Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs (2007–)

2017

State of Utah Plaintiff/ Appellant, v. Bryant Milton Raines, Defendant/ Appellee.

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation
Reply Brief, *State of Utah v Raines*, No. 20150986 (Utah Court of Appeals, 2017).
https://digitalcommons.law.byu.edu/byu_ca3/3603

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH Plaintiff/Appellant, v. BRYANT MILTON RAINES, Defendant/Appellee.	APPELLANT'S REPLY BRIEF Court of Appeals No. 20150986 -CA

APPEAL FROM A CONVICTION OF FIRST-DEGREE FELONY FORCIBLE SODOMY IN THE FIFTH JUDICIAL DISTRICT COURT OF UTAH, WASHINGTON COUNTY, HONORABLE ERIC A. LUDLOW

Thomas B. Brunker, No. 4804
Deputy Solicitor General
Sean D. Reyes, No. 7969
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

Attorneys for Plaintiff/Appellant

Gary G. Kuhlmann, No. 4994
Todd Sheeran, No. 15733
TURNER & KUHLMANN, PLLC
107 South 1470 East, Suite 105
St. George, Utah 84790
Telephone: (435) 656-6156

Attorneys for Defendant/Appellee

FILED
UTAH APPELLATE COURTS

FEB 17 2017

IN THE UTAH COURT OF APPEALS

STATE OF UTAH Plaintiff/Appellant, v. BRYANT MILTON RAINES, Defendant/Appellee.	)))))))))))	APPELLANT'S REPLY BRIEF Court of Appeals No. 20150986 -CA

APPEAL FROM A CONVICTION OF FIRST-DEGREE FELONY FORCIBLE SODOMY IN THE FIFTH JUDICIAL DISTRICT COURT OF UTAH, WASHINGTON COUNTY, HONORABLE ERIC A. LUDLOW

Thomas B. Brunker, No. 4804
Deputy Solicitor General
Sean D. Reyes, No. 7969
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

Attorneys for Plaintiff/Appellant

Gary G. Kuhlmann, No. 4994
Todd Sheeran, No. 15733
TURNER & KUHLMANN, PLLC
107 South 1470 East, Suite 105
St. George, Utah 84790
Telephone: (435) 656-6156

Attorneys for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 5

CERTIFICATE OF COMPLIANCE 6

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

Rules

Rule 803(1), Utah Rules of Evidence 4

Statutes

Utah Code Ann. § 76-5-403(1) 1

Utah Code Ann. § 76-5-403(2) 1

Cases

Crawford v. Washington, 541 U.S. 36 (2004) 1,2,3

Salt Lake City v. Williams, 2005 UT App 493, 128 P.3d 47 3,4,5

ARGUMENT

In Utah, it is a class B misdemeanor to commit sodomy. *See* Utah Code Ann. § 76-5-403(1). But it is a first degree felony to commit 'forcible sodomy', which is defined as committing sodomy "without the other's consent." *Id.* at § 76-5-403(2).

In the present case, the only two people who could determine whether Defendant and H.A. had consented sodomy is Defendant and H.A. However, H.A. did not show up at either the pre-trial conference or at trial, nor did the trial court make a determination that H.A. was 'unavailable' as a witness. Thus, the State's case hinged on whether H.A. made statements to others that claimed she did not consent to Defendant's actions.

The State argues that the Confrontation Clause nor a determination of witness availability applies since there were no 'testimonial' statements made at trial. Appellee Br. 10-15.

The State misconstrues and misplaces the applicability of the Confrontation Clause to this case. As this Court is well aware, the Confrontation Clause has historically been an issue as it relates to a states' rules of evidence. The Supreme Court went at great lengths, in several cases, to explain the correlation between the Confrontation Clause and the rules of evidence. In *Crawford v. Washington*, the Court noted that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford v. Washington*, 541 U.S. 36 (2004). The Court then explained the history of the Confrontation Clause and why courts cannot simply rely on a state's rules of evidence. The Court stated, "The right to confront one's accusers is a concept that dates back to Roman times." *Id.* at 43. The Court then explained that the text of the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who bear testimony. (Citation Omitted). 'Testimony,' in turn is typically '[a] solemn declaration or affirmation made for the

purpose of establishing or proving some fact.' An accuser who makes a formal statement to a government officer bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. Furthermore, the court explicitly stated that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52. The Court held, "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial <u>unless</u> he was unavailable to testify, <u>and</u> the defendant had had a prior opportunity for cross-examination." Accordingly, this Court must first determine whether H.A. made 'testimonial' statements. If the Court finds that H.A. made testimonial statements, then the State was required to produce H.A. as a witness if Defendant did not have a prior opportunity for cross-examination.

In the present case, the state argues that "[Officer Raybould]'s testimony explained why he arrested Raines, so reasonable counsel could conclude that it was not meant as H.A.'s testimony presented through the officer, only the foundation for the officer's decision to arrest. Further, [Officer Raybould] did not at that point recite what H.A. told him or that the 'all accounts' included what H.A. had reported." Appellee Br. 14. However, the only two people that could testify as to whether there was consent to the sodomy was H.A. and Defendant. Defendant has never admitted (before, during, or after trial) that the sodomy was not consented to. As a result, the only other person that could testify that the sodomy was not consented to was H.A. There is no question that H.A. made accusatorial statements to Officer Raybould. Any statement's made to Officer Raybould stating that the sodomy was not consented to is the quintessential definition of a 'testimonial statement' as defined by the Supreme Court in *Crawford.* Accordingly, H.A.'s statements to Officer Raybould was testimonial.

