and,

alternatively, that his conviction should be reversed on the basis of prosecutorial misconduct at trial. We disagree on both counts and accordingly affirm.

I

[1] ¶ 2 In August 2011, Sergeant Huggard, a Murray City police officer, was patrolling a motel parking lot known for frequent drug activity. [1] One night, Huggard observed a tan Ford Ranger truck with a distinctive black panel driving through the parking lot. From the license plates, Huggard determined that the truck belonged to a man named Justin Sorenson. Huggard also discovered that Sorenson had several outstanding warrants and a suspended driver's license, and learned that he had been a suspect in a previous drug investigation.

¶ 3 Later, in the early morning hours, Huggard saw the truck again. The truck had a male driver and a female passenger. The driver pulled the truck into the motel lot, and both the driver and the passenger went into a motel room.

¶ 4 The next night, Huggard returned to the area to patrol again. He saw the tan truck again, with the same male driver and female passenger. He began to follow the truck but did not signal or otherwise direct the driver to stop. After a while, the driver pulled over on his own accord and waited for Huggard to approach. Huggard asked the driver whether he was Sorenson. The driver answered in the negative. He then identified himself as Shannon Ashcraft; explained that he had borrowed the truck from Sorenson, who was in the hospital; and admitted that he did not have a valid driver's license.

¶ 5 As for the passenger, she identified herself as April Chavez. Chavez also indicated that she did not have a valid license. Because neither Ashcraft nor Chavez was licensed to drive the truck, Huggard began impoundment proceedings and called for backup, as well as a K9 unit.

¶ 6 During the impound process, Huggard asked Ashcraft and Chavez to exit the truck. As Chavez exited, a large, open bottle of alcohol fell from her lap. At that point, Huggard asked Ashcraft and Chavez if they consented to be searched for drugs and weapons. Both agreed. During the search, Ashcraft appeared "very nervous" and was "fidgeting around a lot." Huggard "had a difficult time getting any kind of eye contact" with him. In the course of the search, Huggard discovered that Ashcraft was carrying a pocketknife with a "brownish/black tar substance" on the blade. He also found that Ashcraft was carrying a wallet containing $793 in cash. Huggard did not find drugs or weapons when searching Chavez. After the search, Huggard allowed Chavez to take her belongings and leave.

¶ 7 Next, Huggard performed an inventory search of the vehicle pursuant to the impound. In the bed of the truck, tucked between the edge of the truck bed and a spare tire on the driver's side, Huggard found a green zippered bag. He also noted that the rear window between the cab and bed was open. Huggard asked Ashcraft to identify the owner of the bag. Ashcraft responded that he didn't know whose bag it was, and indicated—before the bag was opened—that Huggard "must have put the bag there." Inside the bag, Huggard found thirty to forty baggies, some containing a "white crystal-like substance" and some containing a "brown caked tar[-]like substance," several bottles of pills, two digital scales, three glass pipes with white residue on them, ***667** other drug paraphernalia, and a pink stun gun with a charger.

¶ 8 None of the contraband found in the bag was tested for fingerprints. And none of the substances in the bags, in the pill bottles, or on the blade of Ashcraft's pocketknife were conclusively identified through laboratory testing. Also, the K9 unit's detection dog apparently did not alert on a sweep of the truck. Yet Huggard himself identified all of the substances in question, based on his experience over several years as a narcotics officer.

¶ 9 Huggard testified that the "brown caked tar[-]like substance" on the blade of the knife and in some of the baggies was consistent with heroin, based on the look and smell of the substance. He also testified that he confirmed this conclusion by performing a test using a field test kit, which generated a positive result for an opiate. And he identified the "white crystal-like substance" in the other baggies as consistent with methamphetamine, a conclusion that was also consistent with a positive result from a field test kit. As for the pills in the bottles, Huggard identified them as hydrocodone, oxycodone, Alprazolam, and Clonazepam. He did so by observing the markings on the pills and comparing them visually to pills in a "drug bible."

¶ 10 Ashcraft was arrested and charged with six counts of possession of a controlled substance with an intent to distribute, two counts of unlawful possession of a dangerous weapon, one count of possession of drug paraphernalia, driving on a suspended license, possession of an open

container of alcohol in a vehicle, and failure to signal. Because he was not in direct control of the contraband at the time of his arrest, Ashcraft's possession charges were prosecuted under a constructive possession theory, under which the jury was asked to draw an inference based on circumstantial evidence connecting him with the contraband. *See State v. Fox*, 709 P.2d 316, 318–19 (Utah 1985) (explaining the theory of constructive possession).

¶ 11 At trial, the defense spent a significant amount of time highlighting the potential room for reasonable doubt in the State's case against Ashcraft. During Huggard's cross examination, defense counsel elicited testimony that he originally thought the driver of the truck was Sorenson, that K9 dogs on the scene had not alerted on the truck, that no fingerprints were collected, that the drugs were not identified in a lab, that Chavez was also in the car with Ashcraft, and that the pink stun gun was of the type that is often marketed to women.

¶ 12 During closing arguments, Ashcraft's counsel urged the jury to avoid "preconceived notions" about Ashcraft. Counsel also went on to suggest that Sergeant Huggard had harbored "preconceived notions" against Ashcraft, as evidenced by his "speculating" that the man driving the truck was Sorenson. And the defense suggested that Huggard's preconceived notions had affected his "ability to perceive the circumstances."

¶ 13 In response to the notion that Huggard "had it out to get Mr. Ashcraft," the prosecutor asserted in closing that Huggard had "no ax to grind" and had "nothing to gain by that, neither does any police officer." Counsel also proceeded to assert that "[i]f a police officer were to make up stuff or do something like that, that's their career on the line," and that "Sergeant Huggard has nothing to gain by bringing in preconceived notions."

