2015

State of Utah, Plaintiff/Appellee, v. Rick Jimenez, Defendant/ Appellant : Appellant's Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. RICK JIMENEZ, Defendant/Appellant.	Case No. 20140841-CA Appellant is incarcerated

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for one count of burglary, a second degree felony, Utah Code § 76-6-202, in the Third Judicial District, Salt Lake County, Utah, the Honorable Denise Lindberg presiding.

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INTRODUCTION

As required by Utah Rule of Appellate Procedure 24(c), this reply brief is "limited to answering any new matter set forth in the opposing brief." The brief does not restate arguments from the opening brief or address matters that do not merit reply.

ARGUMENT

I. The Medical Records Were Relevant and Timely.

The State's initial trial objection was relevance. R. 178:165. And the trial court's primary rationale for excluding the evidence was timeliness. R. 178:170. These issues are largely abandoned in the State's brief.

The State does argue that "the trial court's denying Defendant's midtrial request to redact the records and admit the redacted records, was 'well within its power to manage the trial process.'" State's Brief (SB) 15 n.4 (quoting *State v. Clopten*, 2015 UT 82, ¶ 15, _ P.3d _). In support it cites *Clopten*, which addressed a different issue — whether

counsel could bring a "witness on the stand merely to refuse to testify." *Clopten*, 2015 UT 82, ¶ 15. The State also cites a case addressing a situation where the court advised the prosecutor on the consequences of moving for a mistrial. SB 15 n.4 (citing *State v. Parsons*, 781 P.2d 1275, 1282 (Utah 1989)). The State does not and could not argue that evidence becomes inadmissible when counsel offers to simplify it based on opposing counsel's midtrial objection. The court can manage the proceedings and set deadlines, but it has no managerial authority to keep out the defense's evidence. As argued in the opening brief, the offer to redact or simplify the records came in response to the prosecutor's unanticipated midtrial objection to evidence the defense had provided to the prosecution earlier. Opening Brief (OB) 16-17 (citing R. 178:171-74).

II. The Medical Records Were Highly Probative.

The State argues that the medical records were not probative because Mr. Jimenez last visited his doctor months before the burglary. SB 15. But the testimony Mr. Jimenez wanted to substantiate was that he had a long-term, deteriorative condition. R. 178:190-95. The time of his last visit was not important to the issue he wished to establish. In fact, older records were more probative because they established that Mr. Jimenez had long complained of back pain and received medical treatment for herniated disks, crushed vertebrae, torn tendons, and sciatic nerve issues. R. 178:190. The records established that he received frequent treatment for his physical condition and walked with a cane. R. 178:190-92; *accord People v. Smith*, 195 A.D. 265, 266 (N.Y. App. Div. 1993) (reversing because "appellate was prepared to present evidence showing that he suffered from a disabling hip condition for which he had been medically treated from 1986 until the time

of the incident" including a "surgical intervention in 1986 and subsequent intermittent hospital care until at least the time of the break-in"). The records did not need to prove Mr. Jimenez was incapable of climbing through the window in order to be admissible. It was enough that they substantiated Mr. Jimenez's testimony. This substantiation was important in light of the State's argument that Mr. Jimenez fabricated his testimony on the stand. R. 178:226.

The State contends that the records were not probative due to the absence of "X-rays or reports of other scans." SB 16. But again, the records did not need to provide irrefutable proof of innocence in order to be highly probative. The State argued at trial that Mr. Jimenez's sworn testimony resembled the story of a lying child in a comedy movie. R.178:225-26. And the State on appeal faults the testimony for being "rambling" and "implausible" with no "witness to corroborate any part of it." SB 21-22. The medical records would have corroborated an important part of it — Mr. Jimenez's significant back problems that inhibited his ability to climb on trashcans and through windows. R. 178:191-92.

Additionally, the records were not too complex to be probative. The State is concerned that the records contained terms "not necessarily familiar to lay persons." SB 17. The records contained the same information Mr. Jimenez testified to on the stand. Mr. Jimenez testified in court without objection that he had "six herniated disks," "crushed vertebrae," and a "tore tendon," R. 178:190, that he was in physical therapy, R. 178:191, receiving pain medication," R. 178:191, and that he walked with a cane, R. 178:195. The medical records noted the same problems: "Herniated intervertebral disk;

Tendon disorder," physical therapy for "Back Pain – Injury," prescribed medication for "constant pain" caused by back injuries, and the use of a cane. Mr. Jimenez did not need to call a doctor, SB 18, to explain the records because he explained his condition to the jury himself. But he did need the medical records to substantiate his testimony and bolster his credibility in the face of the State's evidence and argument.

