

2016

**State of Utah, Plaintiff and Appellee, v. Carl Mack Courtney,
Defendant and Appellant.**

Utah Court of Appeals

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IN THE
COURT OF APPEALS OF THE STATE OF UTAH

State of Utah,
Plaintiff and Appellee,

v.

Carl Mack Courtney,
Defendant and Appellant.

REPLY BRIEF OF THE APPELLANT

On appeal from the Second Judicial District Court, Weber County,
Honorable Michael DiReda, District Court No. 121901670

Appellant Carl Mack Courtney is currently incarcerated.

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ORAL ARGUMENT REQUESTED

FILED
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Argument

1. **Trial counsel's decision to postpone the mistrial motion was not a product of reasoned decision-making.**

The State argues that Mr. Courtney's trial counsel properly chose to postpone his mistrial motion. Underlying the State's argument is the assumption that the postponement was the result of trial counsel's reasoned decision. But even a cursory review of the transcript of the voir dire proceedings proves otherwise.

After the potential juror made her tainting remark and indicated that she would have difficulty considering Mr. Courtney innocent until proven guilty, trial counsel offered no solutions on how to resolve the issue and reiterated several times that he did not know how to handle the situation. (Add. C; R. 302:39-40, 42, 43.)¹

After the jury was sworn, trial counsel raised the jury tainting issue. (*Id.*; R. 302:60.) The district court informed trial counsel that the court had "invited a challenge to going forward" but that a "motion was never brought or even alluded to at the bench." (*Id.*; R. 302:61.) Trial counsel said that he "didn't know at what point to make" a motion or an objection and that he thought he made

¹ "Add. C" refers to Addendum C that is attached to Mr. Courtney's opening brief.

himself “pretty clear up at the bench” that he wanted to bring a motion. (*Id.*) But when pressed by the district court, trial counsel admitted that he never made a formal motion. (*Id.*; R. 302:62.)

Then trial counsel gave a series of justifications for his decision: he hadn’t had time to talk to his client; he wasn’t paying attention while the jury was being sworn in; he wanted jeopardy to attach; he didn’t want to draw more attention to the issue. (*Id.*; R. 302:62–63.) But as indicated by the district court—and discussed more fully in Mr. Courtney’s opening brief—there were plenty of times before the jury was sworn where trial counsel could have raised the motion without drawing undue attention from the jury, and the other reasons trial counsel gave for not bringing the motion earlier (a misunderstanding about when jeopardy attaches and not paying attention) constitute ineffective assistance. (*See id.*; R. 302:61–65.)

Trial counsel even admitted, “I didn’t know where I was supposed to make the timely—I thought it was after the jury was picked I was supposed to make my [inaudible] Ineffective obviously.” (*Id.*; R. 302:66.)

To argue that trial counsel’s postponement of the mistrial motion was a result of reasoned decision-making is unsupported by the record.

2. **The law did not prohibit trial counsel from moving for a mistrial before the jury was sworn.**

The State also argues that trial counsel could not have challenged the entire jury panel on the basis that it was tainted. The State refers to Utah R. Crim. P. 18(c)(1)(i), which only allows a challenge to a panel based on “a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.”

But what the State ignores is that overlaying Rule 18 is the common law of mistrial. The Utah Rules of Criminal Procedure do not have a specific rule concerning mistrials. However, Utah has a robust common law that allows a district court to grant a mistrial where “the circumstances are such as to reasonably indicate . . . that a fair trial cannot be had and that a mistrial is necessary in order to avoid injustice.” *State v. Wach*, 2001 UT 35, ¶ 45, 24 P.3d 948 (quotation omitted); see *Hill v. Cloward*, 377 P.2d 186, 188 (Utah 1962) (“If something occurs which the party thinks is wrong and so prejudicial to him that he thereafter cannot have a fair trial, he must make his objection promptly and seek redress by moving for a mistrial . . .”). No Utah case has used Rule 18 as a limitation on when an attorney can move for a mistrial based on juror misconduct during voir dire.