¶ 14 Later in the prosecutor's closing argument, he argued that the cash in Ashcraft's wallet should lead the jury to infer that he was in the business of selling the drugs found in the truck. The prosecutor asserted that he usually had only about ten dollars in his wallet at a time, as well as a debit card, "so for me to have $800 would be out of the ordinary." He then stated "I would submit that that's probably normal for most people, but I leave that to your personal experience."

¶ 15 The prosecutor also summed up the circumstantial evidence as a whole and argued that the jury should infer that Ashcraft was in possession of the contraband:

> Given that we had the nexus between the knife, having heroin, the bag having heroin, his activities, the amount of cash he had on him the amount of the pills that were in the bag, the State proceeded on what we had. And I would submit to you ***668** that [the] State has proven beyond a reasonable doubt that the defendant possessed these drugs with the intent to distribute them.

¶ 16 The jury convicted Ashcraft on all charges. He now appeals his convictions of possession of a controlled substance with intent to distribute, possession of drug paraphernalia, and possession of a dangerous weapon. [2]

II

¶ 17 Ashcraft's principal argument on appeal is a challenge to the sufficiency of the evidence to establish constructive possession. Alternatively, Ashcraft also challenges his convictions on the basis of alleged prosecutorial misconduct. We reject both sets of arguments and affirm.

A

[2] ¶ 18 On a sufficiency of the evidence claim we give substantial deference to the jury. We "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict." *State v. Nielsen*, 2014 UT 10, ¶ 46, 326 P.3d 645 (internal quotation marks omitted). Inferences may reasonably be drawn from circumstantial evidence. *Id.* ¶ 47. And a jury's inference is reasonable "unless it falls to a level of inconsistency or incredibility that no reasonable jury could accept." *State v. Maughan*, 2013 UT 37, ¶ 14, 305 P.3d 1058 (internal quotation marks omitted).

[3] **[4]** ¶ 19 For possession charges, the circumstantial evidence necessary to convict is evidence showing a "sufficient nexus between the accused and the [contraband] to permit an inference that the accused had both the power and the intent to exercise dominion and control over the

[contraband].” *State v. Fox*, 709 P.2d 316, 319 (Utah 1985). The analysis of the evidence under this standard depends “upon the facts and circumstances of each case.” *Id.* Yet our cases have identified some relevant considerations that a jury may consider. Those factors include “ownership and/or occupancy of the residence or vehicle”, presence of the defendant when the contraband is discovered, the defendant's proximity to the contraband, previous drug use by the defendant (if the contraband is drug-related), incriminating statements or behavior, and presence of contraband in a specific area where the defendant had control. *State v. Workman*, 2005 UT 66, ¶ 32, 122 P.3d 639.

[5] **[6]** ¶ 20 This is not an exhaustive list, and some factors may not be pertinent in all cases. *Id.* Certain factors, moreover, may be insufficient by themselves to establish possession as a matter of law. Ownership or occupancy of the premises where contraband is discovered, for example, may not be enough to show constructive possession by itself. *Fox*, 709 P.2d at 319.[3] That said, it is a rare case where the defendant's ownership or occupancy is truly the sole nexus with the contraband. In cases where there is additional evidence, including circumstantial evidence, that strengthens the nexus between ownership or occupancy and the contraband, the jury may consider those circumstances in drawing an inference of possession.[4]

***669** **[7]** ¶ 21 Ashcraft asserts that the only connection between him and the green bag was his occupancy of the truck. And he accordingly insists that the evidence is insufficient as a matter of law. We disagree. Here there is more than just evidence of occupancy of the vehicle. Several other considerations suggest a connection between Ashcraft and the green bag, and those considerations, taken together, establish a reasonable basis for a conclusion that Ashcraft was in possession of the contraband.[5] Ashcraft repeatedly drove through an area known for drug activity during late night and early morning hours, while carrying a large amount of cash. The bag was in close enough proximity that Ashcraft could have reached through the open window and touched it from the driver's seat. Ashcraft accused the arresting officer of planting the bag in the truck *immediately* upon being asked about it—and before it had been opened. And a substance, identified as heroin by the arresting officer, was found on the blade of the pocketknife he was carrying.

¶ 22 Each of these pieces of evidence would, taken on its own, be a slim basis for inferring possession. And each piece of evidence could have an innocent explanation. But cumulatively this evidence is sufficient to sustain a reasonable jury verdict. A reasonable jury could conclude from this evidence that there was a sufficient nexus between the bag and Ashcraft to establish the element of constructive possession. *See Workman*, 2005 UT 66, ¶ 35, 122 P.3d 639 (although individual factors “[t]aken alone” may be unlikely “to establish a sufficient nexus,” the “cumulative effect” of such factors may be “such that a reasonable jury could have concluded that there was a sufficient nexus” to establish constructive possession).

¶ 23 The dissent second-guesses the inferences adopted by the jury on individual pieces of evidence, while also declining to defer to the jury's assessment of the cumulative effect of the evidence as a whole. Specifically, the dissent dismisses any inference from Ashcraft's “late-night presence in an area known for drug activity with a large amount of cash” as “speculative,” *infra* ¶ 48; posits an alternative explanation for Ashcraft's incriminating accusation that the arresting officer had “planted” the bag, *infra* ¶ 49; and concludes that “it is mere speculation to assume that the contraband found in the green bag belonged to Mr. Ashcraft simply because he had a knife that contained a suspect residue.” *Infra* ¶ 50.

¶ 24 These are fair arguments for counsel to present to the jury in closing. But our review on appeal is different. The question presented is not whether we can conceive of alternative (innocent) inferences to draw from individual pieces of evidence, or even whether we would have reached the verdict embraced by the jury. It is simply whether the jury's verdict is reasonable in light of all of the evidence taken cumulatively, under a standard of review that yields deference to all reasonable inferences supporting the jury's verdict. We affirm on that basis.