In *United States v. Blaylock*, the Ninth Circuit reversed a conviction based on the erroneous exclusion of the defendant's medical records. 20 F.3d 1458, 1464 (9th Cir. 1994). In that case, like this one, the medical records "state[d] in plain language that [the defendant] had a back injury, that he needed a cane for balance and that he was unable to participate in a range of physical activities." *Id.* Although an expert "might have elaborated more fully in his report, a reasonable jury would not have been misled by its contents but instead could have understood that the evidence, while not conclusive, corroborated [the witness's] testimony." *Id.* Similarly, in Mr. Jimenez's case the jury would have understood the evidence and State's argument should have gone to weight instead of to admissibility.

Finally, as argued in the opening brief, Mr. Jimenez's counsel was willing to submit only the most probative parts of the medical records, which would have mitigated concerns about length or confusion. OB 16 ("Mr. Jimenez offered to use the entire records or to use only thirteen pages of them. R. 178:171.").

III. The Medical Records Were Not Unduly Prejudicial, Confusing, or Cumulative.

First, rule 403 of the Utah Rules of Evidence applies when the danger of "unfair

prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence" "substantially outweigh[s]" the "probative value" of the evidence. The State's argument that the records "were potentially unfairly prejudicial," — an argument rejected by the trial court, R. 178:175 ("the State has not articulated any prejudice to itself") — or that the records "had the potential to waste time, confuse the issues, and mislead the jury" is not enough under this standard. SB 9, 19.

And the medical records carried little if any danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. The State argues that the records would cause the jury "to speculate about the extent of Defendant's injuries." SB 19. But in the absence of this objective evidence, the jury would be even more inclined to speculate based on Mr. Jimenez's testimony alone. The State worries that the jury would "believe the injuries were severe simply because the records were so long." SB 19. The jury was literate and would have realized that the records substantiated Mr. Jimenez's testimony instead of relying solely on page number. And again, Mr. Jimenez offered to shorten the records and introduce only the most relevant portions. R. 178:171.

The State also argues that the "records were cumulative of defendant's own trial testimony." SB 19. That the records were corroborative of Mr. Jimenez's trial testimony does not mean that they were cumulative. Evidence is not "'merely cumulative' when it might help settle the balance in what amounted to a credibility determination between Defendant's sole testimony" and the State's evidence. *State v. Stidham*, 2014 UT App 32, ¶ 30, 320 P.3d 696. In its prejudice argument, the State faults Mr. Jimenez for

bringing "no witness to corroborate any part of [his testimony] — . . . not his friend Daniel, who allegedly could have at least corroborated the trips from Ogden to Salt Lake and then to Glenwood a week before the burglary . . . ." SB 22. The medical records would have corroborated an important part of his testimony concerning his back issues and mobility.

In this case, as the trial court noted, the medical records were not unfairly prejudicial. R. 178:175. The danger of confusing the jury or needlessly presenting cumulative evidence was minimal, especially considering Mr. Jimenez's offer to introduce only the most relevant parts of the records, which corroborated his own testimony. The court erred when it excluded the medical records.

IV. The Error Was Prejudicial.

The State argues that the error was harmless because the DNA was present in the house and Mr. Jimenez's explanation was "hopelessly implausible." SB 23. As argued above, corroboration of an important part of his testimony — his back issues and mobility — would have helped to establish his credibility and his innocence. "The outcome of this case turned on the jury's assessment of two competing factual accounts, and the medical records would have significantly buttressed the account the jury ultimately rejected." *United States v. Blaylock*, 20 F.3d 1458, 1464 (9th Cir. 1994).

The State also argues that "Defendant presented no evidence to contradict the victim's testimony that no blood was on the blender when she left her home on the morning of the burglary, which occurred several days after Defendant allegedly was in her neighborhood." SB 22. Neither N.N. nor the first investigator noticed any blood on

the day of the burglary. R. 178:183-84. It is likely the blood could have gone unnoticed for several days before the burglary made it suddenly seem significant.

CONCLUSION

For the reasons above and in the opening brief, Mr. Jimenez respectfully requests that this Court to reverse his conviction.

SUBMITTED this 17 day of December, 2015.

NATHALIE S. SKIBINE
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 17 day of December, 2015.

NATHALIE S. SKIBINE

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 1,618 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R.App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

NATHALIE S. SKIBINE

DELIVERED this 17th day of December, 2015.