

2015

**THE STATE OF UTAH, Plaintiff/Appellee, v. ROBERT THOMAS
RUST, Defendant/Appellant. : Reply Brief**

Utah Court of Appeals

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No. 20150525-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

ROBERT THOMAS RUST,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Appeal from a conviction for one count of money laundering, a second degree felony, in violation of Utah Code § 76-10-1903; one count of conspiracy to distribute a controlled substance, a third degree felony, in violation of Utah Code §§ 58-37-8(1)(a)(ii), 76-4-201; and two counts of false/fraudulent tax return, third degree felonies, in violation of Utah Code § 76-8-1101(1)(c)(i), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Paul B. Parker presiding.

Appellant is incarcerated.

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REPLY BRIEF OF APPELLANT

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. **Mr. Rust should be granted a new trial with respect to the money laundering count because the court plainly erred by admitting opinion testimony in violation of rules 702, 704, and 403.**

As argued, the State’s money laundering expert, Stephen Sperry, made improper legal conclusions about the elements of the offense when he concluded that a list of case-specific hypotheticals constituted “money laundering.” *See* Aplt. Br. at 12-20. His opinion testimony was also incorrect and expanded the behavior criminalized by the money laundering statute. *See id.* at 17-18. The State does not contend that Sperry’s testimony was proper and admissible under rules 702, 704,

and 403. *See* Aple. Br. at 23-26. It only argues that Mr. Rust was not prejudiced by the expert testimony. *See id.* at 23-29. Contrary to the State's claims, Mr. Rust has demonstrated prejudice. *See infra*; Aplt. Br. at 20-23.

First, the State contends that “[t]he challenged testimony went only to whether certain acts involving the proceeds of illegal drug activity constitute money laundering.” *Id.* at 27. According to the State, Sperry’s testimony “did not speak to whether [Mr. Rust] *in fact* engaged in such illegal activity.” *Id.* (emphasis added). But it does not matter that Sperry did not speak in terms of whether Mr. Rust “in fact” committed money laundering. Rather, this Court has recognized that reversal may be warranted in cases where an expert opines on whether “hypothetical” conduct “consisting of the exact actions of which [the] defendant [i]s accused” amounts to an offense. *State v. Stringham*, 957 P.2d 602, 607 (Utah Ct. App. 1998).

In *Stringham*, the prosecutor proposed a hypothetical involving case-specific conduct and asked the expert if the actions described were “illegal.” *Id.* Specifically, the prosecutor elicited the following opinion:

[Prosecutor:] I'm going to pose a hypothetical. If an individual-we'll call him Mr. A [-]performs personal services, such as accounting work, tax preparation, payroll preparation, filing of quarterly tax returns, preparation of tax documents for employers, a compilation of payroll records, and clinical work[] such as counseling, group therapy[,] individual counseling, is it lawful for that individual to assign income from those activities to a third party[?]

[Expert:] No, that is not lawful.

Id. at 607 n.15.

The *Stringham* court determined that the above testimony warranted reversal even though the testimony did not include an opinion as to whether the defendant himself actually engaged in the unlawful activity. *See id.* at 607-08, 611. This Court found prejudicial error where the prosecutor asked a “hypothetical question consisting of the exact actions of which defendant was accused,” and the expert offered his opinion that these actions were “illegal.” *Id.* at 607.

Likewise, in this case, it is of little consequence that Sperry did not testify to whether Mr. Rust “in fact” was guilty of money laundering. While he did not go as far as saying that Rust himself was guilty, the case-specific hypotheticals plainly mirrored the facts of the case. Accordingly, the jury easily could have understood that in effect, Sperry was offering conclusions about Mr. Rust’s guilt. Thus, Sperry’s testimony prejudiced Mr. Rust because he opined on whether “hypothetical” conduct “consisting of the exact actions of which [Rust] was accused” amounted to money laundering. *Id.* at 607.

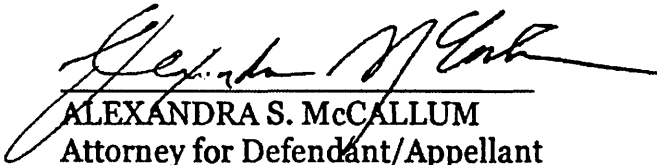
Additionally, the State argues that Sperry’s testimony did not “suggest that [Mr. Rust] was guilty of money laundering [] if the proceeds involved were from a legal source.” Aple. Br. at 27. The State is incorrect. Not only did Sperry’s testimony suggest that Mr. Rust could be found guilty of money laundering absent any knowledge that the money was illegally acquired, *see* Aplt. Br. 17-18, but it also suggested that conviction was warranted if the money itself was lawfully obtained.

Sperry told the jury that a simple “conversion of cash into a vehicle constitute[s] money laundering.” R.1404. This testimony incorrectly implied that Rust could be found guilty if he purchased a vehicle with “clean” money. And as explained in the opening brief, there was evidence from which the jury could have concluded that Rust obtained his money lawfully; this contributed to a reasonable likelihood that Rust would have enjoyed a more favorable result but for the improper testimony. Aplt. Br. at 21; *see also United States v. Boyd*, 55 F.3d 667, 672 (D.C. Cir. 1995) (“where the facts offered at trial are at best ambiguous as to the defendant’s role in alleged criminal activity, expert testimony on the ultimate issue of fact is likely to have a powerful effect on the result” (emphasis omitted)). Thus, as in *Stringham*, reversal is required because Sperry’s “legal conclusion[s] [were] wrong” and his “testimony could easily have misled the jury.” 957 P.2d at 607-08.

CONCLUSION


For the reasons above and in the opening brief, Mr. Rust respectfully requests that this Court reverse his convictions on all counts.

SUBMITTED this 9th day of August, 2016.


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CERTIFICATE OF COMPLIANCE

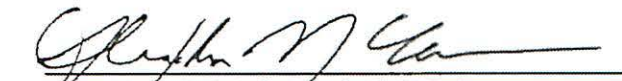
In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains less than 7,000 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.



ALEXANDRA S. McCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. McCALLUM, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 9th day of August, 2016.



ALEXANDRA S. McCALLUM

DELIVERED this 9th day of August, 2016.