¶ 25 We also reject a number of the dissent's arguments on their own terms. First, Ashcraft's incriminating statement need not “necessarily suggest” a connection to the bag to support the jury's verdict. *Infra* ¶ 49. ***670** And the fact that we can identify an “equally” plausible alternative inference is not nearly enough to set that verdict aside. *Infra* ¶ 49. The inference to be drawn from the evidence was the jury's to make (within reason), and the inference it apparently drew was reasonable—more so, in fact, than the notion that Ashcraft may have accused the officer of planting the bag because he knew the contents of the bag, knew it “belonged to Ms. Chavez or Mr. Sorenson,” and “intended to distance himself from it because he was aware of its contents.” *Infra* ¶ 49. Accusing a police officer of planting evidence is a brash

move. If Ashcraft knew that the bag contained contraband but wasn't its owner, surely he would have simply disclaimed ownership instead of accusing a police officer. At least that's the way the jury seems to have seen the matter, on a point meriting our deference on appeal. [6]

¶ 26 Second, there was more than "mere speculation" linking the substance on Ashcraft's knife to the "contraband found in the green bag." *Infra* ¶ 50. Officer Huggard testified, based on his experience and results of field tests, that the "brown caked tar[-]like powdery substance" on the blade of the knife and in some of the baggies in the green bag was consistent with heroin. So, despite the dissent's insistence to the contrary, there *was* "evidence that the substance on the knife was the same as the illicit substance in the green bag." *Infra* ¶ 50. And the evidence regarding Ashcraft's knife is accordingly supportive of the jury's determination of constructive possession.

¶ 27 This and other evidence in the case could be suspect if taken in isolation. But in light of the totality of the evidence taken as a whole, we conclude that there was sufficient evidence to sustain a verdict based on a determination of constructive possession. And in light of that evidence, we find it unnecessary to eliminate other reasonable inferences to be drawn from the evidence—such as the notion that Ashcraft may have had an innocent reason to be in an area known for drug activity with a large amount of cash late at night, *infra* ¶ 48, or that Chavez or Sorenson could have been the owner or possessor of the green bag, *infra* ¶ 51. The question presented is not whether some other (innocent) inference might have been reasonable. It is simply whether the inference adopted by the jury was sustainable. We conclude that it was and affirm on that basis.

¶ 28 In so doing, we acknowledge the lack of direct, forensic evidence tying Ashcraft to the contraband in question. As the dissent indicates, the record is devoid of fingerprint evidence tying Ashcraft to the contraband, of any of Ashcraft's "personal items ... intermingled with the items found in the green bag," or of "drugs on defendant's person" (other than the heroin residue on his knife). *Infra* ¶ 53. And it is certainly true that the results of further investigation might have weakened the prosecution's case. But it might also have strengthened it. And in any event those speculative prospects have nothing to do with the question before us. A reviewing court is not to measure the sufficiency of the evidence against a hypothetical—CSI-based—investigative ideal. Instead of imagining the evidence that *might have been* presented, we consider the evidence that *was* presented, and evaluate its sufficiency through a lens that gives the jury's verdict the benefit of all reasonable inferences. We find the evidence sufficient, and not undermined by speculation about further investigation that might have taken place. [7]

***671** ¶ 29 Ashcraft is also right to note that the evidence could alternatively have supported a determination that the contraband was connected to Sorenson and/or to Chavez. But that is likewise insufficient to undermine our confidence in the verdict. The alleged connection to alternative suspects was a fruitful source of cross-examination and argument to the jury. And as noted above, defense counsel in fact availed herself of this line of argument. Yet the jury was by no means compelled to accept the existence of reasonable doubt posited by the defense's finger-pointing, and in fact it did not accept the argument.

¶ 30 For all of these reasons, the jury made a reasonable inference that Ashcraft was in constructive possession of the green bag. We cannot disturb the jury's conclusion just because it *could have* reasonably come to a different one.

B

[8] **[9]** ¶ 31 Matters not in evidence cannot be properly considered by the jury. It is misconduct for the prosecutor to refer to such matters. *See State v. Hopkins*, 782 P.2d 475, 478 (Utah 1989). To sustain a reversal on an assertion of prosecutorial misconduct, a defendant must establish both that the prosecutor's conduct "call[ed] to the attention of the jurors matters they would not be justified in considering in determining their verdict and, under the circumstances of the particular case, the error is substantial and prejudicial." *State v. Tillman*, 750 P.2d 546, 555 (Utah 1987).

¶ 32 Ashcraft cites three instances of alleged misconduct in the prosecutor's closing argument. He asserts, specifically, that the prosecutor improperly vouched for the credibility of Huggard's testimony; that he vouched for the credibility of the evidence; and that he vouched for the strength of the State's case as a whole. And on each point Ashcraft asserts that the prosecution made reference to material not in the record.

[10] ¶ 33 A threshold question concerns preservation. The State urges us to decline to reach the merits of Ashcraft's claims on the ground that he failed to preserve a specific objection to each of the foregoing instances of alleged

"vouching." Upon review of the record we agree that there was no specific articulation of a basis for objecting to the prosecution's statements—only a general objection (without a basis or explanation) at the first mention of the notion that Huggard had "nothing to gain by bringing in preconceived notions." But we nonetheless proceed to the merits on the basis of an exception to the general requirement of preservation. We hold, specifically, that it would have been futile for Ashcraft to have preserved a specific objection in the district court, and on that basis we excuse him from his failure to do so. [8]

¶ 34 The basis for our determination of futility is this: After defense counsel asserted an initial, general objection to the prosecution's assertion that Huggard had "nothing to gain by bringing in preconceived notions," the district court interrupted and directed the prosecution to "go ahead," admonishing defense counsel with the assertion that "this is argument and you were given the benefit of ... silence." Under the circumstances and given the timing, tone, context, and content of the district court's response, we deem it reasonable for defense counsel to have viewed this response as an indication of the court's unwillingness to hear any further objection or explanation. And we accordingly ***672** deem such further objection or explanation sufficiently futile to excuse Ashcraft's failure to preserve a specific objection. [9]

[11] **[12]** **[13]** ¶ 35 That determination requires us to proceed to the merits of Aschraft's claims of prosecutorial misconduct. Initially, we acknowledge the impropriety of a prosecutor's "bolster[ing] a witness by vouching for his credibility." *State v. Carter*, 776 P.2d 886, 892 (Utah 1989) (internal quotation marks omitted). Such vouching is improper because it invites the jury to rely on matters outside the record. Yet the matter of *vouching* is not just inviting the jury to credit the testimony of the state's witness. That is standard operating procedure, and hardly misconduct. *Impermissible vouching*, on the other hand, occurs when the prosecution "place [s] the prestige of the government behind the witness by making explicit personal assurances of the witness' credibility," or "implicitly ... indicat [es] that information not presented to the jury supports the testimony." *Id.* (internal quotation marks omitted).

