

1997

# State of Utah v. Roger Shame Mazanares; Eldmer Randolph Mondragon, Jr.; Carlos Valdamare Ortiz : Reply Brief

Utah Court of Appeals

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## Recommended Citation

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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STATE OF UTAH,

Plaintiff/Appellee,

vs.

ROGER SHANE MAZANARES;  
ELMER RANDOLPH MONDRAGON, JR.;  
CARLOS VALDAMARE ORTIZ,

Defendant/Appellant.

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\* Appellate No. 970606-CA  
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\* Priority No. 2  
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**REPLY BRIEF OF DEFENDANT/APPELLANTS CONSOLIDATED APPEAL**

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Third District Court, Tooele County, State of Utah  
District Court Case No.: 961000172-3 & 4  
Honorable Judge John A. Rokich presiding

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**UTAH COURT OF APPEALS  
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ATTORNEY FOR APPELLANTS

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COURT OF APPEALS

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## ARGUMENT

### **I. DEFENDANTS DID TIMELY OBJECT TO DEPUTY STIDHAM'S REBUTTAL TESTIMONY AND DID NOT WAIVE THEIR CLAIM TO PROSECUTORIAL MISCONDUCT.**

The State claims that the Defendants waived their claim of prosecutorial misconduct because they did not object in a timely fashion and did not have the Judge give a curative instruction to the jury to disregard Deputy Stidham's rebuttal testimony.

The trial court found that Defendants did object in a timely fashion (Supplemental Transcript Page 4 Lines 2-3) and agreed that Deputy Stidham's rebuttal testimony was prejudicial. (Supplemental Transcript Page 3 Line 22-23). Furthermore, the record contains no indication of any objection by the State regarding the timeliness of the Defendant's objection. Because the State did not raise the question of a timely objection in the form of an objection of its own at the trial level, it waived any such objection on appeal. State vs. Winward, 941 P.2d 627, 633 (Utah App. 1997).

After sustaining Defendants' objection, the Judge stated that if he were to instruct the jury to ignore his (Deputy Stidham's) testimony that it would call more attention to it. (Supplemental Transcript Page 4 Lines 8-10). Thus, the Defendants decided, and the judge agreed, that the least prejudicial means of proceeding was to cross-examine Deputy Stidham as a rebuttal witness.

The State cites State vs. Winward, 941 P.2d 627, 633 (Utah App. 1997), as authority that Defendant must enter a timely objection. Defendants agree. In the present case the Court accepted the Defendants' objection as timely, sustained it and informed the State that they could not ask Deputy Stidham any more questions. (Supplement Transcript Page 4 Lines 4-6).

Furthermore, it is unconscionable for the State to engage in intentional prosecutorial misconduct and intentional disregard of the Court's exclusionary order and then claim waiver on the part of the Defendants. (See Exclusionary Argument Transcripts, Page 6 Lines 2-15). The State intentionally caused the error in order to influence the jury.

The State cites on State vs. Anderson, 929 P.2d 1107, 1109 (Utah 1996) as authority that Defendants waived their appeal rights. Anderson is not applicable in this case because in Anderson the Defendant's attorney consciously choose not to object and thereby, waived the objection. There was no waiver of the objection in this case.

## **II. THE STATE'S RECORD MUST BE INCOMPLETE IN THE DEFENDANTS' CASE**

The State claims that the Defendants provide no record to support their claim regarding Defendants' objection to evidence regarding Mondragon's "Adult Count" and thus, have no appeal. It appears that the State has failed to obtain all of the transcripts on

the Defendants' case. The transcript from the "in chambers" hearing is entitled "IN CHAMBERS". The specific pages dealing with Defendants' objection to evidence of an adult count being introduced is (In Chambers, page 7-17). These transcripts are part of the Court's record and clearly demonstrate that the Court sustained Defendants' objection.

**III. THE STATE COMMITTED REVERSIBLE ERROR WHEN IT EXCEEDED THE SCOPE OF DIRECT EXAMINATION.**

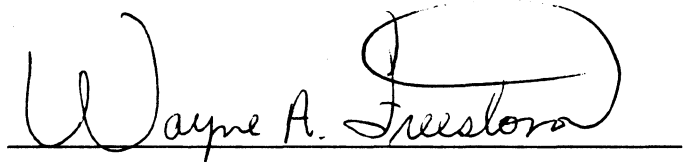
The State claims that since Defendant Ortiz admitted his gang involvement during cross-examination, the State did not commit prejudicial error when it went beyond the scope of direct examination to elicit from Ms. Ortiz that her son was involved in a gang. The State's questioning Mrs. Ortiz about her son's gang involvement is more prejudicial to the jury than the Defendant admitting that he is involved in a gang. Her testimony not only corroborate the Defendants but appears to be more credible because she is his mother. Irrespective of the degree of prejudice, that State committed misconduct in its questioning of Defendant Ortiz's mother beyond the scope of direct examination and did so in an attempt to prejudice the jury against the Defendants. Thus, the Defendants' claim of the State's misconduct should be reviewed by the court.



**CONCLUSION**

Based upon the foregoing, the Defendants/Appellants respectfully requests that the Court find that their rights were violated by the prosecutorial misconduct of the State.

DATED this 6 day of March, 1998.

A handwritten signature in cursive script that reads "Wayne A. Freestone". The signature is written in black ink and is positioned above a solid horizontal line.

**Wayne A. Freestone**  
**Attorney for Defendants/Appellants**

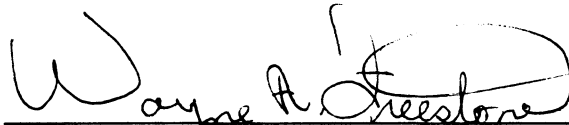
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DATED this 6 day of March, 1998.

A handwritten signature in black ink that reads "Wayne A. Freestone". The signature is written in a cursive style with a large, looped initial "W".

Wayne A. Freestone  
Attorney for Defendants/Appellants