Because H.A.'s statements were testimonial, the State was required to produce Defendant's accuser, H.A., at trial so Defendant could have the opportunity to confront her and try to expose her accusation as a lie. However, the State did not produce H.A. at trial. The trial court did not make any findings as to whether H.A. was unavailable as a witness. Because of those errors, Defendant was denied his Constitutional "right to confront one's accusers" as required by the Confrontation Clause and case law.

The State also argues that "[r]easonable counsel could conclude that [Camacho's] statement was not a 'testimonial' statement within the meaning of the confrontation clause's exclusionary rule." Appellee Br. 13. The State relies on *Salt Lake City v. Williams*, 2005 UT App 439, 128 P.3d 47, which states that nontestimonial statements may be admitted if those statements are deemed "reliable under a long-standing exception to the hearsay rule." *Id.* at ¶ 26 (citing *Crawford*, 541 U.S. at 61). Nonetheless, before this Court can determine whether an exception to the hearsay rule applies, the Court must determine whether H.A.'s statements to Camacho are 'testimonial'.

At trial, Camacho testified that he witnessed H.A. and Defendant engaging in sodomy. *See* R. 69:21-71:12. Right after that testimony, the following dialog occurred:

Q Was [H.A.] upset?
A She was really upset.
Q And when she was really upset, what made you think that she was upset? Give me – tell us.
A Well, she had just said, basically, what he did. And what –
Q What did she say?
A That [Defendant] had violated her, he put his dick in her mouth or tried to.
MR. COMBS: I would object to any hearsay statements supposedly made by [H.A.].
MR. WEILAND: Your Honor, I'm just asking about her demeanor, how upset she was. I'll -- what was the objection though?
THE COURT: Hearsay is the objection.

MR. WEILAND:	Oh, present sense impression. He observed it going on. And this is exactly what took place and what he saw in his presence.
THE COURT:	I'll overrule the objection. Mr. Camacho and testify about what he observed.

Trial Tr. vol. 1, 71:13-72:7, Oct. 13, 2015.

As stated above, "'Testimony,' in turn is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to a government officer bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51.

In the present case and given the circumstances around the statement, H.A.'s statements are testimonial. First, H.A. made a statement "[t]hat [Defendant] had violated her". Second, H.A.'s statement was not a casual remark. Her statement was more an affirmative statement that she apparently wanted others to believe that Defendant had violated her. Lastly, H.A.'s statement was not made to 'an acquaintance'; Camacho was a complete stranger just a couple hours earlier. *See* R. 60:8-10 ("I just met [H.A.] at the party that night. Then we went to get beer. I asked for somebody to go ride with me on the beer run."). Thus, H.A.'s statement to Camacho were 'testimonial' statements.

Even if the Court believes that Camacho's statement was 'nontestimonial', the raised hearsay defense did not exclude or strike Camacho's statement at trial. At trial, defense counsel appropriately raised the hearsay objection right after Camacho's hearsay statement. The State, after forgetting the objection, stated that the applicable hearsay objection was <u>present sense impression</u>. Under Rule 803(1), the present sense impression exception to hearsay is "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Utah R. Evid. 803(1). Even if this hearsay exception applies, H.A.'s

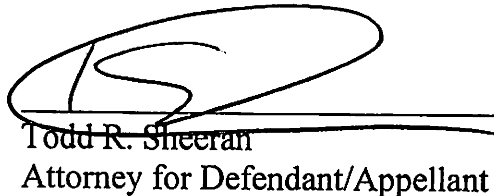
statement could only be properly admitted if the statement is reliable. *See Williams*, 2005 UT App at ¶ 26.

Here, the trial court did not address whether H.A.'s statement to Camacho was reliable. The mere fact that everyone at the party was drunk indicates that the statement was not inherently reliable. Accordingly, H.A.'s statement should have been stricken from the record and the jury should have been admonished not to consider that statement.

CONCLUSION

Based on the foregoing, the Court should find that because H.A. made testimonial statements to Officer Raybould, Defendant was entitled to confront the witnesses who accused him of the crime. H.A. did not attend trial and the trial court did not properly find H.A. unavailable. H.A.'s statement to Camacho were testimonial, thus requiring H.A. to appear at trial. In the alternative, the trial court failed to find that H.A.'s statement was reliable, thus improperly allowing the jury to hear that statement. Therefore, Defendant requests that this Court order a new trial.

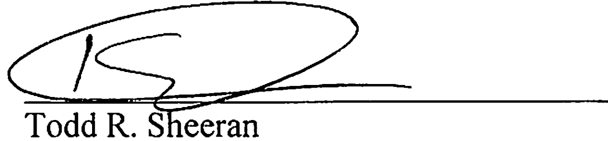
RESPECTFULLY SUBMITTED this 17 day of February, 2017.



Todd R. Sheeran
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellant Procedure 23(f)(1)(C), I hereby certify that the Brief of the Appellant contains 1,436 words, and therefore complies with the type-volume limitation.

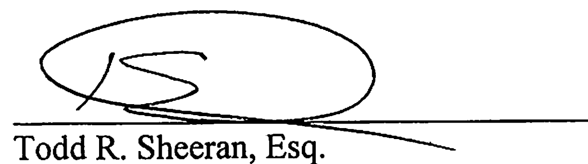


Todd R. Sheeran

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of February, 2017, I mailed a true and correct copy of the foregoing to:

Thomas B. Brunker, No. 4804
Deputy Solicitor General
Sean D Reyes, No. 7969
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854



Todd R. Sheeran, Esq.