[14] ¶ 36 Under this framework, the prosecutor's statements about Huggard did not amount to impermissible vouching. First, the prosecutor made no explicit statement that he *personally* knew Huggard to be truthful. He did not ask the jury to take his word for it that Huggard was a credible witness. Such an argument would call the jury's attention to matters it is not "justified in considering in determining their verdict"—the prosecutor's *personal opinion* of a witness. Instead, the prosecutor, in direct response to defense counsel's argument that Huggard's perception of the events was undermined by "preconceived notions," urged the jury to view that argument skeptically. He did so by arguing that there was no reason to believe that Huggard or any officer would have had "preconceived notions" against suspects, and highlighted the lack of evidence showing that Huggard had an "ax to grind" against Ashcraft in particular.

¶ 37 Second, the prosecutor did not imply that he knew more about Huggard than the jurors did, or implore them to take such information into consideration in evaluating Huggard's testimony. Instead, this was a matter of *both* the prosecution and the defense urging the jury to evaluate the officer's credibility based on their own understanding of incentives generally facing the police—with the defense insisting that Huggard may have harbored "preconceived notions" against Ashcraft and asserting that such notions may have affected his "ability to perceive the circumstances," and the prosecution responding with the suggestion that an officer's "career [could be] on the line" if he "were to make up stuff or do something like that." This was not vouching through an allusion to information known to the prosecution but not in the record. It was an instance of both the defense and the prosecution seeking to urge the jury to assess the officer's credibility in a manner consistent with their respective positions—and in accordance with common-sense incentives and reasonable inferences generally known to the jury. That is permissible—and not at all a matter of vouching. *See State v. Bakalov*, 1999 UT 45, ¶ 59, 979 P.2d 799 (prosecution may "fully discuss with the jury reasonable inferences and deductions drawn from the evidence"); *Delacruz v. State*, 10 P.3d 1131, 1132–33 (Wyo.2000) (holding it was not prosecutorial misconduct to refer to the background of witnesses and argue that "[y]our common sense will tell you that ... they have no reason to come into this courtroom and orchestrate a lie," because the prosecutor was "simply asking the jury to apply common sense to the evidence it had heard").

[15] ¶ 38 For the same reason, it was permissible for the prosecutor to discuss the potential conclusions to be drawn from the ***673** cash in Ashcraft's wallet. The cash in Ashcraft's wallet may be subject to a reasonable inference that it was a result of drug activity—or, alternatively, a contrary inference that it was there for an innocent reason. But as it was up to the jury to make that inference, it was acceptable

for the prosecutor to discuss the matter, and to urge the jury to make an inference in the prosecution's favor. *Bakalov*, 1999 UT 45, ¶ 59, 979 P.2d 799. The prosecutor may have gone too far when he pressed this inference in terms of his own personal experience. But even if the comment about his own practices for carrying cash crossed a line, that comment was harmless, as the prosecutor immediately instructed the jury to rely on their own experience and not his own. *State v. Pearson*, 943 P.2d 1347, 1352–53 (Utah 1997) (holding that it was improper for a prosecutor to "offer[ ] a factual assertion based on his own experience" but that the statement was not reversible prosecutorial misconduct because he "made no effort to hold himself out as an expert, and he addressed matters that are within the general realm of human experience and common sense").

[16] ¶ 39 Finally, there was no prosecutorial misconduct in the prosecution's summary of the evidence and ultimate insistence that the State had proven Ashcraft's guilt beyond a reasonable doubt. This was nothing more than a summary assertion of the prosecution's quintessential position in closing argument. Such assertion did not venture into the forbidden territory of calling upon the jury to "trust the Government's judgment rather than [the jury's] own view of the evidence." *State v. Hopkins*, 782 P.2d 475, 480 (Utah 1989) (quoting *United States v. Young*, 470 U.S. 1, 18–19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). The prosecutor did not ask the jurors to defer to the state's judgment over their own. He simply summarized his position and the evidence supporting it and then asked the jury to enter a conviction. Such a statement is as commonplace as it is innocuous in closing argument—a matter well within the realm of appropriate prosecutorial conduct.

III

¶ 40 We affirm on the above grounds. We deem the evidence presented to the jury to be sufficient to sustain a reasonable inference of Ashcraft's constructive possession. And we find no basis for a determination of prosecutorial misconduct.

Justice PARRISH, dissenting:

¶ 41 I cannot join the court in affirming Mr. Ashcraft's conviction because the evidence is insufficient to establish that Mr. Ashcraft constructively possessed the drugs and paraphernalia found in Mr. Sorenson's truck. Under the court's reasoning, anyone who has the misfortune of occupying a vehicle in which illegal drugs are found is subject to conviction. That cannot be the law.

¶ 42 We "overturn a conviction for insufficient evidence when ... the evidence is insufficient to prove each element of the crime beyond a reasonable doubt." *State v. Fox*, 709 P.2d 316, 318 (Utah 1985). Although we review the evidence "in the light most favorable to the verdict," *State v. Nielsen*, 2014 UT 10, ¶ 30, 326 P.3d 645, we must overturn a conviction when "the evidence 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. Holgate*, 2000 UT 74, ¶ 18, 10 P.3d 346 (internal quotation marks omitted).

