

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20030371-CA	
v.)		
)	F I L E D	
Randy Shea Gardner,)	(January 26, 2006)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2006 UT App 21</td></tr></table>	2006 UT App 21
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Third District, West Valley Department, 011103725
The Honorable Terry L. Christiansen

Attorneys: Margaret P. Lindsay, Orem, and Patrick V. Lindsay,
 Provo, for Appellant
 Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
 City, for Appellee

Before Judges Bench, Billings, and Thorne.

PER CURIAM:

Randy Shea Gardner appeals his conviction of arranging for the distribution of a controlled substance. He asserts that his conviction should be reversed and the case remanded for a new trial because the record is insufficient for a meaningful appeal. He also argues that a jury instruction was in error.

Criminal defendants have the right to a "record of sufficient completeness to permit proper consideration of [their] claims." State v. Menzies, 845 P.2d 220, 241 (Utah 1992) (internal quotations and citation omitted). They do not, however, have a right to a perfect transcript. See id. Rather, the record must be adequate to allow meaningful judicial review. See id.

"Due process requires that there be a record adequate to review specific claims of error already raised." West Valley City v. Roberts, 1999 UT App 358, ¶11, 993 P.2d 252 (internal quotations and citation omitted). Appellate courts will not presume error where a record is incomplete. See id. A lack of a complete record will be a "basis for remand and a new hearing only where: (1) the absence or incompleteness of the record

prejudices the appellant; (2) the record cannot be satisfactorily reconstructed (i.e., by affidavits or other documentary evidence); and, (3) the appellant timely requests the relevant portion of the record." Id.

An incomplete record may necessitate a new trial where a defendant shows that a specific error is asserted and that the missing record was critical to its resolution. See State v. Russell, 917 P.2d 557, 559 (Utah Ct. App. 1996). A defendant is not entitled to a new trial whenever there is a gap in the record, "just in case the missing record might reveal some error." Id. Rather, a showing of prejudice is required. See id. Gardner has not shown that the gap in the record has prejudiced him.

Gardner asserts that the record on appeal is inadequate to determine whether there was sufficient evidence to support his conviction. He argues that the absence of the cross-examination testimony of Leland Clark means that this court cannot review whether there was sufficient evidence to show the "lack of entrapment." However, the record on appeal is complete enough to determine whether Gardner freely and voluntarily committed the acts in question because the State's case-in-chief is complete and the missing testimony would, at most, be inconsistent or contrary evidence.

A conviction may be overturned for insufficiency of evidence only "when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime." State v. Boyd, 2001 UT 30, ¶13, 25 P.3d 985 (quotations and citation omitted). Moreover, "[i]t is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses." Id. at ¶16. "When reviewing a trial wherein conflicting competent evidence was presented, we simply 'assume that the jury believed the evidence supporting the verdict.'" Id. at ¶14 (quoting State v. Dunn, 850 P.2d 1201, 1213 (Utah 1993)). Ultimately, in determining the sufficiency of the evidence, "so long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." Id. at ¶16.

The record is complete enough to determine that the State presented sufficient evidence for a jury to find that Gardner acted freely and voluntarily, and was not entrapped into committing the offense. The evidence showed that Gardner initiated the plan of bringing drugs into the prison, lacking only an outside supplier. Gardner demonstrated his willingness to participate in this enterprise. Kevin Pepper provided Gardner

the opportunity to commit the offense by posing as an outside supplier, with Clark passing on certain contact information to Gardner. The phone conversations between Gardner and Pepper show no hesitation or confusion from Gardner in participating in a drug distribution agreement.

Even assuming that Clark's cross-examination testimony supported Gardner's defense that he was entrapped into committing the offense due to concern for his own safety and concern for a friend's financial circumstances, the testimony would present only inconsistent evidence, which the jury obviously chose not to believe. There is testimony from Clark stating that Gardner initiated the idea of bringing drugs into prison, and testimony from Pepper regarding the further arrangements. Where conflicting evidence is presented at trial, appellate courts "simply assume that the jury believed the evidence supporting the verdict." Id. at ¶14 (internal quotations and citation omitted). Given the evidence supporting the verdict, the presumption is that the jury simply did not give any significant weight to any possible testimony from Clark that would have supported entrapment. As a result, Gardner has not shown any prejudice due to the missing portion of the record.

Gardner also argues that the missing testimony is necessary to identify any other possible errors at trial. However, a defendant is not entitled to a new trial whenever a gap in the record exists just in case the gap may contain some error. See State v. Russell, 917 P.2d 557, 559 (Utah Ct. App. 1996). Gardner overstates Russell as mandating reversal where a record is incomplete. In fact, Russell held that an incomplete record does not on its own require a new trial. See id. The court noted that Utah law "does not require a complete record so appellate counsel can go fishing for error; it only requires that there be a record adequate to review specific claims of error already raised." Id.

Gardner also asserts that the trial court erred in giving an instruction regarding the elements of entrapment. When challenging jury instructions on appeal, an appellant "cannot take advantage of an error committed at trial when that [appellant] led the trial court into committing the error." State v. Geukgeuzian, 2004 UT 16, ¶9, 86 P.3d 742 (quotations and citation omitted). As a result, a jury instruction may not be assigned as error "'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" Id. (quoting State v. Hamilton, 2003 UT 22, ¶54, 70 P.3d 111). Counsel affirmatively represented to the trial court that he had no objection to the

specific instruction now appealed. Thus, Gardner is precluded from challenging this instruction on appeal.

Accordingly, Gardner's conviction is affirmed.

Russell W. Bench,
Presiding Judge

Judith M. Billings, Judge

William A. Thorne Jr., Judge