In fact, taking the State's interpretation of Utah law to the extreme would have prevented Mr. Courtney's attorney from moving for a mistrial during voir dire if the potential juror informed the entire panel, "I know the defendant; he sold drugs to me last week." Such a comment would clearly prejudice the defendant and necessitate the dismissal of the entire jury panel. *See Dippolito v. State*, 143 So.3d 1080, 1085–86 (Fla. Ct. App. 2014) (holding that a comment by a potential juror was not harmless because of the possibility that jurors were prejudiced by the allegation that was close to the charged crime); *Tabor v. Commonwealth*, 948 S.W.2d 569, 572–73 (Ky. Ct. App. 1997) (reasoning that a potential juror's comment that she might have met the defendant at a correctional institution was prejudicial because the panel learned about the defendant's inadmissible conviction through voir dire); *Richardson v. State*, 666 So.2d 223, 224 (Fla. Ct. App. 1995) (holding that defendant was deprived his right to an impartial jury when a potential juror, who informed the panel that she was employed by a correctional institution, suggested that she knew the defendant through her employment, implying that he was a convicted felon).

Contrary to the State's argument, Mr. Courtney's trial counsel could have moved for a mistrial — thereby challenging the entire jury panel because of the potential juror's comment — before the jury was sworn. And moving for a mistrial before the jury is sworn is particularly important in criminal cases,

where jeopardy attaches at the time a jury is sworn. *State v. Manatau*, 2014 UT 7, ¶ 9, 322 P.3d 739.² Furthermore, there is no reason to believe that such a motion would have had to be done within the hearing of the jury; rather, Mr. Courtney's attorney could have called for a sidebar at any time to address matters with the judge outside the hearing of the jury.

3. The district court did not address the merits of the mistrial motion.

The State argues that Mr. Courtney was not prejudiced by his counsel's failure to bring a timely mistrial motion because the district court denied the motion on its merits. But the district court did not address the motion on its merits. Rather, the district court made findings about what happened but never made a determination about whether or not Mr. Courtney was prejudiced. (Add. C; R. 302:71.) The district court stopped short of that because it determined that the motion was untimely. (*Id.*; R. 302:71–72.)

And it is not clear that the district court would have denied the mistrial motion—if it had been made in a timely manner—given the court's clear distress over the potential juror's comment throughout the voir dire process. (*See id.*; R. 302:67–68 (district court stating that a problem “was created by a juror who quite

² The State also argues that Rule 18(c)(2) allows for a challenge to a juror for good cause after the juror is sworn but before the evidence is presented. But it is unclear what “good cause” would justify delaying the challenge of a jury until after it is sworn, especially when all the facts necessary to challenge the jury are known to the attorney well before the jury is sworn.

honestly, in my opinion, ought to be bitch-slapped because . . . I mean for her not to understand the tainting that she was creating when she said that, it's hard for me to . . . I'm just so frustrated. . . ."); R. 302:69 (district court stating, "That juror should be slapped for — I mean that's an extreme statement, but it just reflects the frustration of the Court that she would go beyond the simple question of do you know and offer what she offered. It's so frustrating to me.")).

Finally, the State seems to argue that the potential juror could have been identifying either Mr. Courtney or Mr. Courtney's attorney when she stated, "I have had affiliations with him, especially during the time that I was serving as an agent for the Weber-Morgan Narcotics Strike Force." (*Id.*; R. 302:23.) But the district court found that the potential juror "indicated that she knew Mr. Courtney and was familiar with him from other cases." (*Id.*; R. 302:59.) The record does not support the assertion that the potential juror's comment was directed to Mr. Courtney's attorney.

As argued in the opening brief, the evidence against Mr. Courtney was not strong. The undercover operation was focused on another drug dealer, the confidential informant called that drug dealer before the drug exchange occurred, and the confidential informant purchased drugs in a hotel room registered to the drug dealer. (R. 302:95, 103, 105–107, 128.) When the confidential informant asked Mr. Courtney if certain drugs were the informant's,

Mr. Courtney said, "I don't know." (R. 302:121-22; 138.) The potential juror's tainting comment that she had interacted with Mr. Courtney through her work on the Weber-Morgan Narcotics Strike Force improperly tipped the scale in favor of conviction – the comment informed the jury of past bad acts involving drugs and allowed the jury to reason that if Mr. Courtney had been involved with drugs once, he was probably involved in this instance, also. Such a comment should leave this Court with a lack of confidence in the verdict.

DATED this 17th day of March, 2016.



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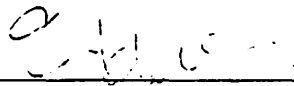
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I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 1,574 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 17th day of March, 2016.



Certificate of Service

This is to certify that on March 18, 2016, I caused two true and correct copies of the Reply Brief of Appellant to be served on the following via first class mail, postage prepaid:

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The appropriate number of copies of the brief were hand-delivered to the Utah Court of Appeals.

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format was also filed with the Court and served on Appellee.