¶ 43 Because the evidence presented fails to establish a nexus between Mr. Ashcraft and the drugs and paraphernalia found in the green bag, I believe that a reasonable juror necessarily would have harbored some reasonable doubt as to Mr. Ashcraft's guilt. Accordingly, I would reverse his conviction.

¶ 44 Mr. Ashcraft was convicted of possessing a controlled substance with intent to distribute. *See* UTAH CODE § 58–37–8(1)(a)(iii). The State prosecuted Mr. Ashcraft on a theory of constructive possession, which requires a "sufficient nexus between the accused and the drug [or paraphernalia] ***674** to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug [or paraphernalia]." *State v. Layman*, 1999 UT 79, ¶ 13, 985 P.2d 911 (alterations in original) (internal quotation marks omitted). But mere proximity to the drugs or paraphernalia, without additional evidence of control and dominion, is insufficient to establish possession, especially when proximity is not exclusive. *See Fox*, 709 P.2d at 319.

¶ 45 The truck in which the contraband was found belonged to Mr. Sorenson. Indeed, Sergeant Huggard initially believed he was following and pulling over Mr. Sorenson. Sgt. Huggard learned Mr. Ashcraft was the driver only after pulling him over. At that time, the truck was also occupied by Ms. Chavez, who was sitting in the passenger seat. While following the truck and pulling Mr. Ashcraft over, Sgt. Huggard neither saw anyone place an item in the truck's bed nor put their hands out of the truck's back window. And it is inherently improbable that Mr. Ashcraft could have put his right-hand through the cab window to hide an item on the far-left side of the truck bed while maintaining control of the vehicle and avoiding detection by Sgt. Huggard.

¶ 46 During the initial search of the truck, Sgt. Huggard did not find any drugs or paraphernalia. Later, when the green bag was found, the contraband was tucked so far out of sight and was so inaccessible that a K–9 officer and dog did not detect it. The green bag contained a pink stun gun. Although Ms. Chavez had easier access to the green bag than Mr. Ashcraft, she was allowed to leave. Finally, despite the fact that three people had access to the green bag, the police did not conduct any forensic testing of the physical evidence. These facts raise serious questions as to whether Mr. Ashcraft had any knowledge of the green bag's existence, and even more serious questions about whether he exercised dominion and control of it.

¶ 47 The majority acknowledges that there is no evidence directly linking Mr. Ashcraft to the illicit drugs. It instead relies on three inferences to create the necessary nexus. These are Mr. Ashcraft's presence in an area known for drug activity while carrying a large amount of cash, Mr. Ashcraft's allegedly incriminating statement to the police, and Mr. Ashcraft's possession of a knife with a brown substance on it. But if these inferences are sufficient to support a conviction based on constructive possession, there is no practical limit to the concept of constructive possession when applied to someone in nonexclusive proximity to illegal drugs or paraphernalia.

¶ 48 Mr. Ashcraft's late-night presence in an area known for drug activity with a large amount of cash creates no nexus between him and the items in the green bag. Instead, it raises only a speculative possibility of Mr. Ashcraft's intent to distribute drugs. And Ms. Chavez was seen in the truck both nights, while Mr. Ashcraft may have been driving the truck on only the second night. In short, Mr. Ashcraft's late-night presence in a questionable neighborhood when the other possible possessors were also present cannot give rise to the inference that the drugs belonged to Mr. Ashcraft.

¶ 49 The court construes Mr. Ashcraft's accusation that the arresting officer planted the green bag "*immediately* upon being asked about it" as an incriminating statement. *Supra* ¶ 21. But this statement is consistent with Mr. Ashcraft's other statements disclaiming ownership of the bag and does not necessarily suggest a knowledge of its contents. Indeed, it is equally consistent with the possibility that the bag in fact belonged to Ms. Chavez or Mr. Sorenson and that Mr. Ashcraft intended to distance himself from it because he suspected its contents. Mr. Ashcraft's allegedly incriminating statement is much different from the statements on which we have relied in other cases where incriminating behavior or statements gave rise to an inference of constructive possession. *Fox*, 709 P.2d at 319 (citing *United States v. Garcia*, 655 F.2d 59, 62 (5th Cir.1981) (noting that defendant nodded affirmatively when introduced as owner of cocaine); *Francis v. State*, 410 So.2d 469, 471 (Ala.Crim.App.1982) (noting that the defendant slammed a door in the face of police and yelled, "throw it in the fire"); *Allen v. State*, 158 Ga.App. 691, 282 S.E.2d 126, 127 (1981) ***675** (noting that the defendant told an unnamed individual that the defendant had $500 worth of marijuana)).

¶ 50 The brown substance on Mr. Ashcraft's knife is similarly insufficient to link him to the green bag. Even if the substance were an opiate-derivative, it is mere speculation to assume that the contraband found in the green bag belonged to Mr. Ashcraft simply because he had a knife that contained a suspect residue. And such speculation is insufficient to overcome reasonable doubt as to the ownership of the green bag. In my view, no nexus between the knife and green bag could be drawn absent some evidence that the substance on the knife was the same as the illicit substance in the green bag. But the State presented no such evidence. While the State may have charged Mr. Ashcraft with possession of drug paraphernalia based on the substance on the knife, the knife itself is not evidence that Mr. Ashcraft committed the separate crime of possessing the green bag. Without some evidence linking Mr. Ashcraft to the drugs, it is a fallacy to infer that he possessed and intended to distribute drugs just because he was driving a borrowed truck in a questionable neighborhood late at night, carrying cash.

¶ 51 Mr. Ashcraft shared possession of the vehicle with two other individuals. Accordingly, in order to support a verdict of guilt, the inferences relied on by the State must either exclude the other individuals as possible possessors or point to Mr. Ashcraft as the possessor of the contraband. *See Fox*, 709 P.2d at 320 ("[E]vidence supporting the theory of 'constructive possession' must raise a reasonable inference that the defendant was engaged in a criminal enterprise and not simply a bystander."); *State v. Salas*, 820 P.2d 1386, 1388 (Utah Ct.App.1991) ("In order to find that the accused was in possession of drugs found in an automobile he was not the sole occupant of, and did not have sole access to, there must be other evidence to buttress such an inference."). Without evidence creating a nexus between Mr. Ashcraft and the drugs, or excluding the other two possible possessors, Mr.

Ashcraft may be serving a sentence for the criminal activity of others.

¶ 52 I acknowledge that the evidence presented at trial may have been sufficient to sustain a conviction if Mr. Ashcraft had exclusive possession of the vehicle. But he did not. The vehicle was actually owned by and registered to Mr. Sorenson, a suspected drug dealer. And the State did not dispute that Mr. Ashcraft had borrowed the truck when Mr. Sorenson was hospitalized. While the contraband was theoretically within reach of Mr. Ashcraft, the officer did not see him reach into the back of the truck. More importantly, the contraband was also in reach of Ms. Chavez, but the police did not bother to question or search her. *See Salas,* 820 P.2d at 1388 (acknowledging that drugs found where a passenger had been sitting "renders the remaining evidence sufficiently inconclusive as to whether defendant knew of the presence of the cocaine"). In short, the evidence does not link Mr. Ashcraft with the contents of the green bag, nor does it exclude Mr. Sorenson or Ms. Chavez as the owner. In my view, the inferences on which the majority relies are simply insufficient to establish beyond a reasonable doubt that Mr. Ashcraft exercised dominion and control over the green bag.

¶ 53 The State's failure to offer any direct evidence linking Mr. Ashcraft to the green bag also speaks volumes. Although I agree with the court that we must not "imagin[e] the evidence that might have been presented," *supra* ¶ 28 (emphasis omitted), it is nonetheless helpful to identify the lacking evidence that may have supported a finding of constructive possession. Here, the State did not present any evidence "linking or tending to link" Mr. Ashcraft with the drugs, including, "sale of drugs, use of drugs, ... drugs in plain view, and drugs on defendant's person." *Salas,* 820 P.2d at 1388. His personal items were not intermingled with the items found in the green bag. *See State v. Workman,* 2005 UT 66, ¶ 34, 122 P.3d 639. And the State presented "no forensic evidence tying" Mr. Ashcraft to the green bag, such as fingerprints or drug-testing of the knife and heroin inside the green bag. *See State v. Gonzalez–Camargo,* 2012 UT App 366, ¶ 24, 293 P.3d 1121. Finally, the State ***676** made no attempt to determine whether Ms. Chavez was the owner of the green bag.

¶ 54 In my view, this case rests exclusively on Mr. Ashcraft's proximity to drugs; the inferences on which the State relies are insufficient to give rise to the inference that Mr. Ashcraft constructively possessed the green bag. Accordingly, I would reverse his conviction.

All Citations

349 P.3d 664, 779 Utah Adv. Rep. 48, 2015 UT 5

Footnotes

1 When reviewing a sufficiency of the evidence claim, we must take the "evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." *State v. Nielsen,* 2014 UT 10, ¶ 30, 326 P.3d 645 (internal quotation marks omitted). Thus, although Ashcraft disagrees with these factual circumstances in some respects, and in particular the deductions to be made from them, we recite the version of the events supporting the jury's verdict.

2 Ashcraft does not appeal his convictions for driving on a suspended license, having an open container in a vehicle, and failure to signal.

3 This rule is a sensible one as far as it goes; if the *only* connection between a defendant and the contraband is bare title or mere occupancy of the area in which it is found, there may be substantial room for reasonable doubt as to whether the contraband belongs to the defendant. Such doubt may be especially substantial where other people with access to the area could have placed the contraband in the home or vehicle without the owner's knowledge, and thus the owner would have no "power and intent to exercise dominion and control" over it. *State v. Fox,* 709 P.2d 316, 320 (Utah 1985). But the general principle is hardly a hard-and-fast rule, and this case falls outside it for reasons noted here.

4 *See, e.g., State v. Workman,* 2005 UT 66, ¶ 34 122 P.3d 639 (defendant who co-occupied an apartment with a meth lab also had belongings intermingled with lab equipment, a history of methamphetamine use, purchased some containers and glassware used in the lab, and left a fingerprint on one of the containers); *State v. Hansen,* 732 P.2d 127, 132 (Utah 1987) (defendant argued his only connection to marijuana was co-occupancy of an apartment, but he possessed drug paraphernalia, the drugs were found in a locked box in his room under his clothing, and he possessed the key to the box); *Fox,* 709 P.2d at 320 (evidence of ownership of a home plus several large greenhouses of marijuana constructed in close proximity to the home, ownership of other drug paraphernalia and instruction books for growing marijuana, and marijuana in such a large volume it was reasonable to conclude it must have been grown for distribution).

5 The dissent's contrary conclusion is based in part on a misreading of our opinion. We do not conclude that "anyone who has the misfortune of occupying a vehicle in which illegal drugs are found is subject to conviction." *Infra* ¶ 41. Our analysis is more nuanced; it is based on our sense of the cumulative effect of the evidence presented to the jury, and on our conclusion that a reasonable jury could find constructive possession under these circumstances. It is one thing to disagree with that conclusion—to assert that the evidence raises "serious questions" as to whether Ashcraft "exercised dominion and control" over the green bag. *Infra* ¶ 46. It is misleading, however, to assert that the court has adopted a legal rule that requires a finding of constructive possession in any case in which the defendant is "in non-exclusive proximity to illegal drugs or paraphernalia." *Infra* ¶ 41 (insisting that that "cannot be the law"); *see also infra* ¶ 47 (asserting that "there is no practical limit to the concept of constructive possession when applied to someone in non-exclusive proximity to illegal drugs or paraphernalia"). That is not the basis of our holding.

6 The dissent also seeks to diminish the significance of this inference on the ground that "Ashcraft's allegedly incriminating statement is different from the statements on which we have relied in other cases where incriminating behavior or statements gave rise to an inference of constructive possession." *Infra* ¶ 49 (citing cases from other jurisdictions crediting incriminating statements of defendants accused of constructive possession). But the cited cases are not ours, and in any event they do not purport to establish any sort of floor or minimum basis for crediting a defendant's statement as incriminating. That is a question of fact, not law. And it is a question on which the jury is entitled to deference in the context of the evidence as a whole in this case, and not by comparison to the record in other cases.

7 The dissent concedes that our role is not to imagine "the evidence that might have been presented." *Infra* ¶ 53. But it then proceeds to insist that it is still somehow "helpful to identify the lacking evidence that may have supported a finding of constructive possession." *Infra* ¶ 53. We see no benefit to that imaginative comparison. The question presented is not how this prosecution stacks up against a hypothetical ideal. It is simply to evaluate the evidence that was presented, against a deferential standard of review yielding the benefit of the doubt to the jury's verdict.

8 *See Roundy v. Staley,* 1999 UT App 229, ¶ 6, 984 P.2d 404 (failure to preserve evidentiary objection excused where district court unequivocally stated that videotape evidence would be admitted, making "further objection to the admission of [the evidence] ... futile"); *People ex rel. Klaeren v. Vill. of Lisle,* 202 Ill.2d 164, 269 Ill.Dec. 426, 781 N.E.2d 223, 231 (2002) ("[T]here is no need to object when it is apparent that an objection would be futile."); *Staubes v. City of Folly Beach,* 339 S.C. 406, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

9 In so holding, we do not mean to suggest that further objection would always be futile any time a trial judge overrules an objection in a manner cutting off the opportunity for further explanation. The question of futility is highly context-dependent and case-specific—turning not just on the trial court's decision but on its timing, tone, and content. Here our decision is based not only on the nature and timing of the district court's decision but on the tone of the admonition that followed it, which seemed to suggest that further objections would not be tolerated to the extent they would deprive the prosecution of the "benefit of ... silence" that was afforded to the defense.

Tab 7

CR304B Reckless as to Result.

A person acts "recklessly" when [he][she] is aware of a substantial and unjustifiable risk that [his] [her] conduct will cause a particular result, but [he] [she] consciously disregards the risk and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

"Conduct" means either an act or an omission.

References

Utah Code § 76-2-103(3).

Committee Notes

This instruction should be given for crimes in which the element of the defendant's recklessness goes to the result of his or her conduct. *See*, e.g., Utah Code §§ 76-5-203(2)(a), murder; 76-5-109(2)(a), child abuse; and 76-5-301, kidnapping.

Committee Amended:

September 2015.

CR303B Knowledge as to Result.

A person acts ["knowingly"] ["with knowledge"] when the person is aware that [his] [her] conduct is reasonably certain to cause a particular result.

"Conduct" means either an act or an omission.

References

Utah Code § 76-2-103(2).
State v. Graham, 2006 UT 43, ¶20, 143 P.3d 268.
Gardner v. Galetka, 2004 UT 42, ¶3, 94 P.3d 263.

Committee Notes

This instruction should be given for crimes in which the element of the defendant's knowledge goes to the result of his or her conduct. *See*, e.g., Utah Code §§ 76-5-203(2)(a), murder; 76-5-109(2)(a), child abuse; and 76-5-301, kidnapping.

The committee recognizes that this is not verbatim the instruction discussed by the Utah Supreme Court in *Gardner v. Galetka*, 2004 UT 42, 94 P.3d 263, but it feels this instruction adequately and more directly addresses the concept for crimes that require that the defendant knowingly cause a result. The committee also feels that it is inherent in the concept of knowingly causing a result that a defendant is aware of the nature of his conduct or the existing circumstances.

Committee Amended:

September 2015.

76-2-103 Definitions.

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Amended by Chapter 229, 2007 General Session

76-5-203 Murder.

(1) As used in this section, "predicate offense" means:

(a) a clandestine drug lab violation under Section 58-37d-4 or 58-37d-5;

(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;

(c) kidnapping under Section 76-5-301;

(d) child kidnapping under Section 76-5-301.1;

(e) aggravated kidnapping under Section 76-5-302;

(f) rape of a child under Section 76-5-402.1;

(g) object rape of a child under Section 76-5-402.3;

(h) sodomy upon a child under Section 76-5-403.1;

(i) forcible sexual abuse under Section 76-5-404;

(j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;

(k) rape under Section 76-5-402;

(l) object rape under Section 76-5-402.2;

(m)forcible sodomy under Section 76-5-403;

(n) aggravated sexual assault under Section 76-5-405;

(o) arson under Section 76-6-102;

(p) aggravated arson under Section 76-6-103;

(q) burglary under Section 76-6-202;

(r) aggravated burglary under Section 76-6-203;

(s) robbery under Section 76-6-301;

(t) aggravated robbery under Section 76-6-302;

(u) escape or aggravated escape under Section 76-8-309; or

(v) a felony violation of Section 76-10-508 or 76-10-508.1 regarding discharge of a firearm or dangerous weapon.

(2) Criminal homicide constitutes murder if:

a. the actor intentionally or knowingly causes the death of another;

b. intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
c. acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
d.
    i. the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;
    ii. a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and
    iii. the actor acted with the intent required as an element of the predicate offense;
e. the actor recklessly causes the death of a peace officer or military service member in uniform while in the commission or attempted commission of:
    i. an assault against a peace officer under Section 76-5-102.4;
    ii. interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer; or
    iii. an assault against a military service member in uniform under Section 76-5-102.4;
f. commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(4); or
g. the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

(3)

(a) Murder is a first degree felony.
(b) A person who is convicted of murder shall be sentenced to imprisonment for an indeterminate term of not less than 15 years and which may be for life.

(4)

(a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.
(b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.
(c) This affirmative defense reduces charges only from:
    (i). murder to manslaughter; and
    (ii). attempted murder to attempted manslaughter.

(5)

(a) Any predicate offense described in Subsection (1) that constitutes a separate offense does not merge with the crime of murder.
(b) A person who is convicted of murder, based on a predicate offense described in Subsection (1) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Amended by Chapter 125, 2009 General Session
Amended by Chapter 206, 2009 General Session

Effective 5/12/2015

76-5-109 Child abuse -- Child abandonment.

(1) As used in this section:

(a) “Child” means a human being who is under 18 years of age.

(b)

(i) “Child abandonment” means that a parent or legal guardian of a child:

(A) intentionally ceases to maintain physical custody of the child;

(B) intentionally fails to make reasonable arrangements for the safety, care, and physical custody of the child; and

(C)

(I) intentionally fails to provide the child with food, shelter, or clothing;

(II) manifests an intent to permanently not resume physical custody of the child; or

(III) for a period of at least 30 days:

(Aa) intentionally fails to resume physical custody of the child; and

(Bb) fails to manifest a genuine intent to resume physical custody of the child.

(ii) “Child abandonment” does not include:

(A) safe relinquishment of a child pursuant to the provisions of Section 62A-4a-802; or

(B) giving legal consent to a court order for termination of parental rights:

(I) in a legal adoption proceeding; or

(II) in a case where a petition for the termination of parental rights, or the termination of a guardianship, has been filed.

(c) “Child abuse” means any offense described in Subsection (2), (3), or (4) or in Section 76-5-109.1.

(d) “Enterprise” is as defined in Section 76-10-1602.

(e) “Physical injury” means an injury to or condition of a child which impairs the physical condition of the child, including:

(i) a bruise or other contusion of the skin;

(ii) a minor laceration or abrasion;

(iii) failure to thrive or malnutrition; or

(iv) any other condition which imperils the child’s health or welfare and which is not a serious physical injury as defined in Subsection (1)(f).

(f)

(i) “Serious physical injury” means any physical injury or set of injuries that:

(A) seriously impairs the child’s health;

(B) involves physical torture;

(C) causes serious emotional harm to the child; or

(D) involves a substantial risk of death to the child.

(ii) “Serious physical injury” includes:

(A) fracture of any bone or bones;

(B) intracranial bleeding, swelling or contusion of the brain, whether caused by blows, shaking, or causing the child’s head to impact with an object or surface;

(C) any burn, including burns inflicted by hot water, or those caused by placing a hot object upon the skin or body of the child;

(D) any injury caused by use of a dangerous weapon as defined in Section 76-1-601;

(E) any combination of two or more physical injuries inflicted by the same person, either at the same time or on different occasions;

(F) any damage to internal organs of the body;

(G) any conduct toward a child that results in severe emotional harm, severe developmental delay or intellectual disability, or severe impairment of the child’s ability to function;

(H) any injury that creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ;

(I) any conduct that causes a child to cease breathing, even if resuscitation is successful

following the conduct; or
(J) any conduct that results in starvation or failure to thrive or malnutrition that jeopardizes the child's life.

(2) Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:
(a) if done intentionally or knowingly, the offense is a felony of the second degree;
(b) if done recklessly, the offense is a felony of the third degree; or
(c) if done with criminal negligence, the offense is a class A misdemeanor.

(3) Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows:
(a) if done intentionally or knowingly, the offense is a class A misdemeanor;
(b) if done recklessly, the offense is a class B misdemeanor; or
(c) if done with criminal negligence, the offense is a class C misdemeanor.

(4) A person who commits child abandonment, or encourages or causes another to commit child abandonment, or an enterprise that encourages, commands, or causes another to commit child abandonment, is:
(a) except as provided in Subsection (4)(b), guilty of a felony of the third degree; or
(b) guilty of a felony of the second degree, if, as a result of the child abandonment:
(i) the child suffers a serious physical injury; or
(ii) the person or enterprise receives, directly or indirectly, any benefit.

(5)
(a) In addition to the penalty described in Subsection (4)(b), the court may order the person or enterprise described in Subsection (4)(b)(ii) to pay the costs of investigating and prosecuting the offense and the costs of securing any forfeiture provided for under Subsection (5)(b).
(b) Any tangible or pecuniary benefit received under Subsection (4)(b)(ii) is subject to criminal or civil forfeiture pursuant to Title 24, Forfeiture and Disposition of Property Act.

(6) A parent or legal guardian who provides a child with treatment by spiritual means alone through prayer, in lieu of medical treatment, in accordance with the tenets and practices of an established church or religious denomination of which the parent or legal guardian is a member or adherent shall not, for that reason alone, be considered to have committed an offense under this section.

(7) A parent or guardian of a child does not violate this section by selecting a treatment option for the medical condition of the child, if the treatment option is one that a reasonable parent or guardian would believe to be in the best interest of the child.

(8) A person is not guilty of an offense under this section for conduct that constitutes:
(a) reasonable discipline or management of a child, including withholding privileges;
(b) conduct described in Section 76-2-401; or
(c) the use of reasonable and necessary physical restraint or force on a child:
(i) in self-defense;
(ii) in defense of others;
(iii) to protect the child; or
(iv) to remove a weapon in the possession of a child for any of the reasons described in Subsections (8)(c)(i) through (iii).

Amended by Chapter 258, 2015 General Session

76-5-301. Kidnapping.

(1) An actor commits kidnapping if the actor intentionally or knowingly, without authority of law, and against the will of the victim:
(a) detains or restrains the victim for any substantial period of time;

(b) detains or restrains the victim in circumstances exposing the victim to risk of bodily injury;

(c) holds the victim in involuntary servitude;

(d) detains or restrains a minor without the consent of the minor's parent or legal guardian or the consent of a person acting in loco parentis, if the minor is 14 years of age or older but younger than 18 years of age; or

(e) moves the victim any substantial distance or across a state line.

(2) As used in this section, acting "against the will of the victim" includes acting without the consent of the legal guardian or custodian of a victim who is a mentally incompetent person.

(3) Kidnapping is a second degree felony.

Amended by Chapter 301, 2001 General Session